

#8

CORRESPONDENCE

NEFMC
Attn. Dr. John Quinn and Mr. Tom Nies
50 Water St.
Newburyport, MA 01950



January 4, 2019

Kevin M. Scola
P.O. Box 1392
Marshfield, MA 02050

RE. Comment on recreational limits

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Dear Mr. Chairman

I would like at this time to make a proposal that the catch limits for 2019 recreational measures concerning Gulf of Maine Cod & Haddock and Georges Banks Cod & Haddock be exactly the same for both geographical areas and user groups including but not limited to Charter boats & Head boats.

I strongly believe that this is the correct course of action given the strong scientific evidence that both of these stocks intermix at a much higher level than originally thought.

This is the only real responsible & correct course of action to take given the astronomical high level of fishing effort on the Georges Bank's stock in the recreational sector and the historical low-level of effort on the Gulf of Maine stock.

To allow one user group access to a stock that has basically collapsed & intermixes with another stock that has basically collapsed as well is irresponsible at best and leads to speculation of special interests being taken care of and corruption .

It only makes sense to have uniform regulations for both user groups if both of these stocks are indeed at very low historical levels as suggested and the mortality rate is astronomically high to the point where it basically accounts for 250 metric tons .

Whatever the catch rate is for the user group that fishes on Georges Bank stock is then it should be the same for Gulf of Maine stock user groups and vice versa..

It's about time we take hard measures in order to help the stock to rebuild in a timelier manner.

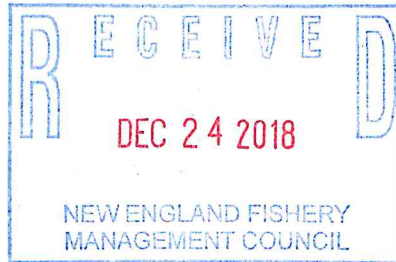
Yours truly

Capt. Kevin M. Scola

Bluewater Charters
Survival fishing company



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930-2276



DEC 20 2018

Jon J. Savage
F/V Taylor Mae
P.O. Box 1144
Hampton, NH 03843

Dear Mr. Savage:

Thank you for your October 25, 2018, proposal for a project to be conducted under an Exempted Fishing Permit (EFP). I am required to make a determination whether your application contains all of the required information and constitutes an activity appropriate for further consideration.

The stated goal of your proposed project is to demonstrate that a small vessel can use bottom-tending gillnet gear to effectively target lobster within the May Gulf of Maine (GOM) Cod Protection Closure without catching spawning cod. Framework Adjustment 53 to the Northeast Multispecies Fishery Management Plan, implemented on May 1, 2015, specifically established the GOM Cod Protection Closures to provide protection for spawning aggregations of cod. GOM cod are currently in a stock rebuilding program and continue to be overfished and subject to overfishing. While it may be possible to show that a single small vessel could effectively target lobster with limited bycatch of certain fish species, recent research¹ has shown that fishing activity using gillnet gear disrupts spawning behavior, disperses spawning aggregations, and that dispersed spawning fish are unlikely to re-aggregate.

Successful spawning protection is the reason the May GOM Cod Protection Closure was established. It is likely that the activities you propose under an EFP would negatively impact the rebuilding efforts for the GOM cod stock and undermine the objectives of the fishery management plan. Moreover, apart from the specific benefits to your operation highlighted in your proposal, it is unclear what long-term benefits allowing small vessels to gillnet in spawning closures would provide. As a result, I am not able to approve the proposed EFP.

My staff thoroughly discussed your proposal to evaluate the potential impacts and possible ways to minimize adverse effects. Because disruption of protected spawning fish is an inherent issue with the proposed activity, the proposed activity is not appropriate for further consideration. We appreciate the time and thought you put into proposing this project; however, all activities conducted under EFPs must remain consistent with the goals and objectives of the management plan.

If you would like to see changes to the regulations implementing the GOM Cod Protection Closures, the New England Fishery Management Council would be the best forum to address your concerns.

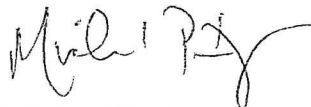
If you have any questions on the EFP issuance process, please contact Ryan Silva, Cooperative Research Liaison, at (978) 281-9326 or at Ryan.Silva@noaa.gov.

jc, rf - 12/24/18



If you have any questions relating to cod and other groundfish, please contact Sarah Heil, Groundfish Team Supervisor at (978) 281-9257 or Sarah.Heil@noaa.gov.

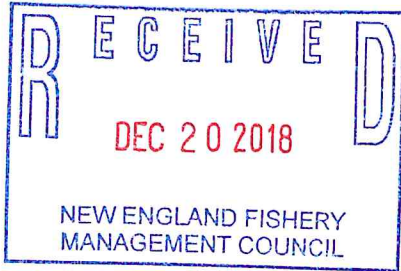
Sincerely,

A handwritten signature in black ink, appearing to read "Michael Pentony". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael Pentony
Regional Administrator

cc: Tom Nies, Executive Director, New England Fishery Management Council

¹ Dean, M.J., Hoffman, W.S., and M.P. Armstrong. 2012. Disruption of an Atlantic Cod Spawning Aggregation Resulting from the Opening of a Directed Gill-Net Fishery. *North American Journal of Fisheries Management*, 32, 124 – 134.



December 20, 2018

Rear Admiral Timothy C. Gallaudet
Assistant Secretary of Commerce for Oceans and Atmosphere
U.S. Department of Commerce
1401 Constitution Avenue NW, Room 5128
Washington, DC 20230

Chris Oliver
Assistant Administrator for NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

Mike Pentony
Regional Administrator
National Marine Fisheries Service
Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930-2276

Dr. John Quinn, Chairman
Tom Nies, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

Dear Sirs:

We write to express our deep concern about the fundamental lack of accountability in the New England groundfish fishery and the deepening crisis it has engendered in the region. The absence of effective monitoring is having profound negative effects on the groundfish resource, on the quality of the stock assessment science and therefore the efficacy of management, and on the economic prospects of fishing communities. This is the oldest organized fishery in the United States and it has become deeply crippled under the watch of the New England Fishery Management Council, GARFO, and NOAA Fisheries. As the key leaders with ultimate management authority and statutory responsibility over this important resource and fishery, you have a duty to take immediate and effective steps to fix this problem.

At the national scale, NOAA Fisheries properly reports that it has “effectively ended overfishing and is rebuilding domestic fish stocks[.]”¹ Not in New England, however, where chronic mismanagement in the groundfish fishery continues unabated. Atlantic cod, various flounders, and other groundfish are still subject to overfishing and remain in a persistent overfished status – which

¹ https://naturalresources.house.gov/uploadedfiles/testimony_oliver.pdf

jc 12/26/18

has endured for almost 30 years in some cases – despite the legal requirement to prevent overfishing and rebuild fisheries in as short a time as possible. NOAA Fisheries and the Council have consistently failed to prevent overfishing on some of these stocks since “overfishing” metrics were first approved in 1989. If there isn’t a radical change in management direction, the prospect of these stocks ever rebuilding remains tenuous at best.

A committee of the best experts in the fisheries science community concluded that stocks will generally rebuild if effective management measures are in place maintaining catches at scientifically appropriate levels.² Their conclusion, of course, rested on the assumption that assessment scientists had access to accurate catch data to set the proper quotas in the first place. A separate analysis by the Natural Resources Defense Council produced three overall reasons why rebuilding plans fail to reduce fishing mortality: (1) ineffective input controls and lack of accountability measures, (2) mortality due to bycatch in other fisheries, and (3) inaccurate estimates of stock size leading to improperly high catch limits.³ All these drivers of management failures are present in the New England groundfish fishery and have a singular common denominator: the lack of effective at-sea monitoring in the fishery. This failure endures despite the millions in taxpayer funds that are dedicated to propping up the current monitoring system.

Lack of monitoring and overfishing are inextricably linked

Meaningful solutions must track the sources of any management problem. In order to achieve a healthy fishery, managers and scientists need accurate and reliable data to understand the level of catch in any given fishing year, inform stock assessments, set appropriate catch limits, and enforce the limits that are set. For years, however, the organizations you lead – organizations that have a mandatory duty to develop and enforce science-based catch limits – have enabled a management system and strategy that is crippled by inaccurate and unreliable catch data. And historic problems are growing more acute in New England. On the one hand, there are now widespread public accounts of unreported and misreported discards of Atlantic cod at sea verified by NOAA Fisheries and state fishery officials, who acknowledge receiving reports of “discards up to 2000-3000 pounds per trip” and “reports about observers not recording these discards.”⁴ And on the other, the world is now aware of the profound lack of oversight that enabled criminal enterprises like those of Carlos Rafael to thrive in this region for years.

² “[A]nalysis of rebuilding plans indicated that when fishing mortality was effectively reduced, only a few stocks did not show an increase in biomass.” NRC Committee on Evaluating the Effectiveness of Stock Rebuilding Plans of the 2008 Fishery Conservation and Management Reauthorization Act at 120 (NAS 2014).

³ NRDC Report *Bringing Back the Fish: An Evaluation of U.S. Fisheries Rebuilding Under the Magnuson-Stevens Fisheries Conservation and Management Act*, <https://www.nrdc.org/sites/default/files/rebuilding-fisheries-report.pdf>.

⁴ See https://s3.amazonaws.com/nefmc.org/180417_1_Intros-and-Reports.mp3, Recording of the April 2018 New England Council meeting, where discussion of widespread reports of high levels of illegal discarding begins at 22:00; the transcript of this discussion is attached. “This Spring, the number of individuals coming to us with reports about cod discarding is unusually high.... Reports we are receiving this spring are that there are discards up to 2000-3000 pounds per trip happening in this area. We are hearing reports from not just groundfish vessels but other non-groundfish vessels that they are catching dead cod in many of their tows. We are also hearing reports about observers not recording these discards.”

New England groundfish fishermen face intense economic pressure to discard low-quota stocks like cod without reporting them so that they can continue fishing for target stocks. When the Pacific groundfish trawl fishery – a similar multispecies fishery with historically high bycatch and seven severely constraining overfished species – made its transition to a catch share program in 2011, a 100 percent at-sea and dockside monitoring requirement ensured accountability and drove intense, rapid innovation in fishing methods and gear configurations to avoid bycatch.^{5,6} Today, most of the previously-overfished West Coast rockfish stocks, which once restricted the catch of other species, have largely recovered, many dramatically ahead of scientific predictions.⁷ The successful recovery of this multispecies fishery and the presence of 100 percent monitoring are not simply coincidences.

Under the watch of the Council, GARFO, and NOAA Fisheries, New England has taken the opposite course and predictably suffered the opposite results. “Target” monitoring coverage levels in New England (which include both ASM and NEFOP science observers) have been steadily declining since 2010 from already minimal levels, reaching their lowest levels – 14 percent – in fishing year 2016. Currently, in fishing year 2018, the monitoring coverage “target” remains low at just 15 percent but the actual coverage is even lower. Recent revelations from GARFO, the Council, and OLE indicate that discarding of legal-sized fish is not even being reported by observers on the trips they do take.⁸ Under these circumstances, there is no reliable information about what is happening with catches and discards at sea. We have yet to find a single person who has any confidence that the current monitoring program produces information that bears any resemblance to the real world of the fishery.

Some fishermen claim that the current ACLs for Gulf of Maine cod do not reflect the actual cod population, arguing that they are seeing more cod now than ever before and that “they can’t get away from cod.” And yet, the reported catches all manage to stay magically within the extremely low ACLs year after year. Even fishermen have become increasingly vocal about what is really happening at sea: massive illegal and unreported discarding of cod and other low quota stocks. At the April 2018 council meeting, during the discussion of increased illegal discarding, GARFO staff said, “Industry are expressing increased frustrations with how wasteful discarding is and the potential impact or future impact on the stock. Related to this, people are concerned that widespread discards puts bad data into the system and puts bad data into the science, and connected to that, industry are expressing frustrations that continued bad data into the system continues to give quotas that aren’t reflective of what they are seeing on the water and it’s not reflective to the fish available to the fishery right now.”⁹ There is no incentive for any of the fishermen to play by the rules in this fishery if they want to stay competitive.

Predictably, the status of key vulnerable stocks has grown worse and their assessment models have degraded as monitoring coverage levels have declined. The Gulf of Maine cod stock, which has been overfished since at least 1990 when Amendment 4 first quantified overfished

⁵<http://blogs.edf.org/edfish/2016/08/05/gear-workshop-highlights-innovators-in-west-coast-fishery/>.

⁶ See NOAA Fisheries, The West Coast Catch Shares Program: 2015 Update for the West Coast Catch Shares Program (November 2015), available at

https://www.westcoast.fisheries.noaa.gov/publications/fishery_management/trawl_program/analytical_docs/final_2012-2013_summary_report.pdf.

⁷ <http://westcoasttrawlers.net/2017/12/12/west-coasts-pacific-ocean-perch-stocks-declared-rebuilt-will-lead-to-higher-groundfish-catches/>.

⁸ See Recording of the April 2018 New England Council meeting; transcript attached.

⁹ *Id.*

levels, is still overfished and subject to overfishing.¹⁰ In recent years, the stock has plummeted to historic lows and is persistently hovering at 5 percent of what scientists consider to be a healthy population level.¹¹ The stock has had a severely truncated size and age structure for some time without any management response and is not on track to meet its 2024 rebuilding timeline.¹² Georges Bank cod is in a similarly poor state, but scientists are unable to make quantitative estimates about the population because the model from the 2015 operational assessments could not be updated and could no longer be used for management advice,¹³ likely the result of poor data inputs to the models. The analytical assessment for witch flounder was rejected due to pervasive retrospective patterns, among other issues, and uncertain estimates of total catch was explicitly identified as a significant deficiency.

In addition to the straight-forward problems of program implementation, part of the problem with the New England groundfish monitoring program is the reliance on the coefficient of variability (CV) standard. CV aims for precision, not accuracy. As discards as a percentage of catch increase, combined with the presence of observer bias, the likelihood increases that the data produced by relying on the CV standard are precisely wrong. *See* Attachment 1 at 14-15. At a Groundfish Plan Development Team (PDT) meeting in June 2018, NOAA Fisheries itself conceded that “[the existence of bias] may call into question [the CV method’s] validity for determining monitoring coverage.”¹⁴ At the same meeting, NOAA Fisheries also provided an analysis that showed, in part, further evidence that “what observers are seeing for catch composition is different than on unobserved trips, so that there is bias in the discard estimates.”¹⁵ If observers are not even reporting the discards that are occurring on the trips they take, this bias is dramatically compounded.

When managers lack reliable information on the amount of catch, both directed and unintentional – as has been the case in the New England groundfish fishery – increased scientific and management uncertainty result, as does the potential for overfishing. There can be no serious question that the Council and NOAA Fisheries are failing to deal adequately with the significant uncertainties that have applied for years in the groundfish fishery and are now increasing. The National Standard 1 Guidelines explicitly call for adequate buffers between the overfishing level (OFL), acceptable biological catch (ABC), and annual catch limit (ACL) in order to ensure that uncertainty in either science or management does not result in overfishing.¹⁶ When the actual in-season monitoring coverage falls below the already inadequate coverage requirements, the guidelines call for the annual catch limit to be even further reduced to prevent overfishing.¹⁷ NOAA Fisheries, however, has not required any buffer changes as monitoring levels have declined and has increased the ACLs on some stocks even while overfishing persists.

¹⁰ https://www.nefsc.noaa.gov/publications/crd/crd1717/gulf_of_maine_cod.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ https://www.nefsc.noaa.gov/publications/crd/crd1717/georges_bank_cod.pdf.

¹⁴ https://s3.amazonaws.com/nefmc.org/6a_180601_Groundfish-Committee_meeting_summary_Final.pdf.

¹⁵ *Id.*

¹⁶ *See* 50 C.F.R. §§ 600.310 (f)(2)(ii) (“The ABC control rule must articulate how ABC will be set compared to the OFL based on the scientific knowledge about the stock or stock complex and taking into account scientific uncertainty.”); 600.310(f)(4)(i) (“ACL cannot exceed the ABC...ACLs in coordination with [accountability measures] must prevent overfishing (see MSA section 303(a)(15)). If an Annual Catch Target (ACT), or functional equivalent, is not used, management uncertainty should be accounted for in the ACL.”)

¹⁷ *See, e.g.*, 50 C.F.R. § 600.310(g)(2) (“For fisheries without inseason management control to prevent the ACL from being exceeded, AMs should utilize ACTs that are set below ACLs so that catches do not exceed the ACL.”).

While the SSC has attempted to account for scientific uncertainty in setting OFLs and ABCs, the management uncertainty buffers applied between the ABC and sub-ACLs are low to the point of being meaningless in these overfished and unhealthy fisheries. In New England, these buffers are based on four criteria: (1) enforceability and precision of management measures, (2) adequacy of catch monitoring, (3) latent effort, and (4) catch of groundfish in non-groundfish fisheries.¹⁸ There has been no adjustment upward to capture the observer bias that is now documented in the fishery.¹⁹ Nor is there any direct consideration of stock health for either uncertainty buffer in New England, whereas in the 100 percent monitored Pacific groundfish fishery, buffer levels do take stock health into account.

Implosion of the sector at-sea monitoring program

Given the region's dismal track record in preventing overfishing, it was shocking to learn several months ago that sectors operating in the groundfish fishery are significantly failing to meet even their current, albeit inadequate, at-sea monitoring requirements. GARFO's own analysis reveals realized coverage for a majority of sectors that represent most of the groundfish fleet is as low as 1.8 percent.²⁰ The current reality has become undeniable: the monitoring system in New England is so broken that vendors cannot provide monitoring services under the present circumstances, and NOAA Fisheries and the Council are now enabling sectors to avoid their regulatory monitoring obligations. This utter lack of accountability has produced a "management" approach that is based, at best, on professional guesswork, not data or science.

We would have expected the acknowledgment of management failure and contract violation that these sector monitoring letters represent to be accompanied by an immediate and consequential corrective response from NOAA Fisheries, GARFO, and the Council, requiring immediate steps to bring sectors into full compliance. However, the GARFO letters and agency statements at the December 2018 Council meeting seem to suggest that your view is that this is simply a routine matter of training more observers and working with the sectors to make sure that fishermen are following their own sector monitoring rules, effectively kicking the problem down the road without consequences yet again. NOAA Fisheries appears reluctant to hold noncompliant sectors accountable with penalties or other sanctions as long as the sectors claim to operate in "good faith" with GARFO to fix the situation. However, behind this façade of "business as usual" is the reality that the monitoring system in New England is utterly broken. There is an urgent need to develop a new monitoring system that provides the full accountability that the fishery requires for recovery and sustainable management.

Unacceptable progress on Amendment 23

The law requires – and the region's groundfish resources and those who depend on them deserve – replacing the current monitoring approach with one that produces accurate as well as precise estimates. Amendment 23 to the Northeast Multispecies Fishery Management Plan is the vehicle the Council and NOAA Fisheries have determined will be used to accomplish that

¹⁸ https://s3.amazonaws.com/nefmc.org/180220_Groundfish_FW57_Appendix_II_Calculation-of-ACLs_FINAL.pdf.

¹⁹ *Id.*

²⁰ See Letters to 15 sectors dated September 25, 2018, from Michael Pentony, Regional Administrator for NOAA Fisheries Greater Atlantic Regional Fisheries Office, included as Attachment 3 (GARFO Letters).

objective.²¹ And yet, as you all recognize, the Council is making little progress on the amendment. The pace and approach to developing Amendment 23, unfortunately, resembles the Council's earlier efforts to address the economic and social impacts of fleet consolidation and quota allocations in Amendment 18: slow progress with frequent deferrals of action steps and a consistent pattern of revisiting decisions. Amendment 18, as we repeatedly expressed to you at the time, ultimately produced a set of management strategies that fundamentally failed to address the consolidation problem that it was intended to fix.

If immediate steps are not taken, the same pattern will play out and Amendment 23 will meet the same fate as Amendment 18. Notwithstanding the imperative to increase accountability in the fishery, to better understand why so many groundfish stocks have performed so poorly for so many years despite fishermen "staying within quotas," and to improve data inputs to the stock assessment models that are performing so poorly as management tools, Amendment 23 will become yet another example of the Council and NOAA Fisheries delaying the process out of fear that the necessary corrective management actions will be controversial, complicated, or expensive.

Amendment 23 was introduced in **September 2016**. Now, **more than two years later**, the Council has yet to put alternatives on the table for consideration. The delays have been the result of a garden variety of bureaucratic issues that are well within your power as leaders to cut through. The most recent delay, which will postpone review of the Amendment 23 alternatives from the Council's January 2019 meeting to the April meeting, was caused by the "challenge" of scheduling a special meeting between the PDT, the Groundfish Advisory Panel, and the Groundfish Committee. Even the need for this special meeting, in part, illustrates the bureaucratic fog surrounding this amendment: Council staff openly questioned the purpose of the amendment at a Groundfish Committee meeting – two years into the process.

Unfortunately, this example is just one in a long string of delays that Amendment 23 has faced since the beginning, and for which there appears to be no end in sight. In a recent meeting with EDF, Council staff hinted that getting the Draft EIS ready in time for a September 2019 Council meeting would be extremely difficult, even assuming the alternatives make it to a Council vote by April. While ongoing efforts to synthesize and peer-review important analyses that will underpin the alternatives are important and take time, the meta-message from the Council's Executive Committee and NOAA Fisheries is that it is acceptable to continue to delay the process, allowing fishing without accountability for yet another season, if not more. Based on everything we as members of the public can see, your leadership on these key issues is lacking.

We can only hope at this point in time that it is not too late for the Council and NOAA Fisheries to ensure that prompt and effective actions are taken to meet the purpose and need of Amendment 23 as immediately as the dire circumstances of groundfish populations require, and that sector accountability is elevated as a critical agency priority before some of these stocks, especially Gulf of Maine cod, drop to such low levels that they can never recover.

As the Council and NOAA Fisheries will already miss the intended 2019 fishing year implementation date for Amendment 23, the agency should demand specific and enforceable

²¹ The Groundfish PDT has concluded that the CV standard will not likely achieve the purpose and need of Amendment 23: "Framework 48 stated that the minimum coverage level based on CV is only appropriate for sector monitoring purposes if there is no evidence that behavior on observed and unobserved trips is different. If there is evidence that behavior is different, then a higher coverage level may be required to ensure the accuracy of discard estimates." Draft Alternatives document of March 20, 2018.

deadlines for each stage of the Amendment 23 process, ensuring that it will be concluded in time to have a new monitoring system on the water for the 2020 fishing year.

In tackling this persistent problem with at-sea monitoring, NOAA Fisheries should not hide behind the current expensive, cumbersome, and inefficient system of human observers – even if the agency were able to fix the current problems causing the systemic breakdown of the ASM program. EDF and CLF, not to mention many other organizations, agencies, and individuals across the fishery, have worked diligently and successfully for years to pursue methods to improve reliability and coverage levels using electronic monitoring and reporting. This is not new territory. The Pacific multispecies groundfish fishery now has 100% at-sea monitoring and 100% dockside monitoring in place and it appears to be working well, and is in the process of a transition to EM coverage.

Simply implementing these new monitoring tools and techniques in combination with human collection and evaluation of data as needed will ensure that the reliable and accurate data needed to manage the groundfish fishery is available at a reasonable cost.²² What is of overriding importance now is achieving full accountability in the groundfish fishery so that it too may someday join the ranks of the nation's sustainably managed fisheries.

NOAA Fisheries must exercise its leadership and oversight duties to regain control of the New England groundfish fishery.

Preventing overfishing remains the most central, important, and unqualified mandate of the fishery law you are charged with implementing. If the statutory goals of producing optimum yields of New England's groundfish fisheries are ever to be achieved, the agency must ensure that:

- New England's groundfish stocks are not overfished;
- overfishing is prevented;
- there is demonstrable compliance with annual catch limits with no illegal discards and full accounting of regulatory discards;
- appropriate management and science buffers are set;
- necessary steps are taken to rebuild overfished stocks;
- the fishery is managed based on the best scientific information available; and
- sectors follow their own rules and contractual obligations.

It is black letter law that regulators must ensure that fishery management plans have at least a 50 percent chance of achieving a rebuilding plan's goals²³ using appropriate scientific and management buffers. The agency has further adapted and expanded that standard.²⁴ Nonetheless, that has not happened in the New England groundfish fishery. NOAA Fisheries has sanctioned and enabled the overfished condition of cod and yellowtail flounder since the early 1990s and seems unwilling to take the necessary corrective actions. Assessment after assessment, there has been an

²² Furthermore, given the new additional resources provided to NOAA Fisheries for supporting the costs of ASM, cost is not the issue. NOAA Fisheries has informed industry members that some \$4.6 million will be available for covering ASM industry costs in FY2019 alone. See <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-announces-reimbursement-sector-sea-monitoring-costs>. That is an exorbitant budget for the published number of observer days, and we encourage the agency to use some of the remaining funds to increase monitoring levels immediately, including accelerating the development of more durable and reliable means of collecting fishing data.

²³ See *NRDC v. Daley*, 209 F.3d 717, 753-754 (D.C. Cir. 2000),

²⁴ See 50 C.F.R. § 600.310(f)(4).

unbroken demonstration that the ACLs that you are setting and the buffers you are using are not preventing overfishing.

The combination of unrealistically low buffers between OFLs and ACLs, demonstrated biases in existing catch data, low monitoring rates, lack of discard monitoring, and, most recently, indications that even those low monitoring rates will not be achieved this year, remove any serious question about two things: 1) overfishing is still occurring on key groundfish stocks, and 2) meaningful measures to ensure accountability with ACLs at-sea are not in place or on the horizon. The result is a fishery that blatantly violates the MSA.

To meet statutory obligations and to offer any hope of rebuilding and ending overfishing of depleted groundfish stocks in New England, the Council and NOAA Fisheries must, at a minimum, access and employ accurate and precise data obtained through a reliable at-sea monitoring program. Statistically reliable data are also necessary to ensure full accountability and fundamental fairness so that all fishermen play by the same rules and catch limits are observed. NOAA Fisheries' chronic failure to demand the same standards in New England that have been demonstrated to achieve management success in other regions undercuts the integrity of the sector system here in New England and jeopardizes the economic and social prospects of the fishery, further eroding the public's trust in fisheries management.

We believe it is past time for everyone engaged with this fishery to face the facts: NOAA Fisheries and the Council have lost control of this fishery and are essentially managing the fishery in the dark. The management measures in place in this fishery are forcing even the most honorable fishing operations to violate the law if they are to survive in the fishery's current environment. There is no way to scientifically determine whether the fishery is in compliance with ACLs and no rational basis for arguing that it is.

In order to cure existing legal violations, NOAA Fisheries and the Council must establish and stick to an aggressive timeline for Amendment 23, using firm deadlines so that full accountability is in force in the fishery no later than the start of the 2020 fishing year. In the meantime, NOAA Fisheries must use the substantial taxpayer resources that have been dedicated to monitoring of this fishery and that are currently sitting idle to immediately increase coverage levels to comply at a minimum with the existing monitoring requirements by the start of the next fishing year on May 1, 2019. The current failure of observers to record discards must be corrected immediately. The Secretary must use his emergency authority, if necessary, in order to remedy the overfishing that is under way at this time.

We request a meeting with you in Washington to discuss this critical situation. We would hope this meeting could take place before the New England Fishery Management Council convenes on January 29, 2019. Please advise us at your earliest opportunity whether and when such a meeting could be scheduled.

Very truly yours,



Peter Shelley
Senior Counsel
Conservation Law Foundation



Matt Tinning
Associate Vice President, Oceans
Environmental Defense Fund

Attachments:

Transcript of discarding discussion at April 2018 New England Council meeting

EDF FR55 letter

GARFO September 25 letters

EDF AM23 letter

FY19 spend plan

CC:

Cisco Werner, Ph.D., NOAA Fisheries Director of Scientific Programs and Chief Science Advisor

Sam Rauch, Deputy Assistant Administrator for Regulatory Programs

Jon Hare, Ph.D., NOAA Fisheries Science and Research Director, Northeast Fisheries Science Center

Jason McNamee, Ph.D., Chair, New England Fishery Management Council Science and Statistical Committee

Transcript of April 17, 2018 New England Fishery Management Council Audio Recording:
"Introductions, Announcements and Reports on Recent Activities" Agenda Item

Section related to the discussion about increased reporting of illegal discarding of groundfish in the inshore Gulf of Maine, 2018, including reports that federal fishery observers were not reporting the illegal discarding activities. The discussion begins at roughly 22 minutes into the recording and ends at 30 minutes.¹

Tom Nies, NEFMC executive director:

- Historically over last 20 years, common to know that haddock move in shore to the inshore Gulf of Maine, usually around the end of March, beginning of April. Particularly with this year, vessels are moving in shore to the inshore Gulf of Maine to target haddock during the month of April.
- At one time, we had a rolling closure in the month of April that prevented this activity and permitted the fishery from benefiting, but rolling closure was originally designed in part to minimize the catches of cod. Go back years before rolling closures came in place, April was always a big month for cod and dabs to be caught by inshore fishermen.
- So the reason I mention that, I don't typically get many calls or communications directly from fishermen in a given month period, but I want to make sure you're aware that last couple of weeks, I've been repeatedly contacted by fishermen who are reporting that in the inshore Gulf of Maine, there are a number of vessels moving into the inshore Gulf of Maine to target haddock and discarding cod in large quantities. I don't have a way to verify the reports, but the argument is that there are vessels primarily those without observers are discarding cod in large quantities and getting reports of fishermen dragging up piles of dead cod in scallop dredges and trawls.
- One or two arguments say that this is happening with vessels who have observers and that there is some complaint that the observers are not recording the cod discards, and I'm not sure if this is happening or not because I do not see the observer reports
- 3 general questions related to that:
 - Curious whether or not the agency is receiving any of the same reports that my staff and that I am getting
 - Second, whether we know the observers are documenting any discards of cod in the area or whether they are documenting whether boats are able to catch haddock without catching cod?
 - If you've heard of any of these reports, is the Agency got any plans or are you going to be able to take any action to verify the reports that this activity is going on to stop the illegal discarding of legal sized groundfish?

¹ ps://s3.amazonaws.com/nefmc.org/180417_1_Intros-and-Reports.mp3

(Mike Pentony, NOAA Regional Administrator of GARFO, asks Sarah Heil to respond)

Sarah Heil, NOAA Groundfish Team Leader, GARFO:

- Responding to Tom's first question, we have received a lot of reports this Spring about cod discards inshore and there are unique aspects about these reports but first I'd like to note that although everything is concentrated on cod discards right now or this Spring, we do hear from individuals throughout the entire year about discarding not only on cod but other groundfish stocks inshore and beyond.
- What's unique about this year as Tom has mentioned, is that in the past, it's common to hear from a handful of individuals about discarding. This Spring, the number of individuals coming to us with reports about cod discarding is unusually high.
- The other unique aspect is that these are concentrated on cod in Stellwagen this Spring, and as Tom mentioned, this area used to be part of the April rolling closure until a few years ago, and so it's probably not surprising to most of you to hear about high cod and haddock catches coming from this area.
- Reports we are receiving this spring are that there are discards up to 2000-3000 pounds per trip happening in this area. We are hearing reports from not just groundfish vessels but other non-groundfish vessels that they are catching dead cod in many of their tows.
- We are also hearing reports about observers not recording these discards and that is something Dr. Hare can follow up on in a moment.
- I think another thing is to characterize some of the reports that we're getting this Spring. It is helpful to share some of the other information that is coming from Industry along with these reports and it probably explains why there is increased number of individuals coming to us.
- Industry are expressing increased frustrations with how wasteful discarding is and the potential impact or future impact on the stock. Related to this, people are concerned that widespread discards puts bad data into the system and puts bad data into the science, and connected to that, Industry are expressing frustrations that continued bad data into the system continues to give quotas that aren't reflective of what they are seeing on the water and it's not reflective to the fish available to the fishery right now.

Jon Hare, Director, NOAA Northeast Fisheries Science Center:

- At the Science Center, we have also been receiving multiple reports about cod discarding in the Western Gulf of Maine with particular focus on the observer issues.
- We've received reports that observers are not recording cod discards on vessels. In response, we sent notice to all observer providers and all observers regarding the standard of conduct and what the consequences are for not reporting.
- We also thanked all of the observers and observer providers that this is a very difficult job.

Transcript of April 2018 New England Fishery Management Council Audio: "Introductions, Announcements and Reports on Recent Activities." Section related to the discussion about increased reporting of illegal discarding of groundfish in the inshore Gulf of Maine, 2018

- I can't comment on any open incident reports regarding discarding and observers on board. Several of those cases, the Office of Law Enforcement is looking into them.

Tim Donovan, Assistant Director for Enforcement, NOAA Office of Law Enforcement:

- We have been receiving reports of discards and are actively pursuing all leads. These violations are hard to detect when you think of our operation and what is going on offshore.
- My folks have been talking to Industry, and this is an opportunity for Industry to step up and help us. A lot of this comes down to identifying those vessels that are actually doing it. And as you can imagine, it's difficult for someone to drop the dime, but we encourage that activity. In the past, we've used our asset forfeiture fund to assist with rewards.
- We're getting that message back up to the fleet that there is an opportunity to earn a reward to help us on this particular issue.
- We are working with the coastguard. They've assisted us with some air flights.
- We're looking into following up with the observer program on those.
- We're looking into starting to do more analysis on the data, looking at VMS and landing data.
- What I can tell you is that we have shifted resources to this issue and we're actively pursuing those investigations.

Jon Hare, Director, Northeast Fisheries Science Center:

- I'd like to follow up on one of Sarah's points that not reporting fish, seeing fish, not reporting fish, is going to impact the assessment and it's going to increase the divide between the perspective of fishermen on the water and the perspective coming out of assessment. So, from a Science Center perspective, from a NOAA fisheries perspective, we need good data and accurate reporting for fisheries management and fisheries assessment to work.



John K. Bullard
Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930

Re: Comments on Groundfish Framework Adjustment 55

Dear Administrator Bullard:

Thank you for the opportunity to comment on the proposal to approve and implement the management measures in Framework Adjustment 55 (Framework 55) to the Northeast Multispecies Fishery Management Plan (FMP). See 81 Fed. Reg. 15,003 (March 21, 2016). Specifically, you have requested comment on whether these measures are consistent with the FMP, including Amendment 16; the Magnuson-Stevens Act (MSA) and its National Standards; and other applicable law. While we support many of the proposals included in Framework 55, we oppose the reduction in monitoring levels contemplated in the framework. Approving it would render inoperable existing measures to ensure accountability with annual catch levels and result in an unacceptably high likelihood of overfishing in violation of the MSA and implementing case law. Approving Framework 55 in its current form would also violate the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, as well as contravene Amendment 16 as modified by Framework 48. Therefore, we urge the National Marine Fisheries Service (NMFS) to partially disapprove Framework 55 insofar as it reduces monitoring levels from a projected 41 percent to 14 percent.

Many of Framework 55's proposed measures are necessary to improve management of the fishery and conform to applicable law. We support adopting catch limits for groundfish stocks based on the 2015 assessment updates, setting shared U.S./Canada quotas for Georges Bank (GB) yellowtail flounder and Eastern GB cod and haddock, creating a new sector, modifying the sector approval process, adjusting gear requirements, removing the Gulf of Maine cod prohibition from Framework 33 for recreational anglers, and allowing sectors to transfer GB cod quota from the eastern to western areas. Fortunately, NMFS has the authority to partially approve an amendment to an FMP, approving the measures that are consistent with applicable law while disapproving measures that are inconsistent. See 16 U.S.C. § 1854(a)(3). Therefore, we urge NMFS to approve the majority of Framework 55 while specifically disapproving the measures that would lead to a drastic reduction in monitoring levels.

We do not urge maintaining adequate monitoring levels because we support continued reliance on the existing at-sea monitoring (ASM) program. That program, which places human observers onboard selected vessels in order to verify area fished, catch and discards, can indeed be very expensive. Moreover, the current ASM program only monitors a small fraction of fishing trips, extrapolating the data collected to unobserved trips. What we oppose is allowing even lower levels of monitoring for a fishery that is in dire need of much higher levels. A transition to widespread monitoring, facilitated by the use of electronic monitoring (EM) technologies, can deliver important economic and conservation benefits to the fishery and the fishermen who rely on it.

Proposed Groundfish At-Sea Monitoring Program Adjustments

The agency proposes in Framework 55 to significantly reduce observer coverage in the New England groundfish fishery by changing the method of calculating the percentage of fishing trips that would need to be monitored. See 81 Fed. Reg. at 15,015. Monitoring in the groundfish fishery is accomplished through a combination of the Northeast Fishery Observer Program (NEFOP) and ASM program, through which observers are selected to accompany a percentage of fishing trips to collect fishery data. Discards and other data are estimated for all fishing trips based on the data collected on observed trips. The agency sets the monitoring coverage at the lowest level required such that 80% of discards by weight can be estimated at a 30% coefficient of variance (CV) or lower. The coefficient of variance is a precision measurement calculated as a ratio of the sample standard error to the sample average,¹ meaning that monitoring levels resulting in a lower CV value generates more precise – but not necessarily more accurate – discard estimates.

Framework 55 proposes several changes to the calculation, each of which can reduce the observer coverage needed to reach the 30% CV limit. With no change to the CV calculation (the “No Action” alternative), observer levels would be set at 41% for the fishing year starting May 1, 2016. See Table 14, 81 Fed. Reg. at 15,017.

First, NMFS proposes to remove its “administrative” standard of setting observer coverage levels to ensure that at least 80 percent of discarded pounds in the groundfish stocks are estimated at the 30% CV statistical quality. NMFS states that “applying this standard resulted in higher coverage levels than if the standards were not applied.” *Id.* at 15,017. This action would reduce the observer coverage level needed to maintain a 30% CV down to 37% of trips. *Id.*

Second, extra-large mesh gillnet trips would be exempted from the ASM observer requirements. This action, if implemented alone, would also reduce the observer coverage level needed to maintain a 30% CV down to 37% of trips. *Id.* at 15,017-15,018.

Third, the proposed rule explains that the ASM coverage levels have, up to now, been set only using the immediately previous available fishing year’s data. As NMFS explains, “there is the potential” – apparently not yet observed – “that variability could result in large fluctuations” in monitoring levels, hypothetically frustrating business planning for the fishermen and observer providers. *Id.* at 15,018. The agency proposes to avoid these anticipated fluctuations by using

¹ See, e.g., Zar, J.H. 1999. *Biostatistical Analysis*, Fourth Edition. Prentice Hall, Upper Saddle River, NJ. 663 pp.

the average of the last three years of available fishing data. *Id.* In operation, this switch would also lead to a lower level of required monitoring levels for the 2016 fishing year – down to 17% of trips. *Id.* at 15,018.

Fourth, the proposed rule explains that NMFS had been using the individual stock that needed the highest coverage level to achieve a 30% CV. *Id.* at 15,016. NMFS proposes to instead filter the application of the 30% CV standard so fish that meet certain health criteria (specifically, redfish) would no longer drive the coverage level. These criteria are: 1) not overfished; 2) overfishing is not occurring; 3) not fully utilized (less than 75% of the sector quota limit is harvested; and 4) discards are less than 10% of total catch. *Id.* at 15,018. This action, if implemented alone, would reduce monitoring levels to 26% of trips; if implemented in conjunction with the other measures above, the level would drop to 14%. *Id.*

The agency describes these changes largely in the context of the need to comply with the 30% CV standard, first established in Framework 48, 78 Fed. Reg. 26,118, 26,129 (May 3, 2013). With minor exceptions, monitoring in the fishery has adhered to this standard for some time, but significant problems remain, as noted below. Fundamentally, CV is a precision standard that ensures that the variance within the sample is not too far from the sample average – but does not measure how close the estimate is to the correct or “true” value.² A skewed sample (as would be produced by data collected from a selection of fishing trips where behavior is known to change once observers are not present) may therefore show a relatively low CV but could be completely divergent from reality. NMFS’s ability to propose measures that could reduce the monitoring down to 14% for a fishery that is experiencing such fundamental problems and yet stay within the 30% CV precision standard thus exposes the basic flaw in reliance on this standard. Indeed, the groundfish Plan Development Team “has repeatedly noted that the standard may not be appropriately addressing the goal of accurately determining sector catch and ACE utilization.”³

Monitoring options besides CV are just as statistically valid, yet yield a much different result in terms of monitoring levels, equitable distribution, and total cost. For example, one approach that is being explored is the “Weighted Discard Proportional Approach” (DPA), recently described to the Council by Dr. Jenny Sun.⁴ In general, the DPA assigns coverage proportional to discards, weighted by the expected utilization rate of each stock. DPA provides coverage that is more fair and equitable, since fishing boats that discard higher total pounds of discards – likely larger vessels with more ability to pay – would pay higher total monitoring costs. Coverage must still be representative of fishing, so additional work is still needed to determine the explanatory power of vessel size and trip length variables in relation to discards

² See, e.g., Zar, *supra* note 1.

³ See Sun, C-H.J. and Fine, L. A cost-effective discards-proportional at-sea monitoring allocation scheme for the groundfish fishery in New England. 66 *Marine Policy* 75-82, 77 (2016), citing to Greater Atlantic Regional Fisheries Office, “Summary of Analysis Conducted to Determine At-Sea Monitoring Requirements for Multispecies Sectors: FY2015” at p.40, 2015, available at http://www.nefsc.noaa.gov/fsb/asm/FY2015_Multispecies_Sector_ASM_Requirements_Summary.pdf.

⁴ See, e.g., Meeting Agenda, Wed. Mar. 30, 2016, Groundfish Plan Development Team, <http://s3.amazonaws.com/nefmc.org/160330-Groundfish-PDT-meeting-agenda.pdf>.

rate by stock area and gear. This approach could still be subject to the observer effect, but the effect could be mitigated to a degree by using vessel size and trip duration as determinants of observer coverage, regardless of total pounds caught on the trip. Finally, DPA would assign more observers to stocks that are of concern, so it might be possible that small boats that target cod, for example, would have a higher coverage rate than a large vessel targeting redfish. Given the inadequacies of the CV method, DPA deserves careful consideration.

I. Background

Reviewing the conservation and economic context in which the rule is proposed serves to illustrate the significant threat to the sustainability, and indeed the existence, of New England groundfish fishing if the problematic portions of Framework 55 are approved.

Many stocks in the New England groundfish fishery suffer from low population sizes and overfishing. As the Environmental Analysis (EA) contained in the Council's formal submission to NMFS of Framework 55 shows in Table 94, the realized CV has been well under the 30% standard for the vast majority of stocks for the last three years, and yet the problems with some stocks in the fishery continue to worsen. Table 63 on page 167 details the status of the stocks and shows that 13 of 20 stocks are either overfished or the overfished status is unknown. Three of these stocks were in year six of a seven year rebuilding plan according to the December 31, 2015 Fish Stock Sustainability Index (FSSI) and non-FSSI stock status tables,⁵ meaning that they are to be rebuilt by next year.⁶ Those tables also show ten other rebuilding plans in progress and two that were in year 12 of ten year rebuilding plans – in other words, they have already failed to rebuild by the date established in the FMP: 2014.⁷

Meanwhile, stock assessments in the fishery have shown what is known as retrospective bias, meaning that although technically the annual catch limits (ACLs) established by the agency have not been exceeded, the stock assessments show overfishing has occurred. For example, according to all available data, catches since 2010 have been *below* the commercial sub-ACLs for Cape Cod/Gulf of Maine yellowtail flounder, yet the stock continued to experience overfishing in both its previous and current stock assessments. EA at 167, Table 63. In other words, despite science-based quotas and data collected by the levels of observer coverage determined to be sufficient to meet the 30% CV standard, it is later found that overfishing continues. This disconcerting reality is likely the product at least in part of unreported discards as described in the GOM cod case study below.

Quotas for some target stocks have declined materially over the past several years, including cod, yellowtail flounder, grey sole, and dabs. The ACLs for the George's Bank cod and Cape Cod/Gulf of Maine yellowtail flounder stocks, for example, have been reduced, first following the updates and peer review of 13 Northeast Groundfish Stocks conducted in 2012 and again following the 2015 groundfish operational assessments. The commercial quota for

⁵ FSSI and non-FSSI tables can be found at http://www.nmfs.noaa.gov/sfa/fisheries_eco/status_of_fisheries/archive/2015/fourth/q4-2015-stock-status-tables.pdf.

⁶ See Amendment 16 at 81 (Oct. 16, 2009); available at http://s3.amazonaws.com/nefmc.org/091016_Final_Amendment_16.pdf

⁷ *Id.* at 83.

George’s Bank cod dropped from 4,605 metric tons (mt) in fishing year 2012 to less than half that amount – 1,807 mt – the following year. This fishing year the commercial quota has dropped to only one-third of the 2013 level, 608 mt, an 86.8% total reduction from 2012. EA at 46 Table 10. The commercial quota for Cape Cod/Gulf of Maine yellowtail flounder likewise fell from 760 mt in fishing year 2012 to 479 mt in 2013 and only 341 mt in 2016. Gulf of Maine cod’s situation is described in greater detail below. These very low quotas all suggest that more careful monitoring is required to ensure that they are not exceeded. See 16 U.S.C. §§ 1853(a)(15), 1852(h)(6) (requiring ACLs and measures to ensure accountability with them).

Reducing monitoring levels will produce particularly negative impacts on data collection for so-called “non-allocated stocks”: wolffish, northern windowpane flounder, southern windowpane flounder, and ocean pout. See EA at 187, 192 Fig. 22. These species “are essentially discards only, [and] estimates of catches rely on observations at sea.” *Id.* Three of these four stocks are overfished as of their most recent assessments, with wolffish in year six of a rebuilding plan without a deadline, northern windowpane flounder in year six of a seven year rebuilding plan, and ocean pout in year 12 of a ten year rebuilding plan. EA at 167 Table 63; *supra* n. 5. Reducing monitoring levels can be expected to have a distinctly negative impact on data collection for these struggling stocks given that those data are collected *only* via monitoring (since the non-allocated stocks cannot be landed), although it is difficult to estimate the full impact that the reduction in monitoring precision will have on these stocks, which are only monitored through observing discards.

Climate change poses another threat to this fishery. The waters off New England are warming more quickly than almost any other body of water in the United States, and in fact in the world (Mills et al. 2013),⁸ posing significant challenges for fish populations. NOAA’s recent climate vulnerability assessment concluded that the vast majority of species in the region are likely to suffer negative impacts of climate change, including the majority of the groundfish complex (Hare et al. 2016).⁹ The question is not so much which phenomenon – fishing or climate change – is responsible for lower population sizes, but that in the context of climate change we need to make more responsible management decisions so as not to push already-low populations towards commercial extinction and/or listing pursuant to the Endangered Species Act.

The situation described above – in which documented catch understates fishing mortality, conditions are changing, and rebuilding does not take place as anticipated – demonstrates that there is substantial uncertainty in managing the New England groundfish fishery. Uncertainty is of course not an unusual characteristic in fisheries management, and NMFS has specified in guidance how managers should account for two types of it: scientific uncertainty and management uncertainty. See 50 C.F.R. § 600.310(f)(4) (setting quotas must take into account

⁸ Mills, K.E., A.J. Pershing, C.J. Brown, Y. Chen, F.-S. Chiang, D.S. Holland, S. Lehuta, J.A. Nye, J.C. Sun, A.C. Thomas, and R.A. Wahle. 2013. Fisheries management in a changing climate: Lessons from the 2012 ocean heat wave in the Northwest Atlantic. *Oceanography* 26(2):191–195, <http://dx.doi.org/10.5670/oceanog.2013.27>.

⁹ Hare JA, W.E. Morrison, M.W. Nelson, M.M. Stachura, E.J. Teeters, R.B. Griffis, et al. 2016. A Vulnerability Assessment of Fish and Invertebrates to Climate Change on the Northeast U.S. Continental Shelf. *PLoS ONE* 11(2): e0146756. doi:10.1371/journal.pone.0146756.

scientific uncertainty); *id.* § 600.310(f)(6)(i) (accountability measures must be set to account for management uncertainty).

It is no surprise that both kinds of uncertainty are found in the Northeast multispecies fishery. For example, NMFS notes that target catch should be set lower to reflect *scientific* uncertainty manifested by “factors such as ... the degree of retrospective revision of assessment results,” *id.* § 600.310(f)(4), which is the pattern seen in New England groundfish as noted above.

Similarly, NMFS identifies “[t]wo sources of *management* uncertainty” that managers should account for in establishing catch limits: “[u]ncertainty in the ability of managers to constrain catch so the ACL is not exceeded, and uncertainty in quantifying the true catch amounts (*i.e.*, estimation errors).” *Id.* § 600.310(f)(6)(i) (emphasis added). Specifically, the guidelines advise managers that “[t]o determine the level of management uncertainty in controlling catch, analyses need to consider past management performance in the fishery.” *Id.* Again, management uncertainty is clearly an issue for the fishery. Despite years of ostensibly holding catch within catch limits, overfishing has continued for some stocks and rebuilding is lagging for those plus others. And “uncertainty in the ability of managers to constrain catch so that the ACL is not exceeded and uncertainty in quantifying the true catch amounts,” *id.*, can only be expected to increase if NMFS approves the reductions in monitoring levels contained in Framework 55.

At present, the Multispecies FMP endeavors to take scientific uncertainty into account by establishing a buffer between the maximum amount of catch that can be allowed without resulting in overfishing, known as the overfishing level or OFL, and the allowable biological catch, the ABC. That buffer varies, but control rules designed to produce ABCs generally result in a buffer of approximately 25%.¹⁰

Quotas (ACLs) are then established by applying a further buffer that reflects management uncertainty. These buffers are approximately five percent.¹¹ In light of the difficulty in quantifying true catch amounts in the fishery (resulting largely from the observer effect), a five percent buffer is extremely low indeed especially under the current low levels of monitoring. One agency expert has opined that “[l]ow management uncertainty typically requires a good, timely inseason catch accounting system and a responsive set of management tools.”¹² Given the

¹⁰ See http://archive.nefmc.org/tech/cte_mtg_docs/101102-03/abc_control_rules/1_NEFMC-%20Control%20Rules.pdf at 2; <http://www.fisherycouncils.org/SSCpapers/SSCWorkshop10.pdf> at 38; and

http://www.fisheries.noaa.gov/sfa/laws_policies/national_standards/documents/acl_faq_may27_2011.pdf.

¹¹ See Northeast Multispecies FMP Amendment 16 at 93, Table 18. ACLs are set at a given percentage of the ABC, and the difference is the buffer that reflects management uncertainty. For example, the first stock listed, Georges Bank cod, will have an ACL of 95 percent of its ABC, reflecting a 5 percent buffer for management uncertainty.

¹² Richard D. Methot Jr., Science Advisor for Stock Assessments, NMFS Office of Science and Technology, “A Scientific Perspective on Challenges and Successes with Annual Catch Limits, and Possibilities to Improve Fishery Sustainability,” *Managing Our Nation’s Fisheries* at 65,

current low levels of monitoring and the overfishing that has resulted despite ostensible adherence to ACLs, low management uncertainty buffers are already inappropriate. Further reducing monitoring levels, as the agency proposes to do in approving Framework 55, would increase management uncertainty and, pursuant to the guidelines, require a larger buffer.

Gulf of Maine Cod Case Study

Gulf of Maine cod, which has been an important target stock for many years but is now at just four to six percent of its healthy population size,¹³ vividly illustrates the context in which NMFS is proposing to reduce monitoring levels and the possible implications of that change. The ACL for GOM cod has been cut by 95% over the last five years, and as such, it is now considered a “choke stock,” because it limits the opportunity to catch abundant, high quota species like Pollock.¹⁴

GOM cod also fits the profile of having a mismatched ACL relative to its fleet-wide catch. In New England, the fishing industry has strongly argued that their observations of GOM cod abundance are dramatically different than the ACLs imposed by managers.¹⁵ If GOM cod stocks truly are abundant and the ACLs are set too low, then it would be very difficult for fishermen to avoid them. This dynamic alone would lead one to expect higher levels of discarding on unobserved trips, but when combined with very low monitoring and enforcement levels and high lease prices for quota, the economic benefits of discarding are far greater. Table 1 shows the ACLs for GOM cod over the last five years, the total catch, the total discards, and the percentage of total catch that are accounted for by discards.

Table 1. Total Catch and Discards of GOM Cod 2010-2015

Fishing Year	Sub ACL (mt)	Total Catch (mt)	% reported caught	Discards (mt)	Discards as a % of total catch
2010	4327	3617	84%	140	3.87%
2011	4721	4368	93%	146	3.33%
2012	3619	2181	60%	122	5.60%
2013	812	732	90%	20	2.69%
2014	810	652	81%	24	3.68%
2015	201	138	68%	12	8.87%

http://www.nmfs.noaa.gov/sfa/laws_policies/national_standards/documents/methot_2013_monf.pdf.

¹³ See 2015 operational groundfish assessments; GOM cod version found at http://www.nefsc.noaa.gov/publications/crd/crd1524/Individual%20Stocks/GOM_Atlantic_cod.pdf

¹⁴ Sun, J. and A. Kitts. “Groundfish Sectors Business Viability Assessment: Analyzing the Time-Value of the ACE Leasing Price and the Utilization of ACE”. Fall 2014 Seminar Series, School for Marine Science and Technology, University of Massachusetts Dartmouth, Fairhaven, MA, Oct. 29, 2014.

¹⁵ Okeefe, C., Cadrin, S., and J. Wiersma, “Fishery Dependent Data in New England Stock Assessments.” Presented at Taking Stock Workshop, Nov. 9, 2015, Plymouth, MA.

This table tells an interesting story. First, even though quota for GOM cod was cut by another 75% from the already low 2014 level, the fleet has only reported harvesting 68% of the 2015 ACL. If, as the industry contends, GOM cod are highly abundant and hard to avoid, why is reported catch limited to such a low proportion of such a miniscule quota? This inconsistency suggests either that all catch is not being reported or that the population is in fact at such low levels that it is difficult to catch even a historically minimal quota.

But even more interesting is the relative percentage of discards to total catch, which in 2015 was two and a half times greater than the five year average (2010-2014). The best explanation for this phenomenon is high levels of unreported discarding of GOM cod on unobserved trips. Understanding why requires an examination of how catch and discards are measured in this fishery.¹⁶ Regulations require that fishermen land legal size GOM cod and have quota share sufficient to cover those landings and all discards. If they do not already own the quota, they must lease it from other participants. *No* legal size GOM cod should be discarded.

Discards of sublegal (too small) fish are tabulated on those trips that carry observers. Regulators then calculate an assumed discard rate based on those observed trips by determining the ratio of the total GOM cod discards to the total kept weight of all landings. Discards for GOM cod for unobserved trips are then calculated by multiplying that weekly assumed discard rate by the total weight of landings (of all species) for each trip. These GOM cod discards are calculated for unobserved trips even when fishermen report no landings of GOM cod on that trip.

If on unobserved trips in 2015 fishermen were keeping and recording the legal-sized cod as mandated by regulation, the overall discards percentage of total catch would likely remain consistent with past years. But if large amounts of GOM cod are discarded on unobserved trips and not landed, one would expect discards as a percent of total catch to be much higher than previous years. Table 1 shows just this situation.

In fact, it is straightforward to show that if the five year average (2010-2014) of discards as a percentage of total catch (which is approximately 3.83%) were applied to the 2015 fishing year, the total catch would be 313 mt—not 138 metric tons as reported—to maintain the same average ratio of discards to total catch as the previous five years. This scenario would mean that the 2015 ACL for GOM cod was exceeded by some 64%. And if the anticipated recreational catch of 185 mt is then added to the revised commercial catch, total catch would equal 498 mt, only 16 mt below the overfishing level of 514 mt. Put differently, straightforward calculations based on very legitimate assumptions suggest that catch was only four percent below the overfishing level for GOM cod in 2015.

Clear patterns in the data thus indicate that the observer effect and perverse economic incentives stemming in large part from an unduly small amount of monitoring resulted in quota overages and possibly overfishing in fishing year 2015 when that monitoring level stood at 24 percent. Reducing that level further, to only 14 percent, is virtually certain to result in quota overages and potentially overfishing.

¹⁶ This discussion focuses on GOM cod, but the same rules and calculations apply to all species governed by the Multispecies FMP.

Some may seek to offer alternative explanations for the dramatic change in the 2015 discard data, such as an environmental anomaly, changes in the areas fished, or the use of new fishing technology or smaller mesh sizes. Such explanations would be farfetched. For an environmental anomaly to explain these data, on average fishermen would be running into sub-legal size cod fish on observed trips at a rate that is 2.5 times higher than in the previous four years. This is highly unlikely. Given that fishing technology, mesh size, and areas fished has remained relatively unchanged over this time period, these are unlikely factors as well.

Low Monitoring and High Quota Prices

The most likely reason for the high levels of illegal discarding of legal sized GOM cod on unobserved trips is the combination of low monitoring and enforcement and high lease prices for cod quota. Given that the assumed point of quota control is the landing site, not at sea through effective monitoring, fishermen have the option of discarding fish at sea in order to reduce the quantity landed against their quota.

Hatcher (2015)¹⁷ developed a model of the individual fishing firm with quota non-compliance, discarding, and the assumption of no at sea monitoring. Based on this model (and consistent with common sense and business practices), the individual fishing firm will choose the optimal level of harvesting, quota leasing, and discarding in order to maximize profits. The first order conditions show that if the costs to land an additional unit of fish (*e.g.* GOM Cod) are greater than the market price of that fish, then the “optimal decision” is to discard the fish at sea.

In the case of 2015 GOM cod, since the ACL was not met,¹⁸ there was opportunity to lease quota to cover any individual overage. But Hatcher shows that if the cost to land and lease quota for GOM cod is greater than the market price paid at the dock for GOM cod, then the profit-maximizing decision for the individual is to discard.

Not all fishermen will make the profit-maximizing choice, and not all prices are always known. But, for GOM cod, this scenario has seemed to play out. According to the Portland Fish Exchange, the average market price for GOM cod since May 1, 2015 is roughly \$2.40 per pound. Based on personal communication with sector managers and fishermen, the average lease price for GOM cod quota this year was roughly \$3.50 per pound. So, the profit-maximizing decision for an individual who does not have sufficient allocation of GOM cod is to discard it at sea. This could explain part of the high ratio of discards to total catch – relative to past years (2010-2014) – observed in the 2015 Sector landings data.

Low Monitoring Levels will Exacerbate the Observer Effect

¹⁷ Hatcher, A., “What determines Quota Prices in Multi-species ITQ Fisheries?” European Association of Environmental and Resource Economists 21st Annual Conference 24 - 27 June 2015, Helsinki, Finland, <http://www.webmeets.com/eaere/2015/prog/viewpaper.asp?pid=466>.

¹⁸ In 2015, only 68% of the GOM cod ACL has been reported caught (see Table 1 supra), so it is assumed that fishermen still had the option to lease quota to cover an individual overage after landing.

NMFS concedes that the current ASM program, where only a fraction of fishing trips are monitored, can lead to what economists and biologists refer to as the “observer effect.” See EA at 6 (“Further, observer bias could potentially increase with fewer observed trips.”) and 187 (“Furthermore, a benefit of higher coverage is to reduce the potential for observer bias. Although it is not possible to quantify observer bias at this time, the uncertainty change from year to year leading to over or under- estimates of discards.”). The observer effect can lead to biased estimates of “assumed discards” on unobserved trips if fishermen purposefully change their harvesting behavior, fish in different locations, use different gear, or target different fish on observed trips versus unobserved trips. There is evidence that these types of behavioral changes have plagued the ASM program for years.

Demarest¹⁹ (2012) analyzed the Sector data trips and found that vessels probably behave differently when they have an observer on board than when they don’t. The results showed that differences in vessel behavior across several metrics were detectable at various strata, and that differences across metrics were indicative of behavior change due to the presence of an observer. This analysis was important because observer coverage is generally thought to improve precision of discard estimates. If those estimates are biased due to behavior change, then precision may be meaningless. And given the economic benefits of fishing differently when an observer is not on board, when observer coverage declines, the degree of bias in observer estimates is likely to increase, further undermining the entire ASM program and jeopardizing both total catch estimates and length frequency samples.²⁰

The Economics of Low Levels of Monitoring and Enforcement in Catch Share Managed Fisheries and Related Shortcomings of Framework 55’s Economic Analysis

The economic effects of low levels of monitoring – which NMFS proposes to drop even further – are also significant, especially since under the modified catch share program of New England sectors, price signals are intended to slow fishing effort when quotas are close to being met. Due to insufficient monitoring, neither fishermen nor the ecosystem are receiving the full expected benefits from the Sector program.

Regulating industries by output control where output is costly to observe can run into problems with unreported outputs (for example pollution). In fisheries this problem arises as illegal landings, and discards and bycatch of fish, see Copes (1986).²¹ The costs of comprehensive monitoring in some fisheries may be substantial, but the costs of insufficient observer coverage, through discards, may be even higher. Cost savings may be realized in the short term by reducing monitoring levels, but the longer term costs may be even greater as the economic effects of higher levels of discards eventually accumulate even if they are not immediately apparent (Squires et al 1998).

¹⁹ Chad Demarest is an Economist with the Northeast Fisheries Science Center Social Science Division. The presentation can be found at http://archive.nefmc.org/nemulti/cte_mtg_docs/120919/120919_obs_effect_v1.pdf.

²⁰ Length frequency samples are a measurement necessary for biological stock assessments. This data was once collected under the NEFOP program but is now collected by the ASM program.

²¹ Copes, P. A critical review of the individual quota in fisheries management. *Land Economics*, 1986, 62, 276-291.

The economic analysis of Framework 55 focused solely on the cost savings to industry from manipulating the methodology of how ASM coverage levels are calculated in order to yield the lowest possible coverage levels that still meet the 30% CV requirement at the stock level. Assuming NEFOP coverage of 4% for FY 2016, the ASM target coverage would then be 10% for a total cost of \$1.4 million dollars to Sectors. EA at 335. According to the analysis of Framework 55, this would represent cost savings of \$3.9 million relative to the No Action alternative (which would result in coverage levels of 41%). *Id.* Even on its own terms, the analysis concedes that because Sectors are able to negotiate lower rates for ASM with service providers, these cost estimates are probably an overestimate. EA at 262, 263, 264, 265, 332, 333, 335. The analysis also fails to address the possibility of reducing costs to some fishermen by using electronic monitoring.

Above and beyond these factors, the proposed change in monitoring coverage levels from 41% to 14% has other economic consequences that were not analyzed in the Framework 55 proposal at all but are just as important to address—especially when considering behavioral changes of fishermen in the context of a multispecies, catch share managed fishery. These additional economic consequences are discussed in the following sections. Specifically, we explain that: (1) low levels of monitoring and enforcement increase the incentive to discard legal size catch on unobserved trips, especially for species with low quotas or that fetch high quota prices and when industry catch rates are significantly lower than ACLs in a multispecies catch share system; and (2) low levels of monitoring and enforcement directly impact quota prices and can prevent them from rising high enough to constrain landings.

Low Monitoring Levels Incentivize Discarding of Low Quota Stocks, Especially in a Multispecies Catch Share Fishery

A proper system of monitoring and enforcement is crucial to the success of the groundfish fishery in New England. If regulators have little idea about what is being caught, discarded and landed, then the resource may be compromised and the full expected benefits of catch shares will fail to emerge (Sutinen and Anderson 1985).²²

Effective enforcement and monitoring are particularly important in modified catch share systems like the Sector program. When exclusive use is not fully specified and enforced in common-pool resources, such as fisheries, the resource and inputs will not be used efficiently. (Tisdell 1991).²³ Under the current system, Sectors have the right to access a specific portion of the resource flow (the catch) rather than the resource stock (the fish) itself (Scott 1986).²⁴ Thus, monitoring is even more important as fishermen in Sectors do not have full incentives to invest in the future stock by deferring harvests through full compliance, since individual quota holders

²² Sutinen, J. G. and Andersen, P. The economics of fisheries law enforcement. *Land Economics*, 1985, 61, 387-397.

²³ Tisdell, C. A., *Economics of Environmental Conservation*. Elsevier Science, Amsterdam, 1991, 116.

²⁴ Scott, A., Catch quotas and shares in the fishstock as property rights. In *Natural Resource Economics and Policy Applications*, ed E. Miles et al. University of Washington Press, Seattle, WA, 1986.

do not bear the full costs of their over-harvest, which is instead borne collectively by all Sector fishermen and the resource stock itself (Squires 1998).²⁵

In addition, the multispecies nature of this fishery makes it difficult for fishermen to have the right mix of quota available, and it may be particularly challenging to combine actual catches of each species in the same relative proportions as their separate ACLs (Squires and Kirkley 1991).²⁶ When harvest rates in a multispecies fishery do not match the quota share for each species, there is a higher incentive to discard legal size fish. Fishermen will dump fish at sea if the total industry catch of one or more species reaches its ACL before the ACLs of other jointly harvested catch share managed species are achieved. If fleet fishing effort is restricted at this point, then the ACLs of some species may remain unharvested, generating “underages.” Conversely, if fleet fishing effort is allowed to continue unchecked and unmonitored, the ACLs of some species will be exceeded, but due to the fact that those exceeded pounds will be discarded and undocumented, the existence or extent of the exceedance will not be known. In such a situation, short-term economic returns to industry may be comparatively high, but over a longer period of time these returns are likely unsustainable.

Low Monitoring Levels can Deflate Quota Prices

Catch share systems are often preferred over command and control, effort type management systems in part because quota prices themselves act as dynamic constraints to protect from over-harvesting ACLs. In New England, prior to Sectors, the Regional Administrator used differential accounting of days at sea (DAS) to slow catch to adhere to catch targets. The DAS system, although economically inefficient, was efficient at ratcheting down, or stopping, fishing completely through command and control measures like differential accounting. Catch shares, on the other hand, rely on prices to slow catch as total catch approaches the ACL. In theory, this is what should happen. But if low monitoring and enforcement exists in the fishery, the price of the quota will never rise above the opportunity cost of discarding (Hatcher 2015)²⁷—so prices can’t act as a built in constraint to prevent over-harvesting and to efficiently redirect effort.

Under the existing formula to set monitoring levels at 30% CV, observer coverage was 24% of trips last year and would be 41% of trips in fishing year 2016, which begins May 1. See Table 13, 81 Fed. Reg. at 15,016. Although the proposed rule states that proposed Groundfish ASM Program Adjustments are intended “to make [the ASM program] more cost-effective” and represent “only . . . minor modifications to the current ASM program,” 81 Fed. Reg. at 15,015, the 2016 observer coverage levels would drop to just 14% of trips if these adjustments are made. Reducing observer coverage by this magnitude perverts the quota share pricing across all 20 groundfish species, making the sector system unable to put the brakes on fishing effort before a crisis occurs.

²⁵ Squires, D., H. Campbell, S. Cunningham, C. Dewees, R. Quentin Grafton, S. Herrick, J. Kirkley, S. Pascoe, K. Salvanes, B. Shallard, B. Turriss, and N. Vestergard. Individual Transferable Quotas in a Multi-species Fishery, *Marine Policy*, 1998, 22.

²⁶ Squires, D. and Kirkley, J. Individual transferable quotas in a multiproduct common property industry. *Journal of Environmental Economics and Management*, 1991, 21.

²⁷ Hatcher (2015) showed that the opportunity cost of discarding a fish at sea, on the margin, is equal to the market price of that fish.

In sum, measures that would reduce the monitoring levels in the New England groundfish fishery, such as those contained in Framework 55, are particularly ill-advised given the poor conditions of many key groundfish stocks and the lack of robust models reliably estimating stock populations. The recent allegations against Carlos Rafael²⁸ highlight how critically important it is to have monitoring in place to avoid profound environmental and economic impacts and so that fishermen can feel certain that the entire industry is playing by the same rules. Reducing monitoring levels will ensure that population estimates are even more error-prone, and the consequences of miscalculation can result in the complete crash of many New England groundfish stocks.

II. Approving the monitoring provisions of Framework 55 would violate the MSA, the APA, the RFA and NEPA

We disagree with NMFS's preliminary determination that the proposed changes to the ASM program are consistent with the MSA and other legal authority, see 81 Fed. Reg. at 15,016. Reducing monitoring levels will increase the likelihood of overfishing and render accountability measures (AMs) ineffective at restraining catch within ACLs, which is already occurring. Moreover, the analysis accompanying Framework 55 gives short shrift to the significant proposal to reduce monitoring, failing to adequately explain why the agency is changing course or consider important impacts and alternatives to the proposed action.

A. Approving the monitoring portion of Framework 55 would violate important provisions of the Magnuson-Stevens Act

1. National Standard 1

National Standard 1 mandates that conservation and management measures prevent overfishing while achieving optimum yield. 16 U.S.C. § 1851(a)(1). This national standard is the only one without qualifying language, such as "practicable," found in the other national standards, and it has served as the foundation for much of the fisheries regulatory structure mandated by the agency. See, e.g., 50 C.F.R. § 600.310 (National Standard 1 guidelines). The strong statutory language has also resulted in case law requiring that the agency implement measures that will result in a 50% or greater chance of preventing overfishing, *NRDC v. Daley*, 209 F.3d 717, 753-54 (D.C. Cir. 2000). NMFS has embraced and expanded upon this ruling. See National Standard 1 Guidelines, 50 C.F.R. § 600.310(f)(4) ("This probability that overfishing will occur cannot exceed 50 percent and should be a lower value."); see also 74 Fed. Reg. 3178, 3196 (Jan. 16, 2009) ("a 50 percent probability of success is a lower bound").

As explained above, some species in New England have reached such low population sizes that even with significant buffers between overfishing levels and quotas, low levels of monitoring result in unobserved mortality such that overfishing continues to occur. Given the retrospective patterns in New England groundfish assessments, even under existing monitoring levels the agency cannot reasonably assert that it has at least a 50 percent chance of preventing

²⁸ See generally Fraser, Doug "'Codfather' arrest exposes empire's potential impact on fisheries," *Cape Cod Times* (March 6, 2016), found at <http://www.capecodtimes.com/article/20160306/NEWS/160309620>.

overfishing when it has failed to do so for years. See *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 193 (D.D.C. 2014) (“Administrative discretion is not a license to engage in Einstein's definition of folly -- doing the same thing over and over again and expecting a different result.”). The best scientific information available – and common sense – supports the conclusion that further reducing monitoring levels will result in *higher* levels of unreported discards and even *lower* likelihoods of constraining fishing mortality within the levels needed to prevent overfishing. Under these circumstances, approving the reductions in monitoring levels included in Framework 55 would violate National Standard 1.

2. ACLs and AMs

While overfishing has been illegal under the MSA since 1976, the 2007 reauthorization added a requirement for binding quotas (ACLs) and measures to assure accountability with them, 16 U.S.C. § 1853(a)(15); § 1852(h)(6). These new provisions had a bracing effect nationwide, but particularly in New England, where restrictions on methods of fishing, rather than quotas, had been used to attempt to prevent overfishing. *Cf.* 75 Fed. Reg. 18,262, 18,273 (Apr. 9, 2010) (sector-based vessels exempted from DAS requirements due to binding quotas). Yet despite significant gains in other parts of the country, New England continues to struggle with depleted population sizes in some critical stocks despite the application of ACLs and AMs. As noted above, overfishing has continued to occur on some stocks despite appearing to conform to ACLs, and that overfishing results at least in part from unreported catch stemming from inadequate monitoring. In short, the measures to ensure accountability with the ACLs in the multispecies fishery are not working, largely because of inadequate monitoring.

Accountability in catch share fisheries usually amounts to holding quota holders to limiting catch to their quota shares, and the New England sector program is similarly constructed. The only AM applicable to the multispecies fishery is a simple payback provision: “[s]hould [quota share] allocated to a sector be exceeded in a given fishing year, the sector’s [quota share] shall be reduced by the overage on a pound-for-pound basis during the following fishing year” and civil and criminal penalties may apply. 50 C.F.R. § 648.87(b)(iii). Of course, to determine whether an overage has occurred, NMFS must consider various forms of information pursuant to the system outlined in the Gulf of Maine cod case study above. Existing monitoring levels are already so low that the reports on which NMFS depends to hold fishery participants accountable to the applicable ACLs are unreliable. Lowering monitoring levels further via approval of Framework 55 would render the only AM even less effective and unable to ensure accountability as required by the MSA. See, *e.g.*, *Guindon*, 31 F. Supp. 3d at 197 (“The statute and the agency's own guidelines make abundantly clear that AMs can and should be used to address management uncertainty. NMFS must disapprove and return for revision any Council proposal that does not contain adequate AMs.”)

The fact that the monitoring changes proposed in Framework 55 technically adhere to the CV standard does not mean they comply with the AM requirement of the MSA. As noted above, the CV standard relates to precision, not accuracy, and follows primarily from the separate statutory requirement to establish a standardized bycatch reporting methodology. 16 U.S.C. § 1853(a)(11); see also *Oceana v. Pritzker*, 26 F. Supp. 3d 33, 39 (D.D.C. 2014); 78 Fed. Reg. at 25,606.

As opposed to precision, Amendment 16, Framework 48, and implementing regulations require the *accurate* determination of catch and bycatch in order to be certain that the ACLs are adhered to. As noted by the *Oceana* court:

The new goals section, moreover, reiterates the need to accurately determine catch, as do Framework 48 itself and the preamble to its implementing regulation. See Framework 48 at 50 (AR 26,091) (objective to “[c]ollect information by gear type to accurately calculate discard rates.”); *id.* (“Adequate coverage (combined NEFOP, ASM and EM) is required to meet the need for both the precision and accuracy of discard estimates.”); 78 Fed. Reg. at 26,129-30 (“The level of observer coverage, ultimately, should provide confidence that the overall catch estimate is accurate enough to ensure that sector fishing activities are consistent with National Standard 1 requirements to prevent overfishing while achieving on a continuing basis optimum yield from each fishery.”). As a result, the Service in its briefing “agrees that it is still bound by the requirement to accurately monitor sector operations.” Def. Reply at 12. The Framework and the prior regulations, therefore, are consistent on this point.

26 F. Supp. 3d at 45. The need for accurate, in addition to precise, information means that even if Framework 55 complies with the CV standard, it is still illegal if it will not provide accurate enough information to ensure accountability with ACLs.

Indeed, previous litigation on the CV standard has demonstrated that the CV standard does not “reliably estimate” catch on its own, but must rely on the existence of “multiple safeguards - such as self-reporting, reporting by vendors, and sanctions for misreporting - that help to ensure the reliability of data on sector catch.” *Oceana v. Pritzker*, 26 F. Supp. 3d at 51; see 50 C.F.R. § 648.87(b)(1)(v)(B)(1)(i) (coverage must be sufficient to “monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels”). These “multiple safeguards” have been sequentially eroded over time. The shortcomings in these safeguards were vividly illustrated by reports that the fleet owner and dealer Carlos Rafael has allegedly been evading them by owning both the ships and the dealers who would otherwise provide a check on falsely reported catch data.

3. Lack of adequate monitoring levels stymies rebuilding

Several New England groundfish species have struggled to rebuild. For the same reasons that reducing monitoring can be expected to lead to overfishing and exceeding ACLs, doing so is likely to further hamstring rebuilding efforts in violation of the MSA, which requires that FMPs include conservation and management measures to both prevent overfishing and rebuild overfished stocks, see 16 U.S.C. § 1854(a)(1)(A); see also *id.* § 1854(e).

4. Cost savings do not justify undermining conservation by reducing monitoring levels

Framework 55 makes clear that a number of its proposals are designed to reduce costs. See, e.g., 81 Fed. Reg. at 15,015 (“In this action, the Council proposes adjustments to the groundfish [ASM] program to make it more cost-effective,” while maintaining the 30% CV standard). While the EA sets out a number of purposes for Framework 55 as a whole, EA at 30-

31, the reductions in monitoring appear to be solely for economic purposes, see 81 Fed. Reg. at 15,019 (adding “in a manner that would reduce the cost of monitoring” to the original language of the ASM program’s primary goal).

We appreciate the importance of reducing costs faced by a fleet that is already struggling with low quotas and changing climate conditions. Indeed, the MSA requires that costs be taken into account when promulgating fishery conservation and management measures. See 16 U.S.C. § 1857(a)(7), (8). However, as noted above the agency has failed to consider (1) the costs of lower monitoring levels in the form of potential overfishing and inefficiencies in the leasing market and (2) other means of reducing costs such as accelerated implementation of electronic monitoring.

Moreover, cost may not trump the conservation requirements of the act; costs may be considered only “where two alternatives achieve similar conservation goals.” 50 C.F.R. 600.345(b)(1); *NRDC*, 209 F.3d at 753. Here, the limited analysis NMFS has undertaken makes clear that each of the proposed measures to reduce observer coverage has been determined to have negative biological impacts compared to the No Action alternative, *infra* note 26 (see, e.g., EA at 211), and, as explained above, they will result in violations of the MSA’s conservation mandates. Thus, adopting these measures that would achieve cost savings at the expense of conservation goals is precluded by the MSA.

B. NMFS has arbitrarily and capriciously failed to explain its decision to depart from its previous approach to monitoring

Framework 55 would abandon NMFS’s previous standard of setting observer coverage at the level that would result in the observation of 80% of discarded pounds. The EA asserts that “[s]ince . . . 2012, NMFS has considered it desirable to set groundfish sector coverage levels so that 80 percent of the discard estimates have CV30 at the sector/stock/gear level. This has resulted in setting ASM coverage at levels higher than what was needed to achieve a CV30 at the overall stock level.” EA at 57. NMFS explains that it “sought to maintain the same statistical quality achieved in the 2010 fishing year” by applying this standard, but that “this additional criterion was not necessary to satisfy the CV requirement of the ASM program or to accurately monitor sector catches, and was not required by the FMP.” 81 Fed. Reg. 15,016-15,017. NMFS then concludes that “target ASM coverage levels for sectors should be set using only realized stock-level CVs, and should not be set using the additional administrative standard of monitoring 80 percent of discard pounds at a 30-percent CV or better.” *Id.* at 15,017.

This conclusory assertion begs the question why observing 80 percent of discards was previously “desirable” and what has changed to make it less desirable now. As noted above, the precarious state of many stocks in the groundfish fishery and the incentives to discard some of those imperiled species would seem to indicate that establishing monitoring levels so that a high percentage of discards are observed is *more* desirable now than in the past when quotas were higher.

Fundamental tenets of administrative law require that NMFS explain why it proposes to change course. In the seminal *State Farm* case, the Supreme Court struck down NHTSA’s decision to abandon a requirement to use air bags, holding that it had failed to articulate a satisfactory explanation and include a “rational connection between the facts found and the

choice made.” See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). NMFS has yet to provide any such connection here.

In the proposed rule, NMFS characterizes the 80 percent review requirement as an “additional administrative standard” that it undertook only because Congress had appropriated funds for the ASM program. See 81 Fed. Reg. at 15,017. NMFS therefore asserts that it may choose not to apply the 80% standard in this coming year, since application of the standard has resulted in realized ASM coverage higher than was needed to meet the 30% CV requirement. *Id.* Regardless of whether NMFS considers the 80 percent standard an administrative one, it would be arbitrary and capricious for the agency to remove it and reduce already low monitoring levels without adequately explaining why, especially because such a change could well result in further deterioration of the fishery. See, e.g., *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (remand of order where agency did not adequately explain why it departed from its traditional analysis); *Arco Oil & Gas Co. v. FERC*, 932 F.2d 1501, 1504 (D.C. Cir. 1991) (agency’s “conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision.”).

C. Reducing monitoring without adjusting uncertainty buffers would violate the MSA and be arbitrary and capricious

As explained above, the agency has asserted that buffers should be used to address scientific and management uncertainty in managing fisheries.²⁹ In previous litigation, the CV standard was upheld in heavy reliance on the presence of such buffers to mitigate for the lack of accuracy in determining total catch and discards in the fishery. See *Oceana v. Pritzker*, 26 F. Supp. 3d 33 (D.D.C. 2014). Specifically, where Oceana argued that the application of the CV standard across all stocks in the fishery would cause the FMP to no longer ensure accountability with the ACLs due to the lack of accuracy of the standard and its application, the court (and NMFS) responded that the CV requirement is not “determinative of whether the fishery meets its ACLs” – rather, bycatch and observer bias have a much larger impact on whether the fishery would stay within the ACLs. *Id.* at 49. And NMFS was able to estimate that these two factors were so minimal that they could be disregarded. *Id.* at 48 (NMFS used an estimate of observer bias at 1-4%, and “[g]iven the small percentage of catch composed of bycatch, measuring it very precisely did not concern the Service.”). As the court stated:

The Service's confidence that overfishing will not occur is also possible, in part, because Defendants include a buffer between the fishery's maximum acceptable catch and the sub-ACLs it allocates to sectors. See 78 Fed. Reg. at 25,606 (“significant additional uncertainty buffers are established in the setting of ACLs that help make up for any lack of absolute precision and accuracy in estimating overall catch by sector vessels”). That buffer guards against statistical uncertainties such as, for example, the unknown level of observer bias created by at-sea monitoring or a relatively generous CV. Cf. *id.* While *Oceana* criticizes

²⁹ The preamble to the NS1 guideline revision of 2009 states: “A major aspect of the revised NS1 guidelines is the concept of incorporating management and scientific uncertainty in using ACLs and AMs. Management uncertainty occurs because of the lack of sufficient information about catch (e.g., late reporting, underreporting and misreporting of landings or bycatch). ...” 74 Fed. Reg. 3,178, 3,181 (Jan. 16, 2009).

what it sees as the Service's over-reliance on these buffers, the Court finds that they are yet another reasonable measure taken to ensure accountability and prevent overfishing.

Id. 48-49.

The buffers that the Court relied upon in *Oceana* to uphold the monitoring levels set through the CV standard are no longer sufficient. First, the assumption that bycatch is such a small percentage of catch that it doesn't need to be measured precisely (or accurately) – when that is exactly what the CV standard purports to do – is unreasonable given the retrospective patterns in the fishery. Second, the assumption that observer bias can be estimated to an effect of nearly zero is similarly no longer reasonable, given the likely increase of illegal discarding on unobserved trips. Finally, the agency may not reasonably rely on existing buffers if these buffers do not change in response to reduced monitoring levels that will exacerbate the uncertainty the buffers are designed to address.

Therefore, these assumptions can no longer be reasonably relied upon for NMFS to justify setting monitoring levels at the low levels it proposes in Framework 55 without a corresponding increase in the uncertainty buffers that are designed to mitigate the uncertainty inherent in the CV standard.

D. The EA's inadequate analysis violates NEPA

One of the greatest concerns we have with the proposed rule to approve and implement Framework 55 is that the environmental impacts analysis performed to date has been cursory and conclusory. As with any significant federal action that might impact the environment, NEPA requires the agency to analyze these impacts through an EA or a more thorough environmental impact statement (EIS). Thus far, the analysis in the EA does not meet NEPA standards, and the agency should produce an EIS before deciding whether to reduce monitoring levels in the groundfish fishery from 41 to 14 percent.

NEPA requires the agency to take a “hard look” at the environmental consequences before taking a major action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989). In order to rely on an EA rather than prepare a full environmental impact statement (EIS), NMFS must show that the action “will not have a significant effect on the human environment” and why an EIS will not be prepared. 40 C.F.R. § 1508.13. Such a Finding of No Significant Impact (FONSI) excuses the agency from the preparation of an EIS. See, e.g., 40 C.F.R. § 1506.10. The legal adequacy of an EA is determined by (1) whether the agency took a “hard look” at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) whether the agency made a convincing case that the impact was insignificant; and (4) whether the agency convincingly established that changes in the project reduced any significant impacts to a minimum. *Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 62 (D.C. Cir. 1988).

Here, NMFS acknowledges that approving the proposed action would have negative environmental impacts, but the agency fails to examine or explain those negative impacts in a manner that reflects the problematic state of the fishery. The EA regularly refers to the potential negative impacts as low, but it does not explain this characterization or provide supporting

analysis that speaks directly to the biological impact on the stocks.³⁰ The bulk of the analysis merely describes how far each proposed measure (e.g., exempting large-mesh fisheries) would lower monitoring levels, rather than perform any analysis of the environmental impact of those lower levels. Additionally, the EA does not address how changes in the realized CVs may impact the overall assessment error, projections, and scientific and/or management uncertainty.

The EA concedes early in the biological impacts section that projections in the fishery have a history of uncertainty that tend to be too optimistic when estimating beyond the short term (one to three years) and that attempts to correct this problem have been unsuccessful. EA at 165. The stock assessments are critical to understanding the biological status of the stocks, and it is not clear how the preferred alternatives may impact that understanding. This is particularly important because the EA's earlier analysis on the risk of overfishing was based on projections that would have resulted from the no action alternative (higher monitoring levels) in observer coverage, not the preferred alternatives that were chosen. The key analysis of risk of overfishing is thus based on conditions that would not exist in the fishery if Framework 55 takes effect. The EA also notes that the "estimates are likely an underestimate of the true uncertainty based on past experience with model and projection results." EA at 177, Table 81. This situation could be compounded with the changes to the percent coverage not only in absolute fishing mortality but in changes in the error that interacts with the projections.

The EA predicts that the short-term economic impacts of the coverage-reducing measures would be positive. The agency notes that by reducing the number of trips for which observers must be present, the cost of monitoring drops. However, that analysis is fundamentally incomplete. "The overall impacts [...] cannot be determined, as the benefits of ASM are not quantifiable at this time. While increased coverage leads to a better estimate of the discards and improved stock estimates, the marginal value of each % increase is unknown." See EA at 263, 265, 266, 333, 335. Thus, while it is easy to quantify the economic benefits from reducing payments for ASM coverage, NMFS has not compared those cost savings to the benefits gained from improved data and a robust fishery – making the assertion that the lower cost of monitoring is the equivalent to economic benefit highly uncertain.

Indeed, the focus on the cost savings of lowering monitoring levels, limited as it is, fails on its own terms since the agency virtually ignores the existence of means of conducting monitoring other than human observers. Specifically electronic monitoring could reduce costs. As such, the analysis is highly flawed even as to its exclusive focus on the direct costs of

³⁰ The environmental analysis that does exist in the EA is very thin regarding biological impacts to the fishery, with some of the proposed measures giving only 1 or 2 paragraphs to cover the biological impacts. Moreover, the analysis concludes that the biological impacts from adopting each of the coverage-reducing measures will be negative – or "fewer positive benefits" relative to No Action. See, e.g., "The combination of options is expected to have low negative impacts on regulated groundfish species when compared to Option 1/No Action." (EA at 211); "Sub-Option 3A would likely provide slightly fewer positive benefits for regulated species that [sic] Option 1" (EA at 194); "Sub-Option 3B would provide fewer positive benefits to regulated species that [sic] Option 1" and "could result in neutral to low negative impacts on regulated groundfish relative to Option 1." (EA at 195); "Under Sub-Option 4A and 4B, impacts relative to Option 1 are likely to be low negative" (EA at 200); "Relative to Option 1/No Action, Sub-Option 5 would have a low negative impact on other species." (EA at 206).

monitoring, failing entirely to take into account the benefits of better monitoring and the true costs to the fishery of the lack of it.

Similarly, the EA's support for the FONSI is conclusory and therefore inadequate. The document posits:

(1) Can the Preferred Alternatives reasonably be expected to jeopardize the sustainability of any target species that may be affected by the action? Response: The Preferred Alternatives cannot reasonably be expected to jeopardize the sustainability of any target species that may be affected by the action. With respect to the target species in the Northeast Multispecies fishery the Preferred Alternatives adopt management measures that are consistent with target fishing mortality rates that promote rebuilding and/or sustaining stock sizes.

EA at 312. But reducing monitoring levels will materially affect managers' ability to monitor adherence to annual catch limits, which are the primary management measures that keep fishing "consistent with target fishing mortality rates that promote rebuilding and/or sustaining stock sizes." Given the significant discrepancies between the anticipated fishing mortality rates and the stock assessment results and the high likelihood that in fact discards are resulting in catch in excess of annual catch limits, it is unreasonable to characterize the reduction in monitoring levels as an action that has no significant impact on the environment, especially given the extremely low population sizes of many important species such as GOM cod. NEPA requires an EIS here. See, e.g., *Nat. Res. Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) ("Conclusory remarks . . . do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning.").

The EA's treatment of the direct, indirect, and cumulative impacts, as required by 40 C.F.R. §§ 1508.7 and 1508.8, that would result from the proposed monitoring measures is similarly conclusory. The Cumulative Effects Analysis section of the EA spends a great deal of time outlining the past, present, and reasonably foreseeable future actions which may interact with the current action. EA at 283-303. But against that background information, the monitoring reduction measures are only briefly summarized in Table 125 using the same conclusory statements that appeared in the Biological Impacts section ("low negative") and Social Impacts section ("positive"), with no further analysis of their impacts cumulatively. EA at 300. Such conclusory statements barely consider the impact which all of these monitoring reduction measures taken together will have on the health of stocks and fishermen's behavior. Again, NMFS's inadequate consideration of these impacts have "provided less than the full picture" of the environmental consequences of these measures, and a full EIS is required. See *Friends of the Earth v. Salazar*, 109 F. Supp. 2d 30, 41-43 (D.D.C. 2000).

It appears that the desire to implement Framework 55 in time for the start of the 2016 fishing year on May 1 may have prompted the agency to limit its NEPA analysis to an EA. NMFS published the proposed rule on March 21, 2016, less than a month after the Council's submission on Feb. 19, too little time to perform any additional environmental analysis itself before publishing the proposed rule.³¹ The comment period for the proposed rule is 15 days, the

³¹ We note that the MSA required NMFS to immediately (within 5 days of transmittal by the Council) initiate an evaluation of proposed regulations, and make a determination within 15 days. 16 U.S.C. § 1854(b). Thus the proposed rule should have been published in the Federal

minimum required by the MSA,³² depriving the public of the time necessary to carefully examine the environmental impact of this proposed action and meaningfully contribute to the discussion.

The shortened comment period and conclusory analysis suggest that NMFS may have prejudged the outcome of the environmental analysis in order to ensure the measures can be implemented by May 1. Indeed, one month before Framework 55 was formally submitted to NMFS by the Council on February 19, the agency argued in a preliminary injunction hearing in the U.S. District Court for the District of New Hampshire that harm to the plaintiff was not significant because of the likelihood that NMFS would approve Framework 55 measures and reduce monitoring levels. See, *e.g.*, Transcript of Motion Hearing at 158, Jan. 21, 2016 (“the agency intends to make administrative adjustments for the 2016 fishing year” and “[F]ramework 55, if it’s approved and implemented by the agency, it could result in lower at-sea monitor coverage target levels for the fishing year 2016, and that’s paragraph 23, your Honor, of Mr. Bullard’s declaration.”) (excerpt attached).

We understand that paying for human observers is a heavy burden for some fishermen. However, NEPA requires a hard look at the environmental impacts of proposed actions, and reducing monitoring levels at this time, contrary to the conclusory assertions in the EA, would have a significant effect on the human environment. Therefore, the agency must produce an EIS on at least this component of the proposed federal action contained in Framework 55.

E. Regulatory Flexibility Act

The RFA is a procedural statute that requires agencies to conduct an Initial Regulatory Flexibility Analysis (IRFA) for each proposed rule. See EA at 337; 5 U.S.C. § 603. The IRFA is designed to assess the impacts various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those impacts. EA at 337. An IRFA is conducted to primarily determine whether the proposed action would have a “significant economic impact on a substantial number of small entities.” *Id.*

The EA document contains an IRFA analysis which concludes that the “vast majority (1,038 out of 1,056) of potentially regulated entities are classified as small businesses by SBA business size standards,” and the proposed measures “are expected to negatively impact gross sales of small entities regulated by this action”. EA at 346. Of the 1,056 total entities, “[t]here are 61 entities that are directly regulated and dependent on the groundfish fishery for greater than 50% of their gross sales. All of these entities are considered small.” *Id.* The EA thus finds that the proposed measures will result in a significant impact on a substantial number of small entities, since small businesses will be disproportionately impacted relative to large businesses and will likely adversely affect profits for a substantial number of small entities. *Id.*

However, the IRFA overwhelmingly focuses its analysis on the cuts to the ACLs and those impacts on small businesses, whereas it only briefly analyzes the impacts of the reduced

Register within 20 days of transmittal by the Council on Feb. 19, which would have been March 14 instead of March 21. The additional week to comment on such a significant rule would have been extremely helpful.

³² 16 U.S.C. § 1854(b) provides for a public comment period of 15 to 60 days.

monitoring measures. The only specific discussion of the proposed monitoring reductions is as follows:

FW55 includes alternatives with different ASM coverage rates. The costs associated with these alternatives range from \$1.3 million to \$4.5 million. For the past six fishing years, i.e, since when sectors were first implemented, NOAA/NMFS has paid for ASM coverage. It is expected that industry will soon be required to pay these costs. While this is not a requirement of FW55, the costs associated with the various levels of coverage are analyzed in FW55 due to the fact that FW55 proposes to reduce ASM coverage rates from the No Action alternative. So while assuming the cost of any ASM rate greater than 0% would be new to industry, some of the alternatives in FW55 are designed to minimize these costs.

EA at 347. This cramped analysis focuses on only one aspect of the costs and benefits of the proposed reductions in monitoring. It fails to examine the negative economic impact on small businesses from reducing monitoring levels (for example via overfishing and negative impacts on the leasing market).

Moreover, the IRFA fails to examine any “significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities,” as required by 5 U.S.C. § 603(c). As noted above, EM represents a possible means of achieving higher levels of monitoring, likely at reduced costs.

More broadly, the blanket CV standard requires smaller businesses to be monitored at the same rate as larger vessels that catch many more fish. Alternative methods of allocating observers between vessels based on catch, such as the DPA described earlier, might be able to provide more accurate monitoring at a lower cost to the smaller vessels that are less able to incur additional costs. NMFS should seriously consider such approaches instead of lowering overall monitoring levels as a means of reducing costs.

Conclusion

We hope these comments have explained in sufficient detail why partial disapproval of Framework 55, specifically disapproval of the measures that would reduce monitoring levels, is required pursuant to the MSA. Instead, we urge you to maintain reasonable levels of monitoring and expedite the implementation of electronic monitoring and reporting programs that have been directed in the latest fiscal year appropriations and have been piloted in the region over the last decade. These actions taken together can ensure the robust quality of data for accurate management of the fishery, while at the same time reducing the costs of obtaining such data. Approving the problematic portions of Framework 55 would sacrifice data quality and effective management of the New England groundfish fishery in favor of cost reductions and would be inconsistent with applicable law.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Matt Tinning". The signature is fluid and cursive, with a long horizontal stroke at the end.

Matt Tinning
Senior Director, US Oceans Program

Fishing Year 2018 Sector Observer Coverage Levels as of September 20, 2018

SECTOR NAME	GROUNDFISH TRIPS	ASM OBSERVED	NEFOP OBSERVED	TOTAL OBSERVED TRIPS	ASM COVERAGE RATE	NEFOP COVERAGE RATE	COMBINED COVERAGE RATE
FGS	615	2	9	11	0.3%	1.5%	1.8%
SHS 1	61	4	3	7	6.6%	4.9%	11.5%
SHS 3	212	12	11	23	5.7%	5.2%	10.8%
MCCS	200	9	6	15	4.5%	3.0%	7.5%
NEFS 8	97	5	3	8	5.2%	3.1%	8.2%
NEFS 11	294	9	10	19	3.1%	3.4%	6.5%
NEFS 12	267	13	13	26	4.9%	4.9%	9.7%
NEFS 2	597	51	28	79	8.5%	4.7%	13.2%
NEFS 3	138	7	4	11	5.1%	2.9%	8.0%
NEFS 10	42	1	2	3	2.4%	4.8%	7.1%
NEFS 13	76	5	4	9	6.6%	5.3%	11.8%
NEFS 5	311	8	11	19	2.6%	3.5%	6.1%
NEFS 6	34	2	1	3	5.9%	2.9%	8.8%
NCCS	55	1	2	3	1.8%	3.6%	5.5%



April 16, 2018

Dr. John Quinn, Chairman
Mr. Tom Nies, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

Dear Dr. Quinn and Mr. Nies:

Environmental Defense Fund (EDF) commends the New England Fishery Management Council (Council) for demonstrating the leadership to undertake needed improvements in the existing system of monitoring in the groundfish fishery through the development of Amendment 23 to the Groundfish Fishery Management Plan (FMP). Specifically, the motion passed by the Council in September 2016 directed staff to prepare “an amendment to the Groundfish FMP to adjust the groundfish monitoring program to improve reliability and accountability.” We encourage the Council and National Marine Fisheries Service (NMFS) staff to continue moving Amendment 23 forward and undertake the rigorous analyses necessary to fully address and solve the myriad problems caused by insufficient monitoring.

Monitoring Reform is Appropriate as an FMP Amendment

We support the Council’s decision to address these monitoring shortfalls through an amendment to the Groundfish FMP, rather than through other avenues like framework actions. An amendment to the FMP allows the Council to think holistically about the existing groundfish monitoring system and make all necessary changes to the requirements contained in previous amendments and framework actions, including the structures and conditions adopted in Amendment 16, Framework 48, and most recently, Framework 55. Development of Amendment 23 allows the Council to reconsider the components of the current monitoring system that have contributed to the fishery’s problems and conduct a comprehensive overhaul to meet the requirements of the Magnuson-Stevens Act (MSA). We encourage the Groundfish Plan Development Team (PDT), Groundfish Committee, and the Council to keep this holistic view in mind and to view Amendment 23 as an opportunity to institute appropriate standards and develop the monitoring system that supports effective management.

NMFS explained in its approval of Framework 55 that “larger changes to the ASM program would likely require an amendment rather than a framework adjustment” and NMFS agreed with Framework 55 commenters “that review [of the monitoring program’s effectiveness] should include evaluating the groundfish monitoring program beyond [Framework 55], including whether the 30-percent CV standard is the most appropriate way to set ASM coverage levels.”¹

¹ Framework 55 Final Rule, 81 Fed. Reg. 26,412, 26,433 (May 2, 2016).

Specifically, these aspects of the monitoring system can and should be revisited by Amendment 23:

- CV standard: Framework 48 established the process of setting monitoring levels at the lowest level required such that 80% of discards by weight can be estimated at a 30% coefficient of variance (CV). However, CV is a measurement of precision rather than accuracy, and can only ensure how the sampled data relate to the *sample* average, not to the population average. Given the continued problems in the fishery and evidence of biased data, monitoring levels that meet the CV standard are likely leading fishery managers to conclusions that are precisely wrong. Therefore, we recommend removing from the scope the action any effort to develop an improved CV standard since it does not address the purpose and need approved by the Council. Instead, we assert that Amendment 23 should focus on improving accuracy of discard accounting in the fishery.
- Monitoring levels less than 100%: Amendment 16 specified that less than 100% electronic monitoring and at-sea observation will be required.² NMFS has stated that “In order to assure perfect accuracy (i.e., zero bias), 100-percent observer coverage would be required” but is “prohibited by Amendment 16.”³ Amendment 23 can change this situation, such that 100% monitoring of vessels at sea, whether by human observers or cameras, could be required if the analyses demonstrate it is needed.
- Dockside Monitoring: Amendment 16 put in place a program for dockside monitoring to verify landings before the catch was transferred to dealers. This program was later removed under the assumption that catch reported by vessels would be checked against the dealer reports. Including provisions to reinstate an independent dockside monitoring program would enable fishery managers to verify catch data.
- Industry funding: Amendment 16 requires industry to pay for the costs of at-sea monitoring. However, the high cost of observers is frequently used as a justification for low monitoring levels. Through Amendment 23, the Council could choose to emphasize the need to determine the appropriate level of monitoring and then explore ways to phase in cost responsibilities over time post-implementation. Other regions have taken this approach when they have moved to higher accountability levels.
- Goals and Objectives: Framework 55 clarified Amendment 16’s goals and objectives as identified in Framework 48, so that “the primary goal of the sector ASM program is to verify area fished, catch and discards by species, and by gear type,” and NMFS should consider achieving this goal in “the most cost effective manner practicable” when setting target coverage levels.⁴ Amendment 23 can reframe the groundfish monitoring goals as needed in order to prioritize accuracy, reliability, and accountability. Cost effectiveness is an important consideration; however it must be evaluated in terms of options that satisfy the need for accurate verification of catch. Evaluation of cost effectiveness should be broadened beyond the existing ASM alone, and encompass other useful components of a monitoring program such as reinstatement of dockside monitoring, accelerated

² See Framework 55 Final Rule, 81 Fed. Reg. at 26,435.

³ Id. at 26,453.

⁴ Id. at 26,421.

implementation of electronic monitoring, and electronic reporting of catch and discard data in real-time.

Analyses and Evidence to Consider in Amendment 23 Development

The existing groundfish monitoring system needs to be overhauled because the information it produces is biased and incomplete, therefore unreliable as the basis for making decisions regarding the fishery. Without comprehensive changes to monitoring, the unreliability of the data will continue. In our comments to Framework 55 submitted in April 2016 [Attachment A], we pointed out significant problems in the groundfish fishery that required a much more comprehensive monitoring solution than was proposed in that framework action. The system for collecting fishery-dependent data has been demonstrated to be untrustworthy, enabled by an already-low percentage of monitored trips determined allowable by the insufficient CV standard. And yet Framework 55 lowered those monitoring levels further.

Since the approval of Framework 55, the need for a comprehensive change has increased and the evidence is continuing to mount that monitoring coverage is insufficient to provide the “reliability and accountability” we all seek under Amendment 23. The Groundfish PDT is conducting and refining important analyses needed to inform development of Amendment 23, providing further evidence of the scale of the failure under the current monitoring regime to keep catch within set limits. We support these studies and encourage development of alternatives focused on these analyses. This evidence includes the following:

1. Observer bias created in fishing behavior due to low monitoring coverage.

NMFS has previously recognized that analysis has “found evidence for some differences in fishing behavior between observed and unobserved groundfish trips”⁵ although without specifying the direction or magnitude of this effect. An observer effect “could result in either systemized or localized biases, which would suggest that observer data used to generate discard estimates may not be representative.”⁶ As rephrased in the Draft Alternatives document of March 20, 2018, “Framework 48 stated that the minimum coverage level based on CV is only appropriate for sector monitoring purposes if there is no evidence that behavior on observed and unobserved trips is different. If there is evidence that behavior is different, then a higher coverage level may be required to ensure the accuracy of discard estimates.”

The NEFSC studies on observer bias are still ongoing, but they show the existence of observer bias in the groundfish fishery. Therefore, even under the current FMP requirements, setting the minimum coverage level based on CV is inappropriate because observer bias is skewing the sample data. The development of Amendment 23 should acknowledge this observer bias exists and both increase monitoring coverage to levels high enough to mitigate that bias as well as disallow inappropriate reliance on the CV standard.

⁵ 81 Fed. Reg at 26,434.

⁶ Id.

2. Illegal discarding at sea to avoid exceeding quotas of choke stocks.

NMFS has previously explained that “the ASM program provides a basis for sector discard estimation” but that “for most allocated stocks, discards are only a small portion of total catch.”⁷ This reason was used to justify lowering monitoring levels in Framework 55. However, increasing evidence shows that discards are a much larger portion of catch than previously assumed and which the ASM program fails to capture.

The illegal discarding that is commonplace in the fishery is gaining greater recognition. As John Bullard stated when he was Regional Administrator for NOAA Fisheries Greater Atlantic Region, “pressures to discard legal fish [have] proven as irresistible to avoid as they are to acknowledge, [but we] have to bring illegal discarding out of the shadows” and “remove the disincentives for full accountability and full coverage.”⁸

3. Misallocation of catch for multi-stock trips.

In January 2017, a study that analyzed vessel trip reports (VTRs) and compared them to speed data collected from vessel monitoring systems found catch accounting errors indicating that certain groundfish species were being reported caught in a different stock area from the stock area in which the species was actually caught.⁹ These errors include underreporting the number of stock areas the vessel fished on one trip or attributing the catch to an area it was not caught while accurately or erroneously reporting the trip’s total fishing locations. As the study suggests, these errors may be unintentional reporting mistakes while filling out the forms or a product of recall bias from filling out and submitting VTRs well after the conclusion of the fishing trip. Whether unintentional or otherwise, these errors cast doubt on the accuracy and reliability of VTR data as a primary source of catch data. Amendment 23 can address these issues by considering real-time reporting of catch data through electronic means, and improved catch monitoring at sea to provide data quality assurance.

4. Misreporting of stocks on vessel trip reports and dealer reports.

The exposure of the extensive criminal activity to which Carlos Rafael pleaded guilty has demonstrated that intentional misreporting in the groundfish fishery has been prevalent for years. Even if Carlos Rafael were the only fisherman to intentionally misreport the stocks he caught, his dominant share of the fishery meant that his misreporting greatly skewed the data collected through sources outside monitors at sea.

⁷ Id. at 26,420.

⁸ John Bullard, “There is No Silver Bullet for Groundfish,” NOAA Fisheries, June 5, 2017, https://www.greateratlantic.fisheries.noaa.gov/stories/2017/06/05_silverbullet.html.

⁹ Palmer MC. 2017. Vessel trip reports catch-area reporting errors: Potential impacts on the monitoring and management of the Northeast United States groundfish resource. US Dept Commer, Northeast Fish Sci Cent Ref Doc. 17-02; 47 p. <https://www.nefsc.noaa.gov/publications/crd/crd1702/crd1702.pdf>.

NMFS has stated that “due to joint and several liability for sector members for certain violations, including illegal discarding and misreporting of catch, a strong incentive for sector member to self-enforce monitoring and reporting requirements to ensure the sector has the most accurate information available.”¹⁰ But Carlos Rafael had been indicted even at the time FW55 was finalized in May 2016, belying the strength of the sectors’ operational plans to self-enforce and ensure accuracy of collected information without stronger accountability standards. More recently, NMFS withdrew approval of the sector operations plan of Northeast Fishery Sector IX (Sector 9), to which Carlos Rafael’s boats belonged, due to Sector 9’s lack of enforcement.¹¹ However, Sector 9 has recently submitted a sector operations plan in which the majority of their boats (including boats controlled by Carlos Rafael) will switch to Sector 7 so they can continue fishing outside of the restrictions imposed on Sector 9, further undermining the idea that sectors will self-enforce these monitoring and reporting requirements.

5. A retrospective pattern in the ability to constrain catch to quotas and overfishing limits.

In our comments to Framework 55, we noted the disheartening combination of the failure of stocks to rebuild by the date established in the FMP and that “stock assessments in the fishery have shown what is known as retrospective bias, meaning that although technically the annual catch limits (ACLs) established by the agency have not been exceeded, the stock assessments show overfishing has occurred.”¹² NMFS has also recognized this phenomenon, noting in the Final Rule for Framework 55 that “the U.S. assessment for the total [Georges Bank] cod stock was rejected due to a strong retrospective pattern during the September 2015 groundfish assessments” causing the 2016 catch recommendation to be based on a different method.¹³ Unreported discards due to extremely low monitoring levels and insufficient catch reporting requirements, as described above, are some likely reasons for this retrospective pattern of overfishing, despite setting quota and monitoring levels as the FMP currently requires. This is even more certain for non-allocated stocks whose catch is essentially discards only (such as wolffish), where the only recorded data on mortality is through discard monitoring at sea.

Retrospective patterns are typically the result of inconsistencies in the data or model, which can include the catch series.¹⁴ We are currently exploring an analysis to determine how sensitive the

¹⁰ 81 Fed. Reg. at 26,420.

¹¹ “Accurate reporting, internal accountability, and organization integrity are core principles of the sector system. The systematic sector and vessel misreporting over a long period of time was facilitated by an internal structure and control by a single, dominant participant combined with a lack of oversight. [...] NEFS 9 has failed its primary responsibility of accurately reporting and tracking its catch and has taken only minimal, insufficient steps to ensure accurate reporting and compliance with its operations plan.” Interim Final Rule, 82 Fed. Reg. 55,522, 55,524 (Nov. 22, 2017).

¹² EDF FW55 Comments at 4 (“For example, according to all available data, catches since 2010 have been below the commercial sub-ACLs for Cape Cod/Gulf of Maine yellowtail flounder, yet the stock continued to experience overfishing in both its previous and current stock assessments.”).

¹³ Framework 55 Final Rule, 81 Fed. Reg. 26,412, 26,430 (May 2, 2016).

¹⁴ Legault CM, Chair. 2009. Report of the Retrospective Working Group, January 14-16, 2008, Woods Hole, Massachusetts. US Dept Commer, Northeast Fish Sci Cent Ref Doc. 09-01; 30 p. Available from: National Marine Fisheries Service, 166 Water Street, Woods Hole, MA 02543-1026, or online at <https://www.nefsc.noaa.gov/nefsc/publications/crd/crd0901/crd0901.pdf>

retrospective pattern is to possible underreported catch. We encourage the PDT to consider this analysis once completed and reviewed in their work as it relates to Amendment 23, and welcome suggestions for ways to support PDT analysis.

Conclusion

Together, these issues create inconsistencies in the data relied upon by fishery scientists and managers to assess and manage groundfish stocks, confounding their ability to set meaningful limits. But each of these issues would be corrected with comprehensive and effective “adjustments to the groundfish monitoring program to improve reliability and accountability” – the aim of Amendment 23.¹⁵


The failure of the FMP to prevent overfishing is contrary to the requirements of the MSA. National Standard 1 mandates that conservation and management measures prevent overfishing while achieving optimum yield.¹⁶ We encourage the PDT to view Amendment 23 as a means to improve groundfish data collection through FMP monitoring requirements that will lower the risk of continued overfishing in the groundfish fishery.

In conclusion, as the Council continues to develop and evaluate alternatives for Amendment 23, we request that you take into account these numerous sources of evidence showing the need for improved monitoring.

Sincerely,



Johanna Thomas
Director, New England Region
Oceans Program



Priya Sundareshan
Attorney, Oceans Program

¹⁵ The “Purpose and Need” for Amendment 23 remains true to this goal, emphasizing accuracy and accountability: “To implement measures to improve reliability and accountability of catch reporting and to ensure a precise and accurate representation of catch (landings and discards).”

¹⁶ 16 U.S.C. § 1851(a)(1).

Information related to the FY'19 Spend Plan for the Northeast Groundfish Fishery At Sea Monitoring Program

- 1) Announcement that NOAA would fund ASM costs for fishing year 2018
- 2) Personal communications from Northeast Fisheries Science Center

1) Announcement, available at <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-announces-reimbursement-sector-sea-monitoring-costs>. Last updated Aug. 14, 2018.

Today, August 14, 2018 we have announced that we will use the provided \$10.3 million in the FY 2018 appropriation to pay for all at-sea monitoring (ASM) costs for fishing year 2018. Any groundfish sector trip beginning on or after May 1, 2018, that was selected for ASM coverage is eligible for reimbursement. NOAA will also reimburse industry for an additional 25 percent of their at-sea monitoring costs in fishing year 2017 using remaining prior year funds, bringing the total reimbursement for 2017 to approximately 85 percent.

Effective at-sea monitoring in the Northeast groundfish fishery is essential to the success and sustainability of this fishery. We continue to evaluate fishery monitoring programs in our region to ensure that we meet scientific and management needs, and to find ways of more effectively and efficiently collecting the data required while respecting fishing vessel operations and business practices. For more information on this action, please visit us here.

Spending Plan

NOAA Fisheries will cover all costs for at-sea monitoring and data processing in Fishing Year 2018 (May 1, 2018, through April 30, 2019). Funds will also be used to support at-sea monitor training and equipment, to process samples, to continue development of electronic monitoring technologies that may the reduce cost of or improve at-sea monitoring in the future, and to cover agency costs for administering the program.

Reimbursement Program

Any groundfish sector trip beginning on or after May 1, 2018, that was selected for at-sea monitoring coverage is eligible for reimbursement. Using existing funds, NOAA will also reimburse industry for an additional 25 percent of their at-sea monitoring costs in fishing year 2017, bringing the total reimbursement for that year to approximately 85 percent.

Since 2015, groundfish sectors have contracted directly with service providers for monitoring services. Sectors will use a program similar to past years to receive reimbursements for the cost of at-sea monitoring.

2) *Personal communication from NOAA Fisheries, Northeast Fisheries Science Center*

Q: Can I have a copy of the spend plan approved by Congress?

How does the funding add up to \$10.3M?

How much of the \$10.3M went to ASM reimbursement versus other costs such as agency costs to administer the program?

NOAA prioritized \$7.5 million of the \$10.3 million provided in the FY 2018 appropriations to ensure the Northeast ASM program is fully funded in fishing year 2018, including shoreside costs and 100 percent reimbursement of industry sea day costs (\$2.9 million), as well setting aside funds for industry reimbursement for future fishing years (\$4.6 million).

ASM costs can vary significantly from year-to-year depending on fishing effort, quotas, and overlap with SBRM observer requirements. The ASMFC cooperative agreement will allow us to fund the at-sea costs of ASM in future years. We expect the \$4.6 million to cover industry sea day costs of ASM for fishing year 2019.

NMFS will also spend \$1.2 million on electronic monitoring needs in the Northeast to advance electronic monitoring technologies that may reduce the cost of or improve at-sea monitoring in the future.

Finally, approximately \$1.6 million will be used for related program costs including training, certifying, equipping at-sea monitors to process samples, safety equipment, as well NOAA mission support costs.

Q: What will the EM (electronic monitoring) funds be used for?

The \$1.2 million for EM will be used to continue development of electronic monitoring technologies that may reduce the cost of or improve at-sea monitoring in the future. For example, funds will be used to develop a data model to support electronic monitoring and reporting. This will help identify most appropriate ways to integrate data generated by electronic monitoring and reporting into existing data systems, to develop mechanisms for comparing data sources to provide feedback about data quality, and systems for sharing these data with appropriate parties.

Effective at-sea monitoring in the groundfish fishery is essential to the success and sustainability of this fishery.

- The groundfish at-sea monitoring (ASM) program provides monitors for groundfish sectors.

- At-sea monitoring helps groundfish sector vessels keep track of where they are in relation to their species-specific quotas during a year and facilitates the greater flexibility for sector vessels to fish.

With the FY18 \$10.3 million increase from Congress for groundfish at-sea monitoring, NOAA will fully fund the At Sea Monitoring Program and reimburse all vessel costs for at-sea monitoring in fishing year 2018.

- This additional FY18 funding provides additional economic stability for the sector vessels.
- To maintain the infrastructure currently used to reimburse groundfish operations for at-sea monitoring, we anticipate continuing to partner with the Atlantic States Marine Fisheries Commission to reimburse sectors for at-sea monitoring costs.
- Groundfish sectors will continue to contract directly with service providers for monitoring services.

NOAA will also provide additional reimbursement for costs incurred in fishing year 2017 using funds remaining in the agreement.

- NOAA has already reimbursed 60 percent of industry's at-sea monitoring costs in 2017 through a Cooperative Agreement with the Atlantic States Marine Fisheries Commission.
- With funds remaining in the agreement, we will be able to reimburse 25 percent more, bringing the total reimbursement rate for at-sea monitoring covered trips in 2017 to approximately 85 percent.

We continue to evaluate fishery monitoring programs in our region to ensure that we meet scientific and management needs, and to find ways of more effectively and efficiently collecting the data required while respecting fishing vessel operations and business practices.

- Part of this funding will go to continue development of electronic monitoring technologies that may reduce the cost of or improve at-sea monitoring in the future.
- The New England Fishery Management Council is currently developing Amendment 23 to the Northeast Multispecies Fishery Management Plan to improve reliability and accountability of catch reporting and to ensure a precise and accurate representation of catch (landings and discards). This includes a re-evaluation of the current groundfish monitoring program, including the at-sea monitoring program.

Questions and Answers:

Q: When will you start reimbursing industry?

A: We are working to get a cooperative agreement in place as quickly as possible. It will take between 30-45 days for final approvals through the NOAA Grants Management Division. After that, sectors will begin receiving reimbursements. (NOW IN PLACE)

Q: Can Sectors submit fishing year 2018 invoices to the Atlantic States Marine Fisheries Commission now?

A: Yes. This might expedite reimbursement once the cooperative agreement is final.

Q: How will the additional 2017 reimbursements be handled?

A: Reimbursements for fishing year 2017 expenses will occur automatically, based on existing invoices, through the established ASMFC mechanism.

Q: Will vessels be reimbursed for costs already incurred this fishing year?

A: Yes, we plan to reimburse all at-sea monitoring costs incurred by industry in fishing year 2018. Sector vessels currently involved in electronic monitoring pilot projects will also continue to receive reimbursements for their costs for trips that would have otherwise been covered by a human at-sea monitor.

Q: Will vessels be reimbursed for expenses in fishing year 2017?

A: Yes, but not 100%. Through a Cooperative Agreement with the Commission, we reimbursed 60 percent of industry's at-sea monitoring costs in 2017. With funds remaining in the agreement, we will be able to reimburse 25 percent more, bringing the total reimbursement for 2017 to approximately 85 percent.

Q: Why isn't NOAA Fisheries directly contracting with the at-sea monitoring providers?

A: Maintaining the current reimbursement program ensures there is a mechanism for an industry-funded monitoring program that may be necessary in the future.

Q: How much does an at-sea monitoring day cost for a fishing vessel?

A: We are not able to calculate a precise cost per vessel, as costs vary and each sector is free to negotiate costs with any approved service provider. Although the cost to the government for ASM was approximately \$700 per day, sectors were able to negotiate lower costs. The cost of monitoring a trip varies based on where the trip begins and ends, the length of the trip, and the price agreed between the sector and the monitoring provider. We do not control terms of these private monitoring contracts.

Q: How much money is available to reimburse at-sea monitoring costs and how long will it last?

A: The Cooperative Agreement we anticipate establishing with the ASMFC will provide \$6.263 million in funding. These funds will remain available to reimburse industry costs until expended, which is affected by how much fishing effort occurs, the cost of each trip, and the level of monitoring required. The FY18 funding will cover the full costs for 2018 fishing year. While exact costs for fishing year 2019 are not yet known, based on past year costs, NOAA expects this funding will be available to reimburse 2019 fishing year costs as well.

Q: Other non-groundfish fisheries (e.g. herring) have industry-funded fishery monitoring. Why aren't you covering those costs?

A: Congress explicitly provided these funds to support groundfish sector monitoring.

Q: Does the agency fund 100% of other fishery monitoring programs in the Northeast?

A: NOAA's Northeast Fishery Observer Program executes coverage necessary to estimate total catch (kept and discarded) in Greater Atlantic Region fisheries as well as required interactions between fishing operations and protected species such as marine mammals. The number of days covered in each fleet is determined through a Standardized Bycatch Reporting Methodology (SBRM). The law and a court decision require that the agency give priority to covering all required SBRM days first. After SBRM requirements are met, we can then support other programs, such as the At Sea Monitoring Program, with any remaining monitoring funds or with funds appropriated specifically for the purpose, as is the case with the spending announced today.

Q: Why are industry-funded monitoring programs required if the participants in the fishery cannot afford to pay for them?

A: The groundfish sector system is a voluntary program that grants participating vessels exemptions from many regulations because those vessels take on additional monitoring responsibilities and costs. Groundfish vessels that are not enrolled in sectors are not subject to ASM.

Industry-funded programs are typically used to gather information specific to that fishery for management purposes, for example, quota monitoring. The New England and Mid-Atlantic Fishery Management Councils are working on a joint amendment on industry-funded monitoring programs. The amendment will provide a way to prioritize industry-funded monitoring programs if federal funding is available to cover them.

Q: Why aren't you giving the money directly to the industry members to use?

A: This money was appropriated by Congress for monitoring. Therefore, we must use the money only to pay for monitoring costs, rather than providing money directly to individual fishermen to defray general business costs. Additionally, at-sea monitoring is a sector requirement and it is up to each sector to decide how those costs are divided among sector members.

Q. What is the timeline for a given fishing year?

A: Fishing years run from May 1 of a given year through April 30 of the following year.

FY18 PROJECT SUMMARY

Atlantic State Marine Fisheries Commission

Fisheries Management, Science, Administration and Logistical Support

Organization, Address and Contact Information: Atlantic States Marine Fisheries Commission, 1050 N. Highland Street, Arlington, Virginia; (703) 842-0740; lleach@asmfc.org

Title: Atlantic Coastal Fisheries Management, Administration and Logistical Support

Project Duration: 7/1/2018 – 6/30/2019

At-Sea Monitoring Program, Northeast Multispecies (Groundfish) Fishery – The Northeast Fisheries Science Center's Fisheries Sampling Branch manages the At-Sea Monitor (ASM) Program. ASM requirements are detailed under Amendment 16 to the Northeast Multispecies Fishery Management Plan and implemented in 2010.

ASMs collect scientific, management, compliance, and other fisheries data on board commercial fishing vessels. Information is collected through interviews with vessel captains and crew, observations of fishing operations, photographing catch, and measurements of selected portions

of the catch and fishing gear. ASM coverage is an integral part of catch monitoring that collects accurate information on catch composition. The data are used to estimate total discards by sectors, gear type, and stock area.

Since July 1, 2016 ASMFC has reimbursed a portion of at-sea monitoring costs for groundfish sector trips, including vessels electing to use electronic monitoring (EM) in lieu of a human ASM. In Fiscal Year 2018, Congress instructed NMFS to fully fund the Northeast Multispecies Fishery's At-Sea Monitoring costs. NMFS will continue to be responsible for the vessel selection of groundfish trips for ASM coverage. Sectors will continue to pay ASM/EM providers directly and submit copies of the paid invoices to ASMFC for reimbursement.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930-2276

DEC 17 2018

Thomas A. Nies
Executive Director
New England Fishery Management Council
50 Water Street Mill 2
Newburyport, MA 01950



Dear Tom:

On October 1, 2018, we received a request for approval of a new Northeast multispecies sector for fishing year 2019. I request that the Council add this to the agenda for discussion at the next upcoming Groundfish Committee meeting as well as the January 2019 Council meeting in order for us to complete the necessary consultation with the Council.

Sectors are required to submit operations plans to us in advance of the new fishing year. We refer to these operations plans when considering whether to approve the sector to operate and allocate Annual Catch Entitlement to the sector. This year's deadline for operations plan submissions was October 1, 2018. We received operations plan submissions for all existing sectors, with the exception of Northeast Fishery Sector IX. We also received one proposed operations plan for the formation of a new sector, submitted by the Cape Cod Commercial Fishermen's Alliance. As it is currently drafted, the operations plan is comparable to existing operations plans and falls within the scope of the fishing years 2015-2020 Northeast multispecies sectors Programmatic Environmental Assessment. It includes all of the necessary components and warrants further consideration. Therefore, we are notifying the Council consistent with the required process for new sectors.

The Council modified the approval process for new sectors as part of Framework Adjustment 55 to the Northeast Multispecies Fishery Management Plan. Under the revised process, we must notify the Council of the proposed sector request in writing and, subsequently, present the proposed sector operations plan and supporting documentation at a future Groundfish Committee meeting and Council meeting. Following review of the request, the Council must provide any comments to us in writing; we will make the final determination after considering the Council's feedback. We may not approve the formation of the new sector without the Council's endorsement.

If you have any questions, please contact Sarah Heil, Groundfish Team Supervisor, at (978) 281-9257.



Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Pentony". The signature is fluid and cursive, with the first name "Michael" and the last name "Pentony" clearly distinguishable.

Michael Pentony
Regional Administrator



Greater Atlantic Region Bulletin

NOAA Fisheries, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930

For Information Contact:
Sustainable Fisheries Division
(978) 281 - 9315

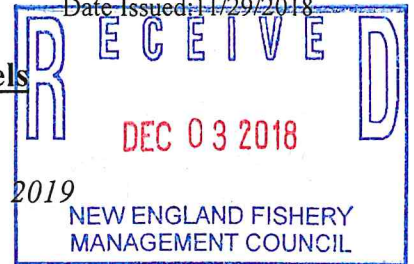
www.greateratlantic.fisheries.noaa.gov

Date Issued: 11/29/2018

Northeast Multispecies Common Pool Vessels

Possession and Trip Limit Increase
for Georges Bank Cod

Effective Date: November 29, 2018, through April 30, 2019



Effective at 0845 hours on November 29, 2018, the possession and trip limits for Georges Bank (GB) cod are adjusted, as summarized in the table below, for the remainder of the 2018 fishing year, through April 30, 2019.

Permit Type	Current Possession/Trip Limits	New Possession/Trip Limits
Day-At-Sea (DAS)	100 lb/DAS, up to 200 lb/trip (Outside of the Eastern U.S./Canada Area)	250 lb/DAS, up to 500 lb/trip
	100 lb/DAS, up to 500 lb/trip (Inside the Eastern U.S./Canada Area)	
	1,000 lb per trip [Closed Area II Yellowtail Flounder/Haddock SAP (for targeting haddock)]	500 lb per trip
Handgear A	100 lb/trip	250 lb/trip
Handgear B	25 lb/trip	unchanged
Small Vessel Category*	100 lb/trip	250 lb/trip

*The Small Vessel Category trip limit of 300 lb of cod, yellowtail flounder, and haddock combined remains in place.

If you are not participating in a Special Access Program (SAP), have declared your trip through the vessel monitoring system (VMS) or interactive voice response (IVR) system, and have crossed the VMS demarcation line prior to 0845 hours on November 29, 2018, you may land up to new possession and trip limits for that trip.

If you are participating in the Closed Area II Haddock SAP, have declared your trip through VMS or the IVR system, and have crossed the VMS demarcation line prior to 0845 hours on November 29, 2018, you are not subject to the new possession and trip limits for that trip.

For small entity compliance guides, this bulletin complies with section 212 of the Small Business Regulatory Enforcement and Fairness Act of 1996. This notice is authorized by the Regional Administrator of the National Marine Fisheries Service, Greater Atlantic Region.

jc 12/10/18

Please note that the GB cod trip limit for vessels participating in the Closed Area II Haddock SAP has been reduced to 500 lb per trip to make it consistent with the trip limit when not participating in a SAP. This reduction in the trip limits for vessels participating in the SAP is expected to prevent an overage of the common pool's annual quota allocation.

<i>Frequently Asked Questions</i>	
Why is this action being taken?	We are increasing the possession and trip limits to provide additional fishing opportunities and facilitate harvest of the quota for GB cod.
How much of the quota has been caught?	As of October 13, 2018, only 11 percent of the GB cod annual quota has been caught. <u>Quota monitoring</u> reports are updated on the internet.
What happens if the Trimester TAC is exceeded? Underharvested?	If the Trimester 1 or Trimester 2 TAC for a stock is exceeded, the overage is deducted from the Trimester 3 TAC. Any unused portion of the Trimester 1 or Trimester 2 TAC for the stock is carried forward to the following trimester. No unused portion of the total annual quota may be carried over to the following fishing year.
What happens if the annual quota is exceeded?	If the 2018 fishing year quota is exceeded, the amount of the overage will be deducted from the common pool's quota for fishing year 2019.



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NOV 13 2018

Thomas A. Nies
Executive Director
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950



Dear Tom:

The Council recommended that we add the large-mesh belly panel (LMBP) to the list of approved gears for other non-groundfish fisheries when the accountability measure is triggered for southern windowpane flounder and for small-mesh fisheries when the Georges Bank yellowtail flounder accountability measure is triggered. Tomorrow we will publish a proposed rule for the use of this gear for small-mesh fisheries when the Georges Bank yellowtail flounder accountability measure is triggered.

We have reviewed the results of Cornell University's 2015 study, and the Groundfish Plan Development Team's (PDT) analysis that the Council submitted with its request. Based on this analysis, we are not proposing to approve the LMBP gear for use in the windowpane accountability measure area at this time because it does not meet the Council's gear performance standard. As currently written, the regulations require that any new selective gear reduce the catch of *all* stocks of concern (defined as stocks that are overfished or experiencing overfishing) by at least 50 percent, on a trip-by-trip basis (50 CFR 648.85(b)(6)(iv)(J)(2)(i)). While the study and PDT analysis demonstrates a sufficient reduction in southern windowpane flounder catch, it does not sufficiently reduce catch of yellowtail or winter flounder.

We understand that this gear could provide important flexibility to non-groundfish fisheries when faced with southern windowpane flounder accountability measures. The Council's gear performance standard was originally developed to evaluate gear for use by groundfish vessels in special programs (U.S./Canada Special Access Program and B Days-at-sea) that facilitated increased access to healthy stocks. The southern windowpane accountability measure does not provide new access to an area, but instead is designed to limit catch of that specific species to address the operational and biological issues related to the sub-ACL overage. The Council could consider creating a new gear performance standard, consistent with these accountability measure goals, to focus on evaluating the catch reductions of the species the accountability measure was designed for, rather than all overfished/overfishing stocks. If the Council chooses to adopt this modified approach to defining species of concern for gear performance standards for accountability measures, we may be able to consider approval of this gear in a future action.



If you have any questions please contact Sarah Heil, Groundfish Team Supervisor, at (978) 281-9257.

Sincerely,



Michael Pentony
Regional Administrator

cc: Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council

Enclosures



November 13, 2018

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

Re: September 25, 2018 Correspondence concerning current ASM coverage levels

Dear Mike,

On behalf of Northeast Fishery Sector I, II, III, IV, VI, VII, VIII, IX and XII please accept the following response to your September 25, 2018 correspondence concerning the Sectors current realization of the 15% monitoring target coverage for FY 2018.

This matter was 1st brought to the attention of NEF Sector Mangers at the September 5, 2018 in person Sector Manager meeting held at GARFO. At that time GARFO staff presented the current concerns to all participants which prompted a thoughtful and detailed discussion regarding various issues that were impacting individual Sector's ability to meet the 15% monitoring target coverage rate. These issues ranged from ASM providers staffing constraints, need for ASM training courses to be held, low trip occurrence compared to previous fishing years, PTNS compliance issues and Trip Start Hail declaration mistakes. Needless to say there are countless elements; some within a Sector's ability to address while others are not, that are contributing to individual sectors being below average on their monitoring coverage.

All NEF Sector Managers walked away from the September 5th meeting with a sincere focus to work with their Sectors, ASM Provider and the Agency to ensure any and all elements are being appropriately addressed. The NESSN Program Director has also been working with NEF Sector Managers to better understand and address sector specific challenges towards meeting the 15% monitoring target coverage rate.

In working through these matters we have discovered that there is not one specific element consistent across all NEF sectors. Some NEF Sectors are on target to reach the 15% coverage rate, other NEF Sectors have no known compliance issues but need to work with their provider to ensure more trips when selected are monitored not waived between now and April 30, 2018; finally some NEF Sectors need to work with a small segment of their membership and their providers to get compliance and monitoring rates up.

Your September 25th correspondence provided each NEF Sector with more detailed sector specific issues concerning this problem. In the letters to the NEF Sectors the Agency included a

Northeast Sector Service Network
1 Blackburn Center, 2nd Floor
Gloucester, MA 01930

CBK, JC 11/19/18

copy of the Sectors PTNS Compliance Report for trips occurring May through August. These compliance reports document situations where a vessel may have failed to pre-trip, refused to take a monitor and/or had a no call/no show. These are overarching categorizations which capture a host of issues, some intentional some not. When we compare the total amount of issues represented in the compliance report to the total groundfish trips taken we see the following level of compliance related issues:

	Total GF Trips	Total PTNS Issues May-August 2018	Compliance percentage
2-NEFS	597	3	0.5%
3-NEFS	138	6	4.3%
6-NEFS	34	0	0.0%
8-NEFS	97	5	5.2%
12-NEFS	267	0	0.0%

NEF Sectors take all of these matters seriously. While digging further into this information we have discovered that all of these issues can be corrected with effective communication and reminders to the members involved. We have also determined that in some situations the issues in question stem from simple mistakes such as occasional failures to notify NMFS that a vessel did not go fishing for a variety of reasons including weather and medical issues.

Furthermore, NEF Sectors have also been engaging with their selected ASM providers to evaluate how they can work to ensure that sectors below target are able to get their overall target coverage rate by the end of the fishing year. While we see places where improvements can be made, we do not believe any sector member is intentionally employing observer avoidance behavior based on the information we have available to us.

As highlighted in this letter, the NEF Sectors have already embarked on addressing numerous elements contributing to low monitoring rates. However, not all responsibility or blame rests on sectors when it comes to this issue. Provider related issues, failure to schedule requested training courses, and communication challenges equally contributed to the current issue. We will continue to do what is within our control to mitigate this issue, but we hope that GARFO and NEFSC equally look internally on ways they can help address the current issue and develop protocols to minimize its potential occurrence in the future.

To conclude, the NEF Sectors understand the 15% target coverage rate requirement for FY 2018. Each of the Sectors intends to continue to work with the Agency, the Observer Program, ASM Providers, NESSN and NEF Sector Members to ensure each Sector is meeting this requirement.

Northeast Sector Service Network
 1 Blackburn Center, 2nd Floor
 Gloucester, MA 01930

Thank you,

A handwritten signature in black ink, appearing to read "E. M. P. S.", is positioned above the typed name.

Program Director, Northeast Sector Service Network

CC:

New England Fishery Management Council
Northeast Seafood Coalition
I, Northeast Fishery Sector Inc.
II, Northeast Fishery Sector Inc.
III, Northeast Fishery Sector Inc.
IV, Northeast Fishery Sector Inc. (lease only)
VI, Northeast Fishery Sector Inc.
VII, Northeast Fishery Sector Inc.
VIII, Northeast Fishery Sector Inc.
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