

# **Regulatory Impact Review (RIR) and Environmental Justice Reviews for a Temporary Rule Emergency Action to Close the 2009 Black Sea Bass Recreational Fishery in the Exclusive Economic Zone (EEZ)**

## **Introduction**

This action would close, by temporary rule emergency action, the black sea bass recreational fishery in the Federal waters of the EEZ (3 to 200 nautical miles offshore) from the effective date of the rule for 180 days. This action is necessary because the best available information for black sea bass recreational landings indicates that the 2009 harvest limit established for the black sea bass recreational fishery is projected to have been exceeded. NOAA's National Marine Fisheries Service (NMFS) is effecting this closure to mitigate the magnitude of the recreational overage to ensure that the established mortality objectives for 2009 are not grossly exceeded, to preserve the possibility of a 2010 recreational fishery, and to ensure that the overage does not unintentionally affect commercial and recreational allocation established in the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) for the 2010 fisheries.

Use of the full 180 day closure permitted under the temporary emergency rule authority will ensure the black sea bass recreational fishery will remain closed for the remainder of the 2009 fishing year and the beginning of the 2010 fishing year. The Mid-Atlantic Fishery Management Council (Council) and Atlantic States Marine Fisheries Commission (Commission) will meet jointly in December 2009 to consider black sea bass recreational measures for the 2010 fishing year. Utilization of the 180-day closure will ensure that the EEZ will remain closed for the first few months of 2010, rather than permitting fishing under the default regulatory measures that become effective January 1, 2010. It is expected that the EEZ closure will be replaced after the 180 day period has ended with appropriate 2010 recreational management measures (i.e., minimum fish size, fishing season, and possession limit).

## **Regulatory Impact Review (E.O. 12866)**

In compliance with E.O. 12866, NMFS requires the preparation of an RIR for all regulatory actions or for significant policy changes that are of public interest. E.O. 12866 was signed on September 30, 1993, and established guidelines for promulgating new regulations and reviewing existing regulations. The RIR is a required component of the process of preparing and reviewing fishery management plans (FMPs) or amendments and provides a comprehensive review of the economic impacts associated with proposed regulatory actions. The RIR addresses many concerns posed by the regulatory philosophy and principles of E.O. 12866. The RIR serves as the basis for assessing whether or not any proposed regulation is a "significant regulatory action" under criteria specified by E.O. 12866.

The RIR must provide the following information: (1) A comprehensive review of the level and incidence of economic impacts associated with a proposed regulatory action or actions; (2) a review of the problems and policy objectives prompting the regulatory proposals; and (3) an evaluation of the major alternatives that could be used to meet these objectives. In addition, an RIR must ensure that the regulatory agency systematically and comprehensively consider all

available alternatives such that the public welfare can be enhanced in the most efficient and cost effective manner.

### **Environmental Justice (E.O. 12898)**

E.O. 12898 provides that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” E.O. 12898 directs each Federal agency to analyze the environmental effects, including human health, economic, and social effects of Federal actions on minority populations, low-income populations, and Indian tribes, when such analysis is required by the National Environmental Policy Act (NEPA). Agencies are further directed to “identify potential effects and mitigation measures in consultation with affected communities, and improve the accessibility of meetings, crucial documents, and notices.”

### **Statement of the Problem and Need for Action**

A final rule to establish the recreational harvest limits for 2009 for the summer flounder, scup, and black sea bass fisheries was published in the Federal Register on January 2, 2009 (74 FR 29). The black sea bass recreational harvest limit for 2009 is 1.14 million lb. The 2009 management measures for Federal waters are a 12.5-inch minimum size, a 25-fish possession limit, and an open season of January 1 through December 31. Marine Recreational Fishery Statistics Survey (MRFSS) data through Wave 3 (January-June) indicate that 1,018,878 lb have been landed. While this number has not been stratified, due to time constraints, to exclude southern stock landings that occur south of Cape Hatteras in North Carolina, the total North Carolina landings through Wave 3 are 71,059 lb. Therefore, the landings through Wave 3 are at least 947,819 lb. Data for Wave 4 (July-August) are not yet available; however, an average of 27 percent of the annual landings has occurred during Wave 4 in the years 2005-2008. On average, an additional 24 percent of landings have occurred during Wave 5 (September-October) and 4 percent during Wave 6 (November-December) for the same time period.

Using MRFSS data, NMFS, along with independent MRFSS queries made by staff of the Commission and Council have concluded that the 2009 recreational harvest limit for black sea bass has been exceeded. MRFSS information through Wave 3 indicates that at least 83 percent and possibly up to 89 percent, dependent on stratification of North Carolina landings, of the established 1.14 million lb recreational harvest limit had been landed by the end of June (i.e., end of Wave 3). Multiple projections utilizing the actual 2009 MRFSS data through Wave 3 and projected landings for the remaining Waves 4-6 have indicated that the potential range of landings is from 2.1 to 3.7 million lb. This would exceed the recreational harvest limit by 84 to 225 percent, respectively, if landings are left unchecked until the regulatory closure date of December 31, 2009.

Regardless of the variability in the projection methods utilized wherein average fish weight and range of prior years included to inform average landings in Waves 4-6 were modified in the different treatments, a substantial portion of the black sea bass recreational fishery clearly occurs during the months of July-October (MRFSS Waves 4 and 5). On average, Waves 4-6 have produced 55 percent of the total coastwide black sea bass landings in the years 2005-2008.

Wave 4 MRFSS information will not be available until mid-October. However, the best information currently available indicates that the 2009 recreational harvest level has been exceeded and that continued operation of the fishery will result in fishing above the established harvest level. Even after a closure of the EEZ occurs, additional landings above the established recreational harvest level may occur in state waters unless states follow suit and close their state water recreational black sea bass fisheries.

The Commission's Black Sea Bass Management Board convened on September 1, 2009, to discuss potential emergency closure of the 2009 recreational fishery. The Board ultimately elected not to promulgate an emergency closure. Had the Commission's Board taken action to close state waters, the EEZ would have effectively been closed as individuals would have been prohibited from transiting state waters in possession of recreational caught black sea bass from the EEZ.

NMFS must take temporary emergency action to close the 2009 black sea bass recreational fishery in the EEZ for 180 days for the following reasons: 1) The best available information indicates that the 2009 recreational harvest limit established for the fishery has likely been exceeded; and 2) the projected overage has already exceeded the recreational fishery mortality objective established for 2009 and the magnitude of the projected overage threatens to exceed the overall mortality objective established at the total landings level (i.e., commercial and recreational sectors combined).

### **Management Objectives**

The objective of the emergency action is to close the recreational black sea bass fishery in the Federal waters of the EEZ, from 3 to 200 nautical miles offshore, for 180 days. This is necessary to mitigate the amount of landings that will occur above the established 2009 recreational harvest limit as the best available information indicates has already been exceeded. This action is taken under the authority of the Magnuson-Stevens Act section 305(c).

### **Description of the Affected Entities**

This emergency action could affect any recreational angler who fishes for black sea bass in the EEZ or on a party/charter vessel issued a Federal permit for black sea bass, regardless of where the vessel operates. Data from MRFSS indicate that 106,574 fishing trips where black sea bass was the primary target species were taken in EEZ of the Northeast Region (Maine-North Carolina) during MRFSS Waves 5 and 6 in 2008. NMFS anticipates the EEZ closure becoming effective on September 30, 2009. As such, there would be no affected entities during the first 30 days of MRFSS Wave 5. In the remaining 31 days of MRFSS Wave 5 (October), an estimated 8,483 party/charter vessel trips and 41,630 private/rental vessel trips targeting black sea bass occurred during 2008 in the Northeast Region EEZ. During MRFSS Wave 6 (November-December), 1,174 party/charter vessel trips and 6,790 private/rental vessel trips targeting black sea bass occurred during 2008 in the Northeast Region EEZ.

No information is collected by the MRFSS for Wave 1; therefore, the potential magnitude of affected entities for the first two months of 2009 cannot be assessed. No data are collected

during January and February because it is assumed that effort and landings are minimal, particularly in the EEZ.

The Council estimated, in conjunction with the analysis for the 2009 black sea bass recreational management measures, that the 2009 recreational measures could affect any of the 962 vessels possessing a Federal charter/party permit for summer flounder, scup, and/or black sea bass in 2007, the most recent year for which complete permit data are available. However, only 283 of these vessels reported active participation in the recreational black sea bass fishery in 2007, the most recent year for which a complete set of fishing vessel trip reports (VTRs) is available. The 2007 VTR data indicates that 10 vessels reported landing black sea bass in combination with scup, 37 vessels reported landing black sea bass only, 89 reported landing black sea bass in conjunction with summer flounder and 147 reported landing summer flounder, scup, and black sea bass.

### **Description of the Alternatives**

The only alternative to closing the recreational fishery in the EEZ for 180 days, as previously described, is to leave the fishery open. As previously stated, the emergency closure action is being taken to mitigate the magnitude of landings that will occur above the already exceeded 2009 recreational harvest limit. This closure will extend into the first few months of 2010. During the interim of the closure period, the Council will take action to recommend appropriate fishing measures for the 2010 fishing year. Even with a closure of Federal waters, some amount of landings may continue for the remainder of the year in state waters by both private anglers and state-permitted party and charter vessels.

Leaving the fishery open would minimize economic impacts and would, for the remainder of 2009, appear to enhance public welfare by allowing continued recreational fishing opportunity. However, the recreational harvest limit that is tied to a desired fishing mortality objective for the year has already been exceeded, according to the analysis conducted. Absent this closure action, the magnitude of the overage would be larger and have direct impacts on the 2010 black sea bass fishery. Dependent on the exact magnitude of the overage incurred if action were not taken, it is quite possible that no recreational black sea bass fishery would be permitted in the EEZ during 2010 or that, at the minimum, very restrictive measures would be enacted to permit an abbreviated recreational fishery (i.e., short season duration with large minimum size and low possession limit).

### **Expected Economic Effects of the Alternatives**

As previously outlined, there are two possible alternatives for this temporary emergency action: Closure of the black sea bass fishery and taking no action, thereby leaving the fishery open. Were NMFS inclined to leave the fishery open, no change to the fishery would be expected and the economic effects would remain as outlined in the analysis contained in the 2009 Summer Flounder, Scup, and Black Sea Bass Recreational Specifications Regulatory Impact Review (2009 RIR) published jointly by the Council and NMFS (MAFMC 2009). Therefore, only the alternative of closing the EEZ has associated impacts that have not previously been analyzed.

No data are collected by the MRFSS for January and February (Wave 1) because effort and landings are expected to be quite small. While it is possible that the 180 day closure could extend to March 2010, it is expected that the Council will be required to recommend substantially modified management measures (i.e., minimum fish size, fishing season, and possession limit) for 2010 to ensure black sea bass landings stay below the recreational harvest level. Implementation of the Council's recommendation by NMFS is anticipated in late spring of 2010. Two factors preclude a quantitative analysis of potential 2010 impacts: 1) the 2010 recreational harvest limit has yet to be established. The Council has recommended *status quo* for 2010 to NMFS; however, the process of reviewing that recommendation and subsequent rulemaking has yet to occur. Absent finalization of the 2010 recreational harvest limit, there is no meaningful basis against which estimated impacts can be evaluated; and 2) the final magnitude of the 2010 overage will not be known in full until the 2009 MRFSS Wave 4-6 data are available. Until such time that the precise overage is known, it is not possible to anticipate the degree of modification required for the 2010 recreational management measures nor is it possible to anticipate what the Council may recommend for such modification. For these reasons, NMFS has confined its analysis of the closure impacts to the remainder of the 2009 fishing season only. The 2010 recreational management measures, when proposed by the Council, will contain a full RIR analysis. This analysis, when submitted, will account for any impacts that result from full or partial closure of Wave 2 (March-April) in 2010.

By the time the closure is effective, a portion of MRFSS Wave 5 will have passed. For the purposes of this analysis, NMFS has assumed that the closure will become effective on September 30, 2009, resulting in closure of the EEZ for the months of October-December. In this analysis, NMFS has assumed an equal distribution of fishing trips across Wave 5, which consists of 61 days. MRFSS data indicate that 98,610 angler trips where the primary target is black sea bass occurred during 2008 in Wave 5 or 1,617 trips per day (98,610 trips divided by 61 days). This resulted in an estimated 48,497 EEZ angler trips targeting black sea bass in the month of September during 2008. Applying the same methods would result in 8,483 party/charter trips and 41,630 private angler vessel trips during the 2008 October portion of Wave 5 or a total of 50,113 black sea bass targeting trips. In addition, 7,964 trips targeting black sea bass occurred during 2008 in Wave 6 (November-December), broken down by mode into 1,174 party/charter trips and 6,790 private angler trips.

Assuming angler effort during October-December 2009 will be the same as that from 2008 outlined above, up to 58,077 fishing trips could be affected by the EEZ closure. This results in 9,657 trips by party/charter vessels and 48,420 private angler vessel trips when broken down by mode. Not all of the trips in question will target, encounter, or land black sea bass. In addition, changes in angler behavior in response to the closure cannot be quantified. Anglers may elect to target alternative species or target black sea bass in state waters following the closure of the EEZ. While the black sea bass recreational fishery will be closed in the EEZ, the specific prohibition is against possession and landing of black sea bass. Some black sea bass will be caught and released while anglers target other species in the EEZ.

In the 2009 RIR, information on the average daily expenditures by recreational fishermen in the northeast region, by mode, was provided in Table 46 (MAFMC 2009). This information was based on 2006 expenditures, the most recent information available at the time and indicated

that an average expenditure of \$107.13 and \$39.14 occurred for party/charter and private vessel trips, respectively. Expenditures included transportation related costs, food, lodging, fuel, equipment, rentals, charter fees, bait, ice, tackle and other expenditures typically associated with a recreational fishing trip. Using the Bureau of Labor Statistics Consumer Price Index Inflation Calculator<sup>1</sup>, these data were adjusted to 2009 values of \$114.44 for party/charter and \$41.81 private vessel trip expenditures. NMFS is utilizing the number of potential affected trips resulting from the EEZ closure multiplied by the average expenditures by fishing mode as an estimate of potential loss of sales to supporting businesses.

Applying the previously listed potential number of affected trips, by mode, and the updated trip expenditure information from 2009 for the anticipated closure period of October-December would result in lost sales of up to \$1.11 million from party/charter anglers and \$2.02 million from private vessel anglers or a total impact of up to \$3.13 million for both modes combined. The potential lost revenue from October is \$2.71 million for both modes combined and \$418 thousand for both modes combined in Wave 6. These potential declines in angler expenditures must be viewed with some degree of caution as the actual impact is expected to be lower than stated as anglers can still fish in the EEZ for other species and potentially target black sea bass in state waters that elect to keep their state-waters open for the remainder of 2009. In addition, the data used determine the number of trips that targeted black sea bass in 2008 include trips in state and Federal waters and, as such, likely provides an overestimate of the number of trips that targeted black sea bass in the EEZ for use in this analysis. MRFSS data from 2005-2008 indicate that black sea bass landings from state waters has ranged from 86 to 46 percent of the total annual landings.

Information in Table 49 of the 2009 RIR indicated that 283 of 342 party/charter vessels (MAFMC 2009) reported landings of black sea bass in some combination with summer flounder and scup in their 2007 calendar year Fishing Vessel Trip Reports (VTRs). The average charter fee, adjusted to 2009 value using the Consumer Price Index Inflation Calculator, is \$60.86. Assuming that party and charter vessels target black sea bass at the same frequency that occurred in 2007 and trips taken in 2008 are the same as what will occur in 2009, the potential lost revenue that the party/charter fleet may realize from the EEZ closure could be as much as \$595,837 or an average of \$2,105 per vessel for each vessel that indicated participation in the 2007 black sea bass fishery. The vessels in question did participate in other fisheries, even the 37 vessels that indicated they landed black sea bass only. These 37 vessels landed only black sea bass in relation to the other two species analyzed summer flounder and scup but did land other species. Thus, the potential lost revenue is likely lower than estimated as party/charter vessels may target alternative species in the EEZ, relinquish their Federal permit and participate in state waters for black sea bass, or some combination thereof to mitigate potential lost revenue resulting from the EEZ black sea bass closure.

### **Determination of Significance under E.O. 12866**

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be significant. A “significant regulatory action” is one that is likely to: (1) Have an annual effect on the economy of \$100 million or more or

---

<sup>1</sup> [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm)

adversely affect in a material way the economy, a sector of the economy, productivity, safety, or state, local, or tribal Governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

A regulatory program is "economically significant" if it is likely to result in the effects described above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

NMFS has determined that, given the information presented above, none of the factors defining "significant regulatory action" are triggered by this emergency action; therefore, the action has been determined to be not significant for the purposes of E.O. 12866. This action should not adversely affect, in the long-term, competition, jobs, the environment, public health or safety, or state, local, or tribal government communities. Second, this action should not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. No other agency has indicated that it plans an action that will affect the black sea bass fishery in the EEZ. Third, this action will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of their participants. And, fourth, the proposed action does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866. Based on the results of the RIR, this action is not significant under EO 12866.

### **Environmental Justice/EO 12898**

Steinback et al. (2009) indicated that 28% of the marine fishing angling population fishes for reasons other than purely recreation. In addition, over a third of anglers rely in part on self-caught marine resources as a cost-saving food source or as a supplement to income. The food for income angling population in 2005 was estimated to have a significantly higher proportion of minorities and lower income households than the overall marine recreational angling population.

The emergency action should not represent a change in relative satisfaction for participation in recreational fisheries because state-waters fisheries for black sea bass may continue to be open even after the EEZ is closed and anglers will still have opportunity to target other species in the EEZ. Thus, the overall participation levels in the fishery are not expected to change. Therefore, the emergency action is not expected to cause disproportionately high and adverse human health, environmental or economic effects on minority populations, low-income populations, or Indian tribes.

### **Literature Cited**

MAFMC. 2009. Summer Flounder, Scup, and Black Sea Bass Recreational Specifications, Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis. Dover, DE. 170 p. + append.

Steinback, S., E. Thunberg, J. O'Neil, A. Gautam, M. Osborn. 1999. Volume I: Summary Report of Methods and Descriptive Statistics for the 1994 Northeast Region Marine Economics Survey. NOAA Technical Memorandum, NMFS-F/SPO-37, August 1999. USDC, NOAA, NMFS, 124 p.