



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
GREATER ATLANTIC REGIONAL FISHERIES OFFICE  
55 Great Republic Drive  
Gloucester, MA 01930

August 2, 2023

Michael Luisi, Chairman  
Mid-Atlantic Fishery Management Council  
800 North State Street, Suite 201  
Dover, DE 19901

Dear Mike:

With this letter, I am notifying the Council that, on behalf of the Secretary of Commerce, I have partially approved Amendment 23 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP). While I have approved the changes to the commercial in-season closure trigger, I have disapproved adding the state-by-state quota allocations to the Federal FMP and regulations, as well as the associated payback provisions and the process for setting the state allocations. We intend to publish a final rule implementing the revised commercial in-season closure trigger prior to the start of the black sea bass fishing year on January 1, 2024.

As required by the Magnuson-Stevens Fishery Conservation and Management Act, we published a Notice of Availability (NOA) for Amendment 23 on May 4, 2023 (88 FR 28456), with a 60-day comment period that ended on July 3, 2023. We published a proposed rule on May 15, 2023 (88 FR 30938), with a comment period that ended on June 14, 2023. The proposed rule included all of the Council's recommended changes and the proposed regulations deemed necessary by the Council. We received 14 comments in response to the NOA and the proposed rule, seven of which were not germane to the alternatives under consideration in the amendment. The Council and three other commenters supported full approval of Amendment 23; however, three other commenters, including the Massachusetts Division of Marine Fisheries and the Rhode Island Division of Environmental Management, agreed with the concerns we raised in the NOA regarding several of the proposed measures and supported disapproving the addition of the commercial state allocations to the Federal FMP.

### ***Approved Measure***

#### ***Federal Commercial In-season Closure Trigger***

Currently, the Federal FMP requires a commercial coastwide in-season closure for all federally permitted vessels and dealers, regardless of state, once the coastwide quota is projected to be landed. Implementing this provision of Amendment 23 will change this trigger, such that the closure would occur once landings are projected to reach the coastwide quota plus an additional buffer of up to five percent. Each year, the Council and the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Boards would agree to the appropriate buffer for the upcoming year through the annual specifications process. The Council's Monitoring Committee and the Commission's Technical Committee would provide advice on the appropriate buffer based on considerations such as stock status, the quota level,



and recent fishery trends. This change is being implemented to help minimize negative economic impacts of coastwide closures on states that have not fully harvested their allocations. This is not expected to create an incentive for quota overages as states would still be required to close when their state-specific quotas through the Commission FMP are reached and states would still be required to pay back quota overages. I have approved this measure.

### ***Disapproved Measures***

#### *Council Management of State Allocations*

Amendment 23 proposed that commercial fishery state-by-state quota allocations be added to the Federal FMP and regulations. This change would have increased the administrative burden and cost of monitoring state quotas and processing state quota transfers for NOAA's National Marine Fisheries Service (NMFS) as well as the states. This would also have meant that any future changes to the state-by-state allocations would require a joint action of the Council and Commission. I have disapproved this measure for the reasons discussed below.

#### *Overages and State Payback Requirements*

Under the Commission's Interstate FMP, overages of state-specific quotas are only required to be paid back by a state when the coastwide quota has been exceeded. If the state allocations were included in the Federal FMP, the Council and FSB Board's preferred alternative was to implement this payback provision in the Federal regulations. I have disapproved incorporating these state payback provisions in the Federal FMP, as they are not necessary given our disapproval of incorporating state allocations in the Federal FMP. However, the Commission's use of this payback process is not affected by our decision on the Federal FMP.

#### *Commercial State Allocation Formula*

This joint action considered changes to the allocation formula for the distribution of commercial black sea bass quota among the states. The Commission adopted and implemented a new allocation formula in its Interstate FMP, and the Council recommended we approve and implement the same allocation approach in the Federal FMP. Because we are disapproving the state-by-state allocations as a measure in the Federal FMP and regulations, it is not necessary to incorporate an allocation formula in the Federal FMP so we are not approving this measure.

### ***National Standards***

Our review of Amendment 23 determined the record supporting the Council's recommendations could not support a decision to approve incorporating the state-by-state allocations into the Federal FMP and regulations. By virtue of their reliance on the state allocations, the proposed state payback provisions and the state allocation formula are also disapproved. Specifically, our review concluded that the disapproved provisions of Amendment 23 are not consistent with:

- National Standard 4, which requires fishery conservation and management measures to avoid discrimination between residents of different States and to allocate or assign fishing privileges among various United States fishermen in a manner that is fair and equitable to all such fishermen, reasonably calculated to promote conservation, and carried out in

such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges;

- National Standard 5, which requires that fishery conservation and management measures, where practicable, consider efficiency in the utilization of fishery resources and may not have economic allocations as its sole purpose;
- National Standard 6, which requires fishery conservation and management measures to take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches; and
- National Standard 7, which requires fishery conservation and management measures, where practicable, to minimize costs and avoid unnecessary duplication.

### *Promoting Conservation*

National Standard 4 requires that when an FMP allocates or assigns fishing privileges among various U.S. fishermen, such allocations must be: (A) Equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. An FMP may contain allocations if such measures are necessary or helpful in furthering legitimate objectives.

After reviewing the Amendment documents and public comments, we have determined that the Council's proposal to add the commercial state allocations of black sea bass to the Federal FMP does not promote conservation of marine resources. The Council and the Commission have successfully co-managed the black sea bass fishery for over 30 years. The Commission has managed the commercial state allocations of black sea bass through the Commission's Interstate FMP for 20 years, in parallel with NMFS coastwide quota management. The Council's rationale for adding the state commercial allocations into the Federal FMP is to acknowledge the importance of the black sea bass fishery in both state and Federal waters, to bring state allocations in line with other aspects of the management program, and to ensure a thorough and transparent review process.

However, Amendment 23 does not identify any conservation needs or objectives that would be addressed or resolved by the addition of the state commercial allocations in the Federal FMP. The Council and Commission first adopted the current two-tier system for black sea bass commercial quotas in 2003. Since that time, the state quotas have been successfully managed through the Commission's Interstate FMP with the coastwide quota successfully managed by NMFS. Through a joint process, each year the Council and Commission establish the acceptable biological catch and annual catch limit (ACL) and allocate the ACL between the commercial and recreational fisheries. Thus, through this annual process, the coastwide commercial quota satisfies the conservation requirement of the Magnuson-Stevens Act. In the circumstance where overages of state quotas could result in a coastwide quota overage, NMFS has the authority to close the entire fishery. Duplication of the state commercial allocations in the Federal FMP will not further any conservation objective because the allocations are already in place and successfully managed through the Interstate FMP, and the Federal regulations are sufficient to address coastwide overages. Therefore, because the proposed action to allocate the Federal coastwide quota to individual states does not promote conservation of the black sea bass resource, we find this aspect of Amendment 23 to be inconsistent with National Standard 4.

### *Efficiency*

National Standard 5 requires FMPs to consider efficiency in the utilization of fishery resources, as long as no such measure has economic allocation as its sole purpose. According to the National Standard Guidelines at 50 CFR 600.330(b), management regimes that allow a fishery to operate at the lowest possible cost (*e.g.*, fishing effort, administration, and enforcement) for a particular level of catch and initial stock size are considered efficient. Costs for administration and enforcement include not only direct costs for industry, but also costs for state and Federal governments. An FMP should demonstrate that management measures aimed at efficiency do not simply redistribute gains and burdens without an increase in efficiency.

Adding the state commercial allocations to the Federal FMP would reduce efficiency by increasing administrative burden and complexity, decreasing flexibility, and protracting management timelines. An efficient system of commercial state allocations is one that provides for ease of quota transfers among states and rapid, efficient, and effective closures when quotas are reached. The current system of managing state commercial allocations through the Commission's Interstate FMP achieves this standard of efficiency. Adding the state commercial allocations in the Federal FMP would require NMFS to monitor state quotas in-season, implement closures if triggered, and manage all quota transfers among states. This would also reduce efficiency by requiring additional steps for the states as they would be required to request transfers from NMFS in addition to the Commission, and then wait for NMFS's approval before the transfers are effective.

Each transfer between states would need to be processed individually and would increase the workload on NMFS staff, reducing agency capacity for other priorities. This is not merely a shift in administrative burden. Rather, it increases the administrative burden for both NMFS and the states without eliminating administrative burden for the Commission. The states would continue to bear the burden of the existing state management processes in addition to the added requirement to submit transfer requests to NMFS.

Having NMFS process interstate quota transfers imposes a delay associated with *Federal Register* publications for such actions. This would reduce the speed at which transfers become effective compared to the status quo. The analysis for Amendment 23 determined that transfers in the last two weeks of the year would likely be limited to unforeseen events, such as vessel failure or bad weather, due to the additional complications of late-in-the-year transfers; this limitation does not exist in the current Commission process. The process for aligning state and Federal quota closures is not seamless, and has been an issue with bluefish and summer flounder. Landings data and projections often differ between state and Federal monitoring, as do the time requirements for a state and NMFS to implement a fishery closure. For example, the Commonwealth of Massachusetts can close a fishery within 24 hours. Because of Federal procedural requirements, including publication of a closure notice in the *Federal Register*, NMFS cannot close a fishery in such a short timeframe and this has resulted in misaligned closure dates affecting state and Federal permit holders differently in other fisheries.

Therefore, because the proposed measure to incorporate state-by-state quota allocations into the Federal FMP and regulations would decrease the efficiency of the management system for the black sea bass commercial fishery, with no expected benefit to the fishery or the resource, we find this aspect of Amendment 23 to be inconsistent with National Standard 5.

### *Variations and Contingencies*

National Standard 6 requires FMPs to take into account and allow for variation among, and contingencies in, fisheries, fishery resources, and catches. According to the National Standard Guidelines at § 600.335(d), unpredictable events, such as unexpected climatic conditions, or resource surges or failures, are best handled by establishing a flexible management regime that contains a range of management options through which it is possible to act quickly without amending the FMP or even its regulations.

Adding commercial state allocations to the Federal FMP would not create an efficient and responsive process for responding to changing conditions and stock status. Duplicating these allocations in the Federal FMP and regulations would make the management of this stock less adaptable to future changes in the distribution of both the resource and the fisheries that rely on it because future changes to the allocations would require a Council action in addition to the Commission action.

The Council has representation from the states of New York through North Carolina, but it does not include representatives from the northern states of Connecticut, Rhode Island, and Massachusetts, which also have a strong interest in the management of the black sea bass fishery. Given the ongoing and expected effects of climate change and the changes in the distribution of the black sea bass stock, it is foreseeable that black sea bass could become a commercially viable species as far north as Maine. Accordingly, we should strive for a management system designed to maximize flexibility and resilience in the face of change. The limited representation on the Council by all states with an interest in the fishery poses a challenge when making allocation decisions that have a direct effect on fishing opportunities at the state level. Continued changes in the distribution of the stock would exacerbate the already challenging allocation deliberations of the Council. The Commission includes representation from all Atlantic states and its process of allowing states to join management boards in which they have an interest will continue to provide equity in representation when making future changes to commercial state allocations.

Rapid changes and increased uncertainties in the distribution of the black sea bass resource, as well as its response to the effects of climate change, highlight the need for a flexible and responsive management system that allows for variations and addresses contingencies in the fishery. The Council is not able to add states to its membership, nor can it lobby Congress to make such changes. Accordingly, maintaining the state commercial allocations solely in the Commission's Interstate FMP better satisfies National Standard 6 by employing a more flexible and responsive decision-making system. Therefore, because the proposed measure to incorporate state-by-state quota allocations into the Federal FMP and regulations would create a less flexible and less responsive management system than the status quo, we find this aspect of Amendment 23 to be inconsistent with National Standard 6.

### *Minimizing Costs*

National Standard 7 requires that FMPs minimize costs and avoid unnecessary duplication in the development of management measures, where practicable. According to the National Standard Guidelines at § 600.340(b), management measures should not impose unnecessary burdens on the economy, individuals, private or public organizations, or Federal, state, or local governments. At § 600.340(c), the Guidelines state that supporting analyses for FMPs should demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance.

Adding the state commercial allocations to the Federal FMP and regulations would duplicate the existing Commission management of state-by-state quota allocations and increase administrative costs to NMFS, the states, and, in some cases, the fishing industry. As discussed above, adding the state commercial allocations in the Federal FMP would add several administrative tasks requiring NMFS to monitor state quotas in-season, implement state-level closures if triggered, and manage all quota transfers among states. This would increase administrative costs by requiring additional steps for the states to submit transfer requests to NMFS in addition to the Commission. This is not merely a shift in administrative costs to NMFS, but an increase in administrative costs for NMFS and the states without a corresponding reduction in administrative costs for the Commission. Having NMFS process interstate quota transfers would also hinder the speed at which transfers become effective compared to the status quo not only because of the duplicative processes, but because the requirement of the Federal process to publish approved transfers in the *Federal Register* increases the time before transfers can take effect. Such delays may have additional costs for industry members if a state fishery is closed while awaiting a transfer to become effective upon publication in the *Federal Register*.

Further, landings data and projections used for monitoring often differ between states and NMFS. In order for NMFS to close a fishery when a state-level quota is achieved, NMFS must monitor each state quota using data received directly from federally permitted vessels and dealers and state data received through the Atlantic Coastal Cooperative Statistics Program, which can have a time lag compared to when states receive data from state-permitted entities. States can receive data directly from their permitted vessels and dealers. As catch approaches quotas, states are often in direct communication with their dealers to ensure more accurate catch accounting and projections. The time requirements for a state and NMFS to implement a fishery closure also differ. As noted above, Massachusetts can close a fishery within 24 hours. NMFS cannot close a fishery in such a short time frame because of the additional Federal review and requirements to publish closure notices in the *Federal Register*, and this has resulted in misaligned closure dates affecting state and Federal permit holders differently in other fisheries. The potential for misaligned closure dates affecting state and Federal permit holders differently would also create a cost in the form of enforcement challenges to ensure permit holders are complying with the correct regulations. The reduced flexibility for late-season transfers could also result in negative economic effects.

Therefore, because the proposed measure to incorporate state-by-state quota allocations into the Federal FMP and regulations would increase administrative costs, unnecessarily duplicate existing processes to manage state quotas, and impose additional administrative burdens on NMFS and the states, without identifying any real benefits to the management process, resource, or fishery that outweigh or justify those costs, we find this aspect of Amendment 23 to be inconsistent with National Standard 7.

### ***Conclusion***

When a Council FMP or amendment is disapproved based on inconsistencies with the Magnuson-Stevens Act or other applicable laws, section 304(a)(3) of the Magnuson-Stevens Act requires the Secretary to recommend actions the Council could take to conform the amendment to the relevant legal requirements. Section 304(a)(4) provides Councils the opportunity to revise and resubmit amendments for Secretarial review after addressing the relevant legal requirements.

However, the Council is not required to take further action on the disapproved measures. If the Council chooses to revise and resubmit the amendment, the Magnuson-Stevens Act indicates that the Council must either:

- Adequately explain how adding the commercial state allocations to the Federal FMP: (1) Promotes conservation, as required by National Standard 4 of the Magnuson-Stevens Act; (2) achieves efficiency in administration and enforcement, as required by National Standard 5; (3) provides for an efficient and responsive process to address variations and contingencies in fisheries, including climate change, as required by National Standard 6; and (4) minimizes costs to the extent practicable, as required by National Standard 7; or
- Reconsider adding the commercial state allocations to the Federal FMP and revise the amendment to adopt different measures that address a management need consistent with the National Standards.

However, given the fundamental flaws identified above, a simple revision to the document to attempt to articulate compliance with the National Standards seems unlikely to survive additional review. Despite this outcome, we do appreciate the efforts of the Council, Board, and staff to develop this amendment among the many ongoing efforts designed to improve the management of the summer flounder, scup, and black sea bass fisheries. Please contact me if you have any questions.

Sincerely,



Michael Pentony  
Regional Administrator

Cc: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council  
Dr. Cate O'Keefe, Executive Director, New England Fishery Management Council  
Robert E. Beal, Executive Director, Atlantic States Marine Fisheries Commission