



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 230804-0184]**

**RIN 0648-BM09**

**Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2023**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS announces Federal management measures for the 2023 summer flounder, scup, and black sea bass recreational fisheries. The implementing regulations for these fisheries require NMFS to publish recreational measures for the fishing year. The intent of this action is to set management measures that allow the recreational fisheries to achieve, but not exceed, the recreational harvest targets and thereby prevent overfishing of the summer flounder, scup, and black sea bass stocks.

**DATES:** This rule is effective [*insert date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Copies of this final rule and the small entity compliance guide prepared for permit holders are available from: Michael Pentony, Regional Administrator, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01938 and accessible via the internet at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/commercial-fishing/northeast-groundfish-monitoring-program>.

**FOR FURTHER INFORMATION CONTACT:** Mark Grant, Fishery Policy Analyst, (978) 281-9145, or [Mark.Grant@noaa.gov](mailto:Mark.Grant@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

## **Background**

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission cooperatively manage summer flounder, scup, and black sea bass. The Council and the Commission's Management Boards meet jointly each year to recommend recreational management measures. This is the first time a new approach for developing recreational summer flounder, scup, and black sea bass recreational management measures is being used. The new process, referred to as the Percent Change Approach, was part of Framework Adjustment 17 to the Summer Flounder and Black Sea Bass Fishery Management Plan (FMP) and Framework Adjustment 6 to the Bluefish FMP (March 9, 2023, 88 FR 14499). The Percent Change Approach is a harvest control rule designed by the Council and Commission for use in managing mid-Atlantic recreational fisheries and uses two factors to determine if management measures could remain status quo, could be liberalized, or must be restricted. These two factors are: 1) A comparison of a confidence interval (CI) around an estimate of expected harvest under status quo measures to the average recreational harvest limit (RHL) for the upcoming 2 years; and 2) biomass compared to the target level, as defined by the most recent stock assessment. These two factors also determine the appropriate degree of change, defined as a percentage change in expected harvest. Changes to recreational management measures to achieve the required percent change are evaluated by the Monitoring Committee consisting of representatives from the Commission, the Council, state marine fishery agencies from Massachusetts to North Carolina, and NMFS. The FMP limits the choices for the types of measures to: Minimum and/or maximum fish size; per angler possession limit; and fishing season. A description of the application of this process for each species is provided below.

In this final rule, NMFS is implementing conservation equivalency to manage the 2023 summer flounder and black sea bass recreational fisheries, as proposed on March

30, 2023 (88 FR 19046). Under conservation equivalency, Federal recreational measures are waived and federally permitted party/charter vessels and all recreational vessels fishing in Federal waters are subject to the recreational fishing measures implemented by the state in which they land. This approach allows for more customized measures at a state or regional level that are likely to meet the needs of anglers in each area, compared to coastwide measures that may be advantageous to anglers in some areas and unnecessarily restrictive in others. The combination of state or regional measures must be “equivalent” in terms of conservation to a set of “non-preferred coastwide measures,” which are recommended by the Council and the Board each year. States, through the Commission, are collectively implementing measures designed to constrain landings to the 2023 harvest targets. Vessels fishing in Federal waters and Federal party/charter vessels are subject to the regulations in the state in which they land. These measures are consistent with the recommendations of the Council and the Commission. Additional information on the development of these measures is provided in the proposed rule (88 FR 19046, March 30, 2023) and not repeated here.

For scup, we are implementing a 40-fish possession limit, and an open season of May 1 through December 31. These measures are consistent with the December 2022 recommendation of the Council and Commission’s Summer Flounder, Scup, and Black Sea Bass Board. However, at the March 2, 2023, meeting of only the Board, the Board requested that we reconsider the January 1 through April 30 Federal scup closure. Our rationale (which incorporates our reconsideration) for implementing the closure is explained in more detail below.

### **Scup Recreational Management Measures**

Application of the Percent Change Approach and the bio-economic model used to evaluate recreational behavior and catch resulted in a recommended 10-percent reduction in scup harvest in 2023.

**Table 1 -- Estimated 2023 scup harvest, associated CI, 2023 RHL, stock size category, and resulting percent change recommended for 2023**

<b>Estimated Harvest Under Status Quo Measures</b>	<b>80-percent CI</b>	<b>2023 RHL</b>	<b>Stock Size Category</b>	<b>Recommended Percent Change</b>
14.31 million lb (6,490 mt)	11.55 – 16.26 million lb <sup>1</sup> (5,216 – 7,375 mt)	9.27 million lb (4,204 mt)	Very High	10-Percent Reduction

<sup>1</sup>In the proposed rule, the incorrect CI of 9.90-17.40 million lb (4,490 – 7,892 mt) was presented. This CI is the correct value range. It does not change the conclusions.

The previously implemented Federal recreational scup management measures were a 10-inch (25.4-cm) minimum fish size, a 50-fish per person possession limit, and a year-round open season.

The measures being implemented in state waters collectively achieve a reduction of approximately 9.5 percent. The exact contribution (in terms of the percent reduction) of the Federal actions cannot be accurately quantified, but they will contribute to the overall reduction, and we expect the required 10-percent reduction will be achieved by the combined Federal actions and state waters measures.

Given the timing of the management process, Federal and state waters measures are not possible to implement at the start of the fishing year (January 1), and often are not effective until spring (May/June). However, the analyses used to determine the needed management changes often assume that changes can and will be made throughout the fishing year. Given the timing of this final rule, the Federal scup closure from January through April will not be effective until 2024. If, during the course of the fishing year, data indicate that the closure is not necessary, there are opportunities for the Council and the Commission’s Summer Flounder, Scup, and Black Sea Bass Board to recommend action prior to January 1, to reopen all or some of the closure. At this time, we cannot determine that it would be appropriate to eliminate the closure. Additionally, the States of Massachusetts, Rhode Island, Connecticut, and New Jersey, where more than 99 percent of all recreationally harvested scup are landed, have all selected State waters measures

that include a closure during January through April to help achieve the required reduction. These State waters closures will remain in place in 2024, and having Federal waters closed during the same period next year will promote compliance and enforcement with the States' measures.

We are implementing a Federal recreational scup possession limit of 40 fish per person, and an open season from May 1 through December 31. No changes to the Federal minimum size are being made. The Federal measures, in conjunction with changes to state waters measures, are expected to achieve the needed 10-percent harvest reduction.

### **Summer Flounder Recreational Management Measures**

On April 20, 2023, the Commission notified NMFS that it has certified that the 2023 recreational fishing measures required to be implemented in state waters for summer flounder are, collectively, the conservation equivalent of the season, fish size, and possession limit prescribed in 50 CFR 648.104(b), 648.105, and 648.106(a). According to § 648.107(a)(1), vessels subject to the recreational fishing measures are not subject to Federal measures and instead are subject to the recreational fishing measures implemented by the state in which they land. Section 648.107(a) is amended through this final rule to recognize state-implemented measures as the conservation equivalent of the Federal coastwide recreational management measures for 2023.

In addition, this action revises the default 'non-preferred' summer flounder coastwide measures at §§ 648.104(b), 648.105, and 648.106(a). For 2023, the non-preferred coastwide measures are an 18-inch (45.72-cm) minimum fish size; a 3-fish per person possession limit; and an open season from May 15 through September 22. Compared to 2022, this is a decrease in the non-preferred minimum size from 18.5 inches to 18 inches (45.72 cm to 48.26 cm) total length; a 1-fish reduction of the possession limit; and an increase in the season length. The non-preferred coastwide measures become the default management measures in the subsequent fishing year, in this case

2024, until the joint process establishes either non-preferred coastwide measures or conservation-equivalency measures for the next year.

### **Black Sea Bass Recreational Management Measures**

On April 20, 2023, the Commission notified NMFS that it has certified that the 2023 recreational fishing measures required to be implemented in state waters for black sea bass are, collectively, the conservation equivalent of the season, fish size, and possession limit prescribed in §§ 648.145(a), 648.146, and 648.147(b). According to § 648.142(d)(2), vessels subject to the recreational fishing measures are not subject to Federal measures and instead are subject to the recreational fishing measures implemented by the state in which they land. Section 648.151 is amended through this final rule to recognize state-implemented measures as the conservation equivalent of the Federal coastwide recreational management measures for 2023.

In addition, this action revises the default ‘non-preferred’ black sea bass coastwide measures. For 2023, the non-preferred coastwide measures are: A 15-inch (12.7-cm) minimum size; a 5-fish possession limit; and an open season of May 15 through September 8. Compared to 2022, this is a 1-inch (2.54-cm) increase to the minimum size and a 1-month reduction to the season length. The non-preferred coastwide measures become the default management measures in the subsequent fishing year, in this case 2024, until the joint process establishes either non-preferred coastwide measures or conservation-equivalency measures for the next year.

### **Changes from the Proposed Rule**

There are no changes to the proposed rule, but there are corrections to two tables that appeared in the proposed rule. As noted above, the estimated scup harvest’s CI values in Table 1 have been corrected. In the proposed rule, the incorrect CI was presented. In this rule, the correct CI is included in Table 1.

Further, in the proposed rule, Table 3 contained the incorrect black sea bass RHL

value. The following table, Table 2, contains the correct RHL.

**Table 2 -- Estimated 2023 black sea bass harvest, associated CI, 2023 RHL, stock size category, and resulting percent change recommended for 2023**

<b>Estimated Harvest Under Status Quo Measures</b>	<b>80-percent CI</b>	<b>2023 RHL</b>	<b>Stock Size Category</b>	<b>Recommended Percent Change</b>
7.93 million lb (3,597 mt)	7.17 – 8.63 million lb (3,252 – 3,915 mt)	6.57 million lb <sup>2</sup> (2,981 mt)	Very High	10-Percent Reduction

<sup>2</sup>In the proposed rule, an incorrect RHL of 6.74 million lb (3,057 mt) was listed. This RHL is the correct value. It does not change the conclusions.

The errors existed only in the proposed rule tables and did not affect the determination of recreational measures.

### **Comments and Responses**

We received 14 unique comment letters in response to the proposed rule (88 FR 19046, March 30, 2023). Comments are grouped and summarized by topic. One of these comments was not relevant to the proposed rule and is not discussed further. Many comments focused in whole or in part on state measures or on the allocation between the commercial and recreational fisheries, neither of which were part of the proposed action and, therefore, are not addressed in the following responses.

#### *General Comments on the 2023 Recreational Measures*

*Comment 1:* The Massachusetts Division of Marine Fisheries (MADMF) generally supported approval of the proposed measures and focused on the need for, and benefits of, the proposed Federal recreational scup measures. Three commenters generally opposed approval of the proposed 2023 recreational measures. Specifically, one individual opposed conservation equivalency because it is based on the overall weight of catch and not fish lengths. A party/charter fishing advocate opposed closed seasons and cited negative economic effects. The Natural Resources Defense Council (NRDC) opposed the proposed measures because they are based on the new process (known as the Percent Change Approach) for setting recreational measures (*i.e.*, bag, size, and season

limits) implemented by Framework Adjustment 17 (88 FR 14499, March 9, 2023). In particular, NRDC argued the recreational measures for 2023 would allow recreational catch to exceed the recreational annual catch limits (ACL) in violation of National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

*Response:* The Council and the Commission cooperatively manage summer flounder, scup, and black sea bass. The Council and the Commission's Management Boards meet jointly each year to recommend recreational management measures. For summer flounder and black sea bass, we must implement 'non-preferred' coastwide measures or approve state-developed conservation-equivalent measures per §§ 648.102(d) and 648.142(d), as soon as possible following the recommendation from the Council and Commission. On April 20, 2023, the Commission formally notified us of its determination that the states have implemented, or are in the process of implementing conservation-equivalent state measures that should be approved for 2023. In accordance with §§ 648.107(a)(1) and 648.142(d)(2), in this final rule we are approving and implementing conservation equivalency for both species for 2023. For scup, we are implementing adjustments to the Federal recreational season and possession limit for 2023 as proposed. We respond in detail to specific comments on the measures below.

*Comment 2:* A party/charter fishing advocate commented that the 2023 recreational measures for summer flounder, scup, and black sea bass create a disparate and negative economic effect to the party/charter industry in the mid-Atlantic and southern New England. The commenter argued that the economic cost for an angler to go fishing is high, continues to rise, and is not considered by the Council in the specification-setting process. This commenter also stated that the rising cost penalizes the party/charter sector and any angler who is specifically targeting black sea bass for food rather than targeting striped bass as a sportfish. The Stellwagen Bank Charter Boat Association (SBCBA) recommended that the party/charter fleet have separate seasons

and possession limits from private recreational anglers because the fleet needs to operate a financially viable business while providing access to the fishery for the public.

*Response:* The 2023 recreational measures were developed and analyzed using the new Recreational Demand Model (RDM). The RDM explicitly models the relationship between policy- or stock-induced changes in trip outcomes and angler behavior. There are three main components of the RDM: An angler behavioral model; a calibration sub-model; and a projection sub-model. The angler behavioral model uses choice experiment survey data (angler survey responses on possible recreational measures) to estimate angler preferences for harvesting and discarding summer flounder, scup, and black sea bass. The projection sub-model computes expected effects on angler effort, angler welfare, the local economy, and recreational fishing mortality. Using the model, the Council and Commission considered 225 options for scup, summer flounder, and black sea bass measures to achieve the recreational harvest targets determined by the application of the Percent Change Approach.

In addition to the overall socioeconomic effects included in the RDM, the Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures as part of the Regulatory Impact Review (RIR) and Regulatory Flexibility Analysis (RFA) (see **ADDRESSES**). The RFA evaluated not only the preferred measures, but also non-preferred alternatives, and examined the economic effects to federally permitted party/charter vessels. It is not possible to accurately quantify the economic impact of measures on party/charter vessels, but all the affected party/charter businesses were determined to be small businesses. The restrictions for scup and black sea bass to achieve a 10-percent reduction in harvest could result in a decrease in for-hire trips, decreased for-hire revenues, and overall slight negative impacts to the recreational for-hire businesses. No impacts to for-hire businesses are expected from state/regional summer flounder measures because they are expected to remain unchanged.

*Comment 3:* The SBCBA commented that the proposed 10-percent recreational harvest reduction for scup and black sea bass is inconsistent with its observations of biomass of both species in Massachusetts' waters. Further, it stated that the ongoing and continued reductions in seasons and bag limits at a time when its observations of black sea bass and scup biomass have significantly increased has the public frustrated and losing confidence in the fishery management process.

*Response:* We agree the biomass of scup and black sea bass are currently very high. Each species' biomass is more than 150 percent of the target level. However, the Percent Change Approach evaluates not only the current biomass in relation to the target biomass, but also evaluates the projected harvest under status quo measures against the RHL.

Application of the Percent Change Approach and the RDM resulted in a recommended 10-percent reduction in scup harvest in 2023. This is because even though scup has a very high biomass (more than 150 percent of the target level), harvest under status quo measures is expected to be above the 2023 RHL. The Federal scup measures implemented by this rule, in conjunction with changes to state waters measures, are projected to achieve the needed 10-percent harvest reduction.

Additionally, this rule does not implement state-specific measures for black sea bass and summer flounder, but waives the Federal recreational measures for both species. Under conservation equivalency, Federal recreational measures are waived and federally permitted party/charter vessels and all private recreational vessels fishing in Federal waters are subject to the recreational fishing measures implemented by the state in which they land. States and regions set their own management measures, which are approved through the Commission process.

*Comments on the National Standards*

*Comment 4:* NRDC argued the recreational measures for 2023 would allow recreational catch to exceed the recreational ACLs in violation of National Standard 1. Specifically, NRDC alleged the proposed recreational measures, and the Percent Change Approach in general, would not constrain recreational catch to the recreational ACLs. It further argued that any recreational ACL overage would risk exceeding the acceptable biological catch (ABC) or overfishing limit (OFL) because the available catch for each stock is allocated fully between the commercial and recreational sectors.

*Response:* National Standard 1 states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. The National Standard guidelines clarify that this means producing an amount of catch that is, on average, equal to the Council's specified optimal yield; prevents overfishing; maintains the long-term average biomass near or above the target biomass; and rebuilds overfished stocks and stock complexes.

The Percent Change Approach has been established by the rulemaking implementing Frameworks 17 and 6 and, as such, must be followed in setting the recreational management measures in this action. Deviating from this approach would require new rulemaking to modify Frameworks 17 and 6, which is beyond the scope of this action. However, as explained in detail in the final rule implementing Framework 17, the new Percent Change Approach is a harvest control rule designed by the Council and Commission for use in managing mid-Atlantic recreational fisheries and uses two factors to determine if management measures could remain status quo, could be liberalized, or must be restricted. These two factors are: 1) a comparison of the CI around an estimate of expected harvest under status quo measures to the average RHL for the upcoming 2 years and; 2) biomass compared to the target level, as defined by the most recent stock assessment. These two factors also determine the appropriate degree of change, defined

as a percentage change in expected harvest.

The Percent Change Approach does not change the process for setting measurable and objective status determination criteria (OFL, ABC, ACL) as required by National Standard 1. The status determination criteria continue to be based on the best available scientific information as determined by the Council's Scientific and Statistical Committee. The Percent Change Approach does not eliminate the recreational ACL or RHL, and continues to use both in the process of setting measures and evaluating accountability measures (AM). Together, these measures meet the requirements of National Standard 1. The Percent Change Approach is a method for determining the need for, and extent of, recreational fishing measures to prevent overfishing while allowing catch to target optimal yield. This new approach attempts to constrain harvest in order to prevent overfishing while also acknowledging that recreational catch estimates are uncertain and often highly variable (more so than commercial catch estimates). The Percent Change Approach makes incremental adjustments, thus reducing the tendency of management measures to chase after the highs and lows by either liberalizing or restricting measures too much in any given year in reaction to potentially large swings in recreational catch estimates.

The approach also builds in more precaution for stocks at lower biomass levels. Biomass levels and the target are taken directly from the approved and peer-reviewed stock assessments that occur every other year. Consider that when a stock biomass is in decline, it often becomes less available to the recreational fishery and, therefore, catch estimates may decline relative to the RHL. Formerly, management measures would be liberalized, sometimes significantly, while catch fell due to a declining biomass, increasing fishing pressure on a declining stock. Conversely, as healthy stocks increase, sometimes far above the target biomass level, such as the current situations with black sea bass and scup, the fish become more available to the fishery, even under restrictive

measures, resulting in catch estimates that exceed the RHL. However, what appear to be overages have, in these circumstances, been found to have no negative biological impact on abundant stocks, as when we continue to see increases in biomass in a subsequent stock assessment. Therefore, not all overages result in overfishing. For example, black sea bass has not been subject to overfishing in over 10 years despite sustained high recreational catch levels that sometimes exceeded the RHL and the recreational ACL.

Prior to implementing the Percent Change Approach, the method used to determine recreational measures used the same criteria (RHL and estimated catch), but did not consider or incorporate stock biomass in determining the extent of changes (whether more liberal or more conservative). The old method prescribed the same degree of changes to management measures whether a stock biomass was considered overfished (less than 50 percent of its maximum sustainable yield target) or over 200 percent of its target level. The Percent Change Approach also considers the estimated harvest compared to the RHL, but, in contrast to the previous approach, also incorporates information about stock status to determine whether, and how much, to either liberalize or restrict management measures. This ensures more conservative responses than the previous method for stocks in lower biomass conditions while allowing potentially more liberal responses only for stocks at very high biomass levels.

NRDC's comments focus on the Percent Change Approach for setting the management measures, but that is only one component of the management system. In addition to setting the status determination criteria, AMs remain a critical part of management. The AMs incorporate the explicit consideration of fishing mortality to determine if overfishing occurred, which has the effect of more accurately reflecting when more stringent adjustments to management measures are needed. Thus, the Percent Change Approach is consistent with the National Standard 1 requirement to use status determination criteria to determine overfishing status.

## *Comments on Summer Flounder Measures*

*Comment 5:* NRDC commented that the 10.92-million lb (4,953 mt) summer flounder harvest target for 2023 is above the 10.62-million lb (4,817 mt) RHL specified for 2023 (88 FR 11, January 3, 2023), argued that including dead discards would exceed the 14.9-million lb (6,759 mt) recreational ACL, and alleged this violates the MSA.

*Response:* The Percent Change Approach does not eliminate the recreational ACL or RHL, and continues to use both in the process of setting measures and evaluating AMs. We expect summer flounder harvest under the status quo measures to be consistent with the RHL. As explained in detail below, application of the Percent Change Approach and the RDM generated conflicting results for summer flounder depending on the model parameters used. The 10.92-million lb (4,953 mt) summer flounder harvest target is only one of the estimated outcomes of the recreational measures, and is not statistically different from the 10.62-million lb (4,817 mt) RHL specified for 2023, as indicated by the 80-percent CI of 9.23–12.94 million lb (4,186–5,869 mt).

The intent of the Percent Change Approach is to iteratively adjust measures as necessary to prevent overfishing and more closely monitor the impact that recreational harvest has on a stock. The potential annual adjustments are constrained within a range of certain percentages in order to minimize the social and economic impact of the large adjustments that were sometimes implemented under the previous system and that were driven by large statistical fluctuations in the data used to estimate catch.

Recreational data are highly variable and uncertain due, in part, to the sampling protocols used to separately collect information about effort and catch data. Catch estimates, even under consistent management measures, vary substantially from year to year. An effective system of managing the recreational fishery must acknowledge and address this variability and uncertainty. The past approach of reacting to large and uncertain swings in estimated harvest by correspondingly liberalizing or reducing those

management controls in the subsequent year, in an attempt to achieve a specific harvest target, has been unsuccessful by all standards. The Percent Change Approach allows managers to consider additional scientific information beyond simply using an uncertain catch estimate when setting recreational measures to achieve optimum yield. Based on an evaluation of the current harvest levels compared to the upcoming RHLs and of the biomass relative to the target, the Percent Change Approach prescribes the degree of change necessary to be achieved by the recreational management measures. When a stock is at a lower biomass than the management target, such as the current situation for summer flounder, the management responses are more precautionary. This is because the conservation risk associated with overages is greater for stocks that are less abundant, whereas stocks that are well above their target biomass are more robust in the face of higher levels of fishing mortality. The overall goal of the Percent Change Approach is to iteratively adjust management measures to achieve the RHL, while minimizing potential overreaction (overcorrection) to annual variability in the harvest estimates.

As explained in detail in the proposed rule (88 FR 19046, March 30, 2023), this is the first time the Percent Change Approach was used for developing summer flounder, scup, and black sea bass recreational management measures. Application of the Percent Change Approach and the RDM generated conflicting results for summer flounder, depending on the initial assumptions used in the model configuration, specifically with regard to the years selected for Marine Recreational Information Program (MRIP) data used to project the amount of catch per trip. When the most recent complete year of MRIP data (2021) was used, the model-estimated summer flounder harvest under status quo measures was 8.38 million lb (3,801 mt), which is below the 2023 RHL. When an average of 2018-2022 MRIP data was used to determine the catch per trip, the model-estimated summer flounder harvest was 10.92 million lb (4,953 mt), which is slightly above the 2023 RHL. While these estimates are not significantly different, because of the

way the Percent Change Approach uses the estimates and CIs, the recommended management action resulting from each estimate was different. The model run using only 2021 data resulted in a recommended 10-percent liberalization, and the model run using the 2018-2022 average resulted in a recommended 10-percent reduction in summer flounder harvest. Given the conflicting results, and uncertainty about which model run was more likely to reflect 2023 harvest, the Council and Board made some adjustments to the non-preferred coastwide measures, but ultimately decided to maintain status quo measures at the state and regional levels. This rule adopts the Council's recommendation.

*Comment 6:* One member of the public, who opposed conservation equivalency because it is based on overall weight of catch and not fish lengths, commented that breeding summer flounder should not be targeted and argued there should be a possession limit of one 20-inch (50.8-cm) or larger fish per person per day. The individual further commented that mostly 16-inch (40.6-cm) to 19-inch (48.3-cm) summer flounder should be retained. A second member of the public commented that summer flounder recreational measures should be four fish with a minimum fish size of 16 inches (40.6 cm), with an open season from April 29 through October 10. This second individual also suggested we consider separate measures and seasons for inshore and offshore areas.

*Response:* This rule does not implement state-specific measures for summer flounder, but rather waives the Federal recreational measures for summer flounder. Under conservation equivalency, Federal recreational measures are waived and federally permitted party/charter vessels and all recreational vessels fishing in Federal waters are subject to the recreational fishing measures implemented by the state in which they land. States and regions set their own management measures, which are then approved through the Commission process.

The combination of state or regional measures must achieve equivalent conservation in lieu of the non-preferred coastwide measures, which are intended to maintain a status quo recreational harvest. The coastwide harvest target was calculated using the Percent Change Approach and the RDM. The non-preferred coastwide measures that are being waived include an 18-inch (45.7-cm) minimum size, a 3-fish bag limit, and an open season from May 15 through September 22. The precautionary default measures remain unchanged and include a 20-inch (50.8-cm) minimum size, a 2-fish bag limit, and an open season from July 1 through August 31. With the adoption and implementation of conservation equivalency, these particular management measures will not be applicable to summer flounder in 2023.

*Comments on Black Sea Bass Measures*

*Comment 7:* NRDC commented that the 7.14-million lb (3,239 mt) black sea bass harvest target for 2023 is above the 6.57-million lb (2,981 mt) RHL specified for 2023 (88 FR 11, January 3, 2023), argued that including dead discards would exceed the 9.16-million lb (4,156 mt) recreational ACL, and alleged this violates the MSA.

*Response:* As explained in the response to Comment 5, the goal of the Percent Change Approach is to iteratively adjust management measures to achieve the RHL, while minimizing potential overreaction (overcorrection) to annual variability in the harvest estimates. From 2018 to 2021, recreational management measures for summer flounder, scup, and black sea bass remained unchanged, yet the estimated harvest varied by as much as 45 percent from year to year. Estimated black sea bass recreational catch ranged from 10.20 million lb to 16.17 million lb (4,626 to 7,335 mt) from 2018 to 2021 despite nearly all management measures remaining the same. Such significant differences in estimated catch under the same management measures (input controls) has made setting management measures in a manner that will precisely reach, but not exceed, a specific catch limit in any given year extremely challenging. Reacting to these large,

uncertain swings in estimated harvest, by liberalizing or reducing those management controls in the subsequent year in an attempt to achieve a specific harvest target, has been unsuccessful by all standards. This has been particularly difficult with robust stocks, such as scup and black sea bass, which continue to grow even in situations where harvest has exceeded previously set limits. Such stocks that are readily and widely available to the recreational fishery because of their high abundance will continue to be harvested, even with very restrictive management measures, and the previous recreational measures-setting process would have continued to chase a target that has proven difficult to reach.

The Percent Change Approach allows managers to consider additional scientific information beyond an uncertain catch estimate when setting recreational measures to achieve optimum yield. Based on an evaluation of the current harvest levels compared to the upcoming RHLs, and the biomass relative to the target, the Percent Change Approach prescribes the degree of change necessary to be achieved by the recreational management measures. When a stock is at a lower biomass (below the biomass target) the management responses are more precautionary. For example, even when harvest is expected to be close to the upcoming RHL, a 10-percent reduction is required for a stock in the low biomass category. For stocks such as black sea bass that have a very high biomass (more than 150 percent of the biomass target), a liberalization of no more than 10 percent would be allowed when harvest is close to the RHL. When harvest is expected to be higher than the RHL, a reduction is required regardless of stock size, but a reduction may be more significant for stocks at lower stock sizes. For stocks at very high biomass, a 10-percent reduction is required, and stocks at a high and low biomass are required to take a reduction based on the difference between the harvest estimate and RHL. This is because the conservation risk associated with overages is greater for stocks that are less abundant, whereas stocks that are well above their target biomass are more robust in the face of higher levels of fishing mortality.

Application of the Percent Change Approach and the RDM resulted in a recommendation of a 10-percent reduction in black sea bass harvest in 2023. This is because black sea bass has a very high biomass, but harvest under status quo measures is expected to be above the RHL. As healthy stocks increase, sometimes far above the target biomass level, such as with black sea bass and scup in 2023, the fish become more available to the fishery, even under restrictive measures, resulting in catch estimates that exceed the RHL. However, what appear to be overages often have no negative biological impact on abundant stocks. We continue to see increases in biomass of these stocks through subsequent stock assessments. The conservation risk of the Percent Change Approach, which reduces the magnitude of a needed reduction compared to what would occur with the previous approach, on a stock that is over 150 percent of its biomass target, is negligible. The Magnuson-Stevens Act defines overfishing as a “rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield *on a continuing basis*” (emphasis added). This scenario in which a stock continues to maintain a biomass significantly above the target, does not constitute overfishing.

It is important to again note the uncertainty in estimated recreational harvests; this uncertainty is one of the main drivers for adoption of the Percent Change Approach in Framework 17 and for being used in this action. Here, the 80-percent CI around the estimated black sea bass recreational harvest using status quo measures ranges from 7.17 million lb (3,252 mt) to 8.63 million lb (3,914 mt), meaning that statistically the estimate can fall anywhere in that range with equal likelihood. If recreational harvest is at the lower end of the range, with the 10-percent reduction adopted here, the recreational harvest would fall below the RHL.

*Comment 8:* One member of the public commented that black sea bass measures should include: A closure in January and February; a bag limit of 10 fish over 12 inches

(30.5 cm) from April 30 through July 15; a bag limit of 2 fish over 13 inches (33 cm) from July 15 through September 1; and a bag limit of 10 fish over 13 inches (33 cm) from September 2 through December 31. A second individual argued the goal of changing measures for 2023 is to reduce recreational demand, not to increase it, and argued that increasing the minimum size for black sea bass increases the recreational demand. We also received several comments that expressed dissatisfaction with the specific state regulations that are being implemented to meet the conservationally equivalent reduction in recreational harvest of 10 percent.

*Response:* This rule does not implement state-specific measures for black sea bass, but rather waives the Federal recreational measures for black sea bass. Under conservation equivalency, Federal recreational measures are waived and federally permitted party/charter vessels and all recreational vessels fishing in Federal waters are subject to the recreational fishing measures implemented by the state in which they land. States and regions set their own management measures, which are approved through the Commission process.

The combination of state or regional measures must achieve equivalent conservation as the non-preferred coastwide measures. The coastwide harvest target was calculated using the Percent Change Approach and the RDM. The non-preferred coastwide measures that are being waived include a 15-inch (38.1-cm) minimum size, a 5-fish bag limit, and an open season from May 15 through September 8. The precautionary default measures remain unchanged and include a 16-inch (40.6-cm) minimum size, a 2-fish bag limit, and an open season June 1 through August 31. With the adoption and implementation of conservation equivalency, these particular management measures will not be applicable to black sea bass in 2023.

*Comments on Scup Measures*

*Comment 9:* NRDC commented that the 14.31-million lb (6,490 mt) scup harvest target for 2023 is above the 9.27-million lb (4,205 mt) RHL specified for 2023 (88 FR 11, January 3, 2023), argued that including dead discards would exceed the 10.39-million lb (4,713 mt) recreational ACL, and alleged this violates the MSA.

*Response:* As explained in the responses to Comments 5 and 7, the goal of the Percent Change Approach is to iteratively adjust management measures to achieve the RHL, while minimizing potential overreaction (overcorrection) to annual variability in the harvest estimates.

Application of the Percent Change Approach and the RDM resulted in a recommendation of a 10-percent reduction in scup harvest in 2023. This is because scup has a very high biomass, but harvest under status quo measures is expected to be above the RHL. As described in response to Comment 7, fish become more available to the fishery as healthy stocks increase, even under restrictive measures, resulting in catch estimates that exceed the RHL. However, what appear to be overages often have no negative biological impact on abundant stocks. We continue to see increases in biomass of these stocks through subsequent stock assessments. This scenario in which a stock continues to maintain a biomass significantly above the target does not constitute overfishing.

It is important to again note the uncertainty in estimated recreational harvests. This uncertainty is one of the main drivers for adoption of the Percent Change Approach in Framework 17 and for being used in this action. Here, the 80-percent CI around the estimated scup recreational harvest using status quo measures ranges from 11.55 million lb (5,216 mt) to 16.26 million lb (7,375 mt), meaning that statistically the estimate can fall anywhere in that range with equal likelihood. With the 10-percent reduction adopted here, recreational harvest of scup could be anywhere from 10.39 million pounds (4,715 mt) to 14.63 million pounds (6,638 mt), a range from 12 percent to 58 percent over the

RHL. With such high scup biomass, making drastic adjustments of recreational catch may prove to be unwarranted as stocks increase; thus, the Percent Change Approach adopted in Framework 17 established a 10-percent reduction in this circumstance. To the extent that biomass remains high and additional reductions are needed the next time that recreational measures are developed, another 10-percent reduction would occur, moving gradually in the needed direction. However, in contrast with the inherent variability and uncertainty in recreational catch data in the context of a growing scup stock, drastic changes to measures could prove to be unwarranted, and could lead to the undesirable result of increased recreational discards of dead fish.

Furthermore, a determination of overfishing involves analysis of total catch, which included commercial catch as well as recreational catch. An overage of the recreational ACL does not necessarily mean that the overall ABC was exceeded if underharvest of the commercial ACL is equal to or greater than that overage of the recreational ACL. While separate sub-ACLs are allocated to the commercial and recreational fisheries, overfishing is a biological determination at the stock level, not the sub-ACL level. The commercial fishery did not completely harvest its commercial quota in any year between 2016 and 2021. The commercial underharvest in those years ranged between 16 percent and 44 percent. Moreover, from 2018 to 2021, the commercial sector only landed between 55 percent and 63 percent of its allocated scup quota, an annual average of 13.42 million lb (6,087 mt) landed compared to 22.67 million lb (10,283 mt) of commercial quota. In such a scenario, a recreational harvest slightly above the RHL is unlikely to result in negative biological consequences for the scup stock where the overall total of commercial and recreational harvests remains below the overall ABC and overfishing levels.

*Comment 10:* MADMF commented in support of the proposed scup measures. It highlighted that the regional approach for recreational scup management has often meant

that the Southern States largely align their rules with the Federal measures while the Northern States amend their regulations to shoulder most of the burden needed to achieve, but not exceed, the recreational harvest target. Further, MADMF noted that all States from Massachusetts through North Carolina are closed to recreational black sea bass harvest during the months of January through April (with the rare exception of those that opt into the February access program), and the scup closure will help limit non-compliance with the black sea bass retention prohibition and will help reduce regulatory discards of black sea bass, including discards of fish generally caught at deeper depths during this time of year that are more susceptible to barotrauma.

*Response:* We agree, and have implemented scup recreational management measures for Federal waters as proposed.

*Comment 11:* The SBCBA commented that closing the scup fishery from January through April does not benefit the healthy stock, but economically harms the party/charter industry. It argued the winter scup fishery is one of the only options to target a healthy stock during that portion of the year. However, SBCBA also stated there is little party/charter activity targeting scup in Federal waters in winter and noted there is no data from that part of the year available from MRIP. One individual argued that for-hire captains looking for scup during the winter have learned how to minimize any interaction with black sea bass during winter and recommended that scup possession should be allowed all year with a 25-fish possession limit and a 10-inch (25.4-cm) minimum size.

*Response:* We disagree. The Council and Commission voted for the Federal scup fishery to be closed January 1 through April 30 and for the Federal possession limit to be reduced from 50 fish to 40 fish to complement state measures and to achieve the required 10-percent reduction. The RDM cannot separate the analysis of Federal measures and state measures, and therefore included the Federal closure along with the state closures in

the analysis of measures necessary to achieve the 10-percent reduction. Accordingly, we have implemented scup recreational management measures for Federal waters as proposed.

### **Classification**

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay of effectiveness period for this rule, to ensure that the final management measures are in place as soon as possible. This action implements 2023 recreational management measures for summer flounder, scup, and black sea bass.

The Federal coastwide regulatory measures for recreational summer flounder fishing that were codified last year (87 FR 22863, April 18, 2022) remain in effect until the decision to waive Federal measures for 2023 is made effective by this final rule. Many states have already implemented their conservationally equivalent 2023 measures and a delay in implementing the measures of this rule will increase confusion on what measures are in place in Federal waters. Inconsistencies between the states' measures and the Federal measures could lead to misunderstanding of the applicable regulations and could increase the likelihood of noncompliant landings. Additionally, the Federal measures currently in place are more restrictive than many of the measures in state waters, which unnecessarily disadvantages federally permitted vessels who are subject to these more restrictive measures until this final rule is effective.

The Federal measures currently in place for scup are more liberal than the measures this action will implement. Further delay of the implementation of the 2023

measures will increase the likelihood that the 2023 RHL and recreational ACL will be exceeded. The MSA requires that we implement measures to constrain recreational harvest to prevent overfishing.

Unlike actions that require an adjustment period to comply with new rules, this action does not require recreational and charter/party operators to purchase new equipment or otherwise expend time or money to comply with this action's management measures. Rather, compliance with this final rule simply means adhering to the published state management measures for summer flounder and black sea bass while the recreational and charter/party operators are engaged in fishing activities.

For these reasons, the Assistant Administrator finds good cause to waive the 30-day delay in the date of effectiveness and to implement this rule upon the date of publication in the *Federal Register*.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. We received no comments regarding this certification. Therefore, a final regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

#### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: August 4, 2023.

---

Samuel D. Rauch, III

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 648 as follows:

**PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

2. In § 648.104, revise paragraph (b) to read as follows:

**§ 648.104 Summer flounder size requirements.**

\* \* \* \* \*

(b) *Party/charter permitted vessels and recreational fishery participants.* The minimum size for summer flounder is 18 inches (45.72 cm) total length for all vessels that do not qualify for a summer flounder moratorium permit under § 648.4(a)(3), and charter boats holding a summer flounder moratorium permit if fishing with more than three crew members, or party boats holding a summer flounder moratorium permit if fishing with passengers for hire or carrying more than five crew members, unless otherwise specified in the conservation equivalency regulations at § 648.107. If conservation equivalency is not in effect in any given year, possession of smaller (or larger, if applicable) summer flounder harvested from state waters is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.111 and abide by state regulations.

\* \* \* \* \*

3. Revise § 648.105 to read as follows:

**§ 648.105 Summer flounder recreational fishing season.**

No person may fish for summer flounder in the EEZ from May 15 through September 22 unless that person is the owner or operator of a fishing vessel issued a commercial summer flounder moratorium permit, or is issued a summer flounder dealer

permit, or unless otherwise specified in the conservation equivalency measures at § 648.107. Persons aboard a commercial vessel that is not eligible for a summer flounder moratorium permit are subject to this recreational fishing season. This time period may be adjusted pursuant to the procedures in § 648.102. Possession of summer flounder harvested from state waters during this time is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.111 and abide by state regulations.

4. In § 648.106, revise paragraph (a) to read as follows:

**§ 648.106 Summer flounder possession restrictions.**

(a) *Party/charter and recreational possession limits.* No person shall possess more than three summer flounder in, or harvested from, the EEZ, per trip unless that person is the owner or operator of a fishing vessel issued a summer flounder moratorium permit, or is issued a summer flounder dealer permit, or unless otherwise specified in the conservation equivalency measures at § 648.107. Persons aboard a commercial vessel that is not eligible for a summer flounder moratorium permit are subject to this possession limit. The owner, operator, and crew of a charter or party boat issued a summer flounder moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.102. Possession of summer flounder harvested from state waters above this possession limit is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.111 and abide by state regulations.

\* \* \* \* \*

5. In § 648.107, revise paragraph (a) introductory text to read as follows:

**§ 648.107 Conservation equivalent measures for the summer flounder fishery.**

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2023 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

\* \* \* \* \*

6. Revise § 648.127 to read as follows:

**§ 648.127 Scup recreational fishing season.**

Fishermen and vessels that are not eligible for a scup moratorium permit under § 648.4(a)(6), may possess scup from May 1 through December 31, subject to the possession limit specified in § 648.128(a). The recreational fishing season may be adjusted pursuant to the procedures in § 648.122. Should the recreational fishing season be modified, non-federally permitted scup vessels abiding by state regulations may transit with scup harvested from state waters on board through the Block Island Sound Transit Area following the provisions outlined in § 648.131.

7. In § 648.128, revise paragraph (a) to read as follows:

**§ 648.128 Scup possession restrictions.**

(a) No person shall possess more than 40 scup in, or harvested from, the EEZ per trip unless that person is the owner or operator of a fishing vessel issued a scup moratorium permit, or is issued a scup dealer permit. Persons aboard a commercial vessel that is not eligible for a scup moratorium permit are subject to this possession limit. The owner, operator, and crew of a charter or party boat issued a scup moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.122.

However, possession of scup harvested from state waters above this possession limit is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.131 and abide by state regulations.

\* \* \* \* \*

8. Revise § 648.146 as follows:

**§ 648.146 Black sea bass recreational fishing season.**

Vessels that are not eligible for a black sea bass moratorium permit under § 648.4(a)(7), and fishermen subject to the possession limit specified in § 648.145(a), may only possess black sea bass from May 15 through September 8, unless otherwise specified in the conservation equivalent measures described in § 648.151 or unless this time period is adjusted pursuant to the procedures in § 648.142. However, possession of black sea bass harvested from state waters outside of this season is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.151 and abide by state regulations.

9. In § 648.147, revise paragraph (b) to read as follows:

**§ 648.147 Black sea bass size requirements.**

\* \* \* \* \*

(b) *Party/charter permitted vessels and recreational fishery participants.* The minimum fish size for black sea bass is 15 inches (38.1 cm) total length for all vessels that do not qualify for a black sea bass moratorium permit, and for party boats holding a black sea bass moratorium permit, if fishing with passengers for hire or carrying more than five crew members, and for charter boats holding a black sea bass moratorium permit, if fishing with more than three crew members, unless otherwise specified in the conservation equivalent measures as described in § 648.151. However, possession of smaller black sea bass harvested from state waters is allowed for state-only permitted

vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.151 and abide by state regulations.

10. Revise § 648.151 to read as follows:

**§ 648.151 Black sea bass conservation equivalency.**

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2023 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.146, 648.147(b), and 648.145(a). This determination is based on a recommendation from the Black Sea Bass Board of the Atlantic States Marine Fisheries Commission.

(1) Federally permitted vessels subject to the recreational fishing measures of this part, and other recreational fishing vessels harvesting black sea bass in or from the EEZ and subject to the recreational fishing measures of this part, landing black sea bass in a state whose fishery management measures are determined by the Regional Administrator to be conservation equivalent shall not be subject to the more restrictive Federal measures, pursuant to the provisions of § 648.4(b). Those vessels shall be subject to the recreational fishing measures implemented by the state in which they land.

(2) [Reserved]

(b) Federally permitted vessels subject to the recreational fishing measures of this part, and other recreational fishing vessels registered in states and subject to the recreational fishing measures of this part, whose fishery management measures are not determined by the Regional Administrator to be the conservation equivalent of the season, size limits and possession limit prescribed in §§ 648.146, 648.147(b), and 648.145(a), respectively, due to the lack of, or the reversal of, a conservation-equivalent recommendation from the Black Sea Bass Board of the Atlantic States Marine Fisheries Commission shall be subject to the following precautionary default measures: Season–

June 1 through August 31; minimum size—16 inches (40.64 cm); and possession limit —  
2 fish.

[FR Doc. 2023-17121 Filed: 8/14/2023 8:45 am; Publication Date: 8/15/2023]