

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 697**

[Docket No. 030617155-3232-02; I.D. 051903D]

RIN 0648-AR11

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Weakfish Fishery

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to increase the incidental catch allowance for weakfish caught in the Exclusive Economic Zone (EEZ) from 150 lb (67 kg) to no more than 300 lb (135 kg) per day or trip, whichever is longer in duration; to remove Connecticut from the list of states where commercially caught weakfish from the EEZ can be landed; and to add to NMFS' regulations the Director, Office of Sustainable Fisheries, as an official who can grant Exempted Fishing Permits. The intent of this final rule is to modify regulations for the Atlantic coast stock of weakfish to promote the effectiveness of the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for weakfish.

DATES: Effective November 3, 2003. Copies of supporting documents, including an Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA),

ADDRESSES: are available from Anne Lange, Chief, State-Federal Fisheries Division (SF8), Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, Suite 13317, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Tom Meyer, 301-713-2334.

SUPPLEMENTARY INFORMATION:**Background**

The background and rationale for this final rule were contained in the preamble to the proposed rule, published in the **Federal Register** on July 1, 2003 (68 FR 39048), and are not repeated here. Additional background for this final rule is available and contained in an EA/RIR/FRFA prepared by NMFS. (See **ADDRESSES**).

This final rule allows vessels using a mesh size less than 3 1/4-inch (8.3 cm)

square stretch mesh or 3 3/4-inch (9.5 cm) diamond stretch mesh for trawls and 2 7/8-inch (7.3 cm) stretch mesh for gillnets to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg)) per day or trip over the current Federal EEZ regulation)(§ 697.7(a)(4)); removes the State of Connecticut from the list of states where weakfish caught in the EEZ for commercial purposes can be landed (§ 697.7(a)(7)); adds to NMFS' regulations the Director, Office of Sustainable Fisheries, as an official who can grant Exempted Fishing Permits (§ 697.22); and adds Atlantic Coastal Act and Director to the definition section (§ 697.2).

Comments and Responses

There was one comment submitted by a state agency during the comment period.

1. Comment: One state agency that is currently a *de minimis* state under Amendment 4 to the weakfish plan commented that the regulation (§ 697.7(a)(7)) that does not allow landings of weakfish from the EEZ in a *de minimis* state is not enforceable and should be re-considered, because it is impossible to determine where the fish were harvested when a vessel comes to port. As an alternative to this unnecessary rule, the state suggested that it could easily adopt trip limits (300 lb) to ensure that the state does not become a destination for unlawful catches of weakfish.

Response: Although enforcement of the regulation pertaining to a *de minimis* state does create certain challenges, NMFS declines to categorize the regulation as unenforceable. This regulation was implemented in 1997, after the Commission specifically requested that the *de minimis* language be included in the EEZ rule in order to support Commission efforts in state waters. The Commission also requested in 1997 that any enforcement problems raised by this regulation be forwarded to the Commission's Weakfish Management Board (Weakfish Board); none have been. The Commission recommended in 2003 that this regulation remain in place. The present restrictions on commercial landings in a *de minimis* state, therefore, remain the Commission's stated regulatory preference. Given the Commission's stated preference, the lack of information and debate suggesting that an alternative approach is necessary, and NMFS's mandate under the Atlantic Coastal Act to support the Commission's interstate fishery management efforts, NMFS remains committed to the present

Commission approach. However, NMFS notes the state agency may request that the Weakfish Board reconsider the enforcement concerns associated with this regulation. The adoption by any *de minimis* state of a trip limit of 300 lbs (135 kg) could be part of the discussion. NMFS would consider any additional recommendations from the Commission that may arise from such discussions.

Changes from the Proposed Rule

In its comment letter dated July 9, 2003, the Commonwealth of Massachusetts indicated its intention to withdraw itself from *de minimis* status under the current management regime due to the difficulty that state would have in codifying and enforcing its *de minimis* status. The process of withdrawal from *de minimis* status is far less complicated than inclusion into such a category. The state would upon approval of the withdrawal be expected to comply with all regulatory responsibilities of the plan, whereas it would be exempted from some responsibilities as a *de minimis* state. On July 16, 2003, the Commonwealth of Massachusetts requested that the Commission remove them from *de minimis* state status. On August 29, 2003, the Weakfish Board recommended and the Commission agreed to withdraw their finding that Massachusetts be given *de minimis* status. Under either status — that is, as a *de minimis* state or not — the actions of Massachusetts are not expected to contribute significantly to the Commission's coastwide conservation program for the species. Accordingly, NMFS is able to support the Commission's change on this matter and add the Commonwealth of Massachusetts to the list of states where commercially caught weakfish from the EEZ can be landed in the final rule at 50 CFR 697.7(a)(7) because it is no longer considered *de minimis*.

In the proposed rule, the term Director was added as an official who can grant Exempted Fishing Permits, but the term Director was not defined. This final rule adds the term Director to the definition section (§ 697.2), and defines it as the Director, Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910.

Classification

This final rule is published under the authority of the Atlantic Coastal Act. Paragraphs (A) and (B) of section 804(b)(1) authorizes the Secretary to implement regulations in the EEZ in the absence of a Magnuson-Stevens Act FMP. Such regulations must be compatible with the effective implementation of a Commission's

ISFMP, and consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

The Assistant Administrator for Fisheries, NOAA (AA) has determined that these actions are compatible with the effective implementation of the Commission's ISFMP for Weakfish and consistent with the national standards of the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS did not receive any comments on the economic impacts of the rule. NMFS prepared a final regulatory flexibility analysis (FRFA) that describes the impact of this final rule on small entities. A summary of the FRFA follows:

This final rule is published under the authority of section 803 of the Atlantic Coastal Act. The purpose of the rule is to improve cooperative management of the Atlantic coast weakfish fishery by supporting the Commission's Amendment 4 to the Interstate Fishery Management Plan for Weakfish, as required under the Atlantic Coastal Act. This rule will increase the permitted non-directed incidental catch of the species from 150 lb (67 kg) to no more than 300 lb (135 kg) per day or trip. Analysis of the best available data in the EA/RIR/FRFA suggests that the increase would not alter current fishing practices or effort, or increase the number of weakfish caught. The 150-lb (67 kg) increase would simply convert 150 lb (67 kg) of weakfish, which would be caught and discarded at sea as dead bycatch, into 150 lb (67 kg) of weakfish caught as incidental catch and landed. The need for the action was explained in the preamble to the proposed rule and is not repeated here.

Two alternatives were considered for this action. They were: Alternative 1: No Action; and Alternative 2 (Preferred Alternative): Allow vessels in non-directed fisheries, using mesh sizes less than 3 1/4-inch (8.3 cm) square stretch mesh or 3 3/4-inch (9.5 cm) diamond stretch mesh for trawls and 2 7/8-inch (7.3 cm) stretch mesh for gillnets to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration. Although a third alternative was identified in the environmental assessment, it would not meet the goals and objectives of the Commission's recommendation. Because the Secretary is required to develop and implement a program to support the Commission's action, analysis of this additional alternative would not meet the purpose and need for this action, or objectives of the Atlantic Coastal Act.

The preferred alternative would allow vessels in non-directed fisheries, using

a mesh size less than 3 1/4-inch (8.3 cm) square stretch mesh or 3 3/4-inch (9.5 cm) diamond stretch mesh for trawls and 2 7/8-inch (7.3 cm) stretch mesh for gillnets, to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg)).

NMFS is not able to estimate the number of small entities to which the action would apply because vessels most likely to be impacted are not required to hold a permit to fish for weakfish in the EEZ. In the proposed rule, NMFS requested specifically that the public comment on the number of small entities likely to be affected. However, NMFS did not receive any information pertaining to the number of small entities and is therefore not able to estimate further the number of entities to which this rule will apply. Although the number of small entities cannot be estimated, NMFS believes the action would only apply to those fishermen who capture weakfish incidentally while fishing for other species using a smaller mesh size than is allowed in the directed weakfish fishery. In addition, under Alternative 1, status quo, no additional small entities would be impacted; while implementation of Alternative 2 would apply to fishermen who use nets with smaller mesh sizes and catch over 150 lb (67 kg) of weakfish on a given day or trip. During 1998 - 2002, vessel trip reports indicated that only 1,116 small mesh otter trawl trips and 4 small mesh gillnet trips landed weakfish caught while fishing in the EEZ. The average price received by fishermen reporting weakfish catch in the EEZ in 2001 was \$0.614 per lb. If an affected vessel were to land 150 lb (67 kg) of weakfish, as currently permitted (Alternative 1), \$92 in revenue could be realized, per trip. If Alternative 2 were implemented, an additional \$92 in revenue, for a weakfish total of \$184 per trip (double the current amount) would be possible. For a more accurate picture of the expected economic impacts for the two alternatives, actual catches from individual vessel trip records, from 1998 - 2002, were multiplied by average price-per-pound of weakfish from the EEZ to determine estimated revenues per trip. Since vessels may not catch the full 150 lb (67 kg) or 300 lb (135 kg) allowed in Alternative 1 and 2, revenues for each Alternative were projected as the average for those trips that reported from 1 to 150 lb (67 kg) (Alternative 1) and from 151 to 300 lb (135 kg) (Alternative 2). Catches from trips that reported over 300 lb (135 kg) were

capped at the 300 lb (135 kg) proposed limit (Alternative 2) for these calculations. Calculated revenues for sale of allowed weakfish landings under Alternative 1 averaged \$22; potential revenues for Alternative 2 were estimated at \$160 per trip. Based on 1998 - 2002 vessel trip data, total annual revenues for all non-directed weakfish trips, coastwide are projected to be about \$6,200 under Alternative 1, and about \$7,800, if Alternative 2 were to be implemented. A copy of the FRFA is available from NMFS (see ADDRESSES).

There will be no reporting and recordkeeping requirements resulting from this action.

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

List of Subjects in 50 CFR Part 697

Fisheries, Fishing.

Dated: September 24, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR chapter VI, part 697, is amended as follows:

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

■ 1. The authority citation for part 697 is revised to read as follows:

Authority: 16 U.S.C. 5101 *et seq.*

■ 2. In § 697.2, the definitions for "Atlantic Coastal Act" and "Director" are added in alphabetical order to read as follows:

§ 697.2 Definitions.

* * * * *

Atlantic Coastal Act means the Atlantic Coastal Fisheries Cooperative Management Act, as amended (16 U.S.C. 5101 *et seq.*).

* * * * *

Director means the Director of the Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910

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■ 3. Section 697.7, paragraph (a)(4) and (a)(7) are revised to read as follows:

§ 697.7 Prohibitions.

(a) * * *

(4) Possess more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer, in the EEZ when using a mesh size less than 3 1/4-inch (8.3 cm) square stretch mesh (as measured between the centers of opposite knots when stretched taut) or

3 3/4-inch (9.5 cm) diamond stretch mesh for finfish trawls and 2 7/8-inch (7.3 cm) stretch mesh for gillnets.

* * * * *

(7) Land weakfish for commercial purposes caught in the EEZ in any state other than Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, or North Carolina.

■ 4. Section 697.22 is revised to read as follows:

§ 697.22 Exempted fishing.

The Regional Administrator or Director may exempt any person or vessel from the requirements of this part for the conduct of exempted fishing beneficial to the management of the American lobster, weakfish, Atlantic

striped bass, Atlantic sturgeon, or horseshoe crab resource or fishery, pursuant to the provisions of § 600.745 of this chapter.

(a) The Regional Administrator or Director may not grant such exemption unless it is determined that the purpose, design, and administration of the exemption is consistent with the objectives of any applicable stock rebuilding program, the provisions of the Atlantic Coastal Act, the Magnuson-Stevens Act, and other applicable law, and that granting the exemption will not:

(1) Have a detrimental effect on the American lobster, Atlantic striped bass, weakfish, Atlantic sturgeon, or horseshoe crab resource or fishery; or

(2) Create significant enforcement problems.

(b) Each vessel participating in any exempted fishing activity is subject to all provisions of this part, except those explicitly relating to the purpose and nature of the exemption. The exemption will be specified in a letter issued by the Regional Administrator or Director to each vessel participating in the exempted activity. This letter must be carried aboard the vessel seeking the benefit of such exemption. Exempted fishing activity shall be authorized pursuant to and consistent with § 600.745 of this chapter.

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