

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110218149-1182-01]

RIN 0648-BA86

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery; Revision of 2011 Butterfish Specifications

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

ACTION: Temporary rule; request for comments.

SUMMARY: NMFS issues this temporary rule pursuant to its authority to issue emergency measures under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This emergency action increases the butterfish allowable biological catch (ABC) for the 2011 fishing year from 1,500 mt to 1,811 mt, and applies the increase to the butterfish mortality cap in the Loligo squid fishery, based on the most recent and best available scientific information.

DATES: Effective March 15, 2011, through September 12, 2011. Comments must be received by April 14, 2011.

ADDRESSES: The supplemental EA is available by request from: Patricia Kurkul, Regional Administrator, National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930-2276, or via the Internet at <http://www.nero.noaa.gov>.

You may submit comments, identified by RIN 0648-BA86, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>;
- Fax: (978) 281-9135, Attn: Aja Peters-Mason;
- Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930. Mark the outside of the envelope “Comments on Emergency Rule to Revise the Butterfish Specifications.”

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Aja Peters-Mason, Fishery Policy Analyst, (978) 281-9195, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

This temporary rule implements emergency measures, authorized by section 305(c) of the Magnuson-Stevens Act, to increase the butterfish ABC for the 2011 fishing year (FY) from

1,500 mt to 1,811 mt, and applies the increase to the butterfish mortality cap in the Loligo squid fishery immediately. This action revises the butterfish ABC in the Final 2011 Specifications for the MSB Fishery Management Plan (FMP) (76 FR 8306; February 14, 2011).

Butterfish catches have been constrained to low levels since the ABC was reduced to 4,545 mt in 2005, and then to 1,500 mt in 2008. ABC reductions were in response to the results of the 38th Stock Assessment Workshop (SAW 38) in 2004, which determined the butterfish stock was overfished. The Mid-Atlantic Fishery Management Council (Council) developed Amendment 10 to the FMP in response to SAW 38; Amendment 10 enacted a rebuilding program for butterfish, as well as measures to reduce butterfish bycatch in the Loligo squid fishery. The most notable bycatch reduction measure in Amendment 10 is the butterfish mortality cap on the Loligo squid fishery, which went into effect on January 1, 2011. The cap is 75 percent of the butterfish ABC, and closes the directed Loligo squid fishery once it is attained.

The most recent butterfish assessment, SAW 49 (January 2010), determined that the status of the butterfish stock is unknown. Though the assessment was inconclusive, it did verify that long-term declines in the butterfish stock persisted even in the absence of fishing pressure, which suggests that fishing mortality may not be a major factor impacting the stock. The estimates of butterfish fishing mortality and total biomass resulting from SAW 49 were highly uncertain, and the final assessment report stated that it would be inappropriate to compare the previous status determination criteria from SAW 38 with the current assessment estimates of spawning stock biomass and fishing mortality, because measures of population abundance in the current assessment were scaled much higher than those in the previous assessment. In May 2010, the Council's Scientific and Statistical Committee (SSC) reviewed the SAW 49 results and

other available information, including the Northeast Fisheries Science Center's (NEFSC) Autumn 2009 trawl survey indices for butterfish and, due to uncertainty in the assessment, recommended setting the butterfish ABC at the status quo level of 1,500 mt for FY 2011.

The Council used the SSC's recommended butterfish ABC as the basis for 2011 specifications, and submitted their recommendations and supporting analysis to NMFS in July 2010. NMFS went on to recommend the 1,500-mt butterfish ABC in the proposed rule for 2011 MSB Specifications in November 2010. During public comment on the proposed specifications, industry members expressed concern that the low butterfish ABC would cause the directed Loligo squid fishery to be closed before the fleet was able to access much of the Loligo squid quota. Commenters also pointed to recent information from the NEFSC Autumn 2009 and 2010 trawl survey that showed butterfish catches almost twice the average for the last decade (6.41 kg/tow for 2009; 5.59 kg/tow for 2010; average 3.4 kg/tow from 1999-2008). However, based on the SSC's recommended ABC, which was adopted by the Council, NMFS implemented the 1,500-mt ABC for butterfish in the final MSB specifications in February 2011.

Because the NEFSC Autumn 2010 trawl survey information was not available during the SSC's initial deliberations in May 2010, the SSC met on February 7, 2011, to consider whether the new information warranted an adjustment to their previous recommended butterfish ABC for 2011. The SSC reviewed inshore butterfish survey data from the Northeast Area Monitoring and Assessment Program (NEAMAP), as well as landings information for butterfish through 2010. The SSC also reviewed the past justification for the establishment of the 1,500-mt ABC.

The SSC noted the high uncertainty about the scale of the current stock biomass, which made it difficult to assess the risk of the lower range of ABC values for 2011 that were previously considered in its May 2010 deliberations. It stated that, while establishing an ABC based on average landings over a given time period is justifiable in some situations where stock size is uncertain, it would be inappropriate to continue to use this method in the case of butterfish, given the long-term declining trend in stock abundance. However, the SSC went on to recommend that the Council adjust the 2011 butterfish ABC to 1,811 mt, based on a revised method that considers realized landings and discards from 2002-2008, a time period during which butterfish catch history was dominated principally by discards. This is in contrast to the method that was initially used to set the ABC at 1,500 mt in 2008, which relied on an estimated level of discards associated with average landings over a slightly different timeframe. The SSC also noted that butterfish catches in NEFSC Autumn trawl surveys from 2002-2008 appeared relatively stable.

Based on the SSC's recommendation, the Council requested at its February 2011 meeting that NMFS take an emergency action to adjust the butterfish ABC to 1,811 mt and apply the increase to the mortality cap for the Loligo squid fishery. The duration of this action is limited by the Magnuson-Stevens Act to 180 days; however, NMFS will re-evaluate the status of the fishery at the end of 180 days and may extend this action in order to make the catch limits effective for the duration of the FY (through December 31, 2011), consistent with the authority in the Magnuson-Stevens Act to extend emergency actions for up to an additional 186 days.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification

for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone.

The new information from the Autumn 2010 survey and the more recent NEAMAP survey results are recently discovered circumstance and represent the best available science. To not take into account the new scientific advice in a timely manner has the potential to present serious management problems in the Loligo fishery. The Loligo squid fishery is particularly active during the first Trimester of the fishing year (January – April). Swift implementation of the modified ABC, consistent with the new SSC recommendation, is critical to the Loligo fleet due to the timing of fleet activity, and the history of interactions between Loligo squid and butterfish. It is intended to provide the Loligo squid fleet additional access to Loligo squid quota during the FY. It would also enable the Loligo squid fleet to optimize Loligo squid harvest with reduced concern that that fishery could be closed due to the butterfish mortality cap. Therefore, this emergency action will reduce the likelihood of disruption to the Loligo squid fishery that would be caused by the existing butterfish cap. Addressing this through Council action, rather than through Secretarial emergency authority, would take most of the year, and would likely

result in implementing measures well after the existing butterfish cap could have closed the Loligo squid fishery. The benefit of increasing the butterfish ABC and applying the increase to the butterfish mortality cap through this emergency action will be immediate to the Loligo fleet, and therefore outweighs the value of going through the normal rulemaking process.

This emergency action increases the butterfish ABC previously implemented for the FY 2011 from 1,500 mt to 1,811 mt. Other specifications for butterfish, specifically, initial optimum yield (IOY), domestic annual harvest (DAH), domestic annual processing (DAP), joint venture processing (JVP), total allowable level of foreign fishing (TALFF), and research set-aside (RSA) are unchanged from those set in the final 2011 specifications. Specifications for Atlantic mackerel, Loligo squid, and Illex squid also remain unchanged.

Amendment 10 specified that the butterfish mortality cap is to be set equal to 75 percent of the butterfish ABC, with the remaining 25 percent of the butterfish ABC allocated to account for butterfish catch in other fisheries, but noted that this apportionment may be revised as necessary to accommodate the Loligo squid fishery. The additional 311-mt ABC allotment implemented through this action is entirely allocated to the mortality cap. Under the current 2011 specifications, the butterfish mortality cap is 1,125 mt (75 percent of 1,500 mt); this emergency action increases the butterfish mortality cap to 1,436 mt.

Classification

NMFS has determined that this rule is necessary to respond to an emergency situation and is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under section 553(b)(B) of the Administrative Procedure Act that it is impracticable and contrary to the public

interest to provide for prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment contrary to the public interest. This action provides the benefit of allowing the Loligo fleet to optimize its harvest, with less concern that the fishery could be closed due to the butterfish mortality cap. This action did not allow for prior public comment because the scientific review process and determination could not have been completed any earlier, due to the inherent time constraints associated with the process and the fact that the information on which this action is based became available very recently.

If this rulemaking were delayed to allow for notice and comment, the current butterfish mortality cap could be reached, which would have the effect of shutting down the directed Loligo fishery for the remainder of Trimester 1 (January – April). The time necessary to provide for prior notice, opportunity for public comment, and delayed effectiveness for this action could have resulted in closing the Loligo fishery due to the low limit of the current butterfish mortality cap. In the interest of receiving public input on this action, the revised assessment upon which this action was based is made available to the public, and this action requests public comments on that document and the provisions in this rule.

For the reason above, the Assistant Administrator for Fisheries finds good cause under section 553(d) of the Administrative Procedure Act to waive the 30-day delay in effectiveness.

This emergency rule has been determined to be not significant for purposes of E.O. 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

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

Dated: March 10, 2011

Samuel D. Rauch III,

Deputy Assistant Administrator

For Regulatory Programs,

National Marine Fisheries Service.

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