

**Background:**

Federal regulation of New York's commercial fishing fleet began shortly after the Magnuson Stevens Act (MSA) was signed into law by Congress in 1976, in the late 1970s and early 1980s. The MSA started the process of regulating fisheries in US waters from three to 200 miles off the shoreline, in what was then termed the Exclusive Economic Zone (EEZ.) The intent of the MSA was to restrict foreign fishing vessels to 200 miles offshore so as to allow for increased US commercial fishing opportunities within our jurisdictional waters.

The MSA created eight regional fishery management councils to act as advisory roles to the Department of Commerce's National Marine Fisheries Service (NMFS), the lead agency in regulating federal fisheries. NMFS is housed in the National Oceanic and Aeronautic Administration (NOAA).

99% of all commercial fishing in New York takes place from Long Island ports. Due to its geography and the migratory patterns of the region's fish species, two separate regional fishery management councils established by the MSA; the New England Fishery Management Council (NEFMC) and the Mid-Atlantic Fishery Management Council (MAFMC), regulate New York's federal fisheries within the EEZ. New York has state representation on the MAFMC (presently one obligatory and two at-large seats), and none on the NEFMC.

The MAFMC regulates 13 species of fish in federal waters that are caught by New York fishermen <http://www.mafmc.org/species/species.htm>, the NEFMC <http://www.nefmc.org/> regulates nine other EEZ fisheries, including the groundfish complex (20 stocks of 13 species of fish), whiting, monkfish, and dogfish among others. For monkfish and dogfish the MAFMC and the NEFMC both regulate the fishery. NEFMC is the lead on monkfish; MAFMC is the lead on dogfish.

The Atlantic States Marine Fisheries Commission is the lead agency for inshore state-jurisdictional fisheries, those that occur primarily in waters from zero to three miles. Members from 15 states from Maine to Florida sit on the ASMFC; 23 species of fish are regulated <http://www.asmfc.org/>

For fisheries that occur in both inshore (0-3) and offshore (3-200) waters, either the federal (NEFMC or the MAFMC), or the ASMFC, becomes the lead agency.

As fishery management and quotas evolved in the 1990s, five NY fisheries were regulated by the MAFMC and the ASMFC based on a state-by-state quota method.

In that method, each state was required to document commercial landings data for each fishery for a prescribed period of years (called the baseline time periods) then the lead fishery management council (either the MAFMC or the ASMFC) would determine what percentage of the fishery each state caught, and then

divvy up the overall yearly quota of fish to each state based on that percentage.

**The problem: State-by-state quota regulations created by the MAFMC and approved by NMFS in the 1990s in four fisheries were prejudicial against New York fishermen, based on a faulty data-collection model that was incapable of collecting accurate landings data. The NMFS' New York data-collection model was called the "box method." No other state utilized this method to count fish landings data.**

We believe New York was given an inaccurate percentage of the overall coast-wide landings quota for the black sea bass, bluefish, scup and summer flounder fisheries according to landings data tabulated by NMFS based on a data-collection process called the "box method." No other state in the Mid-Atlantic utilized the box method.

New York's method of boxing fish dates back to the turn of the century to supply the markets in New York City. Fish are caught and placed in boxes by species at sea. Fish are considered "landed" when they are offloaded at a dock in port. "Landings" refer to the sum of fish caught by species on any given day, or trip (more than one day at sea.)

Once the fish (in boxes) was packed by the dock on pallets and placed on a truck, the fish was then shipped most often to Fulton Fish Market in New York City. Pack houses make/made their money based on selling boxes and shipping the boxes to Fulton; there is/was no vested interest in knowing the fish species in the boxes.

NY fishermen usually do not sell their fish to the packing docks directly, but ship them on consignment to fish buyers at Hunts Point Market. Sold at auction by fish buyers, fishermen are then sent a "return" from the buyers. The return shows the fish sold that day by species, the price per pound sold and a check for payment for fish sold less shipping costs. In NY fish are generally not sold at the dock of landing as they are in most other states.

NMFS port agents used the "box method" of data collection in NY to count fish landings. They would go to the various NY pack-out docks monthly and review shipping records that indicated the total number of boxes of fish shipped to Fulton per month. They would then speak to the dock manager and ask for a breakdown of fish species in the boxes.

Using the number of boxes multiplied by an average weight per box, they would calculate total weight. NMFS port agents would then tabulate the number of boxes shipped by the fish species as it was told to them, or decide based on their own experience and use that information to determine total landings for New York's commercial fishermen.

NMFS port agents in other Mid-Atlantic states and New Bedford used a data collection method called “the weighout system.” Fishermen in all other Mid-Atlantic states would receive a weighout receipt from the dock to which they sold their fish with the vessel name, date, and pounds landed of each species. The dock would then sell those fish to dealers and fish markets.

NMFS describes the weighout system as detailed trip-level landings records contained in master data files maintained by the Northeast Fisheries (Science) Center.

According to a NOAA technical memorandum written in 1990, <http://www.nefsc.noaa.gov/publications/tm/pdfs/tmfnc78.pdf>

*“The basic structure of the program was developed in 1980 by the Northeast Fishery Management Task Force, made up of members of the New England and Mid-Atlantic Fishery Management Councils, commercial fishing industry, and NMFS.”*

*“The task force developed guidelines for reporting fisheries statistics for stock assessments by outlining a three-tier system for collecting fisheries information (Chang et al 1987; Schultz 1989).”*

*“The first tier calls for determination of landings by species and vessel trips. **Port agents employed by, or contracted by, the NMFS use weighout records, which are copies of the receipts that fishermen receive from buyers when they sell their fish. These records, as they are obtained from the buyers, contain the date of purchase, name of vessel or fisherman that sold the fish, species and market category, pounds, and value or price paid.**”*

*“The second tier depends on data obtained from fishing trip logbooks, or from dockside interviews of vessel operators by port agents. Data collected in such interviews include date sailed and landed, gears fished, quantity of fish landed, fishing locations (at a resolution of 10 minutes of latitude and longitude, or a 10-minute square), days fished, days absent, mesh sizes, number of tows, duration of tows, depths fished, time lost, and species and quantity of fish discarded.”*

*“The third tier depends on samples of selected trips from which detailed tow-by-tow information is collected for stock assessment and fisheries management. This information comes from port agents, fishing trip logbooks kept by fishermen, or at-sea observers on board vessels during fishing operations. The third tier has been implemented for selected fisheries (i.e., the domestic sea sampling program and the experimental whiting fishery program in 1988-89). There is still no tow-by-tow logbook system on a regionwide basis.”*

*“After port agents collect weighout records for the first and second-tier data, the records for trips for which dockside interviews were conducted are coded. The weighout records for trips for which interviews were not conducted are also coded. In the latter case, certain data (e.g., area fished to 30 minutes of latitude and longitude and days fished) are estimated based on those trips that were interviewed.”*

*“Data collection under the three-tier system follows a direct line from port agents to the NEFC. Data are entered into computer files and audited by port agents. The data receive a final audit at the NEFC before being entered into NEFC databases. These databases are subsequently forwarded to NMFS in Washington, D.C., for archiving and for the annual publishing of U.S. fisheries statistics.”*

This difference in the NMFS data collection/reporting system between defined weighout data above and the box method put NY at a severe and significant disadvantage relative to baseline calculations for state-by-state quota allocations. Summer flounder, scup, sea bass and bluefish were all allocated in this manner.

NMFS port agents reported their findings to NMFS for entry into the NMFS Commercial Landing Database. Landings totals were based on weighout receipts, and in New York, the box method. Landings were also collected in state waters through other methods, but the majority of federally-landed species were tabulated in this method. New York was the only state to use the box method for landings data.

The box method was highly inaccurate for a variety of reasons:

- NY fishermen did not trust NMFS port agents; they believed their data to be proprietary, and did not want other fishermen privy to their catch or where they caught it because of the fluctuation of fish prices based on who caught what and when; supply and demand. Fishermen felt the port agents would share that information with other fishermen/dock managers.
- Some dock managers were given the directive to not tell the contents of fish boxes to NMFS port agents, since the program was voluntary and fishermen felt it would affect fish prices if other docks knew what fishermen were catching. If one particular dock had a high price-per-pound fish landing, it was the concern of those fishermen landing that fish that the manager might tell the port agent where they were catching them, and that information could be transmitted to other fishermen, so the price per pound would drop.
- Dockside interviews were sporadic (for years) by some members of the NMFS port agent staff in New York. At best, they visited the docks once a month, but only during daytime business hours. Many fishermen during that time period fished round-the-clock; there was no such thing as “normal” business hours for the fleet.
- North Carolina and Massachusetts also sent transfer trucks to NY ports to purchase fluke right off the boat and it is believed that those fish were counted toward NC and Massachusetts’ quotas.
- There was a large cash trade in commercial fishing back in the 1980s, when there were no quotas on catch.

- We have been told that internal documents from NMFS detail problems with New York and the box method, though at no point did National Marine Fisheries Service attempt to utilize another method to recreate landings weighout data in New York, even when they were told and made aware that the data received from NY was inaccurate and faulty.

Baseline fishery landings were established for the following time periods for each fishery and then the MAFMC divvied up the fisheries based on each state's weighout data:

Black seabass 1980-2000

Bluefish 1978-87

Scup 1983-92

Summer flounder (fluke) 1980-89

Amendment Two to the MAFMC's summer flounder (fluke) fishery management plan was ratified on October of 1991 by the MAFMC and then approved by NOAA in August of 1992, allowing for the state-by-state distribution of fluke quota to stand, thereby sticking NY with a seven-percent landings-total of the overall state-by-state quota for fluke. Neighboring states New Jersey and Rhode Island held 16 and 15 percent of the quota respectively. In 2010 that translated to \$2 million dollars less in NY fluke landings sales compared to RI and NJ.

Since 1980 in the Mid-Atlantic, more than 77 percent of the overall fluke caught has been in the EEZ. What this means economically in 2012 to NY's fishermen is while their boats can fish side by side to NJ and RI boats catching the same stock of fluke, they are being unfairly disadvantaged from landing those federal waters fish based on inadequate data collection from 30 years ago.

An inaccurate data system that was created by NMFS and then approved by council members of the MAFMC that we believe was in direct contradiction of National Standard Four of the MSA. , pg 58

[http://www.nmfs.noaa.gov/msa2007/docs/act\\_draft.pdf](http://www.nmfs.noaa.gov/msa2007/docs/act_draft.pdf)

*4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.*

In MAFMC's fluke Amendment Two briefing book, the council refuted the argument that MSA's National Standard four was discriminatory because they called the argument "too narrow."

The Council and ASMFC considered the argument that this measure discriminates among fishermen of different States, and may therefore run afoul of National Standard #4. The Council and the ASMFC have considered this argument and believe that it results in too narrow a construction of the National Standard, particularly in the context of this fishery. The National Standard must be read as a whole, and any interpretation that focuses too narrowly on distinctions based on residence may face problems in providing fair allocations. In this FMP, all fishermen are given an equal opportunity to harvest a fair share of the overall quota. The distinction drawn in the management measures is not for the purpose of harming the fishermen of any State, but rather to ensure that all of the requirements of National Standard #4 are met. This kind of differentiation, which is implemented not to adversely affect anyone, but to ensure attainment of equitable allocations, cannot be considered discriminatory within the meaning of National Standard #4. The allocation system will be administered by the States under this cooperative interjurisdictional management program. The effect of this measure is simply to provide the Secretary with the opportunity to support the collective States' efforts in administering quotas.

Unfortunately there was no legal challenge of the meaning of "too narrow" at the time of the implementation of Amendment Two by NY fishermen.

They were told if they tried to sue, they would never win, and as such had to accept their fate. This information was told to them in specific conversations held by NY fishermen with Northeast Regional heads Rollie Schmitt, former asst. administrator for NMFS, and Andrew Rosenberg, Northeast Regional Office (NERO) administrator.

When they asked if they could appeal the ruling via a council vote, they were told there were not enough votes on the council to overturn the state-by-state quota in exchange for a coast-wide quota system, (one that is in place in many other fisheries in the Mid-Atlantic.) NY was a have-not in the MAFMC council (against the states with large proven weighout data who wanted the state-by-state system.)

Even an attempt to use the five years (1985-1989) as a baseline since NY had a larger percentage of catch for the fluke fishery during those years was shot down by those that fared better with ten, and as such, the 10-year baseline was chosen (see next page.)

In 1993, Connecticut successfully argued to the MAFMC to increase Connecticut's fluke quota based upon CT arguing successfully that they did not have a port agent or appropriate weighout data for the years 1980-1986. They took the average of NY, RI, MA and NJ's quota from 1987-91 and compared it to CT's landings for those same years to create a percentage to estimate CT's quota from 1980-86, from which they derived the new coastwide quota for CT in Amendment Four for fluke.

Table 2. Summer Flounder Commercial Landings (thousands of lbs) by State by Distance from Shore (miles) and Percent of Total Summer Flounder Landings Taken from the EEZ, 1980-1989

Year	Distance	ME	NH	MA	RI	CT	NY	NJ	DE	MD	VA	NC+	All
1980	0-3	-	-	218	185	3	1,090	493	1	65	1,238	3,399	6,696
	3-200	4	-	147	1,091	44	155	4,311	-	1,258	7,265	10,242	24,520
	Total	4	-	365	1,276	48	1,245	4,805	1	1,323	8,503	13,642	31,216
	% EEZ	100	-	40	85	91	12	89	-	95	85	75	78
1981	0-3	-	-	406	352	21	1,727	853	6	8	441	837	4,655
	3-200	2	-	191	2,507	59	257	3,155	-	394	3,210	6,621	16,400
	Total	2	-	597	2,860	81	1,984	4,008	6	403	3,651	7,459	21,056
	% EEZ	100	-	32	87	73	12	78	-	97	87	88	77
1982	0-3	-	-	855	475	8	1,282	402	7	59	463	2,103	5,657
	3-200	17	1	810	3,507	56	582	3,916	-	300	3,868	4,211	17,270
	Total	17	1	1,665	3,982	64	1,865	4,318	7	360	4,331	6,315	22,927
	% EEZ	100	100	48	88	87	31	90	-	83	89	66	75
1983	0-3	1	-	693	507	32	977	485	5	125	2,757	3,644	9,228
	3-200	82	1	1,648	4,091	96	458	4,340	-	811	5,376	3,413	20,319
	Total	83	-	2,341	4,599	129	1,435	4,826	5	936	8,134	7,057	29,547
	% EEZ	98	-	70	88	74	31	89	-	86	66	48	68
1984	0-3	-	-	721	617	59	1,571	1,342	8	125	3,618	3,174	11,239
	3-200	2	1	766	3,862	71	722	5,021	-	687	6,055	9,334	26,525
	Total	2	1	1,488	4,479	130	2,294	6,364	8	812	9,673	12,509	37,764
	% EEZ	100	100	51	86	54	31	78	-	84	62	74	70
1985	0-3	1	-	530	822	133	1,419	1,187	4	79	928	1,454	6,561
	3-200	1	0	1,718	6,710	50	1,098	4,446	-	498	4,107	7,160	25,791
	Total	2	1	2,249	7,532	183	2,517	5,634	4	577	5,036	8,614	32,352
	% EEZ	28	100	76	89	27	43	78	-	86	81	83	79
1986	0-3	-	-	465	914	145	1,808	1,049	3	27	510	2,176	7,101
	3-200	-	1	2,488	6,127	15	929	2,967	-	288	3,202	3,747	19,764
	Total	-	1	2,953	7,042	160	2,737	4,016	3	315	3,712	5,923	26,865
	% EEZ	-	100	84	87	9	33	73	-	91	86	63	73
1987	0-3	-	-	727	349	82	1,062	480	4	122	1,500	1,204	5,534
	3-200	7	1	2,600	4,424	526	1,578	3,970	-	196	4,290	3,922	21,517
	Total	7	1	3,327	4,774	609	2,641	4,450	4	318	5,790	5,127	27,051
	% EEZ	100	100	78	92	86	59	89	-	61	74	76	79
1988	0-3	-	-	801	338	277	1,685	834	6	192	1,078	1,869	7,084
	3-200	4	-	1,619	4,380	463	1,753	5,171	1	321	6,677	4,900	25,292
	Total	4	-	2,420	4,718	740	3,438	6,006	6	513	7,756	6,770	32,377
	% EEZ	100	-	66	92	62	50	86	3	62	86	72	78
1989	0-3	-	-	283	140	27	133	126	2	104	319	201	1,338
	3-200	9	-	1,594	2,942	485	1,330	2,738	-	99	3,369	4,004	16,574
	Total	9	-	1,877	3,082	513	1,463	2,864	2	204	3,688	4,205	17,913
	% EEZ	100	-	84	95	94	90	95	-	48	91	95	92

- = zero

Note: numbers may not total due to rounding.

Source: unpublished NMFS General Canvass data.

The baseline 10-year commercial fishing landings totals for summer flounder (fluke) above

According to Amendment Two, weighout data was used to determine the state by state quota, which according to the amendment represents 70% of the fluke fishery. New York's version of weighout data= box method. If you look at NY's data, there is quite a bit of "weighout data" that does not specify what fish, under

the term "unknown." We believe also a great deal of that unknown fish could be fluke.

Estimates of catch and fishing effort by area, gear, number of trips, and time are obtained by sampling fishing captains and the data are coded using a "weighout" form. The weighout data are a sample rather than a census and do not comprise the entire fishery. Even though the weighout data collection system is limited in geographical coverage (CT, DE, and NC are not included at this time), it is extremely important because the catch is related to particular vessels and effort can be evaluated.

A year by year comparison from 1983-89 between the General Canvas and the weighout data demonstrates that about 70% of the total summer flounder landings from Maine to North Carolina are picked up by the weighout system (Table 27). When Connecticut, Delaware and North Carolina landings are excluded from the 1989 General Canvass, there is almost 100% coverage by the weighout, thus the weighout data covers a large proportion of the complete summer flounder fishery.

Over 97% of the summer flounder that were reported landed between 1983 and 1989 in the weighout system were landed by fish otter trawls (Table 28).

NC apparently was not involved in the weighout method also but had state specific data for the years that were chosen to represent the fluke fishery when cutting up the pie.

An average of 28% of the coastwide summer flounder landings were made in North Carolina from 1980-1989 (Table 35), yet data on the fishery are not incorporated into the weighout system. Fortunately, the North Carolina fishery has been extensively sampled during the winters of 1982-89 by the North Carolina Division of Marine Fisheries (North Carolina 1990). These data enable the comparison of the North Carolina winter trawl fisheries to the southern New England and Mid-Atlantic otter trawl fisheries.

### **Solution:**

NY State should sue NMFS asserting that the box method of fishery data collection for NY during the baseline periods was fatally flawed, inaccurate, and prejudicial as per National Standard Four of the MSA to NY's commercial fishermen in the federal fluke, black seabass, scup and bluefish fisheries.

Not only was the box method prejudicial, but NMFS and the NFSC (Northeast Fisheries Science Center) showed willful disregard through internal memos for NY's commercial fishermen and the economic losses they suffered from 1992 to the present by disenfranchising them from federal fisheries, those that they traditionally prosecuted primarily in the EEZ. They knew it was faulty and did nothing to fix it.

Additionally sue NMFS for not adhering to National Standard Eight  
*8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.*

because of the long-term economic effects of the state-by-state quota upon New York's commercial fishing communities, effects they noted in Amendment 8 to



the scup fishery management plan (FMP) (see below.)

As early as 1996 when discussing preferred choices for allocating the scup quota, they acknowledged in Amendment 8 to the MAFMC scup FMP that the state-by-state system was prejudicial to fishermen of different states, describing the fallout from the fluke state-by-state quota system to those states who received the smallest percentages of quota

[http://www.mafmc.org/fmp/pdf/SFSCBSB\\_Amend\\_8.pdf](http://www.mafmc.org/fmp/pdf/SFSCBSB_Amend_8.pdf) pg 64

However, state-by-state allocations would negatively affect fishermen who land in those states that do not have the capability of regulating a quota. Based on the quota system implemented for summer flounder, a few states have not been able to establish trip limit systems that ensure a continuous and steady supply of product over the season for producers and/or a fair and equitable distribution of flounder to all fishermen who have traditionally landed summer flounder in their state. In addition, some states have had problems coordinating their regulations with neighboring states to prevent large scale landings by fishermen in states with the most favorable trip limits. A similar situation could occur if a state-by-state system was implemented for scup.

Amendment 8 adjusted the scup fishery to a modified partial coastwide/partial state-by-state quota system. In the summer months, the fishery is divvyed into a state-by state quota system to allow inshore fishermen that fish in state waters equal access to the resource. Then in the Winter I and Winter II period, when traditionally a larger portion of the fishery took place offshore, scup is regulated by a coastwide quota system in which all states have the same limit per trip until the quota for that period is caught.

A solution for NMFS to avoid a lawsuit would be create a modified partial state by state/ coastwide fishery for the fluke, black sea bass and bluefish fisheries, as the MAFMC did for the scup fishery in 1996. NMFS will state that only the council can do that, but because of the voting make-up of the council as per the MSA, those that are have-nots (CT, NY) will never have enough votes on the council to make that happen at the MAFMC.

The scup model would be the correct way to equitably regulate the fluke, bluefish and black sea bass fishery, instead of state-by-state quotas as it now stands, taking into account the inshore and offshore fisheries and their historic participation.

### **Conclusion:**

NY commercial fishermen's landings were unfairly counted through the box method data collection system by NMFS, a system that was inaccurate and incomparable to the weighout method preferably used by the MAFMC and the ASMFC to decide state-by state quotas for the fluke, seabass, bluefish and scup

fishery.

NMFS knew at the time the box method was flawed and faulty, but did nothing to ameliorate the situation, showing willful disregard for NY's commercial fishermen. As a result of NMFS lack of action, the MAFMC's decision to use weighout data to determine NY's fishery's quotas and percentages for four species was flawed.

On NMFS' own website, they refer to the data collection process as varying from state to state, but includes supplemental surveys by NMFS to "ensure that the data from different states and surveys is compatible"

<http://www.st.nmfs.noaa.gov/st1/commercial/landings/back.html>

NMFS never attempted that for New York's commercial fishermen and as such have created an enormous economic burden on these fishermen for lost revenue for the last 20 years.

NY commercial fishermen can produce fish buyer fish returns showing the fish species and pounds sold for trips during the baseline time periods. It is our belief that landings of unknown fish as per NMFS will in fact show actual landings of fluke, bluefish and black sea bass that were not counted in the NMFS weighout database.

While a complete inventory of all fishermen's returns from the time period is not possible due to those that have died, left the fishery or moved, it is possible in some of the larger ports to create a picture of what the fishery was during the baseline period, one which was never attempted by NMFS.