

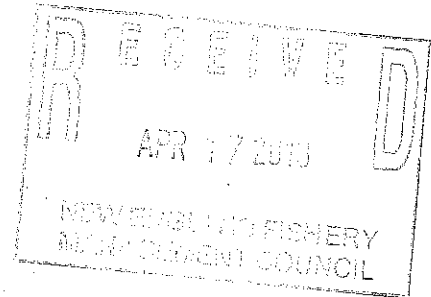
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Additional Correspondence



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northeast Fisheries Science Center
166 Water Street
Woods Hole, MA 02543-1026

April 12, 2013



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

Dear Tom:

I have enclosed a summary of the current shared perspective of the Northeast Fisheries Science Center, Northeast Regional Office, Northeast Enforcement Division, and NOAA General Counsel on the potential uses of electronic monitoring (video monitoring) in the region.

I would appreciate the inclusion of this summary in the Council's discussion documents for the April 23-25 meeting. I will address this topic briefly during the Center's report at the meeting. As we move forward with electronic monitoring we will, of course, work closely with both the New England and Mid-Atlantic Fishery Management Councils.

Sincerely,

William A. Karp, Ph.D.
Science and Research Director

Enclosure

cc: J. Bullard, NER
C. Moore, MAFMC



NOAA PERSPECTIVE ON ELECTRONIC MONITORING IN THE NORTHEAST (DRAFT 4/5/13¹)

Along with other monitoring systems such as observers, at-sea monitors, vessel trip reports, biological sampling and dealer reports, electronic monitoring (EM) technologies hold promise as additional data collection tools. When supplemented by other data collection methods, accountability practices, business rules, and on-board practices, EM may be an important means of supporting full catch accounting. NOAA Fisheries Service encourages and endorses the use of electronic monitoring technologies, where appropriate, in the Northeast Region.

Integrating EM technologies into data collection systems requires us to think differently about fishery monitoring, data streams and structures, and regulatory frameworks; and may require a substantial investment of funds, staff time and collaboration.

As we develop and implement EM for monitoring fisheries in the Northeast, we have identified models that hold promise for effective use in Northeast fisheries.

1. Full retention with monitoring for compliance – Video monitoring has proven effective as a tool for monitoring compliance with specific requirements. In this case, EM would be used to monitor compliance with a full retention requirement and accompanied by dockside monitoring.
2. EM for validation of the vessel trip report – EM can be used as an audit tool to verify industry reporting. In this case, initial quota accounting would be based on industry reports. EM records would be sampled to validate the vessel trip report, and disincentives would be structured to motivate vessel operators to fill out the forms correctly and fully. The use of electronic vessel trip reports may play a role in enhancing the efficiency of data collection and processing.

COSTS

Costs associated with implementation of EM are uncertain and vary depending on the overall monitoring system design, the complexity of equipment installation and maintenance, requirements for reviewing video records, and infrastructure required to process, manage and analyze resulting data. EM-based solutions are perceived to be more cost-effective than conventional approaches to collect data on full catch, but this idea has not yet been validated. Also, cost curves could change as new technologies are developed and as more vessels take on the use of EM. It is important for everyone to have reasonable expectations of potential benefits and costs of implementing EM.

¹ Northeast Fisheries Science Center, Northeast Regional Office, Northeast Enforcement Division, NOAA General Council representatives

NEXT STEPS

The NEFSC, NERO, NED (Northeast Enforcement Division) and NOAA GC will have to coordinate carefully to move forward with developing the concepts, reporting models, actual tools (on-board and in-house) and in addressing the regulatory changes that will be required to enable EM.

Identification of data needs within monitoring program – Although the overarching objective is to account for all catch, the qualities and types of data to meet scientific and management needs must be specified at the outset. This includes (but is not limited to) standards for timing of availability of data, acceptable accuracy and precision, associated spatial and temporal resolution, statistical validity, protocols to ensure data integrity from a legal perspective and the capacity to integrate new data streams with existing programs.

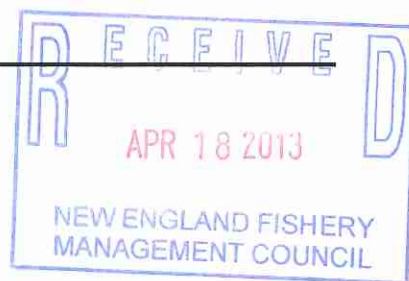
Comprehensive comparison of alternatives – To improve understanding of the shipboard, shoreside, data processing, enforcement and regulatory requirements associated with the two alternatives, the agency will work with stakeholders to undertake a comprehensive description of the capabilities and relative costs of the two approaches, based on currently available information and data specifications (above), and gain an initial understanding of the costs and benefits of the alternatives from the broadest perspective.

Research and initial deployment of selected monitoring tools – The concepts will be evaluated through field experiment to determine whether they produce the required data in a cost effective manner and whether protocols can produce acceptable evidence for enforcement application. Initially, the program will focus on the preferred approach based on the comprehensive comparison (above).

Substantial interaction with the Councils – We will work closely with the Councils to identify data collection needs, to communicate realistic expectations, and consider transitional requirements from current to future regulatory programs. We will also work closely with industry to ensure that EM model are practicable, economical, and effective.

ASSOCIATED FISHERIES OF MAINE

PO Box 287, South Berwick, ME 03908



April 18, 2013

Mr. Rip Cunningham, Chair
New England Fishery Management Council

VIA ELECTRONIC MAIL

Dear Rip:

On April 23 the New England Fishery Management Council (NEFMC) will receive a summary report from the conclusions of the Stock Assessment Review Committee (SARC) for white hake, as well as a recommendation from the groundfish committee for emergency action to modify the 2013 annual catch limit for white hake. Associated Fisheries of Maine (AFM) supports the request for emergency action.

The SARC reports from individual reviewers reveal a serious issue with the calculations and decisions around a recommendation of Fmsy proxy for white hake, and AFM urges the NEFMC to take the time to read the reviewer reports. All three reviewers include recommendations for policy guidance from the NEFMC with regards to setting the Fmsy proxy and the biological reference points.

I have excerpted the specific recommendations from those reports, for the immediate convenience of the NEFMC (see attached). AFM requests that the NEFMC take up consideration of these important recommendations at the earliest convenience.

Sincerely,

M. Raymond

Maggie Raymond

White Hake Peer Review, recommendations by peer reviewers with respect to determining appropriate BRPs and the Fmxy proxy

Stokes: page 41

4. I would recommend a fundamental review is needed by the relevant Councils, with input from SSC, with a view to providing guidance to SAW on reference point setting. This is effectively repeated at (8) below.

8. I recommend that the NEFMC consider the issue of risk standards and development of guidance to SAW (see also 4, above).

Smith:
Page 31

The Review Panel accepted the approach as a valid method of setting reference points, but requested that the explicit risk levels be provided for each scenario. One reviewer commented that the 5% risk level is precautionary and that 10% is widely used. **However, the Panel also felt that the acceptable level of risk should really be set by managers rather than at a technical meeting of scientists and industry.**

Page 32:

It is also worth reiterating my view that the decision on acceptable risk levels should be made by managers and that in order to get a full picture of both the potential risks and benefits it would be useful to have figures for yield changes as well as risks in this analysis.

Cryer
Page 21

I believe there is a need for improvements to the policy framework here, and that the working groups are in need of more guidance on the development and estimation of BRPs.



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

APR 15 2013

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



RE: Comments on Framework Adjustment 50 (FW 50) to the Northeast Multispecies Fishery Management Plan

Dear Tom:

Please find our attached comments regarding Framework 50, including an Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis, that was submitted to NOAA's National Marine Fisheries Service on March 22, 2013. The attached comments are substantive and must be addressed to ensure the document is consistent with applicable law. My staff has already discussed these comments with you, and I understand that your staff is already addressing these comments. If you have additional questions, please contact Sarah Heil. We appreciate your quick turnaround of this document, given the short timeline for this action.

Sincerely,

George H. Darcy
Assistant Regional Administrator
for Sustainable Fisheries

Attachment



Substantive Comments

Section	Page	Comment
6.2.1.10 Georges Bank (GB) Yellowtail Flounder	74	Update the stock status (overfishing is occurring). This update was inadvertently omitted when Regional Office staff provided you the text for this section of the document.
6.4.4 Interactions Between Gear and Protected Resources— <i>Atlantic Sturgeon</i>	109	Update the last paragraph in the Atlantic sturgeon section with text provided by Sustainable Fisheries Division staff.
7.1 Biological Impacts	161	Consistent with the economic impacts analysis, provide a comparison of 2011 in addition to the No Action Alternative. This is already included for most stocks except for Gulf of Maine and GB cod and GB and Southern New England/Mid-Atlantic yellowtail flounder



Paul J. Diodati
Director

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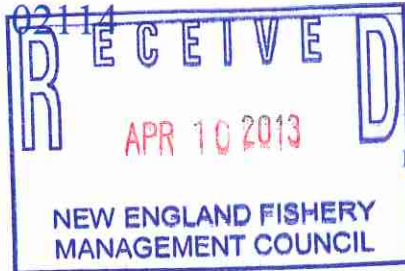
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Deval Patrick
Governor

Richard K. Sullivan, Jr.
Secretary

Mary B. Griffin
Commissioner



April 8, 2013

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

Re: FW48 Proposed Rule (NOAA-NMFS-2013-0050)

Dear John:

We offer the following comments on your proposed rule Framework 48 and begin by requesting you to review the GOM cod presentation given by Northeast Fisheries Science Center (NEFSC) scientist, Michael Palmer, (*Gulf of Maine Cod: From Bankers' Hours to Bankruptcy and the Role of Fine-Scale Spatial Dynamics on Stellwagen Bank*).

FW 48 efforts to mitigate for FW 50 "potential negative economic impacts" should consider the frailty of GOM cod in particular. Dr. Palmer's presentation will assist that consideration; i.e., mitigation that ignores the fine-scale spatial distribution of cod will deteriorate stock status and the overall health of the GOM "stock." We highlight this presentation as part of our comments on your proposal to allow sectors to petition NMFS for access (albeit limited) to groundfish "mortality" closures and your dropping the cod minimum size by three inches.

Minimum fish sizes

The Council has decided to decrease minimum size limits for cod (22 → 19"), haddock (18 → 16"), gray sole (14 → 13"), yellowtail flounder (13 → 12"), plaice (14 → 12"), and redfish (9 → 7"). We opposed this action. Pollock (19"), halibut (41"), and winter flounder (12") are to remain the same. Vessels fishing in sectors will be required to land all allocated groundfish meeting the minimum size requirements. The "logic" for these changes is: *"These changes would be made to reduce regulatory discards and to allow many fish to reach spawning age before being caught, not to facilitate the targeting of smaller fish...The minimum size limits...are based on an analysis of the size of discarded fish in trawl gear in recent years and the length at 50% maturity (our emphasis). The*

WGF etc, Council, FH, RF (4/17)

minimum sizes...would be expected to reduce many discards due to minimum size restrictions under the gear requirements in place in 2009-2011... ”

Because the status of many of our groundfish stocks is so poor (e.g., GOM and Georges Bank cod), it is counterintuitive to move away from minimum sizes where percent maturity is greater than 50%. For cod you propose to drop the minimum by 3 inches approaching 50% maturity. With our learning more about cod spawning behavior and the importance of repeat spawners for increased spawning success (not just for cod), targeting 50% maturity is not defensible. DMF research of which you are very aware is very relevant to our arguments.

The Council with NMFS in support has concluded it's acceptable to target cod and other groundfish even when the target size (as a minimum) is about 50% immature. We should be promoting fisheries sustainability through protection of age structure and accounting for spatial distribution with an emphasis on letting far more individuals become first-time, but better yet, second-time spawners.

As a member of the Sanctuary Advisory Council and aware of the contents of the Sanctuary's Management Plan (June 2010), we know the Sanctuary might revise its designation document on or before 2015 (See Executive Summary page iii) to give it authority to set regulations for fisheries within its boundaries. Weakening protection of cod and other Sanctuary resources heavily fished within the Sanctuary is ill-advised. Consider the following Plan conclusion: *"...fishing – especially commercial fishing impacts and pressures every resource state in the sanctuary. On an annual basis, virtually every square kilometer of the sanctuary is physically disturbed by fishing. Fishing has removed almost all of the big old growth individuals among biological important fish populations, and reshaped biological communities and habitats in the process..."* The Sanctuary, of course, would support any measure that reduces discards (such as increased mesh and strategically placed closures), but promoting the targeting of smaller fish with likely increased discarding of even smaller fish will cause justifiable concern.

Will the reduced minimum sizes "facilitate the targeting of smaller fish?" The Council and NMFS assumption that reduced minimum sizes will not change fishermen's behavior is a very risky assumption. After having participated at most of the Council's ABC Risk Policy Workshop designed to develop advice to the SSC about the acceptable probability of overfishing when setting ABCs, we conclude that the likely "severity of consequences" (one aspect of risk) from targeting smaller fish is too high and unacceptable.

By comparison you use the "full retention" approach as the way to conclude you will *"minimize the likelihood that vessels will target smaller fish."* You compare this option to the minimum size reductions. A far better and legitimate comparison would have been against status quo: "no change in sizes."

Moreover, by decreasing minimum sizes, NMFS will put sector fishermen at too high a risk. The Commonwealth, and perhaps other states, may not our minimum sizes for the aforementioned reasons, i.e., we are risk averse regarding the negative consequences of lowering the sizes. In our case, the Commonwealth's Marine Fisheries Advisory Commission recently opposed the size reductions, and its approval is needed before any reductions can be adopted.

Consequently, if NMFS lowers the sizes without garnering state support, you do so with the understanding that sector fishermen are held jointly liable for discarding legal-size groundfish. Your rule will force them to discard legal fish according to your definition, but illegal by ours. We appreciate the need to have everything in place for May 1; nevertheless, so far, there have been no important discussions with us about minimum size reductions – just a Federal Register announcement and two weeks to comment. States partner with the federal government on inter-jurisdictional fisheries issues, yet that partnership seems lacking when it comes to this pending groundfish action.

We support status quo. Note your rationale for status quo, i.e., make no changes: *“Since implementation in 1986, the Northeast Multispecies FMP has used minimum size limits in conjunction with gear requirements to reduce catches of sub-adult fish. When adopted the purpose of this measure was to **provide opportunities for fish to spawn before harvest, as well as to reduce the incentive to use illegal mesh to increase catches (our emphasis).**”*

The Council has abandoned this rationale in favor of reducing regulatory discards even though decreasing the minimum size likely will motivate fishermen to use illegal mesh. Witness recent examples given to the Council by Law Enforcement about use of net liners. Regrettably, we seem to be moving away from creating incentives for fishermen to use larger mesh and/or to avoid smaller fish.

We ask you to explain what is meant by a decrease in minimum sizes *allowing many fish to reach spawning age before being caught*. This appears to be a non sequitur. More smaller fish will be caught; therefore, how will many more fish reach spawning age before being caught. A better alternative is larger mesh or required use of square versus diamond mesh depending on the situation.

Also, consider the following FW 48 analysis of impacts of biological impacts: *“...the biological impacts of changing minimum size requirements are a function of whether the change leads to a different selectivity in the fishery. If the catch of small fish as a proportion of the total catch increases, then changes in yield per recruit, status determination criteria, and rebuilding progress could result...there would likely be reductions in yield per recruit, MSY, and slower rebuilding progress.”* GOM cod is provided as an example. *“A shift in selectivity of one year reduces the YPR 9.4% for GOM cod. The value of F40 declines 18.5%.”* The analysis highlights that biological impacts are difficult to predict because impacts will depend on fishermen's behavior.

Understand that we appreciate the subtle and unstated benefit of lowering minimum sizes, ostensibly to reduce regulatory discards; i.e., sectors' ACES effectively increase: less assumed discarding means more to land. We suspect that's why many fishermen, including Council members, especially those involved with sectors, favor the full retention approach that is still "on the table." Full-retention will be very difficult to support without far greater at-sea monitoring and law enforcement. Furthermore, states will have to rescind all minimum sizes, an unlikely scenario. Also, recreational fishermen will find that rescinding for the commercial fishery to be very at odds with their having to live with minimum sizes.

Currently, real or assumed discards caused by that sector reduce each sector's ACE(S). Consequently, a sector fisherman can find his catch portfolio reduced to account for discards even when he doesn't fish, i.e., other sector fishermen's discards count against each member's allocation (PSC, percent sector contribution). By assuming reduced discards with lowered minimum sizes, fewer fish are subtracted from sector ACES; therefore, more can be landed. If you decide to reduce the minimum sizes, *how will NMFS adjust fishermen's portfolios? This must be clarified now rather than later.*

Finally, consider your own conclusion regarding reducing the minimum sizes: "*...there could potentially be unforeseen consequences from targeting smaller fish that could have long-term negative impacts on future landings and revenue...*" This is an important admission fraught with risk. We counter that the consequences can be and are "foreseen."

Mitigating negative impact of FW 50

Preparing as best we can for the severe socioeconomic impact of FW 50 is sensible; however, to properly address mitigation, the Council and NMFS must focus on individuals and not on classes of vessels or gear types. That has not happened. Therefore, NMFS' (Council) claim that fishing opportunities will increase and profitability in the groundfish fishery will improve thereby mitigating negative economic impacts anticipated for groundfish vessels and their communities, is specious.

Consider that you make a very important and risky assumption regarding allowance of exemption requests from sectors to year-round closures and changes to minimum size restrictions. You say: "***Assuming all impacts to vessels are also applicable to ownership entities, all of the alternatives have the potential to impact a large number of small entities, and while some of the options may significantly alter profitability, none of them would have a disproportionate impact on small entities.***" This is a profound and vital assumption not supported by FW 48 analyses, unless major, untested assumptions are made.

Consider your statement pertaining to sector vessels and operating costs associated with at-sea and dockside monitoring in FY 2013, absent any funding assistance from NMFS: "*...the highest percent reductions in net revenue were expected to occur in the 30-50 ft vessel category. **Since profitability of individual vessels is unknown (our emphasis), the effects of this option [sector monitoring] on participation levels could not be***

estimated, but it is likely that vessels operating close to the margin would be forced to exit the industry or lease their quota...” NMFS admits the likelihood that small vessels will suffer the greatest impact, contrary to the aforementioned conclusion about no disproportionate impact on small entities. NMFS should explain this seeming contradiction.

We intend to submit comments on FW 50. Those comments will focus on a better way to mitigate. For example, rather than “tweaking rules” in a risky way to give greater operational flexibility to sector fishermen, it will be far better to provide more catch, i.e., extraordinarily precautionary ACLs create extreme adverse socioeconomic impacts affecting sector and common pool fishermen – some far more than others. Caution is important, but layers of precaution cause inordinate sacrifices by vessel owners, fishermen and processors, shore-side infrastructure, etc.

Recreational Fishery AMs

NMFS proposes to proactively modify recreational fishery AMs prior to the start of each fishing year. NMFS intends to *“consult with the Council, or the Council’s designee, and would tell the Council, or its designee, what recreational measures are under consideration for the coming year.”*

We emphasize that NMFS should consult with states, not as Council members, but as separate partners having to consider state regulatory changes to support NMFS. The consultation should be more than telling states what NMFS intends to do. Groundfish recreational fisheries occur in state waters as well as in federal waters, perhaps more so in state waters; therefore, with states having saltwater recreational fishing licenses and working closely with NMFS on marine recreational fishery surveys (MRFSS & now MRIP), close coordination and reciprocal cooperation are key.

Sector Monitoring Programs

You note that Sectors were required by Amendment 16 to *“implement a dockside monitoring program to validate dealer-reported landings...Dockside monitoring was also set to be implemented for common pool vessels in FY 2012...”* Then you note: *“Through Framework 45, the Council suspended the dockside monitoring requirements until FY 2013 and required dockside monitoring only to the extent NMFS could fund it.”* With these dockside programs now being completely eliminated, we ask for a better description of what exactly convinced NMFS in 2011 that sector landings were “sufficiently monitored.” You indicate, *“dockside intercepts by enforcement personnel were sufficient to monitor those landing.”* Is this still true?

We understood then that reliance on law enforcement was a fallback position because limited funds had to be reprogrammed “to alleviate general sector operating costs.” The central question now becomes: How will sector landings be sufficiently monitored?

Regarding current dockside monitoring hail requirements, you ask whether those requirements should be maintained. We believe they should be kept because, as you state, *“hails have become a useful tool for both NMFS and sector managers to monitor*

sector vessels' activities, including use of certain sector exemptions, and to facilitate dockside intercepts by enforcement personnel...” Additionally, we ask if NMFS and Law Enforcement have adequate capability to check hauls versus observed landings to monitor sector and common pool landings versus ACEs and quotas.

On a related monitoring issue, you propose to *“revise the regulatory text at §648.87(b)(1)(v)(B) to read that coverage levels must at least meet the CV standard at the overall stock level and be sufficient to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels.”* We ask for more clarification, i.e., what do you mean by *“to the extent practicable.”*

Furthermore, in the referenced section, you state: *“coverage must be fair and equitable, and distributed in a statistically random manner among all trips such that coverage is representative of fishing activities by all vessels within each sector and by all operations of vessels operating in each sector throughout the year.”* We support your approach, but are concerned that your *“to the extent practicable”* will result in coverage that isn't satisfactory especially for statistical purposes and accurate accounts of catch and discard.

Confounding this important issue is the decision to *“delay industry responsibility for at-sea monitoring costs to FY 2014 to mitigate the expected negative economic impacts of lower trip limits in FY 2013. Coverage levels would instead be set at the level that NMFS can fund.”* We support your decision to delay and realize there is no other option to consider, and we understand why. However, by relying on the Council to *“further modify this requirement in the future as more information becomes available on the appropriate monitoring levels, costs of these programs, and implementation of electronic monitoring systems,”* NMFS really means it's willing to accept a Council likely decision in 2013 to delay that responsibility to 2015 or beyond.

We also support your approach that sectors *“must provide detailed trip-by-trip catch data to NMFS for the purposes of auditing sector catch monitoring data based upon guidance provided by the Regional Administrator.”* However, the *“if requested”* part of your proposal should be understood as a consistent requirement, not just when requested that could very well be occasionally.

Sector Access to Closed Areas

You state, *“...sectors are subject to a hard TAC that limits overall fishing mortality resulting from sector operations, making certain other mortality or effort controls redundant...”* This is a mistake. For example, it doesn't consider that mortality on aggregations of fish, such as cod, subject to fishing without trip or possession limits (i.e., sector vessels fishing as they will with original allocations enhanced through leasing) can create very high, localized fishing mortality dramatically reducing the size of aggregations and/or interfering with pre-spawning and spawning behavior. Reflect on Dr. Palmer's analyses of the Stellwagen Bank area and very localized fishing caused by fine-scale distribution of cod.

You state that our concerns will be “evaluated by NMFS in the consideration of any specific sector requests for each fishing year.” We request those evaluations be made available to the Council and public for review before specific exemptions are granted. You indicate a “rigorous analysis” will be necessary, and we agree and ask if the Council’s PDT will be involved. It should be.

We appreciate NMFS is abiding by the Council decisions on access. For example, sectors will not be allowed access in Closed Areas I and II from February 16 through April 30 to protect spawning groundfish. However, we’re uncertain as to whether those are the correct dates, and we ask if the NEFSC will comment on these access dates to be modified by you if access timing is incorrect, e.g., should access be denied during some part of late fall and early winter when cod are also spawning. As you noted, the analyses must be rigorous.

Finally, we appreciate your treatment of the Council’s Closed Area Technical Team analysis of access to the closed areas. The CATT did a fine job and had some important conclusions such as: *“Due to data limitations and the fact that sector fishing effort is driven more by Catch Per Unit of Effort (CPUE) and market conditions than effort controls, the CATT was unable to quantitatively model potential changes in fishing effort.”*

For this and other reasons you’ve decided to *“consider sector requests for exemptions to closed areas in a separate rulemaking from the general approval of sector operation plans for 2013, if the proposed change in FW 48 is approved. The closed area exemption requests would be considered as amendments to the sector operations plans through a proposed and final rule that would be available for public comment with an accompanying National Environmental Policy Act (NEPA) analysis.”* This suggests any access could be no later than this fall. Sector fishermen likely will want access as soon as possible, and we all appreciate the sense of urgency. Nevertheless, this access is very controversial and requires the approach you have selected.

Status Determination Criteria GOM & GB Cod and SNE/Mid-Atl Yellowtail Flounder

We always appreciate the hard work of the NEFSC and the effort given to complete the many important stock assessments. However, there are times when we wonder about the outcomes. For example, we have two approved assessment models with one providing a biomass target of 54,743 mt (assumed natural mortality of 0.20). The other target is 80,200 mt (“ramped-up” natural mortality to 0.40 not expected to remain “in perpetuity”). Both models provided a fishing mortality threshold of 0.18. For each GOM cod scenario we are overfishing, and the stock is overfished. You now ask for comments on the two choices.

However, you offer no guidance as to what option is preferred and why, although with the SARC concluding that natural mortality is not expected to remain at 0.40, it seems you’re favoring the 54,743 mt. Considering the fishery failure officially effective on May 1 and a revised rebuilding schedule the Council will develop, it makes sense to choose the lower target.

The key will be to reduce fishing mortality to the 0.18 threshold or below. With that said, we wonder why the SARC did not conclude natural mortality is as high as 0.40, if not



SPRING GATHERING ON THE CAPE

Gray seals carpeted a beach Thursday at Monomoy National Wildlife Refuge, which has become the most popular area in the region for the mammals to haul themselves out of the ocean and take the sun. The most recent count showed more than 15,000 of the seals off New England.



higher. Consider the photograph in a recent front-page Boston Globe issue. An estimated 15,000 gray seals clustered at a haul-out on Monomoy Island suggests natural mortality has increased and will be much higher than expected for some time to come. This does not bode well for the groundfish fishery and for other stocks on which these seals and other predators (e.g., spiny dogfish) prey.

Finally, for yellowtail once again we wonder. The SARC concluded that the evidence was 60:40 (quite a call) in favor of a “recent recruitment”

scenario assuming that a “possible change in productivity has reduced the size of incoming year-classes since 1990.” Therefore, the stock is not overfished and overfishing is not occurring; thus, we are rebuilt, yet the new target is a very low 2,995 mt. The fishing mortality threshold is a modest 0.31, a bit higher than we would have expected.

We ask NMFS to reconcile the conclusion that for yellowtail there has been a “possible change in productivity,” but for cod that doesn’t seem to be case. Furthermore, calling yellowtail “rebuilt,” although technically correct, has a hollow ring to it. If productivity has changed so dramatically as to cause such a dramatic reclassification of yellowtail, why hasn’t GOM and GB cod been affected by changed productivity as well? We consider this to be an unanswered key question pertaining to the direction in which the Council and NMFS are headed, i.e., ecosystem-based fishery management.

Conclusion

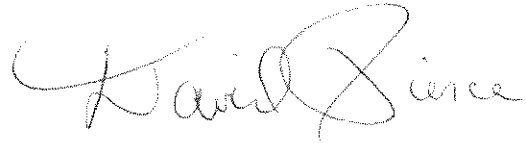
We always appreciate the opportunity to comment on Council decisions and NMFS proposals, especially when those decisions and proposals are not supported by DMF. Of course, there are many we do support and helped develop as a Council member.

The task before us all is how to assist the groundfish fishing industry survive these very difficult times of low ACLs, poor prospects for groundfish rebuilding, and changes in ocean productivity contributing to low to poor year-classes. Our other task is to address industry consolidation and excessive shares – a task made even more difficult due to our fisheries failure.

Mitigation is extremely important, and we will support legitimate mitigation approaches. However, mitigation cannot be allowed that potentially will deteriorate groundfish

resource conditions even further. This is the attitude reflected in all of our
aforementioned comments and our previous ones on sector operations plans.

Sincerely yours,

A handwritten signature in black ink that reads "David E. Pierce". The signature is written in a cursive style with a large, sweeping initial "D".

David E. Pierce, Ph.D.
Deputy Director

cc
Paul Diodati
Mary Griffin
Melanie Griffin
Susan Murphy
Rip Cunningham
Tom Nies
William Karp



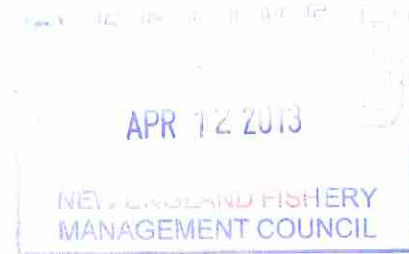
conservation law foundation

For a thriving New England

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April 9, 2013

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



RE: Framework 48 to the Northeast Multispecies Fishery Management Plan
NOAA–NMFS–2013–0050

Dear Mr. Bullard:

On behalf of Conservation Law Foundation (CLF), I am writing to provide comments on the rule proposed by NOAA Fisheries for Framework 48 (FW 48) to the Northeast Multispecies Fishery Management Plan.¹ We recently submitted joint comments with the Pew Charitable Trusts to NOAA Fisheries on the related sector operations plans rule.² CLF focuses here on our particular concerns with Framework 48, most particularly the proposal to authorize a procedure that would allow sectors to access the year-round groundfish closed areas through their annual sector operations plan approval process.

We would note initially three contextual circumstances that surround the series of framework adjustments and sector ops plan approvals that are being promulgated in such a rushed manner this spring with significantly foreshortened public review and comment periods. First, there is a crisis with a number of groundfish stocks including both cod stocks, GOM haddock, and a number of flounder stocks. Many of the stock assessments exhibit significant retrospective patterns and the assessment scientists have already cautioned that their estimates may be optimistic in terms of predicted the actual condition of those stocks. With cod, age structure is significantly truncated and weights at age are low. Many of these stocks are in crisis as a direct result of the failure to curb overfishing and are now further burdened by worsening environmental factors.

There is no rational reason to place these stocks at any greater risk of further collapse. Although there are a number of significant quota cuts, there are also a number of quota increases in the fishery. Moreover, few, if any, multispecies permit holders are dependent on revenues from the

¹ Northeast (NE) Multispecies Fishery; Framework Adjustment 48; Federal Register / Vol. 78, No. 57 / Monday, March 25, 2013 / Proposed Rules / pages 18188-219.

² Letter to Alison Murphy, NOAA-Fisheries, from Pew Charitable Trusts and the Conservation Law Foundation dated March 28, 2013:

NOAA_NMFS_2013_0007_Sector_Plans_Pew_CLF_0328_2013 (1jx-84gi-fimp).

cc: Council, AA, MB, GF Cte (4/15)



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stocks with quota cuts, having diversified to a broad range of other species for some time. What is at risk by the measures proposed in Framework 48 as well as several of the other management actions being taken in this period is the long term future of a number of critical stocks and as well as the related fisheries that unavoidably catch these stocks as bycatch, thereby threatening long term risks of substantially greater social and economic harm.

The second overarching circumstance framing the Framework 48 action is the Omnibus EFH Habitat Amendment (Omnibus Amendment). The Omnibus Amendment has been slowly moving through the management process for close to a decade, despite the fact that protection of essential fish habitats from fishing activities was one of the primary legislative purposes of the Sustainable Fisheries Act of 2006. Significant technical analysis has been done in support of the current thinking underlying the Omnibus Amendment but none of that analysis has been presented to the public in a final form and the gaps in that analysis with respect to a consideration of the full range of benefits that EFH provides to species productivity are well known. Much of the work that is currently underway by the Closed Area Technical Team (CATT) is focused on improving that analytical framework and coming to a better understanding of the relationships between essential fish habitats and species productivity and management actions to mitigate or avoid deleterious effects. Each meeting of the CATT produces new information and insights into the multiple ways in which these closed areas are benefitting managed groundfish species, well beyond the mortality reduction benefits.

That analysis, however, is not complete. The documentation, alternatives analysis, and mitigation measures have not been fully reviewed; and the public has had no opportunity yet to understand and respond to the complex set of issues that will be addressed in the Omnibus Amendment. Any material or points of view about the relative contributions of various parts of the existing closed or open areas to improved productivity that are included in those documents are preliminary from a legal point of view. Nevertheless, even the language that is being used in Framework 48 to distinguish “mortality closures” from “habitat closures” reveals that the agency is already making decisions to promote opening existing closed areas on the basis of that preliminary analysis, prejudging the final decision document and environmental analysis. The agency’s action constitutes a classic segmentation of the environmental review process that is fundamentally against the principles and law of the National Environmental Policy Act (“NEPA”).

The negative impacts of the NEPA segmentation are exacerbated by the fact that all these decisions are being made in a foreshortened and confusing public comment period that stretches across four separate regulatory actions: the sector operating plan regulations, Framework 48, Framework 50, and then whatever form the later action takes on approving sector access in some or all of the closed areas later this year. This is the sort of chopped up, incoherent, and disjointed federal environmental review that routinely is found to violate NEPA. The agency here is already on record with the position that if this very same set of questions were to be raised together, there would be no question that an extended and integrated environmental review would be required.



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The proposed solution of breaking the decision into smaller pieces is being proposed by the agency for the explicit purpose of avoiding that result. Such an approach is antagonistic to the principles of broad public participation and reasoned, integrated decision making that NEPA is intended to bring to all major federal decisions.

Finally, CLF strenuously objects to the framework process by which the existing closed areas are being made available for access for fishing. This is virtually the same approach that was rejected by the Federal District Court for the District of Columbia in Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 254, order clarified, 389 F. Supp. 2d 4 (D.D.C. 2005). In Oceana, the court set forth the following standard: “[a] framework adjustment that truly adjusts management measures according to specifications in the FMP might well be lawful, whereas so-called adjustments which in fact undermine or contravene key provisions of an FMP would not.” Oceana, Inc. v. Evans, 384 F. Supp. at 254.

In the instant case, Amendment 16 is the controlling last amendment and it specifically indicated that access to the year-round closed areas was not available to the sectors through their annual operating plans. CLF can find no support in the record of that action that would suggest that opening of any and all of the year-around closures was to be a proper subject of a framework action. Framework 48 directly undermines and contravenes that prohibition in Amendment 16 and is not a proper subject for a framework amendment. To make the situation even more untenable legally, Framework 48 itself does not even frame out or elucidate what the extent and type of access sectors will be allowed. Those sets of decisions are being delegated to yet another action, which seems to not even have the formal status of a framework: a later approval process with unspecified parameters or scope or even timing.

We will now turn to the provisions of Framework 48 itself and provide comments in the order the issues are identified in the document:

1. Status Determination Criteria for SNE/MA Yellowtail

It is difficult to understand a “best-available-science” assessment for SNE/MA yellowtail flounder that the stock could either be fully rebuilt and not overfished and not experiencing overfishing or that it is experiencing overfishing, is overfished, and the productivity of the fish population is so low that it might not ever rebuild even if fishing mortality were held to zero. While the evidentiary split of 60:40 suggests that the assessment scientists certainly considered it was a close call, it nonetheless seems a true Hobson’s choice. Perhaps SNE/MA yellowtail is just another indicator of a heavily disturbed system coupled with inadequate analytical tools for management.

2. SNE/MA Windowpane Flounder sub-ACLs

Given the recent significant exceedance of the total ACL limits for two years, we are pleased to see a new set of reactive and proactive accountability measures for this stock.

3. Scallop Fishery sub-ACLs for GB Yellowtail Flounder

These provisions make sense and we think the incentive structure provided by the FY2014 sub-ACL is appropriate.

4. Small-Mesh Fisheries sub-ACL for GB Yellowtail Flounder

At 100mt, the small-mesh catch of GB yellowtail flounder is significant and it is important that effective AMs are developed to control mortality in this fishery within prescribed limits. The proposed regulation requires subsequent action to be effecting and the public should know when adequate AMs will be developed in the small-mesh fisheries.

5. Recreational Fishery AM

CLF supports the requirement in the law that there should be proactive accountability measures available to the Administrator to ensure that the recreational sub-ACL is not violated.

6. Commercial Groundfish Fishery AMs

CLF supports the proposal in this framework to increase the effectiveness of the AMs by accelerating implementation in the fishing season after the overage is believed to have occurred. We also support the promulgation of rules setting area-based AMs for Atlantic Halibut, Atlantic wolffish, and SNE/MA winter flounder. We also support the revised AMs for SNE/MA windowpane flounder, including specifically the area-based AMs.

7. Commercial Fishery Minimum Sizes

The goal of these proposals is to reduce regulatory discards and increase revenue from the catch. These proposals are troubling however because they will have a tendency of encouraging fishermen to target small fish that have barely become sexually reproductive. Discards are wasteful and inefficient. However, because discards are counted against the catch but produce no financial return, the current size limits provide a natural disincentive to catching fish just entering the fishery. This action would remove that disincentive and likely still produce large discards of sub-legal fish. The 16" haddock size limit seems designed to promote the targeting of the latest large year class, a year class that might be vital to the future of the fishery if it were allowed another season or two. We have been told and we believe that a number of fishermen also are encouraged to fish illegally with net liners and other devices to prevent the escape of any legal-sized fish, even at the expense of high discards of undersized, sexually immature fish. With continued low levels of observer coverage coupled with the ACL cuts, it is reasonable to expect that such behavior might increase. Lowering sizes will produce more discards, not fewer. This might be less of a problem if full retention were required of all catch; at least then a more accurate picture of the bycatch problem might be documented. But the Council has not elected to do that.



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8. Sector Monitoring Program

A. At-Sea Monitoring

Monitoring the New England groundfish fishery has become a troubling flash point and the quality and quantity of the data inputs to the stock assessment models threatens the very foundations of the public's confidence in fishery management. There is an industry perspective that can be seen in Framework 48 that it is the public's responsibility to pay for any monitoring as evidenced by the following sort of statement: "Framework 48 proposes to delay the industry's responsibility for at-sea monitoring costs to FY 2014.... Coverage levels would instead be set at the level that NMFS can fund."³ The failure of the Council and federal managers to manage these fisheries at sustainable levels has produced the apparent consequence that the scientists and manager are either stuck with inadequate data of the actual catches or fishing businesses that are financially burdened by the low quota levels are forced out of business by the burden of any marginal monitoring costs. We say "apparent" because it remains unclear to CLF what is the broad financial condition of the multispecies permit fleet. Many of the aggregate numbers neither support the notion that there is an economic crisis for vessel owners nor the notion that many multispecies permit holders are currently economically dependent on the stocks that will be experiencing quota cuts in FY2013. The industry has to bear its burden of monitoring if it wants to continue to pursue these fisheries. Raiding the scarce federal funding available for the process of approving electronic monitoring for this fishery in order to cover short-term monitoring costs is one of the worst proposals from a cost-benefit perspective that we can imagine in this area.

This monitoring directly bears on the managers' ability to understand what is actually going on with the various stocks of fish at sea. Monitors provide critical data that supports *increases* in quota as well as *decreases*. The assessment scientists seem to have formed a broad consensus that the persistent retrospective patterns they have seen in many of their groundfish models is a result of missing significant mortality in the fish at sea.

The Council's proposal in Framework 48, like the related provisions in the Sector Operations Plans Proposed Rule (NOAA—NMFS 2013-0007), does not meet applicable legal or regulatory thresholds. They preclude accurate monitoring of sector-level catch and thus undermine the meaningfulness of any of the sector-based accountability measures. These problems have been identified in extensive and thorough detail in the Sector Operations Plan Proposed Rule comments of Oceana. We have attached the Oceana comments to this letter and hereby adopt and incorporate them by reference as if fully set forth herein. The agency should reject the Framework 48 monitoring proposal.

³ Northeast (NE) Multispecies Fishery; Framework Adjustment 48, Supplemental Information at 26.

B. Dockside Monitoring

CLF supports the elimination of the dockside monitoring program as long as the dockside monitoring hail requirements and an effective dockside intercept system are in place, operational, and demonstrably effective.

C. General Monitoring Comments

With respect to the principle objectives of sector monitoring programs, it is becoming apparent that catch is being misidentified as to the stock area where it is being caught. This is a major problem for assessments and for inshore boats that are disproportionately dependent on particular stocks of fish. Accurate and timely identification of catch by stocks and by place is essential to the fishery and must become a much higher priority for the sector monitoring programs. Of course, without sufficient and appropriate sector/stock monitoring and stratification, all of these principles are meaningless.

We also remain very concerned that the monitoring protocols seem to result in too many monitoring trips on smaller boats that catch a diversity of species but are not responsible for a significant portion of the groundfish species of concern. On the other hand, many of the larger vessels that are targeting these species—and have a greater capacity to support the costs of monitoring—are not being targeted by the monitoring effort. CLF also strongly objects to the qualifying language—“to the extent practicable”—in the rulemaking associated with sector monitoring. Monitoring needs to be adequate to its purpose. Fisheries, or sectors within fisheries, that cannot meet appropriate performance standards should not open.

The rationale for reducing ASM on monkfish DAS trips seems to be sound in a world of constrained monitoring, and the protocols associated with the proposal seem appropriate. There is no reason, however, why electronic monitoring and full retention policies have not been developed and implemented in New England fisheries. These large mesh fisheries are perfect examples of where such programs would be very cost effective, produce valuable catch data, and promote regulatory compliance. Lowering the monitoring requirements works against this goal and is likely a false savings. The program will have to be carefully managed so that significant groundfish discards are not hidden by this loophole from normal coverage requirements.

9. GB Yellowtail Flounder Management Measures

The primary problem at this point in time with GB yellowtail management is the recent revelation that potentially wide-scale misreporting of the areas where GB yellowtail are being caught is taking place. This proposal, while understandable on its face, seems likely to create even more misreporting by unobserved boats. Until NMFS develops a better understanding of the extent of catch misreporting and implements measures to reduce the practice, this finer scale tuning of discard rates should not be approved.



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10. List of Allowable Sector Exemption Requests

This section of the proposed rules eliminates the prohibition set out in Amendment 16 that sectors may not request access to year-around closed areas. The two rationales driving this change are eliminating the redundancy of catch limits and mortality-based closed areas and allowing the multispecies permit fleet access to areas where they could target redfish, pollock and GB haddock. The assumptions underlying these rationales are that the existing closed areas are closed purely to limit fishing mortality and that there are populations of haddock, redfish and pollock in these areas that are otherwise not accessible to the groundfish fleet. Both assumptions are invalid.

With respect to the fishery management functions being served by the existing closed areas, it is apparent from a review of the record that they were all closed for multiple reasons, not just to reduce mortality on groundfish populations. The Framework 48 comment letter submitted by the Pew Charitable Trusts and the appendix attached to that document lay out a detailed history of the closed areas. The Pew comment letter and its appendix are attached to these comments and we adopt and hereby incorporate them by reference as if fully set forth herein. CLF agrees with all the facts and the conclusions in those materials.

With respect to the rationale that access is needed before the Omnibus Amendment is completed in order to provide access to GB haddock, redfish and pollock, the analysis conducted by the CATT completely undercuts that justification. Redfish populations are not significantly identified with any of the existing closed areas and the ACL is fully accessible to the fleet without any opening of closed areas. The only analysis that suggests that additional pollock might be available if a closed area were to be open focuses on the proposed thin box on the eastern side of the Western Gulf of Maine Closed Area. Irrespective of this analysis, the entire pollock ACL appears to be readily accessible within currently open areas, thus obviating the need to reopen area for access to pollock. As for haddock, there already exist SAP programs that are designed to allow access to potential haddock in the Georges Bank closed areas but that issue seems almost academic given the fact that the fleet has caught such a low percentage of its ACL in FY2012. There is no evidence from the trawl surveys or observer data that those haddock are hiding out in CA I or CAII.

Indeed, looking objectively at the situation, the economic analysis of the proposed opening of the existing closed areas concluded that there was a chance of “neutral”—no benefits—to slightly positive benefits associated with allowing access into those areas with significant chances of major long term negative economic consequences. CLF believes that the characterization of the CATT literature search and economic analysis provided in the supplement information associated with Framework 48⁴ puts a positive spin, if not an outright exaggeration on the positive side of the presentations CLF observed on this topic at the CATT. In the actual words of

⁴ Northeast (NE) Multispecies Fishery; Framework Adjustment 48 at 40-41.

the economist who conducted the analysis: “there is potential for much greater costs if the exemptions place fishing pressure on critical life stages or greater gear interactions ensue, which would result in a negative net benefit of undetermined magnitude.”⁵

Others have commented on the increased impacts on protected marine mammals if these significant areas were to be re-opened to fishing as well as conflicts between recreational fishermen in the western GOM closure area. All those comments are meritorious and counsel against opening access to these areas.

A. Framework 48 Does Not Comply With the National Environmental Policy Act (NEPA)

As a federal agency proposal to modify the terms of an existing FMP, Framework 48 constitutes a major Federal action under NEPA that triggers the requirement to assess the environmental impact of such the proposed changes to the multispecies regulatory regime. 42 U.S.C.A. § 4332(2)(C). *See, e.g., Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1257 (W.D. Wash. 1999). NEPA imposes a requirement that federal agencies “will have available and will carefully consider detailed information concerning significant environmental impacts” before a project is approved. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). *See also City of Alexandria, Va. v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999).

An environmental impact statement (EIS) must include a detailed statement of the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C)(i)-(v). If it is unclear whether a full EIS is required, an agency must at a minimum prepare an environmental assessment (EA). 40 C.F.R. § 1501.4(b).

While an EA is not as comprehensive as an EIS, an EA must take a “hard look” at potential environmental consequences and consider reasonable alternatives. *See Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 731 F. Supp. 2d 15, 34-35 (D.D.C. 2010), and *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 71 (D.D.C. 2012). More specifically, an EA must discuss the need for the proposal, identify alternatives to the proposed action, and describe the environmental impacts of both the proposed action and the alternatives, including direct, indirect and cumulative impacts. *Nat'l Trust for Historic Pres. in the U.S. v. U.S. Dept. of Veterans Affairs*, CIV.A. 09-5460, 2010 WL 1416729 (E.D. La. Mar. 31, 2010). If, following this “hard look” at a proposed action and its potential effects, an agency determines that the action will not result in any significant environmental impacts, the agency may issue a “finding of no significant impact”

⁵ DePiper, October 25, 2012 at 5.



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(FONSI) and is excused from preparing an EIS. *Id.* However, if the record does not support a FONSI, the agency must issue an EIS. *Id.*

In this case, the record reflects that the NOAA Fisheries has not previously analyzed the potential environmental consequences of the proposed use of a sector operations plan exemption to re-open areas that are currently closed to fishing for groundfish. Amendment 13 to the Northeast Multispecies Fishery Management Plan, published on April 27, 2004, described the procedure for establishing sectors, identified a list of management measures that may be adjusted through a framework action, and specifically provided that the Regional Administrator may not grant exemptions to year-round closure areas. §648.87(b)(1)(xvi). The prohibition on granting exemptions to NE multispecies year-round closure areas was reiterated in Amendment 16. §648.87(c)(2)(i). Because the re-opening of closed-areas was characterized as a prohibited act, such action was not analyzed in either an EIS or an EA nor, consequently, was a FONSI issued pertaining to such action. In light of this history, the fact that much of the area being proposed for access to sectors has been closed to groundfishing for over a decade and that this federal action authorizing a process to allow access to such areas will have a significant impact on the affected marine environment, NOAA may not re-open the closed-areas without conducting an EIS.

Moreover, the agency's actions are clearly an attempt to "segment" the larger Omnibus Amendment action that is intended to comprehensively address the status of all closed areas in New England. This separation from the Omnibus Amendment of this intended subcomponent of that action is designed to avoid NEPA review requirements. This practice of "segmenting" major Federal actions into smaller units for the purpose of avoiding preparation of an EIS and, thus, consideration of overall environmental impacts violates NEPA. *See Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987), *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987). Courts have identified standards that Federal actions must meet in order to avoid illegal segmentation. These include whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987) (citing *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d at 439). The proposed Framework 48 action to establish a process to exempt sectors from the prohibition on fishing in closed-areas would violate at least two of these requirements as it does not have substantial independent utility and it would foreclose opportunities to consider alternatives in the Omnibus Amendment and other future processes.

In 2011, NOAA issued an NOI for the Omnibus Amendment by which it merged into the Amendment a determination as to the functions and values of the groundfish closed areas and as to any future access to those areas. In so doing, NOAA conceded the lack of independent utility of any action to consider re-opening these areas. These are not discrete areas that can be understood or analyzed in isolation; they have interactive effects in the regional marine

ecosystem that have to be approached systemically and in an integrated fashion. The absence of independent utility of these various proposed closed area openings is further emphasized by the economic analysis referenced above that concludes that any benefits of re-opening these areas are highly speculative, if they exist at all.

Additionally, if the areas proposed for new sector access are approved, the opportunity to utilize the Omnibus Amendment to advance alternatives that maintain the existing high quality habitat within the closed areas would obviously be foreclosed as the gear impacts and catch of larger females and other productivity components in the closed areas would be rapidly lost. As noted above, the Omnibus Amendment is designed to fully consider the functions and values of existing and proposed habitat and groundfish closures and to assess the benefits of management measures for alternative areas. Any action that forecloses the very purpose of an ongoing, parallel management effort would be counterproductive and would violate NEPA.

Because NMFS has not prepared an EIS, and because interim consideration of opening areas that are presently closed would constitute improper segmentation under NEPA, NMFS should refrain from implementing any openings outside of the Omnibus Amendment currently underway.

B. The Framework 48 Process Must Comply With the Endangered Species Act

The Endangered Species Act makes it unlawful to take a threatened or endangered species. 16 U.S.C.A. § 1538(a)(1). The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C.A. § 1532(19). Any decision by NOAA to open areas that are presently closed would subject listed endangered species such as right whales and leatherback turtles to ship strikes, entanglement and other forms of takes. NOAA is obligated under the ESA to insure that any action authorized, funded or carried out by the agency is not likely to jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(a)(2). As such, the agency must undertake a detailed consultative process for determining the biological impact of any proposed reopening. *Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv.*, 99-00152 DAE, 1999 WL 33594329 (D. Haw. Oct. 18, 1999). That consultation process must culminate in the issuance of a biological opinion (BiOp) in which the agency states whether it believes that the activity is likely to jeopardize the continued existence of a particular species and, if so, the agency must suggest reasonable and prudent alternatives or devise plans to reduce the risk of a take. *Id.* (citing 16 U.S.C. § 1536(b)(3)(a)). Any action that may authorize groundfishing in the closed areas creates the risk of irreparable harm to endangered species. Consequently, prior to any such action there must first be a full consultative process and the development of a BiOp associated with access to the closed areas.



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11. Requirement to Stow Trawl Gear While Transiting Closed Areas

CLF strenuously objects to this proposal that was adopted by the Groundfish Committee against the advice of the Council's VMS/Enforcement Committee, which recommended more modest changes targeted at safety and effectiveness. CLF believes that this fishery continues to have a significant and underreported problem with illegal fishing activity and misreporting of catches.

12. Correction to Eastern U.S./Canada Quota Monitoring

CLF does not think that the agency has the authority to make this change to the regulation without Council action. The fact that a different approach based on the agency's interpretation of Council intent might have been included in the Amendment 16 Preamble does not convert that interpretation into a Council action. Moreover, CLF is concerned that the recent reports and substantiation of misreporting of catch by multispecies permit boats on Georges Bank makes the VTRs inherently unreliable as an allocation mechanism. The current regulation should stay as is and NMFS should begin implementing it according to its terms until and unless the Council decides to change the allocation approach after debate and public comment.

Framework 48 is a step backward for the New England Fishery Management Council. The proposed program compromises data quality by failing to require adequate and appropriate monitoring; it attempts to authorize allowing widespread access to the closed areas despite the Council's awareness that the risks to future productivity are great and the short term benefits are marginal and short-lived at best; it continues a recent pattern of risk-positive management action in the face of great uncertainties about the status of a number of the stocks; and it violates both the spirit and the letter of the National Environmental Policy Act and the Endangered Species Act.

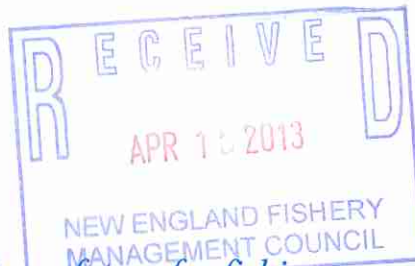
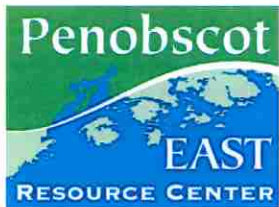
Thank you for this opportunity to offer these comments.

Submitted on behalf of the Conservation Law Foundation.

Sincerely,

A handwritten signature in blue ink that reads "Peter Shelley". The signature is written in a cursive, flowing style.

Peter Shelley, Esq.
Senior Counsel



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Securing a future for fishing communities

Terry Stockwell
 Chair, Groundfish Committee
 New England Fishery Management Council
 50 Water Street
 Newburyport, MA 01950

April 12, 2013

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Dear Terry and members of the groundfish committee,

The New England Fishery Management Council has a unique opportunity to support groundfish rebuilding by capitalizing on an upcoming increase in groundfish prey abundance in the northeastern Gulf of Maine.

The Great Works Dam on the Penobscot River was removed in 2012, and two more dams on this river are scheduled to either be breached or bypassed and four will have enhanced fish passage built—ultimately opening over 1,000 miles of river habitat. In addition, a bill to open the fishway on the St. Croix to anadromous fish just passed the Maine State Legislature and awaits action by Governor Paul LePage. This river is estimated to be capable of supporting millions of alewives annually. Maine’s Department of Marine Resources estimates that these two rivers combined, when the runs are fully rebuilt, would support an annual run of over 37 million alewives. This translates to an annual biomass of tens of thousands of metric tons of young of the year fish from two rivers emptying into the northeastern Gulf of Maine. Alewives are shown to be a preferred prey base for cod.

For comparison, when the Edwards Dam on the Kennebec River was breached, opening 17 miles of river habitat to alewives, and subsequent impediments to fish passage on that river were removed, the number of alewives jumped from roughly 100,000 to 3 million within 12 years.

As you know, Penobscot East Resource Center has proposed a closure to groundfishing in a portion of the northeastern Gulf of Maine, from the waters off eastern Penobscot Bay to Schoodic Ridges, an area of 575 square miles, or 0.7 percent of the area of the

cc: Council, AA, DT, FH, MB (4/15)

Gulf of Maine. The proposal is supported by Port Clyde fishermen, the nearest active groundfish port.

Very few fishermen catch very few groundfish in this region, as has been the case for nearly two decades. As a result of the Allee effect, few fish in the local population means that recovery will be very slow. The region therefore needs protection from the directed groundfish fishery to enable rebuilding.

Historically, the picture was far different. In the 1970's to early 1990's, the region supported a thriving groundfish fishery with boats hailing from ports between Boothbay Harbor to Eastport, as well as larger vessels from ports farther west.

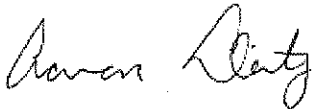
Closing this area now, while impacting a small handful of fishermen, will have a comparatively miniscule negative impact on the fishery today, but holds the potential to yield tremendous future benefits.

The Closed Area Technical Team has examined areas of abundance for both juvenile fish and large, adult spawners. The eastern Maine coast is shown to support an abundance of juvenile groundfish, but currently virtually no large spawning fish.

An area closure may allow these juvenile groundfish to benefit from the increased prey abundance by protecting cod prespawning aggregations. Based on what we know about fish behavior, this ecological shift may entice juvenile fish to either remain in the region, or to return to the region to spawn, thus increasing local groundfish biomass, and dramatically improving the fishery.

We envision a closure that would be adaptive, opening again when the population rebuilds. A closure now would be a small price to pay for the opportunity to rebuild fish populations in a region facing 20 year depletion.

Sincerely,



Aaron Dority
Director, Downeast Groundfish Initiative
Penobscot East Resource Center

Manager, Northeast Coastal Communities Sector