

Commercial and Recreational Harvest Limits for Winter Flounder
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RULE MAKING ACTIVITIES

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

EMERGENCY/PROPOSED RULE MAKING

NO HEARING(S) SCHEDULED

I.D No. ENV-48-09-00003-EP**Filing No.** 1286**Filing Date.** Nov. 13, 2009**Effective Date.** Nov. 13, 2009**Commercial and Recreational Harvest Limits for Winter Flounder**

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

Proposed Action:

Amendment of Part 40 of Title 6 NYCRR.

Statutory authority:

Environmental Conservation Law, sections 11-0303, 13-0105 and 13-0340-c

Finding of necessity for emergency rule:

Preservation of general welfare.

Specific reasons(s) underlying the finding of necessity:

The Department of Environmental Conservation (DEC) proposes to adopt by emergency rule making additional restrictions on the harvest of winter flounder (*Pseudopleuronectes americanus*) in New York waters. This rule making is necessary to protect New York's population of winter flounder. Pursuant to section 3-0301 of the Environmental Conservation Law (ECL), it is DEC's responsibility to provide for the protection and management of New York's marine and coastal resources. The principle mechanism for cooperative interstate management of coastal marine finfish species is the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Program. This program is designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Inshore stocks of winter flounder have been managed cooperatively under the ASMFC Fishery Management Plan (FMP) for Winter Flounder since 1992. In response to the declining status of winter flounder stocks in recent years, the ASMFC adopted Amendment 1 to the FMP in November of 2005. Under Amendment 1 New York and other states implemented restrictive commercial and recreational management measures that were expected to eliminate overfishing and achieve rebuilt stocks of winter flounder by 2015. However, the most recent assessment of regional stocks of winter flounder, conducted by the National Marine Fisheries Service (NMFS), has shown that the measures adopted under Amendment 1 to the ASMFC Winter Flounder Fishery Management Plan failed to achieve the targeted reductions in fishing mortality and have little chance of rebuilding stocks of winter flounder.

The NMFS stock assessment, conducted as part of the 2008 Groundfish Assessment Review Meeting (GARM III), concluded that Southern New England and Mid-Atlantic (SNE/MA) stocks of winter flounder (including New York's populations) have not recovered and continues to experience high rates of removals. The assessment indicated that as of 2007, the spawning biomass of winter flounder was only 9 percent of the sustainable level. Furthermore, recruitment has been poor, with record low year classes in the last five years, indicating a very low probability of recovery in the near future.

In New York's marine waters, populations of winter flounder are clearly in a significant state of depletion. Historically, the winter flounder has supported one of New York's largest and most valuable inshore marine recreational and commercial fisheries. Despite cooperative interstate efforts to manage this fishery, catch data obtained from the NMFS show that winter flounder landings in New York have collapsed. Combined commercial and recreational landings in 2008 are the lowest on record and are less than 6 percent of those reported in the 1980s.

In response to the continued overharvest and decline of stocks of winter flounder, ASMFC adopted Addendum I to Amendment 1 of the Winter Flounder FMP in May of 2009. Addendum I includes some additional harvest restrictions on inshore recreational and

commercial fisheries that are intended to reduce harvest by 50 to 65 percent.

Since spawning biomass will remain at low levels until recruitment improves, it is essential that fishing mortality on spawning adults be immediately reduced to the lowest possible level. Winter flounder spawn in inshore waters from mid-December through March. New York's commercial fyke fishery opened October 1 and the open season for commercial hook and line and otter trawl fisheries, the largest source of fishing mortality during the flounder spawning season, begins December 1. Reducing fishing mortality on the remaining spawning stock biomass of winter flounder requires an immediate adoption of the ASMFC mandated fishery restrictions. Allowing continued harvest at the current rate may result in irreparable harm to the inshore stocks of winter flounder in New York waters.

Subject:

The commercial and recreational harvest limits for winter flounder.

Purpose:

To reduce the commercial and recreational harvest limits of winter flounder and stay in compliance with ASMFC management plans.

Text of emergency/proposed rule:

Existing subdivision 40.1 (f) of 6 NYCRR is amended to read as follows: Species striped bass through **bluefish** remain the same. Species winter flounder is amended to read as follows:

40.1(f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Winter flounder	[April] April 1-May 30	12" TL	[10] 2

Species scup (porgy) licensed party/charter boat anglers through prohibited sharks remain the same.

Existing subdivision 40.1 (i) of 6 NYCRR is amended to read as follows: Species striped bass through **bluefish** remain the same. Species winter flounder is amended to read as follows:

40.1(i) Table B - Commercial Fishing.

Species	Open Season	Minimum Length	Trip Limit
Winter flounder	Pound and trap nets July 26 - June 14 Fyke nets Oct. 1 - March 22 All other gear Dec 1 - June 13	12" TL 12" TL 12" TL	[no limit] 50 pounds [no limit] 50 pounds [no limit] 50 pounds

Species scup through prohibited sharks remains the same.

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 February 10, 2010.

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

Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0435, email: 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 11-0303, 13-0105 and 13-0340-c authorize the Department of Environmental Conservation (DEC) to establish by regulation the open season, size limits, catch limits, possession and sale restrictions, and manner of taking for winter flounder.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries in such a way as to protect this natural resource for its intrinsic value to the marine ecosystem and to optimize resource use for commercial and recreational harvesters. The ECL stipulates that management and use of State fish and wildlife resources must be consistent with marine fisheries conservation and management policies, and Interstate Fishery Management Plans (FMP).

3. Needs and benefits:

New York, as a member State of the Atlantic States Marine Fisheries Commission (ASMFC), must participate in the Interstate Fishery Management Program and comply with the provisions of FMPs adopted by ASMFC pursuant to that program. These FMPs are

designed to promote the long-term sustainability of quota managed marine species, preserve the States' marine resources, and protect the interests of both commercial and recreational fishermen. All member states must promulgate any regulations necessary to implement the provisions of the FMPs to remain compliant with the FMPs. If ASMFC determines a state to be non-compliant with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP.

The stocks of winter flounder in the Southern New England and Mid-Atlantic regions of the Atlantic Ocean have been declining significantly since the late 1990's. In response to this decline in recent years, the ASMFC adopted Amendment 1 to the Winter Flounder FMP in November of 2005. Under Amendment 1 New York and other states implemented restrictive commercial and recreational management measures that were expected to eliminate overfishing and achieve rebuilt stocks of winter flounder by 2015. However, the most recent assessment of regional stocks of winter flounder, conducted by the National Marine Fisheries Service (NMFS), has concluded that Southern New England and Mid-Atlantic (SNE/MA) stocks of winter flounder (including New York's populations) have not recovered and continue to experience high rates of removals. Recruitment has been poor, with record low year classes in the last five years, and the 2007 spawning biomass was only 9 percent of the target level. These findings indicate a very low probability of recovery in the near future under the current management plan. Lastly, winter flounder catch data collected by NMFS show that winter flounder landings in New York have collapsed within the past 10 years.

This fishery has been overfished and overfishing continues to take place. Recognizing the urgency of the depleted state of the winter flounder stock, in May 2009 NMFS prohibited the possession of winter flounder in the Southern New England and Mid-Atlantic regions of the Exclusive Economic Zone. In response to the continued overharvest and decline of stocks of winter flounder, ASMFC adopted Addendum I to the 2005 Amendment 1 of the Winter Flounder FMP in May 2009.

It is essential that fishing mortality on winter flounder be immediately reduced to the lowest possible level. Greatly reducing fishing mortality on the remaining biomass of winter flounder requires immediate adoption of the ASMFC mandated measures. Allowing continued harvest at the current rate will likely result in irreparable harm to the inshore stocks of winter flounder in New York waters. This rule making is needed to provide immediate protection to the remaining stock of winter flounder from overfishing.

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 will likely experience some adverse economic effects. Local party and charter boat businesses and bait and tackle shops will lose many of their customers who target winter flounder during the winter recreational season. Many New York State commercial fishermen rely on harvesting winter flounder for the income it provides and may see a substantial reduction in their earnings.

(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 commercial and 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:

1. No Action Alternative - The Southern New England/Mid-Atlantic (SNE/MA) winter flounder stock (New York stock is included in the SNE/MA stock) is at 9 percent of the target biomass and is considered overfished, with overfishing occurring. Atlantic States Marine Fisheries Commission has recognized the severity of the stock's condition and has made recommendations to reduce fishing mortality. The No Action alternative implies that New York would take no steps to comply with ASMFC's recommendation of the provisions of Addendum I of Amendment 1 to the FMP. This may result in a finding of non-compliance by the National Marine Fisheries Service (NMFS) and the imposition of a total closure of fishing for winter flounder in New York State waters until the state comes into compliance with the FMP.

2. Complete ban on possession of winter flounder - Stock projections by the 2008 Groundfish Assessment Review Meeting indicate

that the ASMFC mandated harvest reductions have less than a 1 percent chance of rebuilding stocks of winter flounder by 2015 and therefore may be insufficient to reduce fishing mortality to the level at which stocks would be expected to rebuild in a reasonable amount of time. A recreational and commercial harvest moratorium has a better chance at achieving the rebuilding target, though likely not in time for 2015. This alternative was rejected after it was determined that no other state subject to the FMP is willing to adopt a complete fishery closure. Connecticut was strongly considering it after consultation with New York, but chose instead to move forward with the ASMFC mandate. In addition, New York is facing severe restrictions in its scup and black sea bass fisheries for 2010, and a potential moratorium on weakfish harvest as well. A winter flounder moratorium in addition to these restrictions may result in significant economic loss for businesses dependent upon commercial or recreational fisheries for these species.

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 DEC'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 rule:

The Department of Environmental Conservation (DEC) has proposed a rule that will severely restrict the possession and landing of winter flounder by commercial and recreational fishermen in New York. This action is necessary to protect this critical species from further depletion by drastically reducing fishing mortality. Winter flounder stocks have declined significantly since the late 1990's. The Atlantic State Marine Fisheries Commission (ASMFC) recognized the depleted status of the winter flounder stock and adopted Amendment 1 to the Winter Flounder Fishery Management Plan (FMP) in 2005 which introduced restrictive management measures to eliminate overfishing. In 2009, ASMFC adopted Addendum I to Amendment 1 of the FMP and further reduced the commercial harvest for winter flounder to a 50 pound possession limit for non-federally permitted commercial fishermen and the recreational harvest to two fish per angler.

Those most affected by the proposed rule are commercial and recreational fishermen, licensed party and charter businesses, and retail and wholesale marine bait and tackle shops operating in New York State (NYS). Local party and charter boat businesses and bait and tackle shops will lose many customers who target winter flounder during the spring recreational season. This represents a significant portion of some party and charter boat businesses during the spring. Many NYS commercial fishermen rely on harvesting winter flounder harvest for the income it provides and may see a reduction in their earnings once the regulations are in place. 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. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by the proposed regulations may reduce the income of commercial fishermen, party and charter businesses and marine bait and tackle shops. Restrictions on the harvest of winter flounder may reduce the income of any fishermen who depend on winter flounder landings as part of their earnings. Recreational anglers who target winter flounder may no longer seek party and charter boat trips for winter flounder and may no longer frequent bait or tackle shops to buy bait and tackle for winter flounder fishing.

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

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for DEC to maintain compliance with the FMP for winter flounder and to protect the depleted winter flounder stock from overfishing. Since these amendments are consistent with Federal and Interstate FMPs, DEC anticipates that New York will remain in compliance with the FMPs.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive affect on employment for the fisheries in question, including commercial fishermen, party and charter boat fisheries and bait and tackle shops and other support industries for recreational fisheries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species, as well as on the supporting industries for those fisheries. For winter flounder, this positive effect of proper

management may not be seen for several years, not until the stock recovers from overfishing and is considered rebuilt.

7. Small business and local government participation:

The Department of Environmental Conservation reviewed two options for reducing fishing mortality on winter flounder with the Marine Resources Advisory Council: a total moratorium on harvest; and the recommendations of ASMFC. Marine Resources Advisory Council voted to accept the ASMFC recommendation instead of the total moratorium out of the concern that a total moratorium would cause financial hardships for the party and charter industry and commercial fishermen.

There was no special effort to contact local governments because the proposed rule does not affect them.

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 winter flounder commercial and recreational fisheries directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The promulgation of this regulation is necessary for the Department of Environmental Conservation (DEC) to maintain compliance with the Fishery Management Plan (FMP) for Winter Flounder and to eliminate overfishing of the winter flounder stock. The proposed rule severely restricts the possession of winter flounder by commercial and recreational fishermen in New York State (NYS) waters. Commercial fishermen, licensed party and charter boat businesses, and bait and tackle shops will be affected by these regulations. Recreational anglers who target winter flounder may no longer seek party and charter boat trips for winter flounder and may no longer frequent bait or tackle shops to buy bait and tackle for winter flounder fishing. This represents a significant portion of some party and charter boat businesses during the spring. Many NYS commercial fishermen rely on harvesting winter flounder for the income it provides and will likely see a reduction in their earnings once restrictions are in place.

2. Categories and numbers affected:

In 2008, there were 1,074 licensed commercial fishermen landing in New York and 558 licensed party and charter businesses in NYS. There were also a number of retail and wholesale marine bait and tackle shop businesses operating in New York; however, DEC does not have a record of the actual number. The number of recreational anglers in New York who could be affected by this rule making is unknown by DEC at this time, but the National Marine Fisheries Service has estimated that there were just over 1 million recreational anglers in New York in 2007. However, this Job Impact Statement does not include recreational anglers in this analysis, since fishing is recreational for them and not related to employment.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area included all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the State, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge. The Hudson River is not a usual habitat of winter flounder.

4. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for DEC to maintain compliance with the FMP for winter flounder and to protect the depleted winter flounder stock from overfishing. Since these amendments are consistent with Federal and Interstate FMPs, DEC anticipates that New York will remain in compliance with the FMPs.

In the long-term, the maintenance of sustainable fisheries will have a positive effect on employment for commercial fishermen, party and charter boat fisheries and bait and tackle shops. Failure to comply with FMPs and take required actions to protect our natural resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species. Any short-term losses in harvest, sales and angler participation will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. For winter flounder, the positive effect of this regulatory action may not be seen for several years, not until the stock recovers from overfishing and is considered rebuilt. Protection of the winter flounder resources is essential to the long-term benefit of commercial fishermen, the party and charter boat industry, and bait and tackle shops. These regulations are designed to protect the winter flounder stock from overfishing, allow the stock to rebuild and achieve long-term sustainability of the fishery for future use.

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