



## Mid-Atlantic Fishery Management Council

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

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September 22, 2022

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

Dear Mike:

The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission's (Commission) Summer Flounder, Scup, and Black Sea Bass Management Board (Board) jointly propose to revise the process for the February recreational black sea bass opening to specify that vessels landing black sea bass in a state with an approved wave 1 recreational fishery are subject to the state regulations during that wave 1 fishery. Under the current process, states participating in this opening are required to match the federal waters measures. The Council and Board propose this change to address challenges associated with the conservation equivalency process used to waive federal waters recreational black sea bass measures.

This letter describes the Council perspective that this action is primarily administrative in nature and should be categorically excluded from requirements to prepare either an Environmental Impact Statement or an Environmental Assessment (EA) under the National Environmental Policy Act.

### **Action Background**

#### *February Recreational Opening*

Starting in 2018, the Council and Commission provided states the opportunity to open their recreational black sea bass fisheries during February under specific conditions. States must opt into this fishery and to date have been required to match the federal recreational measures during February. Participating states may need to adjust their measures during March-December to help ensure participation in this opening does not increase the likelihood of coastwide harvest exceeding the target level.<sup>1</sup> Interested states must propose a program for predicting and/or monitoring February harvest and adjusting measures during March-December as needed. Proposals must be reviewed by the Commission's Technical Committee and approved by the Board each year.

To date, only Virginia and North Carolina have participated in the February opening. North Carolina ended their participation after 2020 and has indicated that they do not intend to participate in future

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<sup>1</sup> Through 2022, the target level for coastwide harvest was the RHL. Starting in 2023, the target level of coastwide harvest will be defined based on the [Percent Change Approach](#), which is pending implementation through the Recreational Harvest Control Rule Framework/Addenda.

years.<sup>2</sup> Virginia participated every year except 2022 and has expressed an interest in participating in future years.

The Monitoring and Technical Committees, Council, and Board have been very supportive of the approach used in Virginia to monitor their February fishery and adjust measures later in the year as needed. Specifically, participating captains or operators of each vessel must have a permit that is specific to this February opening, must hail to the Virginia Marine Resources Commission’s (VMRC’s) Marine Police Operations station prior to or just after the start of each trip, and must report the number of anglers and number of kept and released black sea bass for every trip. This information is used to adjust measures in Virginia later in the year to account for February harvest. Table 1 shows summary information on participation, harvest, and discards during the 2018-2021 February opening in Virginia.

The Monitoring and Technical Committees, Council, and Board have recommended that other states use a similar approach as used in Virginia if they wish to participate in the February opening in future years

**Table 1:** Number of permits, reported trips, trips sampled by VMRC, landed black sea bass, released black sea bass, and estimated weight of landings in the Virginia February recreational black sea bass fishery, 2018-2021. All trips reported number of landed black sea bass; however, some trips did not report the number of released black sea bass. The number of permits is much higher than the number of reported trips each year because the permit is open access and many captains likely obtain the permit without taking any trips. Virginia did not participate in this opening in 2022 given the Council and Board’s requirement that all states achieve a 20.7% reduction in harvest in 2022 compared to the 2018-2021 average. Source: VMRC.

<b>Number of</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
Permits	414	254	372	534
Reported trips	54	79	155	146
Trips sampled by VMRC	9	17	21	9
Black sea bass landed (numbers of fish)	2,560	4,372	7,226	6,985
Black sea bass released (numbers of fish; <i>incomplete reporting</i> )	433	1,817	3,204	2,741
Estimated weight of landings (pounds)	6,090	10,187	13,845	15,709

### *Non-Preferred Coastwide Measures and Implications for February Fishery*

Starting with the 2022 fishing year, as a result of Framework 14,<sup>3</sup> the Council and Commission are now required to decide each year to either waive federal waters recreational black sea bass measures or implement one set of coastwide measures which would be uniformly applied in state and federal waters. This process is separate from, but has implications for, the February opening. When federal measures are waived, a set of non-preferred coastwide measures are proposed in the federal regulations

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<sup>2</sup> North Carolina had relied on Marine Recreational Information Program (MRIP) data to monitor their February harvest and to analyze potential changes in measures later in the year. This proved challenging due to the need to analyze the data at fine temporal scales and the potential for individual intercepts to have an outsized influence on the results. North Carolina is the only state in the black sea bass management unit which conducts MRIP sampling during February.

<sup>3</sup> More information on Framework 14 is available at <https://www.mafmc.org/sf-s-bsb>.

but then waived in favor of state waters measures if it can be demonstrated that the combination of state measures will have the same impact on harvest as the non-preferred coastwide measures. It is anticipated that the Council and Board will agree to waive the federal waters measures in most, if not all, years as this allows states to have greater flexibility in how they set their measures while still achieving the target level of coastwide harvest.

Federal measures cannot remain waived from one year to the next. A rulemaking process is required each year to waive federal waters measures, even in years when measures are unchanged. Therefore, the non-preferred coastwide measures adopted in the previous year are in place from January 1 until they are waived through the federal rulemaking process. Due to the time necessary for rulemaking, the non-preferred coastwide measures are typically not waived until the spring. This means the non-preferred coastwide measures are the federal waters measures during February, and given the current requirement for states participating in the February opening to match federal measures, these states would be required to match the non-preferred coastwide measures during February. This will have implications for the February fishery for the first time in 2023 because, although federal measures were waived through the Framework 14 process for the first time in 2022, the rulemaking for 2022 recreational measures was not complete until June 2022 (i.e., 87 FR 35112). Therefore, 2023 will be the first year the non-preferred coastwide measures for black sea bass will be in place from January 1 until they are waived through rulemaking.

The current non-preferred coastwide measures (i.e., May 15 – October 8 open season, a minimum fish size of 14 inches, and a 5 fish possession limit) are more restrictive than the federal waters measures which were in place during every prior year of the February opening (i.e., February 1-28 and May 15 – December 31 open seasons, 12.5-inch minimum size and a 15 fish bag limit). The Monitoring Committee representative from Virginia indicated that the current non-preferred coastwide bag and size limit may be too restrictive for their recreational fishery stakeholders to see the benefits of the February opening, which previously operated under a 12.5-inch minimum size and a 15 fish bag limit.

Given that the non-preferred coastwide measures are intended as a one-size-fits-all approach to achieve the target level of harvest, they would generally be expected to be more restrictive than the measures which would otherwise be used in some states. Therefore, although the current non-preferred coastwide measures were identified as a barrier to Virginia's participation in the 2023 February fishery, the approach of using non-preferred coastwide measures poses challenges for the February fishery regardless of the year and the specific measures themselves. The change proposed by the Council and Board is intended to address these challenges for all states which may wish to participate in the February fishery in all future years.

The Monitoring Committee, Council, and Board all agreed that, if states use similar monitoring programs as Virginia and similarly modify measures later in the year to account for reported February harvest, those states would not need to match the federal waters measures to achieve the goal of preventing coastwide harvest from exceeding the target level. The Council and Board therefore recommended modification of the requirement to match federal waters measures during the February opening, as described in the next section.

### **Description of the Action**

This action would revise the process for the February recreational black sea bass opening to specify that vessels landing black sea bass in a state with an approved wave 1 recreational fishery are subject to the state regulations during that wave 1 fishery. Under the current process, states participating in this opening are required to match the federal waters measures. As previously stated, this change is

intended to address challenges associated with the conservation equivalency process used to waive federal waters measures.

Under both the current process and the proposed revisions, states participating in this opening are required to submit proposals for predicting and/or monitoring February harvest and adjusting measures later in the year as needed. These proposals must be reviewed by the Technical Committee and approved by the Board. The Monitoring and Technical Committees, Council, and Board have expressed strong support for the approach used in Virginia in recent years and strongly recommend that other states use a similar approach if they wish to participate in future years.

### **Effects of the Action**

The recreational black sea bass February opening was first analyzed through a 2017 EA.<sup>4</sup> Continuation of this opening beyond 2018 was analyzed in a 2018 EA which addressed annual specifications for all three species in the FMP.<sup>5</sup> The associated impacts to the human environment were analyzed in these two EAs. This action does not modify the impacts previously analyzed. This action would simply specify that vessels landing black sea bass in a state with an approved wave 1 recreational fishery are subject to the state regulations during that wave 1 fishery. Under the current process, states participating in the February opening are required to match the federal waters measures. The overall goal of the February opening would remain unchanged; participating states would still need to demonstrate that their participation in the opening will not increase the likelihood that harvest throughout the management unit will exceed the target level. The most notable impacts of the overall recreational management program for black sea bass will continue to derive from the coastwide target level of harvest. The proposed action is not expected to result in any changes to the previously analyzed impacts of the February opening. The basis and rationale for this analysis remains unchanged.

The proposed measures are not expected to result in a substantial change in any of the following: fishing, location, timing, effort, authorized gear types, or harvest levels.

Pursuant to section 7 of the Endangered Species Act (ESA), NMFS issued a Biological Opinion (Opinion) on May 27, 2021, that considered the effects of the NMFS' authorization of ten FMPs, NMFS' North Atlantic Right Whale Conservation Framework, and the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2 on ESA-listed species and designated critical habitat. The ten FMPs considered in the Opinion include the: (1) American lobster; (2) Atlantic bluefish; (3) Atlantic deep-sea red crab; (4) mackerel/squid/butterfish; (5) monkfish; (6) Northeast multispecies; (7) Northeast skate complex; (8) spiny dogfish; (9) summer flounder/scup/black sea bass; and (10) Jonah crab FMPs. The American lobster and Jonah crab FMPs are permitted and operated through implementing regulations compatible with the interstate fishery management plans issued under the authority of the Atlantic Coastal Fisheries Cooperative Management Act, the other eight FMPs are issued under the authority of the MSA.

The 2021 Opinion determined that the proposed action may adversely affect, but is not likely to jeopardize, the continued existence of North Atlantic right, fin, sei, or sperm whales; the Northwest Atlantic Ocean distinct population segment (DPS) of loggerhead, leatherback, Kemp's ridley, or North Atlantic DPS of green sea turtles; any of the five DPSs of Atlantic sturgeon; Gulf of Maine DPS Atlantic salmon; or giant manta rays. The Opinion also concluded that the proposed action is not likely

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<sup>4</sup> Available at: [https://www.mafmc.org/s/2018-01-03\\_BSB-Feb-Rec-EA\\_Final-Draft.pdf](https://www.mafmc.org/s/2018-01-03_BSB-Feb-Rec-EA_Final-Draft.pdf).

<sup>5</sup> Available at: [https://www.mafmc.org/s/SFSBSB\\_2019\\_specs\\_EA.pdf](https://www.mafmc.org/s/SFSBSB_2019_specs_EA.pdf).

to adversely affect designated critical habitat for North Atlantic right whales, the Northwest Atlantic Ocean DPS of loggerhead sea turtles, U.S. DPS of smalltooth sawfish, Johnson's seagrass, or elkhorn and staghorn corals. An Incidental Take Statement was issued in the Opinion. The Incidental Take Statement includes reasonable and prudent measures and their implementing terms and conditions, which NMFS determined are necessary or appropriate to minimize impacts of the incidental take in the fisheries assessed in this Opinion.

**Categorical Exclusion**

As indicated above, this action is primarily administrative in nature and should be considered for a categorical exclusion from requirements to prepare an Environmental Impact Statement or an EA under the National Environmental Policy Act.

Please contact me or Julia Beaty of my staff if you have any questions.

Sincerely,



Christopher M. Moore, Ph.D.  
Executive Director

cc: M. Luisi, W. Townsend, J. Beaty, E. Keiley