



Mid-Atlantic Fishery Management Council

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Michael P. Luisi, Chairman | P. Weston Townsend, Vice Chairman

Christopher M. Moore, Ph.D., Executive Director

May 18, 2023

Mr. Michael Pentony
Regional Administrator
National Marine Fisheries Service
Greater Atlantic Region
55 Great Republic Drive
Gloucester, MA 01930

Dear Mr. Pentony:

The National Marine Fisheries Service (NMFS) recently published a [Notice of Availability \(NOA\)](#) and [proposed rule](#) for Amendment 23 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP). Both documents indicate that your agency may disapprove the aspect of the amendment which would add the black sea bass commercial state allocations to the Council's FMP. We are writing to reiterate the Council's position that adding these allocations to the Council's FMP would be an important improvement to the management program for black sea bass. This change is necessary to ensure a robust review of future modifications to these allocations and to bring the allocations in line with most other aspects of the management program.

The following comments address a number of specific points raised in the NOA regarding the proposed inclusion of the commercial state allocations in the Council's FMP (referred to as the Federal FMP in the NOA). For ease of reference, excerpts from the NOA are included in bold text with our comments directly below.

“Adding the state allocations to the Federal FMP would unnecessarily increase the administrative burden on, and cost to, state agencies and NMFS, and create additional inefficiencies, with no clear direct benefit to either the government, the resource, or the fisheries.”

Comment: We recognize that adding the state allocations to the Council's FMP will create new requirements for NMFS to monitor landings at the state level and manage quota transfers between states. However, we believe the administrative burden concerns are mitigated by the use of existing, well-functioning systems. NMFS has monitored state landings and managed quota transfers for summer flounder and bluefish for many years. Therefore, no new administrative processes are needed to do the same for black sea bass. States are already familiar with this process for these other species. This change would also decrease the administrative burden on the Atlantic States Marine Fisheries Commission (Commission) given that they would no longer be responsible for managing these tasks.

We strongly disagree with the assertion that adding these allocations to the Council's FMP would have “no clear direct benefit” to the resource or fisheries. This change would ensure a thorough and transparent review process is followed when future changes to the allocations are considered, as the Council is bound by the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the National Environmental Policy Act, and other applicable laws which do not apply to the Commission process.

“Under the current Commission process, state-to-state quota transfers are processed efficiently without the added administrative burden of the Federal process, which, for summer flounder and bluefish, requires significantly more time and resources and reduces flexibilities for states, including the need to publish state quota transfers in the Federal Register before they can be effective.”

Comment: The NOA would benefit from additional explanation of why the federal process would require “significantly more time and resources.” The Commission currently allows transfers at any time up to 45 days after the last day of the fishing season. If NMFS were to manage transfers under the same process currently used for summer flounder and bluefish, transfers in the last two weeks of the year would be allowed only for unforeseeable circumstances such as vessel failure or bad weather. Post-season transfers would not be allowed. The new limitations on late in the year and post-season transfers should have minimal impacts, as the states are familiar with these limitations for summer flounder and bluefish and already take steps to ensure that their quotas are not fully reached prior to the end of the year. State quota overages are only required to be repaid when the entire annual coastwide quota is exceeded, which has never occurred due to the steps states take to avoid overages. Therefore, the need for late in the year or post-season transfers should be rare. Restricting their use should have minimal impacts and would certainly not justify disapproving this part of the amendment.

“In addition to the increased administrative burden, shifting the allocations into the Federal FMP encumbers the management process such that both the Council and Board must agree on any future changes to the allocations.”

Comment: Joint decision making is a fundamental part of the commercial and recreational management programs for black sea bass, summer flounder, scup, and bluefish. This process has been in place for close to 30 years and has served both organizations well. Including the state allocations in both the Council and Commission FMPs would bring the allocations in line with most other aspects of the black sea bass management program. We also note that the phrase “shifting the allocations into the Federal FMP” suggests that the allocations are being removed from the Commission’s FMP and added to the Council’s FMP. This is not the case. It would be more accurate to say “adding the allocations to the Federal FMP.”

“Currently, Commission management of this stock includes members from all states and its process will continue to allow equity in representation when making future changes to state allocations. Management by the Mid-Atlantic Council has representation from the states from New York to North Carolina, but does not include membership from the northern states, such as Connecticut, Rhode Island, and Massachusetts, that also have a strong interest in the black sea bass fishery.”

Comment: State representation on the Councils is specified by Congress through the MSA. We are required under the MSA to manage stocks throughout their range, which for the northern stock of black sea bass is defined as Cape Hatteras, North Carolina through Maine. The Council and the Commission’s Summer Flounder, Scup, and Black Sea Bass Management Board (Board) recognize the significant interest of states not represented on the Council and have demonstrated a commitment to ensuring all decisions are made through a fair and equitable process. For example, the Council and Board adopted special voting procedures for this action to further address concerns about representation. In all final action decisions, the Board voted first on alternatives to define the allocation percentages. The Council voted first on alternatives for adding these allocations to the Council’s FMP and for federal in-season closures. This process was proposed by Commissioners from Massachusetts, Rhode Island, and Connecticut to ensure that all states with a declared interest in the black sea bass fishery had a chance to vote on the state allocations. Ultimately, both the Council and the Board passed a motion to include these allocations in both FMPs. Therefore,

disapproval of this aspect of the amendment would be contrary to the recommendations of both the Council and the Board.

In addition, it is important to acknowledge that most commercial black sea bass landings come from federal waters, which provides further support for the Council having a role in these allocation decisions.¹

“Given climate change and the northward expansion of the black sea bass stock, this inequity in representation on the Council creates challenges when making decisions regarding future potential allocation changes, by providing the states with seats on the Council a disproportionate role in the decision-making process.”

Comment: We disagree with the assertion that the lack of voting representation from New England states on the Council creates “inequity in representation” in the joint decision-making process. All states with a declared interest in the black sea bass fishery have equal representation on the Board, including states not represented on the Council. As you know, all joint actions must pass by a majority vote of both the Board and the Council. A motion passed by the Council does not move forward unless it also passes the Board. This joint decision-making approach is equitable and consistent with the MSA.

“The absence of northern states in the Council's membership has important implications for addressing National Standard requirements. For example, while the threshold decision of whether to include the state commercial quotas in the Federal FMP is not an allocation of fishing privileges, it is not clear how this action will provide for National Standard 4's requirement of fair and equitable allocations and National Standard 8's mandate to provide for the sustained participation of all fishing communities along with minimizing adverse economic impacts on such communities to the extent practicable.”

Comment: All Council recommendations must demonstrate compliance with the National Standards. The Commission is not bound by the requirements of the MSA, so it is not clear how *excluding* the state commercial quotas from the Council FMP would provide a better framework for consideration of the MSA's National Standards.

“Given that black sea bass has already become an important commercial and recreational species for fishermen in northern states, it is important that the management body with the authority to change state allocations is inclusive of the states with an interest in the fishery.”

Comment: The importance of black sea bass to northern states has been recognized since the Council established management of the stock in 1996 through Amendment 9 to the FMP, which specifically acknowledged that “black sea bass is an important component of the commercial and recreational fisheries from Massachusetts to North Carolina.” The NOA does not explain why these concerns are unique to this particular management action.

We are alarmed that the NOA appears to call into question fundamental aspects of the Council management system as set forth by Congress through the MSA. Section 302(h) of the MSA requires the Council to prepare and amend FMPs for each fishery under its authority. National Standard 3 states that a stock should be managed as a unit throughout its range, to the extent practicable. We

¹ For example, during 2010-2019, on average, 64% of commercial black sea bass landings from Maine through North Carolina came from federal waters and 17% from state waters. The remaining 18% was categorized as “unknown” (source: NEFSC dealer “AA tables,” which include landings from state and federal fisheries). This analysis has not been updated with more recent data as AA tables are no longer available due to the ongoing transition to the Catch Accounting and Monitoring System (CAMS).

are not aware of any provisions in the MSA or other applicable laws that would preclude the incorporation of state allocations in the Council FMP.

“Continued northward expansion of the stock is expected due to climate change, which is expected to exacerbate the already challenging allocation deliberations of the Council and Commission.”

Comment: This is not unique to black sea bass or to the Mid-Atlantic Council. Many stocks have changing distributions, and Council management of many stocks extends beyond the boundaries of the Council member states.

“Adding the state allocations to the Federal FMP and thus giving the Mid-Atlantic Council jurisdiction over these state allocations without northern states as Council members, while the Commission does include these states, creates management challenges—including potentially inadequate consideration of northern states’ fisheries, or even different allocation decisions from each body.”

Comment: NMFS is required to review this amendment for consistency with the MSA and other applicable laws based on facts in the record. Speculation about future actions involving “potentially inadequate consideration of northern states’ fisheries” is not supported by the administrative record. Once the allocations are added to the Council FMP, any future changes would need to meet the requirements of the MSA, including the National Standard 4 guidelines which require allocations to be fair and equitable to all fishermen and not discriminate between residents of different states. Future changes to the allocations would also need to be approved by both the Council and the Board. Different decisions by each body are theoretically possible but extremely rare in practice, as both bodies understand the implications and work together to achieve consensus on joint actions.

“We are supportive of the revised approach that was developed by the Council and Commission as it includes consideration of the distribution of the black sea bass stock, and the ability to revise allocations as the stock shifts.”

Comment: We agree that the methodology approved by the Council and the Board is an improvement over the prior allocation scheme as it balances the historical dependence of the states on the fishery with considerations related to the impacts of changing stock distribution. This was the first time these allocations were revised since their original implementation in 2003. Allocation decisions are always very challenging, and this was no exception. It is concerning that the NOA states that NMFS supports the outcome of this joint decision-making process, while arguing that this same process will result in unfair and biased decisions in the future.

“[Adding the state allocations to the Council FMP] could make the management of this stock less adaptable to future changes in distribution of both the resource and the fisheries that rely on it, implicating concerns regarding variations and contingencies as articulated by National Standard 6.”

Comment: The changes proposed through this amendment support our shared goal of building resilient, climate-ready fisheries. Under the revised allocations, 25 percent of the coast-wide quota will be allocated based on recent biomass proportions. We believe that formalizing the Council’s role in the review and potential revisions to these allocations will increase the Council’s adaptive capacity, allowing us to respond more effectively and efficiently to future changes in this important fishery.

In summary, we urge you to approve Amendment 23 in its entirety. Thank you for your consideration of these comments. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Luisi", written in a cursive style.

Michael Luisi
Chair, Mid-Atlantic Fishery Management Council

CC: C. Moore, J. Coit, S. Rauch, J. Hermsen, B. Beal