

Atlantic States Marine Fisheries Commission

**ADDENDUM IV TO THE SUMMER FLOUNDER, SCUP AND
BLACK SEA BASS FISHERY MANAGEMENT PLAN**

Specification Setting Process for Summer Flounder, Scup, and Black Sea Bass



Approved January 29, 2001

Background

This Addendum is adopted under the adaptive management/framework procedures that are a part of the Fishery Management Plans for, respectively, Summer Flounder, Scup and Black Sea Bass. The Addendum applies to all three fishery management plans, and is authorized by Amendment 12, which amended each of these FMPs. These fisheries are managed cooperatively by the states, through the Atlantic States Marine Fisheries Commission, and the federal government, through the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service.

Amendment 2 to the Fishery Management Plan for Summer Flounder was adopted by the Commission and the Council in 1992. It established a comprehensive program for annual fishing regulations for summer flounder. Under the program as adopted, the Commission, operating through its Summer Flounder, Scup and Black Sea Bass Management Board, and the Mid-Atlantic Council meet jointly and make a recommendation to the Regional Administrator of NMFS with respect to a total allowable level of fishing (TAL) and a regime of commercial and recreational fisheries regulations that are consistent with achieving the TAL. The Regional Administrator then proposes a rule that considers the recommendation, receives public comment, and publishes a final rule. Under the terms of the FMP, the states are bound to implement the decision of the Regional Administrator as a mandatory compliance element, and may be subject to a noncompliance determination under the Atlantic Coastal Fisheries Cooperative Management Act.

In 1996, the Commission and the Council adopted the Fishery Management Plan and Addendum 1 for Scup. (In the federal version, this is Amendment 8 and the Regulatory Amendment to the Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass.) It contained a similar regime for setting annual specifications for commercial and recreational fisheries. As in the case of summer flounder, states are bound to implement the regulations promulgated by the Regional Administrator.

In 1996, the Commission and the Council adopted Fishery Management Plan for Black Sea Bass. (In the federal version, this is Amendment 9 to the Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass.) It contained a similar regime for setting annual specifications for commercial and recreational fisheries. In the case of black sea bass, however, the decision of the Board on specifications is binding upon the states, regardless of subsequent action taken by the Regional Administrator.

In practice, a Monitoring Committee for each of these species has been established with representatives from the Council, the Commission, the states and NMFS. These monitoring committees meet in July/August and make recommendations to the Council and Board with respect to specifications for the following year for total levels of allowable harvest and landings, and for commercial fishing regulations. In recent years, it has been late in the fall before NMFS has published the proposed rule to implement these regulations. The monitoring committees meet again in November/December to consider recreational fishing regulations based on information from the first eight months of the year, or the first ten if available. Proposed rules to

implement these recommendations for recreational fisheries have been published in the spring, and final rules promulgated during the summer.

In 1998, the Commission and the Council adopted an amendment to all three of these fishery management plans, under the title: *Amendment 12 to the Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass*. In addition to measures for the Council to comply with the Sustainable Fisheries Act, Amendment 12 contained a framework procedure for modifying FMP elements without having to go through the complete FMP amendment process. Among the frameworking possibilities authorized by Amendment 12 is the annual quota specification setting process (See section 3.1.1, #13).

The purpose of this Addendum, which is adopted by the states under Amendment 12, is to harmonize the different procedures for setting specifications under the fishery management plans for these three species, by adopting a procedure that clarifies the ability of the states to operate effectively and consistent with basic concepts of state sovereignty.

Statement of the Problem

The process for setting and implementing specifications for the fisheries for summer flounder, scup and black sea bass has not been working very well over the past few years. The following problems have developed.

1. The final specifications have not been established on a timely basis. In 2000, for example, the proposed specifications for the TAL and commercial measures were not published until January 28; and were not promulgated until May 24. The proposed specifications for the recreational fishery were not published until July 3, and were not promulgated until September 9, by which time many recreational fisheries were completed. As a result, while waiting for federal action, the states have had to find ways to implement rules to conserve and manage the fishery while waiting for the federal regulations to come into effect. Thus, the states need to clarify their authority to implement rules regardless of whether federal regulations have been finalized.

2. In a number of instances, the state and federal management programs have not been consistent with each other. For example, the federal regulations for the commercial scup fishery in the summer do not implement the state-by-state quota system contained in the FMP. The federal regulations for summer flounder for 2001 implement a biomass-based fishing target, rather than the fishing mortality rate target in the FMP. In both cases these federal rules respond to litigation; but regardless of the reason, state and federal management have diverged. Similarly, a number of provisions in the joint FMP documents adopted by the Commission and the Council were disapproved upon Secretarial review, and thus do not exist in the federal FMP; but still apply to the states under the version of the FMP adopted by the states. Again, the point is that the management systems do not completely mirror each other; and the states thus need a mechanism to implement the interstate FMPs separate from the federal decision-making process. (Similar issues occur in other fishery management programs, such as Atlantic herring and American lobster.)

This creates a particular problem for the states in the context of their sovereign responsibilities under state law. The rationale for the states to defer to the decision of a federal official was to provide for consistency in the implementation of the state and federal management programs. However, when the state and federal management programs are not the same, this consistency cannot be achieved and thus the reason for departing from keeping the states in control of their own decisions is no longer valid.

3. The summer flounder, scup and black sea bass fisheries are each managed in a different manner, leading to an unnecessarily complex and confusing regulatory pattern. Summer flounder, for 2001, are managed under an interim rule; and the difficulties that may be apparent in achieving the desired biomass target by December 31, 2001, imply that some alternative federal management may continue at least into 2002. The commercial summer scup fishery is managed by the federal government according to a regional quota; but the states implement a state-by-state quota. The Black Sea Bass FMP requires the Board to make decisions concerning required state regulations, and the Commission to notify the states of their responsibilities, including monitoring landings and projecting commercial fishery closures during the fishing season.

Management Program

Under this Addendum, the process contained in the Black Sea Bass FMP would be applied to the summer flounder and scup fisheries as well. The Commission will continue to participate in the monitoring committee processes as under the current arrangement. However, upon the recommendation of the relevant monitoring committee and joint consideration with the Council, the Board will make a decision concerning what state regulations will be, rather than a recommendation to NMFS. The states will then be responsible for implementing the Board's decision. During the fishing year, the Commission staff will monitor the progress of the fishery, and notify the states when closures or other regulatory actions are required; and the states are responsible for taking the necessary implementing action. Regulations will continue to be in effect the following year if they have not been changed by the Board.

Annual Process for Setting Fishery Specifications

Addendum IV establishes the following process for establishing annual specifications for the summer flounder, scup and black sea bass fisheries. The following provisions will operate with respect to the states and the Commission in lieu of any inconsistent provisions the following FMP sections: Summer Flounder FMP, Amendment 2: Sections 9.1.2.2, 9.1.2.3.1, 9.1.2.3.2, 9.1.2.3.3, 9.1.2.4, and 9.1.2.5; Scup FMP (Amendment 8 of the federal version of the FMP): Sections 9.1.2.2., 9.1.2.3.1, 9.1.2.3.2, 9.1.2.3.3, 9.1.2.3.4, 9.1.2.3.5, 9.1.2.3.6, 9.1.2.3.7, 9.1.2.4, 9.1.2.5, 9.1.2.6, 9.1.2.7; Scup FMP, Addendum I: Section 9.1.2.3.7; Black Sea Bass FMP (Amendment 9 of the federal version of the FMP): Sections 9.1.2.2, 9.1.2.3.1, 9.1.2.3.2, 9.1.2.3.4, 9.1.2.3.5, 9.1.2.3.6, 9.1.2.4.1., and 9.1.2.4.2.

The Summer Flounder, Scup and Black Sea Bass Monitoring Committees are joint committees of the MAFMC and ASMFC made up of staff representatives of the Mid-Atlantic, New England, and South Atlantic Fishery Management Councils, the Northeast Regional Office, the Northeast

Fisheries Center, and ASMFC representatives. The ASMFC is represented by the members of the applicable Plan Review Team as established per section 5(e) of the ASMFC Interstate Fisheries Management Program Charter. The MAFMC Executive Director or his designee will chair the Committee.

The Monitoring Committees will annually review the best available data including, but not limited to, commercial and recreational catch/landing statistics, current estimates of fishing mortality, stock status, the most recent estimates or recruitment, VPA results, target mortality levels, beneficial impacts of size/mesh regulations, as well as the level of noncompliance by fishermen or states and recommend to the Council Committee and ASMFC Summer Flounder, Scup and Black Sea Bass Management Board (“Board”) commercial (annual quota, minimum fish size, minimum mesh size, and vent requirements) and recreational (possession and size limits and seasonal closures) measures designed to assure that the target mortality level for summer flounder or scup or black sea bass, as applicable, is not exceeded. The Committee will also review state regulatory programs for consistency with the FMP. The Committee will also review the gear used in the fisheries to determine whether additional gears need to be regulated to help assure attainment of the fishing mortality rate targets and propose such regulations as appropriate.

The Council and the Board will receive the report of the Committees as well as appropriate public input. The Council and Board will consider this information and jointly determine the quotas and framework adjustments for the following year. Next, the Council will make recommendations to the Regional Administrator and the Board will determine the final state quotas and other state management measures for the year. The Regional Administrator will receive the report of the Council and publish a report in the *Federal Register* for public comment by the date specified in the regulations which provides states sufficient time to implement quotas and other management measures. Following the review period, the Regional Administrator will set the final federal quota and other management measure adjustments applicable to the EEZ and to federal permit holders for the year. All landings will count against the relevant quota. All states must implement measures as contained in the decision on the Board.

In summary, the steps from the Monitoring Committees to action by the ASMFC and the Regional Administrator are:

1. The Monitoring Committees review the data and make recommendations to the Council’s Demersal Species Committee and ASMFC Board.
2. The ASMFC and Council Citizens Advisory Panels present recommendations to the Committee and Board.
3. The Demersal Species Committee and Board consider the recommendations of the Monitoring Committees, Advisors, and other public input in jointly determining annual quotas and framework adjustments.
4. The Board makes final decisions on quotas and framework adjustments for state waters, establishing compliance criteria and dates.

5. The Demersal Species Committee makes recommendations to the Council
6. The Council considers the recommendations of the Demersal Species Committee and makes recommendations to the Regional Administrator.
7. The Regional Administrator considers the recommendations of the Council and the ASMFC Board's decisions and publishes proposed measures in the *Federal Register*.

The decision of the Summer Flounder, Scup, and Black Sea Bass Management Board relative to the specifications for 2001 fisheries that were made on August 15, 2000, November 29, 2000, December 12, 2000, and January 29, 2001, are hereby reaffirmed and deemed to have been adopted in accordance with the provisions of this Addendum. All specifications shall remain in place for the fisheries until changed, including continuing in the subsequent year or years.

Analysis

This Addendum establishes a common process for making specification decisions applicable to the states for each of these FMPs. It leaves the states and the Commission with the authority and the responsibility for determining necessary state action to implement the FMPs. And the states are able to act as soon as they made their decision, rather than waiting for a federal rule. This issue deals exclusively with the procedural, administrative aspects of making and implementing specifications decisions, and as such would not effect the substance of the management program, including conservation and management, environmental, or socioeconomic concerns. Arguably, this Addendum could increase the chance of divergence between state and federal specifications. However, divergence exists under the current system; and there is no evidence that it would be greater under This Addendum. The Board will continue to meet with the Council to consider the advice of the monitoring committees and attempt to make its decisions at the same time as the Council makes recommendations to NMFS.