

**Harvest and Possession of Summer Flounder  
NY-ADR**

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RULE MAKING ACTIVITIES  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
EMERGENCY/PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED

**I.D No.** ENV-19-07-00011-EP**Filing No.** 427**Filing Date.** Apr. 24, 2007**Effective Date.** Apr. 24, 2007**Harvest and Possession of Summer Flounder**

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:**

Amendment of Part 40 of Title 6 NYCRR.

**Statutory authority:**

Environmental Conservation Law, sections 13-0105 and 13-0340-b

**Preservation of:**

General welfare.

**Specific reasons underlying the finding of necessity:**

These regulations are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for Summer Flounder as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105 and 13-0340-b, which authorize the adoption of regulations for the management of summer flounder, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest if the state's regulations remained unchanged and harvest patterns and rates remained the same as the previous year. ASMFC reviews each state's regulations and determines if they are compliant with the FMP. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding its assigned quota. Failure by a state to adopt, in a timely manner, revised regulations may result in a determination of non-compliance by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder in that state, which could result in significant adverse impacts to the state's economy.

New York's assigned recreational harvest limit for 2007 is 430,262 fish. Under current regulations, New York's projected recreational

harvest of summer flounder in 2007 would exceed the state's assigned quota by 49%. The promulgation of this regulation on an emergency basis is necessary in order for the Department to maintain compliance with the FMP for summer flounder and to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such closure. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC, to achieve a harvest reduction of approximately 56% for summer flounder and to therefore achieve compliance with the FMP.

**Subject:**

Harvest and possession of summer flounder.

**Purpose:**

To control the recreational and commercial harvest and possession of summer flounder consistent with fisheries management plans.

**Text of emergency/proposed rule:**

Section 40.1 (f) is amended as follows:

40.1 (f) is amended as follows:

Species	Open Season	Minimum Length	Possession Limit
Striped Bass (except the Hudson River north of the George Washington Bridge)	Apr 15 — Dec 15	Licensed Party/ Charter Boat anglers 28" TL All other anglers 28" to 40" TL >40" TL (Total Length)*	2   1 1
Red Drum	All year	No minimum size limit	No limit for fish less than 27" TL Fish greater than 27" TL shall not be possessed
Tautog	Oct 1 — May 31	14" TL	10
American Eel	All year	6" TL	50
Pollock	All year	19" TL	No limit
Haddock	All year	19" TL	No limit
Atlantic cod	All year	22" TL	No limit
Summer flounder	[May 6 — Sept. 12] <i>All year</i>	[18"] 19.5" TL	4
Yellowtail Flounder	All year	13" TL	No limit
Atlantic Sturgeon	No possession allowed		
Spanish Mackerel	All year	14" TL	15
King Mackerel	All year	23" TL	3
Cobia	All year	37" TL	2
Monkfish (Goosefish)	All year	17" TL 11" tail length #	No limit
Weakfish	All year	16" TL 10" Fillet length + 12" Dressed length**	6
<b>Bluefish</b>	All year	No minimum size limit for the first 10 fish; 12" TL for the next 5 fish.	15, no more than 10 of which shall be less than 12" TL.
Winter Flounder	April 1 — May 30	12" TL	10
Scup (porgy) licensed Party/Charter	June 1 — Aug. 31	10.5" TL	25
Boat anglers ****	Sept. 1 — Oct. 31	10.5" TL	60
Scup (porgy) All other anglers	June 1 — Oct. 31	10.5" TL	25
Black Sea Bass	All year	12" TL	25
American Shad	All year	No minimum size limit	5
Hickory Shad	All year	No minimum size limit	5
Oyster toadfish	Jan 1 — May 14 and July 16 — Dec 31	10" TL	3
Large & Small Coastal Sharks ##, ###	As per Title 50 CFR, Part 635 ###	As per Title 50 CFR, Part 635 ###	As per Title 50 CFR, Part 635 ###
Pelagic Sharks ++, ###	As per Title 50 CFR, Part 635 ###	As per Title 50 CFR, Part 635 ###	As per Title 50 CFR, Part 635 ###
Prohibited Sharks***, ###	No possession allowed		

\* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe of the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

# The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine (all dorsal spines must be intact), laid flat on the measuring device.

+ The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.

\*\* Dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.

## Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

++ Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

\*\*\* Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

### Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135–29160, May 28, 1999, and as amended in volume 68, Number 247, pages 74746–74789, December 24, 2003. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205 N. Belle Mead Road, East Setauket, New York, 11733.

\*\*\*\* See Special Regulations contained in 6NYCRR 40.1(h)(3).

***This notice is intended***

to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 22, 2007.

***Text of rule and any required statements and analyses may be obtained from:***

Stephen W. Heins, Department of Environmental Conservation, 205 N. Belle Meade Rd. Suite 1, East Setauket, NY 117733-3400, (631) 444-0435, e-mail: [swheins@gw.dec.state.ny.us](mailto:swheins@gw.dec.state.ny.us)

***Data, views or arguments may be submitted to:***

Same as above.

***Public comment will be received until:***

45 days after publication of this notice.

***Additional matter required by statute:***

Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

***Regulatory Impact Statement***

1. Statutory authority:

Environmental Conservation Law (ECL) Sections 13-0105 and 13-0340-b authorize the Department of Environmental Conservation (DEC or Department) to establish by regulation, open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manage marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies and interstate FMPs.

3. Needs and benefits:

These regulations are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for Summer Flounder as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105 and 13-0340-b, which authorize the adoption of regulations for the management of summer flounder, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest if the state's regulations remained unchanged and harvest patterns and rates remained the same as the previous year. ASMFC reviews each state's regulations and determines if they are compliant with the FMP. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they

are sufficiently restrictive to prevent the state from exceeding its assigned quota. Failure by a state to adopt, in a timely manner, revised regulations may result in a determination of non-compliance by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder in that state, which could result in significant adverse impacts to the state's economy.

New York's assigned recreational harvest limit for 2007 is 430,262 fish. Under current regulations, New York's projected recreational harvest of summer flounder in 2007 would exceed the state's assigned quota by 49%. The promulgation of this regulation on an emergency basis is necessary in order for the Department to maintain compliance with the FMP for summer flounder and to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such closure. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC, to achieve a harvest reduction of approximately 56% for summer flounder and to therefore achieve compliance with the FMP.

Specific major changes to the regulations include the following:

a) Implement a year-round open season for the summer flounder recreational fishery. The current fishing season for summer flounder is open from May 6 to September 12.

b) Raise the minimum size limit from 18 inches Total Length (TL) to 19.5 inches TL.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action. Certain regulated parties (party/charter vessels, bait and tackle shops) may experience some adverse economic effects through lost economic opportunities due to the size-limit restrictions on summer flounder. These same regulated parties may experience some positive economic effects through new opportunities provided by the longer season.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The following significant alternatives have been considered by the Department and rejected for the reasons set forth below:

(1) One alternative considered was to keep the size limit at 18 inches TL or only raise it to 18.5 inches TL with a 2 or 4 fish possession limit. This would avoid aggravating the asymmetrical socio-economic impacts on the fishery, whereby higher size limits discriminate against shore-based anglers and those boating anglers who are restricted to fishing inside the bays where large fish are harder to find. The needed reduction in harvest would have to have come from shortening the season from the current four months to approximately 6 weeks. This alternative seems to provide the greater likelihood of achieving our management objectives for the stock. However, the potential economic consequences of such a limited season for one of the most important recreational fisheries in New York are believed to be particularly damaging to the industry, resulting in significant economic loss to bait and tackle shops, party and charter boat businesses and the supporting local economy. In addition, the closure of a significant portion of the summer flounder fishing season would shift fishing effort onto other species, the local populations of which may not respond positively to an increase in fishing effort. This analysis resulted in a rejection of this alternative.

(2) Another alternative considered and rejected was to raise the size limit to 19 inches TL with a 2 or 4 fish possession limit and a fishing season slightly shorter than that in place for 2006. Again, the potential large economic impacts and shift of effort resulting from shortening the season were the reason this alternative was rejected.

(3) No Action (no amendment to regulations).

The “no action” alternative would leave current regulations in place and defer short-term adverse socio-economic impacts to the fishery. This option would, however, give us no chance of achieving our management objectives for the stock and likely result in a Federal non-compliance determination, which would bring about a closure of all fishing for summer flounder in New York under ACFCMA. This would have a much more severe economic impact than the imposition of tighter restrictions, therefore, this option was rejected.

#### 9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

#### 10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via the Department's website of the changes to the regulations. The emergency regulations will take effect upon filing with the Department of State.

### ***Regulatory Flexibility Analysis***

#### 1. Effect of the regulations:

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

ASMFC recently adopted annual quota changes and recreational harvest projections for summer flounder (fluke). The Department has chosen to amend its fluke regulations to comply with the requirements of the FMP. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

There were 503 licensed party/charter vessels operating in New York during 2006. In 2006, there were also retail and wholesale marine bait and tackle shop businesses operating in New York; however, the Department does not have a record of the absolute number. The Department consulted the Marine Resources Advisory Council and, through various media outlets, invited comment from party and charter boat operators, bait and tackle shop owners and the general fishing public. The response to the Department's outreach effort indicates that there is a belief that an extension of the season, despite the higher size limit, will grant economic relief to these businesses because their customers will take advantage of the additional opportunities to go fishing for fluke. The responses received by the Department suggest that the longer season will result in more charter bookings, more party boat trips and more bait and tackle sales related to fluke fishing.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

#### 2. Compliance requirements:

None.

#### 3. Professional services:

None.

#### 4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

#### 5. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to maintain compliance with the FMP for summer flounder and to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such closure. Since these regulatory amendments are consistent with federal and interstate fishery management plans, the Department anticipates limited or no adverse impacts.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail outlets and other support industries for recreational fisheries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

#### 6. Small business and local government participation:

The development of this proposal has drawn upon input from the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon consultation with and recommendations received from other interested and affected parties, including recreational fishing organizations, party and

charter boat owners and operators, retail and wholesale bait and tackle shop owners, recreational anglers and state law enforcement personnel. There was no special effort to contact local governments because the rule does not affect them.

#### 7. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. In addition, based on information provided by these businesses, it is anticipated that the extended season will result in an increase in economic benefits. The changes required by this action have been determined to be economically feasible for the affected parties.

There is no additional technology required for small businesses, and this action does not apply to local governments. Therefore, there are no economic or technological impacts for any such bodies.

#### ***Rural Area Flexibility Analysis***

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder fishery directly affected by the emergency rule is entirely located within the marine and coastal district, and is not located adjacent to any rural areas of the state. Further, the emergency rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the emergency amendments of Part 40, a Rural Area Flexibility Analysis is not required.

#### ***Job Impact Statement***

The Department of Environmental Conservation (Department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities and in fact may have a positive impact on jobs and employment opportunities. Therefore, a job impact statement is not required.

The promulgation of this regulation is necessary in order for the Department to maintain compliance with the FMP for summer flounder and to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such closure.

There were 503 licensed party/charter vessels operating in New York during 2006. In 2006, there were also retail and wholesale marine bait and tackle shop businesses operating in New York; however, the Department does not have a record of the absolute number. Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. The regulations may result in an economic gain resulting from an increase in the season length. A longer season will increase the opportunity to fish for summer flounder and may, thereby, result in an increase in the number of angler trips made. Conversely, there may be an adverse affect on the number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season as a result of the proposed increase in the size limit, which will affect the availability of legal-sized fish and may, therefore, negatively affect angler incentive for fishing.

The Department consulted the Marine Resources Advisory Council and, through various media outlets, invited comment from party and charter boat operators, bait and tackle shop owners and the general fishing public. The response to the Department's outreach effort indicates that there is a belief that an extension of the season, despite the higher size limit, will grant economic relief to these businesses because their customers will take advantage of the additional opportunities to go fishing for fluke. The responses received by the Department suggest that the longer season will result in more charter bookings, more party boat trips and more bait and tackle sales related to fluke fishing.

In the long term, the maintenance of sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the summer flounder resource is essential to the survival of the party and charter boat operations and bait and tackle businesses that support in these fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild or maintain them for future utilization.

Based on the above and Department staff's knowledge and past experience with similar regulations, the Department has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making. Therefore, a job impact statement is not required.

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