

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

§ 635.20 [Amended]

2. In § 635.20, paragraph (e)(1) is suspended effective from March 6, 2001 through September 4, 2001.

3. In § 635.27, paragraphs (b)(1)(i), (ii), and (iv)(A) and (C) are suspended and paragraphs (b)(1)(v) and (vi) are added, effective from March 6, 2001 through September 4, 2001, to read as follows:

§ 635.27 Quotas.

* * * * *

(b) * * *

(1) * * *

(v) *Large coastal and small coastal sharks.* The annual commercial quota for large coastal sharks is 1,285 mt dw, divided between two equal semiannual seasons, January 1 through June 30, and July 1 through December 31. The quota for each semiannual large coastal shark season is 642.5 mt dw. The length of each large coastal shark season will be determined based on the projected catch rates, available quota, and other relevant factors. NMFS will file with the Office of the Federal Register for publication in the **Federal Register** notification of the length of each season for large coastal sharks at least 30 days prior to the beginning of the season. The annual commercial quota for small coastal sharks is 1,760 mt dw, divided between two equal semiannual seasons, January 1 through June 30, and July 1 through December 31. The quota for each semiannual small coastal shark season is 880 mt dw.

(vi) NMFS will adjust the next year's semiannual quota for pelagic sharks to reflect actual landings during any semiannual period. For example, a commercial quota underharvest or overharvest in the season that begins January 1 will result in an equivalent increase or decrease in the following year's quota for the season that begins January 1, provided that the annual quota is not exceeded. NMFS will file with the Office of the Federal Register for publication in the **Federal Register** notification of any adjustment at least 30 days prior to the start of the next fishing season.

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4. In § 635.28, paragraph (b)(1) is suspended and paragraph (b)(4) is added, effective from March 6, 2001 through September 4, 2001, to read as follows:

§ 635.28 Closures.

(b) * * *

(4) The commercial fishery for large coastal sharks will remain open for fixed semiannual fishing seasons, as

specified at § 635.27(b)(1)(v). From the effective date and time of a season closure until additional quota becomes available, the fishery for large coastal sharks is closed, and sharks of that species group may not be retained on board a fishing vessel issued a commercial permit pursuant to § 635.4

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 010165024-1024-10; I.D. 121500D]

RIN 0648-AO88

American Lobster; Interstate Fishery Management Plans

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of determination of noncompliance; declaration of a moratorium.

SUMMARY: In accordance with the Atlantic Coastal Fisheries Cooperative Management Act (Act), NMFS, upon a delegation of authority from the Secretary of Commerce (Secretary), has determined that the State of Rhode Island is not in compliance with Amendment 3 to the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for American Lobster, because the state has failed to implement and enforce a measure that is necessary for the conservation of American lobster. Pursuant to the Act, a Federal moratorium on fishing for American lobster within Rhode Island state waters is hereby declared and will be effective on May 1, 2001. If Rhode Island is found to be in compliance with the ISFMP for American lobster before that date, the moratorium will be withdrawn. The purpose of this action is to support and encourage implementation and enforcement of the Commission's American Lobster ISFMP.

DATES: Effective May 1, 2001.

ADDRESSES: Copies of an Environmental Assessment and Regulatory Impact Review (EA/RIR) are available from the Director, State, Federal and Constituent Programs Office, NMFS, 1 Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Harry Mears, NMFS, Northeast Region, 978-281-9144.

SUPPLEMENTARY INFORMATION:

Background

The purpose of the Act is to support and encourage the development, implementation, and enforcement of the Commission's ISFMPs to conserve and manage Atlantic coastal fishery resources. Section 806 of the Act specifies that, after notification by the Commission that an Atlantic coastal state is not in compliance with an ISFMP of the Commission, the Secretary must make a finding, no later than 30 days after receipt of the Commission's notification, on: (1) whether the state has failed to carry out its responsibilities to implement and enforce the Commission's ISFMP; and (2) whether the measures that the state has failed to implement and enforce are necessary for the conservation of the fishery in question. In making such a finding, the Act requires the Secretary to give careful consideration to the comments of the Commission, the Atlantic coastal state found out of compliance by the Commission, and the appropriate Regional Fishery Management Councils. If the Secretary finds that the state is not in compliance with the Commission's ISFMP and that the measures the state has failed to implement and enforce are necessary for the conservation of the fishery, the Secretary must declare a moratorium on fishing in that fishery within the waters of the noncomplying state. The Secretary must specify the moratorium's effective date, which may be any date within 6 months after the declaration of the moratorium. NMFS has been delegated this decision-making authority.

On November 6, 2000, the Secretary received a letter from the Commission prepared pursuant to section 806(b) of the Act. The Commission's letter stated that the State of Rhode Island's American lobster regulations did not meet the provisions of Amendment 3 to the Commission's ISFMP for American lobster and, therefore, the Commission found the State of Rhode Island out of compliance with the ISFMP.

Commission Findings of Non-compliance

The Commission adopted Amendment 3 to the ISFMP for American Lobster in December 1997. Under Amendment 3, states are required to implement and enforce the nontrap gear limit of no more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip,

for trips 5 days or longer. The Commission found that the State of Rhode Island did not implement and is not enforcing this measure and, therefore, is not in compliance with the ISFMP for American Lobster.

NMFS Determination Regarding Compliance by the State of Rhode Island

NMFS met with representatives from the State of Rhode Island on December 5, 2000, to receive comments on their compliance status. Rhode Island temporarily reinstated the non-trap gear possession limit by emergency rule on November 29, 2000. Under Rhode Island law, regulations implemented by emergency action expire after 120 days unless replaced by a final rule. Therefore, there is no guarantee that this regulation will remain in effect after the 120-day period. On December 17, 2000, based on a careful analysis of all relevant information, including comments from the State of Rhode Island and the New England and Mid-Atlantic Fishery Management Councils, NMFS determined that the State of Rhode Island is not in compliance with the Commission's ISFMP for American lobster. This determination is based on Rhode Island's failure to implement and enforce on a permanent basis the nontrap gear limit of no more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip, for trips 5 days or longer as specified in Amendment 3.

Whether the Measure Is Necessary for Conservation

On December 17, 2000, NMFS also determined that implementation and enforcement of the nontrap gear limit by Rhode Island is necessary for the conservation of the resource. "Conservation" is defined in ACFCMA as "the restoring, rebuilding, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis." The most recent stock assessment (March 2000) indicates that all three stocks of American lobster are overfished. The stock assessment reveals that the lobster landings are comprised mainly of young lobsters that have just recruited into the fishery and have not had the opportunity to reproduce before being harvested. If states are not required to both implement and enforce mandatory measures of the ISFMP, the ability of the plan to rebuild American lobster stocks by meeting the necessary egg production goals is compromised.

Unless Rhode Island permanently implements and enforces the non-trap limit, non-trap vessels licensed to fish for lobster in Rhode Island state waters will be able to land unlimited numbers of lobsters. Uncontrolled harvest of lobster taken by non-trap gear is expected to result in elevated landings beyond historical levels, thereby resulting in higher fishing mortality, counter to ISFMP objectives to end overfishing of American lobster. Therefore, Rhode Island's implementation of the non-trap gear landing limit specified in Amendment 3 is necessary to allow the Commission to assure the sustainability of the fishery and long-term viability of the American lobster resource.

Declaration of a Moratorium

On December 18, 2000, NMFS notified the State of Rhode Island that it was not in compliance with Amendment 3 to the Commission's ISFMP for American lobsters, and that the measure Rhode Island failed to implement and enforce is necessary for the conservation of American lobsters. NMFS also indicated that it required further time to analyze the timing and impacts of the moratorium's implementation before declaring a moratorium, as required by law. The Act allows the effective date of the moratorium to be delayed for up to 6 months from the date on which the moratorium is declared. NMFS completed an Environmental Assessment and Regulatory Impact Review (EA/RIR), which analyze the impacts of various alternatives for the implementation of a moratorium. After a thorough review of the EA/RIR, NMFS is hereby declaring, pursuant to subsection 806(c) of the Act, a Federal moratorium on fishing for American lobsters in Rhode Island waters. Since Rhode Island has temporarily reinstated the non-trap gear possession limit by emergency rule on November 29, 2000, which will be in effect until March 28, 2001, NMFS is delaying implementation of the moratorium until May 1, 2001. If the State of Rhode Island is not in compliance with Amendment 3 to the ISFMP for American lobster by that date, a moratorium on fishing for American lobster in Rhode Island state waters will go into effect. If NMFS determines that the State of Rhode Island has complied with Amendment 3 to the ISFMP by May 1, 2000, NMFS will issue an appropriate announcement in the **Federal Register** rescinding the moratorium with respect to the State of Rhode Island. Delaying the effective date of the moratorium until May 1, 2001, will allow Rhode Island time to

complete its legislative process to issue permanent regulations implementing the non-trap limit, and will provide the Commission time to review the new regulations for compliance. The delay will not significantly diminish American lobster conservation efforts because the state has implemented the non-trap possession limit as a temporary measure effective until March 28, 2001. The delay will not significantly impact the American lobster resource for several reasons. As indicated in the March 2000 lobster stock assessment, migrating lobsters move offshore in the fall and winter and inshore during the spring and summer. While lobsters are in inshore waters in April, generally they are inactive due to a variety of factors, such as water temperature and burrowing activity; therefore, they are less likely to be caught. Furthermore, those present in inshore waters are likely to be below the minimum legal size and cannot be retained. Total landings of lobsters for the month of April 1999, in Rhode Island State waters accounted for 2.3 percent of the state's total lobster harvest, equivalent to approximately 54,000 lbs (22.5 metric tons). In comparison, monthly landings from Rhode Island State waters from May 1 through December 31 averaged about 260,000 lbs (117.9 metric tons).

If the moratorium goes into effect, NMFS will terminate it as soon as possible upon determination that the State has taken appropriate remedial actions to bring it into compliance with the the Commission's ISFMP for American lobster

The moratorium on fishing for American lobster includes the statutory prohibitions listed in subsection 806(e) of the Act (16 U.S.C. 5106(e)). Subsection 806(e) states: "During the time in which a moratorium under this section is in effect, it is unlawful for any person to - (1) violate the terms of the moratorium or of any implementing regulation issued under subsection 806(d) of this section; (2) engage in fishing for any species of fish to which the moratorium applies within the waters of the State subject to the moratorium; (3) land, attempt to land, or possess fish that are caught, taken, or harvested in violation of the moratorium or of any implementing regulation issued under subsection (d) of this section; (4) fail to return to the water immediately, with a minimum of injury, any fish to which the moratorium applies that are taken incidental to fishing for species other than those to which the moratorium applies, except as provided by regulations issued under subsection (d) of this section; (5) refuse to permit any officer authorized to

enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter; (6) forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this chapter; (7) resist a lawful arrest for any act prohibited by this section; (8) ship, transport, offer for sale, sell, purchase, import, or have custody, control or possession of, any fish taken or retained in violation of this chapter; or (9) interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such person has committed any act prohibited by this section."

Classification

This declaration of a moratorium and rule are consistent with section 806 of the Atlantic Coastal Fisheries Cooperative Management Act.

The Assistant Administrator for Fisheries, NOAA (AA), finds that providing prior public notice and opportunity for comment is impracticable and unnecessary. Providing prior notice and opportunity for comment would be impracticable, because it would prevent the agency from executing its functions under section 806 of the Act in a timely manner. Section 806 contemplates quick action on the declaration of a moratorium that would not be possible if prior notice and an opportunity for comment are provided. Furthermore, providing prior notice and opportunity for comment would be unnecessary because it would serve no purpose. The nature of a moratorium is described in section 806 of the Act and, therefore, cannot be modified in response to public comments. Therefore, the AA, under 5 U.S.C. 553(b)(B), finds that good cause exists to waive the requirement of prior notice and opportunity for comment.

Because prior notice and opportunity for public comment are not required for this action by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

Federalism Summary Impact Statement

The Act does not explicitly preempt state law. Rather, section 806 of the Act provides clear evidence that Congress intended the Secretary to have the authority to preempt state law. That authority has been delegated from the Secretary to NMFS. NMFS has met the special requirements for preemption under section 4 of Executive Order

13132. The agency, in declaring a moratorium on fishing for American lobsters in Rhode Island state waters has restricted the preemption of state law to the minimum level necessary to achieve the objectives of the statute.

NMFS notified the Governor of Rhode Island on November 13, 2000, of the Commission's non-compliance determination, and the possibility that a moratorium may be declared, and offering him an opportunity to meet and present comments on these issues. In response, Rhode Island requested a meeting with NMFS representatives. This meeting occurred on December 5, 2000.

Rhode Island was found out of compliance because on June 6, 2000, Part 15.18 to the Rhode Island Marine Fisheries Statutes and Regulations was repealed by the Rhode Island Marine Fisheries Council. This section imposed a possession limit on the number of lobsters that could be harvested by commercial vessels using methods other than pots or traps. As a result of the repeal of this section, effective June 29, 2000, vessels permitted by the State of Rhode Island to harvest lobster by a method other than traps may land an unlimited number of lobsters.

Consequently, the State of Rhode Island has failed to implement and enforce the required possession limit of 100 lobsters per day/500 lobsters per trip for non-trap gear as mandated in the ISFMP for American lobster.

Rhode Island representatives stated that the non-trap possession limit was temporarily reinstated by Rhode Island's Director of the Department of Environmental Management (DEM) by emergency action on November 29, 2000. In issuing the emergency action, the Director stated that "...imminent peril exists to the public health, safety and welfare which requires the adoption of the [non-trap gear lobster possession limit] prior to notice of promulgation and opportunity for public comment. Specifically, I find that without the adoption of the attached regulation, the welfare of a significant portion of the state's commercial fishing industry and their families, which rely upon American lobster, would be jeopardized." The Director further states in the emergency adoption of the regulations, "... Failure to take action at this time would negatively affect the numerous commercial fishing vessels, which rely on American lobster and not allow for the orderly development of the fishery." Rhode Island's Administrative Procedures Act allows measures implemented by emergency action to be effective for a period of 120 days; accordingly, the state's emergency

measures will expire March 28, 2001. Rhode Island had informed both NMFS and the Commission's Lobster Management Board (Board) of this emergency action at the Board's meeting on November 30.

Rhode Island representatives also stated that they did not agree with the need for a non-trap gear lobster possession limit, and that implementation of the emergency action should not be viewed as implicit agreement with the need for the non-trap regulations by Rhode Island. Further, NMFS was told that the Rhode Island Marine Fisheries Council will hold a hearing on the matter in February to garner public comments, and will decide then whether to continue the emergency rule or let it expire. Therefore, there is no guarantee that this regulation will remain in effect after the 120 day period. Rhode Island intends to ask its congressional delegation to meet with NMFS officials in the near future to further discuss this issue.

On December 18, 2000, the AA wrote to the Governor of Rhode Island notifying him that NMFS completed its independent review and concurred with the Commission's findings that Rhode Island was out of compliance, and that the measure Rhode Island failed to implement and enforce is necessary for the conservation of the American lobster fishery. NMFS indicated that it required further time to analyze the timing and impacts of the moratorium's before issuing a declaration of a moratorium, as required by law. The Act allows the effective date of the moratorium to be delayed for up to 6 months from the date on which the moratorium is declared.

In a subsequent letter to the AA, the Executive Director of the Commission indicated that although the State of Rhode Island was making an effort to come into compliance by temporarily reinstating the measure, the state will not be in full compliance until the non-trap measure is permanently reinstated. Consequently, the Executive Director recommended delaying any potential moratorium "to allow the state to complete its regulatory process."

In response to Rhode Island's comments received during the December 5, 2000, meeting and a subsequent request by the Commission to delay the moratorium to allow Rhode Island time to complete its regulatory process, NMFS, pursuant to section 806(c) of the Act, declares a Federal moratorium on fishing for American lobsters in Rhode Island state waters effective May 1, 2001. If Rhode Island is found in compliance with the Commission's ISFMP for American

lobster before that date, the moratorium will be withdrawn. The delay until May 1 will allow Rhode Island time to complete its legislative process to issue permanent regulations implementing

the non-trap limit, and will provide the Commission time to review the new regulations for compliance.

This declaration of moratorium has been determined to be significant for purposes of Executive Order 12866.

Dated: February 28, 2001.

William T. Hogarth,

*Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

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