

ADDITIONAL CORRESPONDENCE



September 18, 2025

Dr. Cate O'Keefe, Executive Director
New England Fishery Management Council
50 Water Street Newburyport, MA 01950

Dear Cate,

On behalf of the Northeast Seafood Coalition (NSC), I am writing to forward the comments submitted by Kelley Drye & Warren LLP on April 10, 2025 to the Notice of Authorization for the disapproved Amendment 25 to the Northeast Multispecies Fishery Management Plan. These comments are now being submitted under the New England Fishery Management Council's deliberations for the revised Amendment 25 action scheduled for final action at the upcoming September Council meeting.

Last fall, the NSC and Gloucester Fishing Community Preservation Fund (GFCPF) sought the legal expertise of Kelley Drye & Warren LLP to review the regulatory process and management measures under consideration for the Atlantic Cod Transition Plan. At that time the transition plan included the former Amendment 25 to the Northeast Multispecies Fishery Management Plan ("administrative" action) and the Framework Adjustment 69 (bridge plan) to the Multispecies FMP.

On November 18, 2024, Kelly Drye & Warren LLP submitted a letter to the Council that highlighted notable process and procedural issues with the Atlantic cod transition plan (see attached Exhibit 1). In this letter, Kelly Drye & Warren identified inconsistencies with Amendment 16 policy and identified the methodology for repurposing of Potential Sector Contribution (PSC) as having significant procedural issues.

Given the Framework 69 cod measures continue to serve as the backbone of this revised Amendment 25 action, we fear this repackaging effort has done little to rectify the procedural weaknesses of the former Amendment 25 and Framework 69 cod measures.

NSC and GFCPF share in the Council's goal of developing a rational, fair, legal way to transition Northeast cod management from two to four stocks. We appreciate the time and effort put forth in the Atlantic Cod Stock Structure Working Group and the Atlantic cod research track. However, NSC and GFCPF remain concerned that the abbreviated repackaging process could also be deemed inadequate. We urge you to take the time to read our comments.

Sincerely,

Vito Giacalone

Vito Giacalone, Policy Director, Northeast Seafood Coalition Board of Directors

*1 Blackburn Center
Gloucester, MA 01930
Tel: (978) 283-9992
www.northeastseafoodcoalition.org*



David E. Frulla

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Tel: (202) 342-8648
Fax: (202) 342-8451
dfrulla@kelleydrye.com

April 10, 2025

Filed electronically through <https://www.regulations.gov>

Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring MD

Re: NOAA-NMFS-2024-0141: Comments on Notice of Availability for Northeast Multispecies Amendment 25

Dear Sir or Madam:

We respectfully submit these comments regarding Northeast Multispecies (Groundfish) Fishery Management Plan Amendment 25 ("Amendment 25") on behalf of the Northeast Seafood Coalition ("NSC") and the Gloucester Fishing Community Preservation Fund, Inc. ("GFCPF").

Founded in 2002, NSC is a non-profit membership organization that represents commercial fishing businesses in the scientific, policy, and legislative processes. NSC's members encompass the full diversity of small family-owned and operated businesses that participate in the federal Northeast multispecies (groundfish) fishery. NSC members hail from ports across the Northeast, utilize all groundfish gear types and fish on small, medium, or large platforms. NSC fishing members are enrolled under the groundfish sector management program.

Founded in 2007, the GFCPF is a Internal Revenue Code section 501(c)(3) non-profit organization with charitable purposes including, without limitation, preserving and promoting awareness of Gloucester's fisheries, heritage, and the fabric of the Gloucester community; protecting and enhancing the Port of Gloucester and the Port's infrastructure; and, in order to aid disadvantaged fishermen, serving as a central repository and exchange for the distribution of limited access, multi-species fishing privileges and permits for fishing vessels based in Gloucester.

NOAA Fisheries should disapprove Amendment 25 because it is incomplete. The Secretary should return Amendment 25 to the New England Fishery Management Council for further development. As we will show, any new cod stock area designations should be part of a comprehensive amendment that not only designates the stock areas, but sets status determination and related criteria for the new stocks, and

KELLEY DRYE & WARREN LLP

1

integrates ABCs and ACLs for these new stocks into the sector system in a deliberative and informed way. The Magnuson-Stevens Fishery Conservation and Management Act (“MSA” or “Magnuson-Stevens Act”) requires use of the best scientific information available, but it also requires this information—to the extent it is indeed the best—to be integrated into fishery management plans using a lawful process.

1. Amendment 25 Lacks Elements the MSA Requires

The Magnuson-Stevens Act sets forth required provisions for fishery management plans at 16 U.S.C. §1853(a). Sub-section (10) requires an FMP to:

Specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery)
....

Accordingly, the National Standards Guidelines for National Standard One provide that:

This section provides a summary of items that Councils must include in their FMPs and FMP amendments in order to address ACL, AM, and other aspects of the NS1 guidelines. ... For all stocks and stock complexes that require conservation and management ..., the Councils must evaluate and describe the following items in their FMPs and amend the FMPs, if necessary, to align their management objectives to end or prevent overfishing and to achieve OY:

- (1) MSY and SDC
- (2) OY at the stock, stock complex or fishery level and provide the OY specification analysis
- (3) ABC control rule
- (4) Mechanisms for specifying ACLs
- (5) AM’s¹

Federal courts have specifically held that required provisions of an FMP prescribed in 16 U.S.C. § 1853(a) must be contained in FMP or FMP amendments themselves. In *Oceana, Inc. v. Evans*, the court held:

Congress’ desire that fisheries be managed on a continuing basis cannot be read to eviscerate the legislature’s equally strong desire that policy choices be determined with ample public participation, 16 U.S.C. §1801(b) ..., and its mandate that certain features of fishery management regimes *must* be specified by FMP. *Id.* §1853(a).... Thus, an FMP

¹50 C.F.R. §600.310(c).

must “specify” mandatory governing principles as required by § 1853(a), but the Council and NMFS may undertake a range of actions to carry out these principles in response to updated data about the fishery.²

Oceana then proceeded to invalidate revisions to scallop habitat closed areas because they were contained in a framework adjustment but the Magnuson-Stevens Act’s habitat protection provisions were included among the Act’s mandatory FMP provisions set forth at 16 U.S.C. §1853(a)(7).³ Finally, the court in *Oceana* concluded the fact that NMFS and the Council were rushing to confirm the habitat closures in Groundfish Amendment 13 and Scallop Amendment 10 did not excuse the violation of law.⁴

The Council has made the exact same mistake with respect to Amendment 25. The Amendment NOA states that:

The regulations implementing the National Standard 1 guidelines (§ 600.310(c)) include a summary of items to include in an FMP for each stock. This includes maximum sustainable yield, optimum yield, status determination criteria, and accountability measures. Management measures for the four Atlantic cod stocks that Amendment 25 would add to the FMP are included in a companion Council action titled Framework Adjustment 69.⁵

Amendment 25 violates the law because it does not contain the items quoted directly above. These items should be included in a comprehensive amendment package, not via trailing framework adjustments.

In addition, regulations implementing each FMP prescribe which management actions are frameworkable. For their part, Multispecies FMP implementing regulations do not identify establishment of status determination criteria and other elements set forth in 50 C.F.R. § 50 C.F.R. §600.310(c). Rather, the Groundfish FMP’s framework adjustment provisions only allow for “[r]evisions to the ABC control rule and status determination criteria ...” through the biennial review process Amendment 16 established.⁶

2. The Council Should Have Integrated the Stock Areas into the Amendment 16 System in this Amendment

The Council cannot rely on the framework adjustment process to reconcile Amendment 25 with the Groundfish FMP. Framework adjustments are “intended to respond to new data, to ensure that the fishery achieves optimum yield on an ongoing basis, and to achieve [Fishery Management Plan, (“FMP”)]

²384 F. Supp.2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

³*Id.* at 255-56.

⁴*Id.* at 255.

⁵90 Fed. Reg. 11246, 11248 (Mar. 5, 2025).

⁶50 C.F.R. § 648.90(a)(2)(iii)(Q).

objectives.”⁷ These actions “implement an FMP, but do not fundamentally alter it.”⁸ They are actions that “adjust[] management measures according to specifications in the FMP.”⁹

In order to implement new cod stock areas, a management action will need to fundamentally alter the methodology used under Groundfish Amendment 16 to allocate allowable catch at the permit holder, sector and fleet levels. In addition, the extraordinary level of spatial and stock access changes are likewise outside what can be done under Amendment 16’s rigid PSC and Annual Catch Entitlement (“ACE”) formulas that accrue to individual permit holders, so these formulas will need to be readjusted.

In contrast, amendments represent the regulatory vehicle that introduce “fundamental alterations” into an FMP, such as “[introduction of] a new concept into the management of the fishery or eliminat[ion] or radical[] change[s to] an existing one.” Put differently, amendments “alter management of the fishery in a way, or to an extent, not considered in the FMP or prior amendments, or in hearings held during their preparation.”¹⁰

Accordingly, Amendment 25 should also have included management measures to integrate the new stocks areas into the existing Amendment 16-based groundfish management regime. These management measures will need to be designed to align with the Magnuson-Stevens Act National Standards, including National Standard Eight, to be approvable.¹¹

3. Amendment 25 Fails to Address the National Standards

Amendment 25 does not even address the National Standards, except in the title on page 12. Rather, it only addresses and applies general guidelines not tied to any national standard for determining whether a stock requires conservation and management.¹²

Indeed, Amendment 25 goes so far as to claim that it does not even need to consider, not to mention comply with, the National Standards. It states, in relevant part,

Section 301 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires regulations implementing any fishery management plan or amendment be consistent with ten national standards. Amendment 25 contains no measures that affect

⁷*Oceana*, 384 F. Supp. 2d at 252 (citations omitted).

⁸*Id.*

⁹*Conservation L. Fund. v. Pritzker*, 37 F. Supp. 3d 234, 249 (D.D.C. 2014) (citing *Oceana*, 384 F.Supp.2d at 254).

¹⁰*Oceana*, 384 F. Supp. 2d at 252 (invalidating joint scallop/groundfish framework measure adjusting habitat boundaries).

¹¹50 C.F.R. § 600.305(a)(2).

¹²See Amendment 25, at 12-15 (quoting and applying 50 C.F.R. § 305(c)).

current operational regulations of the fishery and makes administrative updates in incorporating four revised Atlantic cod stock units into the FMP.¹³

The Amendment is wrong on three fundamental accounts. First, the national standards apply to changes to fishery management plans, not just changes to implementing regulations.¹⁴

Second, neither the MSA nor its implementing regulations authorize any such thing as an “administrative” amendment that shortcuts applicable requirements. Nor does any published NOAA or NMFS guidance of which we are aware either define what an administrative amendment is, or prescribe parameters for its use that differ from established MSA procedures. An amendment that shortcuts a surfeit of legal requirements and legally-required analyses is not expedient, it is lawless.

Third, even if an administrative amendment can somehow represent a valid MSA regulatory vehicle, Amendment 25 is not comparable to other instances in which councils have implemented an action called an administrative amendment.

4. Amendment 25 Is Not In Any Way Merely “Administrative”

In the few reported examples of a council’s use of an administrative record found in the Federal Register, administrative amendments generally have ranged from making minor grammar edits to clarifying technical processes (but they stop short of methodological or analytical changes).

The Pacific Fishery Management Council (“PFMC”) summed it up best in describing Coastal Pelagic Species Amendment 21: “The proposed [administrative amendment] changes were not intended to change the policy framework described in the FMP, change management, or otherwise be substantive changes, but rather to: remove or update descriptions that have become out of date, reflect current fishery management practice as described in National Standard 1 Guidelines, and reorganize and revise the text to be more clear and concise.”¹⁵ The Federal Register notice for Amendment 21 (which the PFMC was describing in that summary) notes that the Amendment “would make a number of non-substantive, administrative changes to the CPS FMP including defining acronyms upon first use, adding hyperlinks, removing repetitive language, and rearranging sections for clarity and logical sequence. These changes, colloquially referred to as ‘housekeeping’ changes, would not change the management of the fishery.”¹⁶

¹³Amendment 25, at 12.

¹⁴See 16 U.S.C. § 1851(a).

¹⁵<https://www.pcouncil.org/actions/housekeeping-fmp-amendment/>

¹⁶<https://www.federalregister.gov/documents/2024/02/20/2024-03396/fisheries-off-west-coast-states-coastal-pelagic-species-fisheries-amendment-21-to-the-coastal>

Similarly, the PFMC promulgated Amendment 24 as an “administrative amendment” to the Salmon Fishery Management Plan. The amendment summary¹⁷ notes that the “purpose of the amendment is to clarify the technical process for reviewing updates to the models used to determine the Chinook abundance threshold and reporting to the Council any resulting change in the threshold. There are no proposed changes to methodology or analysis. Other minor administrative or clerical edits may also be included in the amendment language, as needed.” The Council also noted that this action “is administrative in nature and does not change the approach used to establish the threshold, the method described in the Salmon FMP to periodically update it based on new information or the fishery management responses currently described in the Salmon FMP.”

Amendment 25 is in no way a “housekeeping amendment.” Rather it represents a scientifically complex undertaking, with downstream real-world, as-yet unstudied effects on the fishery that will be equally complicated. While regulatory streamlining has its place, it is not appropriate here when the result is a process that contains neither the level nor type of analyses the law requires to make such comprehensive changes to Atlantic cod management.

Regulations implementing the Council’s Multispecies FMP do reference the term “administrative amendment,” in the context of an administrative amendment to a sector operations plan.¹⁸ But the way sub-section (c)(4) characterizes an amendment as administrative further solidifies why Amendment 25 is in no way administrative. That sub-section explains:

If the amendment is administrative in nature, within the scope of and consistent with the actions and impacts previously considered for sector operations, the RA may approve an administrative amendment in writing. (Emphasis added).

In no way are the cod stock area changes in Amendment 25 within the scope of or consistent with actions and impacts previously considered in the Groundfish FMP.

Further, Amendment 25’s use of the term “administrative” is contrary to Amendment 16’s use of the term. Because Amendment 25 is promulgated directly under the program Amendment 16 established, it is instructive to understand how Amendment 16 used the term “administrative.”

Numerous examples provide clarity. For example, Amendment 16 categorizes the following activities as “primarily administrative” or “primarily administrative in nature:”

- Changes to submission requirements related to permit applications;¹⁹

¹⁷<https://www.pcouncil.org/documents/2023/08/c-3-situation-summary-fishery-management-plan-fmp-amendment-24-southern-resident-killer-whale-chinook-threshold-clarifications.pdf/>

¹⁸See 50 C.F.R. § 648.87(c)(4).

¹⁹Amendment 16, at Section 7.2.1.2.3.

- Changes to the periodic adjustment process;²⁰
- Preventing catch history from accruing after implementation of Amendment 16;²¹
- Amending data gathering provisions;²²
- Requiring vessels to declare at the start of the trip whether they intend to fish in one broad reporting area or multiple reporting areas;²³
- Enabling the Council to make a change via the framework adjustment process “to the ACL and AM process or implementation,” “sector *administration* policies,” and reporting requirements;²⁴

These activities are “administrative” because they focus on procedural matters rather than substantive fishery management decisions, like expanding the number of cod stocks from two to four. They involve operational aspects like modifying permit application requirements, adjusting data collection processes, establishing reporting protocols, and creating procedural frameworks for future changes to existing fisheries. Indeed, what makes these functions “administrative” is their emphasis on amending existing governance processes. By contrast, none of these measures make substantive changes to a fishery management program the way establishing four cod stocks does. Nor do these process-related changes required extensive, multi-year management actions to implement and integrate into the sector system.

5. Amendment 25’s NEPA Analyses Are Fatally Deficient

Section 5.2 of Amendment 25 comprises the amendment’s National Environmental Policy Act (“NEPA”) section. Spanning one short paragraph, it does not contain any of the analyses that it should. The Council justified its failure to conduct a NEPA analysis on its “preliminarily determin[ation] that this action qualifies for a categorical exclusion... as it is primarily administrative in nature.”²⁵

For the reasons set forth below, the Council has not produced the necessary underlying documentation to rely on a categorical exclusion (“CE”) to avoid conducting NEPA analyses, and there are numerous substantive reasons that preclude the Council from doing so. Accordingly, the Council must proceed with NEPA and, at a minimum, develop an environmental assessment (“EA”).

²⁰Amendment 16, at 7.2.1.2.8.

²¹Amendment 16, at 7.2.1.2.10.

²²Amendment 16, at 7.2.2.2.3.

²³Amendment 16, at 7.3.1.2.4.

²⁴Amendment 16, at 7.3.1.2.10 (emphasis added). new stock.

²⁵Minor review of Amendment 25 is included in Framework 69, itself predicated on Amendment 25’s implementation. Nowhere does Framework 69 discuss Amendment 25’s reliance on a CE.

Summarily, NEPA analysis is required for proposals of major Federal actions.²⁶ As NOAA concedes, “[f]ishery management actions, such as NMFS’s approval of fishery management plans and amendments, are typically considered ‘major Federal actions’ requiring some level of NEPA review.”²⁷

NEPA “serves the twin purposes of ensuring that (1) agency decisions include informed and careful consideration of environmental impact, and (2) agencies inform the public of that impact.”²⁸ NEPA requires agencies take a “‘hard look’ at their proposed actions’ environmental consequences in advance of deciding whether and how to proceed.”²⁹ This “hard look” takes the form an EA, which outlines the proposal and its possible environmental impacts, unless a CE is claimed.³⁰

NOAA’s adopted procedures for claiming CEs are found in *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual for NOAA Administrative Order 216-6A* (“Companion Manual”).³¹ It notes that a

CE may only be applied to a proposed action when: a) the proposed action falls within one of the CE categories listed in Appendix F [actually, Appendix E] of this Manual; b) the proposed action is not part of a larger action, and can therefore be reviewed independently from other actions under NEPA; and c) there are no extraordinary circumstances that may require further analysis in an EA or EIS.³²

For the reasons outlined below, Amendment 25 fails to meet each of these requirements.

- a. The Proposed Action is Not Covered By Appendix E; Nor is it “Primarily Administrative”

To effectuate the CE, the agency “must prepare a document to evaluate the applicability of a CE, which includes... the CE category number, title, and CE text that applies to the action (Appendix F).”³³ However, Amendment 25 does not include the CE category number, title, or CE text that applies to the action as described in Appendix E of the Companion Manual. While the Council has provided a single sentence outlining its reliance on the CE, this is insufficient in light of the Companion Manual’s requirements.

²⁶42 U.S.C. § 4321 *et seq.*; Companion Manual.

²⁷Companion Manual at C-6.

²⁸*Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36–37 (D.C. Cir. 2015) (citations omitted).

²⁹*Id.* at 37 (citation omitted).

³⁰42 U.S.C. § 4336.

³¹(Jan. 13, 2017).

³²Companion Manual at 4.

³³Companion Manual at 5.

If the Council had properly invoked a CE for Amendment 25, it is likely it would have invoked CE #A1: “an action that is a technical correction to a change to a fishery management action or regulation which does not result in a substantial change in any of the following: fishing, location, timing, effort, authorized gear types, or harvest levels.”³⁴

Amendment 25 will result in substantial changes to the fishery. In fact, Amendment 25 is the first step in effectuating the Council’s Atlantic Cod Management Transition Plan (“ACMTP” or “the Plan”).³⁵ While these changes are contained in subsequent actions, a review of the examples NOAA provides for CE #A1 shows just how far away Amendment 25 is from being subject to this CE. More specifically, the examples include changes to reporting requirements, vessel hailing requirements, or gear marking requirements; requirements regarding stowage of gear when transiting closed areas; and changing an FMP’s or regulation’s period of effectiveness.³⁶

Courts routinely determine actions like this are not “purely administrative.” For instance, in *Shearwater v. Ashe*,³⁷ the court held that a U.S. Fish and Wildlife Service (“FWS”) proposal modifying permit duration for takes of bald and golden eagles failed NEPA because FWS’s reliance on an “administrative” CE for was unsubstantiated, stating:

The primary purpose of the [proposal], according to the regulation itself, was not to reduce FWS’s administrative burden. Rather, the primary purpose was to “facilitate the responsible development of renewable energy and other projects designed to operate for decades” ... Considering that... substantive—and not procedural—concerns drove the [proposal’s] promulgation... the Court fails to see how the regulation could be considered strictly administrative.³⁸

Likewise, Amendment 25 is undoubtedly driven by substantive, not procedural, concerns: the MSA implementing regulations’ requirement that councils periodically “review FMPs and the best scientific information available... to determine if the stocks are appropriately defined.”³⁹ More specifically, the Council developed Amendment 25 to address the supposed “mismatch between management units and the biological populations” of the two cod stocks that allegedly “are subject to overfishing.”⁴⁰

³⁴Companion Manual at E-1.

³⁵See Atlantic Cod Management Transition Plan, New England Fishery Management Council. Available at <https://www.nefmc.org/library/atlantic-cod-management-transition-plan>.

³⁶Companion Manual at E-1.

³⁷No. 14–CV–02830–LHK (N.D. Cal. August 11, 2015).

³⁸*Id.* at 17 (citations omitted).

³⁹Amendment 25 at Section 5.1.1; *see also* 50 C.F.R. § 600.305(c)(7).

⁴⁰Amendment 25 at 14.

b. The Proposed Action is Part of a Larger Action

The second requirement to claim a CE is that the proposed action is not part of a larger action. Amendment 25 is most definitely part of a larger action—it is one of the first steps of a multi-year process in what the Council has termed its Atlantic Cod Management Transition Plan.⁴¹

c. Extraordinary Circumstances Apply

Shearwater explains, “It is well established that ‘an agency may not use a CE when ‘extraordinary circumstances’ exist.’”⁴² “Importantly, ‘the fact that [extraordinary circumstances] *may* apply is all that is required to prohibit use of the categorical exclusion.”⁴³ Accordingly, and for the reasons outlined below, a CE is inappropriate here.

The NOAA Companion Manual lists twelve different extraordinary circumstances that, if found, require an EA’s development. Two are particularly relevant here: when the proposed action has “highly controversial environmental effects;” and when the proposed action has “the potential for significant cumulative impacts when the proposed action is combined with other past, present and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves.”⁴⁴ This section will address each in turn.

“A proposal is highly controversial when *substantial questions* are raised as to whether a project may cause significant degradation of some human environmental factor, or there is a *substantial dispute about the size, nature, or effect* of the major Federal action.”⁴⁵ The Ninth Circuit has observed that this “substantial question” standard “is a low” one.⁴⁶

The record is replete with substantial disputes regarding Amendment 25’s size, nature, and effect, and thus, the action is “highly controversial.” Indeed, public comments received during meetings hosted by the Council, Groundfish Committee, Groundfish Advisory Panel, Recreational Advisory Panel, and Plan Development Team, as well as our November 18, 2024 letter to Director Dr. Cate O’Keefe, all pose substantial questions regarding the size, nature, and effect of Amendment 25 and Framework

⁴¹*See supra* n. 35.

⁴²*Shearwater*, No. 14–CV–02830–LHK at 21 (citations omitted).

⁴³*Id.* (emphasis provided) (citations omitted).

⁴⁴*See* Companion Manual, Section 4.A(i) and 4.A(l), respectively. Other pertinent extraordinary circumstances include “the potential to establish a precedent for future action or an action that represents a decision in principle about future actions with potentially significant environmental effects” at 4.A(j); “environmental effects that are uncertain, unique, or unknown” at 4.A(k).

⁴⁵*Shearwater*, No. 14–CV–02830–LHK at 22 (emphasis added) (citations omitted).

⁴⁶*Id.* at 22 (citing *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011)).

Adjustment 69. In fact, Framework Adjustment 69 itself provides myriad discussions on the size, nature, and effect of Amendment 25, and that alone necessitates the development of an EA.

Moreover, the onus is on the Council to demonstrate why the dispute is not substantial. “[T]he agency must adequately explain why such opposition ‘do[es] not suffice to create a public controversy based on potential environmental consequences,’” as *Shearwater* observed.⁴⁷ Nowhere in Framework Adjustment 69 or Amendment 25 is such discussion present.

Additionally, Amendment 25 presents considerable potential for significant cumulative impacts when combined with past actions, like Amendment 16, present actions like Framework Adjustment 69, and future actions the ACMTP prescribes. Cod is a keystone species in the Northeast groundfish fishery, and whether it serves as a target of economic opportunity or, alternatively, a choke species in the sector program, there is no getting around the fact that the ecological and economic reordering set forth in the ACMTP will have significant cumulative impacts.

Agencies are required to demonstrate how this extraordinary circumstance does not apply. Indeed, the Council must provide a “discussion of how [future] projects together with the proposed... project will affect [the environment].”⁴⁸ Moreover, “NEPA... prohibit[s] an agency from breaking up a large or cumulative project into smaller components in order to avoid designating the project a major federal action” that would be subject to NEPA analysis requirements.⁴⁹

While some discussion of Amendment 25’s environmental and economic impacts takes place in Framework Adjustment 69, that framework is envisioned as merely an interim step. Moreover, “[c]onclusory statements” regarding environmental benefits are wholly inadequate for the purposes of claiming a CE,⁵⁰ and “the cumulative impacts analysis cannot focus solely on the beneficial effects” of Amendment 25, “but must also analyze the effects on the [human] environment as a whole.”⁵¹ And if assessing cumulative impacts of Amendment 25 “as a whole is impractical, then use of the categorical

⁴⁷*Id.* at 22 (citations omitted).

⁴⁸*Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (internal quotation marks omitted) (alterations in original).

⁴⁹*Churchill County v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001) (internal quotation marks omitted).

⁵⁰*See Sierra Club v. Bosworth*, 510 F.3d 1016, 1028 (9th Cir. 2007).

⁵¹*Sierra Club*, 510 F.3d at 1028 (citing *Muckleshoot*, 177 F.3d at 811 (“The statement notably contains no evaluation whatsoever of the impact on natural resources of timber harvesting... nor does it assess the possible impacts ... upon surrounding areas. The statement focuses solely on the beneficial impact the exchange will have on lands received by the Forest Service.”)).

April 10, 2025

exclusion mechanism [is] improper.”⁵² Fatally, Amendment 25 makes no effort to address these issues and requirements.

Importantly, the Companion Manual requires that the Council provide “a brief summary of the review conducted to determine whether extraordinary circumstances exist.”⁵³ These analyses are nowhere in the record. As the court in *Shearwater* explained, “[w]here there is substantial evidence in the record that exceptions to the [CE] may apply, the agency must *at the very least* explain why the action does not fall within one of the exceptions.”⁵⁴ Accordingly, even if the Council were able to rely on this CE, it cannot do so without this discussion present.

6. Path Forward

We recognize not approving Amendment 25 risks creating a void for fishing year 2025. We have offered a proposed approach for emergency action set forth in our March 12, 2025 letter to then-Acting Assistant Administrator Emily Menashes, and we attach this petition as Exhibit A and incorporate it herein. The approach is workable and would provide an orderly and legal path forward.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us if you have any questions or require additional information.

Respectfully submitted,



David E. Frulla

Counsel to Northeast Seafood Coalition and
Gloucester Fishing Community Preservation Fund, Inc.

DEF:

⁵² *Nat’l Parks & Conserv. Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (“[T]he Parks Service’s repeated generic statement that the effects are unknown does not constitute the requisite ‘hard look’ mandated by the statute if preparation of an EIS is to be avoided.”).

⁵³ Companion Manual at 5.

⁵⁴ *Id.* (emphasis added) (citations omitted).

EXHIBIT A



David E. Frulla

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Tel: (202) 342-8648
Fax: (202) 342-8451
dfrulla@kelleydrye.com

March 12, 2025

BY ELECTRONIC MAIL

Emily Menashes, Acting Assistant Administrator
NOAA Fisheries
1315 East-West Highway
Silver Spring MD 20910

**Re: Northeast Multispecies (Groundfish) Specifications for Fishing Year 2025: Petition for
Emergency Action**

Dear Acting Assistant Administrator Menashes:

We write on behalf of the Northeast Seafood Coalition ("NSC") and the Gloucester Fishing Community Preservation Fund, Inc. ("GFCPF"). Our letter relates to the secretarial approval process under the Magnuson-Stevens Fishery Conservation and Management Act for Amendment 25 to the Northeast Multispecies (Groundfish) Fishery Management Plan ("Amendment 25") and the Atlantic cod provisions of Framework Adjustment 69 ("Framework 69") to that plan. For the reasons set forth herein, NOAA Fisheries should disapprove Amendment 25 and Framework 69's Atlantic cod provisions and implement emergency measures described below to manage the New England groundfish fishery for the fishing year beginning May 1, 2025. We would also respectfully request a meeting as soon as possible to discuss our concerns regarding Amendment 25 and Framework 69 and petition for emergency action.

Founded in 2002, NSC is a non-profit membership organization that represents commercial fishing businesses in the scientific, policy, and legislative processes. NSC's members encompass the full diversity of small family-owned and operated businesses that participate in the federal Northeast multispecies (groundfish) fishery. NSC members hail from ports across the Northeast, utilize all groundfish gear types and fish on small, medium, or large platforms. NSC fishing members are enrolled under the groundfish sector management program.

Founded in 2007, the GFCPF is an Internal Revenue Code section 501(c)(3) non-profit organization with charitable purposes including, without limitation, preserving and promoting awareness of Gloucester's fisheries, heritage, and the fabric of the Gloucester community; protecting and enhancing the Port of Gloucester and the Port's infrastructure; and, in order to aid disadvantaged fishermen, serving as a central repository and exchange for the distribution of limited access, multi-species fishing privileges and permits for fishing vessels based in Gloucester.

NEW YORK WASHINGTON, DC CHICAGO HOUSTON LOS ANGELES SAN DIEGO NEW JERSEY STAMFORD

KELLEY DRYE & WARREN LLP

4915-0412-9071v.2

March 12, 2025

1. Executive Summary and Background Facts

Amendment 25 would redefine Atlantic cod stock area boundaries. Historically, Atlantic cod has been managed using two cod stock areas (Georges Bank and Gulf of Maine). These current cod stock areas date back decades and form a fundamental underpinning of cod conservation and management by the New England Fishery Management Council ("Council"). Amendment 25 would define four new cod stock areas (Eastern Gulf of Maine, Western Gulf of Maine, Georges Bank, and Southern New England) within the area of the existing Georges Bank and Gulf of Maine stock areas. A principal complicating factor is that these four new cod stock areas do not divide neatly within the pre-existing two cod stock areas. Rather, the old Georges Bank stock area is split within the new Western Gulf of Maine and the new Georges Bank stock areas. The way the Georges Bank stock area is split introduces significant complications and uncertainties into cod management.

The Northeast multispecies fishery is almost entirely managed according to a "sector" system. Sectors are essentially fishery cooperatives to which participating permit holders bring their potential sector contribution ("PSC") for conversion into actual fishing opportunity. PSC represents a percentage of the total allowable catch allocated to each permit holder based on that permit holder's historical landings of these species. When an individual permit holder joins a sector in a given year, the permit holder contributes his or her PSC to the sector; the sector then allocates catch to its participating permit holders from the sector's Annual Catch Entitlement ("ACE").

For its part, Framework 69 would establish reference points and specifications for fishing year 2025 for all the Northeast multispecies fish stocks that have allowable catch levels, including but not limited to the four new cod stocks that Amendment 25 would define. Specifications for the cod stocks, as with specifications for the other Northeast multispecies stocks, provide for the allowable catch levels of the various groundfish species that are then apportioned among groundfish permit holders based on their PSCs.

Because the four new cod stock areas do not align with the existing two cod stock areas, Framework 69 devises a complicated new methodology to repurpose Gulf of Maine and Georges Bank cod PSC, respectively, and then reallocate PSC for these four cod stocks to individual permit holders. The existing methodology for allocating PSC was established in 2009 in Amendment 16, the conservation and management measure that established the sector system.

Taken together, Amendment 25 and Framework 69 will result in a 45% reduction in allowable Atlantic cod catches in 2025. Framework 69 portends an overall decline in fleet revenue of 17% across all stocks, which is "largely influenced by the constraining WGOM cod stock." Yet Framework 69 magically predicts the "overall" economic impacts from establishing the new reference points for these four new cod stocks are "expected to have low positive impacts." Further, to date, analyses have only been conducted at the sector level, yet PSC is allocated to individual permit holders. The allocative implications to individual permit holders are striking and yet to be considered.

March 12, 2025

In summary, neither Amendment 25 nor Framework 69 are approvable by NOAA Fisheries. Regional NOAA fisheries scientists and regulators convinced the Council to truncate the fundamental revision of Atlantic cod conservation and management measures that comes with creating entirely new stock areas into two abbreviated management processes. As we explained in our November 18, 2024, letter to the Council (attached hereto as Exhibit 1), the Atlantic cod stock area redefinition was improperly fit into what was styled as an “administrative amendment” (Amendment 25), while the establishment of reference points and interim reallocations of cod PSC to groundfish permit holders were improperly wedged into a biannual specifications package (Framework 69). Fisheries managers should have taken the time to address these two management actions in a comprehensive amendment document that wrestled more fully and in a legal way with the conservation and management complexities that redefining cod stock areas will cause.

Further, even with these abbreviated management processes, neither Amendment 25 nor Framework Adjustment 69 will be ready for the May 1 start of the 2025 groundfish fishing year. On March 5, 2025, NOAA Fisheries released Amendment 25 for a 60-day comment period, ending May 5, 2025.¹ Proposed regulations implementing Framework Adjustment 69 have not published as a proposed rule at all yet. As a result, no management measures will be in place for the start of the fishing year, and there are no default specifications in place that can be used to start the fishing year. Accordingly, in order to start the fishing year for this most historic of U.S. fisheries anywhere close to on time, NOAA Fisheries will need to take emergency action, described below.

2. The Cod Stock Re-Delineations Contained in Amendment 25 Cannot Be Promulgated Via an Abbreviated “Administrative Amendment” Process

Amendment 25 cannot be implemented as a mere “administrative” amendment. Administrative amendments shortcut the processes required for a more formal fishery management plan amendments. While they are not well-defined, in practice, administrative amendments generally have ranged from making minor grammar edits to clarifying technical processes (but they stop short of methodological or analytical changes).

The Pacific Fishery Management Council (“PFMC”) summed it up best in describing Coastal Pelagic Species Amendment 21: “The proposed [administrative amendment] changes were not intended to change the policy framework described in the FMP, change management, or otherwise be substantive changes, but rather to: remove or update descriptions that have become out of date, reflect current fishery management practice as described in National Standard 1 Guidelines, and reorganize and revise the text to be more clear and concise.”² The Federal Register notice for Amendment 21 (which the PFMC was describing in that summary) notes that the Amendment “would make a number of non-substantive, administrative changes to the CPS FMP including defining acronyms upon first use, adding hyperlinks,

¹ 90 Fed. Reg. 11246 (Mar. 5, 2025).

² <https://www.pcouncil.org/actions/housekeeping-fmp-amendment/>

March 12, 2025

removing repetitive language, and rearranging sections for clarity and logical sequence. These changes, colloquially referred to as ‘housekeeping’ changes, would not change the management of the fishery.”³

Similarly, the PFMC promulgated Amendment 24 as an “administrative amendment” to the Salmon Fishery Management Plan. The amendment summary⁴ notes that the “purpose of the amendment is to clarify the technical process for reviewing updates to the models used to determine the Chinook abundance threshold and reporting to the Council any resulting change in the threshold. There are no proposed changes to methodology or analysis. Other minor administrative or clerical edits may also be included in the amendment language, as needed.” The Council also noted that this action “is administrative in nature and does not change the approach used to establish the threshold, the method described in the Salmon FMP to periodically update it based on new information or the fishery management responses currently described in the Salmon FMP.”

Amendment 25 is in no way a “housekeeping amendment.” Rather it represents a scientifically complex undertaking, with downstream real-world, as-yet unstudied effects on the fishery that will be equally complicated. While regulatory streamlining has its place, it is not appropriate here when the result is a process that contains neither the level nor type of analyses the law requires to make such comprehensive changes to Atlantic cod management.

3. Framework 69’s Cod Provisions Are Not Appropriate for a Framework Adjustment

Framework adjustments are “intended to respond to new data, to ensure that the fishery achieves optimum yield on an ongoing basis, and to achieve [Fishery Management Plan, (“FMP”)] objectives.”⁵ These actions “implement an FMP, but do not fundamentally alter it.”⁶ They are actions that “adjust[] management measures according to specifications in the FMP.”⁷

In contrast, amendments represent the regulatory vehicle that introduce “fundamental alterations” into an FMP, such as “[introduction of] a new concept into the management of the fishery or eliminat[ion] or radical[] change[s to] an existing one.” Put differently, amendments “alter

³ <https://www.federalregister.gov/documents/2024/02/20/2024-03396/fisheries-off-west-coast-states-coastal-pelagic-species-fisheries-amendment-21-to-the-coastal>

⁴ <https://www.pcouncil.org/documents/2023/08/c-3-situation-summary-fishery-management-plan-fmp-amendment-24-southern-resident-killer-whale-chinook-threshold-clarifications.pdf/>

⁵ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (citations omitted).

⁶ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

⁷ *Conservation L. Fund. v. Pritzker*, 37 F. Supp. 3d 234, 249 (D.D.C. 2014) (citing *Oceana*, 384 F.Supp.2d at 254).

March 12, 2025

management of the fishery in a way, or to an extent, not considered in the FMP or prior amendments, or in hearings held during their preparation.”⁸

Framework 69’s cod provisions should not be promulgated in a framework adjustment because they fundamentally alter the methodology used under Groundfish Amendment 16 to allocate allowable catch at the permit holder, sector and fleet levels. The novel use of Georges Bank PSC and methods for apportioning PSC in the northwest Gulf of Maine (“NWGOM”) and southwest GOM (“SWGOM”) go far beyond frameworkable items allowed in Amendment 16.

“Congress acknowledged [framework adjustments’] use for some types of measures” but these measures “are not without bounds.”⁹ “Congress’ desire that fisheries be managed on a continuing basis cannot be read to eviscerate the legislature’s equally strong desire [in the Magnuson-Stevens Act] that policy choices be determined with ample public participation.”¹⁰

Regulations implementing each FMP prescribe which management actions are frameworkable. For their part, Multispecies FMP implementing regulations do not identify fundamental repurposing of cod PSC (as is now contemplated in Framework 69) allocations as among frameworkable management specifications. Rather, they provide in relevant part that “sector allocation requirements and specifications, including... the allowable percent available of Annual Catch Limit (“ACL”) to a sector through a sector allocation... and the calculation of PSCs” are frameworkable through the biennial review process Amendment 16 established.¹¹

As explained in more detail in our November 18, 2024, letter to the Council, the “calculation of PSCs” described in the groundfish framework regulations does not extend to the repurposing of PSCs that Framework 69 is undertaking. As regards the four new stocks of cod, Framework 69 undertakes an operation to PSCs for cod that is entirely different from the existing Amendment 16 methodology. For instance, Framework 69 entails a reallocation of Gulf of Maine cod PSC to vessels holding Georges Bank PSC, rather than a run-of-the mill periodic “calculation” of PSCs. The resulting changes to individual permit holder fishing opportunities will be major, and they have yet to be studied at all.

⁸ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (invalidating joint scallop/groundfish framework measure adjusting habitat boundaries).

⁹ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

¹⁰ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

¹¹ 50 C.F.R. § 648.90(a)(2)(iii)(E).

March 12, 2025

4. Petition for Emergency Action

According to NOAA Policy Guidelines for the Use of Emergency Rules,¹² “The preparation or approval of management actions under [the MSA’s] emergency provisions ... should be limited to extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery or community would be caused in the time it would take to follow standard rulemaking procedures. An emergency action may not be based on Administrative action to solve a long-recognized problem.” The fact that the 2025 New England groundfish fishing year will commence on May 1 but there will be no specifications in place represents an economic and social emergency. Moreover, there is no prospect of cod specifications absent emergency action because Amendment 25 and the cod provisions of Framework 69 are not approvable for the reasons set forth above.

An economic emergency can be declared “to prevent significant direct economic loss or preserve a significant economic opportunity that might otherwise be foregone.” A social emergency can be declared to “prevent significant community impacts.” Groundfish permit holders should not be forced to suffer severe economic and community dislocation because fundamentally erroneous procedural shortcuts were made during the previous Administration.

No cod fishery ABCs—whether through a framework specification process like Framework 69 or through any emergency action for the 2025 fishing year—should be based directly or indirectly on the four stocks that as a legal matter will not exist if Amendment 25 is not approved. For instance, emergency fishery specifications for 2025 cannot be based on recently concluded stock assessments for each of the four cod stocks that were predicated on Amendment 25 being approved because Amendment 25 is not approvable. Rather, emergency specifications must be based on the pre-existing two cod stock approach.

Our petition has five elements:

- (1) For the first 180 days of the 2025 Northeast multispecies fishing year, NOAA Fisheries should take emergency action to: (a) implement all Northeast multispecies specifications contained in Framework 69 except for those relating to Atlantic cod; and (b) release for harvest to the fishery an amount of cod equal to 40% of the 2024 Georges Bank and Gulf of Maine cod acceptable biological catches (ABCs);
- (2) During the 180 day emergency period, NOAA Fisheries should: (a) undertake an emergency updated assessment of the two existing (Gulf of Maine and Georges Bank) cod stocks and calculate Gulf of Maine and Georges Bank cod ABCs as part of that assessment according to the steps set forth in Exhibit 2; and (b) finalize the

¹² NMFS Procedure 01-101-7.

March 12, 2025

specifications contained in Framework 69 for all species other than Atlantic cod (and potentially Georges Bank haddock);

- (3) During the 180-day emergency period, NOAA Fisheries should reconsider the ABC for Georges Bank haddock based on the information and rationale set forth in Exhibit 3 and determine whether an adjustment to that ABC should be made in Framework 69's final rule;
- (4) For the remaining 186 days of the 2025 Northeast multispecies fishing year once the first 180-day emergency period has elapsed, NOAA Fisheries should take emergency action to make an in-season adjustment to Gulf of Maine and Georges Bank cod ABCs in a manner consistent with the results of the emergency updated assessment;
- (5) For the remaining 186 days of the 2025 Northeast multispecies fishing year once the first 180-day emergency period has elapsed, NOAA Fisheries should implement Framework 69's final specifications set forth in Framework 69 (including any adjustments to the Georges Bank haddock ABC), except for the Atlantic cod stocks.

5. Conclusion and Request for Meeting

Thank you very much for considering NSC's and GFCPF's concerns and petition. As explained above, we respectfully request a meeting as soon as possible to discuss our petition for emergency action. In the meantime, please do not hesitate to contact us if you have any questions or need additional information.

Respectfully submitted,
KELLEY DRYE & WARREN LLP



David E. Frulla

Counsel for Petitioners Northeast Seafood Coalition and Gloucester
Fishing Community Preservation Fund, Inc.

DEF:

cc: Laura Grimm
Erik Noble
Anne Hawkins
Michael Pentony

KELLEY DRYE & WARREN LLP

7

KELLEY DRYE & WARREN LLP

Exhibit 1

(See Attached)



David E. Frulla

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Tel: (202) 342-8648
Fax: (202) 342-8451
dfrulla@kelleydrye.com

November 18, 2024

Dr. Cate O'Keefe
Executive Director
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950

Re: Multispecies FMP Framework Adjustment 69

Dear Executive Director O'Keefe:

We represent the Northeast Seafood Coalition ("NSC") and the Gloucester Fishing Community Preservation Fund, Inc. ("GFCPF"). Founded in 2002, NSC is a non-profit membership organization that represents commercial fishing businesses in the scientific, policy, and legislative processes. NSC's members encompass the full diversity of small family-owned and operated businesses that participate in the federal Northeast multispecies (groundfish) fishery. NSC members hail from ports across the Northeast, utilize all groundfish gear types and fish on small, medium, or large platforms. NSC fishing members are enrolled under the groundfish sector management program.

Founded in 2007, the GFCPF is a Internal Revenue Code section 501(c)(3) non-profit organization with charitable purposes including, without limitation, preserving and promoting awareness of Gloucester's fisheries, heritage, and the fabric of the Gloucester community; protecting and enhancing the Port of Gloucester and the Port's infrastructure; and, in order to aid disadvantaged fishermen, serving as a central repository and exchange for the distribution of limited access, multi-species fishing privileges and permits for fishing vessels based in Gloucester.

We write regarding Northeast Multispecies (Groundfish) Framework Adjustment 69 ahead of the Groundfish Committee's November 25, 2024 meeting relating to that framework. This management action is meant to be a short-term management bridge allowing for implementation of Amendment 25's redefinition of Northeast cod stock areas for the 2025 fishing year, while a more durable allocation is established.

We recognize the Council and its committees have been working diligently to develop Framework 69. Devising even this bridge plan is a complicated task, and the Council only has an abbreviated amount of time to do so. However, as we explain below, the level of changes necessitated to manage under Amendment 25 should be conducted through the full deliberative process that an amendment provides.

NEW YORK WASHINGTON, DC CHICAGO HOUSTON LOS ANGELES SAN DIEGO NEW JERSEY STAMFORD

KELLEY DRYE & WARREN LLP

4915-0412-9071v.2

Dr. Cate O’Keefe
November 18, 2024

While Amendment 25 redefines cod stock areas, it does not provide any authority or basis that would allow deviation from Amendment 16’s allocative methodology. The changes are too fundamental for a framework adjustment.

Simply put, the process the Council is using to implement cod stock area changes was not well-conceived. Amendment 25 was not, and should not be considered, a mere “administrative” action. That amendment will have significant impacts on all groundfish permit holders. The Council should have wrestled with the cod stock re-delineation’s practical effects in a regulatory vehicle—an amendment—consistent with the gravity and complexity of the undertaking. Trying to shoehorn Amendment 25’s management implementation into a hasty framework action is neither commensurate with the task, nor, as we explain, consistent with law and regulation.

Further, the reallocation contained in the Framework 69 bridge plan will not be based on the best scientific information available if it employs the work-around to the Amendment 16 process presently contained in Framework 69. As one example, due to the short time available to develop Framework 69, the Council will be unable to base allocations on individual permit holders’ catch history as Amendment 16 did.

To be clear, this is not to assert that the Framework 69 approach may not ultimately be sensible in context and that a fair and balanced bridge could not be accomplished if there were enough time for the substantive analyses and public input that go into an amendment. But there clearly is not enough time available to undertake this level of analysis.

I. Framework 69’s Process to Establish New Sub-ACLs for the New Cod Stocks Using Existing PSCs Must be Promulgated in an Amendment

Framework Adjustment 69 would bear more weight than a framework adjustment should. Framework adjustments are “intended to respond to new data, to ensure that the fishery achieves optimum yield on an ongoing basis, and to achieve [Fishery Management Plan, (“FMP”)] objectives.”¹ These actions “implement an FMP, but do not fundamentally alter it.”² They are actions that “adjust[] management measures according to specifications in the FMP.”³ Framework 69 fundamentally alters the methodology used under Amendment 16 to allocate allowable catch at the permit holder, sector and fleet levels. The novel use of Georges Bank (“GB”) Potential Sector Contribution (“PSC”) and methods for apportioning northwest Gulf of Maine (“NWGOM”) and southwest GOM (“SWGOM”) go far beyond frameworkable items contemplated in Amendment 16.

¹ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (citations omitted).

² *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

³ *Conservation L. Fund. v. Pritzker*, 37 F. Supp. 3d 234, 249 (D.D.C. 2014) (citing *Oceana*, 384 F.Supp.2d at 254).

Dr. Cate O'Keefe
November 18, 2024

In addition, the extraordinary level of spatial and stock access changes are likewise outside what can be done under Amendment 16's rigid PSC and Annual Catch Entitlement ("ACE") formulas that accrue to individual permit holders. To date, analyses have only been conducted at the sector level yet PSC is allocated to individual permit holders. The allocative implications to individual permit holders are striking and yet to be considered. We raise these issues not to be critical but only to amplify the reasons why Amendment 25 should not be on a streamlined fast track path that it has been set on.

In contrast, amendments represent the regulatory vehicle that introduce "fundamental alterations" into an FMP, such as "[introduction of] a new concept into the management of the fishery or eliminat[ion] or radical[] change[s] to] an existing one." Put differently, amendments "alter management of the fishery in a way, or to an extent, not considered in the FMP or prior amendments, or in hearings held during their preparation."⁴

"Congress acknowledged [framework adjustments'] use for some types of measures" but these measures "are not without bounds."⁵ "Congress' desire that fisheries be managed on a continuing basis cannot be read to eviscerate the legislature's equally strong desire [in the Magnuson-Stevens Act] that policy choices be determined with ample public participation."⁶

Regulations implementing each FMP prescribe which management actions are frameworkable. For their part, Multispecies FMP implementing regulations do not identify fundamental repurposing of PSC (as is now contemplated in Framework 69) allocations as among frameworkable management specifications. Rather, they provide in relevant part that "sector allocation requirements and specifications, including... the allowable percent available of Annual Catch Limit ("ACL") to a sector through a sector allocation... and the calculation of PSCs" are frameworkable through the biennial review process Amendment 16 established.⁷

Especially when viewed through the prism of the court decisions delineating the scope of what is permissible to accomplish in a framework adjustment, the "calculation of PSCs" described in the groundfish framework regulations does not extend to the repurposing of PSCs that Framework 69 is

⁴ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (invalidating joint scallop/groundfish framework measure adjusting habitat boundaries).

⁵ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

⁶ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C.), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (citing 16 U.S.C. § 1801(b), which declares that one purpose of statute is to establish Councils to prepare plans "under circumstances... which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans," and 16 U.S.C. § 1853(a), which mandates that certain features of fisheries management regimes must be specified by the FMP). *See also Oceana I*, 2005 WL 555416, at *40 (noting the statute prohibits total delegation of the "required provisions" of FMPs); *see also PMCC*, 200 F.Supp.2d at 1200 (finding FMP inadequate because "NMFS in theory could decide not to implement an observer program for the ground fishery, and nothing in Amendment 13 would prohibit the agency from making that decision.").

⁷ 50 C.F.R. § 648.90(a)(2)(iii)(E).

Dr. Cate O’Keefe
November 18, 2024

undertaking. As regards the four new stocks of cod, Framework 69 undertakes an operation to set 2025 specifications for cod that is entirely different from the existing Amendment 16 methodology. Framework 69 entails a reallocation of GOM cod PSC to vessels holding GB PSC, rather than a run-of-the-mill periodic “calculation” of PSCs. Notably, this is a fundamental shift of how and where a permit holder will be able to use GB-earned PSC to access and fish in the Gulf of Maine, or more accurately, the new WGOM stock area extending to a vast area far north of where any of the 100% GB history was earned through Amendment 16. The resulting changes to individual permit holder fishing opportunities will be major, and they have yet to be studied at all.

This amount of redistribution of fishing opportunity, at the individual permit level, via Framework 69, fundamentally changes how “the allowable percent available of ACL to a sector through a sector allocation”⁸ is calculated. As explained above, this is because Framework 69 proposes applying 100% of the GB PSC, earned anywhere in the entire GB stock (not just in Statistical Area 521, and to a lesser extent Areas 526 and 541) to a significant portion of the Framework 69-proposed WGOM cob sub-ACL. Framework 69 could then allow the newly resulting ACE allocation to be used anywhere in the areas north of where any of the 100% GB history was earned through Amendment 16.

This change in the usage and application of PSC is not analogous to what was done per commercial/recreational data updates and allocation under Framework 59, as NMFS has claimed. Indeed, the proposed rule for Framework 59 states that the Framework “proposes to apply the same method approved in Amendment 16 but with revised data from the same time period.”⁹ This statement from the proposed rule proves the point — Framework 69 does not “apply the same method approved in Amendment 16.”

The fact that Framework 69 would reallocate GOM cod, and not a broad range of multispecies does not alter the analysis. It is the character of the action that matters, as much as its magnitude. In the *Oceana* case referenced above, the changes to the habitat closed areas also only involved nips and tucks of EFH closures to coordinate scallop and groundfish closures, but the court found these modest revisions required an amendment.

II. Framework 69’s Methodology for Repurposing Northeast Cod PSCs in Framework 69 Violates National Standard 2

National Standard Two requires all measures to be based upon the “best scientific information available.”¹⁰ Under the agency's national standard guidelines, the Secretary must base her determinations upon information available at the time of the preparation of the FMP or implementing

⁸ See 50 C.F.R. § 648.90(a)(2)(E)(iii).

⁹ 85 Fed. Reg. 32347, 32350 (May 29, 2020).

¹⁰ See 16 U.S.C § 1851(a)(2); 50 C.F.R. § 600.315.

Dr. Cate O'Keefe
November 18, 2024

regulations.¹¹ Information is available to allocate WGOM cod following the same type of process Amendment 16 utilized. In its rush to reach a result, the Council is ignoring this information and instead will be basing the new cod allocations on percentage splits of GOM and GB cod that will not be scientific.

As explained above, Amendment 16 establishes a mechanistic formula for allocating PSC to individual permit holders based on their actual catch history over a pre-determined period. Framework 69 proposes allocating WGOM cod differently: based on permit holders' catches of GB cod all across that former stock area rather than their catches from the statistical areas 521, 526, and 541 that are included in the new WGOM stock area. There is no way of knowing from the data provided whether the GB PSC that is being converted into what is effectively Western GOM PSC, was based on individual permit holder landings actually coming from the part of the old GB that is *now* part of the Western GOM. A system where the Council is simply guessing the percentage of GB cod caught in the Western GOM stock area results in an application of PSC and calculation of ACE not based on science, let alone the best scientific information available. Moreover, the information is available from permit holder logbooks to take most of the guess-work and non-scientific compromise out of the equation.

"While National Standard Two does not compel the use of specific analytic methods or require that an agency gather all possible scientific data before acting, the Standard does prohibit an agency from simply creating a rule based on mere political compromise."¹² The operative word here is "mere:" it *will* be necessary to balance the interests of fishermen in the GB and GOM fisheries. However, in terms of determining an allocation, decisions should be reached by taking a deep dive into the data, like reviewing logbooks where fish were caught by statistical area, as originally set forth in Amendment 16. This type of information would best be provided by permit holders, who could submit this information in an amendment implementation process. Furthermore, such a process similarly ensures that Congress' desire that policy choices be determined with ample public participation is effectuated and would leave the Council able to defend itself on the data yielded in reaching allocation determinations.

III. CONCLUSION

Thank you very much for your attention and consideration of the NSC's and GFCPF's concerns. They share the Council's goal of developing a rational, fair and equitable way to transition Northeast cod management from two stock areas to four. However, this is not an undertaking that can be rushed

¹¹ See 50 C.F.R. § 600.315(e)(1).

¹² *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346, 353 (D.R.I. 2003) (citing *Hall v. Evans*, 165 F. Supp. 2d 114, 133 (D.R.I. 2001); *The Fishing Company of Alaska v. United States*, 195 F. Supp. 2d 1239, 1248 (W.D.Wash. 2002); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D.Cal. 1993)). See also *Midwater Travelers Co-operative v. Dept. of Commerce*, 282 F.3d 710, 720-21 (9th Cir. 2002) ("A plain reading of the proposed NMFS rule... demonstrated that the rule was a product of pure political compromise, not reasoned scientific endeavor. Although the NMFS allocation may well be eminently fair, the Act requires that it be founded on science and law, not pure diplomacy."). "[A] regulation must be based on concrete analysis that permits the Secretary to 'rationally conclude that his approach would accomplish his legitimate objectives.'" *The Fishing Company of Alaska*, 195 F. Supp. 2d at 1248 (quoting *Parravano*, 837 F.Supp. at 1047).

Dr. Cate O'Keefe
November 18, 2024

through via an abbreviated framework process. After a period of extreme dislocation following Amendment 16's transition to output control-based sector management, the groundfish industry has stabilized both in terms of participants and the auxiliary market for leased groundfish ACE in a way that has enabled cod to be less of a "choke species" that it might otherwise be. The Council needs to take care not to layer a transition scheme that is not fully thought through on top of the allowable catch reductions that attend Amendment 25's fundamental reconfiguration of Northeast cod stock areas. That would only compound the problem of mislabeling and misconceiving Amendment 25 as an "administrative" action.

We look forward to working with you to develop an approach that achieves conservation objectives while limiting economic and social impacts. As always, please do not hesitate to contact us if you have any questions or need additional information.

Respectfully submitted,



David E. Frulla
Zachary J. Lee

Counsel for Northeast Seafood Coalition
and Gloucester Fishing Community
Preservation Fund

Exhibit 2

(See Attached)

Emergency Cod Assessment Plan: Prepared by Dr. Steven X. Cadrin

During the 180-day emergency period, NOAA Fisheries should: (a) undertake an emergency updated assessment of the two existing (Gulf of Maine and Georges Bank) cod stocks and calculate Gulf of Maine and Georges Bank cod ABCs as part of that assessment according to the steps set forth below:

Georges Bank cod - update of 2021 management track assessment and catch allocations:

1. 2021-2023 US commercial catch from ACL monitoring
2. 2021-2023 Canadian catch from 2024 management track assessment of the revised GB cod assessment unit
3. 2021-2023 recreational catch from 2024 management track assessment of the SNE cod assessment unit
4. 2021-2023 NEFSC survey indices for the entire GB management unit - this would require analysis of survey data to derive stratified mean to update the SAW55 survey indices from NEFSC data request or compiling data from survey reports. The same should be done for 2020 surveys to confirm that the values used in the 2021 management track assessment are replicated.
5. Run plan-B smooth method on updated series of survey indices and apply to recent catch to determine catch for the entire GB cod management unit.

Gulf of Maine cod - update of 2021 management track assessment and catch allocations

1. 2021-2023 US commercial catch from ACL monitoring
2. 2021-2023 recreational catch from 2024 management track assessment of the WGOM and EGOM cod assessment units
3. 2021-2023 total catch at age, with an ideal option (a) and an approximate work-around (b)
4. SAW55 method requiring NEFSC collaboration, 2020 included to confirm that 2021 management track results are replicated
5. 2020-2023 commercial landings by market category and season (quarter-year)
6. 2020-2023 commercial discards by season
7. 2020-2023 port samples of length and age by market category and season
8. 2020-2023 observer samples of length and age by season
9. 2020-2023 recreational catch at age from 2024 management track assessment of the WGOM and EGOM cod assessment units
10. 2021-2023 total catch at age, assuming that the little catch in the Channel is represented by age composition in WGOM and EGOM
11. 2021-2023 commercial catch at age from 2024 management track assessment of the WGOM and EGOM cod assessment units
12. 2021-2023 recreational catch at age from 2024 management track assessment of the WGOM and EGOM cod assessment units
13. 2021-2023 NEFSC survey indices for the entire GOM management unit - this would require analysis of survey data to derive stratified mean to update the SAW55 survey indices from NEFSC data request or compiling data from survey reports. The same should be done for 2020 surveys to confirm that the values used in the 2021 management track assessment are replicated.
14. Run updates of ASAP M=0.2 and Mramp configurations (ASAP input files available from 2019 management track assessment)
15. Update estimates of F40%MSP based on 2019-2023 weight-at-age and selectivity estimates from ASAP
16. Projections at F40 to derive OFL and projections at 75%F40 to derive ABC=ACL
17. Derive commercial sub-ACL from commercial-recreational allocation

Dr. Cadrin was a Working Group Member of the 2023 Research Track Stock Assessment for Atlantic Cod. His CV can be found here:

https://www.umassd.edu/media/umassdartmouth/profiles/smast/Cadrin_CV_Dec_2021.pdf

Exhibit 3

(See Attached)

Georges Bank Haddock

This exhibit is intended to illustrate how serious the consequences can be when government scientists rely too heavily on fishery independent sources of data and their internally developed assessment models while ignoring the highly granular and near 100% monitored data coming out of the fishery. Seeking agreement with reliable data sources such as this fisheries spatial and temporal catch data has failed to occur.

In this case, there were three successive steps that have resulted in effectively eliminating the United States haddock fishery on Georges Bank for FY 2025 (May 1, 2025 to April 30, 2026). The net result is that our Canadian counterparts in the US / CA Transboundary Resource Sharing Agreement received nearly the entire allowable catch.

A brief description of the United States / Canada sharing agreement can be more easily understood by referencing the chart below. Note the black numerical labels on each Chart Area. The gray shaded area is the portion of the Georges Bank haddock and cod stocks that is “transboundary” because they overlap the international boundary shown in purple. The US portion consists of Chart areas 561 and 562 and the Canadian portion consists chart areas 551 and 552.

Outlined in Blue are the four primary chart areas that encompass the predominance of all US ground-fishing on Georges Bank. The four chart areas of the Bank are 521, 522, 525 and 526.

This area is considered the Western Georges Bank portions of the Total Georges Bank haddock and cod stock areas which also includes the Transboundary Sharing Agreement areas shaded in Gray.

Collectively, the shaded gray area referred to as the Eastern Area and the blue outlined Western Area, comprise the Total Georges Bank haddock and cod stock area.

Since the Sharing Agreement began in 2004, the scientific stock assessments were conducted bilaterally by a team of United States and Canadian scientists. This body is referred to as the Transboundary Resource Assessment Committee (TRAC). In 2023 the United States and Canadian scientists have long believed their US counterparts accepted every negative inference about stock conditions to the detriment of fishermen. This left the United States to conduct their total Georges Bank stock assessment without the need to reconcile with the Canadian assessment. The Canadian assessment considers the gray shaded Eastern Area as a distinct stock so their assessment is for the Eastern Areas only.

The three successive steps that has effectively ended the United States haddock fishery on Georges Bank are:

1. The GB haddock assessment was updated in the fall of 2024. This assessment reduced the biomass from the 2022 estimated 2024 and 2025 biomass by more than 50% and

Georges Bank Haddock

the total allowable catch values by the same downscale. This huge change was primarily driven by a choice made by the US assessment lead to improve model diagnostics and it was not driven by the data. The result was an Overfishing Limit (OFL) of 8,034 for Total GB.

2. In the absence of bilateral scientific agreement, the Northeast Fishery Science Center (NEFSC) unilaterally developed an "Apportionment Method" for the purpose of apportioning the Total GB cod and haddock biomass to an Eastern (shared with CA) portion and the remaining Western portion that is exclusively US.
3. The last step was to take whatever biomass was apportioned to the Eastern shared area and divide it between the United States and Canada portions of the Eastern "sharing" area. This "shares" methodology is contained and further described within the United States / Canada Sharing Agreement. For 2025 for Georges Bank haddock and cod the shares are roughly 25% United States and 75% Canada.

Of the three steps described above, the most glaring example of biological implausibility is the NEFSC's "Apportionment" methodology (step 2 above). In short, the method relies solely upon the NEFSC Bottom Trawl Survey biomass distribution extracted from the catches of that survey.

The conclusion was that 100% of the survey biomass from the NEFSC bottom trawl survey for Total Georges Bank haddock and cod stocks was **100% in the EAST and 0% in West**

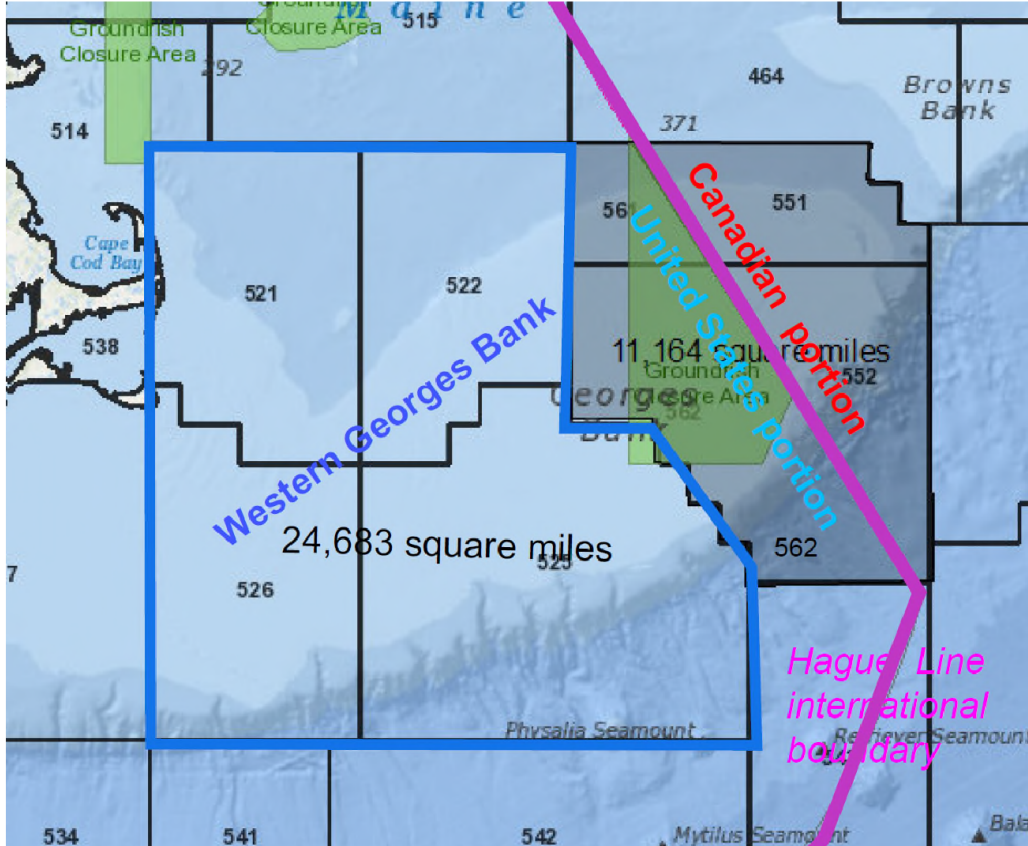
Results of the methodology was not revealed until after the New England Fishery Management Council and Scientific and Statistical Committee preliminary review. Industry quickly noticed the results were completely misaligned with fishery catches. United States vessels have had human and electronic monitoring coverage of up to 100% with 24/7 VMS satellite tracking. The fishery has been catching between **81% and 95% of their haddock catches in the Western portion (primarily in chart areas 521 and 522 along the NW edge of the bank)**:(see the bank on the illustration provided) yet the apportionment method using the NEFSC bottom trawl survey biomass concluded 0% of the biomass was in that very same and vast area of the United States exclusive portion of Georges bank

The Canadians rightfully accepted the United States willingness to give away the haddock fishery because their Eastern Only assessment was near equal to the US Total Bank assessment. (The square miles of these areas shown in the illustration provided here. (roughly 1/3 east and 2/3 west when looking at the primary fishing areas)

The US now only has an Acceptable Biological Catch of 1,556 mt, producing a groundfish sub-Annual Catch Limit of 1,441, of the entire Georges Bank from the Hague line to shore. This is roughly an 80% reduction from the 2024 Sub ACL that will place an economic burden on the

Georges Bank Haddock

United States fishery that has not been adequately analyzed or addressed. Canadians got over 6,000 mt for just the two chart areas 551 and 552.



Georges Bank Haddock

COMMERCIAL KEPT CATCHES OF GEORGES BANK COD AND HADDOCK								
		<u>FY 2021</u>	<u>metric</u> <u>tons</u>				<u>FY 2022</u>	<u>metric</u> <u>tons</u>
East	12%	GB East Cod	55.8		East	19%	GB East Cod	26.9
West	88%	GB West Cod	405.3		West	81%	GB West Cod	115.3
East	14%	GB East Haddock	431.6		East	10%	GB East Haddock	228.7
West	86%	GB West Haddock	2,639.30		West	90%	GB West Haddock	2,051.70
		<u>FY 2023</u>	<u>metric</u> <u>tons</u>				<u>FY 2024</u>	<u>metric</u> <u>tons</u>
East	5%	GB East Cod	13.2		East	13%	GB East Cod	29.8
West	95%	GB West Cod	274.5		West	87%	GB West Cod	194.8
East	7%	GB East Haddock	176.5		East	12%	GB East Haddock	195
West	93%	GB West Haddock	2,472.80		West	88%	GB West Haddock	1,387.10