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

JAN 24 2013

Capt. Paul J. Howard  
 Executive Director  
 New England Fishery Management Council  
 50 Water Street  
 Newburyport, MA 01950

Dear Paul:

Thank you for your December 28, 2012, letter requesting that the Secretary of Commerce issue an interim action to reduce but not end overfishing on Gulf of Maine (GOM) cod and GOM haddock in fishing year (FY) 2013. I appreciate the Council's efforts to identify mitigating measures to help the industry bear the expected quota reductions in FY 2013. Let me assure you, we fully appreciate the importance of your request to the New England groundfish industry. We reviewed our previous determination that the use of interim measures under Section 304(e)(6) of the Magnuson-Stevens Act (MSA) is limited to one year and that overfishing must be ended for FY 2013. Based on this review and the advice of NOAA General Counsel, we have determined that there is no legal basis to change last year's determination, meaning that an interim action for GOM cod would not be justified at this time. We have also concluded that reducing rather than ending overfishing on GOM haddock under the same provision in the MSA is not justified. We summarize the analysis of these two stocks below. This letter also discusses our concerns about increasing catch limits on Southern New England/Mid-Atlantic (SNE/MA) winter flounder and allowing automatic carryover of quota for groundfish stocks.

### GOM Cod

Section 304(e)(6) of the MSA allows for a temporary exception to the overarching requirement of the MSA to end overfishing immediately in certain narrow circumstances during the development or revision of a rebuilding plan. You asked us to reconsider last year's determination that the application of this exception was limited to one year on grounds that there is an apparent conflict between the 2-year time period for revising a rebuilding program specified in § 304(e)(3) and the maximum time periods of 366 days specified for interim rules in § 305(c). The Council and others have argued that the Secretary may issue back-to-back interim actions to span the full 2 years the Council may take to revise the rebuilding program. This argument relies, in part, on an assertion that back-to-back interim actions are not expressly prohibited by § 305(c). We carefully considered this interpretation, but have found no basis for changing last year's determination that because GOM cod is already under a plan designed to prevent overfishing, the interim measures that reduced, but did not end overfishing were limited in duration to the 366 days permitted under § 305(c). We are bound by what the law says, not what it does not say and § 305(c) is clear on its face that interim rules are limited to no more than 366 days. It continues to be our position, therefore, that to be consistent with the plain meaning



of relevant provisions in the MSA, and in light of the clear mandate of the MSA to end overfishing, a second year of interim measures in the case of GOM cod is not justified unless a change in circumstances has created a new emergency situation that would permit such action. At this time there are no new circumstances that would give rise to a new set of interim measures. Moreover, setting aside legal restrictions, to allow overfishing another year on this stock, given its continued declining status, would not be prudent.

### **GOM Haddock**

Your request to allow overfishing on GOM haddock stems from a very different situation than GOM cod presented in 2012. GOM haddock has been identified as approaching an overfished condition, which in turn triggers the requirement to prevent overfishing under § 304(e)(3)(B). Because measures are already in place to prevent overfishing of GOM haddock, there is no need for an interim period to allow the Council to develop measures to prevent overfishing. To rely on a narrow reading of the MSA to step back from such measures would contribute to the decline in the fish stock, which is directly at odds with the purpose of identifying such stocks as approaching an overfished condition. It could be conceivable to reduce, rather than end overfishing on a 1-year basis for a fish stock that is not already subject to a Fishery Management Plan (FMP) and for which there is no mechanism in place to immediately end overfishing on a given stock. But that is not the case here because GOM haddock is already governed by Annual Catch Limits (ACLs) and an Acceptable Biological Catch (ABC) control rule that the Council implemented through Amendment 16. Moreover, the 2012 ACLs may allow overfishing in light of updated assessment information on this stock which became available too late to be incorporated into Framework 47. So, in effect, GOM haddock has already had one year of interim measures that allow overfishing. Based on this analysis we have determined that an interim action to allow another year of overfishing would not be justified for GOM haddock.

### **SNE/MA Winter Flounder**

The Council also passed a motion at its December 20, 2012, meeting to request a new ABC for SNE/MA winter flounder from the Council's Scientific and Statistical Committee (SSC) based on a new management strategy for this stock for FY 2013. Our staffs have been working on this idea since that meeting, but I wanted to relay our advice to you in writing here for the Council to consider as it weighs ABC alternatives at its January 2013 Council meeting.

The Council established the current SNE/MA winter flounder rebuilding strategy through Amendment 16, when it was determined that SNE/MA winter flounder would not rebuild by 2014, even in absence of all fishing mortality. Through Amendment 16, the Council implemented management measures that would end overfishing and get the fishing mortality rate as close to zero as practicable. As part of this strategy, the ABC was calculated using the fishing mortality rate expected to result from these management measures. From the December motion, I understand that the Council would like to increase the fishing mortality rate, while still preventing overfishing, in order to mitigate some of the anticipated reductions in catch limits for other stocks. Because the Council's rebuilding strategy to date has been to get the fishing mortality rate as close to zero as practicable, a higher fishing mortality rate would not be consistent with the existing rebuilding program for this stock. If the Council wishes to

implement a higher fishing mortality rate for this stock in FY 2013, it must revise the SNE/MA winter flounder rebuilding program to begin in FY 2013 and implement catch limits consistent with the new rebuilding plan.

### **Carryover**

Mandatory issuance of carryover of up to 10-percent of unused 2012 allocations presents another pressing issue we must address for FY 2013. The crux of the issue is that, based on preliminary analysis by my staff, potential FY 2012 carryover is so large when compared to FY 2013 potential ACLs, that it risks exceeding the ABC for some key stocks, including GOM cod and GB cod. As we stated in our May and July 2012 letters to the Council, the current groundfish carryover program that allows a sector to carry over up to 10 percent of its allocation on an annual basis, although previously approved, may not be consistent with recently received national policy guidance, the ACL requirements of the National Standard 1 Guidelines, and the MSA. On the other hand, to prohibit carryover completely if it exceeds potential FY 2013 ACLs may undermine the safety and management benefits intended by allowing carryover from year to year. Unless, the Council or NMFS takes some additional action, the full carryover amounts will be automatically added to FY 2013 ACLs, thereby raising concerns about consistency with conservation objectives of the FMP and National Standard 1. In light of this dilemma, we are exploring whether there is a way, including through Secretarial emergency action, to allow some carryover in order to preserve safety and management benefits while still being consistent to the extent practicable with MSA requirements and national standards. Please be aware, however, that we may not be successful in identifying a way to accomplish this result. We are also aware that sectors need ample notice of any change to allowable carryover amounts in order to plan for the end of FY 2012 and for FY 2013, and that a change so late in the year could create safety issues, as sector vessels could rush to harvest their unused allocations. We therefore intend to announce as soon as possible our decision on whether some carryover may be allowed once we have completed our analysis of this issue and our flexibility under the law. In the long term, the Council must consider revising the sector carryover program through a future Council action that would make it consistent with recent national policy guidance and the National Standard 1 Guidelines. My staff is available, as always, to assist the Council in this effort.

I am sure we will discuss these issues further at the January Council meeting. Should you have any questions in the meantime, please feel free to contact me or my staff.

Sincerely,



*for* John K. Bullard  
Regional Administrator





New England Fishery Management Council

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C. M. "Rip" Cunningham, Jr., *Chairman* | Paul J. Howard, *Executive Director*

December 28, 2012

Mr. John Bullard  
Northeast Regional Administrator  
NOAA/NMFS  
55 Great Republic Drive  
Gloucester, MA 01930

Dear John:

I am writing to relay a Council request that the Secretary of Commerce implement interim measures to reduce overfishing on Gulf of Maine (GOM) cod and Gulf of Maine (GOM) haddock in FY 2013. This request stems from a motion passed at the Council meeting on December 20, 2012:

*"that the Council request NMFS implement an interim measure for GOM cod and GOM haddock to reduce overfishing in 2013, pursuant to MSA 304(e)(6)."*

The motion **carried** on a show of hands (16/1/0).

The Northeast Multispecies fishery is facing reduced FY 2013 catch limits for many stocks. At the urging of senior NMFS leadership, we have been attempting to find ways to mitigate these reductions so that the fishing industry and communities can survive until the long-term improvements that will result from stock rebuilding are realized. Economic analyses completed for Framework Adjustment 48 paint a bleak picture: gross groundfish revenues could decline by 28 to 42 percent from FY 2011, depending largely on the catch levels set for GOM and Georges Bank (GB) cod.

On January 26, 2012, the Council was notified that the rebuilding program for GOM cod was not making adequate progress. Pursuant to Section 304(e)(7)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (the M-S Act), in response to this notification the Council will prepare and submit an action that will end overfishing and modify the rebuilding program. That action will be developed in time to be implemented at the beginning of FY 2014 (within two years of the date of notification). The Council also requested that NMFS take interim action in FY 2012 to reduce overfishing on GOM cod, consistent with the provisions of Section 304(e)(6) of the M-S Act. The agency responded to this request by adopting interim measures for FY 2013, including an annual catch limit that is expected to reduce, but not end, overfishing in FY 2012.

The Council asks that a similar approach be used for FY 2013. While the NMFS letter of January 26, 2012 indicated that an interim action can only be adopted for a maximum of one year, the Council believes this is an overly restrictive interpretation of the of the M-S Act. Section 304(e)(3) of the M-S Act

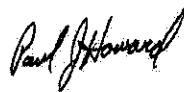
states that a Council has two years after receiving notice of inadequate rebuilding progress to prepare and implement a "...fishery management plan, plan amendment, or proposed regulations..." to address this shortfall. Section 304(e)(6) gives the Secretary of Commerce the authority to implement interim measures to reduce overfishing "...until such measures can be replaced by such plan, amendment, or regulations." Clearly, these two sections should be read in concert and authorize the Secretary to take the steps necessary to reduce overfishing until the Council action can be implemented. It is also worth noting that this section refers to amendments to the plan, indicating that it applies not only to the situation when a fishery management plan does not exist and must be developed, but to an existing plan that must be modified.

The Agency's objections to the use of interim action for the second year appear to hinge on Section 305(c)(3)(B), which limits the time that an interim action can remain in effect to a total of 366 days. A careful consideration of this section reveals flaws in this interpretation. First, if the interim action can only be implemented for one year while the Council has two years to modify the rebuilding program and end overfishing (as specified by Section 304(e)(3)), it creates the situation that overfishing might be reduced for one year but then allowed to continue or increase during the second year until the Council's action is implemented. This has obvious negative conservation implications: it would result in deteriorating stock conditions while the Council modifies the plan. This adverse result can only be avoided if the Council is required to adopt measures that end overfishing after one year, an interpretation that is in direct opposition to the plain language of Section 304(e)(3). Second, Section 305(c)(3)(B) may limit the time period for a specific interim action but does not include any prohibition on implementing a second such action after the first one expires.

For the reasons described above, we ask that you consider an interim action that will reduce overfishing for GOM cod in FY 2013. The situation for GOM haddock is slightly different. Consistent with Section 304(e)(1) of the M-S Act, the Council was notified on May 30, 2012 that GOM haddock was approaching an overfished condition, and overfishing was occurring. This triggers a requirement that the Council implement a "...fishery management plan, plan amendment, or proposed regulations..." within two years to end overfishing. The Council expects this action to be completed in time for the start of FY 2014. Much like the case with GOM cod, Section 304(e)(6) of the M-S Act allows the Council to request an interim action that reduces overfishing while the Council completes its work. Unlike GOM cod, this is the first request for an interim action for this stock. GOM haddock is an important component of the catches of inshore commercial and recreational fishermen in the GOM. Increased catches for this stock will help mitigate reduced catches of other stocks, such as GOM cod, CC/GOM yellowtail flounder, witch flounder, and plaice.

Thank you for your consideration of this motion. The Council is committed to work with you to develop an appropriate interim action that will improve the status of these two stocks while reducing the negative impacts on fishing communities. Please contact me if you have questions.

Sincerely,



Paul J. Howard  
Executive Director