

No. 16-2103

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**In the  
United States Court of Appeals for the First Circuit**

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DAVID GOETHEL, *et al.*,

*Plaintiffs-Appellants,*

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,

*Defendants-Appellees.*

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Appeal from the United States District Court for the District of  
New Hampshire,  
Case No. 1:15-cv-00497-JL  
The Honorable Judge Joseph Laplante Presiding

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OPENING BRIEF OF APPELLANTS

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), Appellants David Goethel and XIII Northeast Fishery Sector, Inc. certify as follows.

Appellant David Goethel is a natural person to whom the corporate disclosure obligations of Rule 26.1 do not apply.

Appellant XIII Northeast Fishery Sector, Inc. is a Massachusetts corporation. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

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## **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Plaintiffs respectfully request oral argument. This case implicates numerous legal questions, many of which are complex issues of first impression. The statutory and regulatory framework for the agency actions under challenge, together with the historical background necessary to understand it, are similarly complex. The case is a potentially consequential one, affecting thousands of fishermen on the Atlantic coast and, potentially, the broader structure of the Federal administrative state. Oral argument is thus likely to benefit the litigants and aid the Court's decision process.

## INTRODUCTION

The New England and Mid-Atlantic fishing industry is older than the Nation itself. Today it creates thousands of jobs in countless fishing communities. The industry’s regulators, however, have embarked on a project that threatens its imminent destruction. They have done so without statutory authority, defying the most elementary limits on federal agency power. This Court should intervene to protect fishermen from agencies run amok.

Regulations promulgated by Defendants—the Department of Commerce, the National Oceanic and Atmospheric Administration (“NOAA”), and the National Marine Fisheries Service (“NMFS”) (collectively, “the Government”)—under the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens”) compel certain Atlantic fishermen to carry monitors as guests onboard their vessels. These “at-sea monitors” are employees of private companies who live with the fishermen at sea, observe their activities, check their compliance with federal regulations, and file reports upon their return to dock. Fishermen have accepted the presence of monitors for years, and the Government has historically paid for them with money appropriated

by Congress. In early 2016, however, the Government ran out of money. Its response was to enforce a new requirement — now, the fishermen must pay for the monitors themselves, at a cost of hundreds of dollars per day, per monitor. Most fishermen cannot afford to do so, and will be forced to abandon their livelihoods.

The fishing industry is entitled to judicial relief from this “industry-funding requirement” because the Government has no statutory authority to impose it. Magnuson-Stevens authorizes the Government to require *placement* of the at-sea monitors on vessels, but its text, structure, and history deny the Government the additional power to make fishermen fund them. Congress has authorized industry funding in other regions, and in other regulatory circumstances; the Government’s decision to require such funding for the at-sea monitors would render those provisions surplusage and conflict with Congress’s manifest intent. If the Government wants third-party monitors to police fishing activity, the Government must also take responsibility for paying for them.

The district court disagreed, holding, *inter alia*, that the Government’s power to regulate the fishing industry and place monitors

includes the much broader power to extract money from regulated parties when congressional appropriations run short. That reasoning, if affirmed, would mark a unique and unprecedented expansion of agencies' implied powers, with implications stretching far beyond the agencies involved in this case. It would also effectively abrogate Congress's power of the purse as a means of restraining the administrative state.

Contrary to the district court's reasoning, the bedrock of administrative law is that federal agencies are limited to congressionally-delegated powers and congressionally-appropriated funds. If they lack statutory authority or appropriated funds, they have no power to act. They may not coerce their regulated industries to provide the funding that Congress has declined to grant. This Court should reaffirm that principle and reverse the district court.

### **JURISDICTIONAL STATEMENT**

This district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, and the Magnuson-Stevens Act, 16 U.S.C. §§ 1861(d), (f); *id.* § 1855(f). *See also* 5 U.S.C. §§ 702, 703, 704 (Administrative Procedure Act).

The district court issued an order on July 29, 2016 that denied Plaintiffs' motion for summary judgment and granted the Government's cross-motion. The district court entered final judgment for the Government on August 1, 2016. Plaintiffs filed a timely notice of appeal on August 23, 2016. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

Plaintiffs present the following issues for this Court's review:

1. Whether Plaintiffs timely sought judicial review of the industry-funding requirement for at-sea monitors.
2. Whether the Government is authorized by Magnuson-Stevens to require industry funding for at-sea monitors.
3. Whether the Government followed appropriate procedures under the Regulatory Flexibility Act in requiring industry funding for at-sea monitors.
4. Whether placement of at-sea monitors on fishing vessels violates the Fourth Amendment, Appointments Clause, or Tenth Amendment of the United States Constitution.

## STATEMENT OF THE CASE

### A. Legal Background

#### 1. Fishery Regulation Under Magnuson-Stevens

Magnuson-Stevens, 16 U.S.C. § 1801 *et seq.*, provides for Federal management of domestic fisheries. 16 U.S.C. §§ 1801(a)(6), (b)(1), (b)(3). Congress granted primary administrative authority for Magnuson-Stevens to the Secretary of Commerce (“Secretary”). *Id.* § 1802(39).

Magnuson-Stevens establishes eight Fishery Management Councils (“Councils”), each charged with a region of the Nation’s coastal waters. The Councils most relevant to this case are the New England Fishery Management Council (“New England Council”), *id.* § 1852(a)(1)(A), and the Mid-Atlantic Fishery Management Council (“Mid-Atlantic Council”). *Id.* § 1852(a)(1)(B). The composition, duties, and powers of the Councils are defined by statute. *Id.* § 1852(h). Magnuson-Stevens requires that each Council include a set number of voting members. The voting members include a statutory number of appointees chosen by the Secretary from lists that the governors of the region’s States are required to provide, *id.* §§ 1852(b)(1)(C), (b)(2)(A)–(C), plus the “principal State official with marine fishery management responsibility and expertise”

from each State, *id.* § 1852(b)(1)(A), and NMFS’s regional director, or his designee. *Id.* § 1852(b)(1)(B).

The Councils’ principal responsibility is to propose and amend Fishery Management Plans (“FMPs”), which regulate the harvesting of particular fish species or sets of species within a Council’s region. FMPs proposed by Councils are approved, implemented, and enforced by the Secretary. *Id.* § 1853(a)–(b). The Councils’ ability to develop FMPs comes with significant power, and including the power to constrain the Secretary’s own discretion. Once a Council proposes an FMP, the Secretary may not modify it on his own authority, but can only approve or reject its provisions. *Id.* §§ 1854(a), (b)(1); *Connecticut v. Daley*, 53 F. Supp. 2d 147, 160 (D. Conn. 1999). In at least some cases, the Secretary can only act with the Council’s approval. *E.g.*, *Daley*, 53 F. Supp. 2d at 161 (explaining that “authority to establish limited access quota systems is vested solely with the Council”). When the Secretary wants to repeal or revoke an FMP, he must seek the Council’s approval, which the Council may grant or withhold. 16 U.S.C. § 1854(h).

Magnuson-Stevens sets out provisions that Councils are required to include in FMPs they develop. *Id.* § 1853(a). An FMP must, for

example, “contain the conservation and management measures . . . which are . . . necessary and appropriate for the conservation and management of the fishery[.]” *Id.* § 1853(a)(1). The Act also authorizes Councils to include certain “discretionary provisions” in FMPs. *Id.* § 1853(b). FMPs may include programs for placement of federal “observers” on fishing vessels “for the purpose of collecting data necessary for the conservation and management of the fishery.” *Id.* § 1853(b)(8). And Councils have the residual power in proposing FMPs to “prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.” *Id.* § 1853(b)(14).

Several provisions of Magnuson-Stevens relate to fees and assessments on regulated parties, including for the purpose of funding observer programs. One such provision authorizes the North Pacific Fishery Management Council (“North Pacific Council”) to propose “fishery research plans” involving onboard observers in that region, and to assess fees to pay for them. *Id.* § 1862(a)(2). Another authorizes collection of fees to “cover the costs of management, data collection and analysis, and enforcement activities” when an FMP creates a special type

of fishing permit program referred to as a “limited access privilege program.” *Id.* § 1853a(e). Magnuson-Stevens also requires that foreign fishing vessels in United States waters carry observers, and that the Secretary assess a fee to cover the costs. *Id.* § 1821(h)(4).<sup>1</sup>

Magnuson-Stevens has its own judicial review provision, which incorporates the review provisions of the Administrative Procedure Act (“APA”) in most respects. *Id.* § 1855(f). Section 1855(f) applies to facial challenges to “[r]egulations promulgated by the Secretary” under Magnuson-Stevens, *id.* § 1855(f)(1), and “actions that are taken by the Secretary under regulations which implement a fishery management plan[.]” *Id.* § 1855(f)(2). Judicial review is available for facial challenges “if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable[.]” *Id.* § 1855(f)(1).

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<sup>1</sup> Magnuson-Stevens also authorizes the Secretary to require permitting fees, 16 U.S.C. § 1854(d)(1) (cross-referencing 16 U.S.C. § 1853(b)(1)), and certain fees for the support of Alaska and Pacific coast communities. *Id.* § 1855(i).

## 2. The Northeast Multispecies Fishery Management Plan

This case concerns fishing for “groundfish” (*i.e.*, fish that live at the bottom of the water they inhabit, such as cod, flounder, hake, halibut, and haddock) off the Atlantic coast. Groundfish migrate within the waters of both the New England and Mid-Atlantic Councils, and so are governed throughout their range by the Northeast Multispecies Fishery Management Plan (“Northeast Multispecies FMP”), developed jointly by the two Councils thirty years ago.<sup>2</sup> 16 U.S.C. § 1854(f)(1). The Northeast Multispecies FMP has been altered since its promulgation by a series of major modifications, called “amendments,” and minor changes, called “framework adjustments.”

The Northeast Multispecies FMP has historically regulated fishermen through a combination of “output” restrictions, or catch quotas, and “input” restrictions on the number of days at sea (“DAS”) that can be spent fishing under a given fishing permit. Under Amendment 16 to the Northeast Multispecies FMP, enacted in 2010, fishermen are subject to different types of restrictions depending on whether they fish

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<sup>2</sup> J.A. at 0541.

in the “common pool” or as members of a “sector.” Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262 (Apr. 9, 2010).

Members of the common pool, the default option, are subject to DAS restrictions. *See generally* 50 C.F.R. § 648.82. Amendment 16 reduced the total DAS allocated to common pool vessels by 32 percent from 2009 levels and 50 percent from 2006 levels. 75 Fed. Reg. at 18,273. Amendment 16 also changed the reckoning of DAS to 24-hour increments rounded up to the next full day, under which, in the Government’s words, “if a vessel fishes 6 [hours], it will be charged for 24 [hours] of DAS usage; a vessel that fishes 25 [hours] will be charged for 48 [hours] of DAS usage.” *Id.*

In addition to DAS limits, common pool fishermen must abide by per-trip limits on the fish they are allowed to catch, 50 C.F.R. § 648.86, and NMFS sets a maximum tonnage of each groundfish species that common pool fishermen can catch in the three trimesters of each “fishing year,” which starts on May 1. *Id.* § 648.82(n)(2)(i). NMFS can close the fishery to common pool permittees for the remainder of a trimester if it projects that 90 percent of the total available common pool allocation for

a given species, during that trimester, has been caught. *Id.* § 648.82(n)(2)(ii).

One result of Amendment 16's changes to common pool regulations was to compel fishermen to leave the common pool and join a "sector."<sup>3</sup> A sector, in contrast to the common pool, is an association of groundfish fishermen who contract with each other to abide by catch restrictions and management requirements compiled in a sector operations plan. The content of a sector's operations plan is regulated by NMFS, which approves plans on a yearly or biyearly basis. *Id.* §§ 648.87(b)(2), (c). Sector membership runs for a fishing year. If NMFS refuses to approve a sector's plan, its members cannot fish as a sector; if it withdraws approval, its members cannot fish as sector members until the next fishing year begins.

Amendment 16 to the Northeast Multispecies FMP introduced new requirements for sector operations plans. 75 Fed. Reg. at 18,275–78.

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<sup>3</sup> The Government intended Amendment 16 to have that effect. The New England Council anticipated that under Amendment 16 "there will not be enough DAS available for all active vessels [in the common pool] to cover their costs." J.A. at 1148. Their fear was that Amendment 16 would be "too lax" to lead fishermen to join sectors, J.A. at 1149, or that providing too much "flexibility and freedom" in the common pool "would be a disincentive for fishermen to consider sectors." J.A. at 1147.

Amendment 16 eliminated the option of using DAS accounting; sector members would receive “annual catch entitlements,” a type of quota that can be shared within the sector. 75 Fed. Reg. at 18,276. It also required that sector operations plans mandate participation by the sector in the At-Sea Monitor Program. 75 Fed. Reg. at 18,278, 18,342 (requiring sectors to develop operational plans that provide for “adequate at-sea/electronic monitoring . . . no later than FY 2012”). 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi).

### **3. The At-Sea Monitor Program**

At-sea monitors are intended to “verify area fished and catch and discards,” and monitor “utilization of sector [annual catch entitlements].” 75 Fed. Reg. at 18,342. While coverage levels may shift from year-to-year, Amendment 16 mandates a minimum coverage rate. 75 Fed. Reg. at 18,278, 18,342; *see generally* Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182 (June 30, 2015) (to be codified 50 C.F.R. pt. 648); 50 C.F.R. § 648.11. At-sea monitors have historically been supplied by third party companies operating under Federal contracts. 75 Fed. Reg. at 18,278, 18,342; Northeast Multispecies Fishery; Approved Monitoring Service Providers, 81 Fed.

Reg. 25,650, 25,650–51 (Apr. 29, 2016) (listing companies approved to provide observers and monitors). The standards governing the At-Sea Monitor Program are established by regulation. 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi), (b)(4), (b)(5).

Amendment 16 asserted that sectors would eventually be required to take over the At-Sea Monitor Program by contracting directly with the at-sea monitor providers and bearing the costs of at-sea monitoring themselves. 75 Fed. Reg. at 18,342. A NOAA-sponsored study estimated the cost for this industry-funding requirement at \$710 per day per vessel when a monitor is present. J.A. at 0220.

Ever since Amendment 16 was promulgated, the Government has threatened to put the industry-funding requirement into effect. *See, e.g.*, Framework Adjustment 45, 76 Fed. Reg. 23,042, 23,043 (Apr. 25, 2011); Framework Adjustment 48, 78 Fed. Reg. 26,117, 26,119 (May 3, 2013). Until this year, however, the Government has always funded the At-Sea Monitor Program with congressionally-appropriated funds. 80 Fed. Reg. at 37,185 (“To date, we have been able to provide sufficient funding for the groundfish sector at-sea monitoring program such that industry did not have to pay for at-sea monitoring.”).

## **B. Factual Background**

### **1. Plaintiffs are now compelled to fund the At-Sea Monitor Program.**

In 2015, NMFS published its approval of sector contracts and operations plans for the next two seasons. 80 Fed. Reg. at 25,143, 25,155. In that publication NMFS asserted, for the first time, that “sector vessels will be responsible for paying the at-sea portion of costs associated” with sector monitoring “before the end of the 2015 fishing year.” *Id.*

On November 10, 2015, the NOAA Northeast Fisheries Science Center turned this threat into a reality when it announced that “federal funds in the major at-sea monitoring contracts for northeast groundfish sectors will be expended by December 31, 2015,” and that “[t]ransition of monitor sea-day costs to industry will therefore be effective January 1, 2016.” J.A. at 0046. NMFS confirmed that announcement in another e-mail sent two days later. J.A. at 1214.

In December, an agreement between three at-sea monitoring companies enabled Federal funds to cover the At-Sea Monitor Program into 2016. J.A. at 1215–16. But the industry-funding requirement has now been in effect since March 1, 2016. J.A. at 0480–83. Sectors now

administer and pay for the At-Sea Monitor Program pursuant to their own contracts with approved at-sea monitoring providers.<sup>4</sup>

The transfer from government funding to industry funding effects little substantive change in the At-Sea Monitor Program itself. Sectors can seek approval for operations plans that tweak the details of the At-Sea Monitor Program, but the changes are at the margins. At-sea monitoring continues to be governed by the same substantive and operational standards established by regulation. 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi), (b)(4), (b)(5). Industry-funded monitoring involves the same approved monitor providers, the same mandated coverage level, and the same system for placement of monitors on vessels. 80 Fed. Reg. at 25,155. Even after the transfer to industry funding, the Government continues to fund “shoreside costs of the program.” J.A. at 0046; *see also* 80 Fed. Reg. at 25,148 (explaining that the Government would continue to pay its own “portion of costs for [at-sea monitor] coverage”).

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<sup>4</sup> In June 2016 the Government identified extra funds budgeted for NEFOP observers, and elected to use that money for a partial, temporary reimbursement of industry funding for at-sea monitors. *See* J.A. at 0525.

**2. The fishing industry cannot afford to pay for the At-Sea Monitor Program.**

Plaintiffs David Goethel and XIII Northeast Fishery Sector, Inc. (“Sector 13”) (collectively, “Plaintiffs”) are participants in the groundfish fishery, subject to the Northeast Multispecies FMP, the At-Sea Monitor Program, and the industry-funding requirement.

Mr. Goethel has been a commercial fisherman since 1982. J.A. at 0251, 37:9–:14. He is “primarily . . . a groundfish fisherman,” *id.* 40:3, and needs a groundfish permit even when he fishes for other species. *Id.* at 41:1–42:1. He is therefore subject to the Northeast Multispecies FMP. *Id.* 42:2–:8.

Mr. Goethel is a member of a sector. He considers sector membership necessary for his livelihood because fishing in the common pool is not “economically viable.” *Id.* 43:20–:21; *see also id.* 41:20–:25, 42:24–:25. As a sector member, Mr. Goethel is subject to the At-Sea Monitor Program, and now must bear the costs of industry funding.

Mr. Goethel will not be able make a living if he must continue to pay the costs of at-sea monitoring. He has testified that if he were forced to pay the full NOAA-estimated cost of an at-sea monitor, his monitored trips “would all be money losers.” *Id.* 65:15–:17. He “cannot absorb [the]

extra cost,” even though not all of his trips would be monitored. *Id.* 67:1–:2.

Mr. Goethel cannot stay in business by shifting to other types of fishing. *See id.* 67–70. His boat, meanwhile, carries fixed costs that he cannot cover if he does not fish. *Id.* 65:24–66:15. If he is required to pay for at-sea monitoring, he may ultimately be forced to “[b]uy a for sale sign” and abandon his profession. *Id.* 70:3–:10.

Plaintiff Sector 13, an approved groundfish sector, is a corporation organized under Section 501(c)(5) of the United States Internal Revenue Code composed of 32 fishermen, using 20 active boats. J.A. at 0060. If its members are required to pay for at-sea monitoring, many of its member fishermen will switch to non-groundfish trips, from which the Sector gets “[z]ero” revenue, J.A. at 0251, 109:8–10, if they continue to fish at all. The Sector’s income will go to “basically nothing,” *id.* 115:19–:24, and the Sector manager may have to work without compensation. *Id.* 116:15.

Plaintiffs’ experience is representative of the industry. On June 26, 2015, at a meeting of the New England Council, NOAA presented a report concluding that “nearly 60% of the fleet could see negative returns to

owner when full 2015 ASM costs are factored in.” J.A. at 0228. Those costs are predicted to be heaviest for small vessels least able to bear them. J.A. at 1208, Table 12 (showing declines in numbers, crew shares, and owner returns for vessels smaller than 50 feet). NOAA recognized these prospects, describing it as a “restructuring of the fleet.” J.A. at 1205.

The risk of noncompliance with the industry-funding requirement is serious. Magnuson-Stevens imposes civil and criminal penalties for failure to comply with monitoring. 16 U.S.C. §§ 1857–59. The Government has asserted the power to “withdraw approval” from sectors that do not contract with monitoring providers. J.A. at 0138.

### **C. Procedural History**

Plaintiffs filed suit on December 9, 2015, less than 30 days after NMFS’s November 10 announcement that industry funding would be required by January 1, 2016. J.A. at 0018; 16 U.S.C. § 1855(f)(1)–(2). Plaintiffs moved at the same time for a temporary restraining order, or, in the alternative, a preliminary injunction to stay the industry-funding requirement until resolution of Plaintiffs’ claims on the merits. J.A. at 0004.

Plaintiffs contended that the industry-funding requirement for at-sea monitors is beyond the Government's statutory powers under Magnuson-Stevens. Plaintiffs also contended that even if the industry-funding requirement were permitted by statute, the Government imposed it without observance of statutory procedures. Finally, even if the industry-funding requirement were allowed by statute and properly implemented, Plaintiffs also argued that the At-Sea Monitor Program, as currently defined, and the Magnuson-Stevens process for enacting FMPs, violate the United States Constitution.

The district court held a hearing on Plaintiffs' motion on January 21, 2016, but denied it as procedurally foreclosed by Magnuson-Stevens's judicial review provisions on January 27. J.A. at 0466–73. Plaintiffs and the Government filed cross-motions for summary judgment, which the district court resolved on July 29, 2016. J.A. at 0016.

The district court held that Plaintiffs' challenge to the industry-funding requirement was untimely because it found Magnuson-Stevens to require Plaintiffs to have filed their action within 30 days of NMFS's May 1, 2015 announcement that sector vessels would be responsible for their cost portion of the At-Sea Monitoring Program by the end of the

fishing year. Add. at 7–8. The district court also rejected Plaintiffs’ arguments on the merits. The district court entered final judgment for the Government on August 1, 2016.

This appeal follows.

### **SUMMARY OF THE ARGUMENT**

The district court’s alternative bases for granting summary judgment to the Government — namely, that Plaintiffs’ claims were untimely and failed on the merits — are both unsound, and should be reversed.

I. The Government has a heavy burden to overcome in showing that Plaintiffs are barred from judicial review. *See, e.g., Mach Mining, L.L.C. v. Equal Emp’t Opportunity Comm’n*, 135 S. Ct. 1645, 1651 (2015). They have not carried that burden here, for two reasons.

A. First, Plaintiffs became entitled to pre-enforcement review of the industry-funding requirement when NMFS announced that it would go into effect. Under longstanding principles of administrative law, Plaintiffs had the option of waiting to seek judicial review until the industry-funding requirement — previously, no more than theoretical — crystallized into a concrete, imminent burden. That is what NMFS’s

announcements in November 2015 and afterward accomplished. By the same token, once industry funding was imminent, Plaintiffs were entitled to go to court immediately rather than refuse to pay, violate the Government's directives, and wait for enforcement.

**B.** Second, aside from Plaintiffs' pre-enforcement review rights, NMFS's announcements regarding the onset of industry funding were also "actions" subject to judicial review under the Magnuson-Stevens statutory review provision. 16 U.S.C. § 1855(f). Plaintiffs filed the present suit consistent with that provision and within the statutory time period. A contrary interpretation of the statute would be inconsistent with authority, and would be harmful to regulated parties, agencies, and judicial economy.

**II.** On the merits, the industry-funding requirement should be invalidated on multiple grounds. It is beyond the Government's statutory authority, has been implemented without proper procedure, and violates multiple provisions of the Constitution.

**A.** Magnuson-Stevens contains no authority for the industry-funding requirement. Although the At-Sea Monitor Program itself is

permitted, Congress provided the Secretary with no express mechanism for funding it independent of congressional appropriations.

The Government's theories of implied authority fail for several reasons. They lack a sound basis in the statutory text, and so would violate the presumption that Congress does not make broad, consequential delegations implicitly. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Reading it into the text would drain all meaning from other provisions of Magnuson-Stevens that do explicitly authorize industry funding for observers in other circumstances, and nullify statutes governing the Defendant agencies' financing.

By the same token, implicit authority for the industry-funding requirement is impossible to reconcile with Magnuson-Stevens's legislative history. Congress has long operated under the assumption that the Secretary can only require funding for observers on vessels when Congress expressly grants that power, and Congress repeatedly declined to grant the kind of blanket authority the Government asserts here.

**B.** Even if the industry-funding requirement were authorized by statute, the Government would still be required to follow mandatory

administrative procedures before imposing it. One such requirement compels agencies to consider the effects of their rules on small businesses. 16 U.S.C. § 1855(e). The Government acknowledged when Amendment 16 was promulgated that industry funding could harm fishermen, but did not fulfill its obligation to study the issue because it intended to pay for at-sea monitoring temporarily. The Government has never revisited the question and fulfilled its obligation.

C. Finally, industry funding is forbidden because at-sea monitoring is unconstitutional. It constitutes a warrantless search under the Fourth Amendment. The Magnuson-Stevens process for creating the Northeast Multispecies FMP was itself tainted by structural violations under the Appointments Clause and Tenth Amendment.

### **STANDARD OF REVIEW**

This Court reviews a grant of summary judgment *de novo*. *Dubois v. Dep't of Agric.*, 102 F.3d 1273, 1283 (1st Cir. 1996). Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Under Magnuson-Stevens and the APA, agency acts and regulations should be set aside when they are: “(A) arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) [made] without observance of procedure required by law[.]” 5 U.S.C. § 706(2); *see* 16 U.S.C. § 1855(f)(1). The burden is not on Plaintiffs to prove that Magnuson-Stevens “expressly precludes” the industry-funding requirement, but on the Government to prove that its acts are “rooted in a grant of such power by the Congress and subject to limitations which that body imposes.” *Ry. Labor Execs.’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (citation omitted).

If an agency’s legal interpretation does not carry the “force of law” — for example, when it has not followed formal procedures — it receives deference commensurate only with its power to persuade. *United States v. Mead Corp.*, 533 U.S. 218, 233–34 (2001). An agency also receives no deference for its interpretation of generally-applicable statutes that are not entrusted to its specific discretion. *Scheduled Airlines Traffic Offices, Inc. v. Dep’t. of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (no deference as to interpretation of the Miscellaneous Receipts Statute).

Acts of a Federal agency that do carry the force of law are generally reviewed under the standard of *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). In such circumstances, “[t]he first question a court must ask . . . is whether Congress has spoken on that issue.” *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 139 (D. Mass. 2010). In so doing, a court applies the “traditional tools of statutory construction.” *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009) (citation omitted). “If, *after* applying these interpretive tools, . . . the statute is ambiguous, [the court] turn[s] to the second question, specifically, whether the agency’s answer is based on a permissible construction of the statute[.]” *Id.* (citations omitted). “[D]eference to an agency’s statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.” *Id.* (citation and alterations omitted).

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS’ SUIT IS UNTIMELY.

In the entire history of the Northeast Multispecies FMP, groundfish fishermen were never required to pay for at-sea monitoring until March of 2016. Even after Amendment 16 was promulgated in 2010, the

industry-funding requirement was no more than a future possibility that only became concrete on November 10, 2015 when the Government provided — for the first time — a date certain after which fishermen would have to begin writing checks for at-sea monitors: January 1, 2016. Faced for the first time with an explicit statement from the Government that industry funding was imminent, Plaintiffs filed suit, and did so within the 30 days prescribed by the Magnuson-Stevens judicial review provisions. 16 U.S.C. § 1855(f). Yet the district court held that Plaintiffs’ suit was untimely. That holding is erroneous.

The burden is on the Government to show that judicial review is foreclosed. Federal courts “appl[y] a ‘strong presumption’ favoring judicial review of administrative action,” on the view that “Congress rarely intends to prevent courts from enforcing its directives to federal agencies.” *Mach Mining*, 135 S. Ct. at 1651; *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670–71 (1986); *R.I. Dep’t of Env’tl. Mgmt. v. United States*, 304 F.3d 31, 41–42 (1st Cir. 2002). As a result, “only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.” *Mich. Acad. of Family Physicians*, 476 U.S. at 670–71.

### A. Plaintiffs Are Entitled To Pre-Enforcement Review.

The district court's principal error was that it failed to address Plaintiffs' main argument for timeliness: When they filed suit, Plaintiffs were entitled to pre-enforcement review of the industry-funding requirement.

When an agency gives regulated parties a Hobson's choice between "costly compliance with [a] regulatory directive" and penalties for noncompliance, immediate judicial review is available. *Ciba-Geigy Corp. v. Evtl. Prot. Agency*, 801 F.2d 430, 438–39, 438 n.10 (D.C. Cir. 1986) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–153 (1967)); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law[.]'" (citation omitted)). Pre-enforcement review is available when three criteria are satisfied: (1) an agency "take[s] a 'definitive' legal position concerning its statutory authority," (2) the issue presented is "a purely legal' question of 'statutory interpretation,'" and (3) the agency's action "impose[s] an immediate and significant practical burden on" the regulated party. *CSI Aviation Servs. v. Dep't of Transp.*, 637 F.3d 408,

412 (D.C. Cir. 2011). In such circumstances, courts consider an agency to have taken final agency action, made reviewable by the APA. *Id.*

This case is a textbook example. As for the first two criteria, the Government now requires sectors to fund at-sea monitoring pursuant to regulations promulgated under the Northeast Multispecies FMP; Plaintiffs contend that Magnuson-Stevens, various other statutes, and the United States Constitution forbid them to do so. Fishermen and sectors who enter contracts with at-sea monitor providers and begin paying risk losing their businesses. But if they do not, they risk civil and criminal penalties and the suspension of fishing rights. 16 U.S.C. §§ 1857–59. NMFS’s announcements at the end of 2015 forced Plaintiffs to make a “painful choice between costly compliance and the risk” of penalties “at an uncertain point in the future,” and so gave rise to pre-enforcement review rights that had not existed before. *CSI Aviation Servs.*, 637 F.3d at 412.

Given that Plaintiffs meet the criteria for pre-enforcement review, it does not matter whether they also may raise facial challenges under Section 1855(f). The fact that Congress has made certain agency acts reviewable under Magnuson-Stevens does not “support an implication of

exclusion as to others,” so the statute’s provision for one type of judicial review does not amount to “clear and convincing evidence” of legislative intent to preclude pre-enforcement review. *Abbott Labs.*, 387 U.S. at 141 (quotes and citations omitted). Even assuming, then, that this case does not fall within Section 1855(f)’s authorization for review — and as discussed below, it does — pre-enforcement review remains available.

Similarly, even if the time for a Section 1855(f) facial challenge had passed — and again, as discussed below, it had not — pre-enforcement review is available even after statutory deadlines for facial challenges expire. “When a party first becomes aggrieved by a regulation that exceeds an agency’s statutory authority [after expiration of a limitations period], that party may challenge the regulation without waiting for enforcement proceedings.” *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015); see *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (“[A] party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had

notice and opportunity to bring a direct challenge within statutory time limits.”).<sup>5</sup>

No authority suggests that Magnuson-Stevens imposes a more restrictive rule on pre-enforcement review. In the rare circumstances where Congress wishes to require that parties bring all challenges within statutory deadlines, it does so explicitly. *E.g.*, *Indep. Cmty. Bankers*, 195 F.3d at 34–35 (citing 42 U.S.C. § 9613); 42 U.S.C. § 7607(b)(2).<sup>6</sup> The fact that Congress chose not to do so here suggests that it intended to leave regulated parties the option of pre-enforcement review. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987); *Lougren v. Locke*, 701 F.3d 5, 28 (1st Cir. 2012). In the absence of “clear and convincing evidence of . . . legislative intent [to] restrict access to judicial review,”

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<sup>5</sup> See also, *e.g.*, *Functional Music, Inc. v. Fed. Commc’ns Comm’n*, 274 F.2d 543, 546–47 (D.C. Cir. 1958); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm’n*, 830 F.2d 610, 614 (7th Cir. 1987); *Tri-State Motor Transit Co. v. Interstate Commerce Comm’n*, 739 F.2d 1373, 1375 n.2 (8th Cir. 1984); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991).

<sup>6</sup> Such limitations on judicial review are questionable as a matter of due process. *Am. Rd. & Transp. Builders Ass’n v. Env’tl. Prot. Agency*, 705 F.3d 453, 457 n.2 (D.C. Cir. 2013). This Court should avoid that constitutional issue by interpreting Section 1855(f) to permit pre-enforcement review here. See *United States v. Pappas*, 613 F.2d 324, 329 (1st Cir. 1979).

*Mich. Acad. of Family Physicians*, 476 U.S. at 670–71, this Court should assume that pre-enforcement review is available under Magnuson-Stevens, just as in other statutory contexts.

The Government has conceded that if Plaintiffs ever face enforcement for failure to pay for at-sea monitoring, Plaintiffs could present their arguments as defenses and Section 1855(f)'s statutory deadlines would not matter. As counsel for the Government explained, in such a circumstance “[P]laintiffs should have an ability to bring their argument” that the industry-funding requirement is contrary to law, even if Plaintiffs “didn’t challenge” industry funding before. J.A. at 0251, 28:18–:23. The Government’s real objection to this suit, in other words, is not that Plaintiffs’ arguments are time-barred, but that they are premature until the Government prosecutes them or suspends their fishing rights. But Plaintiffs need not refuse to pay and wait to be punished. *Free Enter. Fund.*, 561 U.S. at 490 (2010); *Herr*, 803 F.3d at 822. Given that Plaintiffs undisputedly could raise their arguments as defenses to enforcement, they can also raise them pre-enforcement. *CSI Aviation Servs.*, 637 F.3d at 412.

In short, even if the district court were correct that Plaintiffs failed to sue within 30 days of an agency action reviewable under Section 1855(f), they still had the option of pursuing pre-enforcement review rights. Likewise, although Plaintiffs may have had been able to assert facial challenges based on the Section 1855(f) review provisions at various earlier dates, they also had the option of waiting until the criteria for pre-enforcement review were satisfied.

**B. Plaintiffs Are Entitled To Review Under 16 U.S.C. § 1855(f).**

The availability of pre-enforcement review is sufficient to reverse the district court as to timeliness. But even assuming, *arguendo*, that Plaintiffs were not entitled to pre-enforcement review of the industry-funding requirement, and that Section 1855(f) provided the exclusive means of obtaining judicial review unless and until the government prosecutes them for noncompliance,<sup>7</sup> the district court's reasoning fails on its own terms.

Section 1855(f) authorizes judicial review of “actions that are taken by the Secretary under regulations which implement a fishery

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<sup>7</sup> *But see, e.g., Abbott Labs.*, 387 U.S. at 141; *Free Enter. Fund*, 561 U.S. at 489–90

management plan,” 16 U.S.C. § 1855(f)(2), so long as the suit is filed within 30 days. *See id.* § 1855(f)(1). As a matter of plain language, it is difficult to describe the Government’s course as anything else: Regulations implementing the Northeast Multispecies FMP required that sectors fund at-sea monitoring, 50 C.F.R. § 648.87(b)(1)(v)(B), and the November 10, 2015 announcement regarding industry funding was an “action” that required fishermen to pay for at-sea monitors for the first time. Plaintiffs filed their lawsuit on December 9, 2015, less than 30 days later. Thus, Plaintiffs’ suit is timely.

Precedent under the APA governing review of agency actions supports that interpretation of the text. Section 1855(f) incorporates most of the judicial review standards of the APA, 16 U.S.C. 1855(f)(1), under which an “agency action” includes any “whole or a part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof[.]” 5 U.S.C. §§ 551(13), 701(b)(2). A direction that regulated parties begin complying with a particular regulation that had had little or no previous practical effect is surely, at a minimum, the “equivalent” of an agency “order.”

Further, the Supreme Court has explained that agency actions are reviewable under Section 704 of the APA when they (1) “mark the ‘consummation’ of the agency’s decisionmaking process” and (2) are events “by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). By that standard too, the transition to industry funding was reviewable. There was nothing “tentative or interlocutory” about the agency’s direction. *Id.* And by requiring sectors for the first time to shift the basis for their at-sea monitoring from *government* contracts with monitoring providers to their *own* contracts — and not just in theory, but as of a particular day — it changed Plaintiffs’ obligations and effected legal consequences. *See id.*; *see also Natural Res. Def. Council v. Env’tl. Prot. Agency*, 643 F.3d 311, 320 (D.C. Cir. 2011).

Magnuson-Stevens caselaw supports that interpretation. Two federal circuits have held that when the Government applies Magnuson-Stevens regulations for the first time, the regulations themselves are reviewable too, even when the time for direct review has passed. *Gulf Fishermen’s Ass’n v. Gutierrez*, 529 F.3d 1321, 1323 (11th Cir. 2008); *Or.*

*Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1111–16 (9th Cir. 2006). Indeed, that was the very purpose of the current statutory language. When Magnuson-Stevens was reauthorized in 1990, Congress amended Section 1855(f) to ensure judicial review of regulations at the time of application, even where the regulations were not challenged when promulgated. *Or. Trollers Ass'n*, 452 F.3d at 1114; see 136 Cong. Rec. H229-06, H240 (Feb. 6, 1990) (statement of Rep. Jones). The agency's decision to stop funding the At-Sea Monitor Program and shift the burden onto the industry was thus a reviewable agency action.

The district court held, nonetheless, that the Government's direction on industry funding was not reviewable. Its basis was that because the 30-day deadline for facial challenges to agency actions or regulations is calculated from "the date on which the regulations are promulgated or the action is published in the Federal Register," 16 U.S.C. § 1855(f)(1), *only* actions published in the Federal Register are subject to judicial review. *Id.* at 8. Because the Government did not publish an order at the time of transition from agency funding to industry funding, according to the district court, no challenge was possible. In the district court's opinion, Plaintiffs should have raised their challenge in May 2015,

“when the Rule announcing that industry funding would begin during [Fishing Year] 2015 was published.” *Id.*

That holding conflicts with the statutory text. Section 1855(f)(2) defines reviewable actions simply as ones “that are taken by the Secretary under regulations which implement a fishery management plan,” without mentioning publication. *Id.* § 1855(f)(2). The reference in Section 1855(f)(1) to “the date on which . . . the action is published in the Federal Register” suggests that Congress anticipated that the Secretary would typically publish such actions, but does not *require* publication. The district court’s reliance on the statute’s ambiguous reference to the Federal Register thus contradicts the rule that judicial review of agency action is presumptively available unless “clear and convincing evidence” of congressional intent proves otherwise. *Abbott Labs.*, 387 U.S. 140–41.<sup>8</sup>

The statute certainly does not say that the Secretary can avoid judicial review by declining to publish otherwise-reviewable actions. The Government *could* have published a notice regarding the transition to

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<sup>8</sup> Other statutes providing for judicial review after publication of agency actions in the Federal Register have been treated as permitting review of unpublished actions as well. *See Alaska Dep’t of Env’tl. Conservation v. Env’tl. Prot. Agency*, 540 U.S. 461, 482–83 (2004) (discussing 42 U.S.C. § 7607(b)(1)).

industry funding in the Federal Register. In fact, doing so would have been the better course. *See* 1 C.F.R. § 5.2(c) (requiring publication of documents “having general applicability and legal effect”). Its decision not to do so should not allow it to avoid judicial review. If the district court were correct, parties regulated under Magnuson-Stevens are in an impossible position whenever the agency publishes regulations: They must sue immediately — before they know whether, when, or how regulations might be implemented — or risk not being able to sue at all if the agency delays implementation and forgoes another Federal Register announcement.

Courts reject statutory interpretations that force regulated parties into such dilemmas. Agencies cannot avoid review of their actions by selecting informal modes of action over formal ones. *Ciba-Geigy*, 801 F.2d at 438 n.9 (“[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position[.]”); *Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971); *see Abbott Labs.*, 387 U.S. 140–41 (explaining that statutory authorization for review of one type of agency action does not preclude

review of other types of action); *Free Enter. Fund*, 561 U.S. at 490 (similar).

Important practical considerations underlie that rule. Plaintiffs, after all, “cannot be expected to anticipate all possible future challenges to a rule and bring them within [a set period] of the rule’s promulgation, before a later agency action applying the earlier rule leads to an injury.” *Cal. Sea Urchin Comm’n v. Bean*, 828 F.3d 1046, 1050 (9th Cir. 2016). The Government, for its part, “should not be able to sidestep a legal challenge to one of its actions by backdating the action to when the agency first published an applicable or controlling rule.” *Id.* at 1051. And from this Court’s perspective, allowing Plaintiffs to wait until further agency action made industry funding imminent makes an otherwise “theoretical” issue “concrete,” aiding judicial review. *Id.*; *Bethlehem Steel Corp. v. Evtl. Prot. Agency*, 723 F.2d 1303, 1306 (7th Cir. 1983) (“[I]t makes no sense at a time of heavy federal judicial caseloads to encourage people to challenge regulations that may never harm them.”).

The legislative history does not support the district court’s interpretation of the text. Congress’s evident intent was to ensure that judicial review would be equally available at the time of

“implementation” of regulations as at the time of “promulgation.” 136 Cong. Rec. S14953, 14974 (daily ed. Oct. 11, 1990) (statement of Sen. Sanford); *see* 136 Cong. Rec. H229-06, H240 (Feb. 6, 1990) (statement of Rep. Jones) (explaining that the amendments would “permit[s] suit either when initial management plan regulations are issued or when implementing actions are put into effect”); H.R. Rep. No. 101-393, at 28 (1989) (“The amendments made by this subsection will allow a challenge within 30 days of the time that a regulation is implemented.”). None of this suggests that Congress intended to allow the Government to avoid judicial review at the time of implementation.

Judicial review is available to Plaintiffs under multiple legal bases. This Court should therefore consider Plaintiffs’ claims on the merits.

## **II. THE DISTRICT COURT ERRED IN UPHOLDING THE INDUSTRY-FUNDING REQUIREMENT.**

Although the regulatory structure is complex, this case is ultimately a simple one. The Government and the New England Council created the At-Sea Monitor Program under the Northeast Multispecies FMP pursuant to Section 1853(b)(8) of Magnuson-Stevens; the Government operated it for years through government contractors and congressional appropriations — and then, when appropriated money ran

out, required fishermen to take it over by signing their own contracts and paying their own money. The critical question is whether the Government was permitted to do so.

The answer, under fundamental principles of administrative law, is no. “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it,” see *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986), and no statute grants the Government the authority to require industry funding for the At-Sea Monitor Program. On the contrary, the text, structure, and history of Magnuson-Stevens, plus the terms of other statutes governing agency finances and procedures, show that Congress denied the Government that power. “An agency confronting resource constraints may change its own conduct, but it cannot change the law.” *Util. Air Regulatory Grp. v. Evtl. Prot. Agency*, 134 S. Ct. 2427, 2446 (2014).

**A. Magnuson-Stevens Does Not Authorize The Industry-Funding Requirement.**

The lodestar for interpretation of a statute is the text. See *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). No express or implied authorization for the industry-funding requirement appears in Magnuson-Stevens. Because the Act does not

grant the Government authority to perpetuate the At-Sea Monitor Program by levying industry funding, the industry-funding requirement is void.

**1. Magnuson-Stevens contains no express or implied authority for the industry-funding requirement.**

Although Magnuson-Stevens does expressly authorize placement of observers (presumably, including at-sea monitors) on vessels, *see* 16 U.S.C. § 1853(b)(8); 50 C.F.R. § 648.2 (defining “at-sea monitor” and “observer”), it does not take the additional step of expressly authorizing the Government to raise money from industry to support the At-Sea Monitor Program. The Government has never identified an express source of statutory authority for the industry-funding requirement. The argument for industry funding here depends on a showing of *implicit* authority, or it fails.

Several provisions of Magnuson-Stevens make the Government’s assertion of implicit authority untenable. Magnuson-Stevens contains a number of specific authorizations for industry funding of at-sea monitors or observers, but only in specific regions and circumstances — none of which apply here. For example, when an FMP establishes a special type

of fishing permit program called a “limited access privilege program” (“LAPP”), Magnuson-Stevens authorizes collection of fees to “cover the costs of management, data collection and analysis, and enforcement activities.” 16 U.S.C. § 1853a(e). The Northeast Multispecies FMP is not a LAPP; indeed, the Government has successfully argued in this Court that it is not. *Lougren*, 701 F.3d at 22. Another provision of Magnuson-Stevens requires that foreign fishing vessels carry and pay fees to fund observers, 16 U.S.C. § 1821(h)(4), but that provision is separate from the provisions governing the contents of FMPs and does not apply to domestic vessels. The most important Magnuson-Stevens provision related to industry funding is Section 1862(a), which authorizes the North Pacific Council — and only that Council — to propose “fisheries research plans” that fund observers through mandatory fees, but only for certain fisheries in that region.

An implied authority for the Government to require industry funding for at-sea monitors and observers as a general matter, outside the limited grants Congress provided expressly, would render those provisions surplusage. After all, if the Government could fund observer programs anywhere in the Nation through the simple expedient of

requiring that fishermen contract with observer providers and pay for them, there would have been no reason for Congress to delineate specific regions and circumstances where industry funding is permissible. *See, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (rejecting agency interpretation that would have created surplusage).

Implied authority would also reverse two common presumptions regarding congressional intent — (1) that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (citation omitted), and (2) that when Congress grants an agency enumerated regulatory powers, it denies the agency additional powers, *EchoStar Satellite L.L.C. v. Fed. Commc’ns Comm’n*, 704 F.3d 992, 999 (D.C. Cir. 2013); *Ry. Labor Execs.’ Ass’n*, 29 F.3d at 670–71. Even the Government has taken the position in other litigation that “cost sharing’ programs with industry participants in other fisheries in order to provide higher observer coverage levels . . . were expressly authorized by statute *for particular*

*fisheries only.*” *Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 116 n.9 (D.D.C. 2015) (emphasis added) (citing 16 U.S.C. § 1862).

The express powers Congress did grant do not imply a general authority to impose industry funding. FMPs may “require that one or more observers be carried on board a vessel . . . for the purpose of collecting data.” 16 U.S.C. § 1853(b)(8). The statute also requires that an FMP “contain the conservation and management measures . . . which are . . . necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” 16 U.S.C. § 1853(a)(1). But a power to raise money does not follow from general powers related to data collection and conservation. The Supreme Court has held that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

The industry-funding requirement, quite simply, is far too big an elephant to hide in general provisions on the contents of FMPs. The authority to compel regulated parties to pay for the Government’s favored

data collection and monitoring functions once a congressional appropriation runs out is a tax in all but name, and “only Congress has the power to levy taxes.” *Thomas v. Network Solutions*, 2 F. Supp. 2d 22, 29 (D.D.C. 1998); see U.S. Const., art. I, § 8, cl. 1; *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 340 (1974) (“Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes[.]”); see also *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. Congress would not “delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (citation omitted); see *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (rejecting the argument that Congress would delegate “broad and unusual authority through an implicit delegation”).

**2. Other authorities confirm that the Government lacks implied authority for the industry-funding requirement.**

Two additional principles counsel against finding that Magnuson-Stevens contains an implicit authority for the industry-funding requirement.

*First*, the industry-funding requirement would mean that Magnuson-Stevens — and potentially many other statutes as well —

impliedly repeals statutes that limit the powers of agencies to raise additional money to fund their programs. The Anti-Deficiency Act prohibits Federal officers from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation” and from “involv[ing] [the United States] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]” 31 U.S.C. § 1341(a)(1)(A)–(B). The Miscellaneous Receipts Statute provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury[.]” 31 U.S.C. § 3302(b); *see Scheduled Airlines Traffic Offices*, 87 F.3d at 1361. And while the Independent Offices Appropriations Act allows agencies to recoup some “user fees” from regulated parties, 31 U.S.C. § 9701(b), the government has conceded that industry funding for at-sea monitors is not defensible as a user fee. J.A. at 0104.

These statutes limit the ability of agencies to self-fund in the absence of an appropriation of money by Congress. When congressional appropriations run out, even mandatory agency activities are suspended. *Env'tl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995); *see Util. Air*

*Regulatory Grp.*, 134 S. Ct. at 2446. Agencies may not perpetuate their operations by developing their own sources of revenue and undertaking their own financial commitments.

The Government itself has taken the position, in litigation and rulemaking, that the Anti-Deficiency Act and Miscellaneous Receipt Statute preclude it from creating observer programs and offloading costs onto the industry when they exceed appropriated funds. The agency successfully defended that position in litigation last year. *Anglers Conservation Network*, 139 F. Supp. 3d at 116 n.9; *see* Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 14, 79 Fed. Reg. 10,029, 10,034, 10,036, 10,039 (Feb. 24, 2014). NMFS also recently disapproved a fisheries management measure proposed by the New England Council under the Northeast Multispecies FMP for “At-Sea Monitoring Cost-Sharing,” explaining that “the Anti-Deficiency Act and other appropriations law prohibits Federal agencies from obligating the Federal government except through appropriations and from sharing the payment of government obligations with private entities.” 78 Fed. Reg. at 26,119–20 (emphasis added).

But that is exactly what the Government has done by requiring industry funding for the At-Sea Monitor Program: When the Government decided that Congress's appropriation was insufficient to continue full funding for a program that the Government created and ran by regulation and contract, it offloaded the program for the industry to pay for instead. Assuming that Congress could constitutionally permit the Government that kind of fiscal independence, this Court should not assume it impliedly repealed pre-existing limits on agency finances without a more explicit statement than Magnuson-Stevens provides. *Passamaquoddy Tribe v. State of Me.*, 75 F.3d 784, 790 (1st Cir. 1996) (“[I]mplied repeals of federal statutes are disfavored.”) (quotes omitted); *United States v. Brien*, 617 F.2d 299, 310 (1st Cir. 1980) (same).

*Second*, the rule of constitutional avoidance dictates that statutes should be “construe[d] . . . to avoid a question of [their] constitutionality, where such a construction is ‘fairly possible.’” *Pappas*, 613 F.2d at 329 (citation omitted). The industry-funding requirement would infringe on Congress's exclusive taxation power.

Even if it is not a tax, the requirement compels sectors to enter contracts to purchase at-sea monitoring services from private companies.

75 Fed. Reg. at 18,278, 18,342; 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi). But Congress has no authority under the Commerce Clause to compel commercial transactions. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (explaining that the Commerce Clause does not permit the Federal government to “compel[] individuals to *become* active in commerce by purchasing a product”) (opinion of Roberts, C.J.); *id.* at 2644 (“[O]ne does not regulate commerce that does not exist by compelling its existence[.]”) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). While the parties regulated by the Northeast Multispecies FMP may be engaged in commercial fishing, they cannot be compelled to enter the market for at-sea monitors. *Id.* at 2590–91 (“Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today.”) (opinion of Roberts, C.J.). In the absence of clear statutory language, this Court should interpret the relevant statutes as withholding authority to require industry funding and avoid the question of whether the industry-funding requirement is constitutionally permissible.

**3. The legislative history of Magnuson-Stevens confirms that the Government lacks implied authority for the industry-funding requirement.**

The legislative history of Magnuson-Stevens — and particularly of Section 1862, the North Pacific observer funding provision — confirms that the statute grants no implicit authority for the industry-funding requirement.

Section 1862 originated as part of the Fishery Conservation Amendments of 1990 (“1990 Amendments”), which also added Magnuson-Stevens’s express authorization for placement of observers on vessels. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 109(b)(2), 104 Stat. 4448 (codified at 16 U.S.C. 1853(b)(8)); *id.* § 118(a), 104 Stat. 4457–59 (codified at 16 U.S.C. § 1862). Congress authorized placement of observers nationwide but only established a method for industry funding of those observers for particular fisheries, in a single region. The inclusion of those distinct enactments in one bill makes plain that Congress intended to authorize industry funding for certain observers in the North Pacific but not elsewhere. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (citing *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)).

The Section 1862 funding mechanism was intended to be “specific to the North Pacific Fishery Management Council,” and was not understood to affect other councils or fisheries. H.R. Rep. No. 101-393, at 31 (1989). A number of witnesses in hearings for the 1990 Amendments told Congress that no mechanism for industry funding of observers was then available, sometimes in the context of asking Congress to create such a mechanism anew.<sup>9</sup> Some members of Congress

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<sup>9</sup> See *Reauthorization of the Magnuson Fishery Conservation and Management Act of 1976: Hearing on H.R. 2061 Before the H. Comm. on Merch. Marine & Fisheries, Subcomm. on Fisheries & Wildlife Conservation & the Env’t*, 101st Cong. 250 (1989) (written statement of Greenpeace recommending that Congress “[e]stablish a user fee requirement for funding of observer program, and other management and enforcement purposes”); *Reauthorization of the Magnuson Fishery Conservation and Management Act of 1976—Part II, Hearing on H.R. 2061 Before the H. Comm. on Merch. Marine & Fisheries, Subcomm. on Fisheries & Wildlife Conservation & the Env’t*, 101st Cong. 86 (1989) (statement of Ron Hegge, President, Alaskan Longline Fishermen’s Ass’n urging “that the Councils be given authority by region to assess cost recovery fees for the observer program within that region.”); *id.* at 326 (written testimony of Gov. Steve Cowper, State of Alaska stating that “[f]ishing organizations in Washington and Alaska have developed a proposal that would establish a way to pay for observer programs. The State has reviewed this proposal, and we generally support it.”); *id.* at 365 (written testimony of Kate Graham, Exec. Dir., United Fishermen of Alaska that “[w]e have two suggestions for funding such a program. ... Require each vessel to pay for the observer it carries as a cost of doing business.”); *id.* at 431 (written testimony of Henry V.E. Mitchell, Exec. Dir., Bering Sea Fishermen’s Ass’n that “[t]here is substantial question

echoed the point, describing the 1990 Amendments as creating a novel funding power. 136 Cong. Rec. H229, 237 (daily ed. Feb. 6, 1990) (statement of Rep. John Miller) (“Our amendment will allow the North Pacific Fisheries Management Council to collect a fee from the fishing industry to pay for observers on fishing boats and analyze the data they gather.”); 136 Cong. Rec. S14953, 14968 (daily ed. Oct. 11, 1990) (statement of Sen. Robert Packwood) (“The bill also establishes a fee system to pay for the observer program.”).

All parties to the legislative process behind the 1990 Amendments treated Section 1862 as granting the North Pacific Council an industry funding authority that would not have been available to any Council otherwise. If Councils as a general matter had authority to require industry funding for observers whenever they wished, the importance attached to Section 1862 by members of Congress and outside stakeholders makes no sense.

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of how, legally, councils establishing observer programs can assure an equitable and fair method of paying for them. Currently, councils appear to be unable to charge fees to cover such costs, and appear merely to be left now to mandating their existence.”).

Moreover, Congress has repeatedly declined opportunities to permit industry funding nationwide. Magnuson-Stevens has been reauthorized with substantial amendments three times since 1989, and each time Congress considered bills that would have created express blanket authority for mandatory industry funding. H.R. 1554, 101st Cong. § 2(a)(3) (1989); H.R. 39, 104th Cong. § 9(b)(4) (1995); H.R. 5018, 109th Cong. § 9(b) (2006). In concert with Congress's deliberate decision to authorize industry funding in particular places, the obvious inference is that Congress did not intend to do so nationwide. *Brown & Williamson Tobacco*, 529 U.S. at 160 ("Given this history and the breadth of the authority that the [agency] has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the [agency] this power.").

**4. The district court's contrary reasoning fails to support statutory authority.**

The district court nonetheless held that Magnuson-Stevens permits the Government to require industry funding for at-sea monitors under the Northeast Multispecies FMP. The district court's reasoning does not support its ruling.

**a. Sections 1853(b)(14) and 1858(g)(1)(D) do not imply authority.**

The district court seized upon two provisions of Magnuson-Stevens as granting statutory authority. Neither bears the weight the district court gave them.

One provision was Section 1853(b)(14), which provides that an FMP may contain “such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. § 1853(b)(14). According to the district court, industry funding is simply a power “necessary and appropriate” for implementation of at-sea monitoring, and is therefore within the Government’s implied power. Add. at 12–13.

The district court’s own authority, this Court’s decision in *Boston Edison Co. v. Federal Energy Regulatory Commission*, disproves that theory. 856 F.2d 361 (1st Cir. 1988). In *Boston Edison*, this Court held that a similar “‘necessary and appropriate’ provision . . . merely augments whatever *existing* powers have been conferred on [an agency] by Congress, without itself comprising a source of *independent* authority to act.” *Id.* at 369–70. Here, the Government has residual authority to put its delegated powers into effect, but not an independent power to raise

funds and compel industry support for its preferred programs. Congress would not delegate “broad and unusual authority” over agency finance through a residual clause. *Gonzales*, 546 U.S. at 267; *Ry. Labor Execs.’ Ass’n.*, 29 F.3d at 670.

The district court also relied on Section 1858(g)(1)(D), a penalty provision which authorizes sanctions against vessel owners who fail to make “any payment required for observer services provided to or contracted by [the] owner or operator[.]” 16 U.S.C. § 1858(g)(1)(D). “This provision,” the district court reasoned, “would be unnecessary if [Magnuson-Stevens] prohibited the very type of industry funding at issue in this case.” *Add.* at 13.

Not so; there are more plausible interpretations that do not involve broad grants of implied authority. In referring to “contracted” observer services, Congress may believe that its explicit authorizations for industry funding allow mandatory third-party contracting as an alternative to assessed fees. 16 U.S.C. §§ 1862, 1821(h), 1853a(e). Or Congress’s distinction between observers “provided to” or “contracted by” fishermen may have referred to different methods of arranging *placement* of observers, and not to how the observers are paid for. Under either

interpretation, Congress could have had reason to refer to observer contracts without assuming the kind of industry funding authority the Government's argument depends on.

The district court's emphasis on the penalty provision, meanwhile, drains essentially all meaning from the text and legislative history of Magnuson-Stevens's express industry funding provisions. The district court distinguished those provisions as authorizing collection of fees rather than third-party contracts between fishermen and observer providers, *Add.* at 14–15, but that is superficial at best: If the Government was already permitted to authorize industry funding by requiring third-party contracts, why would Congress and other stakeholders have attached so much importance to allowing the North Pacific Council to fund observers through fees? And why would Congress have repeatedly refused to make the implicit background authority explicit? Plaintiffs' interpretation explains and gives meaning to the entire statute and its history; the district court's does not.

**b. Industry funding is not a compliance cost.**

The district court held that industry funding is no more than a compliance cost, indistinguishable from other regulations “which do not

specify a particular funding mechanism but pursuant to which the industry funds monitoring equipment.” Add. at 15.

The district court’s view overlooks a distinction among different monitoring regimes. There are, to be sure, many statutes that require regulated parties to self-monitor and report their own activities, any many of those statutes may entail purchasing equipment. *E.g.*, 42 U.S.C. § 7414(a)(1) (Clean Air Act); 33 U.S.C § 1318(a) (Clean Water Act). In those fields, regulated parties bear the cost of compliance. In other circumstances, however, Congress or agencies do not consider self-monitoring to be sufficient, and instead require outside inspections. The costs of law enforcement are of course borne by the government; when Congress wants regulated parties to pay for the inspections themselves, it issues specific statutory commands. *See, e.g.*, 7 U.S.C. § 1622(h)(1) (USDA inspections); 29 U.S.C. § 655(b)(7) (OSHA medical examinations).

That distinction between self- and government-funded monitoring regimes is consistent with how the government has customarily distinguished compliance costs from the government’s cost of monitoring and enforcement. Executive Order 12886, which requires that administrative agencies undertake a cost-benefit analysis of proposed

regulations, distinguishes between “the costs of enforcement and compliance,” 58 Fed. Reg. 51,735, § 1(b)(5) (Oct. 4, 1993), as well as between “the direct cost . . . to the government in administering the regulation” and the cost “to businesses and others in complying with the regulation.” *Id.* § 6(a)(3)(C)(ii); *see* OMB Circular A-4 at 7–8 (Sept. 17, 2003), *available at* <http://1.usa.gov/28RRdP5> (directing agencies to control their own costs by identifying the most cost-effective “enforcement framework,” including the options of “on-site inspections” and different types of “monitoring” activities). At-sea monitoring falls on what has always been considered the government’s side of the ledger.

That distinction makes sense. Individuals might have to pay for preparation of their taxes, for example, but paid IRS employees review the returns, and the amount of review the agency undertakes depends on how much money Congress has appropriated. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. The fact that Congress authorized third-party monitoring of fishing vessels *without* expressly shifting the cost away from the government except in specific circumstances, 16 U.S.C. § 1853(b)(8), cuts against the industry-funding requirement.

More fundamentally, the district court's expansive approach to compliance costs has no limiting principle. If an agency can arbitrarily shift expenses onto its regulated industry by defining them as compliance costs, the limits created by congressional delegations and appropriations are meaningless. *Cf. Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 82 (D.C. Cir. 1991) (commenting that agency power to require "data collections for compliance enhancement . . . would enable the agencies to shift enforcement costs from themselves to regulated parties"). Assuming the Government can permissibly require regulated parties to carry monitoring equipment, it does not follow that the agency can compel them to take over the cost of third-party monitoring.<sup>10</sup>

**c. It does not matter that monitor providers receive the required payments.**

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<sup>10</sup> The district court observed that Plaintiffs had not provided "with any examples of a court invalidating a payment regime such as the one at issue here." Add. at 16. That cuts against the Government, not Plaintiffs: So far as any party has been able to determine, no agency has ever undertaken an industry funding regime like this one without express statutory authority. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (noting that the Court applies "a measure of skepticism" when agencies claim to have discovered "unheralded power[s]" in "long-extant statute[s]").

The district court rejected Plaintiffs' arguments related to Congress's taxation power and the statutes governing agency finance, observing that industry funding money goes to the third-party companies that provide the monitors, and not to the Government itself. Add. at 17–19.

True, but irrelevant. If NOAA employed and paid at-sea monitors directly while compelling fishermen to provide the funds, there is no question that industry funding for monitoring would involve “revenue for the government” under Congress's taxation power, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594, a government “expenditure or obligation” under the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)–(B), and “money for the Government” under the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). The same would be true if the Government received payments and then remitted the money to monitoring providers. *Anglers Conservation Network*, 139 F. Supp. 3d at 116 n.9; 78 Fed. Reg. at 26,119–20. The district court provided no authority for its holding that a different result is required when the Government formally avoids touching the money.

Contrary to the district court's view, economic reality rather than formalities controls these questions. The Government Accountability Office has rejected the district court's reasoning as to the Miscellaneous Receipts Statute. Government Accountability Office, 2 Principles of Federal Appropriations Law at 6-177; see *Am. Fed'n of Gov't Emp. v. Fed. Labor Relations Auth.*, 388 F.3d 405, 408 (3d Cir. 2004) (“[P]ublic money includes money from *any source* such as taxes, customs and user fees, and other proceeds of government agency activities.”) (citing 31 U.S.C. § 3302(b)) (emphasis added). Given that at-sea monitoring is a government program created by the Secretary, regulated by the defendant agencies in detail, and which the Government will continue to fund in part itself, 80 Fed. Reg. at 25,155, no good is served by holding that industry funding to support it is not revenue for the government. On the contrary, the only effect would be to liberate agency finances from statutory and constitutional restraint, and to reward agencies from evading oversight through fiscal shell games.

**B. The Industry-Funding Requirement Was Imposed Without Observance Of Mandatory Procedures.**

Assuming that the industry-funding requirement was permitted in principle under Magnuson-Stevens, the Government still was obliged to

follow statutory procedures for implementing it. The Government failed to do so, and industry funding should be enjoined until it does.

The Regulatory Flexibility Act (“RFA”) requires that agencies prepare reports discussing the effect of proposed and final rules on small businesses, and any alternatives that might minimize any harms for those businesses. 5 U.S.C. §§ 603, 604. Magnuson-Stevens requires that the agency “shall” comply with the RFA in promulgating fishery management plans. 16 U.S.C. § 1855(e). But no RFA report accompanied any of NMFS’s announcements related to the onset of industry funding in 2015 and 2016.

Earlier acts by the Government did include such analyses, but they were inadequate to cover industry funding. Amendment 16 included an Initial Regulatory Flexibility Analysis (“IRFA”), which estimated the “potential cost[s] for dockside and at-sea monitoring,” but acknowledged that those costs would be borne by the government at the outset. J.A. at 0157. It observed that “these subsidies may make joining a sector a more attractive economic alternative,” *id.* at 862, but said nothing about the effect of withdrawing them.

The district court dismissed Plaintiffs' argument with the observation that "there is no requirement under the RFA as to the 'specific amount of detail' with which an agency must discuss various alternatives presented to it." Add. at 22 (quoting *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 471 (1st Cir. 2003)). That is true, but it does not follow that an agency can ignore an issue indefinitely by punting economic questions into the future and failing to revisit them. *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433–37 (M.D. Fla. 1998). Because the Government avoided analyzing the economic consequences of the industry-funding requirement to date, now should have been the time.

**C. The At-Sea Monitoring Program Is Unconstitutional.**

The above arguments are adequate for this Court to grant relief to Plaintiffs. But should this Court consider the industry-funding requirement to be authorized by Magnuson-Stevens, it would have to reach an even more consequential issue: The At-Sea Monitoring Program, and much of the rest of Federal fishery regulation under Magnuson-Stevens, is itself constitutionally infirm.

## 1. Fourth Amendment

Under the Fourth Amendment, warrantless searches are “*per se* unreasonable” and therefore forbidden, “subject only to a few specifically established and well-delineated exceptions.” *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quotes and alterations omitted); *see* U.S. Const. amend. IV. A Fourth Amendment search — typically requiring a warrant — occurs whenever the government “physically occupie[s] private property for the purpose of obtaining information.” *United States v. Jones*, 132 S. Ct. 945, 949 (2012). That, of course, is what at-sea monitors do: They physically travel on fishing vessels, and not just to collect information, but to evaluate compliance with law governing discards, confirm the location the vessel fishes, and pursue other matters. 50 C.F.R. § 648.87(b)(1)(v)(B). But no warrant issues when at-sea monitors are placed on vessels; fishermen merely receive an electronic notification when a monitor is to accompany them. 50 C.F.R. § 648.87(b)(5)(iii); J.A. at 0251, Tr. 53:21–54:6. Unless an exception applies, the At-Sea Monitor program violates the Fourth Amendment, and should be enjoined. *Patel*, 135 S. Ct. at 2451–57 (holding warrantless inspection program facially unconstitutional).

The district court held warrantless searches are permitted because fishing falls within the Fourth Amendment's exception for "closely regulated" industries. *Add.* at 25. That holding has two critical flaws.

*First*, it cannot be squared with the Supreme Court's recent decision in *Patel*, which held that only "intrinsically dangerous" businesses "pos[ing] a clear and significant risk to the public welfare" fall into the "closely regulated" category. 135 S. Ct. at 2454–55 & n.5. The Supreme Court has only identified four industries subject to warrantless searches, *id.* at 2454 (citing liquor sales, firearm sales, mining, and automobile junkyards), and declined in *Patel* to recognize the hotel industry as a fifth. Just so here: The fishing industry is subject to extensive regulation and scrutiny, but — like the hotels in *Patel* — to hold that it is "closely regulated" would "permit what has always been a narrow exception to swallow the rule." *Id.* at 2455.

The district court neglected to apply *Patel*, and so failed to consider whether fishing "poses a clear and significant risk to the public welfare" that justifies treating it as closely regulated. *Id.* at 2454. Instead, the district court applied what it took to be this Court's standard, which purportedly relies on pre-*Patel* Supreme Court authority and looks only

to whether an industry's regulation is "so pervasive that business owners cannot help but know that their commercial properties may be periodically inspected for specific purposes." *Id.* at 26 n.14 (rejecting reliance on *Patel*). The district court derived that rule from this Court's decision in *Rivera-Corraliza v. Morales*, 794 F.3d 208, 217 (1st Cir. 2015). *Id.*

The district court, however, misunderstood this Court's rule. Far from ignoring *Patel*'s restatement of the closely regulated industry standard, the *Rivera-Corraliza* panel simply had no reason to apply it: Qualified immunity issues in that case required the panel to look only to pre-*Patel* authority. 794 F.3d at 223 ("*Patel* does not apply in this case[.]"); *id.* at 217 n.12; *id.* at 219 n.16. Here, unlike in *Rivera-Corraliza*, *Patel* does control. Because the district court misread *Rivera-Corraliza*, it failed to apply modern Supreme Court authority that resolves this case in Plaintiffs' favor.

*Second*, even if fishing were closely regulated, it would be the Government's burden to prove that warrantless at-sea monitoring (1) is "necessary to further" Magnuson-Stevens's regulatory scheme and (2) includes "a constitutionally adequate substitute for a warrant." *Patel*,

135 S. Ct. at 2456 (quotes omitted). The district court failed to address those factors. As to the first, the district court held that warrantless monitoring “further[s]” the government’s interest in “protecting fishery resources” without considering whether it is *necessary*. *Id.* at 26. As to the second, the district court held that fishermen were on “notice that the government will conduct periodic inspections for specific purposes,” *id.* (quotes omitted), but did not consider whether monitoring, “in terms of the certainty and regularity of its application,” is constitutionally *equivalent* to a warrant. *Patel*, 135 S. Ct. at 2456 (quotes omitted).

The government provided no evidence or authority proving either of those factors in support of summary judgment. J.A. at 0517. In the absence of evidence, authority, or district court holdings, this Court should hold that at-sea monitoring violates the Fourth Amendment even if the fishing industry were closely regulated.

## **2. Appointments Clause**

The Magnuson-Stevens system of fishery management plans promulgated by regional Councils in concert with the Secretary is facially unconstitutional because the Councils are improperly constituted. The

Northeast Multispecies FMP, including its at-sea monitoring provisions, is therefore void.

Under the Appointments Clause, the appointment of “inferior Officers” of the United States — individuals who exercise “significant authority pursuant to the laws of the United States” but whose “work is directed and supervised at some level” by a “principal” officer, *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) — may be vested by Congress “in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const., art. II, § 2, cl. 2. As explained above, Council members have substantial discretionary responsibilities, including the power to constrain the Secretary’s own discretion. 16 U.S.C. §§ 1854(a), (b)(1), (h); *Daley*, 53 F. Supp. 2d at 160. Those powers make Council members inferior officers under *Edmond*. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); see also *Free Enter. Fund*, 561 U.S. at 540 (Breyer, J., dissenting) (discussing examples of minor federal officials held by the Supreme Court to be “inferior Officers”).

Their appointment, however, is not appropriately vested. Each Council includes “the principal State official with marine fishery management responsibility and expertise” for each State within the

Council's territory. 16 U.S.C. § 1852(b)(1)(A). Those individuals do not owe their Council appointments to Federal officers at all, but rather to their own State governments. The Councils also include set numbers of members appointed by the Secretary of Commerce, *id.* § 1852(b)(1)(C), but the Secretary must make those appointments "from a list of individuals submitted by the Governor of each applicable constituent State." *Id.* § 1852(b)(2)(C). The fact that State governors appoint Council members directly, or control the Secretary's discretion to appoint them, renders the Councils (and their acts) constitutionally unsound. *See Ryder v. United States*, 515 U.S. 177, 183–87 (1995).

The district court did not disagree that the involvement of State governors in the appointment of inferior officers would be inconsistent with the Appointments Clause. Rather, the district court held that Council members are not inferior officers because Councils cannot unilaterally promulgate FMPs, but only propose them. *Add.* at 27–28. But that reasoning is incomplete, for it ignores many of the Councils' other important powers. The initial power to propose a regulation may not be enough to make an inferior Federal officer, but the power to constrain the Secretary of Commerce herself is surely a "significant

authority pursuant to the laws of the United States[.]” *Edmond*, 520 U.S. at 662–63.

This Court should recognize that the Councils’ powers go well beyond what the district court acknowledged, and that individuals exercising those powers must be appointed in compliance with the Constitution.

### 3. Tenth Amendment

The Tenth Amendment prohibits Congress from conscripting State officers to implement Federal programs. U.S. Const. amend. X, *Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court in *Printz* invalidated provisions of the Brady Act requiring that State officials “shall” perform certain tasks. 521 U.S. at 935 (addressing 18 U.S.C. § 922(s)(2) (1997)). That is what Magnuson-Stevens does: It states that State officials responsible for “marine fishery management” “shall” participate in a Federal council or designate someone else to sit in his stead, 16 U.S.C. § 1852(b)(1)(A), and that State governors “shall” submit lists of potential council members to the Secretary, including resubmitting at the Secretary’s request. *Id.* § 1852(b)(2). Magnuson-Stevens thus imposes obligations directly on State officers and gives the

Secretary authority to direct their activities, requirements which the Supreme Court has forbidden. *See Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 248 (D. Conn. 2005) (commenting that “such an attack [on Magnuson-Stevens] might have considerable merit”).

The district court disagreed on the basis that Magnuson-Stevens “imposes no penalties or coerced force where Councils are concerned.” Add. at 29. But neither did the provisions that the Supreme Court invalidated in *Printz*, which, like Magnuson-Stevens, only stated that certain State officials “shall” comply with federal direction. 18 U.S.C. § 922(s)(2) (1997). This case and *Printz* are thus substantively indistinguishable, and the district court’s reasoning conflicts with Supreme Court caselaw.

## CONCLUSION

For the foregoing reasons, this Court should reverse the District Court and remand for further proceedings.

Dated: November 14, 2016

Respectfully submitted,

s/ Julie A. Smith

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**CERTIFICATE AS TO COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

Dated: November 14, 2016                      s/ Eric R. Bolinder

## CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

David Goethel, et al.

v.

Civil No. 15-cv-497-JL  
Opinion No. 2016 DNH 127

Penny Pritzker, et al.

**MEMORANDUM ORDER**

This case involves legal challenges to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 et seq. ("MSA" or "the Act"), and actions taken thereunder by the National Marine Fisheries Service ("NMFS"). The plaintiffs are Hampton, New Hampshire-based commercial fisherman David Goethel, and XIII Northeast Fishery Sector, Inc. ("Sector 13").<sup>1</sup> Of particular relevance is a requirement that commercial fishermen must, on occasion, be accompanied by at-sea monitors ("ASMs") who collect certain fishing-related data. As promulgated by NMFS, the ASM provision called for the industry to pay the costs of the monitors. Nevertheless, the government paid the cost of the monitors (estimated at \$700-\$800 per trip) from the inception of

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<sup>1</sup> A "sector" is a self-selected "group of vessels that have voluntarily signed a contract and agree[d] to certain fishing restrictions" regarding, *inter alia*, catch limits. [Lovgren v. Locke](#), 701 F.3d 5, 15-16 (1st Cir. 2012) (citing 69 Fed. Reg. 22,906, 22,945).

the ASM regime in fishing year ("FY") 2012<sup>2</sup> until March 2016, and recently notified the court that it would be "reimbursing some of the industry's [at-sea monitoring] costs" as of July 1. Doc. no. 69.

Plaintiffs advance several legal arguments in support of their claim that the industry funding requirement is illegal. Generally speaking, however, plaintiffs contend that the defendants lack the legal authority to require fishermen to pay the monitors' costs. Presently before the court are the parties' cross-motions for summary judgment.<sup>3</sup> Following a thorough review of the parties' submissions, including the administrative record, the court finds that much of plaintiffs' case is barred by the applicable statute of limitations, and even if timely filed, their claims fail on the merits. Accordingly, the defendant's motion for summary judgment is granted and the plaintiffs' motion is denied.

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<sup>2</sup> A "fishing year" (FY) runs from May 1 to April 30 of the following year.

<sup>3</sup> Finding that the governing statutory scheme prohibited preliminary injunctive relief, the court previously denied plaintiffs' request for an injunction to prevent the industry funding requirement from taking effect. Goethel v. Pritzker, No. 15-cv-497 (D.N.H. Jan. 27, 2016) (doc. no. 44).

## I. Background

Congress enacted and codified The Fishery Conservation and Management Act, Congress enacted MSA in 1976. The Court of Appeals noted that it was enacted in “[r]espon[se] to depletion of the nation’s fish stocks due to overfishing . . . .”

[Associated Fisheries of Maine, Inc. v. Daley](#), 127 F.3d 104, 107 (1st Cir. 1997). The MSA’s codified goals were, *inter alia*, “to conserve and manage the fishery resources found off the coasts of the United States” and “to promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(1), (3). Pursuant to the Act, eight regional Fishery Management Councils (“FMCs”) were established “to exercise sound judgment in the stewardship of fishery resources. . . .” [Id.](#) §§ 1801(b)(5), 1852(a)(1)(A). The FMCs are charged with preparing -- and subsequently amending, if necessary -- Fishery Management Plans (“FMPs”), which regulate conservation and management of the fishery. [Id.](#) § 1853(a)(1)(A).

Central to this case is such an amendment: Amendment 16 (“A16”) to the Northeast Multispecies FMP. This FMP was developed jointly by the New England and Mid-Atlantic Councils in 1985, and addresses groundfish<sup>4</sup> -- those that live on, in, or

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<sup>4</sup> Species of groundfish within the Northeast Multispecies FMP include different types of cod, haddock, halibut and flounder. [See](#) Northeast Multispecies (Groundfish) Fishery Management Plan Overview, available at

near the bottom of the body of water they inhabit -- which migrate between the waters within the purview of those two FMCs. Amendment 16 had its genesis in the MSA Reauthorization Act, which took effect in January 2007 and established new conservation mandates for all FMPs. [Lovgren v. Locke](#), 701 F.3d 5, 17 (1st Cir. 2012).<sup>5</sup> In response, the New England Council included in A16 the at-sea monitoring program pursuant to the Reauthorization Act's requirement that FMPs include "measures to ensure accountability" with respect to catch limits. [See 16 U.S.C. § 1853\(a\) \(15\)](#); [see also Oceana, Inc. v. Pritzker](#), 26 F. Supp. 3d 33, 39 (D.D.C. 2014). Accordingly, commercial fishermen within the purview of the Northeast Multispecies FMP must, on occasion, be accompanied by ASMs who collect certain data related to the particular fishing trip and the fishing vessels' catch. [75 Fed. Reg. 18262 \(April 9, 2010\)](#).

As written, A16 requires that the industry pay the costs of such monitors. [Id.](#) at 18277-78, 18291. Despite this language, however, the government had paid the ASM costs (estimated at \$700-\$800 per trip) throughout the program's existence. In 2015,

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<http://s3.amazonaws.com/nefmc.org/GroundfishFMPOverview.pdf>  
(last visited July 23, 2016).

<sup>5</sup> Amendment 16 had actually been proposed prior to the Reauthorization Act, but the Act's mandates caused the New England Council to delay its implementation. [Lovgren v. Locke](#), 701 F.3d 5, 17 (1st Cir. 2012).

a court ruling required NMFS to fund a particular reporting requirement. See [Oceana v. Locke](#), 670 F.3d 1238 (D.C. Cir. 2011); 16 U.S.C. § 1853(a)(11). This requirement depleted NMFS coffers, and in mid-2015, NMFS informed fishery sectors that the industry would have to pay the monitoring costs going forward. A rule proposed in March and finalized in May of that year made NMFS's position official. 80 Fed. Reg. 12385 (March 9, 2015); 80 Fed. Reg. 25155 (May 1, 2015). NMFS subsequently updated sectors on the anticipated date of federal funds exhaustion, first projecting October 31 and then, in November, projecting a December 31, 2015 exhaustion. The projection was extended to March 1, but NMFS announced that funding was exhausted in mid-February 2016. Nevertheless, NMFS delayed the industry funding requirement until March 1, before recently indicating its reimbursement plan, supra, p. 2. It is the November 10, 2015, update to which this lawsuit was initially directed. See Complaint (doc. no. 1).

## **II. Applicable legal standards**

### **A. Summary judgment**

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute is one that a reasonable

fact-finder could resolve in favor of either party and a material fact is one that could affect the outcome of the case.” [Flood v. Bank of Am. Corp.](#), 780 F.3d 1, 7 (1st Cir. 2015). Reasonable inferences are taken in the light most favorable to the nonmoving party, but unsupported speculation and evidence that “is less than significantly probative” are not sufficient to avoid summary judgment. [Planadeball v. Wyndham Vacation Resorts, Inc.](#), 793 F.3d 169, 174 (1st Cir. 2015) (internal quotation marks omitted).

On cross motions for summary judgment, the standard of review is applied to each motion separately. [Mandel v. Bos. Phoenix, Inc.](#), 456 F.3d 198, 205 (1st Cir. 2006) (“The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review.”). Accordingly, the court must determine “whether either of the parties deserves judgment as a matter of law on facts that are not disputed.” [Adria Int'l Group, Inc. v. Ferré Dev., Inc.](#), 241 F.3d 103, 107 (1st Cir. 2001).

#### **B. Administrative Procedure Act**

With some exceptions not pertinent here, Congress authorized judicial review of agency actions taken under the MSA to follow the dictates of the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et seq. [See](#) 16 U.S.C. § 1855(f). The court’s review is limited to the administrative record. [Lovegren](#), 701

F.3d at 20. As relevant here, the court can set aside agency action only if such action is found to be: A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; B) contrary to constitutional right, power, privilege or immunity; C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or D) without observance of procedure required by law. 5 U.S.C. § 706(2). “Because the APA standard affords great deference to agency decisionmaking and because the Secretary’s action is presumed valid, judicial review, even at the summary judgment stage, is narrow.” Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 107 (1st Cir. 1997). Finally, the MSA contains a 30-day statute of limitations. 16 U.S.C. § 1855(f).

### **III. Legal analysis**

Plaintiffs claim that the industry funding requirement runs afoul of the MSA in three different ways: 1) there is no statutory authority for the requirement; 2) the government failed to follow required procedural steps in implementing the funding requirement; and 3) at-sea monitoring is unconstitutional and the relevant FMPs are invalid. The defendants dispute the legal bases for those arguments, but also assert that they are barred by MSA’s 30-day limitations period. The court turns to that issue first.

**A. Statute of limitations**

The MSA requires that suits seeking judicial review of regulations and “actions” taken by the Secretary of Commerce (or her designee) be filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register. 16 U.S.C. § 1855(f). An “action” is further defined as “actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.” Id. at § 1855(f)(2).

The Secretary argues that the 30-day limitations period began to run when the regulations implementing A16 (which explicitly called for industry funding) went into effect in FY 2012 or, at the latest, in May 2015, when the Rule announcing that industry funding would begin during FY 2015 was published. Plaintiffs argue that the November 10, 2015, notice from the Northeast Fisheries Science Center that federal funds would be exhausted by the end of 2015 triggered the 30-day deadline. Therefore, plaintiffs assert, their December 9, 2015, complaint was timely filed. The court rejects plaintiffs’ argument. The court need not decide whether the original publication of A16 in 2012 started the 30-day limitations clock because it finds that

the May 15, 2015 Rule explicitly announcing that industry funding would begin during the 2015-16 fishing year is the "action" referred to in 16 U.S.C. § 1855(f).

Plaintiffs argue that the November 10 letter is a separately reviewable "action," i.e., implementation of the ASM funding regulation. They rely on two cases, Gulf Fishermen's Ass'n v. Gutierrez, 529 F.3d 1321 (11th Cir. 2008) and Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104 (9th Cir. 2006). Neither case, however, can support the weight that plaintiffs assign to them. Gulf Fishermen's Ass'n involved a rule requiring fishing vessels to use a particular vessel monitoring system. Shortly before scheduled implementation of that rule, NMFS published another rule delaying the effective date by four months. 529 F.3d at 1322. Suit was filed within thirty days of publication of the second rule, challenging the legality of the monitoring system requirement. The court rejected the Secretary's statute of limitations defense, observing that "the plain text of § 1855(f) does not preclude judicial review of a regulation beyond thirty days after its publication where there has been subsequent Secretarial action under the regulation." Id. at 1323 (citing Oregon Trollers, 452 F.3d at 1113).

While plaintiffs go to great lengths to convince the court that the November 10 email notice is an "action" within the meaning of section 1855(f), they ignore additional discussion in

Gulf Fishermen's Ass'n and that case's explication of Oregon Trollers which is fatal to their claim. Specifically, Gulf Fishermen's Ass'n agreed with Oregon Trollers that it is not just agency action," in general, that is separately reviewable, but "actions," in particular, that are "published in the Federal Register," as set forth in section 1855(f). Id. at 1323-24; (quoting Oregon Trollers, 452 F.3d at 1113). Indeed, Gulf Fishermen's Ass'n held that "a petition filed within thirty days of the publication of a Secretarial action, as defined in § 1852(f)(2)" is timely. (Emphasis added); see also Green v. Locke, No. 10-707 (MLC), 2010 WL 3614216, (D.N.J. Sept. 8, 2010) (rejecting, in the context of analyzing the MSA's statute of limitations, plaintiffs' claims that permit denials were "actions" within the meaning of § 1855(f)(2) because they were neither "promulgated" nor "published in the Federal Register"). Here, plaintiffs do not claim that the November 10 email notice was a promulgated regulation or that it was published.

The court finds that plaintiffs 30-day window to challenge the industry funding component of ASM closed, at the latest, in June 2015, well before this suit was filed.<sup>6</sup> As explained below,

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<sup>6</sup> Plaintiffs also argue that they could not have brought suit any earlier because such a suit would have been dismissed as unripe. While necessarily speculative, it seems inconceivable that a suit filed within 30 days of the Rule's publication in May 2016 would have been found unripe. In addition, as plaintiffs point out, pre-enforcement review is available to aggrieved

however, even if plaintiffs' claims were timely filed, defendant is nevertheless entitled to summary judgment.

**B. Plaintiffs' substantive claims**

1. Industry funding is contrary to law

Plaintiffs assert several arguments in support of their allegation that the industry funding component of ASM is contrary to law. [5 U.S.C. § 706\(2\)](#). None prevail. The court addresses them seriatim.

a. Lack of MSA authorization

Plaintiffs first argue that industry funding is unlawful because it is not authorized by the MSA. While it is true that the MSA does not explicitly authorize industry funding (with one exception to be addressed), the court's inquiry does not end there, as "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." [Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.](#), 467 U.S. 837, 843 (1984) (quoting [Morton v. Ruiz](#), 415 U.S. 199, 231 (1974)).

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parties and plaintiffs cite no authority which permits the court to waive the statute of limitations applicable to pre-enforcement review.

To start with, the MSA explicitly authorizes at-sea monitors. 16 U.S.C. §§ 1853(b)(8), 1881(b). Next, the MSA also contains the broad mandate that FMPs shall “contain the conservation and management measures . . . necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery[.]” 16 U.S.C. § 1853(a)(1)(A). Finally, and as explained below, significantly, section 1853(b)(14) allows FMPs to “prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.”

Although it examines a different statutory scheme, this court finds instructive the First Circuit Court of Appeals’s treatment of the Federal Power Act’s “necessary and appropriate” provision, 16 U.S.C. § 825h, in Boston Edison Co. v. FERC, 856 F.2d 361, 369-70 (1st Cir. 1988). There, the Court of Appeals concluded that the provision “augments whatever existing powers have been conferred on [the Federal Energy Regulatory Commission] by Congress,” although it does not comprise an independent source of authority to act. See also, Coastal Conservation Ass’n v. United States Dep’t of Commerce, Civ. No. 15-1300, 2016 WL 54911 at \*4 (E.D. La. Jan. 5, 2016) (describing “necessary and appropriate” language in 16 U.S.C. § 1853(a)(1)(A) as “empowering

language represent[ing] a delegation of authority to the agency.”). NMFS and the Council permissibly found A16’s industry funding provision “necessary and appropriate for the conservation and management of the fishery” and there is no dispute that the provision is a “measure, requirement or condition” as contemplated by 16 U.S.C. § 1853(b)(14). Accordingly, the court finds that the MSA does authorize industry funding of monitors.

Apart from the above statutory language, another provision of the MSA, added in 1996, demonstrates beyond peradventure that the MSA contemplates -- and most certainly does not prohibit -- the use of industry funded monitors. 16 U.S.C. § 1858(g)(1)(D) allows the Secretary to issue sanctions against any vessel owner or operator who has not made “any payment required for observer services provided to or contracted by an owner or operator . . .” (emphasis added). This provision would be unnecessary if the MSA prohibited the very type of industry funding at issue in this case. See generally, Richards v. United States, 369 U.S. 1, 11 (1962) (“in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law . . .”) (citation and internal quotation omitted).

In addition to arguing that the MSA does not authorize industry funding, plaintiffs also assert that the MSA prohibits industry funding. Although not expressly cited by the

plaintiffs, this contention is based on the statutory interpretation canon *expressio unius est exclusion alterius*, which instructs that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” [Duncan v. Walker](#), 533 U.S. 167, 173 (2001); see also [United States v. Councilman](#), 418 F.3d 67, 73 (1st Cir. 2005). Here, plaintiffs point to 16 U.S.C. § 1862(a)(2), which expressly authorizes the imposition of fees to cover the costs of, inter alia, observer coverage in North Pacific fisheries. From this, they argue that the canon requires a conclusion that the lack of similar express authorization elsewhere in the statute dooms A16’s industry funding requirement.<sup>7</sup>

The court disagrees. The Court of Appeals has cautioned that the canon “is an aid to construction and not an inflexible rule,” [Hewlett-Packard Co., Inc. v. Berg](#), 61 F.3d 101, 106 (1st Cir. 1995), and the Pacific Northwest fee mechanism is a substantively different animal than A16’s industry funding requirement for at-sea monitoring. While plaintiffs correctly

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<sup>7</sup>Relatedly, the plaintiffs argue that if industry funding is implicitly authorized by the MSA, the Pacific Council fee provision would be surplusage, and thus run afoul of the court’s obligation “to attempt to give meaning to each word and phrase.” [United States v. Flores](#), 968 F.2d 1366, 1371 (1st Cir. 1992)

observe that § 1862 allows Councils to establish a fee schedule, details the requirements of such a schedule and directs how funds received are handled, see id. §§ 1854(d)(2)(A)-(c) and 1862(b), (d), A16's industry-funding provision does not establish, provide for, or in any way implicate fees.<sup>8</sup> Instead, A16 requires industry contracts with ASM providers, with whom they are free to negotiate contract terms. See Cumberland Farms, Inc. v. Tax Assessor, State of Me., 116 F.3d 943, 946 (1st Cir. 1997) ("The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation."). Finally, the court also agrees with the Secretary's analogizing ASM costs to those of mandatory vessel monitoring systems, the cost of which is the responsibility of the vessel owner, although that funding responsibility is not expressly authorized by statute. See Nat'l Fed'n of Indep. Bus. V. Sebelius, 132 S. Ct. 2566, 2645 (2012) ("Government regulation typically imposes costs on the regulated industry."). The Secretary also cites to provisions of the Clean Air Act and Clean Water Act which do not specify a particular funding mechanism but pursuant to which the industry funds monitoring equipment. Doc. no. 72 at 15. Plaintiffs primarily attempt to diminish the import of these examples through

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<sup>8</sup>Similarly, plaintiffs list several other fee-based provisions of the MSA in their supplemental memorandum, doc. no. 76 at 2, 4. For the reasons stated above, these are inapposite.

semantics, referring to them as “true compliance costs” relating to “primary conduct.” Doc. no. 76 at 4. But plaintiffs do not support this purported distinction with any examples of a court invalidating a payment regime such as the one at issue here.

The fact that fees are addressed in § 1862 but not § 1853 does not “support[] a sensible inference” that the MSA forbids an FMP under which industry must bear the cost of certain regulations. The court therefore declines to rule that the MSA prohibits industry funding of at-sea monitors.

*b. Industry funding as a tax*

Alternatively, the plaintiffs suggest<sup>9</sup> that industry funding is a tax, which can only be levied by Congress. Doc. no. 53-1 at 10 (citing [Nat’l Cable Television Ass’n, Inc. V. United States](#), 415 U.S. 336, 340 (1974) (“Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes[.]”).). Again, the court disagrees. A payment made to a third party vendor (in this case, an at-sea monitor) is not a tax simply because the law requires it.

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<sup>9</sup> Plaintiffs’ argument on this point consists of one sentence and two cited cases. It is only for the sake of completeness that the court did not decline to address this argument as insufficiently developed. See [United States v. Zannino](#), 895 F.2d 1, 17 (1st Cir. 1990) (“issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”).

As the Court of Appeals has observed, a “‘tax’ is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community.” [Cumberland Farms, Inc. v. Tax Assessor, State of Me.](#), 116 F.3d 943, 946 (1st Cir. 1997) (quoting [San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n](#), 967 F.2d 683, 685 (1st Cir. 1992)). Here, payments for ASMs are made directly to the vendors and not to NMFS.<sup>10</sup> Funds paid by industry sources to third party at-sea monitors are not collected by the government, received by the government, or otherwise available to the government to be expended for any public purpose. The rates or terms of monitor payments are not set by government officials, or even known to them. The industry funding of at-sea monitoring does not involve taxation, and thus constitute an unlawful tax.

c. Anti-Deficiency Act

Plaintiffs further suggest that the industry funding requirement violates the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)-(B), which prohibits federal officers from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation” and from “involv[ing] [the United

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<sup>10</sup> Further, the court is aware of no record evidence or argument that the vendors supplying ASM services remit any of the monies paid by fisherman to any government agency.

States] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]” This argument fails because the Anti-Deficiency Act simply has no bearing on or application to A16’s industry funding requirement. The entire point of industry funding -- in fact, the very reason the plaintiffs object to it -- is that it requires private expenditures, not public ones. There is nothing in the record to suggest that industry funding of at-sea monitors involves the government or any government official spending public money, unappropriated or otherwise, or entering into a contract. See Mack Bros. v. Me. State Hous. Auth., No. 2:10-cv-00087-GZS, 2011 WL 2633084, at \*12 (D. Me. June 24, 2011) quoting Hercules v. United States, 516 U.S. 417, 427 (1996) (noting that Act “bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.”). Indeed, the effect of industry funding is a cessation of government spending. The Anti-Deficiency Act is simply not implicated here.

d. Miscellaneous Receipts Act

The plaintiffs’ argument based on the Miscellaneous Receipts Act fails for reasons similar to its taxation and ADA-based arguments: industry funding doesn’t involve the receipt of money by any government entity. Under 31 U.S.C. § 3302(b), “an

official or agent of the Government receiving money for the Government from any source must deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." As A16 calls for contracting directly with ASM providers, it involves no "official or agent of the Government" receiving money.

Plaintiffs nevertheless argue that the required payments to the ASM providers contracting with the various fishing sectors is "money for the government" because monitoring is a "government program." Doc. no. 53-1 at 11. But this semantic argument also fails. Even if the payments to contractors were somehow considered "money for the government" and used to fund the ASM program,

"[t]he Miscellaneous Receipts Act cannot in any way be construed to prohibit the deposit of receipts of [a] self-financing program in a special fund or account distinct from that of the general Treasury fund. All the Act literally requires is that miscellaneous money received by government officials be deposited in the general Treasury."

[AINS, Inc. v. United States](#), 56 Fed. Cl. 522, 539 (2003). A16 does not provide for -- and is not alleged to provide for -- the receipt of money by government officials. Accordingly, the industry funding requirement does not run afoul of the Miscellaneous Receipts Act.

e. Commerce Clause

Plaintiffs next allege that the industry-funding requirement for ASMs violates the Commerce Clause of the United States Constitution<sup>11</sup> because it compels sectors to enter contracts with private companies, in contravention of the Supreme Court's mandate in [Nat'l Fed'n of Indep. Bus.](#), in which the Court held that the Commerce Clause did not permit the government to "compel individuals to *become* active in commerce by purchas[ing]" health insurance. 132 S. Ct. at 2587 (emphasis in original). Here, plaintiffs argue, A16 unconstitutionally compels them to enter the market for at-sea monitors.

The Commerce Clause is not a barrier to the enforcement of A16, at least for the reasons advanced by the plaintiff. The underlying factual premise of this argument is flawed because nothing in the Magnuson-Stevens Act compels at-sea monitoring to begin with. Fisherman who do not participate in the sector system would not be required to have monitors, regardless of who is paying for them. See A16 at 861 ("sector vessels will be afforded greater flexibility [, but] will have to bear the administrative costs associated with preparing an environmental assessment as well as the monitoring costs associated with a

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<sup>11</sup> Pursuant to [art. I, § 8, cl. 3](#), Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

sector manager, dockside monitoring and at-sea monitoring.”). Fisherman who do not participate in the sector system fish in the “common pool,” which does not require ASM. A16 at 149.

But even if, as plaintiffs assert, the sector system is only theoretically voluntary,<sup>12</sup> the Secretary here, unlike in [Nat’l Fed’n of Indep. Bus.](#), is not “regulat[ing] individuals because they are doing nothing.” [Id.](#) at 2587. As pointed out repeatedly [supra](#) at pp. 16-18, nothing in Magnuson-Stevens or A16 taxes, assesses fees, or otherwise penalizes [fishermen] for choosing a course of action (like the sector system) that does not require at-sea monitoring. Instead, the costs of monitors are part of the permissible regulation of plaintiffs’ commercial fishing activities. The court finds no Commerce Clause violation based on the arguments advanced by the plaintiffs.

## 2. Procedural requirements

Plaintiffs next claim that even if the industry funding requirement for ASMs is permissible, NMFS failed to satisfy two procedural requirements imposed by the MSA -- those imposed by the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 603-04 and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(C). The court addresses these claims in turn.

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<sup>12</sup> At A16’s inception, 55 percent of permit holders joined a sector; these vessels accounted for 98% of the previous decade’s catch. [Lovgren](#), 701 F.3d 5.

a. Regulatory Flexibility Act

The MSA requires that the Secretary comply with the Regulatory Flexibility Act. See 16 U.S.C. § 1855(e). The RFA requires agencies to conduct a "regulatory flexibility analysis" whenever they propose rules that will have "a significant economic impact on a substantial number of small entities." 5 U.S.C. §§ 601-605. The agency must prepare an initial analysis when a proposed rule is published and a final analysis when it publishes a final rule. Id. §§ 603(a), 604(a).

There is no dispute that NMFS complied with the letter of RFA by preparing both the initial analysis and the final analysis. Plaintiffs argue, however, that in doing so, the NMFS insufficiently analyzed the economic impacts on the relevant fisheries. But as the Court Appeals has observed, there is no requirement under the RFA as to the "specific amount of detail" with which an agency must discuss various alternatives presented to it. Little Bay Lobster Co. v. Evans, 352 F.3d 462, 471 (1st Cir. 2003); see also, City of New Bedford v. Locke, No. 10-10789-RWZ, 2011 WL 2636863 at \*9 (D. Mass. June 30, 2011), aff'd, Lovgren, supra ("Arguments about the substantive merits of a new rule . . . are beyond the scope of [the] procedural requirements" of the RFA). The court accordingly rejects plaintiffs' RFA-based argument.

b. National Environmental Policy Act ("NEPA")

The MSA also requires NMFS to comply with NEPA, 42 U.S.C. § 4332(c), which, in turn, requires agencies to prepare environmental impact statements prior to implementing "significant acts." Plaintiffs' argument appears limited to the claim that NMFS failed to adequately assess the economic impact of industry funding, as their briefing makes no mention of environmental concerns. Doc. no. 53-1 at 15. This posture is fatal to the argument as a party "must assert an environmental harm in order to come within [NEPA's] zone of interests." Gunpowder Riverkeeper v. F.E.R.C., 807 F.3d 267, 273 (D.C. Cir. 2015) (citing Realty Income Tr. v. Eckerd, 564 F.2d 447, 452 & n.10 (D.C. Cir. 1977); see also, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388 (2014) ("presum[ing] that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.") (internal quotation and citation omitted)).

Plaintiffs' argument fails substantively as well. The environmental impact statement issued in conjunction with A16 acknowledged the potential negative consequences of industry funding. As explained in detail, supra, at pp. 7-10, the time for challenging A16 itself has long passed. Plaintiffs further argue that the environmental assessment accompanying approval for

2015 sector operations plans did not address the transition to industry funding. This argument fails because supplementation is only required "if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered." [Marsh v. Or. Nat. Res. Council](#), 490 U.S. 360, 373-74 (quoting 42 U.S.C. § 4332(2)(c) (emphasis added)). Here, the impact of industry funding was already considered, and plaintiffs have failed to identify any new circumstances that would require a supplemental statement. Accordingly, the court rejects plaintiffs' argument premised on NEPA.

### 3. Constitutional claims

Plaintiffs' final arguments rest on the United States Constitution. The court notes at the outset that none of the plaintiffs' constitutional arguments challenge *industry funding*; rather, they challenge *at-sea monitoring*, a provision which has long been in place, for which the time to challenge has long expired. Nevertheless, plaintiffs specifically argue that the ASM requirement itself violates the 4th and 10th Amendments, as well as the Appointments Clause, [U.S. Const., art. II, § 2, cl.](#)

2 .<sup>13</sup> As explained below, the court finds each argument meritless.

a. Fourth Amendment

Plaintiffs first argue that the presence of at-sea monitors amounts to an unconstitutional warrantless search. The court disagrees. Even assuming that ASM presence constitutes a search -- an assumption the Secretary accepts only for purposes of argument -- warrantless administrative searches of closely regulated industries are valid. See [New York v. Burger](#), 482 U.S. 691 (1987). The test for determining if an industry is "closely regulated" is whether the regulatory presence is "so pervasive that business owners cannot help but know that their commercial properties may be periodically inspected for specific purposes." [Rivera-Corraliza v. Morales](#), 794 F.3d 208, 217 (1st Cir. 2015) (citing [Burger](#), 482 U.S. at 705 n. 16). So it is here. See [Lovgren v. Byrne](#), 787 F.2d 857, 865 n.8 (3rd Cir. 1986) (noting "pervasive regulation" of the fishing industry "since the founding of the Republic."); see also [Balelo v. Balridge](#), 724 F.2d 753, 765 (9th Cir. 1984) (applying "closely regulated" doctrine in holding that presence of monitors to support

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<sup>13</sup> Earlier in this litigation, plaintiffs also argued that industry funding of ASM also violated the Third Amendment's prohibition against quartering of soldiers. They no longer advance that claim.

compliance with Marine Mammal Protection Act does not violate Fourth Amendment, given long national history of commercial fishing regulation).

Given the closely regulated nature of commercial fishing, the ASM "searches" are reasonable within the meaning of the Fourth Amendment if the government has a substantial interest in regulating the business, the monitors' presence furthers this interest, and the regulations offer notice to the regulated. [Rivera-Corraliza](#), 794 F.3d at 216-217. Here, all three criteria are met. Plaintiffs do not seriously dispute the government's interest -- as expressed by the MSA -- in protecting fishery resources. See 16 U.S.C. § 1801. Nor do they dispute that ASMs further that interest. And finally, the explicit provisions of the MSA give fishermen notice "that the government will conduct periodic inspections for specific purposes." [Balelo](#), 724 F.2d at 765 (citing [Donovan v. Dewey](#), 452 U.S. 594, 600 (1981)); 16 U.S.C. §§ 1853(b)(8), 1881b. On this record, there is no basis for this court to find or rule that the ASM program does not violate the Fourth Amendment.<sup>14</sup>

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<sup>14</sup> Plaintiffs urge the court to rely on [City of Los Angeles v. Patel](#), 135 S. Ct. 2443 (2015), in which the Court found that a municipal code requiring motel operators to provide guest information to police violated the Fourth Amendment. In so doing the Court observed that it had identified only four industries as "closely regulated." Id. at 2454. Commercial fishing was not one of the four. The Court, however, did not hold that no other industry could be considered "closely regulated." See, [Patel](#),

b. Appointments Clause

The Appointments Clause “makes nomination and confirmation the requisite appointment protocol for what have come to be known as ‘principal officers’ of the United States but allows Congress to permit a limited class of officials to appoint ‘inferior officers’ without the need for confirmation.” [United States v. Hilario](#), 218 F.3d 19, 24 (1st Cir. 2000) (citing [Edmond v. United States](#), 520 U.S. 651, 659-60 (1997)); U.S. Const., art. II, § 2, cl. 2. The clause applies only to the appointment of officers “exercising significant authority pursuant to the laws of the United States.” [Edmond](#), 520 U.S. at 662-63.

Plaintiffs claim that appointment of members to the various Regional Councils established by the MSA runs afoul of the Appointments Clause because of the extent to which Governors of states within a particular council are involved in those appointments. Because the Councils do not exercise “significant” authority, the court rejects this argument. “Significant authority over federal government actions comes from the ability to promulgate, not propose, implementing regulations for a fishery management plan or plan amendment. Under the [MSA], only

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135 S. Ct. at 2461 (Scalia, J., dissenting) (listing various industries held by courts of appeals to be “closely regulated”). Given that the Court of Appeals’s criteria post-dates [Patel](#) and does not restrict “closely regulated” industries to those listed in [Patel](#), this court adheres to the Court of Appeals’s criteria as set forth in [Rivera-Corraliza](#), 794 F.3d at 217.

the Secretary of Commerce can promulgate implementing regulations.” [Nw. Env'tl. Def. Ctr., Or., Inc. v. Evans](#), No. 87-229-FR, 1988 WL 360476 at \*8 (D. Or. Aug. 12, 1988); [Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv.](#), 730 F. Supp. 2d 157, 174 (D.D.C.) (“the FMP does not constitute final agency action without promulgation of the corresponding regulations: neither approval of the FMP nor failure to act on it marks the end of the decisionmaking process; nor does the FMP establish any rights or obligations or create any binding legal consequences. Adoption of implementing regulations is mandatory[.]”).

c. Tenth Amendment

Plaintiffs' final argument is that the inclusion of state marine fishery officials among council members “conscripts” state officers to administer the MSA, in violation of the Tenth Amendment. See [Printz v. United States](#), 521 U.S. 898, 935 (1997). The argument warrants little discussion. State officials are placed on Councils to provide advice regarding state concerns. See 16 U.S.C. § 1801(b)(5). They can also influence FMPs through their votes. 16 U.S.C. § 1852 (b)(1)(A). This is not a case of Congress attempting to “conscript state [officials] into the national bureaucratic army.” [Nat'l Fed. Of Indep. Bus.](#), 132 S. Ct. at 2606-07. Unlike the Affordable Care

Act at issue in [Nat'l Fed. of Indep. Bus.](#), where Congress intended to penalize states that did not participate in an expanded Medicaid program, the MSA imposes no penalties or coerced force where Councils are concerned. A state which does not provide a representative will simply not have representation. The court therefore rejects plaintiff's Tenth Amendment challenge.

#### **IV. Conclusion**

Ultimately, the voluminous administrative record demonstrates that A16 -- including the industry funding requirement -- was the end product of a lengthy period of deliberation and public comment. See [Lovgren](#), 701 F.3d at 12 ("The N.E. Council adopted . . . Amendment 16[] after 3 years' work, which included several publications in the federal register, eight public hearings, and receipt of numerous comments."). The record demonstrates that the Secretary received considerable feedback on the ASM plan in general and the industry funding aspect in particular. Some comments from industry interests supported the monitor requirement and, in at least one case, expressed the understanding that such costs, while a potential burden, are an expected expense of doing business. See doc. no. 58, Ex. 3 (comments by Cape Cod Commercial Hook Fisherman's Association & Georges Bank Fixed Gear and Hook

Sectors). At the same time, the Secretary received comments from other industry interests pointing out the financial hardship that monitoring costs would create, *id.* at Exs. 7, 16. Against this legal and factual backdrop, and for the reasons set forth herein, the court finds that plaintiffs' suit is untimely and, in the alternative: 1) that the industry funding requirement is authorized by the MSA and does not violate the Anti-Deficiency Act, The Miscellaneous Receipts Act or the Commerce Clause; 2) that the government did not violate the Regulatory Flexibility Act or the National Environmental Policy Act in implementing the funding requirement; and 3) that Amendment 16 does not violate the 4th or Tenth Amendments.

Accordingly, the Secretary's motion for summary judgment<sup>15</sup> is GRANTED. The plaintiffs' motion for summary judgment<sup>10</sup> is DENIED.

**SO ORDERED.**

  
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Joseph N. Laplante  
United States District Judge

Dated: July 29, 2016

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<sup>15</sup> Doc. no. 56.

<sup>10</sup> Doc. no. 53.

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

David Goethel

v.

Civil No. 15-cv-00497-JL

US Department of Commerce,  
Secretary et al

**J U D G M E N T**

In accordance with the Order dated July 29, 2016, by Chief Judge Joseph N. Laplante,  
judgment is hereby entered.

By the Court,

*/s/ Pamela E. Phelan*

\_\_\_\_\_  
Pamela E. Phelan  
Chief Deputy Clerk

Date: August 1, 2016

cc: Eric R. Bolinder, Esq.  
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AA0032

**5 U.S.C.A. § 551**

§ 551. Definitions

For the purpose of this subchapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory;

or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;<sup>1</sup>

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

- (8) “license” includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
- (9) “licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;
- (10) “sanction” includes the whole or a part of an agency--
- (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
  - (B) withholding of relief;
  - (C) imposition of penalty or fine;
  - (D) destruction, taking, seizure, or withholding of property;
  - (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
  - (F) requirement, revocation, or suspension of a license; or
  - (G) taking other compulsory or restrictive action;
- (11) “relief” includes the whole or a part of an agency--
- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
  - (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
  - (C) taking of other action on the application or petition of, and beneficial to, a person;
- (12) “agency proceeding” means an agency process as defined by paragraphs (5), (7), and (9) of this section;
- (13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and
- (14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

**5 U.S.C.A. § 603**

§ 603. Initial regulatory flexibility analysis

**(a)** Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

**(b)** Each initial regulatory flexibility analysis required under this section shall contain--

- (1)** a description of the reasons why action by the agency is being considered;
- (2)** a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3)** a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4)** a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- (5)** an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

**(c)** Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

- (1)** the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2)** the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3)** the use of performance rather than design standards; and
- (4)** an exemption from coverage of the rule, or any part thereof, for such small entities.

**(d)(1)** For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of--

**(A)** any projected increase in the cost of credit for small entities;

**(B)** any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

**(C)** advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

**(2)** A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)--

**(A)** identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

**(B)** collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

### **CREDIT(S)**

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1166; amended Pub.L. 104-121, Title II, § 241(a)(1), Mar. 29, 1996, 110 Stat. 864; Pub.L. 111-203, Title X, § 1100G(b), July 21, 2010, 124 Stat. 2112.)

### **5 U.S.C.A. § 604**

#### § 604. Final regulatory flexibility analysis

**(a)** When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

**(1)** a statement of the need for, and objectives of, the rule;

**(2)** a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

**(3)** the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

- (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
  - (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
  - (6)<sup>1</sup> a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and
  - (6)<sup>1</sup> for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.
- (b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

### **CREDIT(S)**

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub.L. 104-121, Title II, § 241(b), Mar. 29, 1996, 110 Stat. 864; Pub.L. 111-203, Title X, § 1100G(c), July 21, 2010, 124 Stat. 2113; Pub.L. 111-240, Title I, § 1601, Sept. 27, 2010, 124 Stat. 2551.)

### **5 U.S.C.A. § 701**

#### § 701. Application; definitions

(b) For the purpose of this chapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory;  
or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;<sup>1</sup> and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

**5 U.S.C.A. § 702**

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

**5 U.S.C.A. § 703**

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

**5 U.S.C.A. § 704**

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

**5 U.S.C.A. § 706**

§ 706. Scope of review

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

**7 U.S.C.A. § 1622**

§ 1622. Duties of Secretary relating to agricultural products

**(h) Inspection and certification of products in interstate commerce; credit and future availability of funds; investment; certificates as evidence; penalties**

(1) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.

(2)(A) Any fees collected under this subsection, late payment penalties, the proceeds from the sales of samples, and interest earned from the investment of such funds shall be credited to the trust fund account that incurs the cost of the services provided under this subsection and shall remain available without fiscal year limitation to pay the expenses of the Secretary incident to providing such services.

(B) Such funds may be invested by the Secretary in insured or fully collateralized, interest-bearing accounts or, at the discretion of the Secretary, by the Secretary of the Treasury in United States Government debt instruments.

(3) Any official certificate issued under the authority of this subsection shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the statements therein contained.

(4) Whoever knowingly shall falsely make, issue, alter, forge, or counterfeit any official certificate, memorandum, mark, or other identification, or device for making such mark or identification, with respect to inspection, class, grade, quality, size, quantity, or condition, issued or authorized under this section or knowingly cause or procure, or aid, assist in, or be a party to, such false making, issuing, altering, forging, or counterfeiting, or whoever knowingly shall possess, without promptly notifying the Secretary of Agriculture or his representative, utter, publish, or use as true, or cause to be uttered, published, or used as true, any such falsely made, altered, forged, or counterfeited official certificate, memorandum, mark, identification, or device, or whoever knowingly represents that an agricultural product has been officially inspected or graded (by an authorized inspector or grader) under the authority of this section when such commodity has in fact not been so graded or inspected shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(5) Shell eggs packed under the voluntary grading program of the Department of Agriculture shall not have been shipped for sale previous to being packed under the program, as determined under a regulation promulgated by the Secretary.

**(6) Identification of honey**

**(A) In general**

The use of a label or advertising material on, or in conjunction with, packaged honey that bears any official certificate of quality, grade mark or statement, continuous inspection mark or statement, sampling mark or statement, or any combination of the certificates, marks, or statements of the Department of Agriculture is hereby prohibited under this Act unless there appears legibly and permanently in close proximity (such as on the same side(s) or surface(s)) to the certificate, mark, or statement, and in at least a comparable size, the 1 or more names of the 1 or more countries of origin of the lot or container of honey, preceded by the words "Product of" or other words of similar meaning.

**(B) Violation**

A violation of the requirements of subparagraph (A) may be deemed by the Secretary to be sufficient cause for debarment from the benefits of this Act only with respect to honey.

**CREDIT(S)**

(Aug. 14, 1946, c. 966, Title II, § 203, 60 Stat. 1087; Aug. 9, 1955, c. 632, § 1, 69 Stat. 553; Sept. 29, 1977, Pub.L. 95-113, Title II, § 206, 91 Stat. 920; Aug. 6, 1981, Pub.L. 97-31, § 12(2), 95 Stat. 153; Aug. 28, 1984, Pub.L. 98-403, § 2, 98 Stat. 1480; Oct. 4, 1984, Pub.L. 98-443, § 9(j), 98 Stat. 1708; Oct. 21, 1998, Pub.L. 105-277, Div. A, § 101(a) [Title VII, § 755(a)], 112 Stat. 2681-34; Nov. 9, 2000, Pub.L. 106-472, Title III, § 303, 114 Stat. 2069; May 22, 2008, Pub.L. 110-

234, Title X, § 10402(a), Title XI, § 11016(a), 122 Stat. 1349, 1368; June 18, 2008, Pub.L. 110-246, § 4(a), Title X § 10402(a), Title XI, § 11016(a), 122 Stat. 1664, 2110, 2130; Pub.L. 113-79, Title VI, § 6202, Title XII, § 12106(a)(4), Feb. 7, 2014, 128 Stat. 856, 981.)

**16 U.S.C.A. § 1801**

§ 1801. Findings, purposes and policy

**(a) Findings**

The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls, or (C) direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(8) The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.

(9) One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.

(10) Pacific Insular Areas contain unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth.

(11) A number of the Fishery Management Councils have demonstrated significant progress in integrating ecosystem considerations in fisheries management using the existing authorities provided under this chapter.

(12) International cooperation is necessary to address illegal, unreported, and unregulated fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry.

**(b) Purposes**

It is therefore declared to be the purposes of the Congress in this chapter--

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, and (B) exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

- (3) to promote domestic commercial and recreational fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing;
- (4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;
- (5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) 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 (B) which take into account the social and economic needs of the States;
- (6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development in a non-wasteful manner; and
- (7) to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.

**(c) Policy**

It is further declared to be the policy of the Congress in this chapter--

- (1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;
- (2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;
- (3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; considers efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish; and is workable and effective;
- (4) to permit foreign fishing consistent with the provisions of this chapter;
- (5) to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management

of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation;  
(6) to foster and maintain the diversity of fisheries in the United States; and  
(7) to ensure that the fishery resources adjacent to a Pacific Insular Area, including resident or migratory stocks within the exclusive economic zone adjacent to such areas, be explored, developed, conserved, and managed for the benefit of the people of such area and of the United States.

**CREDIT(S)**

(Pub.L. 94-265, § 2, Apr. 13, 1976, 90 Stat. 331; Pub.L. 95-354, § 2, Aug. 28, 1978, 92 Stat. 519; Pub.L. 96-561, Title II, § 233, Dec. 22, 1980, 94 Stat. 3299; Pub.L. 99-659, Title I, § 101(c)(1), Nov. 14, 1986, 100 Stat. 3707; Pub.L. 101-627, Title I, § 101, Nov. 28, 1990, 104 Stat. 4437; Pub.L. 102-251, Title III, § 301(a), Mar. 9, 1992, 106 Stat. 62; Pub.L. 104-297, Title I, § 101, Oct. 11, 1996, 110 Stat. 3560; Pub.L. 109-479, § 3(a), Title IV, § 402, Jan. 12, 2007, 120 Stat. 3577, 3626.)

**AMENDMENT OF SUBSEC. (B)(1)**

<Pub.L. 102-251, Title III, §§ 301(a), 308, Mar. 9, 1992, 106 Stat. 62, 66, provided that, effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States, with authority to prescribe implementing regulations effective on Mar. 9, 1992, but with no such regulation to be effective until the date on which the Agreement enters into force for the United States, subsec. (b)(1) is amended by inserting “, and fishery resources in the special areas” before the semicolon at the end.>

**16 U.S.C.A. § 1802**

§ 1802. Definitions

(39) The term “Secretary” means the Secretary of Commerce or his designee.

**CREDIT(S)**

(Pub.L. 94-265, § 3, Apr. 13, 1976, 90 Stat. 333; Pub.L. 95-354, § 3, Aug. 28, 1978, 92 Stat. 519; Pub.L. 97-453, § 15(a), Jan. 12, 1983, 96 Stat. 2492; Pub.L. 99-659, Title I, §§ 101(a), 112, Nov. 14, 1986, 100 Stat. 3706, 3715; Pub.L. 100-239, § 2, Jan. 11, 1988, 101 Stat. 1778; Pub.L. 101-627, Title I, § 102(a), Title X, § 1001, Nov. 28, 1990, 104 Stat. 4438, 4468; Pub.L. 102-251, Title III, § 301(b),

Mar. 9, 1992, 106 Stat. 62; Pub.L. 104-297, Title I, § 102, Oct. 11, 1996, 110 Stat. 3561; Pub.L. 109-479, § 3(b), (c), Jan. 12, 2007, 120 Stat. 3577.)

**16 U.S.C.A. § 1821**

§ 1821. Foreign fishing

**(h) Full observer coverage program**

**(1)(A)** Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone.

**(B)** The Secretary shall by regulation prescribe minimum health and safety standards that shall be maintained aboard each foreign fishing vessel with regard to the facilities provided for the quartering of, and the carrying out of observer functions by, United States observers.

**(2)** The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that-

**(A)** in a situation where a fleet of harvesting vessels transfers its catch taken within the exclusive economic zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the requirements of the applicable management plans for the by-catch species are being complied with;

**(B)** in a situation where the foreign fishing vessel is operating under a Pacific Insular Area fishing agreement, the Governor of the applicable Pacific Insular Area, in consultation with the Western Pacific Council, has established an observer coverage program or other monitoring program that the Secretary, in consultation with the Western Pacific Management Council, determines is adequate to monitor harvest, bycatch, and compliance with the laws of the United States by vessels fishing under the agreement;

**(C)** the time during which a foreign fishing vessel will engage in fishing within the exclusive economic zone will be of such short duration that the placing of a United States observer aboard the vessel would be impractical; or

**(D)** for reasons beyond the control of the Secretary, an observer is not available.

**(3)** Observers, while stationed aboard foreign fishing vessels, shall carry out such scientific, compliance monitoring, and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this chapter; and shall cooperate in carrying out such other scientific programs relating to the

conservation and management of living resources as the Secretary deems appropriate.

(4) In addition to any fee imposed under section 1824(b)(10) of this title and section 1980(e) of Title 22 with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 1824 of this title, a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay the permit fee for such vessel under section 1824(b) (10) of this title. All surcharges collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(6) If at any time the requirement set forth in paragraph (1) cannot be met because of insufficient appropriations, the Secretary shall, in implementing a supplementary observer program:

(A) certify as observers, for the purposes of this subsection, individuals who are citizens or nationals of the United States and who have the requisite education or experience to carry out the functions referred to in paragraph (3);

(B) establish standards of conduct for certified observers equivalent to those applicable to Federal personnel;

(C) establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services; and

(D) monitor the performance of observers to ensure that it meets the purposes of this chapter.

#### **CREDIT(S)**

(Pub.L. 94-265, Title II, § 201, Apr. 13, 1976, 90 Stat. 337; Pub.L. 95-354, § 4(1) to (4), Aug. 28, 1978, 92 Stat. 519, 520; Pub.L. 96-61, § 3(a), Aug. 15, 1979, 93 Stat. 407; Pub.L. 96-118, § 5, Nov. 16, 1979, 93 Stat. 860; Pub.L. 96-561, Title II, §§ 230, 231(a), 236, Dec. 22, 1980, 94 Stat. 3296, 3297, 3299; Pub.L. 97-453, §

2(a), Jan. 12, 1983, 96 Stat. 2481; Pub.L. 98-623, Title IV, § 404(1), (2), Nov. 8, 1984, 98 Stat. 3408; Pub.L. 99-386, Title II, § 206(a), Aug. 22, 1986, 100 Stat. 823; Pub.L. 99-659, Title I, §§ 101(c)(2), 103(a), Nov. 14, 1986, 100 Stat. 3707, 3708; Pub.L. 101-627, Title I, § 104, Nov. 28, 1990, 104 Stat. 4439; Pub.L. 102-251, Title III, § 301(d), Mar. 9, 1992, 106 Stat. 63; Pub.L. 103-236, Title I, § 139(24), Apr. 30, 1994, 108 Stat. 399; Pub.L. 104-297, Title I, § 105(a), Oct. 11, 1996, 110 Stat. 3563; Pub.L. 109-479, § 5, Title IV, § 404(a), Jan. 12, 2007, 120 Stat. 3578, 3632.)

#### **AMENDMENT OF SECTION**

<Pub.L. 102-251, Title III, §§ 301(d), 308, Mar. 9, 1992, 106 Stat. 63, 66, provided that, effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States, with authority to prescribe implementing regulations effective on Mar. 9, 1992, but with no such regulation to be effective until the date on which the Agreement enters into force for the United States, this section is amended as follows:>

<(1) in subsection (a)-->

<(A) by inserting “within the special areas,” immediately before “or for anadromous species”; and>

<(B) by striking “beyond the exclusive economic zone” and inserting in lieu thereof “beyond such zone or areas”;>

<(2) in subsection (e)(1)(E)(IV), by inserting “or special areas” immediately after “exclusive economic zone”;>

<(3) in subsection (i) [redesignated (h)]-->

<(A) by inserting “or special areas” immediately before the period at the end of paragraph (1)(A);>

<(B) by inserting “or special areas” immediately after “exclusive economic zone” in paragraph (2)(A); and>

<(C) by inserting “or special areas” immediately after “exclusive economic zone” in paragraph (2)(B) [redesignated par. (2)(C)]; and>

<(4) in subsection (j) [redesignated (i)]-->

<(A) by inserting “, special areas,” immediately after “exclusive economic zone”; and>

<(B) by inserting “, areas,” immediately after “such zone”.>

### **16 U.S.C.A. § 1852**

#### **§ 1852. Regional Fishery Management Councils**

##### **(a) Establishment**

(1) There shall be established, within 120 days after April 13, 1976, eight Regional Fishery Management Councils, as follows:

**(A) New England Council**

The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in paragraph (3)). The New England Council shall have 18 voting members, including 12 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

**(B) Mid-Atlantic Council**

The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except North Carolina, and as provided in paragraph (3)). The Mid-Atlantic Council shall have 21 voting members, including 13 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

**(C) South Atlantic Council**

The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in paragraph (3)). The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

**(D) Caribbean Council**

The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of such States and of commonwealths, territories, and possessions of the United States in the Caribbean Sea (except as provided in paragraph (3)). The Caribbean Council shall have 7 voting members, including 4 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

**(E) Gulf Council**

The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States (except as provided in paragraph (3)). The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

**(F) Pacific Council**

The Pacific Fishery Management Council shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 14 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State), and including one appointed from an Indian tribe with Federally<sup>1</sup> recognized fishing rights from California, Oregon, Washington, or Idaho in accordance with subsection (b)(5) of this section.

**(G) North Pacific Council**

The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary in accordance with subsection (b) (2) of this section (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

**(H) Western Pacific Council**

The Western Pacific Fishery Management Council shall consist of the States of Hawaii, American Samoa, Guam, and the Northern Mariana Islands and shall have authority over the fisheries in the Pacific Ocean seaward of such States and of the Commonwealths, territories, and possessions of the United States in the Pacific Ocean area. The Western Pacific Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each of the following States: Hawaii, American Samoa, Guam, and the Northern Mariana Islands).

(2) Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

(3) The Secretary shall have authority over any highly migratory species fishery that is within the geographical area of authority of more than one of the following Councils: New England Council, Mid-Atlantic Council, South Atlantic Council, Gulf Council, and Caribbean Council.

**(b) Voting members**

(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are

within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

**(C)** The members required to be appointed by the Secretary in accordance with paragraphs (2) and (5).

**(2)(A)** The members of each Council required to be appointed by the Secretary must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned. Within nine months after November 28, 1990, the Secretary shall, by regulation, prescribe criteria for determining whether an individual satisfies the requirements of this subparagraph.

**(B)** The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council. On January 31, 1991, and each year thereafter, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the actions taken by the Secretary to ensure that such fair and balanced apportionment is achieved. The report shall--

**(i)** list the fisheries under the jurisdiction of each Council, outlining for each fishery the type and quantity of fish harvested, fishing and processing methods employed, the number of participants, the duration and range of the fishery, and other distinguishing characteristics;

**(ii)** assess the membership of each Council in terms of the apportionment of the active participants in each such fishery; and

**(iii)** state the Secretary's plans and schedule for actions to achieve a fair and balanced apportionment on the Council for the active participants in any such fishery.

**(C)** The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State. A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has determined that each such individual is qualified under the requirements of subparagraph (A) and unless the Governor has, to the extent practicable, first consulted with representatives of the commercial and recreational fishing interests of the State regarding those individuals. Each such list shall include the names and pertinent biographical data of not less than three individuals for each applicable vacancy and shall be accompanied by a statement by the Governor explaining how each such individual meets the requirements of subparagraph (A). The Secretary shall review each list submitted by a Governor to

ascertain if the individuals on the list are qualified for the vacancy on the basis of such requirements. If the Secretary determines that any individual is not qualified, the Secretary shall notify the appropriate Governor of that determination. The Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question. An individual is not eligible for appointment by the Secretary until that individual complies with the applicable financial disclosure requirements under subsection (k)<sup>2</sup> of this section.

**(D)(i)** The Governor of a State submitting a list of names of individuals for appointment by the Secretary of Commerce to the Gulf of Mexico Fisheries Management Council under subparagraph (C) shall include--

**(I)** at least 1 nominee each from the commercial, recreational, and charter fishing sectors; and

**(II)** at least 1 other individual who is knowledgeable regarding the conservation and management of fisheries resources in the jurisdiction of the Council.

**(ii)** Notwithstanding the requirements of subparagraph (C), if the Secretary determines that the list of names submitted by the Governor does not meet the requirements of clause (i) the Secretary shall--

**(I)** publish a notice in the Federal Register asking the residents of that State to submit the names and pertinent biographical data of individuals who would meet the requirement not met for appointment to the Council; and

**(II)** add the name of any qualified individual submitted by the public who meets the unmet requirement to the list of names submitted by the Governor.

**(iii)** For purposes of clause (i) an individual who owns or operates a fish farm outside of the United States shall not be considered to be a representative of the commercial or recreational fishing sector.

**(iv)** The requirements of this subparagraph shall expire at the end of fiscal year 2012.

**(E)** Whenever the Secretary makes an appointment to a Council, the Secretary shall make a public announcement of such appointment not less than 45 days before the first day on which the individual is to take office as a member of the Council.

**(3)** Each voting member appointed to a Council by the Secretary in accordance with paragraphs (2) and (5) shall serve for a term of 3 years; except that the Secretary may designate a shorter term if necessary to provide for balanced expiration to terms of office. No member appointed after January 1, 1986, may serve more than three consecutive terms. Any term in which an individual was appointed to replace a member who left office during the term shall not be counted in determining the number of consecutive terms served by that Council member.

(4) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(5)(A) The Secretary shall appoint to the Pacific Council one representative of an Indian tribe with Federally<sup>1</sup> recognized fishing rights from California, Oregon, Washington, or Idaho from a list of not less than 3 individuals submitted by the tribal governments. The Secretary, in consultation with the Secretary of the Interior and tribal governments, shall establish by regulation the procedure for submitting a list under this subparagraph.

(B) Representation shall be rotated among the tribes taking into consideration--

(i) the qualifications of the individuals on the list referred to in subparagraph (A),  
(ii) the various rights of the Indian tribes involved and judicial cases that set forth how those rights are to be exercised, and

(iii) the geographic area in which the tribe of the representative is located.

(C) A vacancy occurring prior to the expiration of any term shall be filled in the same manner as set out in subparagraphs (A) and (B), except that the Secretary may use the list from which the vacating representative was chosen.

(D) The tribal representative appointed under subparagraph (A) may designate as an alternate, during the period of the representative's term, an individual knowledgeable concerning tribal rights, tribal law, and the fishery resources of the geographical area concerned.

(6) The Secretary may remove for cause any member of a Council required to be appointed by the Secretary in accordance with paragraphs<sup>3</sup> (2) or (5) if--

(A) the Council concerned first recommends removal by not less than two-thirds of the members who are voting members and submits such removal recommendation to the Secretary in writing together with a statement of the basis for the recommendation; or

(B) the member is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, to have committed an act prohibited by section 1857(1)(O) of this title.

**(h) Functions**

Each Council shall, in accordance with the provisions of this chapter--

(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824(b)(4)(C) of this title or section 1824(d) of this title, and any

fishery management plan or amendment transmitted to it under section 1854(c)(4) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this chapter (and for purposes of this paragraph, the term “geographical area concerned” may include an area under the authority of another Council if the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area; but not unless such other Council is first consulted regarding the conduct of such hearings within its area);

(4) submit to the Secretary such periodic reports as the Council deems appropriate, and any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from, the capacity and extent to which United States fish processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery (except as provided in section<sup>4</sup> subsection (a)(3) of this section) within its geographical area of authority;

(6) develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g);

(7) develop, in conjunction with the scientific and statistical committee, multi-year research priorities for fisheries, fisheries interactions, habitats, and other areas of research that are necessary for management purposes, that shall--

(A) establish priorities for 5-year periods;

(B) be updated as necessary; and

(C) be submitted to the Secretary and the regional science centers of the National Marine Fisheries Service for their consideration in developing research priorities and budgets for the region of the Council; and

(8) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 302, Apr. 13, 1976, 90 Stat. 347; Pub.L. 95-354, § 5(1), Aug. 28, 1978, 92 Stat. 521; Pub.L. 96-561, Title II, § 234, Dec. 22, 1980, 94 Stat. 3299; Pub.L. 97-453, § 5, Jan. 12, 1983, 96 Stat. 2484; Pub.L. 99-659, Title I, § 104(a)(1), (b), (c), (d), (e)(1), Nov. 14, 1986, 100 Stat. 3709, 3710; Pub.L. 101-627, Title I, §§ 108(a) to (j), 120(c), Nov. 28, 1990, 104 Stat. 4444 to 4446, 4459; Pub.L. 102-582, Title IV, § 403, Nov. 2, 1992, 106 Stat. 4909; Pub.L. 104-

297, Title I, § 107, Oct. 11, 1996, 110 Stat. 3570; Pub.L. 106-113, Div. B., § 1000(a)(1), [Title II, § 210], Nov. 29, 1999, 113 Stat. 1535, 1501A-33; Pub.L. 109-479, Title I, §§ 102, 103, Jan. 12, 2007, 120 Stat. 3579.)

**16 U.S.C.A. § 1853**

§ 1853. Contents of fishery management plans

**(a) Required provisions**

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

**(1)** contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

**(A)** necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

**(B)** described in this subsection or subsection (b) of this section, or both; and

**(C)** consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

**(2)** contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

**(3)** assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

**(4)** assess and specify--

**(A)** the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

**(B)** the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

**(C)** the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

**(5)** specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,<sup>1</sup> charter fishing, and fish processing in the fishery,

including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors,<sup>2</sup>

**(6)** consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

**(7)** describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

**(8)** in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

**(9)** include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for--

**(A)** participants in the fisheries and fishing communities affected by the plan or amendment;

**(B)** participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

**(C)** the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

**(10)** 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) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished,

contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority--

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;<sup>3</sup>

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

**(b) Discretionary provisions**

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to--

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

- (B)** designate such zones in areas where deep sea corals are identified under section 1884 of this title, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and
- (C)** with respect to any closure of an area under this chapter that prohibits all fishing, ensure that such closure--
- (i)** is based on the best scientific information available;
  - (ii)** includes criteria to assess the conservation benefit of the closed area;
  - (iii)** establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and
  - (iv)** is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;
- (3)** establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the--
- (A)** catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);
  - (B)** sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and
  - (C)** transshipment or transportation of fish or fish products under permits issued pursuant to section 1824 of this title;
- (4)** prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;
- (5)** incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;
- (6)** establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--
- (A)** present participation in the fishery;
  - (B)** historical fishing practices in, and dependence on, the fishery;
  - (C)** the economics of the fishery;

- (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
- (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
- (F) the fair and equitable distribution of access privileges in the fishery; and
- (G) any other relevant considerations;
- (7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;
- (8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;
- (9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;
- (10) include, consistent with the other provisions of this chapter, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;
- (11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;
- (12) include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and
- (14)<sup>4</sup> prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

**CREDIT(S)**

(Pub.L. 94-265, Title III, § 303, Apr. 13, 1976, 90 Stat. 351; Pub.L. 95-354, § 5(2), (3), Aug. 28, 1978, 92 Stat. 521; Pub.L. 97-453, § 6, Jan. 12, 1983, 96 Stat. 2486; Pub.L. 99-659, Title I, §§ 101(c)(2), 105(a)(1), (b), Nov. 14, 1986, 100 Stat. 3707, 3711; Pub.L. 101-627, Title I, § 109, Nov. 28, 1990, 104 Stat. 4447; Pub.L. 102-251, Title III, § 301(g), Mar. 9, 1992, 106 Stat. 64; Pub.L. 104-297, Title I, § 108(a), (c) to (e), Oct. 11, 1996, 110 Stat. 3574 to 3576; Pub.L. 106-554, § 1(a)(4) [Div. B, Title I, § 144(a)(1), (2)], Dec. 21, 2000, 114 Stat. 2763, 2763A-238; Pub.L. 109-479, Title I, §§ 101(b), 104(a), 105, 106(a)(1), Jan. 12, 2007, 120 Stat. 3579, 3584 to 3586.)

**16 U.S.C.A. § 1854**

§ 1854. Action by Secretary

**(a) Review of plans**

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall--

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 1853(a)(6) of this title.

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b) of this section, the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan amendment, or proposed regulation that the Council characterizes as final.

**(b) Review of regulations**

(1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 1853(c) of this title, the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this chapter and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and--

(A) if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register, with such technical changes as may be necessary for clarity and an explanation of those changes, for a public comment period of 15 to 60 days; or

(B) if that determination is negative, the Secretary shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, this chapter, and other applicable law.

**(d) Establishment of fees**

(1) The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title. The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

**(f) Fisheries under authority of more than one Council**

(1) Except as provided in paragraph (3), if any fishery extends beyond the geographical area of authority of any one Council, the Secretary may--

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

**(h) Repeal or revocation of a fishery management plan**

The Secretary may repeal or revoke a fishery management plan for a fishery under the authority of a Council only if the Council approves the repeal or revocation by a three-quarters majority of the voting members of the Council.

**(i)<sup>1</sup> Environmental review process**

**(1) Procedures**

The Secretary shall, in consultation with the Councils and the Council on Environmental Quality, revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.). The procedures shall--

(A) conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and

(B) integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this chapter in order to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork, and effectively involve the public.

**(2) Usage**

The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this chapter.

**(3) Schedule for promulgation of final procedures**

The Secretary shall--

(A) propose revised procedures within 6 months after January 12, 2007;

(B) provide 90 days for public review and comments; and

(C) promulgate final procedures no later than 12 months after January 12, 2007.

**(4) Public participation**

The Secretary is authorized and directed, in cooperation with the Council on Environmental Quality and the Councils, to involve the affected public in the development of revised procedures, including workshops or other appropriate means of public involvement.

**CREDIT(S)**

(Pub.L. 94-265, Title III, § 304, Apr. 13, 1976, 90 Stat. 352; Pub.L. 97-453, § 7(a), Jan. 12, 1983, 96 Stat. 2487; Pub.L. 99-659, Title I, § 106, Nov. 14, 1986, 100 Stat. 3712; Pub.L. 101-627, Title I, §§ 110(a), (b)(1), (c), 111(a)(2), 120(d), Nov. 28, 1990, 104 Stat. 4449 to 4452, 4459; Pub.L. 102-567, Title III, § 303, Oct. 29, 1992, 106 Stat. 4283; Pub.L. 103-206, Title VII, § 702, Dec. 20, 1993, 107 Stat. 2446; Pub.L. 104-297, Title I, § 109(a) to (c), (e) to (g), (i), Oct. 11, 1996, 110 Stat. 3581 to 3585, 3587; Pub.L. 109-479, § 3(d)(2), Title I, §§ 104(c), 106(b), (d), 107, Title IV, § 406, Jan. 12, 2007, 120 Stat. 3578, 3584, 3593, 3594, 3633.)

**16 U.S.C.A. § 1855**

§ 1855. Other requirements and authority

**(e) Effect of certain laws on certain time requirements**

The Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and Executive Order Numbered 12866, dated September 30, 1993, shall be complied with within the time limitations specified in subsections (a), (b), and (c) of section 1854 of this title as they apply to the functions of the Secretary under such provisions.

**(f) Judicial review**

**(1)** Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

**(A)** section 705 of such Title is not applicable, and

**(B)** the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.

**(2)** The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

**(3)(A)** Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

**(B)** A response of the Secretary under this paragraph shall include a copy of the administrative record for the regulations that are the subject of the petition.

**(4)** Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.

**(i) Alaska and Western Pacific community development programs**

**(1) Western Alaska community development quota program**

**(A) In general**

There is established the western Alaska community development quota program in order--

**(i)** to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area;

- (ii) to support economic development in western Alaska;
- (iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and
- (iv) to achieve sustainable and diversified local economies in western Alaska.

**(B) Program allocation**

**(i) In general**

Except as provided in clause (ii), the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

**(ii) Exceptions**

Notwithstanding clause (i)--

**(I)** the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a total allocation (directed and nontarget combined) of 10.7 percent effective January 1, 2008; and

**(II)** the allocation under the program in any directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) established after July 11, 2006, shall be a total allocation (directed and nontarget combined) of 10.7 percent.

The total allocation (directed and nontarget combined) for a fishery to which subclause (I) or (II) applies may not be exceeded.

**(iii) Processing and other rights**

Allocations to the program include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

**(iv) Regulation of harvest**

The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.

**(C) Allocations to entities**

Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all

processing rights and any other rights and privileges associated with such allocations as of March 1, 2006. Voluntary transfers by and among eligible entities shall be allowed, whether before or after harvesting. Notwithstanding the first sentence of this subparagraph, seven-tenths of one percent of the total allowable catch, guideline harvest level, or other annual catch limit, within the amount allocated to the program by subclause (I) or subclause (II) of subparagraph (B)(ii), shall be allocated among the eligible entities by the panel established in subparagraph (G), or allocated by the Secretary based on the nontarget needs of eligible entities in the absence of a panel decision.

**(D) Eligible villages**

The following villages shall be eligible to participate in the program through the following entities:

(i) The villages of Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, and Saint George through the Aleutian Pribilof Island Community Development Association.

(ii) The villages of Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon/Savonoski, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik through the Bristol Bay Economic Development Corporation.

(iii) The village of Saint Paul through the Central Bering Sea Fishermen's Association.

(iv) The villages of Chefnak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtown, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, and Tununak through the Coastal Villages Region Fund.

(v) The villages of Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, and White Mountain through the Norton Sound Economic Development Corporation.

(vi) The villages of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, and Nunam Iqua through the Yukon Delta Fisheries Development Association.

**(E) Eligibility requirements for participating entities**

To be eligible to participate in the program, an entity referred to in subparagraph (D) shall meet the following requirements:

**(i) Board of directors**

The entity shall be governed by a board of directors. At least 75 percent of the members of the board shall be resident fishermen from the entity's member villages. The board shall include at least one director selected by each such member village.

**(ii) Panel representative**

The entity shall elect a representative to serve on the panel established by subparagraph (G).

**(iii) Other investments**

The entity may make up to 20 percent of its annual investments in any combination of the following:

**(I)** For projects that are not fishery-related and that are located in its region.

**(II)** On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-related and that are located in one or more of their regions.

**(III)** For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant program under any other provision of law.

**(iv) Fishery-related investments**

The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.

**(v) Annual statement of compliance**

Each year the entity, following approval by its board of directors and signed by its chief executive officer, shall submit a written statement to the Secretary and the State of Alaska that summarizes the purposes for which it made investments under clauses (iii) and (iv) during the preceding year.

**(vi) Other panel requirements**

The entity shall comply with any other requirements established by the panel under subparagraph (G).

**(F) Entity status, limitations, and regulation**

The entity--

**(i)** shall be subject to any excessive share ownership, harvesting, or processing limitations in the fisheries of the Bering Sea and Aleutian Islands Management Area only to the extent of the entity's proportional ownership, excluding any program allocations, and notwithstanding any other provision of law;

**(ii)** shall comply with State of Alaska law requiring annual reports to the entity's member villages summarizing financial operations for the previous calendar year, including general and administrative costs and compensation levels of the top 5 highest paid personnel;

**(iii)** shall comply with State of Alaska laws to prevent fraud that are administered by the Alaska Division of Banking and Securities, except that the entity and the State shall keep confidential from public disclosure any information if the disclosure would be harmful to the entity or its investments; and

(iv) is exempt from compliance with any State law requiring approval of financial transactions, community development plans, or amendments thereto, except as required by subparagraph (H).

**(G) Administrative panel**

**(i) Establishment**

There is established a community development quota program panel.

**(ii) Membership**

The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel.

**(iii) Functions**

The panel shall--

**(I)** administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and

**(II)** coordinate and facilitate activities of the entities under the program.

**(iv) Unanimity required**

The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel.

**(H) Decennial review and adjustment of entity allocations**

**(i) In general**

During calendar year 2012 and every 10 years thereafter, the State of Alaska shall evaluate the performance of each entity participating in the program based on the criteria described in clause (ii).

**(ii) Criteria**

The panel shall establish a system to be applied under this subparagraph that allows each entity participating in the program to assign relative values to the following criteria to reflect the particular needs of its villages:

**(I)** Changes during the preceding 10-year period in population, poverty level, and economic development in the entity's member villages.

**(II)** The overall financial performance of the entity, including fishery and nonfishery investments by the entity.

**(III)** Employment, scholarships, and training supported by the entity.

**(IV)** Achieving of the goals of the entity's community development plan.

**(iii) Adjustment of allocations**

After the evaluation required by clause (i), the State of Alaska shall make a determination, on the record and after an opportunity for a hearing, with respect to the performance of each entity participating in the program for the criteria described in clause (ii). If the State determines that the entity has maintained or improved its overall performance with respect to the criteria, the allocation to such

entity under the program shall be extended by the State for the next 10-year period. If the State determines that the entity has not maintained or improved its overall performance with respect to the criteria--

**(I)** at least 90 percent of the entity's allocation for each species under subparagraph (C) shall be extended by the State for the next 10-year period; and

**(II)** the State may determine, or the Secretary may determine (if State law prevents the State from making the determination), and implement an appropriate reduction of up to 10 percent of the entity's allocation for each species under subparagraph (C) for all or part of such 10-year period.

**(iv) Reallocation of reduced amount**

If the State or the Secretary reduces an entity's allocation under clause (iii), the reduction shall be reallocated among other entities participating in the program whose allocations are not reduced during the same period in proportion to each such entity's allocation of the applicable species under subparagraph (C).

**(I) Secretarial approval not required**

Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.

**(J) Community development plan defined**

In this paragraph, the term "community development plan" means a plan, prepared by an entity referred to in subparagraph (D), for the program that describes how the entity intends--

**(i)** to harvest its share of fishery resources allocated to the program, or

**(ii)** to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development,

but does not include a plan that allocates fishery resources to the program.

**(2)(A)** The Western Pacific Council and the Secretary may establish a western Pacific community development program for any fishery under the authority of such Council in order to provide access to such fishery for western Pacific communities that participate in the program.

**(B)** To be eligible to participate in the western Pacific community development program, a community shall--

**(i)** be located within the Western Pacific Regional Fishery Management Area;

**(ii)** meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the Federal Register;

**(iii)** consist of community residents who are descended from the aboriginal people indigenous to the area who conducted commercial or subsistence fishing using traditional fishing practices in the waters of the Western<sup>1</sup> Pacific region;

(iv) not have previously developed harvesting or processing capability sufficient to support substantial participation in fisheries in the Western Pacific Regional Fishery Management Area; and

(v) develop and submit a Community Development Plan to the Western Pacific Council and the Secretary.

(C) In developing the criteria for eligible communities under subparagraph (B)(ii), the Western Pacific Council shall base such criteria on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery, and economic barriers to access to the fishery.

(D) For the purposes of this subsection “Western Pacific Regional Fishery Management Area” means the area under the jurisdiction of the Western Pacific Council, or an island within such area.

(E) Notwithstanding any other provision of this chapter, the Western Pacific Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.

(3) The Secretary shall deduct from any fees collected from a community development quota program under section 1854(d)(2) of this title the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the allocation to such program has been made.

(4) After October 11, 1996, the North Pacific Council and Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 305, Apr. 13, 1976, 90 Stat. 354; Pub.L. 96-561, Title II, § 235, Dec. 22, 1980, 94 Stat. 3299; Pub.L. 97-453, § 8, Jan. 12, 1983, 96 Stat. 2490; Pub.L. 101-627, Title I, §§ 110(b)(2), 111(a)(1), (b), Nov. 28, 1990, 104 Stat. 4451, 4452; Pub.L. 104-297, Title I, §§ 110(a) to (d), 111(a), Oct. 11, 1996, 110 Stat. 3587 to 3590, 3592; Pub.L. 109-241, Title IV, § 416(a), July 11, 2006, 120 Stat. 540; Pub.L. 109-479, § 3(d)(3), Title I, §§ 108 to 110, 116(b)(1), Jan. 12, 2007, 120 Stat. 3578, 3594, 3606.)

### **16 U.S.C.A. § 1861**

#### **§ 1861. Enforcement**

#### **(d) Jurisdiction of courts**

The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Hawaii or any possession of the United States in the Pacific Ocean, the appropriate

court is the United States District Court for the District of Hawaii, except that in the case of Guam and Wake Island, the appropriate court is the United States District Court for the District of Guam, and in the case of the Northern Mariana Islands, the appropriate court is the United States District Court for the District of the Northern Mariana Islands. Any such court may, at any time--

- (1) enter restraining orders or prohibitions;
- (2) issue warrants, process in rem, or other process;
- (3) prescribe and accept satisfactory bonds or other security; and
- (4) take such other actions as are in the interest of justice.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 311, Apr. 13, 1976, 90 Stat. 358; Pub.L. 96-470, Title II, § 209(e), Oct. 19, 1980, 94 Stat. 2245; Pub.L. 97-453, §§ 13, 15(c), Jan. 12, 1983, 96 Stat. 2491, 2493; Pub.L. 99-659, Title I, §§ 101(c)(2), 109(b), Nov. 14, 1986, 100 Stat. 3707, 3714; Pub.L. 101-627, Title I, § 117, Nov. 28, 1990, 104 Stat. 4456; Pub.L. 102-251, Title III, § 301(i), Mar. 9, 1992, 106 Stat. 64; Pub.L. 102-567, Title IX, § 901, Oct. 29, 1992, 106 Stat. 4316; Pub.L. 104-297, Title I, § 115, Oct. 11, 1996, 110 Stat. 3599; Pub.L. 109-479, Title I, § 111(a), Jan. 12, 2007, 120 Stat. 3596; Pub.L. 114-120, Title VI, § 609, Feb. 8, 2016, 130 Stat. 83.)

### **AMENDMENT OF SUBSEC. (B)(2)**

<Pub.L. 102-251, Title III, §§ 301(i), 308, Mar. 9, 1992, 106 Stat. 64, 66, provided that, effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States, with authority to prescribe implementing regulations effective Mar. 9, 1992, but with no such regulation to be effective until the date on which the Agreement enters into force for the United States, subsec. (b)(2) is amended by inserting “and special areas” after “exclusive economic zone”.>

## **16 U.S.C.A. § 1862**

### **§ 1862. North Pacific fisheries conservation**

#### **(a) In general**

The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan for any fishery under the Council's jurisdiction except a salmon fishery which--

- (1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the

conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system, or system,<sup>1</sup> of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan.

**(b) Standards**

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to--

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall--

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers, or electronic monitoring systems, on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a fixed amount reflecting actual observer costs as described in subparagraph (A) or a percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against some or all fishing vessels and United States fish processors, including those not required to carry an observer or an electronic monitoring system under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section;

(I) provide that fees collected will be credited against any fee for stationing observers or electronic monitoring systems on board fishing vessels and United States fish processors and the actual cost of inputting collected data to which a fishing vessel or fish processor is subject under section 1854(d) of this title; and

(J) meet the requirements of section 9701(b) of Title 31.

**(c) Action by Secretary**

(1) Within 60 days after receiving a plan or plan amendment from the North Pacific Council under this section, the Secretary shall review such plan or plan amendment and either (A) remand such plan or plan amendment to the Council with comments if it does not meet the requirements of this section, or (B) publish in the Federal Register proposed regulations for implementing such plan or plan amendment.

(2) During the 60-day public comment period, the Secretary shall conduct a public hearing in each State represented on the Council for the purpose of receiving public comments on the proposed regulations.

(3) Within 45 days of the close of the public comment period, the Secretary, in consultation with the Council, shall analyze the public comment received and publish final regulations for implementing such plan.

(4) If the Secretary remands a plan or plan amendment to the Council for failure to meet the requirements of this section, the Council may resubmit such plan or plan amendment at any time after taking action the Council believes will address the defects identified by the Secretary. Any plan or plan amendment resubmitted to the Secretary will be treated as an original plan submitted to the Secretary under paragraph (1) of this subsection.

**(d) Fishery Observer Fund**

There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

**(e) Special provisions regarding observers**

(1) The Secretary shall review--

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that--

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

**(f) Bycatch reduction**

In implementing section 1853(a)(11) of this title and this section, the North Pacific Council shall submit conservation and management measures to lower, on an annual basis for a period of not less than four years, the total amount of economic discards occurring in the fisheries under its jurisdiction.

**(g) Bycatch reduction incentives**

(1) Notwithstanding section 1854(d) of this title, the North Pacific Council may submit, and the Secretary may approve, consistent with the provisions of this chapter, a system of fines in a fishery to provide incentives to reduce bycatch and bycatch rates; except that such fines shall not exceed \$25,000 per vessel per season. Any fines collected shall be deposited in the North Pacific Fishery Observer Fund, and may be made available by the Secretary to offset costs related to the reduction of bycatch in the fishery from which such fines were derived, including conservation and management measures and research, and to the State of Alaska to offset costs incurred by the State in the fishery from which such penalties were derived or in fisheries in which the State is directly involved in management or enforcement and which are directly affected by the fishery from which such penalties were derived.

(2)(A) Notwithstanding section 1853(d) of this title, and in addition to the authority provided in section 1853(b)(10) of this title, the North Pacific Council may submit, and the Secretary may approve, conservation and management measures which provide allocations of regulatory discards to individual fishing vessels as an incentive to reduce per vessel bycatch and bycatch rates in a fishery, *Provided, That*--

(i) such allocations may not be transferred for monetary consideration and are made only on an annual basis; and

(ii) any such conservation and management measures will meet the requirements of subsection (h) of this section and will result in an actual reduction in regulatory discards in the fishery.

**(B)** The North Pacific Council may submit restrictions in addition to the restriction imposed by clause (i) of subparagraph (A) on the transferability of any such allocations, and the Secretary may approve such recommendation.

**(h) Catch measurement**

**(1)** By June 1, 1997 the North Pacific Council shall submit, and the Secretary may approve, consistent with the other provisions of this chapter, conservation and management measures to ensure total catch measurement in each fishery under the jurisdiction of such Council. Such measures shall ensure the accurate enumeration, at a minimum, of target species, economic discards, and regulatory discards.

**(2)** To the extent the measures submitted under paragraph (1) do not require United States fish processors and fish processing vessels (as defined in chapter 21 of Title 46) to weigh fish, the North Pacific Council and the Secretary shall submit a plan to the Congress by January 1, 1998, to allow for weighing, including recommendations to assist such processors and processing vessels in acquiring necessary equipment, unless the Council determines that such weighing is not necessary to meet the requirements of this subsection.

**(i) Full retention and utilization**

**(1)** The North Pacific Council shall submit to the Secretary by October 1, 1998 a report on the advisability of requiring the full retention by fishing vessels and full utilization by United States fish processors of economic discards in fisheries under its jurisdiction if such economic discards, or the mortality of such economic discards, cannot be avoided. The report shall address the projected impacts of such requirements on participants in the fishery and describe any full retention and full utilization requirements that have been implemented.

**(2)** The report shall address the advisability of measures to minimize processing waste, including standards setting minimum percentages which must be processed for human consumption. For the purpose of the report, “processing waste” means that portion of any fish which is processed and which could be used for human consumption or other commercial use, but which is not so used.

**(j) Bering Sea and Aleutian Islands crab rationalization**

**(1)** By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003. This section shall not preclude the Secretary from approving by January 1, 2005, and implementing any subsequent program amendments approved by the Council.

**(2)** Notwithstanding any other provision of this chapter, in carrying out paragraph (1) the Secretary shall approve all parts of the Program referred to in such paragraph. Further, no part of such Program may be implemented if, as approved

by the North Pacific Fishery Management Council, individual fishing quotas, processing quotas, community development quota allocation, voluntary cooperatives, binding arbitration, regional landing and processing requirements, community protections, economic data collection, or the loan program for crab fishing vessel captains and crew members, is invalidated subject to a judicial determination not subject to judicial appeal. If the Secretary determines that a processor has leveraged its Individual Processor Quota shares to acquire a harvesters open-delivery "B shares", the processor's Individual Processor Quota shares shall be forfeited.

**(3)** Subsequent to implementation pursuant to paragraph (1), the Council may submit and the Secretary may implement changes to or repeal of conservation and management measures, including measures authorized in this section, for crab fisheries of the Bering Sea and Aleutian Islands in accordance with applicable law, including this chapter as amended by this subsection, to achieve on a continuing basis the purposes identified by the Council.

**(4)** The loan program referred to in paragraph (2) shall be carried out pursuant to the authority of sections 53735 and 53702(b) of Title 46.

**(5)** For purposes of implementing this section \$1,000,000 shall be made available each year until fully implemented from funds otherwise made available to the National Marine Fisheries Service for Alaska fisheries activities.

**(6)** Nothing in this chapter shall constitute a waiver, either express or implied, of the antitrust laws of the United States. The Secretary, in consultation with the Department of Justice and the Federal Trade Commission, shall develop and implement a mandatory information collection and review process to provide any and all information necessary for the Department of Justice and the Federal Trade Commission to determine whether any illegal acts of anti-competition, anti-trust, or price collusion have occurred among persons receiving individual processing quotas under the Program. The Secretary may revoke any individual processing quota held by any person found to have violated a provision of the antitrust laws of the United States.

**(7)** An individual processing quota issued under the Program shall be considered a permit for the purposes of sections 1857, 1858, and 1859 of this title, and may be revoked or limited at any time in accordance with this chapter. Issuance of an individual processing quota under the program shall not confer any right of compensation to the holder of such individual processing quota if it is revoked or limited and shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is purchased from an individual fishing quota holder.

**(8)** The restriction on the collection of economic data in section 1853 of this title shall not apply with respect to any fish processor who is eligible for, or who has received, individual processing quota under the Program. The restriction on the

disclosure of information in section 1881a(b)(1) of this title shall not apply when the information is used to determine eligibility for or compliance with an individual processing quota program.

(9) The provisions of sections 1858, 1860, and 1861 of this title shall apply to the processing facilities and fish products of any person holding individual processing quota, and the provisions of subparagraphs (D), (E), and (L) of section 1857(l)<sup>2</sup> of this title shall apply to any facility owned or controlled by a person holding individual processing quota.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 313, as added Pub.L. 101-627, Title I, § 118(a), Nov. 28, 1990, 104 Stat. 4457; amended Pub.L. 102-582, Title IV, § 404, Nov. 2, 1992, 106 Stat. 4909; Pub.L. 104-297, Title I, § 117(a), Oct. 11, 1996, 110 Stat. 3603; Pub.L. 108-199, Div. B, Title VIII, § 801, Jan. 23, 2004, 118 Stat. 108; Pub.L. 109-479, Title II, § 214, Jan. 12, 2007, 120 Stat. 3619.)

### **16 U.S.C.A. § 1857**

#### § 1857. Prohibited acts

It is unlawful--

(1) for any person--

(A) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this chapter;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 1821(c) of this title;

(D) to refuse to permit any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title) to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

**(G)** to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

**(H)** to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section;

**(I)** to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United States fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this chapter;

**(J)** to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species *Homarus americanus*, that--  
**(i)** is smaller than the minimum possession size in effect at the time under the American Lobster Fishery Management Plan, as implemented by regulations published in part 649 of title 50, Code of Federal Regulations, or any successor to that plan implemented under this subchapter, or in the absence of any such plan, is smaller than the minimum possession size in effect at the time under a coastal fishery management plan for American lobster adopted by the Atlantic States Marine Fisheries Commission under the Atlantic Coastal Fisheries Cooperative Management Act (16 U.S.C. 5101 et seq.);

**(ii)** is bearing eggs attached to its abdominal appendages; or

**(iii)** bears evidence of the forcible removal of extruded eggs from its abdominal appendages;

**(K)** to to<sup>1</sup> steal or attempt to steal or to negligently and without authorization remove, damage, or tamper with--

**(i)** fishing gear owned by another person, which is located in the exclusive economic zone, or

**(ii)** fish contained in such fishing gear;

**(L)** to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this chapter, or any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under this chapter;

**(M)** to engage in large-scale driftnet fishing that is subject to the jurisdiction of the United States, including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone of any nation;

**(N)** to strip pollock of its roe and discard the flesh of the pollock;

- (O)** to knowingly and willfully fail to disclose, or to falsely disclose, any financial interest as required under section 1852(j) of this title, or to knowingly vote on a Council decision in violation of section 1852(j)(7)(A) of this title;
- (P)(i)** to remove any of the fins of a shark (including the tail) at sea;
- (ii)** to have custody, control, or possession of any such fin aboard a fishing vessel unless it is naturally attached to the corresponding carcass;
- (iii)** to transfer any such fin from one vessel to another vessel at sea, or to receive any such fin in such transfer, without the fin naturally attached to the corresponding carcass; or
- (iv)** to land any such fin that is not naturally attached to the corresponding carcass, or to land any shark carcass without such fins naturally attached;
- (Q)** to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation or any treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party; or
- (R)** to use any fishing vessel to engage in fishing in Federal or State waters, or on the high seas or in the waters of another country, after the Secretary has made a payment to the owner of that fishing vessel under section 1861a(b)(2) of this title.

For purposes of subparagraph (P), there shall be a rebuttable presumption that if any shark fin (including the tail) is found aboard a vessel, other than a fishing vessel, without being naturally attached to the corresponding carcass, such fin was transferred in violation of subparagraph (P)(iii) or that if, after landing, the total weight of shark fins (including the tail) landed from any vessel exceeds five percent of the total weight of shark carcasses landed, such fins were taken, held, or landed in violation of subparagraph (P). In such subparagraph, the term “naturally attached”, with respect to a shark fin, means attached to the corresponding shark carcass through some portion of uncut skin.

- (2)** for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage--
- (A)** in fishing within the boundaries of any State, except--
- (i)** recreational fishing permitted under section 1821(i) of this title;
- (ii)** fish processing permitted under section 1856(c) of this title; or
- (iii)** transshipment at sea of fish or fish products within the boundaries of any State in accordance with a permit approved under section 1824(d) of this title;
- (B)** in fishing, except recreational fishing permitted under section 1821(i) of this title, within the exclusive economic zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is

authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to section 1824(b), (c), or (d) of this title; or

(C) except as permitted under section 1856(c) of this title, in fish processing (as defined in paragraph (4)(A) of such section) within the internal waters of a State (as defined in paragraph (4)(B) of such section);

(3) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to transfer at sea directly or indirectly, or attempt to so transfer at sea, any United States harvested fish to any foreign fishing vessel, while such foreign vessel is within the exclusive economic zone or within the boundaries of any State except to the extent that the foreign fishing vessel has been permitted under section 1824(d) of this title or section 1856(c) of this title to receive such fish;

(4) for any fishing vessel other than a vessel of the United States to operate, and for the owner or operator of a fishing vessel other than a vessel of the United States to operate such vessel, in the exclusive economic zone or within the boundaries of any State, if--

(A) all fishing gear on the vessel is not stored below deck or in an area where it is not normally used, and not readily available, for fishing; or

(B) all fishing gear on the vessel which is not so stored is not secured and covered so as to render it unusable for fishing;

unless such vessel is authorized to engage in fishing in the area in which the vessel is operating; and

(5) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to engage in fishing in the waters of a foreign nation in a manner that violates an international fishery agreement between that nation and the United States that has been subject to Congressional oversight in the manner described in section 1823 of this title, or any regulations issued to implement such an agreement; except that the binding provisions of such agreement and implementing regulations shall have been published in the Federal Register prior to such violation.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 307, Apr. 13, 1976, 90 Stat. 355; Pub.L. 95-354, § 5(4), Aug. 28, 1978, 92 Stat. 521; Pub.L. 97-191, § 2, June 1, 1982, 96 Stat. 107; Pub.L. 97-453, § 15(b), Jan. 12, 1983, 96 Stat. 2492; Pub.L. 99-659, Title I, §§ 101(c)(2), 107(a), Nov. 14, 1986, 100 Stat. 3707, 3713; Pub.L. 100-629, § 4, Nov. 7, 1988, 102 Stat. 3286; Pub.L. 101-224, § 8, Dec. 12, 1989, 103 Stat. 1907; Pub.L. 101-627, Title I, § 113, Nov. 28, 1990, 104 Stat. 4454; Pub.L. 102-251, Title III, § 301(h), Mar. 9, 1992, 106 Stat. 64; Pub.L. 104-297, Title I, § 113, Title IV, § 405(b)(1), Oct. 11, 1996, 110 Stat. 3597, 3621; Pub.L. 106-557, § 3, Dec. 21,

2000, 114 Stat. 2772; Pub.L. 109-479, Title I, § 118, Jan. 12, 2007, 120 Stat. 3607; Pub.L. 111-348, Title I, § 103(a), Jan. 4, 2011, 124 Stat. 3670; Pub.L. 114-81, Title I, § 112, Nov. 5, 2015, 129 Stat. 659.)

#### **AMENDMENT OF SECTION**

<Pub.L. 102-251, Title III, §§ 301(h), 308, Mar. 9, 1992, 106 Stat. 64, 66, as amended Pub.L. 104-297, Title IV, § 405(b)(1), Oct. 11, 1996, 110 Stat. 3621, provided that, effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States, with authority to prescribe implementing regulations effective on Mar. 9, 1992, but with no such regulation to be effective until the date on which the Agreement enters into force for the United States, this section is amended as follows:>

<(1) in paragraph (1)(K), by inserting “or special areas” immediately after “exclusive economic zone”;>

<(2) in paragraph (2)(B)-->

<(A) Repealed. Pub.L. 104-297, Title IV, § 405(b)(1), Oct. 11, 1996, 110 Stat. 3621>

<(B) by inserting “or areas” immediately after “such zone”;>

<(3) in paragraph (3), by inserting “or special areas” immediately after “exclusive economic zone”; and>

<(4) in paragraph (4), by inserting “or special areas” immediately after “exclusive economic zone”.>

#### **16 U.S.C.A. § 1858**

#### **§ 1858. Civil penalties and permit sanctions**

##### **(a) Assessment of penalty**

Any person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty. The amount of the civil penalty shall not exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information

provided by the violator relating to the ability of the violator to pay, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

**(b) Review of civil penalty**

Any person against whom a civil penalty is assessed under subsection (a) of this section or against whom a permit sanction is imposed under subsection (g) of this section (other than a permit suspension for nonpayment of penalty or fine) may obtain review thereof in the United States district court for the appropriate district by filing a complaint against the Secretary in such court within 30 days from the date of such order. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of Title 28. The findings and order of the Secretary shall be set aside by such court if they are not found to be supported by substantial evidence, as provided in section 706(2) of Title 5.

**(c) Action upon failure to pay assessment**

If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

**(d) In rem jurisdiction**

A fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used in the commission of an act prohibited by section 1857 of this title shall be liable in rem for any civil penalty assessed for such violation under this section and may be proceeded against in any district court of the United States having jurisdiction thereof. Such penalty shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.

**(e) Compromise or other action by Secretary**

The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

**(f) Subpenas**

For the purposes of conducting any hearing under this section, the Secretary may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contempt or refusal to obey a subpoena served

upon any person pursuant to this subsection, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

**(g) Permit sanctions**

**(1)** In any case in which (A) a vessel has been used in the commission of an act prohibited under section 1857 of this title, (B) the owner or operator of a vessel or any other person who has been issued or has applied for a permit under this chapter has acted in violation of section 1857 of this title, (C) any amount in settlement of a civil forfeiture imposed on a vessel or other property, or any civil penalty or criminal fine imposed on a vessel or owner or operator of a vessel or any other person who has been issued or has applied for a permit under any marine resource law enforced by the Secretary has not been paid and is overdue, or (D) any payment required for observer services provided to or contracted by an owner or operator who has been issued a permit or applied for a permit under any marine resource law administered by the Secretary has not been paid and is overdue, the Secretary may--

**(i)** revoke any permit issued with respect to such vessel or person, with or without prejudice to the issuance of subsequent permits;

**(ii)** suspend such permit for a period of time considered by the Secretary to be appropriate;

**(iii)** deny such permit; or

**(iv)** impose additional conditions and restrictions on any permit issued to or applied for by such vessel or person under this chapter and, with respect to foreign fishing vessels, on the approved application of the foreign nation involved and on any permit issued under that application.

**(2)** In imposing a sanction under this subsection, the Secretary shall take into account--

**(A)** the nature, circumstances, extent, and gravity of the prohibited acts for which the sanction is imposed; and

**(B)** with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.

**(3)** Transfer of ownership of a vessel, by sale or otherwise, shall not extinguish any permit sanction that is in effect or is pending at the time of transfer of ownership. Before executing the transfer of ownership of a vessel, by sale or otherwise, the owner shall disclose in writing to the prospective transferee the existence of any

permit sanction that will be in effect or pending with respect to the vessel at the time of the transfer.

(4) In the case of any permit that is suspended under this subsection for nonpayment of a civil penalty or criminal fine, the Secretary shall reinstate the permit upon payment of the penalty or fine and interest thereon at the prevailing rate.

(5) No sanctions shall be imposed under this subsection unless there has been a prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed, either in conjunction with a civil penalty proceeding under this section or otherwise.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 308, Apr. 13, 1976, 90 Stat. 356; Pub.L. 97-453, § 10, Jan. 12, 1983, 96 Stat. 2491; Pub.L. 99-659, Title I, § 108, Nov. 14, 1986, 100 Stat. 3713; Pub.L. 101-627, Title I, § 114, Nov. 28, 1990, 104 Stat. 4454; Pub.L. 104-297, Title I, § 114(a) to (c), Oct. 11, 1996, 110 Stat. 3598, 3599.)

### **16 U.S.C.A. § 1859**

#### § 1859. Criminal offenses

#### **(a) Offenses**

A person is guilty of an offense if he commits any act prohibited by--

(1) section 1857(1)(D), (E), (F), (H), (I), or (L) of this title; or

(2) section 1857(2) of this title.

#### **(b) Punishment**

Any offense described in subsection (a)(1) of this section is punishable by a fine of not more than \$100,000, or imprisonment for not more than 6 months, or both; except that if in the commission of any such offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any observer described in section 1857(1)(L) of this title or any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title), or places any such observer or officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than \$200,000, or imprisonment for not more than 10 years, or both. Any offense described in subsection (a)(2) of this section is punishable by a fine of not more than \$200,000.

#### **(c) Jurisdiction**

There is Federal jurisdiction over any offense described in this section.

### **CREDIT(S)**

(Pub.L. 94-265, Title III, § 309, Apr. 13, 1976, 90 Stat. 357; Pub.L. 97-453, § 11(a), Jan. 12, 1983, 96 Stat. 2491; Pub.L. 99-659, Title I, § 107(b), Nov. 14, 1986, 100 Stat. 3713; Pub.L. 100-66, § 2, July 10, 1987, 101 Stat. 384; Pub.L. 101-627, Title I, § 115, Nov. 28, 1990, 104 Stat. 4455.)

### 18 U.S.C.A. § 922

#### § 922. Unlawful acts

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

#### **CREDIT(S)**

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 228; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1216; Pub.L. 97-377, Title I, § 165(a), Dec. 21, 1982, 96 Stat. 1923; Pub.L. 99-308, § 102, May 19, 1986, 100 Stat. 451; Pub.L. 99-408, § 2, Aug. 28, 1986, 100 Stat. 920; Pub.L. 100-649, § 2(a), (f)(2)(A), Nov. 10, 1988, 102 Stat. 3816, 3818; Pub.L. 100-690, Title VII, § 7060(c), Nov. 18, 1988, 102 Stat. 4404; Pub.L. 101-647, Title XVII, § 1702(b)(1), Title XXII, §§ 2201, 2202, 2204(b), Title XXXV, § 3524, Nov. 29, 1990, 104 Stat. 4844, 4856, 4857, 4924; Pub.L. 103-159, Title I, § 102(a)(1), (b), Title III, § 302(a) to (c), Nov. 30, 1993, 107 Stat. 1536, 1539, 1545; Pub.L. 103-322, Title XI, §§ 110102(a), 110103(a), 110105(2), 110106, 110201(a), 110401(b), (c), 110511, 110514, Title XXXII, §§ 320904, 320927, Title XXXIII, § 330011(i), Sept. 13, 1994, 108 Stat. 1996, 1998, 2000, 2010, 2014, 2019, 2125, 2131, 2145; Pub.L. 104-208, Div. A, Title I, § 101(f) [Title VI, §§ 657, 658(b)], Sept. 30, 1996, 110 Stat. 3009-369, 3009-372; Pub.L. 104-294, Title VI, § 603(b), (c)(1), (d) to (f)(1), (g), Oct. 11, 1996, 110 Stat. 3503, 3504; Pub.L. 105-277, Div. A, § 101(b) [Title I, § 121], Oct. 21, 1998, 112 Stat. 2681-71; Pub.L. 107-273, Div. B, Title IV, § 4003(a)(1), Nov. 2, 2002, 116 Stat. 1811; Pub.L. 107-296, Title XI, § 1112(f)(4), (6), Nov. 25, 2002, 116 Stat. 2276; Pub.L. 109-92, §§ 5(c)(1), 6(a), Oct. 26, 2005, 119 Stat. 2099, 2101; Pub.L. 114-94, Div. A, Title XI, § 11412(c)(2), Dec. 4, 2015, 129 Stat. 1688.)

#### **REPEAL OF SUBSEC. (P)**

<Pub.L. 100-649, § 2(f)(2)(A), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1(1), Dec. 9, 2003, 117 Stat. 2481; Pub.L. 113-57, § 1,

Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under this section], subsec. (p) of this section is repealed.>

### 26 U.S.C.A. § 501

§ 501. Exemption from tax on corporations, certain trusts, etc.

(5) Labor, agricultural, or horticultural organizations.

#### **CREDIT(S)**

(Aug. 16, 1954, c. 736, 68A Stat. 163; Mar. 13, 1956, c. 83, § 5(2), 70 Stat. 49; Apr. 22, 1960, Pub.L. 86-428, § 1, 74 Stat. 54; July 14, 1960, Pub.L. 86-667, § 1, 74 Stat. 534; Oct. 16, 1962, Pub.L. 87-834, § 8(d), 76 Stat. 997; Feb. 2, 1966, Pub.L. 89-352, § 1, 80 Stat. 4; Nov. 8, 1966, Pub.L. 89-800, § 6(a), 80 Stat. 1515; June 28, 1968, Pub.L. 90-364, Title I, § 109(a), 82 Stat. 269; Dec. 30, 1969, Pub.L. 91-172, Title I, §§ 101(j)(3) to (6), 121(b)(5)(A), (6)(A), 83 Stat. 526, 527, 541; Dec. 31, 1970, Pub.L. 91-618, § 1, 84 Stat. 1855; Aug. 29, 1972, Pub.L. 92-418, § 1(a), 86 Stat. 656; June 8, 1974, Pub.L. 93-310, § 3(a), 88 Stat. 235; Jan. 3, 1975, Pub.L. 93-625, § 10(c), 88 Stat. 2119; Oct. 4, 1976, Pub.L. 94-455, Title XIII, §§ 1307(a)(1), (d)(1)(A), 1312(a), 1313(a), Title XIX, § 1906(b)(13)(A), Title XXI, §§ 2113(a), 2134(b), 90 Stat. 1720, 1727, 1730, 1834, 1907, 1927; Oct. 20, 1976, Pub.L. 94-568, §§ 1(a), 2(a), 90 Stat. 2697; Feb. 10, 1978, Pub.L. 95-227, § 4(a), 92 Stat. 15; Aug. 15, 1978, Pub.L. 95-345, § 1(a), 92 Stat. 481; Nov. 6, 1978, Pub.L. 95-600, Title VII, § 703(b)(2), (g)(2)(B), 92 Stat. 2939, 2940; Apr. 1, 1980, Pub.L. 96-222, Title I, § 108(b)(2)(B), 94 Stat. 226; Sept. 26, 1980, Pub.L. 96-364, Title II, § 209(a), 94 Stat. 1290; Dec. 24, 1980, Pub.L. 96-601, § 3(a), 94 Stat. 3496; Dec. 28, 1980, Pub.L. 96-605, Title I, § 106(a), 94 Stat. 3523; Dec. 29, 1981, Pub.L. 97-119, Title I, § 103(c)(1), 95 Stat. 1638; Sept. 3, 1982, Pub.L. 97-248, Title II, § 286(a), Title III, § 354(a), (b), 96 Stat. 569, 640, 641; Jan. 12, 1983, Pub.L. 97-448, Title III, § 306(b)(5), 96 Stat. 2406; July 18, 1984, Pub.L. 98-369, Div. A, Title X, §§ 1032(a), 1079, Div. B, Title VIII, § 2813(b), 98 Stat. 1033, 1056, 1206; Apr. 7, 1986, Pub.L. 99-272, Title XI, § 11012(b), 100 Stat. 260; Oct. 22, 1986, Pub.L. 99-514, Title X, §§ 1012(a), 1024(b), Title XI, §§ 1109(a), 1114(b)(14), Title XVI, § 1603(a), Title XVIII, §§ 1879(k)(1), 1899A(15), 100 Stat. 2390, 2406, 2435, 2451, 2768, 2909, 2959; Dec. 22, 1987, Pub.L. 100-203, Title X, § 10711(a)(2), 101 Stat. 1330-464; Nov. 10, 1988, Pub.L. 100-647, Title I, §§ 1010(b)(4), 1011(c)(7)(D), 1016(a)(1)(A), (2) to (4), 1018(u)(14), (15), (34), Title II, § 2003(a)(1), (2), Title VI, § 6202(a), 102 Stat. 3451, 3458, 3573, 3574, 3590, 3592, 3597 to 3598, 3730; Aug. 9,

1989, Pub.L. 101-73, Title XIV, § 1402(a), 103 Stat. 550; Oct. 24, 1992, Pub.L. 102-486, Title XIX, § 1940(a), 106 Stat. 3034; Aug. 10, 1993, Pub.L. 103-66, Title XIII, § 13146(a), (b), 107 Stat. 443; July 30, 1996, Pub.L. 104-168, Title XIII, § 1311(b)(1), 110 Stat. 1478; Aug. 20, 1996, Pub.L. 104-188, Title I, §§ 1114(a), 1704(j)(5), 110 Stat. 1759, 1882; Aug. 21, 1996, Pub.L. 104-191, Title III, §§ 341(a), 342(a), 110 Stat. 2070; Aug. 5, 1997, Pub.L. 105-33, Title IV, § 4041(a), 111 Stat. 360; Aug. 5, 1997, Pub.L. 105-34, Title I, § 101(c), Title IX, §§ 963(a), (b), 974(a), 111 Stat. 799, 892, 898; July 22, 1998, Pub.L. 105-206, Title VI, § 6023(6), (7), 112 Stat. 825; June 7, 2001, Pub.L. 107-16, Title VI, § 611(d)(3)(C), 115 Stat. 98; Dec. 21, 2001, Pub.L. 107-90, Title II, § 202, 115 Stat. 890; Nov. 11, 2003, Pub.L. 108-121, Title I, §§ 105(a), 108(a), 117 Stat. 1338, 1339; Apr. 10, 2004, Pub.L. 108-218, Title II, § 206(a), (b), 118 Stat. 610, 611; Oct. 22, 2004, Pub.L. 108-357, Title III, § 319(a), (b), 118 Stat. 1470, 1471; Aug. 8, 2005, Pub.L. 109-58, Title XIII, § 1304(a), (b), 119 Stat. 997; Dec. 21, 2005, Pub.L. 109-135, Title IV, § 412(bb), (cc), 119 Stat. 2639; Aug. 17, 2006, Pub.L. 109-280, Title VIII, § 862(a), Title XII, § 1220(a), 120 Stat. 1021, 1086; Mar. 23, 2010, Pub.L. 111-148, Title I, § 1322(h)(1), Title VI, § 6301(f), Title IX, § 9007(a), Title X, § 10903(a), 124 Stat. 191, 747, 855, 1016; Mar. 30, 2010, Pub.L. 111-152, Title I, § 1004(d)(4), 124 Stat. 1035; Pub.L. 113-295, Div. A, Title II, § 221(a)(19)(B)(iii), (62), Dec. 19, 2014, 128 Stat. 4040, 4048; Pub.L. 114-113, Div. Q, Title III, § 331(b), Dec. 18, 2015, 129 Stat. 3104.)

### 28 U.S.C.A. § 1291

#### § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

#### **CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

**28 U.S.C.A. § 1331**

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

**29 U.S.C.A. § 655**

§ 655. Standards

**(b) Procedure for promulgation, modification, or revocation of standards**

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary

determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

**(3)** On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

**(4)** Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

**(5)** The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

**(6)(A)** Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come

into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

**(B)** An application for a temporary order under this paragraph (6) shall contain:

- (i)** a specification of the standard or portion thereof from which the employer seeks a variance,
- (ii)** a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,
- (iii)** a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,
- (iv)** a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and
- (v)** a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

**(C)** The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an

experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

### 31 U.S.C.A. § 1341

#### § 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

- (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
  - (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
  - (C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
  - (D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.
- (2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.
- (b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

**CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 923; Pub.L. 101-508, Title XIII, § 13213(a), Nov. 5, 1990, 104 Stat. 1388-621.)

**31 U.S.C.A. § 3302**

§ 3302. Custodians of money

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

**CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 948; Pub.L. 97-452, § 1(10), Jan. 12, 1983, 96 Stat. 2468; Pub.L. 98-369, Title VI, § 2652(b)(1), July 18, 1984, 98 Stat. 1152; Pub.L. 103-272, § 4(f)(1)(H), July 5, 1994, 108 Stat. 1362; Pub.L. 103-429, § 7(a)(3)(A), Oct. 31, 1994, 108 Stat. 4388.)

**31 U.S.C.A. § 9701**

§ 9701. Fees and charges for Government services and things of value

**(b)** The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--

**(1)** fair; and

**(2)** based on--

**(A)** the costs to the Government;

**(B)** the value of the service or thing to the recipient;

**(C)** public policy or interest served; and

**(D)** other relevant facts.

### **CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 1051.)

### **33 U.S.C.A. § 1318**

#### § 1318. Records and reports; inspections

##### **(a) Maintenance; monitoring equipment; entry; access to information**

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title--

**(A)** the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

**(B)** the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials--

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

### **CREDIT(S)**

(June 30, 1948, c. 758, Title III, § 308, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 858; amended Dec. 27, 1977, Pub.L. 95-217, § 67(c)(1), 91 Stat. 1606; Feb. 4, 1987, Pub.L. 100-4, Title III, § 310, Title IV, § 406(d)(1), 101 Stat. 41, 73.)

### **42 U.S.C.A. § 7414**

§ 7414. Recordkeeping, inspections, monitoring, and entry

#### **(a) Authority of Administrator or authorized representative**

For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, any emission standard under section 7412 of this title,<sup>1</sup> or any regulation of solid waste combustion under section 7429 of this title, or any regulation under section 7429 of this title (relating to solid waste combustion), (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)--

(1) the Administrator may require any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title with respect to a provision of subchapter II of this chapter) on a one-time, periodic or continuous basis to--

(A) establish and maintain such records;

(B) make such reports;

(C) install, use, and maintain such monitoring equipment, and use such audit procedures, or methods;

(D) sample such emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator shall prescribe);

(E) keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical;

(F) submit compliance certifications in accordance with subsection (a)(3) of this section; and

(G) provide such other information as the Administrator may reasonably require; and<sup>2</sup>

(2) the Administrator or his authorized representative, upon presentation of his credentials--

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).<sup>3</sup>

(3) The<sup>4</sup> Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, require enhanced monitoring and submission of compliance certifications. Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require. Compliance certifications and monitoring data shall be subject to subsection (c) of this section. Submission of a compliance certification shall in no way limit the Administrator's authorities to investigate or otherwise implement this chapter. The Administrator shall promulgate rules to provide guidance and to implement this paragraph within 2 years after November 15, 1990.

### **CREDIT(S)**

(July 14, 1955, c. 360, Title I, § 114, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1687; amended June 22, 1974, Pub.L. 93-319, § 6(a)(4), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 109(d)(3), 113, Title III, § 305(d), 91 Stat. 701, 709, 776; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(22), (23), 91 Stat. 1400; Nov. 15, 1990, Pub.L. 101-549, Title III, § 302(c), Title VII, § 702(a), (b), 104 Stat. 2574, 2680, 2681.)

42 U.S.C.A. § 7607

§ 7607. Administrative proceedings and judicial review

**(b) Judicial review**

**(1)** A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,<sup>2</sup> any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

**(2)** Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or

criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

### **CREDIT(S)**

(July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681-2684.)

### **42 U.S.C.A. § 9613**

#### § 9613. Civil proceedings

#### **(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia**

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

#### **(b) Jurisdiction; venue**

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

#### **(c) Controversies or other matters resulting from tax collection or tax regulation review**

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

**(d) Litigation commenced prior to December 11, 1980**

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

**(e) Nationwide service of process**

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

**(f) Contribution**

**(1) Contribution**

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

**(2) Settlement**

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

**(3) Persons not party to settlement**

**(A)** If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

**(B)** A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

**(C)** In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

**(g) Period in which action may be brought**

**(1) Actions for natural resource damages**

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

**(2) Actions for recovery of costs**

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced--

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response

costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

**(3) Contribution**

No action for contribution for any response costs or damages may be commenced more than 3 years after--

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

**(4) Subrogation**

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

**(5) Actions to recover indemnification payments**

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

**(6) Minors and incompetents**

The time limitations contained herein shall not begin to run--

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

**(h) Timing of review**

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

**(i) Intervention**

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

**(j) Judicial review**

**(1) Limitation**

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

**(2) Standard**

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

**(3) Remedy**

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

**(4) Procedural errors**

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

**(k) Administrative record and participation procedures**

**(1) Administrative record**

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

**(2) Participation procedures**

**(A) Removal action**

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

**(B) Remedial action**

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

- (i)** Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.
- (ii)** A reasonable opportunity to comment and provide information regarding the plan.
- (iii)** An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).
- (iv)** A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.
- (v)** A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

**(C) Interim record**

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

**(D) Potentially responsible parties**

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

**(I) Notice of actions**

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

**CREDIT(S)**

(Pub.L. 96-510, Title I, § 113, Dec. 11, 1980, 94 Stat. 2795; Pub.L. 99-499, Title I, § 113, Oct. 17, 1986, 100 Stat. 1647; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

**1 C.F.R. § 5.2**

§ 5.2 Documents required to be filed for public inspection and published.

(c) Each document having general applicability and legal effect.

**Credits**

[54 FR 9676, March 7, 1989]

**50 C.F.R. § 648.11**

§ 648.11 At-sea sea sampler/observer coverage.

(a) The Regional Administrator may request any vessel holding a permit for Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, Atlantic surfclam, ocean quahog, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a NMFS–certified fisheries observer. A vessel holding a permit for Atlantic sea scallops is subject to the additional requirements specific in paragraph (g) of this section. Also, any vessel or vessel

owner/operator that fishes for, catches or lands hagfish, or intends to fish for, catch, or land hagfish in or from the exclusive economic zone must carry a NMFS-certified fisheries observer when requested by the Regional Administrator in accordance with the requirements of this section.

(b) If requested by the Regional Administrator to carry an observer or sea sampler, it is the responsibility of the vessel owner to arrange for and facilitate observer or sea sampler placement. Owners of vessels selected for sea sampler/observer coverage must notify the appropriate Regional or Science and Research Director, as specified by the Regional Administrator, before commencing any fishing trip that may result in the harvest of resources of the respective fishery. Notification procedures will be specified in selection letters to vessel owners.

(c) The Regional Administrator may waive the requirement to carry a sea sampler or observer if the facilities on a vessel for housing the observer or sea sampler, or for carrying out observer or sea sampler functions, are so inadequate or unsafe that the health or safety of the observer or sea sampler, or the safe operation of the vessel, would be jeopardized.

(d) An owner or operator of a vessel on which a NMFS-approved sea sampler/observer is embarked must:

(1) Provide accommodations and food that are equivalent to those provided to the crew.

(2) Allow the sea sampler/observer access to and use of the vessel's communications equipment and personnel upon request for the transmission and receipt of messages related to the sea sampler's/observer's duties.

(3) Provide true vessel locations, by latitude and longitude or loran coordinates, as requested by the observer/sea sampler, and allow the sea sampler/observer access to and use of the vessel's navigation equipment and personnel upon request to determine the vessel's position.

(4) Notify the sea sampler/observer in a timely fashion of when fishing operations are to begin and end.

(5) Allow for the embarking and debarking of the sea sampler/observer, as specified by the Regional Administrator, ensuring that transfers of observers/sea samplers at sea are accomplished in a safe manner, via small boat or raft, during daylight hours as weather and sea conditions allow, and with the agreement of the sea samplers/ observers involved.

(6) Allow the sea sampler/observer free and unobstructed access to the vessel's bridge, working decks, holding bins, weight scales, holds, and any other space used to hold, process, weigh, or store fish.

(7) Allow the sea sampler/observer to inspect and copy any the vessel's log, communications log, and records associated with the catch and distribution of fish for that trip.

(e) The owner or operator of a vessel issued a summer flounder moratorium permit, a scup moratorium permit, a black sea bass moratorium permit, a bluefish permit, a spiny dogfish permit, an Atlantic herring permit, an Atlantic deep-sea red crab permit, a skate permit, or a tilefish permit, if requested by the sea sampler/observer, also must:

(1) Notify the sea sampler/observer of any sea turtles, marine mammals, summer flounder, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, Atlantic deep-sea red crab, tilefish, skates (including discards) or other specimens taken by the vessel.

(2) Provide the sea sampler/observer with sea turtles, marine mammals, summer flounder, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, Atlantic deep-sea red crab, skates, tilefish, or other specimens taken by the vessel.

(f) NMFS may accept observer coverage funded by outside sources if:

(1) All coverage conducted by such observers is determined by NMFS to be in compliance with NMFS' observer guidelines and procedures.

(2) The owner or operator of the vessel complies with all other provisions of this part.

(3) The observer is approved by the Regional Administrator.

(g) Atlantic sea scallop observer program—

(1) General. Unless otherwise specified, owners, operators, and/or managers of vessels issued a Federal scallop permit under § 648.4(a)(2), and specified in paragraph (a) of this section, must comply with this section and are jointly and severally responsible for their vessel's compliance with this section. To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access and LAGC IFQ permits are required to comply with the additional notification requirements specified in paragraph (g)(2) of this section. When NMFS notifies the vessel owner, operator, and/or manager of any requirement to carry an observer on a specified trip in either an Access Area or Open Area as specified in paragraph (g)(3) of this section, the vessel may not fish for, take, retain, possess, or land any scallops without carrying an observer. Vessels may only embark on a scallop trip in open areas or Access Areas without an observer if the vessel owner, operator, and/or manager has been notified that the vessel has received a waiver of the observer requirement for that trip pursuant to paragraphs (g)(3) and (g)(4)(ii) of this section.

(2) Vessel notification procedures—

(i) Limited access vessels. Limited access vessel owners, operators, or managers shall notify NMFS/NEFOP by telephone not more than 10 days prior to the beginning of any scallop trip of the time, port of departure, open area or specific Sea Scallop Access Area to be fished, and whether fishing as a scallop dredge, scallop trawl, or general category vessel.

(ii) LAGC IFQ vessels. LAGC IFQ vessel owners, operators, or managers must notify the NMFS/NEFOP by telephone by 0001 hr of the Thursday preceding the week (Sunday through Saturday) that they intend to start any open area or access area scallop trip and must include the port of departure, open area or specific Sea Scallop Access Area to be fished, and whether fishing as a scallop dredge, scallop trawl vessel. If selected, up to two trips that start during the specified week (Sunday through Saturday) can be selected to be covered by an observer. NMFS/NEFOP must be notified by the owner, operator, or vessel manager of any trip plan changes at least 48 hr prior to vessel departure.

(3) Selection of scallop trips for observer coverage. Based on predetermined coverage levels for various permit categories and areas of the scallop fishery that are provided by NMFS in writing to all observer service providers approved pursuant to paragraph (h) of this section, NMFS shall notify the vessel owner, operator, or vessel manager whether the vessel must carry an observer, or if a waiver has been granted, for the specified scallop trip, within 24 hr of the vessel owner's, operator's, or vessel manager's notification of the prospective scallop trip, as specified in paragraph (g)(2) of this section. Any request to carry an observer may be waived by NMFS. All waivers for observer coverage shall be issued to the vessel by VMS so as to have on-board verification of the waiver. A vessel may not fish in an area with an observer waiver confirmation number that does not match the scallop trip plan that was called in to NMFS. Confirmation numbers for trip notification calls are only valid for 48 hr from the intended sail date; and

(4) Procurement of observer services by scallop vessels.

(i) An owner of a scallop vessel required to carry an observer under paragraph (g)(3) of this section must arrange for carrying an observer certified through the observer training class operated by the NMFS/NEFOP from an observer service provider approved by NMFS under paragraph (h) of this section. The owner, operator, or vessel manager of a vessel selected to carry an observer must contact the observer service provider and must provide at least 48-hr notice in advance of the fishing trip for the provider to arrange for observer deployment for the specified trip. The observer service provider will notify the vessel owner, operator, or manager within 18 hr whether they have an available observer. A list of approved observer service providers shall be posted on the NMFS/NEFOP Web site at <http://www.nefsc.noaa.gov/femad/fsb/>. The observer service provider may take up to 48 hr to arrange for observer deployment for the specified scallop trip.

(ii) An owner, operator, or vessel manager of a vessel that cannot procure a certified observer within 48 hr of the advance notification to the provider due to the unavailability of an observer may request a waiver from NMFS/NEFOP from the requirement for observer coverage for that trip, but only if the owner, operator, or vessel manager has contacted all of the available observer service providers to

secure observer coverage and no observer is available. NMFS/NEFOP shall issue such a waiver within 24 hr, if the conditions of this paragraph (g)(4)(ii) are met. A vessel may not begin the trip without being issued a waiver.

(5) Owners of scallop vessels shall be responsible for paying the cost of the observer for all scallop trips on which an observer is carried onboard the vessel, regardless of whether the vessel lands or sells sea scallops on that trip, and regardless of the availability of set-aside for an increased possession limit or reduced DAS accrual rate. The owners of vessels that carry an observer may be compensated with a reduced DAS accrual rate for open area scallop trips or additional scallop catch per day in Sea Scallop Access Areas or additional catch per open area or access area trip for LAGC IFQ trips in order to help defray the cost of the observer, under the program specified in §§ 648.53 and 648.60.

(i) Observer service providers shall establish the daily rate for observer coverage on a scallop vessel on an Access Area trip or open area DAS or IFQ scallop trip consistent with paragraphs (g)(5)(i)(A) and (B), respectively, of this section.

(A) Access Area trips.

(1) For purposes of determining the daily rate for an observed scallop trip on a limited access vessel in a Sea Scallop Access Area when that specific Access Area's observer set-aside specified in § 648.60(d)(1) has not been fully utilized, a service provider may charge a vessel owner for no more than the time an observer boards a vessel until the vessel disembarks (dock to dock), where "day" is defined as a 24-hr period, or any portion of a 24-hr period, regardless of the calendar day. For example, if a vessel with an observer departs on July 1 at 10 p.m. and lands on July 3 at 1 a.m., the time at sea equals 27 hr, which would equate to 2 full "days."

(2) For purposes of determining the daily rate in a specific Sea Scallop Access Area for an observed scallop trip on a limited access vessel taken after NMFS has announced the industry-funded observer set-aside in that specific Access Area has been fully utilized, a service provider may charge a vessel owner for no more than the time an observer boards a vessel until the vessel disembarks (dock to dock), where "day" is defined as a 24-hr period, and portions of the other days would be pro-rated at an hourly charge (taking the daily rate divided by 24). For example, if a vessel with an observer departs on July 1 at 10 p.m. and lands on July 3 at 1 a.m., the time spent at sea equals 27 hr, which would equate to 1 day and 3 hr.

(3) For purposes of determining the daily rate in a specific Sea Scallop Access Area for observed scallop trips on an LAGC vessel, regardless of the status of the industry-funded observer set-aside, a service provider may charge a vessel owner for no more than the time an observer boards a vessel until the vessel disembarks (dock to dock), where "day" is defined as a 24-hr period, and portions of the other days would be pro-rated at an hourly charge (taking the daily rate divided by 24). For example, if a vessel with an observer departs on July 1 at 10 p.m. and lands on

July 3 at 1 a.m., the time spent at sea equals 27 hr, which would equate to 1 day and 3 hr.

(B) Open area scallop trips. For purposes of determining the daily rate for an observed scallop trip for DAS or LAGC IFQ open area trips, regardless of the status of the industry-funded observer set-aside, a service provider shall charge dock to dock where “day” is defined as a 24-hr period, and portions of the other days would be pro-rated at an hourly charge (taking the daily rate divided by 24). For example, if a vessel with an observer departs on the July 1st at 10 p.m. and lands on July 3rd at 1 a.m., the time at sea equals 27 hr, so the provider would charge 1 day and 3 hr.

(ii) NMFS shall determine any reduced DAS accrual rate and the amount of additional pounds of scallops per day fished in a Sea Scallop Access Area or on an open area LAGC IFQ trips for the applicable fishing year based on the economic conditions of the scallop fishery, as determined by best available information. Vessel owners and observer service providers shall be notified through the Small Entity Compliance Guide of any DAS accrual rate changes and any changes in additional pounds of scallops determined by the Regional Administrator to be necessary. NMFS shall notify vessel owners and observer providers of any adjustments.

(iii) Owners of scallop vessels shall pay observer service providers for observer services within 45 days of the end of a fishing trip on which an observer deployed.

(6) When the available DAS or TAC set-aside for observer coverage is exhausted, vessels shall still be required to carry an observer as specified in this section, and shall be responsible for paying for the cost of the observer, but shall not be authorized to harvest additional pounds or fish at a reduced DAS accrual rate.

(h) Observer service provider approval and responsibilities—

(1) General. An entity seeking to provide observer services must apply for and obtain approval from NMFS following submission of a complete application. A list of approved observer service providers shall be distributed to vessel owners and shall be posted on the NMFS/NEFOP Web site at:

[www.nefsc.noaa.gov/femad/fsb/](http://www.nefsc.noaa.gov/femad/fsb/).

(2) [Reserved]

(3) Contents of application. An application to become an approved observer service provider shall contain the following:

(i) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

- (ii) The permanent mailing address, phone and fax numbers where the owner(s) can be contacted for official correspondence, and the current physical location, business mailing address, business telephone and fax numbers, and business email address for each office.
- (iii) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, that they are free from a conflict of interest as described under paragraph (h)(6) of this section.
- (iv) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, describing any criminal conviction(s), Federal contract(s) they have had and the performance rating they received on the contracts, and previous decertification action(s) while working as an observer or observer service provider.
- (v) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to, recruiting, hiring, deployment, and personnel administration.
- (vi) A description of the applicant's ability to carry out the responsibilities and duties of a fishery observer services provider as set out under paragraph (h)(5) of this section, and the arrangements to be used.
- (vii) Evidence of holding adequate insurance to cover injury, liability, and accidental death for observers during their period of employment (including during training). Workers' Compensation and Maritime Employer's Liability insurance must be provided to cover the observer, vessel owner, and observer provider. The minimum coverage required is \$5 million. Observer service providers shall provide copies of the insurance policies to observers to display to the vessel owner, operator, or vessel manager, when requested.
- (viii) Proof that its observers, whether contracted or employed by the service provider, are compensated with salaries that meet or exceed the U.S. Department of Labor (DOL) guidelines for observers. Observers shall be compensated as Fair Labor Standards Act (FLSA) non-exempt employees. Observer providers shall provide any other benefits and personnel services in accordance with the terms of each observer's contract or employment status.
- (ix) The names of its fully equipped, NMFS/NEFOP certified, observers on staff or a list of its training candidates (with resumes) and a request for an appropriate NMFS/NEFOP Observer Training class. The NEFOP training has a minimum class size of eight individuals, which may be split among multiple vendors requesting training. Requests for training classes with fewer than eight individuals will be delayed until further requests make up the full training class size.
- (x) An Emergency Action Plan (EAP) describing its response to an "at sea" emergency with an observer, including, but not limited to, personal injury, death, harassment, or intimidation.

(4) Application evaluation.

(i) NMFS shall review and evaluate each application submitted under paragraph (h)(3) of this section. Issuance of approval as an observer provider shall be based on completeness of the application, and a determination by NMFS of the applicant's ability to perform the duties and responsibilities of a fishery observer service provider, as demonstrated in the application information. A decision to approve or deny an application shall be made by NMFS within 15 business days of receipt of the application by NMFS.

(ii) If NMFS approves the application, the observer service provider's name will be added to the list of approved observer service providers found on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section, and in any outreach information to the industry. Approved observer service providers shall be notified in writing and provided with any information pertinent to its participation in the fishery observer program.

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, an observer provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be re-considered for being added to the list of approved observer service providers.

(5) Responsibilities of observer service providers.

(i) An observer service provider must provide observers certified by NMFS/NEFOP pursuant to paragraph (i) of this section for deployment in a fishery when contacted and contracted by the owner, operator, or vessel manager of a fishing vessel, unless the observer service provider refuses to deploy an observer on a requesting vessel for any of the reasons specified at paragraph (h)(5)(viii) of this section.

(ii) An observer service provider must provide to each of its observers:

(A) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments, and to any debriefing locations, if necessary;

(B) Lodging, per diem, and any other services necessary for observers assigned to a fishing vessel or to attend an appropriate NMFS/NEFOP observer training class;

(C) The required observer equipment, in accordance with equipment requirements listed on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section, prior to any deployment and/or prior to NMFS observer certification training; and (D) Individually assigned communication equipment, in working order, such as a mobile phone, for all necessary communication. An observer service provider may alternatively compensate observers for the use of the observer's personal mobile phone, or other device, for communications made in support of, or necessary for, the observer's duties.

(iii) Observer deployment logistics. Each approved observer service provider must assign an available certified observer to a vessel upon request. Each approved observer service provider must be accessible 24 hours per day, 7 days per week, to enable an owner, operator, or manager of a vessel to secure observer coverage when requested. The telephone system must be monitored a minimum of four times daily to ensure rapid response to industry requests. Observer service providers approved under paragraph (h) of this section are required to report observer deployments to NMFS daily for the purpose of determining whether the predetermined coverage levels are being achieved in the appropriate fishery.

(iv) Observer deployment limitations.

(A) A candidate observer's first four deployments and the resulting data shall be immediately edited and approved after each trip by NMFS/NEFOP prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(B) Unless alternative arrangements are approved by NMFS, an observer provider must not deploy any observer on the same vessel for more than two consecutive multi-day trips, and not more than twice in any given month for multi-day deployments.

(v) Communications with observers. An observer service provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed shoreside, in transit, or in port awaiting vessel assignment.

(vi) Observer training requirements. The following information must be submitted to NMFS/NEFOP at least 7 days prior to the beginning of the proposed training class: A list of observer candidates; observer candidate resumes; and a statement signed by the candidate, under penalty of perjury, that discloses the candidate's criminal convictions, if any. All observer trainees must complete a basic cardiopulmonary resuscitation/first aid course prior to the end of a NMFS/NEFOP Observer Training class. NMFS may reject a candidate for training if the candidate does not meet the minimum qualification requirements as outlined by

NMFS/NEFOP minimum eligibility standards for observers as described on the NMFS/NEFOP Web site.

(vii) Reports—

(A) Observer deployment reports. The observer service provider must report to NMFS/NEFOP when, where, to whom, and to what fishery (including Open Area or Access Area for sea scallop trips) an observer has been deployed, within 24 hours of the observer's departure. The observer service provider must ensure that the observer reports back to NMFS its Observer Contract (OBSCON) data, as described in the certified observer training, within 24 hours of landing. OBSCON data are to be submitted electronically or by other means specified by NMFS. The observer service provider shall provide the raw (unedited) data collected by the observer to NMFS within 4 business days of the trip landing.

(B) Safety refusals. The observer service provider must report to NMFS any trip that has been refused due to safety issues, e.g., failure to hold a valid USCG Commercial Fishing Vessel Safety Examination Decal or to meet the safety requirements of the observer's pre-trip vessel safety checklist, within 24 hours of the refusal.

(C) Biological samples. The observer service provider must ensure that biological samples, including whole marine mammals, sea turtles, and sea birds, are stored/handled properly and transported to NMFS within 7 days of landing.

(D) Observer debriefing. The observer service provider must ensure that the observer remains available to NMFS, either in-person or via phone, at NMFS' discretion, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any observed trip. If requested by NMFS, an observer that is at sea during the 2-week period must contact NMFS upon his or her return.

(E) Observer availability report. The observer service provider must report to NMFS any occurrence of inability to respond to an industry request for observer coverage due to the lack of available observers by 5 p.m., Eastern Time, of any day on which the provider is unable to respond to an industry request for observer coverage.

(F) Other reports. The observer service provider must report possible observer harassment, discrimination, concerns about vessel safety or marine casualty, or observer illness or injury; and any information, allegations, or reports regarding observer conflict of interest or breach of the standards of behavior, to NMFS/NEFOP within 24 hours of the event or within 24 hours of learning of the event.

(G) Observer status report. The observer service provider must provide NMFS/NEFOP with an updated list of contact information for all observers that includes the observer identification number, observer's name, mailing address, email address, phone numbers, homeports or fisheries/trip types assigned, and must

include whether or not the observer is “in service,” indicating when the observer has requested leave and/or is not currently working for an industry funded program.

(H) Vessel contract. The observer service provider must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services.

(I) Observer contract. The observer service provider must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and specific observers.

(J) Additional information. The observer service provider must submit to NMFS/NEFOP, if requested, copies of any information developed and/or used by the observer provider and distributed to vessels, such as informational pamphlets, payment notification, description of observer duties, etc.

(viii) Refusal to deploy an observer.

(A) An observer service provider may refuse to deploy an observer on a requesting scallop vessel if the observer service provider does not have an available observer within 48 hours of receiving a request for an observer from a vessel.

(B) An observer service provider may refuse to deploy an observer on a requesting fishing vessel if the observer service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described at § 600.746 of this chapter.

(C) The observer service provider may refuse to deploy an observer on a fishing vessel that is otherwise eligible to carry an observer for any other reason, including failure to pay for previous observer deployments, provided the observer service provider has received prior written confirmation from NMFS authorizing such refusal.

(6) Limitations on conflict of interest. An observer service provider:

(i) Must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, a fishing vessel, fish dealer, fishery advocacy group, and/or fishery research;

(ii) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed; and

(iii) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(7) Removal of observer service provider from the list of approved observer service providers. An observer service provider that fails to meet the requirements, conditions, and responsibilities specified in paragraphs (h)(5) and (6) of this section shall be notified by NMFS, in writing, that it is subject to removal from the list of approved observer service providers. Such notification shall specify the reasons for the pending removal. An observer service provider that has received notification that it is subject to removal from the list of approved observer service providers may submit written information to rebut the reasons for removal from the list. Such rebuttal must be submitted within 30 days of notification received by the observer service provider that the observer service provider is subject to removal and must be accompanied by written evidence rebutting the basis for removal. NMFS shall review information rebutting the pending removal and shall notify the observer service provider within 15 days of receipt of the rebuttal whether or not the removal is warranted. If no response to a pending removal is received by NMFS, the observer service provider shall be automatically removed from the list of approved observer service providers. The decision to remove the observer service provider from the list, either after reviewing a rebuttal, or if no rebuttal is submitted, shall be the final decision of NMFS and the Department of Commerce. Removal from the list of approved observer service providers does not necessarily prevent such observer service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers under contract with an observer service provider that has been removed from the list of approved service providers must complete their assigned duties for any fishing trips on which the observers are deployed at the time the observer service provider is removed from the list of approved observer service providers. An observer service provider removed from the list of approved observer service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if an observer service provider may remain on the list of approved observer service providers:

- (i) Failure to meet the requirements, conditions, and responsibilities of observer service providers specified in paragraphs (h)(5) and (h)(6) of this section;
- (ii) Evidence of conflict of interest as defined under paragraph (h)(6) of this section;
- (iii) Evidence of criminal convictions related to:
  - (A) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(B) The commission of any other crimes of dishonesty, as defined by state law or Federal law, that would seriously and directly affect the fitness of an applicant in providing observer services under this section;

(iv) Unsatisfactory performance ratings on any Federal contracts held by the applicant; and

(v) Evidence of any history of decertification as either an observer or observer provider.

(i) Observer certification.

(1) To be certified, employees or sub-contractors operating as observers for observer service providers approved under paragraph (h) of this section must meet NMFS National Minimum Eligibility Standards for observers. NMFS National Minimum Eligibility Standards are available at the National Observer Program Web site: [www.nmfs.noaa.gov/op/pds/categories/science\\_and\\_technology.html](http://www.nmfs.noaa.gov/op/pds/categories/science_and_technology.html).

(2) Observer training. In order to be deployed on any fishing vessel, a candidate observer must have passed an appropriate NMFS/NEFOP Observer Training course. If a candidate fails training, the candidate shall be notified in writing on or before the last day of training. The notification will indicate the reasons the candidate failed the training. Observer training shall include an observer training trip, as part of the observer's training, aboard a fishing vessel with a trainer. A candidate observer's first four deployments and the resulting data shall be immediately edited and approved after each trip by NMFS/NEFOP, prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(3) Observer requirements. All observers must:

(i) Have a valid NMFS/NEFOP fisheries observer certification pursuant to paragraph (i)(1) of this section;

(ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board fishing vessels, pursuant to standards established by NMFS. Such standards are available from NMFS/NEFOP Web site specified in paragraph (h)(1) of this section and shall be provided to each approved observer service provider;

(iii) Have successfully completed all NMFS–required training and briefings for observers before deployment, pursuant to paragraph (i)(2) of this section; and

(iv) Hold a current Red Cross (or equivalence) CPR/first aid certification.

(v) Accurately record their sampling data, write complete reports, and report accurately any observations relevant to conservation of marine resources or their environment.

(4) Probation and decertification. NMFS may review observer certifications and issue observer certification probation and/or decertification as described in NMFS

policy found on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section.

(5) Issuance of decertification. Upon determination that decertification is warranted under paragraph (i)(4) of this section, NMFS shall issue a written decision to decertify the observer to the observer and approved observer service providers via certified mail at the observer's most current address provided to NMFS. The decision shall identify whether a certification is revoked and shall identify the specific reasons for the action taken. Decertification is effective immediately as of the date of issuance, unless the decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions. Decertification is the final decision of NMFS and the Department of Commerce and may not be appealed.

(j) In the event that a vessel is requested by the Regional Administrator to carry a NMFS-certified fisheries observer pursuant to paragraph (a) of this section and is also selected to carry an at-sea monitor as part of an approved sector at-sea monitoring program specified in § 648.87(b)(1)(v) for the same trip, only the NMFS-certified fisheries observer is required to go on that particular trip.

(k) NE multispecies observer coverage—

(1) Pre-trip notification. Unless otherwise specified in this paragraph (k), or notified by the Regional Administrator, the owner, operator, or manager of a vessel (i.e., vessel manager or sector manager) issued a limited access NE multispecies permit that is fishing under a NE multispecies DAS or on a sector trip, as defined in this part, must provide advanced notice to NMFS of the vessel name, permit number, and sector to which the vessel belongs, if applicable; contact name and telephone number for coordination of observer deployment; date, time, and port of departure; and the vessel's trip plan, including area to be fished, whether a monkfish DAS will be used, and gear type to be used at least 48 hr prior to departing port on any trip declared into the NE multispecies fishery pursuant to § 648.10 or § 648.85, as instructed by the Regional Administrator, for the purposes of selecting vessels for observer deployment. For trips lasting 48 hr or less in duration from the time the vessel leaves port to begin a fishing trip until the time the vessel returns to port upon the completion of the fishing trip, the vessel owner, operator, or manager may make a weekly notification rather than trip-by-trip calls. For weekly notifications, a vessel must notify NMFS by 0001 hr of the Friday preceding the week (Sunday through Saturday) that it intends to complete at least one NE multispecies DAS or sector trip during the following week and provide the date, time, port of departure, area to be fished, whether a monkfish DAS will be used, and gear type to be used for each trip during that week. Trip notification calls must be made no more than 10 days in advance of each fishing trip. The vessel owner, operator, or manager must notify NMFS of any trip plan changes at least 24

hr prior to vessel departure from port. A vessel may not begin the trip without being issued an observer notification or a waiver by NMFS.

(2) Vessel selection for observer coverage. NMFS shall notify the vessel owner, operator, or manager whether the vessel must carry an observer, or if a waiver has been granted, for the specified trip within 24 hr of the vessel owner's, operator's or manager's notification of the prospective trip, as specified in paragraph (k)(1) of this section. All trip notifications shall be issued a unique confirmation number. A vessel may not fish on a NE multispecies DAS or sector trip with an observer waiver confirmation number that does not match the trip plan that was called in to NMFS. Confirmation numbers for trip notification calls are valid for 48 hr from the intended sail date. If a trip is interrupted and returns to port due to bad weather or other circumstance beyond the operator's control, and goes back out within 48 hr, the same confirmation number and observer status remains. If the layover time is greater than 48 hr, a new trip notification must be made by the operator, owner, or manager of the vessel.

(1) NE multispecies monitoring program goals and objectives. Monitoring programs established for the NE multispecies are to be designed and evaluated consistent with the following goals and objectives:

(1) Improve documentation of catch:

(i) Determine total catch and effort, for each sector and common pool, of target or regulated species; and

(ii) Achieve coverage level sufficient to minimize effects of potential monitoring bias to the extent possible while maintaining as much flexibility as possible to enhance fleet viability.

(2) Reduce the cost of monitoring:

(i) Streamline data management and eliminate redundancy;

(ii) Explore options for cost-sharing and deferment of cost to industry; and

(iii) Recognize opportunity costs of insufficient monitoring.

(3) Incentivize reducing discards:

(i) Determine discard rate by smallest possible strata while maintaining cost-effectiveness; and

(ii) Collect information by gear type to accurately calculate discard rates.

(4) Provide additional data streams for stock assessments:

(i) Reduce management and/or biological uncertainty; and

(ii) Perform biological sampling if it may be used to enhance accuracy of mortality or recruitment calculations.

(5) Enhance safety of monitoring program.

(6) Perform periodic review of monitoring program for effectiveness.

(m) Atlantic herring observer coverage—

(1) Pre-trip notification. At least 48 hr prior to the beginning of any trip on which a vessel may harvest, possess, or land Atlantic herring, a vessel issued a Limited Access Herring Permit or a vessel issued an Areas 2/3 Open Access Herring Permit on a declared herring trip or a vessel issued an All Areas Open Access Herring Permit fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), and herring carriers must provide notice of the following information to NMFS: Vessel name, permit category, and permit number; contact name for coordination of observer deployment; telephone number for contact; the date, time, and port of departure; gear type; target species; and intended area of fishing, including whether the vessel intends to engage in fishing in the Northeast Multispecies Closed Areas, Closed Area I, Closed Area II, Nantucket Lightship Closed Area, Cashes Ledge Closure Area, and Western GOM Closure Area, as defined in § 648.81(a) through (e), respectively, at any point in the trip. Trip notification calls must be made no more than 10 days in advance of each fishing trip. The vessel owner, operator, or manager must notify NMFS of any trip plan changes at least 12 hr prior to vessel departure from port.

(2) When vessels issued limited access herring permits are working cooperatively in the Atlantic herring fishery, including pair trawling, purse seining, and transferring herring at-sea, each vessel must provide to observers, when requested, the estimated weight of each species brought on board and the estimated weight of each species released on each tow.

(3) Sampling requirements. In addition to the requirements at § 648.11(d)(1) through (7), an owner or operator of a vessel issued a Limited Access Herring Permit on which a NMFS-approved observers is embarked must provide observers:

(i) A safe sampling station adjacent to the fish deck, including: A safety harness, if footing is compromised and grating systems are high above the deck; a safe method to obtain samples; and a storage space for baskets and sampling gear.

(ii) Reasonable assistance to enable observers to carry out their duties, including but not limited to assistance with: Obtaining and sorting samples; measuring decks, codends, and holding bins; collecting bycatch when requested by the observers; and collecting and carrying baskets of fish when requested by the observers.

(iii) Advance notice when pumping will be starting; when sampling of the catch may begin; and when pumping is coming to an end.

(iv) Visual access to the net, the codend of the net, and the purse seine bunt and any of its contents after pumping has ended and before the pump is removed from the net. On trawl vessels, the codend including any remaining contents must be brought on board, unless bringing the codend on board is not possible. If bringing the codend on board is not possible, the vessel operator must ensure that the

observer can see the codend and its contents as clearly as possible before releasing its contents.

(4) Measures to address slippage.

(i) No vessel issued a limited access herring permit may slip catch, as defined at § 648.2, except in the following circumstances:

(A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(B) A mechanical failure, including gear damage, precludes bringing some or all of the catch on board the vessel for inspection; or,

(C) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish which can be pumped from the net prior to release.

(ii) Vessels may make test tows without pumping catch on board if the net is re-set without releasing its contents provided that all catch from test tows is available to the observer to sample when the next tow is brought on board for sampling.

(iii) If a vessel issued any limited access herring permit slips catch, the vessel operator must report the slippage event on the Atlantic herring daily VMS catch report and indicate the reason for slipping catch. Additionally, the vessel operator must complete and sign a Released Catch Affidavit detailing: The vessel name and permit number; the VTR serial number; where, when, and the reason for slipping catch; the estimated weight of each species brought on board or slipped on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

(iv) If a vessel issued an All Areas or Areas 2/3 Limited Access Herring permit slips catch for any of the reasons described in paragraph (m)(4)(i) of this section, the vessel operator must move at least 15 nm (27.78 km) from the location of the slippage event before deploying any gear again, and must stay at least 15 nm (27.78 km) away from the slippage event location for the remainder of the fishing trip.

(v) If catch is slipped by a vessel issued an All Areas or Areas 2/3 Limited Access Herring permit for any reason not described in paragraph (m)(4)(i) of this section, the vessel operator must immediately terminate the trip and return to port. No fishing activity may occur during the return to port.

(n) Atlantic mackerel, squid, and butterfish observer coverage—

(1) Pre-trip notification.

(i) A vessel issued a limited access Atlantic mackerel permit, as specified at § 648.4(a)(5)(iii), must, for the purposes of observer deployment, have a representative provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, telephone number or email

address for contact; and the date, time, port of departure, gear type, and approximate trip duration, at least 48 hr, but no more than 10 days, prior to beginning any fishing trip, unless it complies with the possession restrictions in paragraph (n)(1)(iii) of this section.

(ii) A vessel that has a representative provide notification to NMFS as described in paragraph (n)(1)(i) of this section may only embark on a mackerel trip without an observer if a vessel representative has been notified by NMFS that the vessel has received a waiver of the observer requirement for that trip. NMFS shall notify a vessel representative whether the vessel must carry an observer, or if a waiver has been granted, for the specific mackerel trip, within 24 hr of the vessel representative's notification of the prospective mackerel trip, as specified in paragraph (n)(1)(i) of this section. Any request to carry an observer may be waived by NMFS. A vessel that fishes with an observer waiver confirmation number that does not match the mackerel trip plan that was called in to NMFS is prohibited from fishing for, possessing, harvesting, or landing mackerel except as specified in paragraph (n)(1)(iii) of this section. Confirmation numbers for trip notification calls are only valid for 48 hr from the intended sail date.

(iii) Trip limits: A vessel issued a limited access mackerel permit, as specified in § 648.4(a)(5)(iii), that does not have a representative provide the trip notification required in paragraph (n)(1)(i) of this section is prohibited from fishing for, possessing, harvesting, or landing more than 20,000 lb (9.07 mt) of mackerel per trip at any time, and may only land mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(iv) If a vessel issued a limited access Atlantic mackerel permit, as specified in § 648.4(a)(5)(iii), intends to possess, harvest, or land more than 20,000 lb (9.07 mt) of mackerel per trip or per calendar day, and has a representative notify NMFS of an upcoming trip, is selected by NMFS to carry an observer, and then cancels that trip, the representative is required to provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, and telephone number or email address for contact, and the intended date, time, and port of departure for the cancelled trip prior to the planned departure time. In addition, if a trip selected for observer coverage is cancelled, then that vessel is required to carry an observer, provided an observer is available, on its next trip.

(2) Sampling requirements for limited access Atlantic mackerel and longfin squid/butterfish moratorium permit holders. In addition to the requirements in paragraphs (d)(1) through (7) of this section, an owner or operator of a vessel issued a limited access Atlantic mackerel or longfin squid/butterfish moratorium permit on which a NMFS-approved observer is embarked must provide observers:

- (i) A safe sampling station adjacent to the fish deck, including: A safety harness, if footing is compromised and grating systems are high above the deck; a safe method to obtain samples; and a storage space for baskets and sampling gear.
- (ii) Reasonable assistance to enable observers to carry out their duties, including but not limited to assistance with: Obtaining and sorting samples; measuring decks, codends, and holding bins; collecting bycatch when requested by the observers; and collecting and carrying baskets of fish when requested by the observers.
- (iii) Advance notice when pumping will be starting; when sampling of the catch may begin; and when pumping is coming to an end.

(3) Measures to address slippage.

(i) No vessel issued a limited access Atlantic mackerel permit or a longfin squid/butterfish moratorium permit may slip catch, as defined at § 648.2, except in the following circumstances:

- (A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or
- (B) A mechanical failure, including gear damage, precludes bringing some or all of the catch on board the vessel for sampling and inspection; or
- (C) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish that can be pumped from the net prior to release.

(ii) If a vessel issued any limited access Atlantic mackerel permit slips catch, the vessel operator must report the slippage event on the Atlantic mackerel and longfin squid daily VMS catch report and indicate the reason for slipping catch.

Additionally, vessels issued a limited Atlantic mackerel permit or a longfin squid/butterfish moratorium permit, the vessel operator must complete and sign a Released Catch Affidavit detailing: The vessel name and permit number; the VTR serial number; where, when, and the reason for slipping catch; the estimated weight of each species brought on board or slipped on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

(iii) If a vessel issued a limited access Atlantic mackerel permit slips catch for any of the reasons described in paragraph (n)(3)(i) of this section, the vessel operator must move at least 15 nm (27.8 km) from the location of the slippage event before deploying any gear again, and must stay at least 15 nm (27.8 km) from the slippage event location for the remainder of the fishing trip.

(iv) If catch is slipped by a vessel issued a limited access Atlantic mackerel permit for any reason not described in paragraph (n)(3)(i) of this section, the vessel operator must immediately terminate the trip and return to port. No fishing activity may occur during the return to port.

**Credits**

[61 FR 43425, Aug. 23, 1996; 61 FR 58465, Nov. 15, 1996; 64 FR 54745, Oct. 7, 1999; 65 FR 1569, Jan. 11, 2000; 65 FR 7460, Feb. 15, 2000; 65 FR 15110, March 21, 2000; 65 FR 16844, March 30, 2000; 65 FR 45852, July 26, 2000; 65 FR 77466, Dec. 11, 2000; 66 FR 49144, Sept. 26, 2001; 67 FR 63232, Oct. 10, 2002; 68 FR 49700, Aug. 19, 2003; 71 FR 33225, June 8, 2006; 71 FR 34844, June 16, 2006; 71 FR 69073, 69075, Nov. 29, 2006; 72 FR 20038, April 23, 2007; 72 FR 32555, June 13, 2007; 72 FR 68096, Dec. 4, 2007; 73 FR 4750, Jan. 28, 2008; 73 FR 30802, May 29, 2008; 74 FR 20534, May 4, 2009; 75 FR 18312, April 9, 2010; 75 FR 36569, June 28, 2010; 76 FR 43762, July 21, 2011; 76 FR 81845, Dec. 29, 2011; 77 FR 20737, April 6, 2012; 78 FR 26154, May 3, 2013; 78 FR 27099, May 9, 2013; 78 FR 42891, July 18, 2013; 79 FR 8814, Feb. 13, 2014; 79 FR 10047, Feb. 24, 2014; 80 FR 37191, June 30, 2015; 80 FR 48247, Aug. 12, 2015; 81 FR 19053, April 4, 2016; 81 FR 24508, April 26, 2016; 81 FR 38972, June 15, 2016]

#### 50 C.F.R. § 648.2

#### § 648.2 Definitions.

In addition to the definitions in the Magnuson Act and in § 600.10 of this chapter, the terms used in this part have the following meanings:

Alewife means *Alosa pseudoharengus*.

American lobster or lobster means *Homarus americanus*.

American shad means *Alosa sapidissima*.

Annual catch entitlement (ACE), with respect to the NE multispecies fishery, means the share of the annual catch limit (ACL) for each NE multispecies stock that is allocated to an individual sector or state-operated permit bank based upon the cumulative fishing history attached to each permit participating in that sector or held by a state-operated permit bank in a given year. This share may be adjusted due to penalties for exceeding the sector's ACE for a particular stock in earlier years, or due to other violations of the FMP, including the yearly sector operations plan. When a sector's or state-operated permit bank's share of a NE multispecies stock, as determined by the fishing histories of vessels participating in that sector or permits held by a state-operated permit bank, is multiplied by the available catch, the result is the amount of ACE (live weight in pounds) that can be harvested (landings and discards) by participants in that sector or transferred by a state-operated permit bank, during a particular fishing year.

At-sea monitor, with respect to the NE multispecies fishery, means any person responsible for observing, verifying, and reporting area fished, catch, and discards

of all species by gear type for sector trips as part of an approved sector at-sea monitoring program.

Atlantic butterfish or butterfish means *Peprilus triacanthus*.

Atlantic croaker means *Micropogonias undulatus*.

Atlantic deep-sea red crab (red crab) means *Chaceon quinquegens*.

Atlantic hagfish means *Myxine glutinosa*.

Atlantic herring means *Clupea harengus*.

Atlantic herring carrier means a fishing vessel that may receive and transport herring caught by another fishing vessel, provided the vessel has been issued a herring permit, does not have any gear on board capable of catching or processing herring, and that has on board a letter of authorization from the Regional Administrator to transport herring caught by another fishing vessel or has declared an Atlantic herring carrier trip via VMS consistent with the requirements at § 648.4(a)(10)(ii).

Atlantic herring dealer means:

- (1) Any person who purchases or receives for a commercial purpose other than solely for transport or pumping operations any herring from a vessel issued a Federal Atlantic herring permit, whether offloaded directly from the vessel or from a shore-based pump, for any purpose other than for the purchaser's own use as bait;
- (2) Any person owning or operating a processing vessel that receives any Atlantic herring from a vessel issued a Federal Atlantic herring permit whether at sea or in port; or
- (3) Any person owning or operating an Atlantic herring carrier that sells Atlantic herring received at sea or in port from a vessel issued a Federal Atlantic herring permit.

Atlantic herring offload means to remove, begin to remove, to pass over the rail, or otherwise take Atlantic herring off of or away from any vessel issued an Atlantic herring permit for sale to either a permitted at-sea Atlantic herring dealer or a permitted land-based Atlantic herring dealer.

Atlantic herring processor means a person who receives unprocessed Atlantic herring from a fishing vessel issued a Federal Atlantic herring permit or from an Atlantic herring dealer for the purposes of processing; or the owner or operator of a fishing vessel that processes Atlantic herring; or an Atlantic herring dealer who purchases Atlantic herring from a fishing vessel with a Federal Atlantic herring permit for resale as bait.

Atlantic herring transfer at-sea means a transfer from the hold, deck, codend, or purse seine of a vessel issued an Atlantic herring permit to another vessel for personal use as bait, to an Atlantic herring carrier or at-sea processor, to a permitted transshipment vessel, or to another permitted Atlantic herring vessel.

Transfers between vessels engaged in pair trawling are not herring transfers at-sea.

Atlantic mackerel or mackerel means *Scomber scombrus*.

Atlantic Mackerel, Squid, and Butterfish Monitoring Committee means the committee made up of staff representatives of the MAFMC and the NEFMC, and the Northeast Regional Office and NEFSC of NMFS. The MAFMC Executive Director or a designee chairs the Committee.

Atlantic salmon means *Salmo salar*.

Atlantic sea scallop or scallop means *Placopecten magellanicus*, throughout its range.

Beam trawl means gear, consisting of a twine bag attached to a beam attached to a towing wire, designed so that the beam does not contact the bottom. The beam is constructed with sinkers or shoes on either side that support the beam above the bottom or any other modification so that the beam does not contact the bottom. The beam trawl is designed to slide along the bottom rather than dredge the bottom.

Black sea bass means *Centropristis striata*.

Black Sea Bass Monitoring Committee means a committee made up of staff representatives of the Mid-Atlantic, New England, and South Atlantic Fishery Management Councils, the Northeast Regional Office of NMFS, the Northeast Fisheries Science Center, and Commission representatives. The Council Executive Director or his designee chairs the Committee.

Black sea bass pot or black sea bass trap means any such gear used in catching and retaining black sea bass.

Blowfish (puffer) means any species in the family Tetraodontidae.

Blueback herring means *Alosa aestivalis*.

Bluefish means *Pomotomus saltatrix*.

Bluefish Monitoring Committee means a committee made up of staff representatives of the Mid-Atlantic Fishery Management Council, the New England Fishery Management Council, and South Atlantic Fishery Management Council, the NMFS Northeast Regional Office, the NMFS Northeast Fisheries Science Center, and the Commission. The Mid-Atlantic Fishery Management Council's Executive Director or a designee chairs the committee.

<Text of definition added by 81 FR 39594, effective June 17, 2016 through Dec. 14, 2016.>

Blueline tilefish means *Caulolatilus microps*.

Bonito means *Sarda sarda*.

Border transfer (BT) means the amount of herring specified pursuant to § 648.200 that may be transferred to a Canadian transport vessel that is permitted under the provisions of Pub.L. 104-297, section 105(e).

Bottom-tending mobile gear, with respect to the NE multispecies and tilefish fisheries, means gear in contact with the ocean bottom, and towed from a vessel, which is moved through the water during fishing in order to capture fish, and

includes otter trawls, beam trawls, hydraulic dredges, non-hydraulic dredges, and seines (with the exception of a purse seine).

Brush-sweep trawl gear means trawl gear consisting of alternating roller discs and bristle brushes that are strung along cables, chains, or footropes, and aligned together to form the sweep of the trawl net, designed to allow the trawl sweep to maintain contact with the ocean floor, or any modification to trawl gear that is substantially similar in design or effect.

Bushel (bu) means a standard unit of volumetric measurement deemed to hold 1.88 ft<sup>3</sup>(53.24 L) of surfclams or ocean quahogs in shell, or 1.24 ft<sup>3</sup> (35.24 L) of in-shell Atlantic sea scallops.

Cage means a container with a standard unit of volumetric measurement containing 60 ft<sup>3</sup>(1,700 L). The outside dimensions of a standard cage generally are 3 ft (91 cm) wide, 4 ft (122 cm) long, and 5 ft (152 cm) high.

Chafing gear or cookies, with respect to the scallop fishery, means steel, rubberized or other types of donut rings, disks, washers, twine, or other material attached to or between the steel rings of a sea scallop dredge.

Charter or party boat means any vessel that carries passengers for hire to engage in recreational fishing and, with respect to multispecies, that is not fishing under a DAS.

Circle hook, with respect to the NE multispecies fishery, means a fishing hook with the point turned perpendicularly back to the shank, or an offset circle hook where the barbed end of the hook is displaced relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side.

Combination vessel means a vessel that has fished in any one calendar year with scallop dredge gear and otter trawl gear during the period 1988 through 1990, and that is eligible for an allocation of individual DAS under the NE Multispecies FMP and has applied for or been issued a limited access scallop permit.

Commercial fishing or fishing commercially means fishing that is intended to, or results in, the barter, trade, transfer, or sale of fish.

Commission means the Atlantic States Marine Fisheries Commission.

Common pool trip, with respect to the NE multispecies fishery, means any trip taken by a common pool vessel under a NE multispecies DAS or under the provisions of a limited access NE multispecies Small Vessel or Handgear A permit, or an open access Handgear B permit that lands regulated species or ocean pout.

Common pool vessel, with respect to the NE multispecies fishery, means any vessel issued a limited access NE multispecies permit or open access NE multispecies Handgear B permit that is not a member of an approved sector for a particular fishing year and that is not operating under the provisions of an approved sector operations plan. Such vessels must use a NE multispecies DAS, or be

fishing under the provisions of a limited access NE multispecies Small Vessel or Handgear A permit, or an open access Handgear B permit, to land regulated species or ocean pout, and must comply with effort controls, trip limits, gear restricted areas, and other provisions specified in this part. Vessels fishing under the provisions of the common pool are also referred to as non-sector vessels.

Conger eel means *Conger oceanicus*.

Council means the New England Fishery Management Council (NEFMC) for the Atlantic herring, Atlantic sea scallop, Atlantic deep-sea red crab, NE multispecies, monkfish, and NE skate fisheries; or the Mid-Atlantic Fishery Management Council (MAFMC) for the Atlantic mackerel, squid, and butterfish; Atlantic surfclam and ocean quahog; summer flounder, scup, and black sea bass; spiny dogfish; Atlantic bluefish; and tilefish fisheries.

Councils with respect to the monkfish fishery and spiny dogfish fishery means the New England Fishery Management Council (NEFMC) and the Mid-Atlantic Fishery Management Council (MAFMC).

Cunner means *Tautoglabrus adspersus*.

DAS flip, with respect to the NE multispecies fishery, means ending fishing under a Regular B DAS and beginning fishing under a Category A DAS.

DAS Lease, with respect to the NE multispecies limited access fishery, means the transfer of the use of DAS from one limited access NE multispecies vessel to another limited access NE multispecies vessel for a period not to exceed a single fishing year.

DAS Lessee, with respect to the NE multispecies limited access fishery, means the NE multispecies limited access vessel owner and/or the associated vessel that acquires the use of DAS from another NE multispecies limited access vessel.

DAS Lessor, with respect to the NE multispecies limited access fishery, means the NE multispecies limited access vessel owner and/or the associated vessel that transfers the use of DAS to another NE multispecies limited access vessel.

Day(s)-at-Sea (DAS), with respect to the NE multispecies and monkfish fisheries (except as described in § 648.82(k)(1)(iv)), and the Atlantic sea scallop fishery, means the 24-hr period of time or any part thereof during which a fishing vessel is absent from port to fish for, possess, or land, or fishes for, possesses or lands, regulated species, monkfish, or scallops.

Dealer means any person who receives, for a commercial purpose (other than solely for transport on land), from the owner or operator of a vessel issued a valid permit under this part, any species of fish, the harvest of which is managed by this part, unless otherwise exempted in this part.

Dealer code means a confidential five-digit number assigned to each dealer required to submit purchases using the IVR system for the purpose of maintaining the integrity of the data reported through the IVR system.

De-hooker, with respect to the NE multispecies hook gear fishery, means the fairlead rollers when used in a manner that extracts fish hooks from caught fish, also known as “crucifiers.”

Dockside/roving monitor, with respect to the NE multispecies fishery, means any person responsible for observing/verifying the offloads of all species by common pool or sector vessels either directly to a federally permitted dealer or to a truck for later delivery to a federally permitted dealer, and for certifying the accuracy of landed weights, as reported by federally permitted dealers, pursuant to this part.

Dredge or dredge gear, with respect to the scallop fishery, means gear consisting of a mouth frame attached to a holding bag constructed of metal rings, or any other modification to this design, that can be or is used in the harvest of scallops.

Dredge bottom, with respect to scallops, means the rings and links found between the bail of the dredge and the club stick, which, when fishing, would be in contact with the sea bed. This includes the triangular shaped portions of the ring bag commonly known as “diamonds.”

Dredge top, with respect to the scallop fishery, means the mesh panel in the top of a dredge and immediately adjacent rings and links found between the bail of the dredge, the club stick, and the two side panels. The bail of the dredge is the rigid structure of the forward portion of the dredge that connects to the warp and holds the dredge open. The club stick is the rigid bar at the tail of the dredge bag that is attached to the rings.

Dredge vessel, with respect to the scallop fishery, means any fishing vessel that is equipped for fishing using dredge gear and that is capable of catching scallops.

Electronic monitoring, with respect to the NE multispecies fishery, means any equipment that is used to monitor area fished and the amount and identity of species kept and discarded in lieu of at-sea monitors as part of an approved Sector at-sea monitoring program.

Exempted gear, with respect to the NE multispecies fishery, means gear that is deemed to be not capable of catching NE multispecies, and includes: Pelagic hook and line, pelagic longline, spears, rakes, diving gear, cast nets, tongs, harpoons, weirs, dipnets, stop nets, pound nets, pelagic gillnets, pots and traps, shrimp trawls (with a properly configured grate as defined under this part), and surfclam and ocean quahog dredges.

Fishing circle, with respect to the NE multispecies limited access fishery, means the calculated circumference of a bottom trawl based on the number of meshes and stretched mesh length at the narrow, aft end of the square of the net.

Fishing trip or trip means a period of time during which fishing is conducted, beginning when the vessel leaves port and ending when the vessel returns to port.

<Text of definition effective until Dec. 5, 2016.>

Fishing year means:

(1) For the Atlantic sea scallop and Atlantic deep-sea red crab fisheries, from March 1 through the last day of February of the following year.

(2) For the NE multispecies, monkfish and skate fisheries, from May 1 through April 30 of the following year.

(3) For the tilefish fishery, from November 1 through October 31 of the following year.

(4) For all other fisheries in this part, from January 1 through December 31.

<Text of definition effective Dec. 5, 2016.>

Fishing year means:

(1) For the Atlantic deep-sea red crab fishery, from March 1 through the last day of February of the following year.

(2) Beginning in 2018, for the Atlantic sea scallop fishery, from April 1 through March 31 of the following year (for 2017, the Atlantic sea scallop fishing year will be from March 1, 2017, through March 31, 2018).

(3) For the NE multispecies, monkfish and skate fisheries, from May 1 through April 30 of the following year.

(4) For the tilefish fishery, from November 1 through October 31 of the following year.

(5) For all other fisheries in this part, from January 1 through December 31.

Fixed gear, for the purposes of the Atlantic herring fishery, means weirs or stop seines.

Flatfish gillnets means gillnets that are either constructed with no floats on the float line, or that are constructed with floats on the float line and that have tie-down twine between the float line and the lead line not more than 48 inches (18.90 cm) in length and spaced not more than 15 feet (4.57 m) apart.

FMP means fishery management plan.

Fourspot flounder means *Paralichthys oblongus*.

Full-processing (fully process or fully processed), with respect to the Atlantic deep-sea red crab fishery, means any activity that removes meat from any part of a red crab.

Gillnet gear capable of catching multispecies means all gillnet gear except pelagic gillnet gear specified at § 648.81(f)(5)(ii) and pelagic gillnet gear that is designed to fish for and is used to fish for or catch tunas, swordfish, and sharks.

Gross registered tonnage (GRT) means the gross registered tonnage specified on the USCG documentation for a vessel.

Hagfish means *Myxine glutinosa*.

Hail Weight means a good-faith estimate in pounds (or count of individual fish, if a party or charter vessel), by species, of all species, or parts of species, such as monkfish livers, landed or discarded for each trip.

Handgear, with respect to the NE multispecies fishery, means handline gear, rod and reel gear, and tub-trawl gear.

Handline or handline gear means fishing gear that is released by hand and consists of one main line to which is attached no more than two leaders for a total of no more than three hooks. Handlines are retrieved only by hand, not by mechanical means.

Harbor porpoise means *Phocoena phocoena*.

Harbor Porpoise Review Team (HPRT) means a team of scientific and technical experts appointed by the NEFMC to review, analyze, and propose harbor porpoise take mitigation alternatives.

Hickory shad means *Alosa mediocris*.

Hook gear means fishing gear that is comprised of a hook or hooks attached to a line and includes, but is not limited to, longline, setline, jigs, troll line, rod and reel, and line trawl.

Illex means *Illex illecebrosus* (short-finned or summer squid).

Incidental Total Allowable Catch (TAC), with respect to the NE multispecies fishery, means the total amount of catch (both kept and discarded) of a regulated groundfish stock of concern that can be taken by vessels fishing under Category B DAS.

Individual Transferable Quota (ITQ) Program means, for the Atlantic surfclam and ocean quahog fishery, the annual individual allocation of quota specified at § 648.74.

Inshore exempted species means the following species:

Bay scallop - *Aequipecten irradians*.

Blood arc clam - *Anadara ovalis*.

Blood worm - *Glycera dibranchiata*.

Blue crab - *Callinectes similis* and *Callinectes sapidus*.

Blue mussel - *Mytilus edulis*.

Green crab - *Carcinus maenas*.

Hermit crab - *Clibanarius vittatus*, *Pagurus pollicaris* and *Pagurus longicarpus*.

Japanese shore crab - *Hemigrapsus sanguineus*.

Oyster - *Crassostrea virginica* and *Ostrea edulis*.

Quahog - *Mercenaria mercenaria*.

Razor clam - *Ensis directus*.

Sand worm - *Nereis virens*.

Soft clam - *Mya arenaria*.

Spider crab - *Libinia emarginata*.

Interest in an IFQ allocation means: An allocation of quota share or annual IFQ allocation held by an individual; or by a company in which the individual is an

owner, part owner, officer, shareholder, or partner; or by an immediate family member (an individual's parents, spouse, children, and siblings).

IVR System means the Interactive Voice Response reporting system established by the Regional Administrator for the purpose of monitoring harvest levels for certain species.

Jigging, with respect to the NE multispecies fishery, means fishing for regulated species with handgear, handline, or rod and reel using a jig, which is a weighted object attached to the bottom of the line used to sink the line and/or imitate a baitfish, which is moved (“jigged”) with an up and down motion.

John Dory means *Zenopsis conchifera*.

JVpt, with respect to the Atlantic herring fishery, means the specification of the total amount of herring available for joint venture processing by foreign vessels in the EEZ and state waters.

Land means to begin offloading fish, to offload fish, or to enter port with fish.

Lessee means:

- (1) A vessel owner who receives temporarily transferred NE multispecies DAS from another vessel through the DAS Leasing Program specified at § 648.82(k); or
- (2) A person or entity eligible to hold tilefish IFQ allocation, who receives temporarily transferred tilefish IFQ allocation, as specified at § 648.294(e)(1).

Lessor means:

- (1) A vessel owner who temporarily transfers NE multispecies DAS to another vessel through the DAS Leasing Program specified at § 648.82(k); or
- (2) An IFQ Allocation permit holder who temporarily transfers tilefish IFQ Allocation, as specified at § 648.294(e)(1).

Limited access general category (LAGC) scallop vessel means a vessel that has been issued an individual fishing quota (IFQ), Northern Gulf of Maine (NGOM), or incidental catch LAGC scallop permit pursuant to § 648.4(a)(2)(ii). An LAGC scallop vessel may also be issued a limited access scallop permit.

Limited access herring vessel means a vessel that has been issued a valid permit for any type of limited access herring vessel permit described in § 648.4.

Limited access scallop vessel means a vessel that has been issued a limited access full-time, part-time, or occasional scallop permit pursuant to § 648.4(a)(2)(i). A limited access scallop vessel may also be issued an LAGC scallop permit.

Liner means a piece of mesh or any other material rigged inside or outside the main or outer net or dredge that restricts the mesh or ring size or otherwise reduces escapement.

Link, with respect to the sea scallop fishery, means the material, usually made of a  $\frac{3}{8}$ -inch (10-mm) or  $\frac{7}{16}$ -inch (11-mm) diameter metal rod, that joins two adjacent rings within the ring bag of a dredge.

Little tunny means *Euthynnus alleteratus*.

Longfin squid means *Doryteuthis (Amerigo) pealeii* (formerly *Loligo pealeii*).

Longhorn sculpin means *Myoxocephalus octodecimspinosus*.

Longline gear means fishing gear that is or is designed to be set horizontally, either anchored, floating, or attached to a vessel, and that consists of a main or ground line with three or more gangions and hooks.

Mahogany Quahog see Ocean Quahog

Maine bushel means a standard unit of volumetric measurement equal to 1.2445 cubic feet (35.24 L) of ocean quahogs in the shell.

Maine mahogany quahog zone means the area bounded on the east by the U.S.–Canada maritime boundary, on the south by a straight line at 43°50' N. latitude, and on the north and west by the shoreline of Maine.

MCSP means a Mobile Communications Service Provider, which is an operator of a mobile communications service used to provide wireless connectivity between mobile platforms and fixed platforms, and enables location transmission and two-way message exchange between the vessel and NMFS, when using a compatible MTU.

Menhaden means Atlantic menhaden, *Brevoortia tyrannus*.

Midwater trawl gear means trawl gear that is designed to fish for, is capable of fishing for, or is being used to fish for pelagic species, no portion of which is designed to be or is operated in contact with the bottom at any time. The gear may not include discs, bobbins, or rollers on its footrope, or chafing gear as part of the net.

Mobile gear means trawls, beam trawls, and dredges that are designed to maneuver with that vessel.

Monkfish, also known as anglerfish or goosefish, means *Lophius americanus*.

Monkfish gillnets means gillnet gear with mesh size no smaller than 10–inches (25.4 cm) diamond mesh that is designed and used to fish for and catch monkfish while fishing under a monkfish DAS.

Monkfish Monitoring Committee means a team of scientific and technical staff appointed by the NEFMC and MAFMC to review, analyze, and recommend adjustments to the management measures. The team consists of staff from the NEFMC and the MAFMC, NMFS Northeast Regional Office, NEFSC, the USCG, two fishing industry representatives selected by their respective Council chairman (one from each management area with at least one of the two representing either the Atlantic sea scallop or northeast multispecies fishery), and staff from affected coastal states, appointed by the Atlantic States Marine Fisheries Commission. The Chair is elected by the Committee from within its ranks, subject to the approval of the Chairs of the NEFMC and MAFMC.

Monkfish-only DAS means monkfish DAS allocated to a limited access monkfish Category C, D, F, G, or H permit that are in excess of that permit's initial allocation of Northeast multispecies Category A DAS at the beginning of a fishing year.

MTU means a Mobile Transmitting Unit, which is a transceiver or communications device, including antennae, dedicated message terminal and display, and an input device such as a keyboard installed on a fishing vessel participating in the VMS program.

Mullet means any species in the family Mugilidae.

Multispecies frames, also known as multispecies racks, means the remains of the multispecies finfish after it has been filleted or processed, not including the fillet. Multispecies Monitoring Committee means a team of scientific and technical staff appointed by the NEFMC to review, analyze, and recommend adjustments to the measurement measures. The team consists of staff from the NEFMC and the MAFMC, NMFS Northeast Region Office, NEFSC, the USCG, an industry representative, and no more than two representatives, appointed by the Commission, from affected states.

NAFO means Northwest Atlantic Fisheries Organization.

NAFO Convention Area means the waters of the Northwest Atlantic Ocean north of 35°00' N. lat. and west of a line extending due north from 35°00' N. lat. and 42°00' W. long. to 59°00' N. lat., thence due west to 44°00' W. long., and thence due north to the coast of Greenland and the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78°10' N. lat.

NAFO Regulatory Area means the part of the NAFO Convention Area which lies beyond the 200-mile zone of the coastal states.

NEFSC means the Northeast Fisheries Science Center, NMFS.

NE Skate Complex (skates) means *Leucoraja ocellata* (winter skate); *Dipturus laevis* (barndoor skate); *Amblyraja radiata* (thorny skate); *Malacoraja senta* (smooth skate); *Leucoraja erinacea* (little skate); *Raja eglanteria* (clearnose skate); and *Leucoraja garmani* (rosette skate).

Net tonnage (NT) means the net tonnage specified on the USCG documentation for a vessel.

Non-exempt gillnet fishery means a fishery which uses gillnet gear capable of catching multispecies.

Non-exempt species means species of fish not included under the GOM, GB and SNE Regulated Mesh Area exempted fisheries, as specified in § 648.80(a)(5); (a)(6); (a)(9) through (14); (b)(3)(i) and (ii); (b)(5) through (8); and (d), (e), (h), and (i).

Northeast (NE) multispecies or multispecies means the following species:

American plaice—*Hippoglossoides platessoides*.

Atlantic cod—*Gadus morhua*.

Atlantic halibut—*Hippoglossus hippoglossus*.

Atlantic wolffish—*Anarhichas lupus*.

Haddock—*Melanogrammus aeglefinus*.

Ocean pout—*Macrozoarces americanus*.

Offshore hake—*Merluccius albidus*.

Pollock—*Pollachius virens*.

Redfish—*Sebastes fasciatus*.

Red hake—*Urophycis chuss*.

Silver hake (whiting)—*Merluccius bilinearis*.

White hake—*Urophycis tenuis*.

Windowpane flounder—*Scophthalmus aquosus*.

Winter flounder—*Pleuronectes americanus*.

Witch flounder—*Glyptocephalus cynoglossus*.

Yellowtail flounder—*Pleuronectes ferruginea*.

Not available for immediate use means that the gear is not being used for fishing and is stowed in conformance with one of the following methods:

(1) Nets—

(i) Below-deck stowage.

(A) The net is stored below the main working deck from which it is deployed and retrieved;

(B) The net is fan-folded (flaked) and bound around its circumference.

(ii) On-deck stowage.

(A) The net is fan-folded (flaked) and bound around its circumference;

(B) The net is securely fastened to the deck or rail of the vessel; and

(C) The towing wires, including the leg wires, are detached from the net.

(iii) On-reel stowage.

(A) The net is on the net reel;

(B) The codend of the net is removed from the net and stored below deck; and

(C) The entire surface of the net is covered and securely bound by:

(1) Canvas of other similar opaque material; or

(2) A highly visible orange or yellow mesh material that is not capable of catching fish or being utilized as fishing gear. An example of highly visible orange or yellow mesh includes but is not limited to the orange fence material commonly used to enclose construction sites.

(iv) On-reel stowage for vessels transiting the Gulf of Maine Rolling Closure Areas and the Georges Bank Seasonal Closure Area.

(A) If a vessel is transiting the Gulf of Maine Rolling Closure Areas and the Georges Bank Seasonal Closure Area, not available for immediate use also means, the net is on the net reel;

(B) No containment rope, codend tripping device, or other mechanism to close off the codend is attached to the codend;

(C) The entire surface of the net is covered and securely bound by:

(1) Canvas or other similar opaque material; or

(2) A highly visible orange or yellow mesh material that is not capable of catching fish or being utilized as fishing gear. Highly visible orange or yellow mesh includes but is not limited to the orange fence material commonly used to enclose construction sites.

(2) Scallop dredges.

(i) The towing wire is detached from the scallop dredge, the towing wire is completely reeled up onto the winch, the dredge is secured, and the dredge or the winch is covered so that it is rendered unusable for fishing; or

(ii) The towing wire is detached from the dredge and attached to a bright-colored poly ball no less than 24 inches (60.9 cm) in diameter, with the towing wire left in its normal operating position (through the various blocks) and either is wound back to the first block (in the gallows) or is suspended at the end of the lifting block where its retrieval does not present a hazard to the crew and where it is readily visible from above.

(3) Hook gear (other than pelagic). All anchors and buoys are secured and all hook gear, including jigging machines, are covered.

(4) Sink gillnet gear. All nets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck or rail, and all buoys larger than 6 inches (15.24 cm) in diameter, high flyers, and anchors are disconnected.

(5) Other methods of stowage. Any other method of stowage authorized in writing by the Regional Administrator and subsequently published in the Federal Register. Northern shrimp means *Pandalus borealis*.

Observer/sea sampler means any person certified/approved by NMFS to collect operational fishing data, biological data, or economic data through direct observation and interaction with operators of commercial fishing vessels as part of NMFS' Northeast Fisheries Observer Program and Northeast At-sea Monitoring Program. Observer/sea samplers are also referred to as fisheries observers, fisheries observers/sea samplers, and NMFS-certified fisheries observers/sea samplers.

Ocean quahog means the species *Arctica islandica*.

Offload or offloading means to begin to remove, to remove, to pass over the rail, or otherwise take away fish from any vessel. For purposes of the surfclam and ocean quahog fishery, it means to separate physically a cage from a vessel, such as by removing the sling or wire used to remove the cage from the harvesting vessel.

<Text of definition effective until Dec. 5, 2016.>

Open areas, with respect to the Atlantic sea scallop fishery, means any area that is not subject to restrictions of the Sea Scallop Access Areas specified in §§ 648.59 and 648.60, Rotational Closed Areas specified in § 648.58, EFH Closed Areas specified in § 648.61, or the Northern Gulf of Maine Management Area specified in § 648.62.

<Text of definition effective Dec. 5, 2016.>

Open areas, with respect to the Atlantic sea scallop fishery, means any area that is not subject to restrictions of the Sea Scallop Rotational Areas specified in §§ 648.59 and 648.60, EFH Closed Areas specified in § 648.61, or the Northern Gulf of Maine Management Area specified in § 648.62.

Operational discards in the Atlantic herring fishery means small amounts of fish that cannot be pumped on board and remain in the codend or seine at the end of pumping operations. Leaving small amounts of fish in the codend or seine at the end of pumping operations is operationally discarding catch.

Operator means the master, captain, or other individual on board a fishing vessel, who is in charge of that vessel's operations.

Out of the monkfish fishery means the period of time during which a vessel is not fishing for monkfish under the monkfish DAS program.

Out of the multispecies fishery means the period of time during which a vessel is not fishing for regulated species under the NE multispecies DAS program.

Pair trawl or pair trawling means to tow a single net between two vessels.

Parlor trap/pot means any structure or other device, other than a net, with more than one compartment inside designed to impede escape of lobsters or crabs from the device or structure, which is placed, or designed to be placed, on the ocean bottom and is designed for, or is capable of, catching lobsters and/or red crabs.

Pelagic hook and line gear means handline or rod and reel gear that is designed to fish for, or that is being used to fish for, pelagic species, no portion of which is designed to be or is operated in contact with the bottom at any time.

Pelagic longline gear means fishing gear that is not fixed, nor designed to be fixed, nor anchored to the bottom and that consists of monofilament main line (as opposed to a cable main line) to which gangions are attached.

<Text of definition effective until Dec. 5, 2016.>

Permit year means:

- (1) For the Atlantic sea scallop and Atlantic deep-sea red crab fisheries, from March 1 through the last day of February of the following year;
- (2) For all other fisheries in this part, from May 1 through April 30 of the following year.

<Text of definition effective Dec. 5, 2016.>

Permit year means:

(1) For the Atlantic deep-sea red crab fishery, from March 1 through the last day of February of the following year;

(2) Beginning in 2018, for the Atlantic sea scallop fishery, from April 1 through the last day of March of the following year (for 2017, the Atlantic sea scallop permit year will be from March 1, 2017, through March 31, 2018);

(3) For all other fisheries in this part, from May 1 through April 30 of the following year.

Personal use, with respect to the surfclam or ocean quahog fishery, means harvest of surfclams or ocean quahogs for use as bait, for human consumption, or for other purposes (not including sale or barter) in amounts not to exceed 2 bu (106.48 L) per person per fishing trip.

Person who receives bluefish for commercial purposes means any person (excluding representatives of governmental agencies) engaged in the sale, barter, or trade of bluefish received from a fisherman, or one who transports bluefish from a fisherman.

Postmark means independently verifiable evidence of date of mailing, such as U.S. Postal Service postmark, United Parcel Service (U.P.S.) or other private carrier postmark, certified mail receipt, overnight mail receipt, or receipt received upon hand delivery to an authorized representative of NMFS.

Potential Sector contribution (PSC), with respect to the NE multispecies fishery, means an individual vessel's share of the ACL for each stock of regulated species or ocean pout that is derived from the fishing history associated with the permit issued to that particular vessel for the purposes of participating in a sector and contributing to that sector's ACE for each stock allocated to sectors under the NE Multispecies FMP.

Prior to leaving port, with respect to the call-in notification system for NE multispecies, and the call-in notification system for monkfish vessels that are fishing under the limited access monkfish Category C, D, F, G, or H permit provisions that are also fishing under a NE multispecies DAS, means no more than 1 hour prior to the time a vessel leaves the last dock or mooring in port from which that vessel departs to engage in fishing, including the transport of fish to another port. With respect to the call-in notification system for monkfish vessels that are fishing under the limited access monkfish Category A or B permit provisions, it means prior to the last dock or mooring in port from which a vessel departs to engage in fishing, including the transport of fish to another port.

Private recreational fishing vessel, with respect to the NE multispecies fishery, means a vessel engaged in recreational fishing that has not been issued a Federal NE multispecies permit, does not sell fish, and does not take passengers for hire.

Processing, or to process, with respect to the Atlantic herring fishery, means the preparation of Atlantic herring to render it suitable for human consumption, bait,

commercial uses, industrial uses, or long-term storage, including but not limited to cooking, canning, roe extraction, smoking, salting, drying, freezing, or rendering into meat or oil.

Processor, with respect to the Atlantic surfclam and ocean quahog fisheries, means a person who receives surfclams or ocean quahogs for a commercial purpose and removes them from a cage.

Purse seine gear means an encircling net with floats on the top edge, weights and a purse line on the bottom edge, and associated gear, or any net designed to be, or capable of being, used in such fashion.

Quota-managed species means any species of finfish managed under this part by an annual or seasonal quota, by annual target or actual TAC, or by DAH limits.

Records, with respect to records required to be kept by § 648.7, means those that include, but are not limited to, any written, recorded, graphic, electronic, or digital material; as well as other information stored in or accessible through a computer or other information retrieval system; worksheets; weighout slips; preliminary, interim, and final tally sheets; tags; notes; logbooks; statements; receipts; checks; ledgers; notebooks; diaries; spreadsheets; diagrams; graphs; charts; tapes; disks; or computer printouts.

Recreational fishing means fishing that is not intended to, nor results in the barter, trade, or sale of fish.

Recreational fishing vessel, with respect to the scup fishery, means any vessel from which no fishing other than recreational fishing is conducted. Charter and party boats are considered recreational fishing vessels for purposes of the scup minimum size requirement.

Red Crab Management Unit means an area of the Atlantic Ocean from 35° 15.3' N. Lat., the approximate latitude of Cape Hatteras Light, NC, northward to the U.S.–Canada border, extending eastward from the shore to the outer boundary of the exclusive economic zone and northward to the U.S.–Canada border in which the United States exercises exclusive jurisdiction over all Atlantic deep-sea red crab fished for, possessed, caught, or retained in or from such area.

Red crab trap/pot means any structure or other device, other than a net or parlor trap/pot, that is placed, or designed to be placed, on the ocean bottom and is designed for, or is capable of, catching red crabs.

Red crab trip, with respect to the Atlantic deep-sea red crab fishery, means a trip on which a vessel fishes for, possesses, or lands, or intends to fish for, possess, or land red crab in excess of the incidental limit, as specified at § 648.263(b)(1).

Regional Administrator means the Administrator, Northeast Region, NMFS, or a designee.

Regulated fishery means any fishery of the United States which is regulated under the Magnuson–Stevens Act.

Regulated species, means the subset of NE multispecies that includes Atlantic cod, witch flounder, American plaice, yellowtail flounder, haddock, pollock, winter flounder, windowpane flounder, redfish, white hake, Atlantic halibut, and Atlantic wolffish. Regulated species is also referred to as regulated NE multispecies.

Reporting month means the period of time beginning at 0001 hours local time on the first day of each calendar month and ending at 2400 hours local time on the last day of each calendar month.

Reporting week means the period of time beginning at 0001 local time on Sunday and ending at 2400 hours local time the following Saturday.

Re-rig or re-rigged means physical alteration of the vessel or its gear in order to transform the vessel into one capable of fishing commercially for a species in the applicable fishery.

Rigged hooks means hooks that are baited, or only need to be baited, in order to be fished. Unsecured, unbaited hooks and gangions are not considered to be rigged.

River herring means alewife (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*).

Rockhopper and roller gear means trawl gear configured with disks, rollers, or other similar shaped devices that are attached to the bottom belly of the trawl, contact the sea bottom, and that are designed to raise the bottom panel of the trawl off the ocean bottom so as to enable the gear to be fished on hard bottom.

Rod and reel means a hand-held (including rod holder) fishing rod with a manually operated reel attached.

<Text of definition effective until Dec. 5, 2016.>

Rotational Closed Area, with respect to the Atlantic sea scallop fishery, means an area that is closed only to scallop fishing for a period defined in § 648.58.

Roundfish gillnets means gillnets that are constructed with floats on the float line and that have no tie-down twine between the float line and the lead line.

Runaround gillnet or encircling gillnet means a rectangular net placed upright in the water column in a circular fashion with an opening equal to or less than  $\frac{1}{4}$  the length of the net or with an opening greater than  $\frac{1}{4}$  the length of the net, if the opening is obstructed in any fashion.

Scallop dredge vessel means any fishing vessel, other than a combination vessel, that uses or is equipped to use scallop dredge gear.

Scup means *Stenotomus chrysops*.

Scup Monitoring Committee means a committee made up of staff representative of the MAFMC, NEFMC, South Atlantic Fishery Management Council, the NMFS Northeast Regional Office, the NEFSC, and the Commission. The MAFMC Executive Director or a designee chairs the committee.

Scup pot or trap means a pot or trap used in catching and retaining scup.

<Text of definition effective until Dec. 5, 2016.>

Sea Scallop Access Area, with respect to the Atlantic sea scallop fishery, means an area that has been designated under the Atlantic Sea Scallop Fishery Management Plan as an area with area-specific management measures that are designed to control fishing effort and mortality on only the portion of the scallop resource within the specified Sea Scallop Access Area. Such measures are not applicable in Open Areas defined above.

<Text of definition added by 81 FR 76519, effective Dec. 5, 2016.>

Sea Scallop Access Area, Scallop Access Area, or Access Area, with respect to the Atlantic sea scallop fishery, means an area that has been designated under the Atlantic Sea Scallop Fishery Management Plan as a sea scallop rotational area that is open to the scallop fishery in a given fishing year.

Sea Scallop Plan Development Team (PDT) means a team of technical experts appointed by the NEFMC.

<Text of definition added by 81 FR 76519, effective Dec. 5, 2016.>

Sea Scallop Rotational Area, Scallop Rotational Area, or Rotational Area, with respect to the Atlantic sea scallop fishery, means an area that has been designated under the Atlantic Sea Scallop Fishery Management Plan as part of the Sea Scallop Rotational Management Program. A rotational area may be closed or open to the scallop fishery in a given fishing year. A rotational area open to the scallop fishery is termed a Sea Scallop Access Area and has area-specific management measures that are designed to control fishing effort and mortality on only the portion of the scallop resource within the area. Such measures are not applicable as defined in § 648.2 in the definition to Open Areas.

Sea raven means *Hemitripterus americanus*.

Searobin means any species of the family Triglidae.

Sector, with respect to the NE multispecies fishery, means a group of persons holding limited access NE multispecies permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and that have been allocated a portion of the TACs of species managed under the NE Multispecies FMP to achieve objectives consistent with the applicable goals and objectives of the FMP. Each sector must meet the sector eligibility and minimum size requirements specified in § 648.87(a)(3) and (4) to be approved by NMFS.

Sector trip, with respect to the NE multispecies fishery, means any trip taken by a sector vessel subject to the restrictions and conditions of an approved sector operations plan, as specified in § 648.87(c), in which the vessel declared its intent to fish in the NE multispecies fishery pursuant to § 648.10.

Sector vessel, with respect to the NE multispecies fishery, means any vessel assigned a permit that is a member of an approved sector for a particular fishing

year and that is subject to the restrictions and conditions of an approved sector operations plan, as specified in § 648.87.

Set-only trip means a fishing trip on which any federally permitted vessel deploys gear with the intention of retrieving it on a separate trip and does not haul-back or retrieve any gear capable of catching fish on the set-only trip.

Shad means American shad (*Alosa sapidissima*) and hickory shad (*Alosa mediocris*).

Shucking or to shuck means opening or to open a scallop, surfclam, or ocean quahog and removing the meat or the adductor muscle from the shell.

Shucking machine means any mechanical device that automatically removes the meat or the adductor muscle from a scallop, surfclam, or ocean quahog shell.

Sink gillnet or bottom-tending gillnet means any gillnet, anchored or otherwise, that is designed to be, or is fished on or near, the bottom in the lower third of the water column.

Skate means members of the Family Rajidae, including: *Leucoraja ocellata* (winter skate); *Dipturus laevis* (barndoor skate); *Amblyraja radiata* (thorny skate); *Malacoraja senta* (smooth skate); *Leucoraja erinacea* (little skate); *Raja eglanteria* (clearnose skate); and *Leucoraja garmani* (rosette skate).

Skate Management Unit means an area of the Atlantic Ocean from 35° 15.3' N. lat., the approximate latitude of Cape Hatteras Light, NC, northward to the U.S.–Canada border, extending eastward from the shore to the outer boundary of the EEZ and northward to the U.S.–Canada border in which the United States exercises exclusive jurisdiction over all skates fished for, possessed, caught, or retained in or from such area.

Slip(s) or slipping catch in the Atlantic herring fishery means discarded catch from a vessel issued an Atlantic herring permit that is carrying a NMFS–approved observer prior to the catch being brought on board or prior to the catch being made available for sampling and inspection by a NMFS–approved observer after the catch is on board. Slip(s) or slipping catch includes releasing fish from a codend or seine prior to the completion of pumping the fish on board and the release of fish from a codend or seine while the codend or seine is in the water. Slippage or slipped catch refers to fish that are slipped. Slippage or slipped catch does not include operational discards, discards that occur after the catch is brought on board and made available for sampling and inspection by a NMFS–approved observer, or fish that inadvertently fall out of or off fishing gear as gear is being brought on board the vessel.

Slip(s) or slipping catch in the Atlantic mackerel and longfin squid fisheries means discarding catch from a vessel issued an Atlantic mackerel or longfin squid permit that is carrying a NMFS–approved observer prior to the catch being brought on board or prior to the catch being made available for sampling and inspection by a

NMFS–approved observer after the catch is onboard. Slip(s) or slipping catch includes releasing fish from a codend or seine prior to the completion of pumping the fish on board and the release of fish from a codend or seine while the codend or seine is in the water. Slippage or slipped catch refers to fish that are slipped.

Slippage or slipped catch does not include operational discards, discards that occur after the catch is brought on board and made available for sampling and inspection by a NMFS–approved observer, or fish that inadvertently fall out of or off fishing gear as gear is being brought on board the vessel.

Small-mesh multispecies means the subset of Northeast multispecies that includes silver hake, offshore hake, and red hake.

Smooth dogfish means *Mustelis canis*.

Sorting machine, with respect to the Atlantic sea scallop fishery, means any mechanical device that automatically sorts whole scallops by shell height, size, or other physical characteristics.

Spiny dogfish means *Squalus acanthias*.

Spiny Dogfish Monitoring Committee means a committee made up of staff representatives of the MAFMC, NEFMC, the NMFS Northeast Regional Office, the Northeast Fisheries Science Center, and the states, as well as two ex-officio industry members (one from each Council jurisdiction). The MAFMC Executive Director or a designee chairs the committee.

Spot means *Leiostomus xanthurus*.

Square mesh, with respect to the NE multispecies fishery, means mesh in which the horizontal bars of the mesh run perpendicular to the long axis of the net so when the net is placed under a strain the mesh remains open to a square-like shape.

Square mesh can be formed by hanging diamond mesh “on the square,” if the resulting mesh conforms with the above description of square mesh.

Squid means longfin squid (*Doryteuthis (Amerigo) pealeii*, formerly *Loligo pealeii*) or *Illex illecebrosus*.

Standard tote means a box typically constructed of plastic, designed to hold 100 lb (45.3 kg) of fish plus ice, and that has a liquid capacity of 70 L, or a volume of not more than 4,320 cubic in (2.5 cubic ft or 70.79 cubic cm).

State-operated permit bank means a depository established and operated by a state through an agreement between NMFS and a state in which Federal grant funds have been used by the state to obtain Federal fishing vessel permits so that the fishing access privileges associated with those permits may be allocated to qualified persons and that meets the requirement of § 648.87(e).

Static gear, with respect to the NE multispecies fishery, means stationary gear, usually left for a period of time in one place, that depends on fish moving to the gear, and includes gillnets, longlines, handgear, traps, and pots.

Stock of concern, with respect to the NE multispecies fishery, means a stock that is in an overfished condition, or that is subject to overfishing.

Stocks targeted by the default measures, with respect to the NE multispecies fishery, are: American plaice, and SNE/MA yellowtail flounder for the 2006 fishing year; and American plaice, GB cod, GOM cod, CC/GOM yellowtail flounder, SNE/MA yellowtail flounder, white hake and SNE/MA winter flounder for the 2009 fishing year.

Stretched mesh, with respect to the NE multispecies Rühle Trawl, means mesh that is pulled so that slack in the mesh is eliminated and the mesh opening is closed.

Sub-lease, with respect to the NE multispecies fishery, means the leasing of DAS that have already been leased to another vessel.

Summer flounder means *Paralichthys dentatus*.

Summer Flounder Monitoring Committee means a committee made up of staff representatives of the MAFMC, NEFMC, and SAFMC, the NMFS Northeast Regional Office, the NEFSC, the Southeast Science Center, and the Commission. The MAFMC Executive Director or a designee chairs the committee.

Surfclams means Atlantic surfclams of the species *Spisula solidissima*.

Sweep, with respect to the NE multispecies limited access fishery, means the part of a bottom trawl that, during normal use, is in contact with the sea floor along the outer edges of the lower webbing of the net.

Swordfish means *Xiphias gladius*.

Target total allowable catch (TAC) means the annual domestic harvest targets for regulated species.

Tautog (blackfish) means *Tautoga onitas*.

Tied up to the dock or tying up at a dock means tied up at a dock, on a mooring, or elsewhere in a harbor.

Tilefish means golden tilefish, *Lopholatilus chamaeleonticeps*, unless otherwise specified.

Tilefish FMP Monitoring Committee means a committee made up of staff representatives of the MAFMC, the NMFS Northeast Regional Office, the Northeast Fisheries Science Center, up to three state representatives (the New England states having one representative and the Mid-Atlantic states having a maximum of two representatives) and one non-voting industry member. The MAFMC Executive Director or his designee chairs the committee.

Tilefish Management Unit means an area of the Atlantic Ocean from the latitude of the VA and NC border (36°33.36' N. Lat.), extending eastward from the shore to the outer boundary of the exclusive economic zone and northward to the United States-Canada border in which the United States exercises exclusive jurisdiction over all golden tilefish (*Lopholatilus chamaeleonticeps*) fished for, possessed, caught or retained in or from such area.

Total Length (TL) means the straight-line distance from the tip of the snout to the end of the tail (caudal fin) while the fish is lying on its side. For black sea bass, Total Length (TL) means the straight-line distance from the tip of the snout to the end of the tail (caudal fin), excluding any caudal filament, while the fish is lying on its side.

Transboundary Management Guidance Committee (TMGC), with respect to the NE multispecies fishery, means the technical sub-committee that provides non-binding guidance to the U.S./Canada Steering Committee, comprised of government and industry representatives from U.S. and Canada.

Transboundary Resource Advisory Committee (TRAC), with respect to the NE multispecies fishery, means a committee consisting of scientific staff from NMFS and Canada's Department of Fisheries and Oceans that jointly assess the status of the shared U.S./Canada stocks of cod, haddock, and yellowtail flounder.

Transfer means to begin to remove, to remove, to pass over the rail, or to otherwise take away fish from any vessel and move them to another vessel.

Transferee means a vessel owner who receives permanently transferred NE multispecies DAS and potentially other permits from another vessel through the DAS Transfer Program specified at § 648.82(1).

Transferor means a vessel owner who permanently transfers NE multispecies DAS and potentially other permits to another vessel through the DAS Transfer Program specified at § 648.82(1).

Trawl means gear consisting of a net that is towed, including but not limited to beam trawls, pair trawls, otter trawls, and Danish and Scottish seine gear.

Trawl sweep means the total length of the footrope on a trawl net that is directly attached to the webbing of a net.

Trip Identifier means the complete serial number of the vessel logbook page completed for that trip.

Tub-trawl, with respect to the NE multispecies fishery, means gear designed to be set horizontally on the bottom, with an anchored mainline to which are attached three or more gangions and hooks. Tub-trawls are retrieved only by hand, not by mechanical means.

Tuna purse seine gear, with respect to the NE multispecies fishery, means encircling gear designed and utilized to harvest pelagic tuna.

Under construction means that the keel had been laid or the vessel was under written agreement for construction or the vessel was under written contract for purchase.

Upon returning to port, means, for purposes of the call-in notification system for the NE multispecies and monkfish fisheries, upon first tying up at a dock at the end of a fishing trip.

U.S. at-sea processing (USAP), with respect to the Atlantic herring fishery, means the specification, pursuant to § 648.200, of the amount of herring available for processing by U.S. vessels issued an Atlantic herring processing permit as described in § 648.4(a)(10)(ii).

U.S./Canada Steering Committee, with respect to the NE multispecies fishery, means the joint U.S./Canada committee consisting of staff from NMFS and Canada's Department of Fisheries and Oceans that has overall responsibility for the U.S./Canada Resource Sharing Understanding.

Used DAS baseline, with respect to the NE multispecies fishery, means the number of DAS that represent the historic level of DAS use associated with a particular limited access permit, as described in § 648.82(l).

Vessel length means the length specified on the USCG documentation for a vessel or on the state registration for a vessel not required to be documented under title 46 U.S.C., if the state length is verified by an authorized officer or NMFS official.

Vessel Monitoring System (VMS) means a vessel monitoring system or VMS unit as set forth in § 648.9 and approved by NMFS for use on Atlantic sea scallop, NE multispecies, monkfish, Atlantic herring, and Atlantic surfclam and ocean quahog vessels, as required by this part.

VMS unit means a device installed on board a vessel used for vessel monitoring and transmitting the vessel's position as required by this part.

Weakfish means *Cynoscion regalis*.

Whiting means *Merluccius bilinearis*.

Whiting Monitoring Committee (WMC) means a team appointed by the NEFMC to review, analyze, and recommend adjustments to the management measures addressing small-mesh multispecies. The team consists of staff from the NEFMC and MAFMC, NMFS Northeast Regional Office, the NEFSC, the USCG, at least one industry representative from each geographical area (northern New England, southern New England, and the Mid-Atlantic), and no more than two representatives, appointed by the Commission, from affected states.

### **Credits**

[61 FR 39910, July 31, 1996; 61 FR 43424, Aug. 23, 1996; 61 FR 49277, Sept. 19, 1996; 61 FR 56126, Oct. 31, 1996; 61 FR 58464, Nov. 15, 1996; 62 FR 2620, Jan. 17, 1997; 62 FR 9379, March 3, 1997; 62 FR 10748, March 10, 1997; 62 FR 13299, March 20, 1997; 62 FR 14646, March 27, 1997; 62 FR 15385, April 1, 1997; 62 FR 49148, Sept. 19, 1997; 62 FR 51381, Oct. 1, 1997; 63 FR 11593, March 10, 1998; 63 FR 27484, May 19, 1998; 63 FR 40377, July 29, 1998; 63 FR 52640, Oct. 1, 1998; 63 FR 58329, Oct. 30, 1998; 64 FR 24072, May 5, 1999; 64 FR 42048, Aug. 3, 1999; 64 FR 54743, Oct. 7, 1999; 64 FR 55825, Oct. 15, 1999; 65 FR 1568, Jan. 11, 2000; 65 FR 7460, Feb. 15, 2000; 65 FR 15110, March 21, 2000; 65 FR 16774, March 29, 2000; 65 FR 16844, March 30, 2000; 65 FR

45850, July 26, 2000; 65 FR 60895, Oct. 13, 2000; 65 FR 77464, Dec. 11, 2000; 66 FR 49142, Sept. 26, 2001; 67 FR 21143, April 29, 2002; 67 FR 50304, Aug. 1, 2002; 67 FR 63229, Oct. 10, 2002; 68 FR 49699, Aug. 19, 2003; 69 FR 13495, March 23, 2004; 69 FR 22456, April 26, 2004; 69 FR 22944, April 27, 2004; 69 FR 35214, June 23, 2004; 69 FR 63472, Nov. 2, 2004; 69 FR 67796, Nov. 19, 2004; 70 FR 21940, April 28, 2005; 70 FR 21981, April 28, 2005; 70 FR 31339, June 1, 2005; 70 FR 34059, June 13, 2005; 70 FR 39193, July 7, 2005; 70 FR 76425, Dec. 27, 2005; 70 FR 77067, Dec. 29, 2005; 71 FR 46875, Aug. 15, 2006; 71 FR 62183, Oct. 23, 2006; 72 FR 11270, March 12, 2007; 72 FR 20038, April 23, 2007; 72 FR 43191, Aug. 3, 2007; 72 FR 51702, Sept. 11, 2007; 72 FR 73277, Dec. 27, 2007; 73 FR 20117, April 14, 2008; 73 FR 40190, July 14, 2008; 73 FR 52215, Sept. 9, 2008; 74 FR 20529, May 4, 2009; 74 FR 42598, Aug. 24, 2009; 75 FR 18309, April 9, 2010; 76 FR 42582, July 19, 2011; 76 FR 60382, Sept. 29, 2011; 76 FR 60649, Sept. 29, 2011; 77 FR 16479, March 21, 2012; 77 FR 16945, March 23, 2012; 78 FR 42891, July 18, 2013; 78 FR 49187, Aug. 13, 2013; 79 FR 8812, Feb. 13, 2014; 79 FR 10046, Feb. 24, 2014; 79 FR 41924, July 18, 2014; 79 FR 52580, Sept. 4, 2014; 79 FR 67369, Nov. 13, 2014; 79 FR 71968, Dec. 4, 2014; 79 FR 77946, Dec. 29, 2014; 80 FR 25138, May 1, 2015; 80 FR 31866, June 4, 2015; 80 FR 48247, Aug. 12, 2015; 80 FR 51756, Aug. 26, 2015; 80 FR 74712, Nov. 30, 2015; 81 FR 19053, April 4, 2016; 81 FR 39594, June 17, 2016; 81 FR 76519, Nov. 3, 2016]

#### 50 C.F.R. § 648.82

§ 648.82 Effort-control program for NE multispecies limited access vessels.

(a) Except as provided in §§ 648.17 and 648.82(a)(2), a vessel issued a limited access NE multispecies permit may not fish for, possess, or land regulated species, except during a DAS, as allocated under, and in accordance with, the applicable DAS program described in this section, unless otherwise provided elsewhere in this part.

(1) End-of-year carry-over. With the exception of vessels that held a Confirmation of Permit History, as described in § 648.4(a)(1)(i)(J), for the entire fishing year preceding the carry-over year, limited access vessels that have unused DAS on the last day of April of any year may carry over a maximum of 10 DAS into the next year. Unused leased DAS may not be carried over. Vessels that have been sanctioned through enforcement proceedings will be credited with unused DAS based on their DAS allocation minus any total DAS that have been sanctioned through enforcement proceedings. For the 2004 fishing year only, DAS carried over from the 2003 fishing year will be classified as Regular B DAS, as specified

under paragraph (d)(2) of this section. Beginning with the 2005 fishing year, for vessels with a balance of both unused Category A DAS and unused Category B DAS at the end of the previous fishing year (e.g., for the 2005 fishing year, carry-over DAS from the 2004 fishing year), Category A DAS will be carried over first, than Regular B DAS, than Reserve B DAS. Category C DAS cannot be carried over.

(2) Notwithstanding any other provision of this part, any vessel issued a NE multispecies limited access permit may not call into the DAS program and fish under a DAS, fish on a sector trip, or fish under the provisions of a limited access Small Vessel Category or Handgear A permits pursuant to paragraphs (b)(5) and (6) of this section, respectively, if such vessel carries passengers for hire for any portion of a fishing trip.

(b) Permit categories. All limited access NE multispecies permit holders shall be assigned to one of the following permit categories, according to the criteria specified. Permit holders may request a change in permit category, as specified in § 648.4(a)(1)(i)(I)(2). Each fishing year shall begin on May 1 and extend through April 30 of the following year. Beginning May 1, 2004, with the exception of the limited access Small Vessel and Handgear A vessel categories described in paragraphs (b)(5) and (6) of this section, respectively, NE multispecies DAS available for use will be calculated pursuant to paragraphs (c) and (d) of this section.

(1) Individual DAS category. This category is for vessels allocated individual DAS that are not fishing under the Hook Gear, Combination, or Large-mesh individual categories. Beginning May 1, 2004, for a vessel fishing under the Individual DAS category, the baseline for determining the number of NE multispecies DAS available for use shall be calculated based upon the fishing history associated with the vessel's permit, as specified in paragraph (c)(1) of this section. The number and categories of DAS that are allocated for use in a given fishing year are specified in paragraph (d) of this section.

(2) Hook Gear category. To be eligible for a Hook Gear category permit, the vessel must have been issued a limited access multispecies permit for the preceding year, be replacing a vessel that was issued a Hook Gear category permit for the preceding year, or be replacing a vessel that was issued a Hook Gear category permit that was issued a Confirmation of Permit History. Beginning May 1, 2004, for a vessel fishing under the Hook Gear category, the baseline for determining the number of NE multispecies DAS available for use shall be calculated based upon the fishing history associated with the vessel's permit, as specified in paragraph (c)(1) of this section. The number and categories of DAS that are allocated for use in a given fishing year are specified in paragraph (d) of this section. A vessel fishing under this category in the DAS program must meet or comply with the gear

restrictions specified under § 648.80(a)(3)(v), (a)(4)(v), (b)(2)(v) and (c)(2)(iv) when fishing in the respective regulated mesh areas.

(3) Combination vessel category. To be eligible for a Combination vessel category permit, a vessel must have been issued a Combination vessel category permit for the preceding year, be replacing a vessel that was issued a Combination vessel category permit for the preceding year, or be replacing a vessel that was issued a Combination vessel category permit that was also issued a Confirmation of Permit History. Beginning May 1, 2004, for a vessel fishing under the Combination vessel category, the baseline for determining the number of NE multispecies DAS available for use shall be calculated based upon the fishing history associated with the vessel's permit, as specified in paragraph (c)(1) of this section. The number and categories of DAS that are allocated for use in a given fishing year are specified in paragraph (d) of this section.

(4) Large Mesh Individual DAS category. This category is for vessels allocated individual DAS that are not fishing under the Hook Gear, Combination, or Individual DAS categories. Beginning May 1, 2004, for a vessel fishing under the Large Mesh Individual DAS category, the baseline for determining the number of NE multispecies DAS available for use shall be calculated based upon the fishing history associated with the vessel's permit, as specified in paragraph (c)(1) of this section. The number and categories of DAS that are allocated for use in a given fishing year are specified in paragraph (d) of this section. The number of Category A DAS shall be increased by 36 percent. To be eligible to fish under the Large Mesh Individual DAS category, a vessel, while fishing under this category, must fish under the specific regulated mesh area minimum mesh size restrictions, as specified in § 648.80(a)(3)(iii), (a)(4)(iii), (b)(2)(iii), and (c)(2)(ii).

(5) Small Vessel category—

(i) DAS allocation. A vessel qualified and electing to fish under the Small Vessel category may retain up to 300 lb (136.1 kg) of cod, haddock, and yellowtail flounder, combined, and one Atlantic halibut per trip, without being subject to DAS restrictions, provided the vessel does not exceed the yellowtail flounder possession restrictions specified at § 648.86(g). Such a vessel is subject to the possession limits specified for other regulated species and ocean pout, as specified at § 648.86. Any vessel may elect to switch into the Small Vessel category, as provided in § 648.4(a)(1)(i)(I)(2), if the vessel meets or complies with the following:

(A) The vessel is 30 ft (9.1 m) or less in length overall, as determined by measuring along a horizontal line drawn from a perpendicular raised from the outside of the most forward portion of the stem of the vessel to a perpendicular raised from the after most portion of the stern.

(B) If construction of the vessel was begun after May 1, 1994, the vessel must be constructed such that the quotient of the length overall divided by the beam is not less than 2.5.

(C) Acceptable verification for vessels 20 ft (6.1 m) or less in length shall be USCG documentation or state registration papers. For vessels over 20 ft (6.1 m) in length overall, the measurement of length must be verified in writing by a qualified marine surveyor, or the builder, based on the vessel's construction plans, or by other means determined acceptable by the Regional Administrator. A copy of the verification must accompany an application for a NE multispecies permit.

(D) Adjustments to the Small Vessel category requirements, including changes to the length requirement, if required to meet fishing mortality goals, may be made by the Regional Administrator following framework procedures of § 648.90.

(ii) [Reserved]

(6) Handgear A category. A vessel qualified and electing to fish under the Handgear A category, as described in § 648.4(a)(1)(i)(A), may retain, per trip, up to 300 lb (135 kg) of cod, one Atlantic halibut, and the daily possession limit for other regulated species and ocean pout, as specified under § 648.86. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is reduced below 300 lb (135 kg) per DAS by NMFS, the cod trip limit specified in this paragraph (b)(6) shall be adjusted to be the same as the applicable cod trip limit specified for NE multispecies DAS permits. For example, if the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area would also be reduced to 250 lb (113.4 kg). Qualified vessels electing to fish under the Handgear A category are subject to the following restrictions:

(i) The vessel must not use or possess on board gear other than handgear while in possession of, fishing for, or landing NE multispecies, and must have at least one standard tote on board.

(ii) A vessel may not fish for, possess, or land regulated species from March 1 through March 20 of each year.

(iii) Tub-trawls must be hand-hauled only, with a maximum of 250 hooks.

(iv) Declaration. For any such vessel that is not required to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator stating an intent to fish south of the GOM Regulated Mesh Area and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. For any such vessel that is required, or elects, to use VMS pursuant

to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must declare an intent to fish south of the GOM Regulated Mesh Area on each trip through the VMS prior to leaving port, in accordance with instructions provided by the Regional Administrator. Such vessels may transit the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), provided that their gear is stowed and not available for immediate use as defined in § 648.2.

(c) Used DAS baseline—

(1) Calculation of used DAS baseline. For all valid limited access NE multispecies DAS vessels, vessels issued a valid small vessel category permit, and NE multispecies Confirmation of Permit Histories, beginning with the 2004 fishing year, a vessel's used DAS baseline shall be based on the fishing history associated with its permit and shall be determined by the highest number of reported DAS fished during a single qualifying fishing year, as specified in paragraphs (c)(1)(i) through (iv) of this section, during the 6-year period from May 1, 1996, through April 30, 2002, not to exceed the vessel's annual allocation prior to August 1, 2002. A qualifying year is one in which a vessel landed 5,000 lb (2,268 kg) or more of regulated multispecies, based upon landings reported through dealer reports (based on live weights of landings submitted to NMFS prior to April 30, 2003). If a vessel that was originally issued a limited access NE multispecies permit was lawfully replaced in accordance with the replacement restrictions specified in § 648.4(a), then the used DAS baseline shall be defined based upon the DAS used by the original vessel and by subsequent vessel(s) associated with the permit during the qualification period specified in this paragraph (c)(1). The used DAS baseline shall be used to calculate the number and category of DAS that are allocated for use in a given fishing year, as specified in paragraph (d) of this section.

(i) Except as provided in paragraphs (c)(1)(ii) through (iv) of this section, the vessel's used DAS baseline shall be determined by calculating DAS use reported under the DAS notification requirements in § 648.10.

(ii) For a vessel exempt from, or not subject to, the DAS notification system specified in § 648.10 during the period May 1996 through June 1996, the vessel's used DAS baseline for that period will be determined by calculating DAS use from vessel trip reports submitted to NMFS prior to April 9, 2003.

(iii) For a vessel enrolled in a Large Mesh DAS category, as specified in paragraph (b)(4) of this section, the calculation of the vessel's used DAS baseline may not include any DAS allocated or used by the vessel pursuant to the provisions of the Large Mesh DAS category.

(2) [Reserved by 75 FR 18319]

(d) DAS categories and allocations. For all valid limited access NE multispecies DAS permits, and NE multispecies Confirmation of Permit Histories, beginning

with the 2004 fishing year, DAS shall be allocated and available for use for a given fishing year according to the following DAS Categories (unless otherwise specified, “NE multispecies DAS” refers to any authorized category of DAS):

(1) Category A DAS. Calculation of Category A DAS for each fishing year is specified in paragraphs (d)(1)(i) through (iv) of this section. An additional 36 percent of Category A DAS will be added and available for use for participants in the Large Mesh Individual DAS permit category, as described in paragraph (b)(4) of this section, provided the participants comply with the applicable gear restrictions. Category A DAS may be used in the NE multispecies fishery to harvest and land stocks of regulated species or ocean pout, in accordance with all of the conditions and restrictions of this part.

(i) For the 2004 and 2005 fishing years, Category A DAS are defined as 60 percent of the vessel's used DAS baseline specified under paragraph (c)(1) of this section.

(ii) For the 2006 through 2008 fishing years, Category A DAS are defined as 55 percent of the vessel's used DAS baseline specified under paragraph (c)(1) of this section.

(iii) For fishing year 2009 (May 1, 2009, through April 30, 2010), Category A DAS are defined as 45 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(iv) Starting in fishing year 2010 (beginning May 1, 2010), Category A DAS are defined as follows:

(A) For a vessel fishing under the provisions of the common pool, as defined in this part, Category A DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section, or reduced pursuant to § 648.87(b)(1)(iii).

(B) For a sector vessel, Category A DAS allocated for use when fishing in other fisheries that require the concurrent use of a NE multispecies DAS are defined as 45 percent of the vessel's used DAS baseline specified in paragraph

(2) Category B DAS. Category B DAS are divided into Regular B DAS and Reserve B DAS. Calculation of Category B DAS for each fishing year, and restrictions on use of Category B DAS, are specified in paragraphs (d)(2)(i) and (ii) of this section.

(i) Regular B DAS—

(A) Restrictions on use. Regular B DAS can only be used by NE multispecies vessels in an approved SAP or in the Regular B DAS Program as specified in § 648.85(b)(6). Unless otherwise restricted under the Regular B DAS Program as described in § 648.85(b)(6)(i), vessels may fish under both a Regular B DAS and a Reserve B DAS on the same trip (i.e., when fishing in an approved SAP as described in § 648.85(b)). Vessels that are required by the Monkfish Fishery

Management Plan to utilize a NE multispecies DAS, as specified under § 648.92(b)(2), may not elect to use a NE multispecies Category B DAS to satisfy that requirement.

(B) Calculation. Regular B DAS are calculated as follows:

(1) For the 2004 and 2005 fishing years, Regular B DAS are defined as 20 percent of the vessel's DAS baseline specified under paragraph (c)(1) of this section.

(2) For the 2006 through 2008 fishing years, Regular B DAS are defined as 22.5 percent of the vessel's DAS baseline specified under paragraph (c)(1) of this section.

(3) For fishing year 2009 (May 1, 2009, through April 30, 2010), Regular B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(4) Starting in fishing year 2010 (beginning May 1, 2010), Regular B DAS are defined as follows:

(i) For a common pool vessel, Regular B DAS are defined as 36.25 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section.

(ii) For a sector vessel, Regular B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(ii) Reserve B DAS—

(A) Restrictions on use. Reserve B DAS can only be used in an approved SAP, as specified in § 648.85.

(B) Calculation. Reserve B DAS are calculated as follows:

(1) For the 2004 and 2005 fishing years, Reserve B DAS are defined as 20 percent of the vessel's DAS baseline specified under paragraph (c)(1) of this section.

(2) For the 2006 through 2008 fishing years, Reserve B DAS are defined as 22.5 percent of the vessel's DAS baseline specified under paragraph (c)(1) of this section.

(3) For fishing year 2009 (May 1, 2009, through April 30, 2010), Reserve B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(4) Starting in fishing year 2010 (beginning May 1, 2010), Reserve B DAS are defined as follows:

(i) For a common pool vessel, Reserve B DAS are defined as 36.25 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section.

(ii) For a sector vessel, Reserve B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(3) Category C DAS—

(i) Restriction on use. Category C DAS are reserved and may not be fished.

(ii) Calculation. Category C DAS are defined as the difference between a vessel's used DAS baseline, as described in paragraph (c)(1) of this section, and the number of DAS allocated to the vessel as of May 1, 2001.

(e) Accrual of DAS.

(1) When a vessel is participating in the NE multispecies DAS program, as required by the regulations in this part, NE multispecies DAS shall accrue as specified in paragraphs (e)(1)(i) and (ii) of this section and shall be based upon the time called, or logged into the DAS program, consistent with the DAS notification requirements specified in § 648.10. For the purpose of calculating trip limits specified in this part, the amount of DAS deducted from a vessel's DAS allocation shall determine the amount of fish the vessel can land legally.

(i) Common pool vessels. For a common pool vessel, Category A DAS shall accrue in 24-hr increments, unless otherwise required under paragraphs (n) or (o) of this section. For example, a vessel that fished from 6 a.m. to 10 p.m. would be charged 24 hr of Category A DAS, not 16 hr; a vessel that fished for 25 hr would be charged 48 hr of Category A instead of 25 hr.

(ii) [Reserved]

(2) [Reserved by 75 FR 18319]

(3) Regular B DAS Program 24-hr clock. For a vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), that remains fishing under a Regular B DAS for the entire fishing trip (without a DAS flip), DAS shall accrue at the rate of 1 full DAS for each calendar day, or part of a calendar day fished. For example, a vessel that fished on 1 calendar day from 6 a.m. to 10 p.m. would be charged 24 hr of Regular B DAS, not 16 hr; a vessel that left on a trip at 11 p.m. on the first calendar day and returned at 10 p.m. on the second calendar day would be charged 48 hr of Regular B DAS instead of 23 hr, because the fishing trip would have spanned 2 calendar days. For the purpose of calculating trip limits specified under § 648.86, the amount of DAS deducted from a vessel's DAS allocation shall determine the amount of fish the vessel can land legally. For a vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), while also fishing in an area subject to differential DAS counting pursuant to paragraph (n)(1)(i) of this section, Category B DAS shall accrue at the rate described in this paragraph (e)(3), unless the vessel flips to a Category A DAS, in which case the vessel is subject to the pertinent DAS accrual restrictions of paragraph (n)(1) of this section for the entire trip. For vessels electing to fish in both the Regular B DAS Program, as specified in § 648.85(b)(8), and in the Eastern U.S./Canada Area, as specified in § 648.85(a), DAS counting will begin and end according to the DAS rules specified in § 648.10(e)(5)(iv).

(f) DAS credits—

(1) Good Samaritan credit. A limited access vessel fishing under the DAS program and that spends time at sea assisting in a USCG search and rescue operation or assisting the USCG in towing a disabled vessel, and that can document the occurrence through the USCG, shall not accrue DAS for the time documented.

(2) Canceled trip DAS credit. A limited access vessel operating under the DAS program and that ends a fishing trip prior to setting and/or hauling fishing gear for any reason may request a cancelled trip DAS credit for the trip based on the following conditions and requirements:

(i) There is no fish onboard the vessel and no fishing operations on the vessel were initiated, including setting and/or hauling fishing gear; and

(ii) The owner or operator of the vessel fishing under a DAS program and required to use a VMS as specified under § 648.10(b) makes an initial trip cancellation notification from sea, at the time the trip was canceled, or at the earliest opportunity prior to crossing the demarcation line as defined at § 648.10(a). These reports are in the form of an email to NMFS Office of Law Enforcement and include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator must that no fish were onboard and no fishing activity occurred; and

(iii) The owner or operator of the vessel operating under the DAS program required to use the IVR call in as specified under § 648.10(h) makes an initial trip cancellation notification to NMFS by calling the IVR back at the time the trip was canceled, or at the earliest opportunity prior to returning to port. This request must include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator that no fish were onboard and no fishing activity occurred; and

(iv) The owner or operator of the vessel requesting a canceled trip DAS credit, in addition to the requirements in paragraphs (f)(2)(ii) and (iii) of this section, submits a written DAS credit request form to NMFS within 30 days of the vessel's return to port from the canceled trip. This application must include at least the following information: Date and time when the vessel canceled the fishing trip; date and time of trip departure and landing; operator name; owner/corporation name; permit number; hull identification number; vessel name; date and time notification requirements specified under paragraphs (f)(2)(ii) and (iii) of this section were made; reason for canceling the trip; and owner/operator signature and date; and

(v) The vessel trip report for the canceled trip as required under § 648.7(b) is submitted along with the DAS credit request form; and

(vi) For DAS credits that are requested near the end of the fishing year as defined at § 648.2, and approved by the Regional Administrator, the credited DAS apply to the fishing year in which the canceled trip occurred. Credited DAS that remain unused at the end of the fishing year or are not credited until the following fishing year may be carried over into the next fishing year, not to exceed the maximum number of carryover DAS as specified under paragraph (a)(1) of this section.

(3) DAS credit for standing by entangled whales. A limited access vessel fishing under the DAS program that reports and stands by an entangled whale may request a DAS credit for the time spent standing by the whale. The following conditions and requirements must be met to receive this credit:

(i) At the time the vessel begins standing by the entangled whale, the vessel operator must notify the USCG and the Center for Coastal Studies, or another organization authorized by the Regional Administrator, of the location of the entangled whale and that the vessel is going to stand by the entangled whale until the arrival of an authorized response team;

(ii) Only one vessel at a time may receive credit for standing by an entangled whale. A vessel standing by an entangled whale may transfer its stand-by status to another vessel while waiting for an authorized response team to arrive, provided it notifies the USCG and the Center for Coastal Studies, or another organization authorized by the Regional Administrator, of the transfer. The vessel to which stand-by status is transferred must also notify the USCG and the Center for Coastal Studies or another organization authorized by the Regional Administrator of this transfer and comply with the conditions and restrictions of this part;

(iii) The stand-by vessel must be available to answer questions on the condition of the animal, possible species identification, severity of entanglement, etc., and take photographs of the whale, if possible, regardless of the species of whale or whether the whale is alive or dead, during its stand-by status and after terminating its stand-by status. The stand-by vessel must remain on scene until the USCG or an authorized response team arrives, or the vessel is informed that an authorized response team will not arrive. If the vessel receives notice that a response team is not available, the vessel may discontinue standing-by the entangled whale and continue fishing operations; and

(iv) To receive credit for standing by an entangled whale, a vessel must submit a written request to the Regional Administrator. This request must include at least the following information: Date and time when the vessel began its stand-by status; date of first communication with the USCG; and date and time when the vessel terminated its stand-by status. DAS credit shall not be granted for the time a vessel fishes when standing by an entangled whale. Upon a review of the request, NMFS shall consider granting the DAS credit based on information available at the time of the request, regardless of whether an authorized response team arrives on scene

or a rescue is attempted. NMFS shall notify the permit holder of any DAS adjustment that is made or explain the reasons why an adjustment will not be made.

(g) Spawning season restrictions. A vessel issued a valid Small Vessel or Handgear A category permit specified in paragraphs (b)(5) or (b)(6) of this section, respectively, or a vessel issued an open access Handgear B permit, as specified in § 648.88(a), may not fish for, possess, or land regulated species or ocean pout from March 1 through March 20 of each year. A common pool vessel must declare out and be out of the NE multispecies DAS program, and a sector must declare that the vessel will not fish with gear capable of catching NE multispecies (i.e., gear that is not defined as exempted gear under this part), for a 20-day period between March 1 and May 31 of each calendar year, using the notification requirements specified in § 648.10. A vessel fishing under a Day gillnet category designation is prohibited from fishing with gillnet gear capable of catching NE multispecies during its declared 20-day spawning block, unless the vessel is fishing in an exempted fishery, as described in § 648.80. If a vessel owner has not declared and been out of the fishery for a 20-day period between March 1 and May 31 of each calendar year on or before May 12 of each year, the vessel is prohibited from fishing for, possessing or landing any regulated species, ocean pout, or non-exempt species during the period May 12 through May 31, inclusive.

(h) Declaring DAS and blocks of time out. A vessel's owner or authorized representative shall notify the Regional Administrator of a vessel's participation in the DAS program; declaration of its 120 days out of the non-exempt gillnet fishery, if designated as a Day gillnet category vessel, as specified in paragraph (j) of this section; and declaration of its 20-day period out of the NE multispecies DAS program, or, for a sector vessel that the vessel will not fish with gear capable of catching NE multispecies, using the notification requirements specified in § 648.10.

(i) [Reserved]

(j) Gillnet restrictions. A vessel issued a limited access NE multispecies permit may fish under a NE multispecies DAS, under the provisions of the small vessel permit category, or on a sector trip with gillnet gear, provided the owner of the vessel obtains an annual designation as either a Day or Trip gillnet vessel, as described in § 648.4(c)(2)(iii), and provided the vessel complies with the gillnet vessel gear requirements and restrictions specified in § 648.80.

(1) Day gillnet vessels. Unless otherwise exempted in this part, a Day gillnet vessel fishing with gillnet gear under a NE multispecies DAS, the provisions of a small vessel permit category, or on a sector trip is not required to remove gear from the water upon returning to the dock and calling out of the DAS program, as appropriate, provided the vessel complies with the restrictions specified in

paragraphs (j)(1)(i) through (iii) of this section. Vessels electing to fish under the Day gillnet designation must have on board written confirmation, issued by the Regional Administrator, that the vessel is a Day gillnet vessel.

(i) Removal of gear. All gillnet gear must be brought to port prior to the vessel fishing in an exempted fishery.

(ii) Declaration of time out of the gillnet fishery.

(A) During each fishing year, a Day gillnet vessel must declare, and take, a total of 120 days out of the non-exempt gillnet fishery. Each period of time declared and taken must be a minimum of 7 consecutive days. At least 21 days of this time must be taken between June 1 and September 30 of each fishing year. The spawning season time out period required by paragraph (g) of this section shall be credited toward the 120 days time out of the non-exempt gillnet fishery. If a vessel owner has not declared and taken any or all of the remaining periods of time required to be out of the fishery by the last possible date to meet these requirements, the vessel is prohibited from fishing for, possessing, or landing regulated multispecies, ocean pout, or non-exempt species harvested with gillnet gear and from having gillnet gear on board the vessel that is not stowed and not available for immediate use as defined in § 648.2 while fishing under a NE multispecies DAS, the provisions of the small vessel category permit, or on a sector trip from that date through the end of the period between June 1 and September 30, or through the end of the fishing year, as applicable, unless otherwise exempt pursuant to § 648.87.

(B) Any such vessel shall declare its required time periods through the notification procedures specified in § 648.10(j)(2).

(C) During each period of time declared out, any such vessel is prohibited from fishing with non-exempted gillnet gear and must remove such gear from the water. However, the vessel may fish in an exempted fishery, as described in § 648.80, or it may fish under a NE multispecies DAS, under the provisions of the small vessel category permit, or on a sector trip, provided it fishes with gear other than non-exempted gillnet gear.

(iii) Method of counting DAS. A Day gillnet vessel fishing with gillnet gear under a NE multispecies DAS shall accrue DAS as follows:

(A) A Day gillnet vessel fishing with gillnet gear that has elected to fish in the Regular B DAS Program, as specified in § 648.85(b)(6), under a Category B DAS, is subject to the DAS accrual provisions of paragraph (e)(1)(i) of this section.

(B) A Day gillnet vessel fishing with gillnet gear under a NE multispecies Category A DAS shall accrue DAS as follows:

(1) A Day gillnet vessel on a common pool trip is subject to the DAS accrual provisions of paragraph (e)(1)(i) of this section.

(2) A Day gillnet vessel on a sector trip is subject to the DAS accrual provisions of paragraph (e)(1)(ii) of this section.

(2) Trip gillnet vessels. When fishing under a NE multispecies DAS, under the provisions of the small vessel category permit, or on a sector trip, a Trip gillnet vessel is required to remove all gillnet gear from the water before returning to port upon the completion of a fishing trip and calling out of a NE multispecies DAS, as applicable, under § 648.10(e)(5) or (h)(5), respectively. When not fishing under a NE multispecies DAS, Trip gillnet vessels may fish in an exempted fishery with gillnet gear, as authorized by § 648.80. Vessels electing to fish under the Trip gillnet designation must have on board written confirmation issued by the Regional Administrator that the vessel is a Trip gillnet vessel.

(k) NE Multispecies DAS Leasing Program.

(1) Program description. Eligible vessels, as specified in paragraph (k)(2) of this section, may lease Category A DAS to and from other eligible vessels, in accordance with the restrictions and conditions of this section. The Regional Administrator has final approval authority for all NE multispecies DAS leasing requests.

(2) Eligible vessels.

(i) A vessel issued a valid limited access NE multispecies permit is eligible to lease Category A DAS to or from another such vessel, subject to the conditions and requirements of this part, unless the vessel was issued a valid Small Vessel or Handgear A permit specified under paragraphs (b)(5) and (6) of this section, respectively.

(ii) Subject to the conditions and requirements of this part, DAS associated with a confirmation of permit history may be leased to another vessel without placing the permit on an active vessel.

(3) Application to lease NE multispecies DAS—

(i) Application information requirements. An application to lease Category A DAS must contain the following information: Lessor's owner name, vessel name, permit number and official number or state registration number; Lessee's owner name, vessel name, permit number and official number or state registration number; number of NE multispecies DAS to be leased; total priced paid for leased DAS; signatures of Lessor and Lessee; and date form was completed. Information obtained from the lease application will be held confidential, according to applicable Federal law. Aggregate data may be used in the analysis of the DAS Leasing Program.

(ii) Approval of lease application. Unless an application to lease Category A DAS is denied according to paragraph (k)(3)(iii) of this section, the Regional Administrator shall issue confirmation of application approval to both Lessor and Lessee within 45 days of receipt of an application.

(iii) Denial of lease application. The Regional Administrator may deny an application to lease Category A DAS for any of the following reasons, including,

but not limited to: The application is incomplete or submitted past the March 1 deadline; the Lessor or Lessee has not been issued a valid limited access NE multispecies permit or is otherwise not eligible; the Lessor's or Lessee's DAS are under sanction pursuant to an enforcement proceeding; the Lessor's or Lessee's vessel is prohibited from fishing; the Lessor's or Lessee's limited access NE multispecies permit is sanctioned pursuant to an enforcement proceeding; the Lessor or Lessee vessel is determined not in compliance with the conditions, restrictions, and requirements of this part; or the Lessor has an insufficient number of allocated or unused DAS available to lease. Upon denial of an application to lease NE multispecies DAS, the Regional Administrator shall send a letter to the applicants describing the reason(s) for application rejection. The decision by the Regional Administrator is the final agency decision.

(4) Conditions and restrictions on leased DAS—

(i) Confirmation of permit history. Pursuant to paragraph (k)(2)(ii) of this section, DAS associated with a confirmation of permit history may be leased.

(ii) Sub-leasing. In a fishing year, a Lessor or Lessee vessel may not sub-lease DAS that have already been leased to another vessel. Any portion of a vessel's DAS may not be leased more than one time during a fishing year.

(iii) Carry-over of leased DAS. Leased DAS that remain unused at the end of the fishing year may not be carried over to the subsequent fishing year by the Lessor or Lessee vessel.

(iv) [Reserved by 75 FR 18319]

(v) History of leased DAS use. The history of leased DAS use shall be presumed to remain with the Lessor vessel. In the case of multiple leases to one vessel, the history of leased DAS use shall be presumed to remain with the Lessor in the order in which such leases were approved by NMFS. For the purpose of accounting for leased DAS use, leased DAS will be accounted for (subtracted from available DAS) prior to allocated DAS.

(vi) Monkfish Category C, D, F, G and H vessels. A vessel that possesses a valid limited access NE multispecies DAS permit and a valid limited access monkfish Category C, D, F, G, or H permit and leases NE multispecies DAS to or from another vessel is subject to the restrictions specified in § 648.92(b)(2).

(vii) DAS Category restriction. A vessel may lease only Category A DAS, as described under paragraph (d)(1) of this section.

(viii) Duration of lease. A vessel leasing DAS may only fish those leased DAS during the fishing year in which they were leased.

(ix) Size restriction of Lessee vessel. A Lessor vessel only may lease DAS to a Lessee vessel with a baseline main engine horsepower rating that is no more than 20 percent greater than the baseline engine horsepower of the Lessor vessel. A Lessor vessel may only lease DAS to a Lessee vessel with a baseline length overall

that is no more than 10 percent greater than the baseline length overall of the Lessor vessel. For the purposes of this program, the baseline horsepower and length overall specifications of vessels are those associated with the permit as of January 29, 2004, unless otherwise modified according to paragraph (k)(4)(xi) of this section.

(x) Leasing by vessels fishing under a sector allocation. A sector vessel may not lease DAS to or from common pool vessels, but may lease DAS to or from another sector vessel during the fishing year in which the vessel is a member of a sector.

(xi) One-time downgrade of DAS Leasing Program baseline. Unless otherwise specified in paragraph (k)(4)(xi)(B) and (C) of this section, for the purposes of determining eligibility for leasing DAS only, a vessel owner may elect to make a one-time downgrade to the vessel's DAS Leasing Program baseline length and horsepower as specified in paragraph (k)(4)(ix) of this section to match the length overall and horsepower specifications of the vessel that is currently issued the permit.

(A) Application for a one-time DAS Leasing Program baseline downgrade. To downgrade the DAS Leasing Program baseline, eligible NE multispecies vessels must submit a completed application form obtained from the Regional Administrator. An application to downgrade a vessel's DAS Leasing Program baseline must contain at least the following information: Vessel owner's name, vessel name, permit number, official number or state registration number, current vessel length overall and horsepower specifications, an indication whether additional information is included to document the vessel's current specifications, and the signature of the vessel owner.

(B) Applicability of the one-time DAS Leasing Program baseline downgrade. The downgraded DAS Leasing Program baseline may only be used to determine eligibility for the DAS Leasing Program and does not affect or change the baseline associated with the DAS Transfer Program specified in paragraph (l)(1)(ii) of this section, or the vessel replacement or upgrade restrictions specified at § 648.4(a)(1)(i)(E) and (F), or any other provision.

(C) Duration of the one-time DAS Leasing Program baseline downgrade. Unless otherwise specified in this paragraph (k)(4)(xi)(C) of this section, the downgraded DAS Leasing Program baseline remains in effect until the DAS Leasing Program expires or the permit is transferred to another vessel via a vessel replacement, or through a DAS transfer. With the exception of vessels combining DAS Leasing Program baselines from two different vessels through the DAS Transfer Program as outlined in paragraph (k)(4)(xi)(C)(2) of this section, once the DAS Leasing Program baseline is downgraded for a particular permit, no further downgrades may be authorized for that permit.

(1) Vessel replacement. If the permit is transferred to another vessel via a vessel replacement, the DAS Leasing Program baseline reverts to the baseline horsepower and length overall specifications associated with the permit prior to the one-time downgrade.

(2) DAS Transfer Program. For vessels involved in a DAS Transfer Program transaction as described in paragraph (1) of this section, if the transferee vessel baseline is adopted, consistent with the regulations under paragraph (1)(1)(ii) of this section, and the DAS Leasing Program baseline of the transferee vessel was previously downgraded, consistent with the regulations under this paragraph (k)(4)(xi), the downgraded DAS Leasing Program baseline specifications remain valid. For vessels involved in a DAS Transfer Program transaction where a combination of the transferor and transferee vessel baselines is adopted resulting in a new vessel baseline, any previous DAS Leasing Program baseline downgrade for either the transferor or transferee vessel will be voided and the transferee vessel would have an additional opportunity to downgrade its combined DAS Leasing Program baseline.

(1) DAS Transfer Program. Except for vessels fishing under a sector allocation as specified in § 648.87, or a vessel that acted as a lessee or lessor in the DAS Leasing Program transaction, a vessel issued a valid limited access NE multispecies permit may transfer all of its NE multispecies DAS for an indefinite time to another vessel with a valid NE multispecies permit, in accordance with the conditions and restrictions described under this section. The Regional Administrator has final approval authority for all NE multispecies DAS transfer requests.

(1) DAS transfer conditions and restrictions.

(i) The transferor vessel must transfer all of its DAS. Upon approval of the DAS transfer, all history associated with the transferred NE multispecies DAS (moratorium right history, DAS use history, and catch history) shall be associated with the permit rights of the transferee. Neither the individual permit history elements, nor total history associated with the transferred DAS may be retained by the transferor.

(ii) NE multispecies DAS may be transferred only to a vessel with a baseline main engine horsepower rating that is no more than 20 percent greater than the baseline engine horsepower of the transferor vessel. NE multispecies DAS may be transferred only to a vessel with a baseline length overall that is no more than 10 percent greater than the baseline length overall of the transferor vessel. For the purposes of this program, the baseline horsepower and length overall are those associated with the permit as of January 29, 2004. Upon approval of the transfer, the baseline of the transferee vessel would be the smaller baseline of the two vessels or the vessel owner could choose to adopt the larger baseline of the two

vessels provided such an upgrade is consistent with provisions of this paragraph (l)(1)(ii). A vessel that has executed a one-time downgrade of a DAS Leasing Program baseline in accordance with paragraph (k)(4)(xi) of this section is subject to the restrictions of paragraph (k)(4)(xi)(C) of this section.

(iii) The transferor vessel must transfer all of its Federal limited access permits for which it is eligible to the transferee vessel in accordance with the vessel replacement restrictions under § 648.4, or permanently cancel such permits. When duplicate permits exist, i.e., those permits for which both the transferor and transferee vessel are eligible, one of the duplicate permits must be permanently cancelled.

(iv) [Reserved]

(v) In any particular fishing year, a vessel may not execute a DAS transfer as a transferor if it previously participated in the DAS Leasing Program as either a lessee or a lessor, as described under paragraph (k) of this section. A vessel may participate in DAS lease transaction (as a lessee or a lessor) and submit an application for a DAS transfer (as a transferor) during the same fishing year, but the transfer, if approved, would not be effective until the beginning of the following fishing year. Other combinations of activities under the DAS Leasing and DAS Transfer programs are permissible during the same fishing year (i.e., act as a transferee, or act as transferor and subsequently conduct a DAS lease).

(vi) Confirmation of permit history. NE multispecies DAS associated with a Confirmation of Permit History may be transferred.

(vii) Transfer by sector vessels. A sector vessel may not transfer DAS to or from vessels that are fishing under the provisions of the common pool or another sector, but may transfer DAS to or from another vessel participating in that vessel's sector during the fishing year in which the vessel is a member of a particular sector.

(viii) Unless otherwise restricted by this part, a vessel with a NE multispecies limited access Category D permit may transfer DAS only to a vessel with a NE multispecies limited access Category D permit, but may receive transferred DAS from any eligible NE multispecies vessel.

(2) Application to transfer DAS. Owners of the vessels applying to transfer and receive DAS must submit a completed application form obtained from the Regional Administrator. The application must be signed by both seller/transferor and buyer/transferee of the DAS, and submitted to the Regional Office at least 45 days before the date on which the applicant desires to have the DAS effective on the buying vessel. The Regional Administrator will notify the applicants of any deficiency in the application pursuant to this section. Applications may be submitted at any time during the fishing year, up until March 1.

(i) Application information requirements. An application to transfer NE multispecies DAS must contain the following information: Seller's/transferor's

name, vessel name, permit number and official number or state registration number; buyer's/transferee's name, vessel name, permit number and official number or state registration number; total price paid for purchased DAS; signatures of seller and buyer; and date the form was completed. Information obtained from the transfer application will be held confidential, and will be used only in summarized form for management of the fishery.

(ii) Approval of transfer application. Unless an application to transfer NE multispecies DAS is denied according to paragraph (1)(2)(iii) of this section, the Regional Administrator shall issue confirmation of application approval to both seller/transferor and buyer/transferee within 45 days of receipt of an application.

(iii) Denial of transfer application. The Regional Administrator may reject an application to transfer NE multispecies DAS for the following reasons: The application is incomplete or submitted past the March 1 deadline; the seller/transferor or buyer/transferee does not possess a valid limited access NE multispecies permit; the seller's/transferor's or buyer's/transferee's DAS is sanctioned, pursuant to an enforcement proceeding; the seller's/transferor's or buyer/transferee's vessel is prohibited from fishing; the seller's/transferor's or buyer's/transferee's limited access NE multispecies permit is sanctioned pursuant to enforcement proceedings; or the seller/transferor has a DAS baseline of zero. Upon denial of an application to transfer NE multispecies DAS, the Regional Administrator shall send a letter to the applicants describing the reason(s) for application rejection. The decision by the Regional Administrator is the final agency decision and there is no opportunity to appeal the Regional Administrator's decision.

(m) [Reserved by 77 FR 16946]

(n) NE multispecies common pool accountability measure (AM). Common pool vessels are subject to the following AMs, in addition to the DAS accrual provisions specified in paragraph (e) of this section and other measures specified in this part.

(1) Differential DAS counting AM for fishing years 2010 and 2011. Unless otherwise specified pursuant to § 648.90(a)(5), based upon catch and other information available to NMFS by February of each year, the Regional Administrator shall project the catch of regulated species or ocean pout by common pool vessels for the fishing year ending on April 30 to determine whether such catch will exceed any of the sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii). This initial projection of common pool catch shall be updated shortly after the end of each fishing year, once information becomes available regarding the catch of regulated species and ocean pout by vessels fishing for groundfish in state waters outside of the FMP, vessels fishing in exempted fisheries, and vessels fishing in the Atlantic sea scallop fishery; and the catch of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and

Atlantic wolffish by sector vessels to determine if excessive catch by such vessels resulted in the overall ACL for a particular stock to be exceeded. If such catch resulted in the overall ACL for a particular stock being exceeded, the common pool's catch of that stock shall be increased by an amount equal to the amount of the overage of the overall ACL for that stock multiplied by the common pool's share of the overall ACL for that stock calculated pursuant to § 648.90(a)(4)(iii)(H)(2). For example, if the 2010 overall ACL for GOM cod was exceeded by 10,000 lb (4,536 kg) due to excessive catch of that stock by vessels fishing in state waters outside the FMP, and the common pool's share of the 2010 overall GOM cod ACL was 5 percent, then the common pool's 2010 catch of GOM cod shall be increased by 500 lb (226.8 kg) (10,000 lb (4,536 kg) x 0.05 of the overall GOM cod ACL). If, based on the initial projection completed in February, the Regional Administrator projects that any of the sub-ACLs specified for common pool vessels will be exceeded or underharvested, the Regional Administrator shall implement a differential DAS counting factor to all Category A DAS used within the stock area in which the sub-ACL was exceeded or underharvested, as specified in paragraph (n)(1)(i) of this section, during the following fishing year, in a manner consistent with the Administrative Procedure Act. Any differential DAS counting implemented at the start of the fishing year will be reevaluated and recalculated, if necessary, once updated information is obtained. The differential DAS counting factor shall be based upon the projected proportion of the sub-ACL of each NE multispecies stock caught by common pool vessels, rounded to the nearest even tenth, as specified in paragraph (n)(1)(ii) of this section, unless otherwise specified pursuant to § 648.90(a)(5). For example, if the Regional Administrator projects that common pool vessels will catch 1.18 times the sub-ACL for GOM cod during fishing year 2010, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to all Category A DAS used by common pool vessels only within the Inshore GOM Differential DAS Area during fishing year 2011 (i.e., Category A DAS will be charged at a rate of 28.8 hr for every 24 hr fished—1.2 times 24-hr DAS counting). If it is projected that catch in a particular fishing year will exceed or underharvest the sub-ACLs for several regulated species stocks within a particular stock area, including both exceeding and underharvesting several sub-ACLs within a particular stock area, the Regional Administrator shall implement the most restrictive differential DAS counting factor derived from paragraph (n)(1)(ii) of this section for the sub-ACLs exceeded or underharvested to any Category A DAS used by common pool vessels within that particular stock area. For example, if it is projected that common pool vessels will be responsible for 1.2 times the GOM cod sub-ACL and 1.1 times the CC/GOM yellowtail flounder sub-ACL, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to any

Category A DAS fished by common pool vessels only within the Inshore GOM Differential DAS Area during the following fishing year. For any differential DAS counting factor implemented in fishing year 2011, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section for the time spent fishing in the applicable differential DAS counting area based upon the first VMS position into the applicable differential DAS counting area and the first VMS position outside of the applicable differential DAS counting area, pursuant to § 648.10. For example, if a vessel fished 12 hr inside a differential DAS counting area where a differential DAS counting factor of 1.2 would be applied, and 12 hr outside of the differential DAS counting area, the vessel would be charged 48 hr of DAS use because DAS would be charged in 24-hr increments ((12 hr inside the area x 1.2 = 14.4 hr) + 12 hr outside the area, rounded up to the next 24-hr increment to determine DAS charged). For any differential DAS counting factor implemented in fishing year 2012, the differential DAS counting factor shall be applied against the DAS accrual provisions in paragraph (e)(1)(i) of this section, or if a differential DAS counting factor was implemented for that stock area during fishing year 2011, against the DAS accrual rate applied in fishing year 2011. For example, if a differential DAS counting factor of 1.2 was applied to the Inshore GOM Differential DAS Area during fishing year 2011 due to a 20-percent overage of the GOM cod sub-ACL, yet the GOM cod sub-ACL was exceeded again, but by 50 percent during fishing year 2011, an additional differential DAS factor of 1.5 would be applied to the DAS accrual rate applied during fishing year 2012 (i.e., the DAS accrual rate in the Inshore GOM Differential DAS Counting Area during fishing year 2012 would be 43.2 hr charged for every 24-hr fished—1.2 x 1.5 x 24-hr DAS charge). If the Regional Administrator determines that similar DAS adjustments are necessary in all stock areas, the Regional Administrator will adjust the ratio of Category A:Category B DAS specified in paragraph (d)(1) of this section to reduce the number of available Category A DAS available based upon the amount of the overage, rather than apply a differential DAS counting factor to all Category A DAS used in all stock areas.

(i) Differential DAS counting areas. The following differential DAS counting areas shall be used for the purposes of implementing the differential DAS counting AM specified in paragraph (n)(1) of this section:

(A) Inshore GOM Differential DAS Area. The Inshore GOM Differential DAS Area applies to the following stocks of regulated species: White hake, pollock, GOM cod, GOM haddock, CC/GOM yellowtail flounder, GOM winter flounder, and Atlantic wolffish. The Inshore GOM Differential DAS Area is defined as the area bounded on the west by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**Inshore GOM Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
INGOM1	<sup>1</sup>	69°30'
INGOM2	43°00'	69°30'
INGOM3	43°00'	70°00'
INGOM4	<sup>2</sup>	70°00'

(B) Offshore GOM Differential DAS Area. The Offshore GOM Differential DAS Area applies to the following stocks of regulated species: GOM haddock, white hake, pollock, redfish, witch flounder, American plaice, and Atlantic halibut. The Offshore GOM Differential DAS Area is defined as the area bounded on the north by the shoreline of Maine, bounded on the east by the U.S./Canadian maritime boundary, and bounded on the south and west by straight lines connecting the following points in the order stated:

**Offshore GOM Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
CII3	42°22'	67°20'
OFFGOM1	42°20'	67°20'
OFFGOM2	42°20'	70°00'
OFFGOM5	43°00'	70°00'
INGOM2	43°00'	69°30'
INGOM1	<sup>1</sup>	69°30'

(C) Inshore GB Differential DAS Area. The Inshore GB Differential DAS Area applies to the following stocks of regulated species: Witch flounder, American plaice, white hake, Atlantic halibut, redfish, pollock, CC/GOM yellowtail flounder, GB cod, GB haddock, SNE/MA winter flounder, and Atlantic wolffish. The Inshore GB Differential DAS Area is defined as the area bounded by straight lines connecting the following points in the order stated:

**Inshore GB Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
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G9	<sup>1</sup>	70°00'
G10	42°20'	70°00'
IGB1	42°20'	68°50'
IGB2	41°00'	68°50'
IGB3	41°00'	69°30'
IGB4	41°10'	69°30'
IGB5	41°10'	69°50'
IGB6	41°20'	69°50'
IGB7	41°20'	70°00'
G12	<sup>2</sup>	70°00'

(D) Offshore GB Differential DAS Area. The Offshore GB Differential DAS Area applies to the following stocks of regulated species: Witch flounder, American plaice, Atlantic halibut, northern windowpane flounder, GB cod, GB haddock, GB yellowtail flounder, and GB winter flounder. The Offshore GB Differential DAS Area is defined as the area bounded on the east by the U.S./Canadian maritime boundary and straight lines connecting the following points in the order stated:

**Offshore GB Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
IGB1	42°20'	68°50'
OGB1	42°20'	67°20'
CII3	<sup>1</sup>	67°20'
OGB2	40°10'	<sup>1</sup>
OGB3	40°10'	68°50'
IGB1	42°20'	68°50'

(E) SNE/MA Differential DAS Area. The SNE/MA Differential DAS Area applies to the following stocks of regulated species or ocean pout: SNE/MA winter flounder, SNE/MA yellowtail flounder, southern windowpane flounder, and ocean pout. The SNE/MA Differential DAS Area is defined as the area bounded on the north and west by the coastline of the United States, bounded on the east and south by straight lines connecting the following points in the order stated:

**SNE/MA Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
G12	<sup>1</sup>	70°00'
IGB7	41°20'	70°00'
IGB6	41°20'	69°50'
IGB5	41°10'	69°50'
IGB4	41°10'	69°30'
IGB3	41°00'	69°30'
IGB2	41°00'	68°50'
SNEDA1	40°10'	68°50'
SNEDA2	40°10'	73°10'
SNEDA3	39°50'	73°10'
SNEDA4	39°50'	<sup>2</sup>

(ii) Differential DAS counting factor. For determining the differential DAS counting AM specified in this paragraph (n)(1), or the inseason differential DAS counting adjustment specified in paragraph (o) of this section, the following differential DAS factor shall, except as provided in paragraph (n)(1)(iii) of this section, be applied to the DAS accrual rate specified in paragraph (e)(1) of this section, and implemented in a manner consistent with the Administrative Procedure Act.

<b>Proportion of ACL caught</b>	<b>Differential DAS factor</b>
0.5	0.5

0.6	0.6
0.7	0.7
0.8	0.8
0.9	No change
1.0	No change
1.1	1.1
1.2	1.2
1.3	1.3
1.4	1.4
1.5	1.5
1.6	1.6
1.7	1.7
1.8	1.8
1.9	1.9
2.0	2.0

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(iii) Mixed-stock exception. When determining the differential DAS counting AM specified in this paragraph (n)(1), the Regional Administrator shall conduct an analysis to determine whether the mixed-stock exception, as specified in § 600.310(m), may be applicable. If the analysis concludes that the mixed-stock exception is applicable, the Regional Administrator shall modify or not apply a differential DAS counting AM on specific stocks, as appropriate, in accordance with the mixed-stock exception.

(iv) Fishing year 2012. Any adjustments to DAS counting necessary as a result of either underharvesting or overharvesting any of the sub-ACLs specified for

common pool vessels during the 2011 fishing year pursuant to § 648.90(a)(4) shall become effective and remain effective for the duration of fishing year 2012 in addition to the implementation of the trimester TAC AM specified in paragraph (n)(2) of this section.

(2) Trimester TAC AM for fishing years 2012 and beyond. Beginning in fishing year 2012, common pool vessels shall be subject to the following restrictions:

(i) Trimester TACs—

(A) Trimester TAC distribution. Any sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4) shall be apportioned into trimesters of 4 months in duration, beginning at the start of the fishing year (i.e., Trimester 1: May 1–August 31; Trimester 2: September 1–December 31; Trimester 3: January 1–April 30), as follows):

**Portion of Common Pool Sub-ACLs Apportioned to Each Stock for Each Trimester**

<b>Stock</b>	<b>Trimester 1 (percent)</b>	<b>Trimester 2 (percent)</b>	<b>Trimester 3 (percent)</b>
GOM cod	27	36	37
GB cod	25	37	38
GOM haddock	27	26	47
GB haddock	27	33	40
CC/GOM yellowtail flounder	35	35	30
GB yellowtail flounder	19	30	52
SNE/MA yellowtail flounder	21	37	42
GOM winter flounder	37	38	25
GB winter flounder	8	24	69
Witch flounder	27	31	42
American plaice	24	36	40

Pollock	28	35	37
Redfish	25	31	44
White hake	38	31	31

(B) Trimester TAC adjustment. The distribution of trimester TACs specified in paragraph (n)(2)(i)(A) of this section may be adjusted pursuant to the biennial adjustment process specified in § 648.90. Future adjustments to the distribution of trimester TACs shall use catch data for the most recent 5-year period prior to the reevaluation of trimester TACs.

(ii) Stock area closures. Unless otherwise specified in this paragraph (n)(2)(ii), if the Regional Administrator projects that 90 percent of the trimester TACs specified in paragraph (n)(2)(i) of this section will be caught based upon available information, the Regional Administrator shall close the area where 90 percent of the catch for each such stock occurred to all common pool vessels on a NE multispecies DAS using gear capable of catching such stocks for the remainder of that trimester, as specified in paragraphs (n)(2)(ii)(A) through (N) of this section, in a manner consistent with the Administrative Procedure Act. For example, if the Regional Administrator projects that 90 percent of the CC/GOM yellowtail flounder Trimester 1 TAC will be caught, common pool vessels using trawl and gillnet gear shall be prohibited from fishing in the CC/GOM Yellowtail Flounder Closure Area specified in paragraph (n)(2)(ii)(G) of this section until the beginning of Trimester 2 on September 1 of that fishing year. Based upon all available information, the Regional Administrator is authorized to expand or narrow the areas closed under this paragraph (n)(2)(ii) in a manner consistent with the Administrative Procedure Act. If it is not possible to identify an area where only 90 percent of the catch occurred, the Regional Administrator shall close the smallest area possible where greater than 90 percent of the catch occurred. Common pool vessels holding either a Handgear A or B permit and fishing with handgear or tub trawls are exempt from stock area closures for white hake. The Regional Administrator may exempt Handgear A and B permitted vessels from stock area closures for other stocks pursuant to this paragraph (n)(2)(ii) if it is determined that catches of the respective species or stock by these vessels are less than 1 percent of the common pool catch of that species or stock. The Regional Administrator shall make such determination prior to the start of the fishing year through a notice published in the Federal Register, consistent with the Administrative Procedure Act, and any such determination shall remain in effect until modified.

(A) GB Cod Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Cod Trimester TAC

Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Cod Trimester TAC Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	42° 20'	70° 00'
2	42° 20'	1
3	41° 50'	1
4	41° 50'	67° 40'
5	41° 10'	67° 40'
6	41° 10'	67° 10'
7	41° 00'	67° 10'
8	41° 00'	67° 00'
9	40° 50'	67° 00'
10	40° 50'	66° 50'
11	40° 40'	66° 50'
12	40° 40'	66° 40'
13	39° 50'	66° 40'
14	39° 50'	68° 50'
15	41° 00'	68° 50'
16	41° 00'	69° 30'
17	41° 10'	69° 30'
18	41° 10'	69° 50'

19	41° 20'	69° 50'
20	41° 20'	<sup>2</sup>
21	<sup>3</sup>	70° 00'
22	<sup>4</sup>	70° 00'
23	<sup>5</sup>	70° 00'

(B) GOM Cod Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Cod Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded on the south, west, and north by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**GOM Cod Trimester TAC Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	<sup>1</sup>	69° 20'
2	43° 40'	69° 20'
3	43° 40'	69° 00'
4	43° 10'	69° 00'
5	43° 10'	69° 10'
6	43° 00'	69° 10'
7	43° 00'	69° 20'
8	42° 50'	69° 20'
9	42° 50'	69° 40'
10	42° 20'	69° 40'
11	42° 20'	70° 00'

12                    2                    70° 00'

(C) GB Haddock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Haddock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Haddock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GB1	42°20'	70°00'
GB2	42°20'	1
GB3	40°30'	1
GB4	40°30'	66°40'
GB5	39°50'	66°40'
GB6	39°50'	68°50'
GB7	41°00'	68°50'
GB8	41°00'	69°30'
GB9	41°10'	69°30'
GB10	41°10'	69°50'
GB11	41°20'	69°50'
GB12	41°20'	2
GB13	3	70°00'
GB14	4	70°00'
GB15	5	70°00'

GB1            42°20'            70°00'

(D) GOM Haddock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Haddock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded on the south, west, and north by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**GOM Haddock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GOM1	<sup>1</sup>	69°20'
GOM2	43°40'	69°20'
GOM3	43°40'	69°00'
GOM4	43°20'	69°00'
GOM5	43°20'	67°40'
GOM6	<sup>2</sup>	67°40'
GOM7	42°53.1'	67°44.4'
GOM8	<sup>2</sup>	67°40'
GOM9	42°20'	67°40'
GOM10	42°20'	70°00'
GOM12	<sup>3</sup>	70°00'

(E) GB Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
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GB1	42°20'	68°50'
GB2	42°20'	1
GB3	40°30'	1
GB4	40°30'	66°40'
GB5	39°50'	66°40'
GB6	39°50'	68°50'
GB1	42°20'	68°50'

(F) SNE/MA Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the SNE/MA Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**SNE/MA Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SNEMA1	1	70°00'
SNEMA2	2	70°00'
SNEMA3	3	70°00'
SNEMA4	39°50'	70°00'
SNEMA5	39°50'	71°40'
SNEMA6	40°00'	71°40'
SNEMA7	40°00'	73°00'
SNEMA8	4	73°00'
SNEMA9	41°00'	5
SNEMA10	41°00'	71°40'

SNEMA11                    6    71°40'

(G) CC/GOM Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the CC/GOM Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**CC/GOM Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
CCGOM1	42°50'	1
CCGOM2	42°50'	69°40'
CCGOM3	42°20'	69°40'
CCGOM4	42°20'	68°50'
CCGOM5	41°00'	68°50'
CCGOM6	41°00'	69°30'
CCGOM7	41°10'	69°30'
CCGOM8	41°10'	69°50'
CCGOM9	41°20'	69°50'
CCGOM10	41°20'	2
CCGOM11	3	70°00'
CCGOM12	4	70°00'

(H) American Plaice Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the American Plaice Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**American Plaice Trimester TAC Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	<sup>1</sup>	68°00'
2	44°10'	67°50'
3	44°00'	67°50'
4	44°00'	67°40'
5	<sup>2</sup>	67°40'
6	42°53.1'	67°44.4'
7	<sup>2</sup>	67°40'
8	41°10'	67°40'
9	41°10'	67°10'
10	41°00'	67°10'
11	41°00'	67°00'
12	40°50'	67°00'
13	40°50'	66°50'
14	40°40'	66°50'
15	40°40'	66°40'
16	39°50'	66°40'
17	39°50'	68°50'
18	41°00'	68°50'
19	41°00'	69°30'
20	41°10'	69°30'

21	41°10'	69°50'
22	41°20'	69°50'
23	41°20'	3
24	4	70°00'
25	5	70°00'

(I) Witch Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Witch Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

<b>Witch Flounder Trimester TAC Area</b>		
<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	1	68°00'
2	44°10'	67°50'
3	44°00'	67°50'
4	44°00'	67°40'
5	2	67°40'
6	42°53.1'	67°44.4'
7	2	67°40'
8	41°10'	67°40'
9	41°10'	67°10'
10	41°00'	67°10'
11	41°00'	67°00'

12	40°50'	67°00'
13	40°50'	66°50'
14	40°40'	66°50'
15	40°40'	66°40'
16	39°50'	66°40'
17	39°50'	68°50'
18	41°00'	68°50'
19	41°00'	69°30'
20	41°10'	69°30'
21	41°10'	69°50'
22	41°20'	69°50'
23	41°20'	3
24	4	70°00'
25	5	70°00'

(J) GB Winter Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Winter Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Winter Flounder Trimester TAC Area**

Point	N. Latitude	W. Longitude
1	42°20'	68°50'
2	42°20'	1
3	40°30'	1

4	40°30'	66°40'
5	39°50'	66°40'
6	39°50'	68°50'

(K) GOM Winter Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Winter Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**GOM Winter Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GOM1	42°50'	<sup>1</sup>
GOM2	42°50'	69°40'
GOM3	42°20'	69°40'
GOM4	42°20'	70°00'
GOM5	<sup>2</sup>	70°00'

(L) Redfish Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Redfish Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**Redfish Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
RF1	<sup>1</sup>	69°20'
RF2	43°40'	69°20'
RF3	43°40'	69°00'
RF4	43°20'	69°00'
RF5	43°20'	67°40'

RF6	<sup>2</sup>	67°40'
RF7	42°53.1'	67°44.4'
RF8	<sup>2</sup>	67°40'
RF9	41°20'	67°40'
RF10	41°20'	68°10'
RF11	41°10'	68°10'
RF12	41°10'	68°20'
RF13	41°00'	68°20'
RF14	41°00'	69°30'
RF15	41°10'	69°30'
RF16	41°10'	69°50'
RF17	41°20'	69°50'
RF18	41°20'	<sup>3</sup>
RF19	<sup>4</sup>	70°00'
RF20	<sup>5</sup>	70°00'

(M) White Hake Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the White Hake Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear, except for Handgear A and B permitted vessels using handgear or tub trawls, within the area bounded by straight lines connecting the following points in the order stated:

**White Hake Trimester TAC Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	<sup>1</sup>	69°20'

2	43°40'	69°20'
3	43°40'	69°00'
4	43°20'	69°00'
5	43°20'	67°40'
6	2	67°40'
7	42°53.1'	67°44.4'
8	2	67°40'
9	41°20'	67°40'
10	41°20'	68°10'
11	41°10'	68°10'
12	41°10'	68°20'
13	41°00'	68°20'
14	41°00'	69°30'
15	41°10'	69°30'
16	41°10'	69°50'
17	41°20'	69°50'
18	41°20'	3
19	4	70°00'
20	5	70°00'

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(N) Pollock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Pollock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**Pollock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
RF1	<sup>1</sup>	69°20'
RF2	43°40'	69°20'
RF3	43°40'	69°00'
RF4	43°20'	69°00'
RF5	43°20'	67°40'
RF6	<sup>2</sup>	67°40'
RF7	42°53.1'	67°44.4'
RF8	<sup>2</sup>	67°40'
RF9	41°20'	67°40'
RF10	41°20'	68°10'
RF11	41°10'	68°10'
RF12	41°10'	68°20'
RF13	41°00'	68°20'
RF14	41°00'	69°30'
RF15	41°10'	69°30'
RF16	41°10'	69°50'
RF17	41°20'	69°50'

RF18	41°20'	3
RF19	4	70°00'
RF20	5	70°00'

(iii) Trimester TAC overage/underage. If any trimester TAC, as specified in paragraph (n)(2)(i) of this section, is not caught during Trimester 1 or 2, the uncaught portion of the trimester TAC shall be carried forward into the next trimester. Uncaught portions of any trimester TAC following Trimester 3 may not be carried over into the following fishing year. If any trimester TAC is exceeded during the Trimesters 1 or 2, the overage shall be deducted from the Trimester 3 TAC for that stock. If the entire sub-ACL for a particular stock that is allocated to the common pool is exceeded (i.e., the common pool catch of that stock at the end of the fishing year, including the common pool's share of any overage of the overall ACL for a particular stock caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5), exceeds all three trimester TACs for that stock combined), an amount equal to the overage shall be deducted from the sub-ACL for that stock that is allocated to common pool vessels pursuant to § 648.90(a)(4) for the following fishing year.

(iv) [Reserved by 78 FR 26155]

(v) Adjustments to trimester TACs. The distribution of trimester TACs specified in paragraph (n)(2)(i) of this section may be revised pursuant to the biennial adjustment or framework process specified in § 648.90(a)(2) and shall use the distribution of landings of the most recent 5-year period available.

(vi) Trip limit adjustment. When 60 percent of the northern or southern windowpane flounder, ocean pout, or Atlantic halibut sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii)(H)(2) is projected to be caught, the Regional Administrator may specify, consistent with the APA, a possession limit for these stocks that is calculated to prevent the yearly sub-ACL from being exceeded prior to the end of the fishing year.

(vii) SNE/MA winter flounder AM. If the common pool fishery sub-ACL for SNE/MA winter flounder is exceeded, including the common pool's share of any overage of the total ACL, as specified at § 648.90(a)(5), by an amount that exceeds the management uncertainty buffer, the AM described in this paragraph would be implemented in the following fishing year. The AM would be effective for the entire fishing year. Common pool vessels fishing on a NE Multispecies DAS with trawl gear may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(3); a rope

separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6) in the SNE/MA Winter Flounder Trawl Gear AM Areas. The AM areas are defined below, and are bounded by the following coordinates, connected in the order listed by straight lines, unless otherwise noted.

**SNE/MA Winter Flounder Trawl Gear AM Area 1**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	41°10'	71°40' <sup>1</sup>
2	41°10'	71°20'
3	41°00'	71°20'
4	41°00'	71°40'

**SNE/MA Winter Flounder Trawl Gear AM Area 2**

<b>Point</b>	<b>N. Latitude W.</b>	<b>Longitude</b>
1	41°20'	70°30'
2	41°20'	70°20'
3	41°00'	70°20'
4	41°00'	70°30'

**SNE/MA Winter Flounder Trawl Gear AM Area 3**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	41°20'	69°20'
2	41°20'	69°10'
3	41°10'	69°10'
4	41°10'	69°20'

**SNE/MA Winter Flounder Trawl Gear AM Area 4**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	41°20'	69°20'

2	41°20'	1
3	1	69°00'
4	41°00'	69°00'
5	41°00'	69°10'
6	41°10'	69°10'
7	41°10'	69°20'

(o) Inseason adjustment to differential DAS counting for NE multispecies common pool vessels.

(1) In addition to the DAS accrual provisions specified in paragraphs (e) and (n) of this section, and other measures specified in this part, common pool vessels are subject to the following restrictions: The Regional Administrator shall project the catch of regulated species or ocean pout by common pool vessels and shall determine whether such catch will exceed any of the sub-ACLs specified for common pool vessels as described in § 648.90(a)(4). This projection shall include catch by common pool vessels, as well as available information, regarding the catch of regulated species and ocean pout by vessels fishing for NE multispecies in State waters outside of the authority of the FMP, vessels fishing in exempted fisheries, and vessels fishing in the Atlantic sea scallop fishery. If it is projected that catch will exceed or under-harvest the common pool sub-ACL, the Regional Administrator may, at any time during the fishing year, implement a differential DAS counting factor to all Category A DAS used within the pertinent stock area(s), as specified in paragraph (n)(1)(i) of this section, in a manner consistent with the Administrative Procedure Act. Notwithstanding the fact that the differential DAS accountability measures described in paragraph (n)(1) of this section are intended to address potential over-harvests in fishing year 2010 and 2011, the scope of the Regional Administrator authority specified in this paragraph (o) is not limited to FY 2010 and 2011.

(2) The differential DAS counting factor shall be based on the projected proportion of the sub-ACL of each NE multispecies stock caught by common pool vessels, rounded to the nearest even tenth, as specified in paragraph (n)(1)(ii) of this section, unless otherwise specified in § 648.90(a)(5). For example, if the Regional Administrator projects that common pool vessels will catch 1.18 times the sub-ACL for GOM cod by the end of fishing year 2010, the Regional Administrator may implement a differential DAS counting factor of 1.2 to all Category A DAS

used by common pool vessels within the Inshore GOM Differential DAS Area during fishing year 2010 (i.e., Category A DAS will be charged at a rate of 28.8 hr for every 24 hr fished—1.2 times 24-hr DAS counting). If it is projected that catch will simultaneously exceed or underharvest the sub-ACLs for several regulated species stocks within a particular stock area, the Regional Administrator may implement the most restrictive differential DAS counting factor derived from paragraph (n)(1)(ii) of this section for the sub-ACLs exceeded or underharvested to any Category A DAS used by common pool vessels within that particular stock area. For example, if it is projected that the common pool vessel catch will exceed the GOM cod sub-ACL by a factor of 1.2 and the CC/GOM yellowtail flounder sub-ACL by a factor of 1.1, the Regional Administrator may implement a differential DAS counting factor of 1.2 to any Category A DAS fished by common pool vessels within the Inshore GOM Differential DAS Area during the fishing year. For any inseason differential DAS counting factor implemented, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section for the time spent fishing in the applicable differential DAS counting area based upon the first VMS position into the applicable differential DAS counting area and the first VMS position outside of the applicable differential DAS counting area pursuant to § 648.10. For example, if a vessel fished 12 hr inside a differential DAS counting area where a differential DAS counting factor of 1.2 would be applied, and 12 hr outside of the differential DAS counting area, the vessel would be charged 48 hr of DAS, because DAS would be charged in 24-hr increments ((12 hr inside the area x 1.2 = 14.4 hr) + 12 hr outside the area, rounded to the next 24-hr increment to determine DAS charged).

(3) For any inseason differential DAS counting factor implemented in fishing year 2011, the inseason differential DAS counting factor shall be applied in accordance with the DAS accrual provisions specified in paragraph (e)(1)(i) of this section, and, if pursuant to paragraph (n)(1) of this section, in conjunction with a differential DAS counting factor also implemented for the same differential DAS area during fishing year 2011 as an AM. For example, if a differential DAS counting factor of 1.2 was applied to the Inshore GOM Differential DAS Area during fishing year 2011, as an AM due to a 20-percent overage of the GOM cod sub-ACL in fishing year 2010, and during fishing year 2011 the GOM cod sub-ACL was projected to be exceeded by 30 percent, an additional differential DAS factor of 1.3 would be applied to the DAS accrual rate as an inseason action during fishing year 2011. Under this example, the DAS accrual rate after both the AM and the inseason differential DAS rate is applied to FY 2011 in the Inshore GOM Differential DAS Counting Area would be 37.4 hr charged for every 24 hr fished— $1.2 \times 1.3 \times 24$ -hr DAS charge.

## Credits

[62 FR 2620, Jan. 17, 1997; 62 FR 14650, March 27, 1997; 62 FR 15388, April 1, 1997; 62 FR 37156, July 11, 1997; 62 FR 49148, 49149, Sept. 19, 1997; 63 FR 11595, March 10, 1998; 63 FR 42592, Aug. 10, 1998; 64 FR 24076, May 5, 1999; 64 FR 42045, Aug. 3, 1999; 64 FR 54747, Oct. 7, 1999; 65 FR 379, Jan. 5, 2000; 65 FR 21666, April 24, 2000; 65 FR 37915, June 19, 2000; 67 FR 21156, April 29, 2002; 67 FR 50318, Aug. 1, 2002; 69 FR 22969, April 27, 2004; 69 FR 67798, Nov. 19, 2004; 70 FR 21942, April 28, 2005; 70 FR 31340, June 1, 2005; 70 FR 76427, Dec. 27, 2005; 71 FR 19376, April 13, 2006; 71 FR 25094, April 28, 2006; 71 FR 59020, Oct. 6, 2006; 71 FR 62156, 62186, Oct. 23, 2006; 72 FR 73279, Dec. 27, 2007; 74 FR 10515, March 11, 2009; 74 FR 17054, April 13, 2009; 74 FR 20555, May 4, 2009; 74 FR 32468, July 8, 2009; 74 FR 55158, Oct. 27, 2009; 75 FR 18319, April 9, 2010; 75 FR 18371, April 9, 2010; 76 FR 23071, April 25, 2011; 76 FR 42584, July 19, 2011; 77 FR 16946, March 23, 2012; 77 FR 26123, May 2, 2012; 78 FR 26155, May 3, 2013; 78 FR 26207, May 3, 2013; 79 FR 52580, Sept. 4, 2014; 79 FR 67373, Nov. 13, 2014; 79 FR 77946, 77951, Dec. 29, 2014; 80 FR 25140, May 1, 2015; 80 FR 51756, Aug. 26, 2015]  
SOURCE: 61 FR 34967, July 3, 1996; 81 FR 76306, Nov. 2, 2016, unless otherwise noted.

AUTHORITY: 49 U.S.C. 329, 41101, and 41701.

## Notes of Decisions (1)

Current through November 3, 2016; 81 FR 78629.

## Footnotes

1

Intersection with ME shoreline.

2

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

1

The intersection of the Cape Cod, MA, coastline and 70°00' W. longitude.

2

South-facing shoreline of Cape Cod, MA.

1

The U.S./Canada maritime boundary as it intersects with the EEZ.

1

South-facing shoreline of Cape Cod, MA.

2

East-facing shoreline of NJ.

1

U.S./Canada maritime boundary.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Cape Cod, MA.

5

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

North-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Cape Cod, MA.

5

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

North-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary.

1

South-facing shoreline of Cape Cod, MA.

2

North-facing shoreline of Nantucket, MA.

3

South-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Long Island, NY.

5

East-facing shoreline of Long Island, NY.

6

Intersection with RI shoreline.

1

Intersection with MA shoreline.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary

1

Intersection with MA shoreline

2

North-facing shoreline of Cape Cod, MA

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Point 1 connects to Point 2 along 41°10' N or the southern coastline of Block Island, RI, whichever is farther south.

<sup>1</sup> The southwest-facing boundary of Closed Area I.

**End of Document**

**50 C.F.R. § 648.86**

§ 648.86 NE Multispecies possession restrictions.

Except as provided in § 648.17 or elsewhere in this part, the following possession restrictions apply:

(a) Haddock—

(1) NE multispecies common pool vessels. Haddock possession restrictions for such vessels may be implemented through Regional Administrator authority, as specified in paragraph (r) of this section.

(2) Scallop dredge vessels.

(i) No person owning or operating a scallop dredge vessel issued a NE multispecies permit may land haddock from, or possess haddock on board, a scallop dredge vessel from January 1 through June 30.

(ii) No person owning or operating a scallop dredge vessel without an NE multispecies permit may possess haddock in, or harvested from, the EEZ from January 1 through June 30.

(iii) Unless otherwise authorized by the Regional Administrator as specified in paragraph (f) of this section, scallop dredge vessels or persons owning or operating a scallop dredge vessel that is fishing under a scallop DAS allocated under § 648.53 may land or possess on board up to 300 lb (136.1 kg) of haddock, except as specified in § 648.88(c), provided that the vessel has at least one standard tote on board. This restriction does not apply to vessels also issued limited access NE multispecies permits that are fishing under a multispecies DAS. Haddock on board a vessel subject to this possession limit must be separated from other species of fish and stored so as to be readily available for inspection.

(3)(i) Incidental catch allowance for some Atlantic herring vessels. A vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of gear or area fished, or a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), may only possess and land haddock, in accordance with requirements specified in § 648.80(d) and (e).

(ii) Haddock incidental catch cap.

(A)(1) When the Regional Administrator has determined that the incidental catch allowance for a given haddock stock, as specified in § 648.85(d), has been caught, no vessel issued an Atlantic herring permit and fishing with midwater trawl gear in the applicable stock area, i.e., the Herring GOM Haddock Accountability Measure (AM) Area or Herring GB Haddock AM Area, as defined in paragraphs (a)(3)(ii)(A)(2) and (3) of this section, may fish for, possess, or land herring in excess of 2,000 lb (907.2 kg) per trip in or from that area, unless all herring possessed and landed by the vessel were caught outside the applicable AM Area and the vessel's gear is stowed and not available for immediate use as defined in § 648.2 while transiting the AM Area. Upon this determination, the haddock possession limit is reduced to 0 lb (0 kg) for a vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear or for a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access

Herring Permit fishing on a declared herring trip, regardless of area fished or gear used, in the applicable AM area, unless the vessel also possesses a NE multispecies permit and is operating on a declared (consistent with § 648.10(g)) NE multispecies trip. In making this determination, the Regional Administrator shall use haddock catches observed by NMFS–approved observers by herring vessel trips using midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), expanded to an estimate of total haddock catch for all such trips in a given haddock stock area.

(2) Herring GOM Haddock Accountability Measure Area. The Herring GOM Haddock AM Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

**Herring GOM Haddock Accountability Measure Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
HGA1	<sup>1</sup>	69°20'
HGA	43°40'	69°20'
HGA3	43°40'	69°00'
HGA4	43°20'	69°00'
HGA5	43°20'	<sup>2</sup>
HGA6	42°20'	<sup>3</sup>
HGA7	42°20'	70°00'
HGA8	<sup>4</sup>	70°00'

(3) The Herring GB Haddock Accountability Measure Area. The Herring GB Haddock AM Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

**Herring GB Haddock Accountability Measure Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	42° 20'	70° 00'
2	42° 20'	<sup>1</sup>

3	40° 30'	1
4	40° 30'	66° 40'
5	39° 50'	66° 40'
6	39° 50'	68° 50'
7	2	68° 50'
8	41° 00'	3
9	41° 00'	69° 30'
10	41° 10'	69° 30'
11	41° 10'	69° 50'
12	41° 20'	69° 50'
13	41° 20'	4
14	5	70° 00'
15	6	70° 00'
16	7	70° 00'

(4) The haddock incidental catch caps specified are for the NE multispecies fishing year (May 1–April 30), which differs from the herring fishing year (January 1–December 31). If the haddock incidental catch allowance is attained by the herring midwater trawl fishery for the GOM or GB, as specified in § 648.85(d), the 2,000–lb (907.2–kg) limit on herring possession in the applicable AM Area, as described in paragraph (a)(3)(ii)(A)(2) or (3) of this section, shall be in effect until the end of the NE multispecies fishing year. For example, the 2011 haddock incidental catch cap is specified for the period May 1, 2011–April 30, 2012, and the 2012 haddock catch cap would be specified for the period May 1, 2012–April 30, 2013. If the catch of haddock by herring midwater trawl vessels reached the 2011 incidental catch cap at any time prior to the end of the NE multispecies fishing year (April 30, 2012), the 2,000–lb (907.2–kg) limit on possession of herring in the applicable AM

Area would extend through April 30, 2012. Beginning May 1, 2012, the 2012 catch cap would go into effect.

(B) [Reserved]

(b) Cod—

(1) GOM cod landing limit. Except as provided in paragraph (b)(4) of this section, or unless otherwise restricted under § 648.85, a vessel fishing under a NE multispecies DAS permit, including a vessel issued a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, may land up to 800 lb (362.9 kg) of cod for each DAS, or part of a DAS, up to 4,000 lb (1,818.2 kg) per trip. Cod on board a vessel subject to this landing limit must be separated from other species of fish and stored so as to be readily available for inspection.

(2) GB cod landing and maximum possession limits. Unless otherwise restricted under § 648.85, a vessel fishing under a NE multispecies DAS permit, including a vessel issued a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, may land up to 2,000 lb (907.2 kg) of cod per DAS, or part of a DAS, up to 20,000 lb (9,072 kg) provided it complies with the requirements specified in paragraph (b)(4) of this section and this paragraph (b)(2). Cod on board a vessel subject to this landing limit must be separated from other species of fish and stored so as to be readily available for inspection.

(3) [Reserved]

(4) Exemption. A common pool vessel fishing under a NE multispecies DAS is exempt from the landing limit described in paragraph (b)(1) of this section when fishing south of the GOM Regulated Mesh Area, defined in § 648.80(a)(1), provided that it complies with the requirement of this paragraph (b)(4).

(i) Declaration. With the exception of a vessel declared into the U.S./Canada Management Area, as described in § 648.85(a)(3)(ii), a common pool vessel that fishes or intends to fish under a NE multispecies DAS south of the line described in paragraph (b)(4) of this section, under the cod trip limits described in paragraph (b)(2) of this section, must, prior to leaving port, declare its intention to do so through the VMS, in accordance with instructions to be provided by the Regional Administrator. In lieu of a VMS declaration, the Regional Administrator may authorize such vessels to obtain a letter of authorization. If a letter of authorization is required, such vessel may not fish north of the exemption area for a minimum of 7 consecutive days (when fishing under the multispecies DAS program), and must carry the letter of authorization on board.

(ii) A common pool vessel exempt from the GOM cod landing limit pursuant to paragraph (b)(4)(i) of this section may not fish north of the line specified in paragraph (b)(4) of this section for the duration of the trip, but may transit the GOM Regulated Mesh Area, provided that its gear is stowed and not available for

immediate use as defined in § 648.2. A vessel fishing north and south of the line on the same trip is subject to the most restrictive applicable cod trip limit.

(c) Atlantic halibut. A vessel issued a NE multispecies permit under § 648.4(a)(1) may land or possess on board no more than one Atlantic halibut per trip, provided the vessel complies with other applicable provisions of this part, unless otherwise specified in § 648.90(a)(5)(i)(D)(2).

(d) Small-mesh multispecies.

(1) Vessels issued a valid Federal NE multispecies permit specified under § 648.4(a)(1) are subject to the following possession limits for small-mesh multispecies, which are based on the mesh size used by, or on board vessels fishing for, in possession of, or landing small-mesh multispecies.

(i) Vessels possessing on board or using nets of mesh size smaller than 2.5 in (6.35 cm). Owners or operators of a vessel may possess and land not more than 3,000 lb (1,361 kg) of red hake, and not more than 3,500 lb (1,588 kg) of combined silver hake and offshore hake, if either of the following conditions apply:

(A) The mesh size of any net or any part of a net used by or on board the vessel is smaller than 2.5 inches (6.35 cm), as applied to the part of the net specified in paragraph (d)(1)(iv) of this section, as measured in accordance with § 648.80(f); or

(B) The mesh size of any net or part of a net on board the vessel not incorporated into a fully constructed net is smaller than 2.5 inches (6.35 cm), as measured by methods specified in § 648.80(f). “Incorporated into a fully constructed net” means that any mesh smaller than 2.5 inches (6.35 cm) that is incorporated into a fully constructed net may occur only in the part of the net not subject to the mesh size restrictions specified in paragraph (d)(1)(iv) of this section, and the net into which the mesh is incorporated must be available for immediate use.

(ii) Vessels possessing on board or using nets of mesh size equal to or greater than 2.5 in (6.35 cm) but less than 3 in (7.62 cm). An owner or operator of a vessel that is not subject to the possession limit specified in paragraph (d)(1)(i) of this section may possess and land not more than 3,000 lb (1,361 kg) of red hake, and not more than 7,500 lb (3,402 kg) of combined silver hake and offshore hake if either of the following conditions apply:

(A) The mesh size of any net or any part of a net used by or on board the vessel is equal to or greater than 2.5 inches (6.35 cm) but smaller than 3 inches (7.62 cm), as applied to the part of the net specified in paragraph (d)(1)(iv) of this section, as measured by methods specified in § 648.80(f); or

(B) The mesh size of any net or part of a net on board the vessel not incorporated into a fully constructed net is equal to or greater than 2.5 inches (6.35 cm) but smaller than 3 inches (7.62 cm), as measured by methods specified in § 648.80(f). “Incorporated into a fully constructed net” means that any mesh smaller than 2.5 inches (6.35 cm) that is incorporated into a fully constructed net may occur only in

the part of the net not subject to the mesh size restrictions as specified in paragraph (d)(1)(iv) of this section, and the net into which the mesh is incorporated must be available for immediate use.

(iii) Vessels possessing on board or using nets of mesh size equal to or greater than 3 in (7.62 cm). An owner or operator of a vessel that is not subject to the possession limits specified in paragraphs (d)(1)(i) and (ii) of this section may possess and land not more than 3,000 lb (1,361 kg) of red hake, and not more than 30,000 lb (13,608 kg) of combined silver hake and offshore hake when fishing in the Gulf of Maine or Georges Bank Exemption Areas, as described in § 648.80(a), and not more than 40,000 lb (18,144 kg) of combined silver hake and offshore hake when fishing in the Southern New England or Mid-Atlantic Exemption Areas, as described in § 648.80(b)(10) and (c)(5), respectively, if both of the following conditions apply:

(A) The mesh size of any net or any part of a net used by or on board the vessel is equal to or greater than 3 inches (7.62 cm), as applied to the part of the net specified in paragraph (d)(1)(iv) of this section, as measured by methods specified in § 648.80(f); and

(B) The mesh size of any net or part of a net on board the vessel not incorporated into a fully constructed net is equal to or greater than 3 inches (7.62 cm), as measured by methods specified in § 648.80(f). “Incorporated into a fully constructed net” means that any mesh smaller than 3 inches (7.62 cm) that is incorporated into a fully constructed net may occur only in the part of the net not subject to the mesh size restrictions as specified in paragraph (d)(1)(iv) of this section, and the net into which the mesh is incorporated must be available for immediate use.

(iv) Application of mesh size. Counting from the terminus of the net, the mesh size restrictions specified in paragraphs (d)(1)(i) through (iii) of this section are only applicable to the first 100 meshes (200 bars in the case of square mesh) for vessels greater than 60 ft (18.3 m) in length, and to the first 50 meshes (100 bars in the case of square mesh) for vessels 60 ft (18.3 m) or less in length. Notwithstanding any other provision of this section, the restrictions and conditions pertaining to mesh size do not apply to nets or pieces of net smaller than 3 ft by 3 ft (0.9 m by 0.9 m), (9 sq ft (0.81 sq m)).

(2) Possession limit for vessels participating in the northern shrimp fishery. Owners and operators of vessels participating in the Small-Mesh Northern Shrimp Fishery Exemption Area, as described in § 648.80(a)(3), with a vessel issued a valid Federal NE multispecies permit specified under § 648.4(a)(1), may possess and land silver hake and offshore hake, combined, up to an amount equal to the weight of shrimp on board, not to exceed 3,500 lb (1,588 kg). Silver hake and

offshore hake on board a vessel subject to this possession limit must be separated from other species of fish and stored so as to be readily available for inspection.

(3) Possession restriction for vessels electing to transfer small-mesh NE multispecies at sea. Owners and operators of vessels issued a valid Federal NE multispecies permit and issued a letter of authorization to transfer small-mesh NE multispecies at sea according to the provisions specified in § 648.13(b) are subject to a combined silver hake and offshore hake possession limit that is 500 lb (226.8 kg) less than the possession limit the vessel otherwise receives. This deduction shall be noted on the transferring vessel's letter of authorization from the Regional Administrator.

(4) Accountability Measure In-season adjustment of small-mesh multispecies possession limits. If the Regional Administrator projects that an in-season adjustment TAL trigger level for any small-mesh multispecies stock, as specified in § 648.90(b)(5)(iii), has been reached or exceeded, the Regional Administrator shall reduce the possession limit of that stock to the incidental level for that stock, as specified in this paragraph (d)(4), for the remainder of the fishing year through notice consistent with the Administrative Procedure Act, unless such a reduction in the possession limit would be expected to prevent the TAL from being reached.

(i) Red hake. If a possession limit reduction is needed for a stock area, the incidental possession limit for red hake in that stock area will be 400 lb (181.44 kg) for the remainder of the fishing year.

(ii) Silver hake and offshore hake. If a possession limit reduction is needed for a stock area, the incidental possession limit for silver hake and offshore hake, combined, in that stock area will be 2,000 lb (907 kg) for the remainder of the fishing year.

(5) In-season adjustment of Northern Red Hake Possession Limits. In addition to the accountability measure in-season adjustment of small-mesh multispecies possession limits specified in paragraph (d)(4) of this section, if the Regional Administrator projects that 45 percent of the northern red hake TAL has been reached or is exceeded, the Regional Administrator shall reduce the possession limit for northern red hake to 1,500 lb (680 kg) for the remainder of the fishing year unless further reduced to the incidental possession limit according to the accountability measure in-season adjustment of small-mesh multispecies possession limits specified in paragraph (d)(4) of this section.

(e) White hake. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions is not restricted in the amount of white hake the vessel may land per trip during fishing years 2010 and 2011. Starting in fishing year 2012, unless otherwise restricted under this part, a

common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions may land up to 500 lb (226.8 kg) of white hake per DAS, or any part of a DAS, up to 2,000 lb (907.2 kg) per trip.

(f) Calculation of weight of fillets or parts of fish. The possession limits described under this part are based on the weight of whole, whole-gutted, or gilled fish. For purposes of determining compliance with the possession limits specified in paragraphs (a), (b), or (c) of this section, the weight of fillets and parts of fish, other than whole-gutted or gilled fish, as allowed under § 648.83(a) and (b), will be multiplied by 3.

(g) Yellowtail flounder—

(1) CC/GOM and SNE/MA yellowtail flounder landing limit. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, and fishing exclusively outside of the U.S./Canada Management Area, as defined in § 648.85(a)(1), may land or possess on board up to 250 lb (113.6 kg) of yellowtail flounder per DAS, or any part of a DAS, up to a maximum possession limit of 1,500 lb (680.4 kg) per trip. A vessel fishing outside and inside of the U.S./Canada Management Area on the same trip is subject to the more restrictive yellowtail flounder trip limit (i.e., that specified by this paragraph (g) or § 648.85(a)(3)(iv)(C)).

(2) GB yellowtail flounder landing limit. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, and fishing in the U.S./Canada Management Area defined in § 648.85(a)(1) is subject to the GB yellowtail flounder limit described in paragraph § 648.85(a)(3)(iv)(c).

(h) Other possession restrictions. Vessels are subject to any other applicable possession limit restrictions of this part.

(i) Offloading requirement for vessels possessing species regulated by a daily possession limit. A vessel that has ended a trip as specified in § 648.10(e)(2)(iii) or (h)(5) that possesses on board species regulated by a daily possession limit (i.e., pounds per DAS), as specified at § 648.85 or § 648.86, must offload species in excess of the daily landing limit prior to leaving port on a subsequent trip. A vessel may retain on board up to one day's worth of such species prior to the start of a subsequent trip. Other species regulated by an overall trip limit may be retained on board for a subsequent trip. For example, a vessel that

possesses cod and winter flounder harvested from Georges Bank is subject to a daily possession limit for cod of 1,000 lb (453 kg)/DAS and an overall trip limit of 5,000 lb (2,267 kg)/trip for winter flounder. In this example, the vessel would be required to offload any cod harvested in excess of 1,000 lb (453 kg) (i.e., the vessel may retain up to 1,000 lb (453 kg) of Georges Bank cod, but must offload any additional cod), but may retain on board winter flounder up to the maximum trip limit prior to leaving port and crossing the VMS Demarcation Line to begin a subsequent trip.

(j) GB winter flounder. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions and fishing in the U.S./Canada Management Area defined in § 648.85(a)(1) is not restricted in the amount of GB winter flounder the vessel may land per trip.

(k) Other regulated NE. multispecies possession restrictions for some Atlantic herring vessels. A vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit on a declared herring trip, regardless of area fished or gear used, or a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), may possess and land haddock, and up to 100 lb (45 kg), combined, of other regulated NE. multispecies, other than haddock, in accordance with the requirements in § 648.80(d) and (e). Such fish may not be sold for human consumption.

(l) Ocean pout, windowpane flounder, and Atlantic wolffish. A vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit, or a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions may not fish for, possess, or land ocean pout, windowpane flounder, or Atlantic wolffish.

(m) Additional possession restrictions—

(1) Daily landing restriction. A vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit, or a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions may only land regulated species or ocean pout once in any 24-hr period, based upon the time the vessel lands following the end of the previous trip. For example, if a vessel lands 1,600 lb (725.7 kg) of GOM cod at 6 p.m. on Tuesday, that vessel cannot land any more regulated species or ocean pout until at least 6 p.m. on the following Wednesday.

(2) Possession limits for vessels fishing in multiple areas. If a vessel fishes in more than one stock area on the same trip, as defined in § 648.85(b)(6)(v) or §

648.87(b)(1)(ii), the most restrictive trip limit for a species applies for the entire trip.

(n) Pollock. Unless otherwise restricted under this part, a vessel issued a NE multispecies DAS permit, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, may not possess or land more than 1,000 lb (450 kg) of pollock for each DAS or part of a DAS fished, up to 10,000 lb (4,500 kg) per trip.

(o) Regional Administrator authority to implement possession limits—

(1) Possession restrictions to prevent exceeding common pool sub-ACLs. If the Regional Administrator projects that the catch of any NE multispecies stock allocated to common pool vessels pursuant to § 648.90(a)(4) will exceed the pertinent sub-ACL, NMFS may implement or adjust, at any time prior to or during the fishing year, in a manner consistent with the Administrative Procedure Act, a per-DAS possession limit and/or a maximum trip limit in order to prevent exceeding the common pool sub-ACL in that fishing year.

(2) Possession restrictions to facilitate harvest of sub-ACLs allocated to the common pool. If the Regional Administrator projects that the sub-ACL of any stock allocated to the common pool pursuant to § 648.90(a)(4) will not be caught during the fishing year, the Regional Administrator may remove or adjust, in a manner consistent with the Administrative Procedure Act, a per-DAS possession limit and/or a maximum trip limit in order to facilitate harvest and enable the total catch to approach, but not exceed, the pertinent sub-ACL allocated to the common pool for that fishing year.

### **Credits**

[62 FR 14650, March 27, 1997; 62 FR 15389, April 1, 1997; 62 FR 37157, July 11, 1997; 62 FR 49148, Sept. 19, 1997; 63 FR 11595, March 10, 1998; 63 FR 15332, March 31, 1998; 63 FR 25416, May 8, 1998; 63 FR 42592, Aug. 10, 1998; 64 FR 24076, May 5, 1999; 64 FR 31151, June 10, 1999; 64 FR 42045, 42048, Aug. 3, 1999; 64 FR 54747, Oct. 7, 1999; 64 FR 55827, Oct. 15, 1999; 65 FR 380, Jan. 5, 2000; 65 FR 16777, 16782, March 29, 2000; 65 FR 21666, April 24, 2000; 65 FR 30548, May 12, 2000; 65 FR 37915, June 19, 2000; 66 FR 21648, May 1, 2001; 66 FR 24060, May 11, 2001; 67 FR 5243, Feb. 5, 2002; 67 FR 21157, April 29, 2002; 67 FR 50321, Aug. 1, 2002; 68 FR 4114, Jan. 28, 2003; 69 FR 22978, April 27, 2004; 70 FR 34060, June 13, 2005; 70 FR 76428, Dec. 27, 2005; 71 FR 19385, April 13, 2006; 71 FR 25094, April 28, 2006; 71 FR 46876, Aug. 15, 2006; 71 FR 59020, Oct. 6, 2006; 71 FR 62156, 62193, Oct. 23, 2006; 72 FR 11277, March 12, 2007; 72 FR 73280, Dec. 27, 2007; 74 FR 17062, April 13, 2009; 74 FR 20556, May 4, 2009; 74 FR 32469, July 8, 2009; 74 FR 55158, Oct. 27, 2009; 75 FR 18337, April 9, 2010; 75 FR 18373, April 9, 2010; 76 FR 42586,

July 19, 2011; 76 FR 56998, Sept. 15, 2011; [77 FR 19142, March 30, 2012; 77 FR 26125, May 2, 2012; 78 FR 20265, April 4, 2013; 78 FR 26159, May 3, 2013; 78 FR 26208, May 3, 2013; 78 FR 53367, Aug. 29, 2013; 79 FR 24356, April 30, 2014; 79 FR 52580, Sept. 4, 2014; 79 FR 67374, Nov. 13, 2014; 79 FR 77946, 77952, Dec. 29, 2014; 80 FR 25141, May 1, 2015; 80 FR 30381, May 28, 2015] SOURCE: 61 FR 34967, July 3, 1996; 81 FR 76306, Nov. 2, 2016, unless otherwise noted.

AUTHORITY: 49 U.S.C. 329, 41101, and 41701.

Current through November 3, 2016; 81 FR 78629.

### Footnotes

1

The intersection of the Maine coastline and 69°20' W. long.

2

The intersection of the U.S./Canada maritime boundary and 43°20' N. lat.

3

The intersection of the U.S./Canada maritime boundary and 42°20' N. lat.

4

The intersection of the north-facing shoreline of Cape Cod, MA, and 70°00' W. long.

1

The intersection of the U.S./Canada maritime boundary.

2

The intersection of the boundary of Closed Area I and 68° 50' W. long.

3

The intersection of the boundary of Closed Area I and 41° 00' N. lat.

4

The intersection of the east-facing shoreline of Nantucket, MA, and 41° 20' N. lat.

5

The intersection of the north-facing shoreline of Nantucket, MA, and 70° 00' W. long.

6

The intersection of the south-facing shoreline of Cape Cod, MA, and 70° 00' W. long.

7

The intersection of the north-facing shoreline of Cape Cod, MA, and 70° 00' W. long.

**End of Document**

50 C.F.R. § 648.87

§ 648.87 Sector allocation.

(b) General requirements applicable to all approved Sectors.

(1) All sectors approved under the provisions of paragraph (a) of this section must submit the documents specified in paragraphs (a)(1), (b)(2), and (b)(3) of this section, and comply with the conditions and restrictions of this paragraph (b)(1).

(i) TAC allocation—

(A) Allocated stocks. Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock, with the exception of Atlantic halibut, ocean pout, windowpane flounder (both the GOM/GB and the SNE/MA stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels/permits participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section.

(B) Eastern GB stocks—

(1) Allocation. Each sector allocated ACE for stocks managed under the terms of the U.S./Canada Resource Sharing Understanding in the Eastern U.S./Canada Area, as specified in § 648.85(a), shall be allocated a specific portion of the ACE for such stocks that can only be harvested from the Eastern U.S./Canada Area, as specified in § 648.85(a)(1). The ACE specified for the Eastern U.S./Canada Area portions of these stocks shall be proportional to the sector's allocation of the overall ACL available to all vessels issued a limited access NE multispecies permit for these stocks pursuant to § 648.90(a)(4). For example, if a sector is allocated 10 percent of the GB cod ACL available to all vessels issued a limited access NE multispecies permit, that sector would also be allocated and may harvest 10 percent of that ACE from the Eastern U.S./Canada Area. In this example, if the overall GB cod ACL available to all vessels issued a limited access NE multispecies permit is 1,000 mt, of which 100 mt is specified to the Eastern U.S./Canada Area, the sector would be allocated 100 mt of GB cod, of which no more than 10 mt could be harvested from the Eastern U.S./Canada Area and no more than 90 mt could be harvested from the rest of the GB cod stock area.

(2) Re-allocation of haddock or cod ACE. A sector may re-allocate all, or a portion, of its haddock or cod ACE specified to the Eastern U.S./Canada Area, pursuant to paragraph (b)(1)(i)(B)(1) of this section, to the Western U.S./Canada Area at any time during the fishing year, and up to 2 weeks into the following fishing year (i.e., through May 14), unless otherwise instructed by NMFS, to cover any overages during the previous fishing year. Re-allocation of any ACE only becomes effective upon approval by NMFS, as specified in paragraphs (b)(1)(i)(B)(2)(i) through (iii) of this section. Re-allocation of haddock or cod ACE may only be made within a sector, and not between sectors. For example, if 100 mt

of a sector's GB haddock ACE is specified to the Eastern U.S./Canada Area, the sector could re-allocate up to 100 mt of that ACE to the Western U.S./Canada Area.

(i) Application to re-allocate ACE. GB haddock or GB cod ACE specified to the Eastern U.S./Canada Area may be re-allocated to the Western U.S./Canada Area through written request to the Regional Administrator. This request must include the name of the sector, the amount of ACE to be re-allocated, and the fishing year in which the ACE re-allocation applies, as instructed by the Regional Administrator.

(ii) Approval of request to re-allocate ACE. NMFS shall approve or disapprove a request to re-allocate GB haddock or GB cod ACE provided the sector, and its participating vessels, are in compliance with the reporting requirements specified in this part. The Regional Administrator shall inform the sector in writing, within 2 weeks of the receipt of the sector's request, whether the request to re-allocate ACE has been approved.

(iii) Duration of ACE re-allocation. GB haddock or GB cod ACE that has been re-allocated to the Western U.S./Canada Area pursuant to this paragraph

(b)(1)(i)(B)(2) is only valid for the fishing year in which the re-allocation is approved, with the exception of any requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section, unless otherwise instructed by NMFS.

(C) Carryover.

(1) With the exception of GB yellowtail flounder, a sector may carryover an amount of ACE equal to 10 percent of its original ACE for each stock that is unused at the end of one fishing year into the following fishing year, provided that the total unused sector ACE plus the overall ACL for the following fishing year does not exceed the ABC for the fishing year in which the carryover may be harvested. If this total exceeds the ABC, NMFS shall adjust the maximum amount of unused ACE that a sector may carryover (down from 10 percent) to an amount equal to the ABC of the following fishing year. Any adjustments made would be applied to each sector based on its total unused ACE and proportional to the cumulative PSCs of vessels/permits participating in the sector for the particular fishing year, as described in paragraph (b)(1)(i)(E) of this section.

(i) Eastern GB Stocks Carryover. Any unused ACE allocated for Eastern GB stocks in accordance with paragraph (b)(1)(i)(B) of this section shall contribute to the carryover allowance for each stock, as specified in this paragraph (b)(1)(i)(C)(1), but shall not increase individual sector's allocation of Eastern GB stocks during the following year.

(ii) This carryover ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

(2) Carryover accounting.

(i) If the overall ACL for a particular stock is exceeded, the allowed carryover of a particular stock harvested by a sector, minus the NMFS–specified de minimis amount, shall be counted against the sector's ACE for purposes of determining an overage subject to the AM in paragraph (b)(1)(iii) of this section.

(ii) De Minimis Carryover Amount. The de minimis carryover amount is one percent of the overall sector sub–ACL for the fishing year in which the carryover would be harvested. NMFS may change this de minimis carryover amount for any fishing year through notice consistent with the Administrative Procedure Act. The overall de minimis carryover amount would be applied to each sector proportional to the cumulative PSCs of vessels/permits participating in the sector for the particular fishing year, as described in paragraph (b)(1)(i)(E) of this section.

(D) Maximum ACE allocation. There is no maximum amount of ACE that can be allocated to a particular sector during each fishing year.

(E) Potential sector contribution (PSC). For the purposes of allocating a share of the available ACL for each NE multispecies stock to approved sectors pursuant to § 648.90(a)(4), the landings history of all limited access NE multispecies permits shall be evaluated to determine each permit's share of the overall landings for each NE multispecies stock as specified in paragraphs (b)(1)(i)(E)(1) and (2) of this section. When calculating an individual permit's share of the overall landings for a particular regulated species or ocean pout stock, landed weight shall be converted to live weight to maintain consistency with the way ACLs are calculated pursuant to § 648.90(a)(4) and the way ACEs are allocated to sectors pursuant to this paragraph (b)(1)(i). This calculation shall be performed on July 1 of each year, unless another date is specified by the Regional Administrator, to redistribute the landings history associated with permits that have been voluntarily relinquished or otherwise canceled among all remaining valid limited access NE multispecies permits as of that date during the following fishing year. The PSC calculated pursuant to this paragraph (b)(1)(i)(E) shall remain with the permit indefinitely, but may be permanently reduced or eliminated due to a permit sanction or other enforcement action.

(1) Calculation of PSC for all NE multispecies stocks except GB cod. Unless otherwise specified in paragraph (b)(1)(i)(E)(2) of this section, for each valid limited access NE multispecies permit, including limited access NE multispecies Handgear A permits, landings recorded in the NMFS dealer database of each stock of NE multispecies determined by NMFS to be the landings history associated with that permit while subject to the NE multispecies regulations based on whether the

vessel fishing under that permit was issued a limited access NE multispecies permit or subsequently qualified for a limited access NE multispecies permit pursuant to § 648.4(a)(1)(i), including regulated species or ocean pout caught under a NE multispecies DAS when participating in the skate or monkfish fisheries, but excluding, for example, landings by scallop vessels operating under a scallop DAS, shall be summed for fishing years 1996 through 2006. This sum shall then be divided by the total landings of each NE multispecies stock during the same period by all permits eligible to join sectors as of May 1, 2008. The resulting figure shall then be multiplied by a factor of  $1/\text{PSC}$  of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the PSC for each individual valid limited access NE multispecies permit for each regulated species or ocean pout stock allocated to sectors in the NE multispecies fishery for the following fishing year pursuant to this paragraph (b)(1)(i)(E)(1).

(2) Calculation of GB cod PSC. The GB cod PSC shall be calculated as specified in this paragraph (b)(1)(i)(E)(2) and shall remain with the permit indefinitely regardless whether the vessel participates in either the GB Cod Hook Gear Sector or the GB Cod Fixed Gear Sector, as defined in § 648.87(d)(1) or (2), joins a new sector, or fishes pursuant to the provisions of the common pool.

(i) GB cod PSC for permits committed to participate in the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector. For each owner of a valid NE multispecies permit, or CPH, that committed to participate in either the GB Cod Hook Gear Sector or the GB Cod Fixed Gear Sector as evidenced by a valid authorized signature executed on or before March 1, 2008, on a preliminary roster for either of these sectors, the PSC for GB cod shall be equal to the sum of dealer landings of GB cod for fishing years 1996 through 2001, divided by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period. The PSC for all other regulated species or ocean pout stocks specified for these permits shall be calculated pursuant to paragraph (b)(1)(i)(E)(1) of this section. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(2)(i) shall then be multiplied by a factor of  $1/\text{PSC}$  of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit for the following fishing year.

(ii) GB cod PSC for all other permits. For each owner of a valid NE multispecies permit or CPH that has not committed to participate in either the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector, as specified in paragraph (b)(1)(i)(E)(2)(i) of this section, the GB cod PSC for each such permit or CPH shall be based upon the GB cod PSC available after accounting for the GB cod PSC calculated pursuant to paragraph (b)(1)(i)(E)(2)(i) of this section. To determine the GB cod PSC for each of these permits, the sum of the individual

permit's landings of GB cod available in the NMFS dealer database for fishing years 1996 through 2006 shall be divided by the total landings of GB cod during that period by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period, after subtracting the total landings of GB cod by permits that committed to participate in either the GB Cod Hook Sector or GB Cod Fixed Gear Sector as of March 1, 2008. This individual share shall then be multiplied by the available GB cod PSC calculated by subtracting the GB cod PSC allocated pursuant to paragraph (b)(1)(i)(E)(2)(i) of this section from one. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(2)(ii) shall then be multiplied by a factor of 1/PSC of remaining permits as of July 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit.

(ii)<sup>1</sup> Areas that can be fished. Vessels in a sector may only fish in a particular stock area, as specified in paragraphs (b)(1)(ii)(A) through (F) of this section, and § 648.85(b)(6)(v), or the Eastern U.S./Canada Area, as specified in § 648.85(a)(1), if the sector has been allocated, or acquires, pursuant to paragraph (b)(1)(viii) of this section, ACE for all stocks allocated to sectors pursuant to paragraph (b)(1)(i)(A) of this section that are caught in that stock area. A sector must project when its ACE for each stock will be exceeded and must ensure that all vessels in the sector cease fishing operations prior to exceeding it. Once a sector has harvested its ACE for a stock, all vessels in that sector must cease fishing operations in that stock area on a sector trip unless and until it acquires additional ACE from another sector pursuant to paragraph (b)(1)(viii) of this section, or as otherwise specified in an approved operations plan pursuant to paragraph (b)(2)(xiv) of this section. For the purposes of this paragraph (b)(1)(ii), an ACE overage means catch of regulated species or ocean pout by vessels participating in a particular sector that exceeds the ACE allocated to that sector, as of the date received or purchased by the dealer, whichever occurs first, after considering all ACE transfer requests ultimately approved by NMFS during the current fishing year, pursuant to paragraph (b)(1)(viii) of this section, unless otherwise specified pursuant to § 648.90(a)(5).

(A) CC/GOM Yellowtail Flounder Stock Area. The CC/GOM Yellowtail Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86, and for determining areas applicable to sector allocations of CC/GOM yellowtail flounder ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and on the south by rhumb lines connecting the following points in the order stated:

**CC/GOM Yellowtail Flounder Stock Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	1	70° 00'

2	2	70° 00'
3	41° 20'	3
4	41° 20'	69° 50'
5	41° 10'	69° 50'
6	41° 10'	69° 30'
7	41° 00'	69° 30'
8	41° 00'	68° 50'
9	42° 20'	68° 50'
10	42° 20'	4

(B) SNE/MA Yellowtail Flounder Stock Area. The SNE/MA Yellowtail Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86, and for determining areas applicable to sector allocations of SNE/MA yellowtail flounder ACE pursuant to paragraph (b) of this section, is the area bounded by rhumb lines connecting the following points in the order stated:

**SNE/MA Yellowtail Flounder Stock Area**

Point	N. Latitude	W. Longitude
1	35° 00'	1
2	35° 00'	2
3	39° 00'	2
4	39° 00'	69° 00'
5	39° 50'	69° 00'
7	39° 50'	68° 50'
8	41° 00'	68° 50'

9	41° 00'	69° 30'
10	41° 10'	69° 30'
11	41° 10'	69° 50'
12	41° 20'	69° 50'
13	41° 20'	3
14	4	70° 00'
15	5	70° 00'

(C) GOM Haddock Stock Area. The GOM Haddock Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GOM haddock ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and on the south by straight lines connecting the following points in the order stated:

**GOM Haddock Stock Area**

Point	N. Latitude	W. Longitude
1	1	70° 00'
2	42° 20'	70° 00'
3	42° 20'	67° 40'
4	2	67° 40'
5	3	67° 40'
6	43° 50'	67° 40'
7	43° 50'	4
8	4	67° 00'
9	5	67° 00'

(D) GB Haddock Stock Area. The GB Haddock Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GB haddock ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the west by the coastline of the United States, on the south by a line running from the east-facing coastline of North Carolina at 35° N. lat. until its intersection with the EEZ, on the east by the U.S./Canadian maritime boundary, and bounded on the north by straight lines connecting the following points in the order stated:

**GB Haddock Stock Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	<sup>1</sup>	70° 00'
2	42° 20'	70° 00'
3	42° 20'	<sup>2</sup>

(E) Redfish Stock Area. The Redfish Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of redfish ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and bounded on the south by a rhumb line running from the east-facing coastline of North Carolina at 35° N. lat. until its intersection with the EEZ.

(F) GOM Winter Flounder Stock Area. The GOM Winter Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GOM winter flounder ACE pursuant to paragraph (b) of this section, is the area bounded by straight lines connecting the following points in the order stated:

**GOM Winter Flounder Stock Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
1	<sup>1</sup>	70°00'
2	42°20'	70°00'
3	42°20'	67°40'
4	<sup>2</sup>	67°40'

5	3	67°40'
6	43°50'	67°40'
7	43°50'	4
8	4	67°00'
9	5	67°00'

(iii) Sector AMs. At the end of the fishing year, NMFS shall evaluate sector catch using VTR, VMS, IVR, and any other available information to determine whether a sector has exceeded any of its ACE allocations based upon the cumulative catch by participating permits/vessels, as identified in the final operations plan approved by the Regional Administrator pursuant to paragraph (c) of this section, and each sector's share of any overage of the overall ACL for any stock caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5), if necessary. Should an ACE allocated to a sector be exceeded in a given fishing year, the sector's ACE shall be reduced by the overage on a pound-for-pound basis during the following fishing year, and the sector, each vessel, vessel operator and/or vessel owner participating in the sector may be charged, as a result of said overages, jointly and severally for civil penalties and permit sanctions pursuant to 15 CFR part 904. If an ACE allocated to a sector is not exceeded in a given fishing year pursuant to this paragraph (b)(1)(iii), the sector's ACE allocation shall not be reduced for the following fishing year as a result of an overage of an ACE by non-compliant sectors or an overage of sub-ACLs allocated to common pool vessels, but may be reduced if the excessive catch of a particular stock by other sub-components of the fishery causes the overall ACL of a particular stock to be exceeded pursuant to § 648.90(a)(5). If declining stock conditions result in a need to reduce fishing mortality, and all sectors and common pool vessels have operated within their ACE or sub-ACL limits, a sector's percentage share shall not be changed, but the amount this share represents may be reduced due to reduced overall ACL for a particular stock. If stock conditions improve, and certain sectors stay within their ACE while other sectors or the common pool exceed their respective ACEs or sub-ACLs, the sectors that stay within their ACEs shall receive a temporary increase in ACE equal to the amount that other sectors or the common pool exceeded their ACE or sub-ACL, divided among such sectors proportional to each sector's share of the ACL available to vessels issued a limited access NE multispecies permit.

(A) Overage penalty if there is sufficient ACE to cover the overage. If a sector exceeds an ACE allocated to it during the previous fishing year, but has sufficient ACE to address the overage pursuant to this paragraph (b)(1)(iii) based upon the cumulative PSCs of participating vessels during the fishing year following the overage, no overage penalty shall be applied to any member permit/vessel that leaves that sector to fish under the provisions of the common pool or in another sector in the year following the overage. Any impacts to departing member permits/vessels may be specified and addressed by the sector operations plan and associated sector contract.

(B) Overage penalty if there is insufficient ACE to cover an overage. If a sector exceeds an ACE allocated to it during the previous fishing year, but disbands in the year following the overage, or otherwise does not have sufficient ACE to address the overage pursuant to this paragraph (b)(1)(iii) based upon the cumulative PSCs of permits/vessels participating in that sector during the fishing year following the overage, individual permit holders that participated in the sector during the fishing year in which the overage occurred shall be responsible for reducing their DAS/PSC to account for that overage in the subsequent fishing year, as follows:

(1) PSC reduction. If a sector disbands following an overage, and the owner of an individual permit joins another sector for the subsequent fishing year, that permit's contribution toward the ACE for the stock for which the overage occurred to the other sector in the subsequent fishing year shall be reduced by an amount equal to the overage divided by the number of permits/vessels participating in the sector during the fishing year in which the overage occurred. For example, if a sector comprised of 10 permits/vessels exceeded its GB cod ACE by 10,000 lb (4,536 kg) during the previous fishing year, but later disbands, each permit/vessel that was in that sector, but then joins another sector during the following fishing year shall have its contribution of GB cod to another sector temporarily reduced by 1,000 lb (453.6 kg) during the subsequent fishing year for the purposes of calculating the available GB cod ACE allocated to another sector during that fishing year.

(2) DAS reduction. If a sector disbands following an overage and the owner of an individual permit elects to fish under the provisions of the common pool during the subsequent fishing year, that permit/vessel's NE multispecies Category A DAS allocation for the subsequent fishing year shall be temporarily reduced by an amount proportional to the highest percentage overage by that sector of any of the stocks for which an overage occurred. For example, if a sector exceeded its GB cod ACE by 10 percent and its pollock ACE by 15 percent, each permit would receive a 15-percent reduction in its Category A DAS allocation for the subsequent fishing year if fishing under the provisions of the common pool.

(3) Fishing prohibition. If a sector does not disband following an overage, but otherwise does not have sufficient ACE to cover an overage based upon the PSC of

participating permits, that sector's ACE for the stock for which the overage occurred shall be temporarily reduced to zero for the following fishing year, and that sector shall be prohibited from fishing on a sector trip in the stock area associated with the stock for which the ACE was exceeded during the following year, unless and until that sector can acquire sufficient ACE from another sector to cover the remaining overage from the previous fishing year. For example, if a sector comprised of 10 permits/vessels was allocated 10 mt of GB cod ACE, but caught 25 mt during the previous fishing year (i.e., it exceeded its GB cod ACE by 15 mt), each permit/vessel that participating in that sector during the following fishing year would have its GB cod PSC temporarily reduced to zero during the subsequent fishing year, and that sector would not be able to fish on a sector trip in the GB cod stock area until it could acquire at least an additional 5 mt of GB cod ACE from another sector (i.e., 15 mt overage–10 mt ACE for the following year = 5 mt overage remaining).

(C) ACE buffer. At the beginning of each fishing year, NMFS shall withhold 20 percent of a sector's ACE for each stock for a period of up to 61 days (i.e., through June 30), unless otherwise specified by NMFS, to allow time to process any ACE transfers submitted at the end of the fishing year pursuant to paragraph (b)(1)(viii) of this section and to determine whether the ACE allocated to any sector needs to be reduced, or any overage penalties need to be applied to individual permits/vessels in the current fishing year to accommodate an ACE overage by that sector during the previous fishing year, as specified in paragraph (b)(1)(iii) of this section. NMFS shall not withhold 20 percent of a sector's ACE at the beginning of a fishing year in which default specifications are in effect, as specified in § 648.90(a)(3).

(iv) Sector enforcement—

(A) Sector compliance and joint/several liability. Unless exempted through a letter of authorization specified in paragraph (c)(2) of this section, each vessel operator and/or vessel owner fishing under an approved sector must comply with all NE multispecies management measures of this part and other applicable law. Each vessel and vessel operator and/or vessel owner participating in a sector must also comply with all applicable requirements and conditions of the operations plan specified in paragraph (b)(2) of this section and the letter of authorization issued pursuant to paragraph (c)(2) of this section. Pursuant to 15 CFR part 904, each sector, permit/vessel owner, and vessel operator participating in the sector may be charged jointly and severally for violations of the following sector operations plan requirements, which may result in an assessment of civil penalties and permit sanctions: ACE overages, discarding of legal-sized NE multispecies, and misreporting of catch, including both landings and discards. For the purposes of enforcement, a sector is a legal entity that can be subject to NMFS enforcement

action for violations of the regulations pertaining to sectors, as specified in this paragraph (b)(1)(iv).

(B) Commitment to a sector. A permit/vessel participating in a sector must remain in the sector for the remainder of the fishing year. Such permits/vessels cannot fish under both the sector provisions and the provisions of the common pool during that same fishing year for any reason, including, but not limited to, expulsion from the sector pursuant to enforcement actions or other measures specified in an approved sector operations plan, vessel replacement, or permit/vessel sale to another owner. For example, if a permit/vessel is sold by a sector participant during the fishing year, the new owner must comply with the sector regulations and the conditions of the sector operations plan, sector contract, or any other binding agreements among participating sector vessels for the remainder of the fishing year. If a permit/vessel has been expelled from a sector, the sector must notify NMFS of such an expulsion immediately. Any permit/vessel, vessel operator, or vessel owner removed from a sector during a specific fishing year consistent with sector rules shall not be eligible to fish in another sector or under the NE multispecies regulations for common pool vessels specified in this part for the remainder of that fishing year. For the purposes of this paragraph, “permit/vessel” refers to the fishing and landings history associated with a particular permit/vessel enrolled in a specific sector at the start of the fishing year that was used to calculate the PSC for that permit/vessel and contribute to the ACE for each stock allocated to that specific sector.

(v) Sector monitoring. Each sector shall monitor catch by participating sector vessels to ensure that ACEs are not exceeded during the fishing year, as specified in this paragraph (b)(1)(v). The sector shall summarize trips validated by dealer reports; oversee the use of electronic monitoring equipment and review of associated data; maintain a database of VTR, dealer, observer, and electronic monitoring reports; determine all species landings by stock areas; apply discard estimates to landings; deduct catch from ACEs allocated to sectors; and report sector catch on a weekly basis to NMFS, as required in paragraph (b)(1)(vi) of this section. Unless otherwise specified in this paragraph (b)(1)(v), all catches of stocks allocated to sectors by vessels on a sector trip shall be deducted from the sector's ACE for each NE multispecies stock regardless of what the fishery the vessel was participating in when the fish was caught. For the purposes of this paragraph (b)(1)(v), any regulated species or ocean pout caught using gear capable of catching NE multispecies (i.e., gear not listed as exempted gear under this part) would be deducted from a sector's ACE if such catch contributed to the specification of PSC, as described in § 648.87(b)(1)(i)(E), and would not apply to another ACL sub-component pursuant to § 648.90(a)(4). For example, any regulated species or ocean pout landed while fishing for or catching skates or

monkfish pursuant to the regulations for those fisheries would be deducted from the sector's ACE for each stock because such regulated species or ocean pout were caught while also operating under a NE multispecies DAS. However, if a sector vessel is issued a limited access General Category Atlantic Sea Scallop permit and fishes for scallops under the provisions specific to that permit, any yellowtail flounder caught by the vessel on such trips would be deducted from the other sub-component of the appropriate stock of yellowtail flounder's ACL specified for the Atlantic Sea Scallop fishery and not from the yellowtail flounder ACE for the sector.

(A) Discards. A sector vessel may not discard any legal-sized regulated species or ocean pout allocated to sectors pursuant to paragraph (b)(1)(i) of this section, unless otherwise required pursuant to § 648.86(l). Discards of undersized regulated species or ocean pout by a sector vessel must be reported to NMFS consistent with the reporting requirements specified in paragraph (b)(1)(vi) of this section. Discards shall not be included in the information used to calculate a vessel's PSC, as described in § 648.87(b)(1)(i)(E), but shall be counted against a sector's ACE for each NE multispecies stock allocated to a sector.

(B) Independent third-party monitoring program. A sector must develop and implement an at-sea or electronic monitoring program that is satisfactory to, and approved by, NMFS for monitoring catch and discards and utilization of sector ACE, as specified in this paragraph (b)(1)(v)(B). The primary goal of the at-sea/electronic monitoring program is to verify area fished, as well as catch and discards by species and gear type, in the most cost-effective means practicable. All other goals and objectives of groundfish monitoring programs at § 648.11(l) are considered equally-weighted secondary goals. The details of any at-sea or electronic monitoring program must be specified in the sector's operations plan, pursuant to paragraph (b)(2)(xi) of this section, and must meet the operational standards specified in paragraph (b)(5) of this section. Electronic monitoring may be used in place of actual observers if the technology is deemed sufficient by NMFS for a specific trip type based on gear type and area fished, in a manner consistent with the Administrative Procedure Act. The level of coverage for trips by sector vessels is specified in paragraph (b)(1)(v)(B)(1) of this section. The at-sea/electronic monitoring program shall be reviewed and approved by the Regional Administrator as part of a sector's operations plans in a manner consistent with the Administrative Procedure Act. A service provider providing at-sea or electronic monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet the service provider standards specified in paragraph (b)(4) of this section, and be approved by NMFS in a manner consistent with the Administrative Procedure Act.

(1) Coverage levels. Except as specified in paragraph (b)(1)(v)(B)(1)(i) of this section, any service provider providing at-sea or electronic monitoring services

required under this paragraph (b)(1)(v)(B)(1) must provide coverage that is 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 fishing year. Coverage levels for an at-sea monitoring program shall be specified by NMFS, pursuant to paragraph (b)(1)(v)(B)(1)(i) of this section, but shall be less than 100 percent of all sector trips. In the event that a NMFS-sponsored observer and a third-party at-sea monitor are assigned to the same trip, only the NMFS observer must observe that trip. If either an at-sea monitor or electronic monitoring is assigned to a particular trip, a vessel may not leave port without the appropriate at-sea monitor or electronic monitoring equipment on board.

(i) At-sea/electronic monitoring. Coverage levels must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology at the overall stock level for each stock of regulated species and ocean pout, and to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels. In making its determination, NMFS shall take into account the primary goal of the at-sea/electronic monitoring program to verify area fished, as well as catch and discards by species and gear type, in the most cost-effective means practicable, the equally-weighted secondary goals and objectives of groundfish monitoring programs detailed at § 648.11(l), the National Standards and requirements of the Magnuson-Stevens Act, and any other relevant factors. NMFS will determine the total target coverage level (i.e., combined NEFOP coverage and at-sea/electronic monitoring coverage) for the upcoming fishing year using the criteria in this paragraph. Annual coverage levels will be based on the most recent 3-year average of the total required coverage level necessary to reach the required coefficient of variation for each stock. For example, if data from the 2012 through 2014 fishing years are the most recent three complete fishing years available for the fishing year 2016 projection, NMFS will use data from these three years to determine 2016 target coverage levels. For each stock, the coverage level needed to achieve the required coefficient of variation would be calculated first for each of the 3 years and then averaged (e.g., (percent coverage necessary to meet the required coefficient of variation in year 1 + year 2 + year 3)/3). The coverage level that will apply is the maximum stock-specific rate after considering the following criteria. For a given fishing year, stocks that are not overfished, with overfishing not occurring according to the most recent available stock assessment, and that in the previous fishing year have less than 75 percent of the sector sub-ACL harvested and less than 10 percent of catch comprised of discards, will not be used to predict the annual target coverage level. A stock must meet all of these criteria to be eliminated as a predictor for the annual target coverage level for a given year.

(ii) A sector vessel that declares its intent to exclusively fish using gillnets with a mesh size of 10–inch (25.4–cm) or greater in either the Inshore GB Stock Area, as defined at § 648.10(k)(3)(ii), and/or the SNE Broad Stock Area, as defined at § 648.10(k)(3)(iv), is not subject to the coverage level specified in this paragraph (b)(1)(v)(B)(1) of this section provided that the trip is limited to the Inshore GB and/or SNE Broad Stock Areas and that the vessel only uses gillnets with a mesh size of 10–inches (25.4–cm) or greater. When on such a trip, other gear may be on board provided that it is stowed and not available for immediate use as defined in § 648.2. A sector trip fishing with 10–inch (25.4–cm) mesh or larger gillnets will still be subject to the annual coverage level if the trip declares its intent to fish in any part of the trip in the GOM Stock area, as defined at § 648.10(k)(3)(i), or the Offshore GB Stock Area, as defined at § 648.10(k)(3)(iii).

(2) Hail reports. For the purposes of the at-sea monitoring requirements specified in paragraph (b)(1)(v)(B) of this section, sector vessels must submit all hail reports for a sector trip in which the NE multispecies catch applies against the ACE allocated to a sector, as specified in this part, to service providers offering at-sea monitoring services. The mechanism and timing of the transmission of such hail reports must be consistent with instructions provided by the Regional Administrator for any at-sea or electronic monitoring program required by paragraph (b)(1)(v)(B) of this section, or specified in the annual sector operations plan, consistent with paragraph (b)(5) of this section.

(3) Notification of service provider change. If, for any reason, a sector decides to change approved service providers used to provide at-sea or electronic monitoring services required in this paragraph (b)(1)(v), the sector manager must first inform NMFS in writing in advance of the effective date of the change in approved service providers in conjunction with the submission of the next weekly sector catch report specified in paragraph (b)(1)(vi)(B) of this section. A sector may employ more than one service provider at any time, provided any service provider employed by a sector meets the standards specified in paragraph (b)(4) of this section.

(vi) Sector reporting requirements. In addition to the other reporting/recordkeeping requirements specified in this part, a sector's vessels must comply with the reporting requirements specified in this paragraph (b)(1)(vi).

(A) VMS declarations and trip-level catch reports. Prior to each sector trip, a sector vessel must declare into broad stock areas in which the vessel fishes and submit the VTR serial number associated with that trip pursuant to § 648.10(k). The sector vessel must also submit a VMS catch report detailing regulated species and ocean pout catch by broad stock areas when fishing in multiple stock areas on the same trip, pursuant to § 648.10(k).

(B) Weekly catch report. Each sector must submit weekly reports to NMFS stating the remaining balance of ACE allocated to each sector based upon regulated

species and ocean pout landings and discards of vessels participating in that sector and any compliance/enforcement concerns. These reports must include at least the following information, as instructed by the Regional Administrator: Week ending date; species, stock area, gear, number of trips, reported landings (landed pounds and live pounds), discards (live pounds), total catch (live pounds), status of the sector's ACE (pounds remaining and percent remaining), and whether this is a new or updated record of sector catch for each NE multispecies stock allocated to that particular sector; sector enforcement issues; and a list of vessels landing for that reporting week. These weekly catch reports must be submitted no later than 0700 hr on the second Monday after the reporting week, as defined in this part. The frequency of these reports must be increased to more than a weekly submission when the balance of remaining ACE is low, as specified in the sector operations plan and approved by NMFS. If requested, 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.

(C) Year-end report. An approved sector must submit an annual year-end report to NMFS and the Council, no later than 60 days after the end of the fishing year, that summarizes the fishing activities of participating permits/vessels, which must include at least the following information: Catch, including landings and discards, of all species by sector vessels; the permit number of each sector vessel that fished for regulated species or ocean pout; the number of vessels that fished for non-regulated species or ocean pout; the method used to estimate discards by sector vessels; the landing port used by sector vessels; enforcement actions; and other relevant information required to evaluate the biological, economic, and social impacts of sectors and their fishing operations consistent with confidentiality requirements of applicable law.

(vii) Interaction with other fisheries—

(A) Use of DAS. A sector vessel must comply with all measures specified for another fishery pursuant to this part, including any requirement to use a NE multispecies DAS. If the regulations of another fishery require the use of a NE multispecies DAS, the DAS allocation and accrual provisions specified in § 648.82(d) and (e), respectively, apply to each trip by a sector vessel, as applicable. For example, if a sector vessel is also issued a limited access monkfish Category C permit and is required to use a NE multispecies DAS concurrent with a monkfish DAS under this part, any NE multispecies DAS used by the sector vessel accrues, as specified in § 648.82(e)(1)(ii) based upon the vessel's NE multispecies DAS allocation calculated pursuant to § 648.82(d)(1)(iv)(B).

(B) Availability of ACE. Notwithstanding the requirements in paragraph (b)(1)(vii)(A) of this section, if a sector has not been allocated or does not acquire sufficient ACE available to cover the catch of a particular stock of NE multispecies

while participating in another fishery in which such catch would apply to the ACE allocated to a sector, vessels participating in that sector cannot participate in those other fisheries unless NMFS has approved a sector operations plan that ensures that regulated species or ocean pout will not be caught while participating in these other fisheries.

(viii) ACE transfers. All or a portion of a sector's ACE for any NE multispecies stock may be transferred to another sector at any time during the fishing year and up to 2 weeks into the following fishing year (i.e., through May 14), unless otherwise instructed by NMFS, to cover any overages during the previous fishing year. A sector is not required to transfer ACE to another sector. An ACE transfer only becomes effective upon approval by NMFS, as specified in paragraph (b)(1)(viii)(B) of this section.

(A) Application to transfer ACE. ACE may be transferred from one sector to another through written request to the Regional Administrator. This request must include the name of the sectors involved, the amount of each ACE to be transferred, the fishing year in which the ACE transfer applies, and the amount of compensation received for any ACE transferred, as instructed by the Regional Administrator.

(B) Approval of an ACE transfer request. NMFS shall approve/disapprove a request to transfer ACE based upon compliance by each sector and its participating vessels with the reporting requirements specified in this part. The Regional Administrator shall inform both sectors in writing whether the ACE transfer request has been approved within 2 weeks of the receipt of the ACE transfer request.

(C) Duration of transfer. Notwithstanding ACE carried over into the next fishing year pursuant to paragraph (b)(1)(i)(C) of this section, ACE transferred pursuant to this paragraph (b)(1)(viii) is only valid for the fishing year in which the transfer is approved, with the exception of ACE transfer requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section, unless otherwise instructed by NMFS.

(ix) Trip limits. With the exception of stocks listed in § 648.86(1) and the Atlantic halibut trip limit at § 648.86(c), a sector vessel is not limited in the amount of allocated NE multispecies stocks that can be harvested on a particular fishing trip, unless otherwise specified in the operations plan.

(2) Operations plan and sector contract. To be approved to operate, each sector must submit an operations plan and preliminary sector contract to the Regional Administrator no later than September 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. A final roster, sector contract, and list of Federal and state permits held by participating

vessels for each sector must be submitted by December 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. The operations plan may cover a 1- or 2-year period, provided the analysis required in paragraph (b)(3) of this section is sufficient to assess the impacts of sector operations during the 2-year period and that sector membership, or any other parameter that may affect sector operations during the second year of the approved operations plan, does not differ to the point where the impacts analyzed by the supporting NEPA document are compromised. Each vessel and vessel operator and/or vessel owner participating in a sector must agree to and comply with all applicable requirements and conditions of the operations plan specified in this paragraph (b)(2) and the letter of authorization issued pursuant to paragraph (c)(2) of this section. It shall be unlawful to violate any such conditions and requirements unless such conditions or restrictions are identified in an approved operations plan as administrative only. If a proposed sector does not comply with the requirements of this paragraph (b)(2), NMFS may decline to propose for approval such sector operations plans, even if the Council has approved such sector. At least the following elements must be contained in either the final operations plan or sector contract submitted to NMFS:

- (i) A list of all parties, vessels, and vessel owners who will participate in the sector;
- (ii) A list of all Federal and state permits held by persons participating in the sector, including an indication for each permit whether it is enrolled and will actively fish in a sector, or will be subject to the provisions of the common pool;
- (iii) A contract signed by all sector participants indicating their agreement to abide by the operations plan;
- (iv) The name of a designated representative or agent of the sector for service of process;
- (v) If applicable, a plan for consolidation or redistribution of ACE detailing the quantity and duration of such consolidation or redistribution within the sector;
- (vi) A list of the specific management rules the sector participants will agree to abide by in order to avoid exceeding the allocated ACE for each stock, including a plan of operations or cessation of operations once the ACEs of one or more stocks are harvested and detailed plans for enforcement of the sector rules;
- (vii) A plan that defines the procedures by which members of the sector that do not abide by the rules of the sector will be disciplined or removed from the sector, and a procedure for notifying NMFS of such expulsions from the sector;
- (viii) If applicable, a plan of how the ACE allocated to the sector is assigned to each vessel;
- (ix) If the operations plan is inconsistent with, or outside the scope of the NEPA analysis associated with the sector proposal/framework adjustment as specified in

paragraph (a)(1) of this section, a supplemental NEPA analysis may be required with the operations plan;

(x) Detailed information about overage penalties or other actions that will be taken if a sector exceeds its ACE for any stock;

(xi) Detailed plans for the monitoring and reporting of landings and discards by sector participants, including, but not limited to, detailed information describing the sector's at-sea/electronic monitoring program for monitoring utilization of ACE allocated to that sector; identification of the independent third-party service providers employed by the sector to provide at-sea/electronic monitoring services; the mechanism and timing of any hail reports; a list of specific ports where participating vessels will land fish, with specific exemptions noted for safety, weather, etc., allowed, provided the sector provides reasonable notification to NMFS concerning a deviation from the listed ports; and any other information about such a program required by NMFS;

(xii) ACE thresholds that may trigger revisions to sector operations to ensure allocated ACE is not exceeded, and details regarding the sector's plans for notifying NMFS once the specified ACE threshold has been reached;

(xiii) Identification of any potential redirection of effort into other fisheries expected as a result of sector operations, and, if necessary, proposed limitations to eliminate any adverse effects expected from such redirection of effort;

(xiv) If applicable, description of how regulated species and ocean pout will be avoided while participating in other fisheries that have a bycatch of regulated species or ocean pout if the sector does not have sufficient ACE for stocks of regulated species or ocean pout caught as bycatch in those fisheries, as specified in paragraph (b)(1)(vii)(B) of this section; and

(xv) A list of existing regulations that the sector is requesting exemption from during the following fishing year pursuant to paragraph (c)(2) of this section.

(3) NEPA analysis. In addition to the documents required by paragraphs (a)(1) and (b)(2) of this section, before NMFS can approve a sector to operate during a particular fishing year, each sector must develop and submit to NMFS, in conjunction with the yearly operations plan and sector contract, an appropriate NEPA analysis assessing the impacts of forming the sector and operating under the measures described in the sector operations plan.

(4) Independent third-party monitoring provider standards. Any service provider intending to provide at-sea/electronic monitoring services described in paragraph (b)(1)(v) of this section must apply to and be approved/certified by NMFS in a manner consistent with the Administrative Procedure Act. NMFS shall approve/certify service providers and/or at-sea monitors as eligible to provide sector monitoring services specified in this part and can disapprove/decertify

service providers and/or individual monitors through notice in writing to individual service providers/monitors if the following criteria are no longer being met:

(i) Service provider information. As part of the application for service provider approval/certification, potential service providers must include at least the following information:

(A) Identification of corporate structure, including the names and duties of controlling interests in the company such as owners, board members, authorized agents, and staff; and articles of incorporation, or a partnership agreement, as appropriate;

(B) Contact information for official correspondence and communication with any other office;

(C) A statement, signed under penalty of perjury, from each owner, board member, and officer that they are free from a conflict of interest with fishing-related parties including, but not limited to, vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions and will not accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from such parties;

(D) A statement, signed under penalty of perjury, from each owner, board member, and officer describing any criminal convictions, Federal contracts they have had, and the performance rating they received on the contract, and previous decertification action while working as an observer or observer service provider;

(E) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments including, but not limited to, recruiting, hiring, deployment, and personnel administration;

(F) A description of the applicant's ability to carry out the responsibilities and duties of a sector monitoring/reporting service provider and the arrangements to be used, including whether the service provider is able to offer at-sea monitoring services;

(G) Evidence of adequate insurance (copies of which shall be provided to the vessel owner, operator, or vessel manager, when requested) to cover injury, liability, and accidental death to cover at-sea monitors (including during training); vessel owner; and service provider. NMFS will determine the adequate level of insurance and notify potential service providers;

(H) Proof of benefits and personnel services provided in accordance with the terms of each monitor's contract or employment status;

(I) Proof that the service provider's at-sea monitors have passed an adequate training course sponsored by the service providers to the extent not funded by NMFS that is consistent with the curriculum used in the current yearly NEFOP training course, unless otherwise specified by NMFS;

(J) An Emergency Action Plan describing the provider's response to an emergency with an at-sea monitor, including, but not limited to, personal injury, death, harassment, or intimidation; and

(K) Evidence that the company is in good financial standing;

(ii) Service provider performance requirements. At-sea monitoring service providers must be able to document compliance with the following criteria and requirements:

(A) A service provider must establish and carry out a comprehensive plan to deploy NMFS-certified at-sea monitors, or other at-sea monitoring mechanism, such as electronic monitoring equipment that is approved by NMFS, according to a prescribed coverage level (or level of precision for catch estimation), as specified by NMFS, including all of the necessary vessel reporting/notice requirements to facilitate such deployment, as follows:

(1) A service provider must be available to industry 24 hr per day, 7 days per week, with the telephone system monitored a minimum of four times daily to ensure rapid response to industry requests;

(2) A service provider must be able to deploy at-sea monitors, or other approved at-sea monitoring mechanism to all ports in which service is required by sectors, or a subset of ports as part of a contract with a particular sector;

(3) A service provider must report at-sea monitors and other approved at-sea monitoring mechanism deployments to NMFS and the sector manager in a timely manner to determine whether the predetermined coverage levels are being achieved for the appropriate sector;

(4) A service provider must assign at-sea monitors and other approved at-sea monitoring mechanisms without regard to any preference by the sector manager or representatives of vessels other than when the service is needed and the availability of approved/certified monitors and other at-sea monitoring mechanisms;

(5) A service provider's at-sea monitor assignment must be fair, equitable, representative of fishing activities within each sector, and able to monitor fishing activity throughout the fishing year;

(6) For service providers offering catch estimation or at-sea monitoring services, a service provider must be able to determine an estimate of discards for each trip and provide such information to the sector manager and NMFS, as appropriate and as required by this section;

(B) The service provider must ensure that at-sea monitors remain available to NMFS, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any monitored trip/offload;

(C) The service provider must report possible at-sea monitor harassment; discrimination; concerns about vessel safety or marine casualty; injury; and any information, allegations, or reports regarding at-sea monitor conflict of interest or

breach of the standards of behavior to NMFS and/or the sector manager, as specified by NMFS;

(D) The service provider must submit to NMFS, if requested, a copy of each signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the service provider and those entities requiring services (i.e., sectors and participating vessels) and between the service provider and specific dockside, roving, or at-sea monitors;

(E) The service provider must submit to NMFS, if requested, copies of any information developed and used by the service providers distributed to vessels, such as informational pamphlets, payment notification, description of duties, etc.;

(F) A service provider may refuse to deploy an at-sea monitor or other approved at-sea monitoring mechanism on a requesting fishing vessel for any reason including, but not limited to, the following:

(1) If the service provider does not have an available at-sea monitor or other at-sea monitoring mechanism approved by NMFS within the advanced notice requirements established by the service provider;

(2) If the service provider is not given adequate notice of vessel departure or landing from the sector manager or participating vessels, as specified by the service provider;

(3) For the purposes of at-sea monitoring, if the service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described in § 600.746; and

(4) Failure to pay for previous deployments of at-sea monitors, or other approved at-sea monitoring mechanism.

(G) With the exception of a service provider offering reporting, dockside, and/or at-sea monitoring services to participants of another fishery managed under Federal regulations, a service provider must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, fishing vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions and may not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing-related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of service providers;

(H) A system to record, retain, and distribute the following information to NMFS, as requested, for a period specified by NMFS, including:

(1) At-sea monitor and other approved monitoring equipment deployment levels, including the number of refusals and reasons for such refusals;

(2) Incident/non-compliance reports (e.g., failure to offload catch); and

(3) Hail reports, landings records, and other associated interactions with vessels and dealers.

(I) A means to protect the confidentiality and privacy of data submitted by vessels, as required by the Magnuson–Stevens Act; and

(J) A service provider must be able to supply at-sea monitors with sufficient safety and data-gathering equipment, as specified by NMFS.

(iii) Standards for individual at-sea monitors. For an individual to be approved/certified as an at-sea monitor, the service provider must demonstrate that each potential monitor meets the following criteria:

(A) A high school diploma or legal equivalent;

(B) Successful completion of all NMFS–required training and briefings before deployment;

(C) Physical and mental capacity for carrying out the responsibilities of an at-sea monitor on board fishing vessels, pursuant to standards established by NMFS such as being certified by a physician to be physically fit to work as an at-sea monitor after consideration of at least the following work-related issues:

(1) Susceptibility to chronic motion sickness;

(2) Ability to live in confined quarters;

(3) Ability to tolerate stress;

(4) Ability to lift and carry heavy objects up to 50 lb (22.7 kg);

(5) Ability to drag heavy objects up to 200 lb (90.7 kg); and

(6) Ability to climb a ladder.

(D) A current Red Cross (or equivalent) CPR/first aid certification;

(E) Absence of fisheries-related convictions, based upon a thorough background check; and

(F) Independence from fishing-related parties including, but not limited to, vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions to prevent conflicts of interest.

(5) At-sea/electronic monitoring operational standards. In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any at-sea/electronic monitoring program developed as part of a sector's yearly operations plan pursuant to paragraph (b)(1)(v)(B) of this section must meet the following operational standards to be approved by NMFS:

(i) Gear. Each at-sea monitor must be provided with all of the equipment specified by the Northeast Fisheries At-sea Monitoring Program. A list of such equipment is available from the Northeast Fisheries Science Center upon request. At-sea/electronic monitoring service providers are responsible for the cost of providing such gear to at-sea monitors to the extent not funded by NMFS. This gear shall be inspected by NMFS upon the completion of training required pursuant to paragraph (b)(4)(i)(I) of this section.

(ii) Vessel selection protocol. An at-sea/electronic monitoring program service provider must develop a formal vessel-selection protocol to deploy at-sea monitors and electronic monitoring equipment in a statistically random manner consistent with the coverage levels required pursuant to paragraph (b)(1)(v)(B)(1) of this section. This protocol must include a method to allow for waivers in specific circumstances, including how waivers would be requested, assessed, and recorded.

(iii) Reporting/recordkeeping requirements—

(A) Vessel requirements. In addition to all other reporting/recordkeeping requirements specified in this part, to facilitate the deployment of at-sea monitors and electronic monitoring equipment pursuant to paragraph (b)(1)(v)(B)(1) of this section, the operator of a vessel fishing on a sector trip must provide at-sea/electronic monitoring service providers with at least the following information: The vessel name, permit number, trip ID number in the form of the VTR serial number of the first VTR page for that trip or another trip identifier specified by NMFS, whether a monkfish DAS will be used, and an estimate of the date/time of departure in advance of each trip. The timing of such notice shall be sufficient to allow ample time for the service provider to determine whether an at-sea monitor or electronic monitoring equipment will be deployed on each trip and allow the at-sea monitor or electronic monitoring equipment to prepare for the trip and get to port, or to be installed on the vessel, respectively. The details of the timing, method (e.g., phone, email, etc.), and information needed for such pre-trip notifications shall be included as part of a sector's yearly operations plan. If a vessel has been informed by a service provider that an at-sea monitor or electronic monitoring equipment has been assigned to a particular trip pursuant to paragraph (b)(5)(iii)(B)(1) of this section, the vessel may not leave port to begin that trip until the at-sea monitor has arrived and boarded the vessel, or the electronic monitoring equipment has been properly installed.

(B) At-sea/electronic monitoring service provider requirements—

(1) Confirmation of pre-trip notification. Upon receipt of a pre-trip notification pursuant to paragraph (b)(5)(iii)(A) of this section, the service provider shall inform the vessel operator whether the vessel will be monitored by an at-sea observer or electronic monitoring equipment for that trip, or will be issued an at-sea/electronic monitoring waiver for that trip based upon the vessel selection protocol specified in paragraph (b)(5)(ii) of this section.

(2) At-sea/electronic monitoring report. A report detailing area fished and the amount of each species kept and discarded shall be submitted electronically in a standard acceptable form to the appropriate sector and NMFS within 48 hr of the completion of the trip, as instructed by the Regional Administrator. The data elements to be collected and the format for submission shall be specified by NMFS and distributed to all approved at-sea/electronic monitoring service providers and

sectors. At-sea/electronic monitoring data shall not be accepted until such data pass automated NMFS data quality checks.

(iv) Safety hazards—

(A) Vessel requirements. The operator of a sector vessel must detail and identify any safety hazards to any at-sea monitor assigned pursuant to paragraph (b)(5)(iii)(B)(1) of this section prior to leaving port. A vessel cannot begin a trip if it has failed a review of safety issues pursuant to paragraph (b)(5)(iv)(B) of this section, until the identified safety deficiency has been resolved, pursuant to § 600.746(i).

(B) At-sea/electronic monitoring service provider requirements. An at-sea monitor must complete a pre-trip vessel safety checklist provided by NMFS before an at-sea monitor can leave port onboard a vessel on a sector trip. If the vessel fails a review of safety issues pursuant to this paragraph (b)(5)(iv)(B), an at-sea monitor cannot be deployed on that vessel for that trip.

(v) Adjustment to operational standards. The at-sea/electronic monitoring operational standards specified in paragraph (b)(5) of this section may be revised by the Regional Administrator in a manner consistent with the Administrative Procedure Act.

(c) Approval of a sector and granting of exemptions by the Regional Administrator.

(1) Once the Regional Administrator has made a preliminary determination that the documents submitted pursuant to paragraphs (a)(1), (b)(2), and (b)(3) of this section appear to comply with the requirements of this section, NMFS may consult with the Council and approve or disapprove sector operations consistent with the Administrative Procedure Act and other applicable law.

(2) If a sector is approved, the Regional Administrator shall issue a letter of authorization to each vessel operator and/or vessel owner participating in the sector. The letter of authorization shall authorize participation in the sector operations and may exempt participating vessels from any Federal fishing regulation implementing the NE multispecies FMP, except those specified in paragraphs (c)(2)(i) and (ii) of this section, in order to allow vessels to fish in accordance with an approved operations plan, provided such exemptions are consistent with the goals and objectives of the FMP. The letter of authorization may also include requirements and conditions deemed necessary to ensure effective administration of, and compliance with, the operations plan and the sector allocation. Solicitation of public comment on, and NMFS final determination on such exemptions shall be consistent with paragraphs (c)(1) and (2) of this section.

(i) Regulations that may not be exempted for sector participants. The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: Specific times and areas within the NE multispecies year-

round closure areas; permitting restrictions (e.g., vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); reporting requirements; AMs specified in § 648.90(a)(5)(i)(D). For the purposes of this paragraph (c)(2)(i), the DAS reporting requirements specified in § 648.82; the SAP-specific reporting requirements specified in § 648.85; and the reporting requirements associated with a dockside monitoring program are not considered reporting requirements, and the Regional Administrator may exempt sector participants from these requirements as part of the approval of yearly operations plans. For the purpose of this paragraph (c)(2)(i), the Regional Administrator may not grant sector participants exemptions from the NE multispecies year-round closures areas defined as Essential Fish Habitat Closure Areas as defined in § 648.81(h); the Fippennies Ledge Area as defined in paragraph (c)(2)(i)(A) of this section; Closed Area I and Closed Area II, as defined in § 648.81(a) and (b), respectively, during the period February 16 through April 30; and the Western GOM Closure Area, as defined at § 648.81(e), where it overlaps with GOM Cod Protection Closures I through III, as defined in § 648.81(f)(4). This list may be modified through a framework adjustment, as specified in § 648.90.

(A) Fippennies Ledge Area. The Fippennies Ledge Area is bounded by the following coordinates, connected by straight lines in the order listed:

**Fippennies Ledge Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
1	42°50.0'	69°17.0'
2	42°44.0'	69°14.0'
3	42°44.0'	69°18.0'
4	42°50.0'	69°21.0'
1	42°50.0'	69°17.0'

(B) [Reserved]

(ii) Universal sector exemptions. All sector vessels are exempt from the following Federal fishing regulations under this part:

(A) Trip limits on NE multispecies stocks for which a sector receives an allocation of ACE pursuant to paragraph (b)(1)(i) of this section (i.e., all stocks except Atlantic halibut, ocean pout, windowpane flounder, and Atlantic wolffish);

(B) The GOM Cod Protection Closures IV and V specified in § 648.81(f)(4)(iv) and (v) and the GB Seasonal Closed Area specified in § 648.81(g)(1);

(C) NE multispecies DAS restrictions other than those required to comply with effort controls in other fisheries, as specified in §§ 648.92 and 648.322; and  
(D) The minimum codend mesh size restrictions for trawl gear specified in § 648.80(a)(4)(i) when using a haddock separator trawl defined in § 648.85(a)(3)(iii) or the Ruhle trawl defined in § 648.85(b)(6)(iv)(J)(3) within the GB RMA, as defined in § 648.80(a)(2), provided sector vessels use a codend with 6-inch (15.2-cm) minimum mesh.

(3) The Regional Administrator may withdraw approval of a sector, after consultation with the Council, at any time, if it is determined that sector participants are not complying with the requirements of an approved operations plan or that the continuation of the operations plan will undermine achievement of fishing mortality objectives of the FMP. Withdrawal of approval of a sector may only be done in a manner consistent with the Administrative Procedure Act and other applicable law.

(4) Any sector may submit a written request to amend its approved operations plan to the Regional Administrator. If the amendment is administrative in nature, within the scope of and consistent with the actions and impacts previously considered for current sector operations, the Regional Administrator may approve an administrative amendment in writing. The Regional Administrator may approve substantive changes to an approved operations plan in a manner consistent with the Administrative Procedure Act and other applicable law. All approved operations plan amendments will be published on the regional office Web site and will be provided to the Council.

**79 FR 10029-01**, 2014 WL 671213(F.R.)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100120035-4085-03]

RIN 0648-AY26

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 14

Monday, February 24, 2014

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**\*10029 ACTION:** Final rule.

SUMMARY: This rule implements approved measures in Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP). Amendment 14 was developed by the Mid-Atlantic Fishery *\*10030* Management Council (Council) to improve the catch monitoring program for the MSB fisheries, with a focus on better evaluation of the incidental catch of river herring and shad, and to address river herring and shad bycatch issues in the mackerel fishery. The approved measures include: Revising vessel reporting requirements (vessel trip reporting frequency, pre-trip and pre-landing vessel notification requirements, and requirements for vessel monitoring systems); expanding vessel requirements to maximize observer's ability to sample catch at-sea; minimizing the discarding of unsampled catch; and a measure to allow the Council to set a cap on river herring and shad catch in the Atlantic mackerel fishery. NMFS disapproved three measures in Amendment 14: A dealer reporting requirement; a cap that, if achieved, would require vessels discarding catch before it had been sampled by observers (known as slippage) to return to port; and a requirement for increased observer coverage on limited access midwater trawl and small-mesh bottom trawl mackerel trips, coupled with an industry contribution of \$325 per day toward observer costs. NMFS disapproved these measures because it determined that they are inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other applicable law. Therefore, these three measures are not implemented in this action.

DATES: Effective March 26, 2014, except for the amendments to § 648.7(b)(3)(ii)-(iii) and § 648.10, which are effective April 25, 2014.

ADDRESSES: Copies of supporting documents used by the Council, including the Environmental Impact Statement (EIS) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904-6790. The EIS/RIR/IRFA is also accessible via the Internet at <http://www.nero.nmfs.gov>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930, and by email to [OIRA-Submission@omb.eop.gov](mailto:OIRA-Submission@omb.eop.gov), or fax to 202-395-7285.

Information on the Federal Vessel Monitoring System (VMS) reimbursement program is available from the Pacific States Marine Fisheries Commission, 205 SE Spokane Street, Suite 100, Portland, OR 97202 (Web site: <http://www.psmfc.org/>, Telephone Number: 503-595-3100, Fax Number: 503-595-3232) and from the NMFS VMS Support Center at 888-219-9228.

FOR FURTHER INFORMATION CONTACT: Aja Szumylo, Fishery Policy Analyst, phone 978-281-9195, fax 978-281-9135.

SUPPLEMENTARY INFORMATION:

**Background**

On June 9, 2010 (75 FR 32745), the Council published a notice of intent (NOI) to prepare an EIS for Amendment 14 to the MSB FMP to consider measures to: Implement catch share systems for the squid fisheries, increase fishery monitoring to determine the significance of river herring and shad incidental catch in the MSB fisheries, and measures to minimize bycatch and/or incidental catch of river herring and shad. The Council subsequently conducted scoping meetings during June 2010 to gather public comments on these issues. Based on the comments submitted during scoping, the Council removed consideration of catch shares for squids from Amendment 14 at its August 2010 meeting.

Following further development of Amendment 14, the Council conducted MSA and National Environmental Policy Act public hearings in April and May 2012, and, following the public comment period on the draft EIS that ended on June 4, 2012, the Council adopted Amendment 14 on June 14, 2012. The Council submitted Amendment 14 to NMFS for review on February 26, 2012. Following a series of revisions, the Council submitted a revised version of Amendment 14 to NMFS on June 3, 2013. A Notice of Availability (NOA) for Amendment 14, as submitted by the Council for review by the Secretary of Commerce (Secretary), was published on August 12, 2013 (78 FR 48852), with a comment period ending September 16, 2013. A proposed rule for Amendment 14 was published on August 29, 2013 (78 FR 53404), with a comment period ending October 11, 2013. On November 7, 2013, NMFS partially approved Amendment 14 on behalf of the Secretary. NMFS sent a letter to the Council on November 7, 2013, informing it of the partial approval of Amendment 14.

The Council spent several years developing this amendment, and it contains many measures that will improve MSB management and that can be administered by NMFS. NMFS supports improvements to fishery-dependent data collections, either through increasing reporting requirements or expanding the at-sea monitoring of the MSB fisheries. NMFS also shares the Council's concern for reducing river herring and shad bycatch and unintended catch, and unnecessary discarding. However, three measures in Amendment 14 lacked adequate rationale or development by the Council, and NMFS had utility and legal concerns with the implementation of these measures. These measures were: A requirement for mackerel and longfin squid dealers to document how they estimated species composition of the weights of the fish they report; a cap that, if reached, would require vessels discarding catch before it had been sampled by observers to return to port; and a recommendation for 100-percent observer coverage on all limited

access midwater trawl and Tier 1 small-mesh bottom trawl mackerel trips, 50-percent coverage on Tier 2 small-mesh bottom trawl trips, and 25-percent coverage on Tier 3 small-mesh bottom trawl trips, coupled with an industry contribution of \$325 per day toward observer costs. NMFS expressed potential concerns with these measures throughout the development of this amendment, but these measures have strong support from some stakeholders. The proposed rule for Amendment 14 described NMFS's concerns about these measures' consistency with the MSA and other applicable law. In addition, the proposed rule described the recent disapproval of similar measures in the New England Fishery Management Council's Amendment 5 to the Atlantic Herring FMP. After review of public comments, NMFS determined these three measures had to be disapproved because they are inconsistent with the MSA and other applicable law. In the November 7, 2013, partial approval letter sent to the Council, NMFS detailed recommendations on how these measures could be revised in a future action to address NMFS's concerns. If the Council chooses to revise these measures and submit them in a future action, NMFS will continue to work with the Council to design effective measures to help improve management of the MSB fisheries. Whether those future actions would be amendments or framework adjustments would depend on the scope of the revised measures.

Amendment 14 includes measures to address the catch of river herring and shad in the mackerel fishery. River herring (alewife and blueback herring) and shad (American shad and hickory shad) are anadromous species that co-occur seasonally with mackerel and are\**10031* harvested as incidental catch in the mackerel fishery. For the purposes of this rulemaking, the term "river herring and shad" refers to all four species. When river herring and shad are encountered in the mackerel fishery, they are either discarded at sea (bycatch) or retained and sold as part of the mackerel catch (incidental catch). For the purposes of this rulemaking, the terms bycatch and incidental catch are used interchangeably.

### **Approved Measures**

As noted in the proposed rule, some of the regulations implemented through Amendment 14 overlap with the regulations implemented through Amendment 5 to the Atlantic Herring FMP, which will publish as a final rule shortly. Several sections of regulatory text are affected by both actions. Since the Amendment 5 regulatory text is now finalized, the regulatory text presented in this final rule references the updated regulations. Therefore, it differs slightly in structure, but not content, from the regulations presented in the proposed rule.

This final rule implements approved management measures that:

- Institute weekly vessel trip reports (VTRs) for all MSB permits to facilitate quota monitoring and cross-checking with other data sources;

- Require 48-hr pre-trip notification to retain more than 20,000 lb (9.07 mt) of mackerel so NMFS has sufficient notice to assign observers to fishing vessels;
- Require VMS and daily catch reporting via VMS for limited access mackerel vessels to facilitate monitoring and cross-checking with other data sources;
- Require VMS and daily catch reporting via VMS for longfin squid/butterfish moratorium vessels to facilitate monitoring and cross-checking with other data sources;
- Require 6-hr pre-landing notification via VMS to land over 20,000 lb (9.07 mt) of mackerel to allow sufficient notice to facilitate at-sea monitoring, enforcement, and portside monitoring;
- Expand vessel requirements related to at-sea observer sampling to help ensure safe sampling and improve data quality;
- Prohibit slippage on limited access mackerel and longfin squid trips, with exceptions for safety concerns, mechanical failure, and when spiny dogfish prevents catch from being pumped aboard the vessel, and require a released catch affidavit (statement by the vessel operator) to be completed for each slippage event;
- Evaluate the existing river herring bycatch avoidance program to investigate providing real-time, cost-effective information on river herring distribution and fishery encounters;
- Implement a mortality cap for river herring and shad in the mackerel fishery; and
- Establish a mechanism within the fishery management plan whereby a river herring and shad catch cap can be developed through future framework actions.

### ***1. Adjustments to the Fishery Management Program***

Amendment 14 revises several existing fishery management provisions, including VTR requirements, and VMS requirements and reporting.

#### **VTR Frequency Requirements**

Currently MSB permit holders are required to submit fishing vessel logs, known as VTRs, on a monthly basis. Amendment 14 implements a weekly VTR submission requirement for all MSB permits and requires that VTRs be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If an MSB permit holder did not make a trip during a given reporting week, a vessel representative is required to submit a report to NMFS stating so by midnight of the first Tuesday following the end of the reporting week. Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) constitutes fishing during that reporting week and eliminates the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel began a fishing trip on Wednesday, but returned to port and offloaded its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the

third week, but a negative report (i.e., a “did not fish” report) would not be required for either earlier week. This weekly VTR reporting requirement brings MSB reporting requirements in line with other Northeast region fisheries, improves monitoring of directed and incidental catch, and facilitates cross-checking with other data sources.

### **VMS Requirement, Daily Catch Reports and Pre-Landing Notifications**

Amendment 14 implements VMS requirements for vessels with limited access mackerel permits and longfin squid/butterfish moratorium permits to improve monitoring of directed and incidental catch. Currently, vessels with these permits are not required to have VMS, to submit activity declarations, to submit catch reports, or to submit pre-landing notifications, although many vessels already possess VMS units due to requirements for other fisheries for which they hold permits.

Amendment 14 requires limited access mackerel and longfin squid/butterfish moratorium permit holders to purchase and maintain a VMS unit. Reimbursement for VMS units is available on a first come, first serve, basis until the funds are depleted. More information on the VMS reimbursement program is available from the Pacific States Marine Fisheries Commission (see ADDRESSES) and from the NMFS VMS Support Center, which can be reached at 888-219-9228. Information about approved VMS vendors will be provided in the small entity compliance guide for this final rule, which will be mailed to all permit holders and available online at <http://www.nero.noaa.gov>.

Vessels are required to declare into the fishery via VMS for trips targeting mackerel or longfin squid, and are required to transmit location information at least every hour, 24 hr a day, throughout the year (see existing operating requirements at § 648.10(c)(1)(i)). Vessel owners may request a letter of exemption from the NMFS Regional Administrator for permission to power down their VMS units if the vessel is continuously out of the water for more than 72 consecutive hours (see existing power-down exemption regulations at § 648.10(c)(2)). Vessels that do not already have VMS units installed have to confirm that their VMS units are operational by notifying the NMFS Office of Law Enforcement (OLE) (see existing installation notification procedures at § 648.10(e)(1)).

Amendment 14 requires daily VMS catch reporting for all limited access mackerel permits and longfin squid/butterfish moratorium permits when fishing on a declared mackerel or longfin squid trip. Daily VMS catch reports need to include: The VTR serial number for the current trip; month, day, and year the mackerel and/or longfin squid were caught; and total pounds retained. Daily mackerel and/or longfin squid VMS catch reports need to be submitted for each calendar day of the trip (midnight to midnight) and must to be submitted by 0900 hr of the following

day. Reports are required even if mackerel and/or longfin squid caught that day has not yet been landed.

Amendment 14 also requires that vessels landing more than 20,000 lb (9.07 mt) of mackerel submit a pre-landing notification via VMS. Vessels *\*10032* must notify NMFS Office of Law Enforcement of the time and place of offloading at least 6 hr prior to arrival or, if fishing ends less than 6 hr before arrival, immediately upon leaving the fishing grounds.

## ***2. Adjustments to At-Sea Catch Monitoring***

One of the primary goals of Amendment 14 is to improve catch monitoring in the mackerel and longfin squid fisheries, with a focus on better evaluation of the incidental catch of river herring and shad. Amendment 14 codifies a number of requirements to facilitate at-sea catch monitoring, including adding a pre-trip notification for mackerel, observer assistance requirements, and proper notice of pumping and/or net haulback for observers in the mackerel and longfin squid fisheries. Amendment 14 also includes a measure to minimize the discarding of catch before it has been sampled by an observer.

### **Pre-Trip Notification in the Mackerel Fishery**

Amendment 14 requires a 48-hr pre-trip notification for all vessels intending to retain, possess or transfer 20,000 lb (9.07 mt) or more of Atlantic mackerel, in order to facilitate observer placement. Currently mackerel vessels have no pre-trip notification requirements. This measure assists the NMFS Northeast Fisheries Observer Program (NEFOP) scheduling and deployment of observers on directed mackerel trips, with minimal additional burden on the industry, helping ensure that the observer coverage target for the mackerel fishery is met. The list of information that must be provided to NEFOP as part of this pre-trip observer notification is described in the regulations at § 648.11(n)(1). Details of how vessels should contact NEFOP will be provided in the small entity compliance guide for this final rule, which will be mailed to all permit holders and available online at <http://www.nero.noaa.gov>. If a vessel operator is required to notify NEFOP to request an observer before embarking on a fishing trip, but does not notify NEFOP before beginning the fishing trip, that vessel would be prohibited from possessing, harvesting, or landing more than 20,000 lb (9.07 mt) of mackerel on that trip. If a fishing trip is cancelled, a vessel representative must notify NEFOP of the cancelled trip, even if the vessel is not selected to carry observers. All waivers or selection notices for observer coverage will be issued by NEFOP to the vessel via VMS, so the vessel would have an on-board verification of either the observer selection or waiver.

### **Observer Assistance Requirements**

Northeast fisheries regulations (found at 50 CFR part 648) specify requirements for vessels carrying NMFS-approved observers, such as providing observers with food

and accommodations equivalent to those available to the crew; allowing observers to access the vessel's bridge, decks, and spaces used to process fish; and allowing observers access to vessel communication and navigations systems. Amendment 14 expands these requirements, such that vessels issued limited access mackerel and longfin squid/butterfish moratorium permits and carrying NMFS-approved observers must provide observers with the following: (1) A safe sampling station adjacent to the fish deck, and a safe method to obtain and store samples; (2) reasonable assistance to allow observers to complete their duties; (3) advance notice of when pumping or net haulback will start and end and when sampling of the catch may begin; and (4) visual access to net/codend or purse seine and any of its contents after pumping has ended, including bringing the codend and its contents aboard if possible. These measures are anticipated to help improve at-sea catch monitoring in the mackerel and longfin squid/butterfish fisheries by enhancing the observer's ability to collect quality data in a safe and efficient manner. Many vessels already provide this assistance voluntarily.

#### **Measures To Prevent Catch Discards Before Observer Sampling**

Amendment 14 requires limited access mackerel and longfin squid moratorium vessels to bring all catch aboard the vessel and make it available for sampling by an observer. The Council recommended this measure to improve the quality of at-sea monitoring data by reducing the discarding of unsampled catch. If catch is discarded before it has been made available to the observer, that catch is defined as slippage. Fish that cannot be pumped and that remain in the net at the end of pumping operations are considered operational discards and not slippage. Some stakeholders believe that slippage is a serious problem in the mackerel and longfin squid fisheries because releasing catch before an observer can estimate its species composition undermines accurate catch accounting.

Amendment 14 allows catch to be slipped if: (1) Bringing catch aboard compromises the safety of the vessel or crew; (2) mechanical failure prevents the catch from being brought aboard; or (3) spiny dogfish prevents the catch from being pumped aboard. If catch is slipped, even for the exempted reasons, the vessel operator is required to complete a released catch affidavit within 48 hr of the end of the fishing trip. The released catch affidavit would detail: (1) Why catch was slipped; (2) an estimate of the quantity and species composition of the slipped catch and any catch brought aboard during the haul; and (3) the time and location of the slipped catch.

In 2010, the NMFS NEFOP revised the training curriculum for observers deployed on herring and mackerel vessels to focus on effectively sampling in high-volume fisheries. NEFOP also developed a discard log to collect detailed information on discards in the herring fishery, including slippage, such as why catch was discarded, the estimated amount of discarded catch, and the estimated composition

of discarded catch. Recent slippage data collected by observers indicate that: Information about these events, and the amount and composition of fish that are slipped, has improved; and the number of slippage events by limited access herring vessels has declined. Given NEFOP's recent training changes and its addition of a discard log, NMFS believes that observer data on slipped catch, rather than released catch affidavits, provide the best information to account for discards. However, there is still a compliance benefit to requiring a released catch affidavit because it would provide information regarding the operator's decisions and may help NMFS to understand why slippage occurs.

NMFS expects that prohibiting slippage will help reduce slippage events in the mackerel and longfin squid fisheries, thus improving the quality of observer catch data, especially data on bycatch species encountered in the mackerel and longfin squid fisheries. Additionally, NMFS expects that the slippage prohibition will help minimize bycatch, and bycatch mortality, to the extent practicable in the mackerel and longfin squid fisheries.

Lastly, Amendment 14 allows for a number of measures related to at-sea sampling to be modified through the specifications process, including: (1) Observer provisions to maximize sampling; and (2) exceptions for the requirement to pump/haul aboard all fish from net for inspection by at-sea observers.

***\*10033 3. Measures To Address River Herring and Shad Interactions***

Amendment 14 establishes several measures to address the catch of river herring and shad in the mackerel fishery to minimize bycatch and bycatch mortality to the extent practicable. River herring (the collective term for alewife and blueback herring) are anadromous species that may co-occur seasonally with Atlantic herring and Atlantic mackerel and are harvested as a non-target species in the Atlantic herring and Atlantic mackerel fisheries.

River herring are managed by the Atlantic States Marine Fisheries Commission (ASMFC) and individual states. According to the most recent ASMFC river herring stock assessment (May 2012), river herring populations have declined from historic levels and many factors will need to be addressed to allow their recovery, including fishing (in both state and Federal waters), river passageways, water quality, predation, and climate change. In an effort to aid in the recovery of depleted or declining stocks, the ASMFC, in cooperation with individual states, prohibited state water commercial and recreational fisheries that did not have approved sustainable fisheries management plans, effective January 1, 2012. NMFS considers river herring to be a species of concern, but recently (78 FR 48944, August 12, 2013) determined that listing river herring as either threatened or endangered under the Endangered Species Act is not warranted at this time. Following this determination, NMFS established a technical working group and continues to work closely with the ASMFC and others to develop a long-term,

dynamic conservation plan for river herring from Canada to Florida. The working group will evaluate the impact of ongoing restoration and conservation efforts, as well as new fisheries management measures, which should benefit the species. It will also review new information produced from ongoing research, including genetic analyses, ocean migration pattern research, and climate change impact studies, to assess whether recent reports showing higher river herring counts in the last 2 yr represent sustained trends. NMFS intends to revisit its river herring status determination within the next 5 yr.

This action establishes a mortality cap on river herring and shad in the mackerel fishery, where the mackerel fishery would close once it has been determined to cause a certain amount of river herring and/or shad mortality. Based on the results of the ASMFC's assessments for river herring and shad, data do not appear to be robust enough to determine a biologically based catch cap for these species, and/or the potential effects on these populations if a catch cap is implemented on a coast-wide scale. Nevertheless, the Council believes that capping the allowed level of river herring and shad catch in the mackerel fishery should provide a strong incentive for the industry to avoid river herring and shad, and will help to minimize encounters with these species.

While Amendment 14, as approved, includes the measure to allow caps and the general methodology for applying the caps, the MSB specifications process for the 2014 fishing year will establish the actual cap amount and other logistical details of the cap (e.g., the closure threshold and post-closure possession limit). The process for 2014 MSB specifications began in May 2013 with a MSB Monitoring Committee meeting to develop technical recommendations on the cap level and any necessary management measures. At its June 2013 meeting, the Council selected a combined catch cap for river herring and shad of 236 mt, a trip limit threshold of 95 percent, and a post-threshold incidental trip limit of 20,000 lb (9.07 mt). The Council finalized its analysis of these measures and submitted its final recommendation to NMFS as part of the 2014 MSB specifications package. The proposed rule for 2014 MSB specifications, which NMFS intends to publish early in 2014, will provide the opportunity for interested parties to comment on the actual proposed cap level and management measures related to the cap. NMFS intends to implement the river herring and shad cap, if approved, in the spring of 2014.

The New England Fishery Management Council is also considering establishing a catch cap for river herring and shad in the Atlantic herring fishery in Framework 3 to the Atlantic Herring FMP. Due to the mixed nature of the herring and mackerel fisheries, especially during January through April, the potential for the greatest river herring catch reduction would come from the implementation of a joint river herring catch and shad cap for both the fisheries. At its September 2013 meeting,

the New England Council took final action on Framework 3 and recommended establishing river herring and shad catch caps for midwater and bottom trawl gear in the herring fishery. Framework 3, if approved, is expected to be implemented in the spring or summer of 2014. Based on the ASMFC's recent river herring assessment, data do not appear to be robust enough to determine a biologically-based river herring catch cap and/or the potential effects on river herring populations of such a catch cap on a coast-wide scale. Still, similar to the Mid-Atlantic Council, the New England Council intends to establish the ability to consider a river herring catch cap and approaches for setting a river herring catch cap in the Atlantic herring fishery as soon as possible.

Amendment 14 establishes a mechanism to develop, evaluate, and consider regulatory requirements for a river herring bycatch avoidance strategy in small-mesh pelagic fisheries. A river herring bycatch avoidance strategy will be developed and evaluated by the Council, in cooperation with participants in the mackerel fishery, specifically the Sustainable Fisheries Coalition (SFC), the Massachusetts Division of Marine Fisheries (MADMF), and the University of Massachusetts Dartmouth School of Marine Science and Technology (SMAST). This measure is based on the existing river herring bycatch avoidance program involving SFC, MADMF, and SMAST, which is voluntary and seeks to reduce river herring and shad bycatch by working within current fisheries management programs, without the need for additional regulatory requirements. The river herring bycatch avoidance program includes portside sampling, real-time communication with the SFC on river herring distribution and encounters in the herring fishery, and data collection to evaluate if oceanographic features may predict high rates of river herring encounters.

Amendment 14 requires that, within 6 months of completion of the existing SFC/MA DMF/SMAST river herring bycatch avoidance project, the Council will review and evaluate the results from the river herring bycatch avoidance project, and consider a framework adjustment to the MSB FMP to establish river herring bycatch avoidance measures. Measures that may be considered as part of the framework adjustment include: (1) Mechanisms to track herring fleet activity, report bycatch events, and notify the herring fleet of encounters with river herring; (2) the utility of test tows to determine the extent of river herring bycatch in a particular area; (3) the threshold for river herring bycatch that would trigger the need for vessels to be alerted and move out of a given area; and (4) the distance and/or time that vessels would be required to move from an area.

The Council considered other measures to address river herring and shad bycatch in Amendment 14, including closed areas. Because the *\*10034* seasonal and inter-annual distribution of river herring and shad is highly variable in time and space, the Council determined that the most effective measures in Amendment 14 to

address river herring and shad bycatch would be those that increase monitoring, bycatch accounting, and promote cooperative efforts with the industry to minimize bycatch to the extent practicable. In order to streamline the regulatory process necessary to adjust the river herring and shad mortality caps, or enact time area management for river herring and shad, if scientific information to support such management measures becomes available, this action adds river herring and shad catch caps and time/area closures to the list of measures that can be addressed via framework adjustment.

#### ***4. Adding Individual River Herring and Shad Species as Stocks in the MSB Fishery***

Though there are currently no measures in Amendment 14 related to this issue, the Council initially considered alternatives in the Amendment 14 draft EIS to include the four river herring and shad species as stocks in the MSB FMP. Instead, the Council initiated a separate amendment, Amendment 15 to the MSB FMP, to explore the need for conservation and management of these species more thoroughly, and analyze all of the MSA provisions (i.e., management reference points, description and delineation of essential fish habitat, etc.). Scoping for MSB Amendment 15 began in October 2012 (77 FR 65867). Based on NMFS guidance, the Council completed a document that examined a range of issues related to Federal management for river herring and shad. The document presented legal requirements for managing species under the MSA, the existing management and protection of river herring and shad, and the potential benefits of managing them under the MSA in contrast to the other authorities already providing protection. After reviewing the document, the Council determined at its October 2013 meeting that it should not go forward with the development of Amendment 15 at this time. The Council's decision was based on a range of considerations related to ongoing river herring and shad conservation and management efforts, including conservation efforts for river herring and shad at the local, state and Federal level, the pending incidental catch caps for river herring and shad in the Atlantic mackerel and Atlantic herring fisheries, the recent determination by NMFS that river herring are not endangered or threatened, and the NMFS commitment to expand engagement in river herring conservation following the ESA determination. The Council also decided to re-evaluate Federal management of river herring and shad in 3 yr after a number of other actions related to river herring and shad conservation have been implemented.

#### **Disapproved Measures**

The following sections detail why NMFS's disapproved three measures that were proposed as part of Amendment 14. NMFS disapproved these three measures because it found the measures to be inconsistent with the MSA and other applicable law. The proposed rule for Amendment 14 described NMFS's concerns

with these measures' consistency with the MSA and other applicable law. After review of public comments, NMFS, on behalf of the Secretary, disapproved these measures; therefore, this final rule does not include regulations for these measures.

### ***1. Increased Observer Coverage Requirements***

Currently, the NMFS Northeast Fisheries Science Center (NEFSC) determines observer coverage levels in the mackerel fishery based on the standardized bycatch reporting methodology (SBRM) and after consultations with the Council. Observer coverage in the mackerel fishery is currently fully funded by NMFS. In Amendment 14, the Council recommended increases in the observer coverage in the mackerel fishery, specifically 100-percent observer coverage on all limited access mackerel vessels using midwater trawl (i.e., Tiers 1, 2 and 3) and Tier 1 mackerel vessels using small-mesh bottom trawl, 50-percent coverage on Tier 2 mackerel vessels using small-mesh bottom trawl, and 25-percent on Tier 3 mackerel vessels using small-mesh bottom trawl. Many stakeholders believe this measure is necessary to accurately determine the extent of bycatch and incidental catch in the mackerel fishery. The Council recommended this measure to gather more information on the mackerel fishery so that it may better evaluate and, if necessary, implement additional measures to address catch and discards of river herring and shad. The increased observer coverage level recommendations were coupled with a target maximum industry contribution of \$325 per day. There are two types of costs associated with observer coverage: Observer monitoring costs, such as observer salary and travel costs; and NMFS support and infrastructure costs, such as observer training, data processing, and infrastructure. The monitoring costs associated with an observer in the mackerel fishery are higher than \$325 per day. Upon legal analysis of this measure, the cost-sharing of monitoring costs between NMFS and the industry would violate the Antideficiency Act. Therefore, based on this analysis, there is no current legal mechanism to allow cost-sharing of monitoring costs between NMFS and the industry.

Throughout the development of Amendment 14, NMFS advised the Council that Amendment 14 must identify a funding source for increased observer coverage because NMFS's annual appropriations for observer coverage are not guaranteed. Some commenters asserted that the \$325 per day industry contribution was not a limit, but a target, and that the Council intended the industry to pay whatever is necessary to ensure 100-percent observer coverage. NMFS disagrees, and does not believe the amendment specifies that the industry would pay all the monitoring costs associated with 100-percent observer coverage, nor does the amendment analyze the economic impacts of the industry paying all the monitoring costs. The FEIS for Amendment 14 analyzes the industry paying \$325 per day, and the DEIS analyzes the cost of vessels paying \$800 per day (estimated sum of observer monitoring costs), but it does not analyze a range of that would approximate total

monitoring costs. Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the mackerel fishery. Requiring NMFS to pay for 100-percent observer coverage would amount to an unfunded mandate. Because Amendment 14 does not identify a funding source to cover the costs of increased observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, NMFS had to disapprove the 100-percent observer coverage requirement. With the disapproval of this measure, this action maintains the existing observer coverage levels and full Federal funding for observer coverage the mackerel fishery.

In 2013, a working group was formed to identify a workable, legal mechanism to allow for industry-funded observer coverage in the herring fishery, including staff from the New England and Mid-Atlantic Councils and NMFS. To further explore the legal issues surrounding industry-funded observer coverage, NMFS formed a working group of Greater Atlantic Regional Fisheries Office, NEFSC, General Counsel, and Headquarters staff. The \*10035 NMFS working group is currently exploring possibilities.

In the November 7, 2013, partial approval letter to the Council, NMFS offered to be the technical lead on an omnibus amendment to establish an administrative mechanism to allow for industry-funded observer coverage in New England and Mid-Atlantic FMPs. At its October 2013 meeting, the Council considered NMFS's offer and encouraged NMFS to begin development of the omnibus amendment. NMFS expects to present a preliminary range of alternatives for the omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Additionally, other measures implemented in this action help improve monitoring in the mackerel fishery. These measures include the requirement for vessels to contact NMFS at least 48 hr in advance of a fishing trip to facilitate the placement of observers, observer sample station and reasonable assistance requirements to improve an observer's ability collect quality data in a safe and efficient manner, and the slippage prohibition and the sampling requirements for midwater trawl vessels fishing in groundfish closed areas to minimize the discarding of unsampled catch.

The same measure that would have required increased observer coverage, coupled with a \$325 contribution by the industry, would have also required that: (1) The Council would re-evaluate the increased observer coverage level 2 yr after implementation; and (2) observer service provider requirements for the Atlantic sea scallop fishery would apply to observer service providers for the mackerel fishery. NMFS believes these additional measures are inseparable from the 100-percent observer coverage requirement; therefore, NMFS also disapproved these measures. With the disapproval of these measures, this action maintains the existing SBRM-based observer coverage provisions for the mackerel fishery.

## ***2. Measures To Minimize Slippage***

Amendment 14 proposed establishing a slippage cap for the mackerel fishery. Under the proposed measures, once there have been 10 slippage events fleet-wide in the mackerel fishery by vessels carrying an observer, vessels that subsequently slip catch would have been required to immediately return to port. NMFS would have been required to track slippage events and notify the fleet once the slippage cap had been reached. Slippage events due to conditions that may compromise the safety of the vessel or crew, mechanical failure, or dogfish in the pump would not count against the slippage cap. The Council recommended these slippage caps to discourage the inappropriate use of the slippage exceptions, and to allow for some slippage, but not unduly penalize the fleet.

Throughout the development of Amendment 14, NMFS identified potential concerns with the rationale supporting, and legality of, the slippage caps. The need for, and threshold for triggering, a slippage cap (10 slippage events) does not appear to have a strong biological or operational basis. Under the proposed measure, once a slippage cap had been met, vessels that slip catch with an observer aboard for reasons other than safety, mechanical failure, or spiny dogfish in the pump would have been required to return to port. Vessels could have continued fishing following slippage events 1 through 10, but would have been required to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10, could continue fishing after the 11th slippage event, provided they do not slip catch again. NMFS believes this aspect of the proposed measure is inequitable.

From 2006-2010, approximately 26 percent (73 of 277 or 15 per year) of hauls on observed mackerel trips (trips that caught 50 percent or more mackerel or at least 100,000 lb (45.34 mt) of mackerel) had some unobserved catch. Hauls may be unobserved for a variety of reasons—e.g., transfer of catch to another vessel without an observer, observers not being on deck to sample a given haul, or hauls released from the net while still in the water. The estimate of 15 unobserved hauls per year would thus be an upper bound on slippage events. The Council's analysis noted that while documented slippage events are relatively infrequent, increases above the estimated 15 unobserved hauls per year could compromise observer data because large quantities of fish can be caught in a single tow. However, the Council's analysis did not provide sufficient rationale for why it is biologically or operationally acceptable to allow the fleet 10 un-exempted slippage events prior to triggering the trip termination requirement, as opposed to any other number.

The proposed Amendment 14 measures to minimize slippage were based on the sampling requirements for midwater trawl vessels fishing in Groundfish Closed Area I. However, there are important differences between these measures. Under the Closed Area I requirements, midwater trawl vessels are allowed to continue

fishing if they slip catch, but they must leave Closed Area I for the remainder of that trip. The requirement to leave Closed Area I is less punitive than the proposed requirement in Amendment 14 to return to port when slippage occurs.

Additionally, because the consequences of slipping catch apply uniformly to all vessels under the Closed Area I requirements, inequitable application to the fleet is not an issue for the Closed Area I requirements, like NMFS believes it is for the proposed Amendment 14 slippage caps.

If the Council wants to revise the slippage cap, the revisions would need to address the biological/administrative justification for the cap's trigger and equity within the fleet. The slippage cap could be revised to be more similar to the sampling requirements in Groundfish Closed Area I, such that all vessels that slip catch have a consequence. This revision would alleviate NMFS's concern with the equitable application of the slippage cap among those who contribute to reaching the cap, as well as its concern with the basis for triggering the cap. The consequence of slipped catch could be a requirement to return to port, or to leave a defined area, such as a statistical area, where the slippage event occurred.

Even through the slippage cap was disapproved, the prohibition on slippage, the released catch affidavit, and the ongoing data collection by NEFOP still allow for improved monitoring in the mackerel fishery, increased information regarding discards, and an incentive to minimize the discarding of unsampled catch.

### ***3. Reporting Requirements for Dealers***

During the development of Amendment 14, some stakeholders expressed concern that MSB catch is not accounted for accurately and that there needs to be a standardized method to determine catch. In an effort to address that concern, Amendment 14 proposed requiring MSB dealers to accurately weigh all fish or use volume-to-weight conversions for all transactions with over 2,500 lb (1.13 mt) of longfin squid or 20,000 lb (9.07 mt) of mackerel. If catch is not sorted by species, dealers would be required to document for each transaction how they estimate relative species composition. During the development of Amendment 14, NMFS identified concerns with the utility of this measure.

Dealers are currently required to accurately report the weight of fish, which is obtained by scale weights and/or volumetric estimates. Because the proposed measure did not specify how *\*10036* fish would be weighed and would still have allowed volumetric estimates, the proposed measure might not change dealer behavior and, therefore, might not lead to any measureable change in the accuracy of catch weights reported by dealers. Further, this proposed measure did not provide standards for estimating species composition. Without standards for estimating species composition or for measuring the accuracy of the estimation method, NMFS would likely be unable to evaluate the sufficiency of the methods used to estimate species composition. For these reasons, the requirement for

dealers to document the methods used to estimate species composition might not have improved the accuracy of dealer reporting.

While the measure requiring dealers to document methods used to estimate species composition may not have direct utility in monitoring catch in the MSB fisheries, it might still inform NMFS's and the Council's understanding of the methods used by dealers to determine species weights. That information might aid in development of standardized methods for purposes of future rulemaking. Furthermore, full and accurate reporting is a permit requirement; failure to fully and accurately report could render dealer permit renewals incomplete, precluding renewal of the dealer's permit. Therefore, there is incentive for dealers to make reasonable efforts to document how they estimate relative species composition, which might increase the likelihood that useful information would be obtained as a result of this requirement.

In light of the foregoing, NMFS evaluated whether the proposed measure had practical utility, as required by the MSA and the Paperwork Reduction Act (PRA), that would have outweighed the additional reporting and administrative burden on the dealers. In particular, NMFS considered whether and how the proposed measure would help prevent overfishing, promote the long-term health and stability of the MSB resource, monitor the fishery, facilitate inseason management, or judge performance of the management regime.

NMFS determined that this measure would not measurably improve the accuracy of dealer reporting or the management of the MSB resources. NMFS also determined that this measure does not comply with National Standard 7's requirement to minimize costs and avoid unnecessary duplication to the extent practicable, and the PRA's requirement for the utility of the measure to outweigh the additional reporting and administrative burden on the dealers. Therefore, NMFS disapproved the proposed dealer reporting requirements, and this action maintains the existing requirement that dealers accurately report the weight of fish. If the Council wants to revise dealer reporting requirements in a future action, the revisions would need to address issues concerning accuracy and utility of the information reported and could be addressed in several ways. For example, the Council could select Alternative 2b in Amendment 14 (requiring vessel owners to review and validate data for their vessels in Fish-on-Line). This measure would be a change from status quo, and it has some utility as it helps identify, and possibly reduce, discrepancies between dealer and vessel reports. Another way for the Council to revise the dealer reporting requirement would be to clarify and standardize the methods used to "accurately weigh all fish" by requiring the use of scales or standardized volume measurement. If the methods to "accurately weigh all fish" were specified, it would likely change dealer behavior from status quo, and may, depending on the methods, improve the accuracy of dealer reports.

Alternatively, the Council could take this opportunity to revisit the original concern that sparked the development of the dealer reporting requirement, which was the fact that landing data were not verified by a third-party, and revise the measure to better address that concern. Lastly, the sub-option requiring dealers to document how they estimate the composition of catch was intended to gather information on methods used by dealers to estimate species composition. Another way to obtain that type of information would be to gather it as part of a data collection program that would update community profiles for Northeast fisheries.

### **Comments and Responses**

NMFS received 15 comment letters during the comment period for the NOA and proposed rule. Three of the letters were from the general public, and 12 were from environmental advocacy groups. Five of the letters from environmental advocacy groups were form letters that contained signatures and personalized comments, including: 47 total signatures and one personalized comment on a letter from the Natural Resources Defense Council; 1,810 signatures on a letter from the Chesapeake Bay Foundation; 32,219 total signatures with 2,694 personalized comments on a letter from the Pew Charitable Trusts; 1,147 signatures and 279 personalized comments on a letter from the Ocean River Institute; and 4,716 total signatures with 230 personalized comments on a letter from the National Audubon Society. Only comments relevant to measures considered in Amendment 14 are summarized and addressed below. Comments related to other fishery management actions or general fishery management practices are not addressed here.

#### ***1. General Comments***

Comment 1: Many commenters urged NMFS to approve Amendment 14 in its entirety, but provided no specific comments on the proposed measures. Additional comments acknowledged that the amendment contains many important components, but commenters believe the river herring and shad catch cap, the slippage cap, 100-percent observer coverage on mid-water trawl vessels, and accurate dealer weighing of catch are especially important for reducing bycatch of river herring and shad in the mackerel fishery.

Response: NMFS supports improvements to fishery-dependent data collections by expanding, to the extent practicable, at-sea monitoring of the mackerel fishery and reducing bycatch and unnecessary discarding. However, NMFS determined that the increased observer coverage requirements, slippage caps, and dealer reporting alternatives proposed in Amendment 14 were inconsistent with the MSA and other applicable law. Regardless of NMFS's desire to increase monitoring and reduce bycatch in the mackerel fishery, it cannot approve and implement measures it believes are inconsistent with applicable law. Amendment 14 has many tools to improve management of the mackerel fishery (i.e., expanded vessel reporting

requirements) and to monitor and mitigate river herring and shad bycatch (i.e., the slippage prohibition and river herring and shad catch caps).

Comment 2: Wild Oceans commented that the proposed rule incorrectly states that one of the goals of Amendment 14 is to “improve catch monitoring in the mackerel and longfin squid fisheries.” They point out that the Amendment 14 FEIS specifically ties the monitoring improvements for these fisheries to improving the precision of river herring and shad catch estimates, and that the proposed alternatives must be evaluated in this context to determine their utility.

Response: NMFS agrees that the goal was not fully stated in some places in the proposed rule. We have clarified the statement of the goal in this final rule. The full statement of the goal was not overlooked in our evaluation of the *\*10037* Council's proposed alternatives. Again, while we are supportive of improvements to data collection to strengthen our understanding of river herring and shad bycatch in the MSB fisheries, we had to disapprove the slippage caps, increased observer coverage requirements, and dealer reporting requirement because of the inconsistency of these measures with the MSA and other applicable laws.

Comment 3: NMFS referenced the Herring Amendment 5 partial approval in the Amendment 14 proposed rule, and linked concerns with the disapproved measures to several measures in the Amendment 14 proposed rule. Several commenters expressed their disagreement with NMFS's approvability concerns, and believe that NMFS fails to recognize the substantial need for these measures, their central role in the overall Amendment 14 reform package, and their strong justification in the FEIS for Amendment 14. A number of other commenters raised similar sentiments, focusing on their belief that the proposed measures strike a carefully designed balance between conservation and industry needs, are consistent with the MSA and other applicable law, and should be approved in full. Some commenters went on to say that, if NMFS disapproves the measures in Amendment 14, it must provide specific and timely recommendations for “fixing” the disapproved measures, consistent with the process for resubmittal of disapproved measures outlined in the MSA.

Response: NMFS expressed concerns about the proposed increased observer coverage requirements, the slippage caps, and the dealer reporting requirements throughout the development of this amendment. While these measures have strong support from many stakeholders, they were not modified in a manner to alleviate NMFS's concerns. The proposed rule for Amendment 14 described potential concerns about these measures' consistency with the MSA and other applicable law. No new or additional information was identified by commenters during the public comment period on the NOA and proposed rule for Amendment 14 to address NMFS's concerns with the identified deficiencies of these measures.

Therefore, on November 7, 2013, NMFS determined these three measures must be disapproved.

NMFS provided suggestions for alleviating our approvability concerns in both our November 7, 2013, partial approval letter to the Council, and in the preamble to the proposed rule, in the discussion of the since-disapproved measures. If the Council chooses to revise these measures, NMFS will continue to work with the Council to design effective measures that help improve management of the mackerel fishery. Revised measures could be addressed in upcoming Council actions. Whether such actions would be amendments or frameworks will depend on the scope of the revised measures.

The measures in Amendment 14 that were approved by NMFS are consistent with the MSA and other applicable law, and analysis in the FEIS indicates these measures will improve data quality, as well as bycatch avoidance and minimization.

Comment 4: The Herring Alliance and NRDC expressed their view that they support the majority of Amendment 14, but that Amendment 14 should be disapproved to the extent that it fails to include river herring and shad in a Federal FMP. They note that a Federal FMP would enable NMFS to set science-based annual catch limits, identify and protect essential fish habitat, gather better data and improve the population estimates of river herring and shad, and coordinate with state efforts to restore river herring and shad. Several other commenters also expressed their support for including river herring and shad in a Federal FMP as part of Amendment 15 to the MSB FMP.

Response: It is not clear what the commenters meant by disapproving Amendment 14 “to the extent that it fails to include river herring and shad in a Federal FMP.” Amendment 14 is not required to consider all aspects of management of the MSB fisheries; instead the amendment is focused on considering measures to better evaluate the incidental catch of river herring and shad, and to address river herring and shad bycatch issues in the mackerel fishery. As noted in this preamble, because of the complexity of the issue of Federal management of river herring and shad, the Council voted in June 2012 to move consideration of this issue out of Amendment 14 and into Amendment 15. Thus, considering whether river herring and shad should be stocks in the MSB FMP outside the scope of Amendment 14. If the comment meant that Amendment 14 should be disapproved in its entirety because it does not add river herring and shad to a Federal FMP, then important river herring and shad protection measures implemented through this action, including the increased reporting requirements for mackerel and longfin squid vessels, the slippage prohibitions, and the river herring and shad catch cap, would also be disapproved. NMFS determined these measures are administratively feasible and

offer conservation benefits to river herring and shad, and approved them for implementation.

## ***2. Comments on Adjustments to the Fishery Management Program***

Comment 5: While most commenters expressed their overall support for measures proposed in Amendment 14, Wild Oceans and PEW Charitable Trusts specifically supported the adjustments to vessel reporting requirements, including: Weekly VTR for all MSB permits; the 48-hr pre-trip notification for mackerel; VMS requirements for mackerel and longfin squid; and the 6-hr pre-landing notification for mackerel.

Response: NMFS concurs with the commenters, because NMFS believes these measures will help improve monitoring, improve overall management of the MSB fisheries, and are consistent with the MSA and other applicable law. NMFS approved these measures and this action implements them.

Comment 6: Wild Oceans expressed disappointment that, given the mixed nature of the herring and mackerel fisheries in Quarter 1, a recommendation raised at a joint meeting of the technical teams for Amendments 5 and 14 to create a “mixed trip” or “pelagic” VMS declaration for these fisheries was not included in the proposed rule. They expressed concern that ambiguity in the VMS declaration procedures could weaken the enforcement of fishery-specific conservation measures, such as the river herring and shad catch caps.

Response: NMFS agrees with the commenter's concern, and did move forward with the recommendation to combine the declarations for the herring, mackerel, and longfin squid fisheries to ensure maximum enforceability of fishery-specific conservation measures. While regulations in this action specify that vessel operators must make appropriate trip declarations, NMFS does not include specific declaration types in regulations because regulatory requirements do not provide sufficient flexibility, should specific declaration provisions need to change. NMFS communicates specific details of the requirement, including trip declaration instructions, to industry in bulletins or small entity compliance guides. In this case, instructions on how to comply with the new combined declaration will be sent to industry in the small entity compliance guide for this rule.

Comment 7: Wild Oceans, the Herring Alliance, and PEW Environment Group **\*10038** urged NMFS to approve the requirement that MSB dealers accurately weigh all fish because accurate landings data will ensure catch accountability, including catch estimates for river herring and shad, for the MSB fisheries. These comments also noted that the measure has strong support from stakeholders. The commenters disagreed with NMFS's language in the proposed rule that describe this measure as essentially status quo. They believe this measure is intended to eliminate the practice of dealers reporting visual estimates of catch weight in favor of verifiable methods such as scales or volumetric estimates of fish

holds. The commenters also believe that the measure is different than the status quo because they believe it requires dealers to document their volume-to-weight estimation methodology, and to justify its use as opposed to an actual weight, which will improve the Council's understanding of the methods used by dealers to determine species and weight compositions so that appropriate standards can be developed and implemented in future rulemakings.

Response: Section 2.2 of the Amendment 14 FEIS notes that, while a majority of MSB dealers weigh their landings using scales, there are some instances, especially with mackerel, where product may be de-watered and shipped by truck before it is weighed. The FEIS goes on to say that, while in some instances the receiver may report back a weight, in other cases weights may be estimated based on the size of the shipping container or truck volume. Because the FEIS, and the Council's proposed alternative 2g, describe using a volume-to-weight conversion, possibly an estimate of a container of fish to generate the weight of any container of a similar size, NMFS believes that the amendment would have allowed for the practice of visual estimates of catch weight, rather than ending it. In Section 7.2, the final EIS concludes that dealers are unlikely to change their current operations without a requirement to do so, therefore it is unlikely that that this measure would have improved the accuracy of weights reported by dealers as compared to the status quo. The requirement would not have asked for dealers to justify why they must use a volume-to-weight estimation methodology, rather than actually weighing fish, and would simply ask for dealers to document the approach they use to determine the composition of mixed catch. Finally, as noted in this preamble, NMFS agrees that collecting information about the methods used by dealers to estimate species weight and composition could allow for the development of improved standards in future rulemakings. However, if the goal of this measure is to simply take a census of current dealer practices, it is unnecessarily punitive to tie that information collection to permit issuance. Another way to obtain that type of information would be to gather it as part of a data collection program that would update community profiles for Northeast fisheries.

### ***3. Comments on Adjustments to At-Sea Monitoring***

Comment 8: The Herring Alliance, Wild Oceans, PEW Charitable Trusts, and Oceana urged NMFS to approve critical measures in Amendment 14 designed to better monitor catch and bycatch in the mackerel fishery, including the 100-percent coverage requirement on all midwater trawl mackerel trips and Tier 1 small-mesh bottom trawl mackerel trips, 50-percent coverage on Tier 2 small-mesh bottom trawl mackerel trips, and 25-percent on Tier 2 small-mesh bottom trawl mackerel trips. They point out that the Council approved the increased observer coverage requirement with widespread support from commercial and recreational fishermen, eco-tourism and coastal businesses, river herring and coastal watershed advocates,

and other members of the public. They believe that increased observer coverage is justified given the fleet's harvesting capacity and its demonstrated bycatch, and makes it possible to document rare bycatch events. Additionally, they believe the increased coverage measures are consistent with the MSA and other applicable law and necessary to improve the accuracy and precision of data used to make management decisions, and ensure that both target and non-target species are effectively administered without regulatory loopholes.

Response: Throughout the development of Amendment 14, NMFS advised the Council that Amendment 14 must identify a funding source for increased observer coverage for the types of trips referenced by the commenter because NMFS's annual appropriations for observer coverage are not guaranteed. Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery. Requiring NMFS to pay for increased observer coverage levels would amount to an unfunded mandate, meaning regulations would obligate NMFS to implement something it cannot pay for. Because Amendment 14 does not identify a funding source to cover the costs of increased observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, NMFS had to disapprove the increased observer coverage requirements. With the disapproval of this measure, this action maintains the existing SBRM observer coverage levels and Federal observer funding for the mackerel fishery. Despite the disapproval of the increased observer coverage requirements, there are many other measures in the MSB FMP (e.g., annual catch limits (ACLs), accountability measures) and implemented in this action (e.g., adjustments to the fishery management program and at-sea monitoring, measures to address river herring interactions) that meet MSA requirements to minimize bycatch and ensure catch accountability.

In 2013, staff from NMFS and the New England and Mid-Atlantic Councils formed a working group to identify a workable, legal mechanism to allow for industry-funded observer coverage in the herring and mackerel fisheries. To further explore the legal issues surrounding industry-funded observer coverage, NMFS formed a separate internal working group of Greater Atlantic Regional Fisheries Office, Northeast Fisheries Science Center, General Counsel, and Headquarters staff. The NMFS working group identified an administrative mechanism to allow for industry funding of observer monitoring costs in Northeast fisheries, as well as a potential way to help offset funding costs that would be borne by the industry, subject to available funding. This administrative mechanism would be an option to fund observer coverage targets that are higher than SBRM coverage levels. The mechanism to allow for industry-funded observer coverage is a potential tool for all Northeast FMPs, but it would need to be added to each FMP to make it an available tool, should the Council want to use it. Additionally, this omnibus

amendment could establish the observer coverage targets for mackerel vessels using midwater trawl and small-mesh bottom trawl.

In a September 20, 2013, letter to the Council, NMFS offered to be the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in New England and Mid-Atlantic FMPs. At its October 2013 meeting, the Council considered NMFS's offer and encouraged NMFS to begin development of the omnibus amendment. NMFS expects to present a preliminary range of alternatives for the \*10039 omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Comment 9: The Herring Alliance and PEW Environment Group do not agree with disapproval of the observer coverage provisions on the grounds that the Council failed to identify a funding source for the increased observer coverage. They assert that the Council clearly identified industry as the funding source.

Response: NMFS disagrees with the comment that the Council clearly identified industry as the funding source. The amendment states that the preferred funding option for the increased observer coverage requirement is an industry contribution of \$325 per sea day. NMFS does not believe this description indicates that the industry would be responsible for paying the full costs of the Council's proposed increased observer coverage requirements, and the analysis of impacts in the FEIS fails to examine the effects that paying for observer coverage in full would have on vessel owners, operators, and crews. In addition, approval and implementation of the Council's preferred industry funding option required considerable development that the Council deferred to NMFS to be completed, subsequent to Amendment 14 approval. We communicated the complexities of developing the preferred funding option to the Council before the Council's approval, and, given the complexities and the incompleteness of the measure, NMFS could not approve the amendment in the required timeline.

There are two types of costs associated with observer coverage: Observer monitoring costs, such as observer salary and travel costs, and NMFS support and infrastructure costs, such as observer training and data processing. Monitoring costs can either be paid by industry or paid by NMFS, but they cannot be shared. NMFS support and infrastructure costs can only be paid by NMFS. The monitoring costs associated with an observer in the mackerel fishery are higher than \$325 per day. The FEIS for Amendment 14 analyzed the industry paying \$325 per day, but it did not analyze a range of that would approximate the total monitoring costs. The amendment does not describe or analyze the industry being responsible for paying all observer monitoring costs. Therefore, Amendment 14 does not identify a funding source to cover the costs of increased observer coverage, and that measure was not sufficiently developed to be approved.

Comment 10: The Herring Alliance and PEW Environment Group disagree with NMFS's statement in the proposed rule that there is no legal mechanism to allow timely implementation of the Council's preferred funding options and point to successful precedents set on the West Coast for cost-sharing between NMFS and the industry. The Herring Alliance also suggested that NMFS could simply fund the full number of observer days the budget can accommodate, and require industry to contract with observer service providers to pay in full for the rest.

Response: In Amendment 14, the increased observer requirements are coupled with an industry contribution of \$325 per day. The monitoring costs associated with an observer in the mackerel fishery are higher than \$325 per day. The cost-sharing of observer monitoring costs between NMFS and the industry violates the Anti-Deficiency Act and the Miscellaneous Receipts Act. NMFS may pay all the observer monitoring costs (e.g., NEFOP observers) or the industry may pay all the observer monitoring costs directly to a third party (e.g., like in the Atlantic scallop fishery). However, NMFS and the industry cannot both pay towards the same observer monitoring costs. For example, if observer monitoring costs are \$700 per sea day, NMFS and industry cannot split the costs 50/50, or by any other proportion, nor can NMFS accept contributions directly from industry to fund observer monitoring costs. Therefore, there is no current legal mechanism to allow cost-sharing of monitoring costs between NMFS and the industry.

In the Pacific Groundfish Trawl Program, the industry is required to pay all observer monitoring costs directly to a third party. However, as a way to transition the industry to paying all observer monitoring costs, NMFS is reimbursing the observer service providers a percentage of the observer monitoring costs through a time-limited grant with Pacific States Marine Fisheries Commission. The level of reimbursement is contingent on available NMFS funding, is expected to decrease over time, and will end such that eventually the industry will be paying all observer monitoring costs. Subject to NMFS funding, this grant mechanism may also be a temporary option to reimburse the mackerel industry for observer monitoring costs. But this funding mechanism is very different than the measure proposed in Amendment 14, and NMFS cannot modify the proposed measure to make it consistent with the Anti-deficiency Act.

As described previously, NMFS has offered to be the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in New England and Mid-Atlantic FMPs, and expects to present a preliminary range of alternatives for the omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Comment 11: The Herring Alliance and PEW Environment Group expressed their view that, consistent with other government programs, vessels should not be

allowed to fish if an observer cannot be deployed on a trip due to insufficient funding (either industry or NMFS, or both).

Response: Preventing vessels from fishing would be a new policy that was clearly not the intent of the Council in the observer measures in Amendment 14.

Implementing such a provision would have required a Council decision and analysis in Amendment 14, or would require future Council action.

Comment 12: Several commenters urged NMFS to approve measures prohibiting slippage, requiring a released catch affidavit, and slippage caps to improve catch monitoring and reduce wasteful discarding. They believe slippage caps, and the subsequent trip termination provisions, are critical to the effectiveness of catch monitoring and bycatch estimation in the mackerel fishery, are consistent with the MSA and other applicable law, and necessary to meet requirements to end overfishing, minimize bycatch, and ensure accountability. They believe the proposed cap on the number of slippage events (i.e., 10 non-exempted slippage events fleetwide) is a carefully designed expansion of the regulations in place for Closed Area I for herring vessels or the requirement to stop fishing in an area when the sub-ACL has been harvested, and that the cap amounts are based on existing data and set at levels high enough that allow the fleet to avoid trip termination while preventing unlimited slippage.

Response: NMFS approved measures prohibiting slippage on observed mackerel and longfin squid trips and requiring a released catch affidavit for slippage events on such trips. NMFS expects that prohibiting slippage will help reduce slippage events in the mackerel and longfin squid fisheries. NMFS believes this will improve the quality of observer catch data, especially data on bycatch species encountered in both fisheries. NMFS also expects the released catch affidavit to help provide insight into when and why slippage occurs. Additionally, NMFS expects that the slippage prohibition will help *\*10040* minimize bycatch, and bycatch mortality, to the extent practicable in the mackerel and longfin squid fisheries.

NMFS disapproved the proposed slippage cap on the mackerel fishery, and the associated trip termination requirement, because of concerns about the details of the slippage cap. Under the proposed measure, once a slippage cap had been met, vessels that slip catch would have been required to return to port. Vessels could continue fishing following slippage events 1 through 10, but would have been required to return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10, could have continued fishing after the 11th slippage event provided they did not slip catch again. NMFS believes this aspect of the measure is arbitrary.

The measures to minimize slippage are based on the sampling requirements for midwater trawl vessels fishing in Groundfish Closed Area I. However, there are important differences between these measures. Under the Closed Area I requirements, midwater trawl vessels are allowed to continue fishing if they slip catch, but they must leave Closed Area I for the remainder of that trip. The requirement to leave Closed Area I is less punitive than the Amendment 14 proposed requirement to return to port. Additionally, because the consequences of slipping catch apply uniformly to all vessels under the Closed Area I requirements, or when a closure becomes effective when the ACL has been harvested, inequitable application to the fleet is not an issue for the Closed Area I requirements or closure measures, like NMFS believes it is for the Amendment 14 proposed slippage caps.

Even though NMFS disapproved the slippage caps, the prohibition on slippage in the mackerel and longfin squid fisheries, the released catch affidavit, and the ongoing data collection by NEFOP still provide improved monitoring in the mackerel and longfin squid fisheries, increased information regarding discards, and an incentive to minimize discards of unsampled catch.

Comment 13: NMFS received comments from the Herring Alliance, PEW Environment Group, and Wild Oceans that the analysis in the FEIS provides a reasonable basis for capping slippage events at 10 fleet-wide slippage events. The commenters also disagreed with NMFS's statements in the proposed rule that the slippage caps may be punitive or unfair. Wild Oceans suggested that, if the controversy is around the number of allowed slippage events (i.e., 10 allowed non-exempted slippage events before triggering the cap) as opposed to the need to minimize slippage, then the trip termination penalty should apply after all slippage events.

Response: The Amendment 14 FEIS notes that, from 2006-2010, approximately 26 percent (73 of 277, or 15 per year) of hauls on observed mackerel trips (trips that caught 50 percent or more mackerel or at least 100,000 lb (45.34 mt) of mackerel) had some unobserved catch. Hauls may be unobserved for a variety of reasons—for example, transfer of catch to another vessel without an observer, observers not being on deck to sample a given haul, or hauls released from the net while still in the water. The FEIS discusses that, while documented slippage events are relatively infrequent, increases above the estimated 15 unobserved hauls per year could compromise observer data because “high-volume fisheries . . . can catch large quantities of fish in a single tow.” NMFS agrees that unobserved hauls can compromise observer data, and that limiting the total number of slippage events to 10 does reduce slippage events from the recent average of 15 unobserved hauls on mackerel trips. However, NMFS does not believe the FEIS provides analysis for why it is operationally justified to allow the fleet 10 un-exempted slippage events

prior to triggering the trip termination requirement, as opposed to the selection of any other value.

NMFS disapproved the proposed slippage caps, and the associated trip termination requirement, because of concerns with the legality of the slippage cap. Once the slippage cap has been met, vessels that slip catch would be required to return to port. Vessels may continue fishing following slippage events 1 through 10 but must return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10, may continue fishing after the 11th slippage event provided they do not slip catch again. NMFS believes this aspect of the measure is inequitable.

Throughout the development of Amendment 14, NMFS identified potential concerns with the rationale supporting, and legality of, the slippage caps. NMFS highlighted its concerns with these aspects of the slippage cap in the proposed rule. As described in the response to the previous comment, NMFS believes the arbitrary nature of the slippage cap, and the potential for inequitable application to the fleet as a result of the slippage cap, render the proposed slippage cap inconsistent with the MSA and other applicable law. For these reasons, NMFS disapproved the proposed slippage cap.

NMFS agrees with Wild Ocean's recommendation to make the consequences of the slippage cap apply after every non-exempted slippage event and offered this suggestion to the Council in our November 7, 2013, partial approval letter.

Comment 14: The Herring Alliance and PEW Environment Group assert that NMFS stated in the proposed rule that existing procedures in the mackerel fishery are adequate to address slippage. They assert that, though the NEFOP high-volume fishery procedures have been in place for several years, these protocols do not prevent slippage and still allow for significant amounts of catch to be discarded prior to sampling by NEFOP observers. Wild Oceans asserts that NMFS should clarify, through the regulations, the Council's position that slippage is a detrimental practice that should be discouraged, and that simply collecting information on slippage does not convey this message and does not deter its occurrence.

Response: NMFS did not characterize the high-volume fishery procedures as a means to prevent slippage. Rather, NMFS noted that, in contrast to the information that would be collected in the proposed released catch affidavits, the discard logs documented as part of the high-volume fishery observation protocol provide more detailed, comprehensive information on discards. However, NMFS notes that there is a compliance benefit to requiring a released catch affidavit because it would provide information regarding the operator's decisions and may help NMFS understand why slippage occurs. NMFS agrees that the high-volume fishery observation protocol does not prevent slippage, and that it only collects information about slippage events. NMFS reflected the Council's intent that

slippage is a detrimental practice that must be discouraged by implementing the slippage prohibitions in the mackerel and longfin squid fisheries. NMFS believes that the slippage prohibition and the associated released catch affidavit requirement should provide a strong incentive to minimize the discarding of unsampled catch and provide increased information regarding discards.

Comment 15: The Herring Alliance and PEW Environment Group assert that NMFS documented slippage as a problem that directly affects the administration of the butterfish \*10041 mortality cap on the longfin squid fishery, where longfin squid hauls have been slipped due to the presence of butterfish.

Response: NMFS reiterates that the slippage prohibition and released catch affidavit are also a requirement for longfin squid permit holders, which can help address any issues with the administration of the butterfish mortality cap that may have resulted from past slippage events.

Comment 16: Wild Oceans notes that the proposed regulatory definition of slippage (§ 648.2) does not reflect the description of slippage in Amendment 14, which describes transferring of fish to another vessel that is not carrying a NMFS-approved observer as a slippage event.

Response: While the fish transfer issue is not described in the definition of slippage, it is described in the measures to address slippage at at § 648.11(n)(3)(i).

Comment 17: Commenters support proposed measures requiring limited access mackerel and longfin squid vessels to provide observers with: (1) Safe sampling stations; (2) reasonable assistance; and (3) notification of haulback or pumping.

Response: NMFS recognizes the commenters support for these measures and believes these measures will help improve monitoring in the mackerel and longfin squid fisheries. These measures were approved.

Comment 18: Wild Oceans believes that Amendment 14 should add regulatory text to require both vessels involved in pair trawl fishing to carry observers.

Response: NEFOP randomly assigns observers to mackerel vessels consistent with SBRM coverage requirements to optimize sampling of the mackerel fishery.

Because NMFS considered this requirement a directive to NEFOP, rather than as a requirement for pair trawl vessels, it is unnecessary for NMFS to codify the requirement in the regulations. If NEFOP desires to place observers on both vessels in a pair trawl operation, it can do so. The Council will be considering increased observer coverage requirement for the mackerel fishery in the observer-funding omnibus amendment. Until then, NEFOP will continue to assign observers to mackerel vessels in order to best meet SBRM requirements.

#### ***4. Comments on Measures To Address River Herring Interactions***

Comment 19: Several comments express support for establishing catch caps for a river herring and shad catch cap on the Atlantic mackerel fishery as quickly as possible, and assert that the catch cap is the only measure in Amendment 14 that

addresses the National Standard 9 obligation to minimize bycatch to the extent practical. Commenters also stated that, while catch caps and occasional closures can be effective conservation tools for river herring and shad, without increased observer coverage and improved catch monitoring, the caps cannot be effectively administered.

Response: NMFS supports the Council in its efforts to establish the river herring and shad catch cap on the mackerel fishery, and is currently reviewing the Council's proposed catch cap allocation in 2014 Specifications and Management Measures for the MSB Fisheries.

Based on the ASMFC's recent river herring and shad assessments, data are not robust enough to determine a biologically-based river herring and shad catch cap and/or the potential effects on river herring and shad populations of such a catch cap on a coast-wide scale. However, both the Council and NMFS believe catch caps would provide a strong incentive for the Atlantic mackerel industry to continue avoiding river herring and shad and reduce river herring and shad catch to the extent practicable.

NMFS disagrees that the river herring/shad catch caps are the only measure in Amendment 14 that will satisfy the MSA's requirement to minimize bycatch to the extent practicable. Rather, Amendment 14 implements several measures to address bycatch in the mackerel and longfin squid fisheries: (1) Prohibiting catch from being discarded prior to sampling by an at-sea observer (known as slippage), with exceptions for safety concerns, mechanical failure, and spiny dogfish preventing catch from being pumped aboard the vessel, and requiring a released catch affidavit to be completed for each slippage event; (2) evaluating the ongoing bycatch avoidance program investigation of providing real-time, cost-effective information on river herring distribution and fishery encounters; and (3) expanding and adding reporting and sampling requirements designed to improve data collection methods, data sources, and applications of data to better determine the amount, type, disposition of bycatch. NMFS believes these measures provide incentives for bycatch avoidance and gather more information that may provide a basis for future bycatch avoidance or bycatch mortality reduction measures. These measures are supported by sufficient analysis and consideration of the best available scientific information and the MSA National Standards and represent the most practicable bycatch measures for the MSB FMP based on this information at this time.

Finally, while increases to observer coverage may improve the quality of data used to determine the rate of river herring and shad bycatch in the mackerel fishery, NMFS disagrees that the river herring and shad catch cap cannot be administered without the three measures disapproved in Amendment 14. The pre-trip notification requirement for the mackerel fishery that will be implemented through

this action will help with the identification of directed mackerel trips and the placement of observers on those trips. The expansion of sampling requirements and the slippage prohibition should help improve data collection on observed trips. Last, as noted in the preamble, we are considering ways for industry-funded observer coverage to help reach the Council's desired coverage increases.

Comment 20: The Herring Alliance, PEW Environment Group, Wild Oceans, Oceana, and the NRDC urged disapproval of the voluntary program investigating river herring distribution and fishery encounters because they believe as a voluntary program it has no place in a regulatory action and will not satisfy the MSA's requirement to minimize bycatch to the extent practicable. They assert that this program should not be a substitute for a meaningful catch cap.

Response: While the voluntary program for river herring monitoring and avoidance does not include regulatory requirements, we believe the program, along with the Council's formal evaluation of the program, has the potential to help vessels avoid river herring during the fishing season and gather information that may help predict and prevent future interactions. The regulations approved in Amendment 14 allow the Council to complete a framework adjustment to codify certain aspects of this important research to help reduce river herring and shad interactions in the mackerel fishery. This could involve adjustments to fleet tracking mechanisms, the use of test tows to determine the extent of incidental catch, thresholds of river herring and shad catch that would require a vessel to move out of a given fishing area, and lengths of time that vessels would need to move out of the area to allow river herring and shad aggregations to migrate. Allowing for the future consideration of this program is not a substitute for the river herring and shad catch cap in the mackerel fishery. \*10042 Instead, NMFS hopes for the avoidance program and the catch cap to work in concert. The overall catch cap on river herring and shad should offer incentive for industry to engage in avoiding the incidental catch.

### **Changes From the Proposed Rule**

The proposed rule for Amendment 14 contained all the measures in the amendment that were adopted by the Council in June 2012. As described previously, the proposed rule highlighted NMFS's utility and legal concerns about three measures adopted by the Council. Because the increased observer coverage measure, coupled with a \$325 per day industry contribution, slippage cap, and dealer reporting requirements, were ultimately disapproved by NMFS, the regulatory requirements associated with those three measures are not included in this final rule. Specifically, the following proposed regulations are not being implemented: § 648.7(a)(1)(iv), § 648.11(h), § 648.11(i)(3)(ii), § 648.11(m)(4), § 648.14(g)(2)(viii), § 648.22(b)(4)(ii), § 648.22(b)(4)(iv), and § 648.24(b)(7).

Sections 648.10 and 648.22 differ slightly in structure, but not content, from the regulations in the proposed rule.

### **Classification**

The Administrator, Greater Atlantic Regional Fisheries Office, NMFS, determined that the approved measures in Amendment 14 to the MSB FMP are necessary for the conservation and management of the MSB fisheries and that they are consistent with the MSA and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared a FEIS for Amendment 14. A notice of availability for the FEIS was published on August 16, 2013 (78 FR 50054). The FEIS describes the impacts of the proposed measures on the environment. Revisions to fishery management program measures, including vessel reporting requirements and trip notification, are expected to improve catch monitoring in the MSB fisheries, with positive biological impacts to the MSB fisheries and minimal negative economic impacts on human communities. Measures to improve at-sea sampling by observers, and measures to minimize discarding of catch before it has been sampled by observers are also expected to improve catch monitoring and have positive biological impacts on the MSB fisheries. The economic impacts of these proposed measures on human communities are varied, but negative economic impacts may be substantial compared to the status quo. Measures to address bycatch are expected to have positive biological impacts and moderate negative economic impacts on fishery participants. Lastly, all measures are expected to have positive biological impacts on non-target species and neutral impacts on habitat. In partially approving Amendment 14 on November 7, 2013, NMFS issued a record of decision (ROD) identifying the selected alternatives. A copy of the ROD is available from NMFS (see ADDRESSES).

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses to support this action. A copy of this analysis is available from the Council or NMFS (see ADDRESSES) or via the Internet at <http://www.nero.noaa.gov>.

### ***Statement of Need***

This action helps improve monitoring of the MSB fisheries with a focus on better evaluation of the incidental catch of river herring and shad, and addresses river herring and shad bycatch issues in the mackerel fishery. A description of the action, why it was considered, and the legal authority for the action is contained elsewhere in this preamble and is not repeated here.

***A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments***

NMFS received 15 comment letters during the comment periods on the NOA and proposed rule. Those comments, and NMFS's responses, are contained elsewhere in this preamble and are not repeated here. None of the comments are relevant to the analysis of economic impacts on regulated entities.

***Description and Estimate of Number of Small Entities to Which the Rule Will Apply***

On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from \$4.0 to \$19.0 million, Shellfish Fishing from \$4.0 to \$5.0 million, and Other Marine Fishing from \$4.0 to \$7.0 million. NMFS has reviewed the analyses prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities; thus, they all would continue to be considered small under the new standards. NMFS has determined that the new size standards do not affect the analyses prepared for this action.

The Office of Advocacy at the SBA suggests two criteria to consider in determining the significance of regulatory impacts: Disproportionality and profitability. The disproportionality criterion compares the effects of the regulatory action on small versus large entities (using the SBA-approved size definition of "small entity"), not the difference between segments of small entities. The changes in profits, costs, and net revenues due to Amendment 14 are not expected to be disproportional for small versus large entities, as the proposed action will affect all entities, large and small, in a similar manner. Therefore, this action is not expected to have disproportionate impacts or place a substantial number of small entities at a competitive disadvantage relative to large entities.

The measures in Amendment 14 could affect any vessel holding an active Federal permit to fish for Atlantic mackerel, longfin squid, Illex squid, or butterfish. All of the potentially affected businesses are considered small entities under the standards described in NMFS guidelines, because they have gross receipts that do not exceed \$19 million annually. In 2012, 1,835 commercial vessels possessed Atlantic mackerel permits (132 limited access permits and 1,703 open access permits), 329 vessels possessed longfin squid/butterfish moratorium permits, 72 vessels possessed Illex permits, 1,578 vessels possessed incidental squid/butterfish permits, and 705 vessels possessed squid/mackerel/butterfish party/charter permits.

Many vessels participate in more than one of these fisheries; therefore, permit numbers are not additive.

Available data indicate that no single fishing entity earned more than \$19 million annually. Having different size standards for different types of marine fishing activities creates difficulties in categorizing businesses that participate in more than one of these activities. For now, the short-term approach is to classify a business entity into the SBA-defined categories based on which activity produced the highest gross revenue. In this case, Atlantic mackerel is the only species with significant recreational fishing, and in 2012, the charterboat industry harvested only 10,000 lb (4.54 mt). Based on these *\*10043* assumptions, the finfish size standard would apply and the business is considered large, only if revenues are greater than \$19 million. No MSB vessels total \$19 million in revenues from MSB fishing, but some do have income from other fishing activity. However, it is unlikely that the value exceeds that threshold. Although there are likely to be entities that, based on rules of affiliation, would qualify as large business entities, due to lack of reliable ownership affiliation data NMFS cannot apply the business size standard at this time. NMFS is currently compiling data on vessel ownership that should permit a more refined assessment and determination of the number of large and small entities for future actions. For this action, since available data are not adequate to identify affiliated vessels, each operating unit is considered a small entity for purposes of the RFA, and, therefore, there is no differential impact between small and large entities. Therefore, there are no disproportionate economic impacts on small entities. Section 6.7 in Amendment 14 describes the vessels, key ports, and revenue information for the MSB fisheries; therefore, that information is not repeated here.

***Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements Minimizing Significant Economic Impacts on Small Entities***

This final rule contains collection-of-information requirements subject to the PRA and that have been approved by Office of Management and Budget (OMB) under control number 0648-0679. The new requirements, which are described in detail elsewhere in this preamble, were approved as a new collection.

Amendment 14 increases VTR reporting submission frequency for all MSB permit holders from monthly to weekly. MSB permit holders currently submit 12 VTRs per year, so the additional cost of submitting VTRs on a weekly basis is \$18. This cost was calculated by multiplying 40 (52 weeks in a year minus 12 (number of monthly reports)) by \$0.46 to equal \$18. The VTR is estimated to take 5 min to complete. Therefore the total annual burden estimate of weekly VTRs is \$18, and 3 hr and 20 min.

This action requires limited access mackerel and longfin squid/butterfish moratorium permit holders purchase and maintain a VMS. Because other Northeast

permits require vessels to maintain a VMS, it is estimated that only 80 vessels do not already have a VMS. The average cost of purchasing and installing a VMS is \$3,400, the VMS certification form takes an estimated 5 min to complete and costs \$0.46 to mail, and the call to confirm a VMS unit takes an estimated 5 min to complete and costs \$1. The average cost of maintaining a VMS is \$600 per year. Northeast fisheries regulations require VMS activity declarations and automated polling of VMS units to collect position data. Each activity declaration takes an estimated 5 min to complete and costs \$0.50 to transmit. If a longfin squid/butterfish moratorium permit holder takes 22 trips per year, the burden estimate for activity declarations would be 1 hr and 50 min, and \$11. If a limited access mackerel permit holder takes 8 trips per year, the burden estimate for activity declarations would be 40 min and \$4. Each automated polling transmission costs \$0.06, and a vessel is polled once per hour every day of the year. The annual estimated cost associated with polling is \$526. Vessels may request a power-down exemption to stop position transmission under certain provisions, as described elsewhere in this preamble. The form to request a power-down exemption letter takes 5 min to complete, and costs \$0.46 to mail. If each vessel submits a power-down exemption request 2 times a year, the total estimated burden is 10 min and \$1. In summary, the total annual burden estimate for a vessel to purchase and maintain a VMS would be 2 hr 10 min and \$4,540 for a longfin squid/butterfish moratorium permit holder, and 1 hr and \$4,533 for a limited access mackerel permit holder.

Amendment 14 requires that limited access mackerel and longfin squid/butterfish moratorium permit holders submit daily VMS reports. The cost of transmitting a catch report via VMS is \$0.60 per transmission, and it is estimated to take 5 min to complete. If a longfin squid/butterfish moratorium permit holder takes 22 trips per year, and each trip lasts an average of 2 days, the burden estimate for activity declarations would be 1 hr and 50 min, and \$14. If a limited access mackerel permit holder takes 8 trips per year, and each trip lasts an average of 3 days, the burden estimate for activity declarations would be 40 min, and \$5.

This action requires limited access mackerel vessels to submit a pre-landing notification to NMFS OLE via VMS 6 hr prior to landing. Each VMS pre-landing notification is estimated to take 5 min to complete and cost \$1. Limited access mackerel permit holders are estimated to take 8 trips per year, so the total annual burden estimate is 40 min, and \$8.

Amendment 14 increases the reporting burden for measures designed to improve at-sea sampling by NMFS-approved observers. Limited access mackerel vessels would be required to notify NMFS to request an observer at least 48 hr prior to beginning a trip where they intend to land over 20,000 lb (9.07 mt) of mackerel. The phone call is estimated to take 5 min to complete and is free. If a vessel has

already contacted NMFS to request an observer and then decides to cancel that fishing trip, Amendment 14 would require that vessel to notify NMFS of the trip cancellation. The call to notify NMFS of a cancelled trip is estimated to take 1 min and is free. If a vessel takes an estimated 8 trips per year, the total annual reporting burden associated with pre-trip observer notification would be 40 min.

Amendment 14 requires a released catch affidavit for limited access mackerel and longfin squid/butterfish moratorium permit holders that discard catch before it had been made available to an observer for sampling (slipped catch). The reporting burden for completion of the released catch affidavit is estimated to average 5 min. The cost associated with the affidavit is the postage to mail the form to NMFS (\$0.46). The affidavit requirement would affect an estimated 312 longfin squid/butterfish moratorium permit holders, and 132 limited access mackerel permit holders. If the longfin squid/butterfish moratorium permit holders slipped catch once per trip with an observer aboard, and took an estimated 22 trips per year, the total annual reporting burden for the released catch affidavit would be 1 hr 50 min, and \$10. If the limited access mackerel permit holders slipped catch once per trip with an observer aboard, and took an estimated 8 trips per year, the total annual reporting burden for the released catch affidavit would be 40 min, and \$4.

Public comment is sought regarding: Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Regional Administrator (see ADDRESSES), and email to OIRA—Submission@omb.eop.gov or fax to 202-395-7285.

**\*10044** Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

***Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected***

### **1. Adjustments to the Fishery Management Program**

Amendment 14 revises several existing fishery management provisions, including VTR and VMS requirements, to better administer the MSB fisheries. Amendment 14 requires all MSB permit holders to submit VTRs on a weekly basis (Alternative 1c in the FEIS). The no action (alternative 1a) would have maintained monthly reporting requirements for all MSB permit holders, and two additional alternatives would have instituted weekly reporting for just mackerel permit holders (alternative 1bMack) or longfin squid/butterfish permit holders (alternative 1bLong). Weekly VTRs would cost an additional \$18 per year compared to status quo, but many permit holders already submit weekly VTRs related to other Northeast permits. Compared to the non-selected alternatives, which would have maintained the monthly VTR reporting requirement, or only extended the weekly reporting requirement to some of the permit categories in this FMP, extending the requirement for weekly VTR reporting to all MSB permit holders improves data for quota monitoring, and brings VTR requirements in line with those for other Northeast permits.

This action requires VMS for limited access mackerel and longfin squid/butterfish moratorium permit holders (alternatives 1eMack and 1eLong), requires trip declarations and daily VMS catch reports for these permit holders (alternatives 1fMack and 1fLong), and requires a pre-landing notifications via VMS in order to land more than 20,000 lb (9.07 mt) of mackerel (alternative 1gMack). The no action alternative (alternative 1a) would not impose VMS requirements for these permit holders, and was rejected because the Council intends to use VMS as a compliance and enforcement tool for area-based management measures currently under consideration. As with the VTR requirements, many limited access mackerel and longfin squid/butterfish moratorium permit holders already have VMS related to other Northeast permits. For permit holders obtaining a new VMS, the new VMS requirements would cost roughly \$4,500 for the first year of operation. The FEIS for Amendment 14 discussed that the economic impacts of these reporting requirements is mixed compared to status quo. While short-term operating costs for these fishing vessels is increased compared to status quo, these measures may have long-term positive impacts if they result in less uncertainty and, ultimately, additional harvest being made available to MSB fishery participants. Economic impacts on small entities resulting from the purchase costs of new VMS units have been minimized through a VMS reimbursement program (May 6, 2008; 73 FR 24955) that made grant funds available for vessel owners and/or operators who have purchased a VMS unit for the purpose of complying with fishery regulations. Reimbursement for VMS units is available on a first come, first serve, basis until funds are depleted. More information on the VMS reimbursement program is available from the Pacific States Marine Fisheries Commission (see ADDRESSES) and from the NMFS VMS Support Center, which can be reached at 888-219-9228.

Amendment 14 proposed requiring that MSB dealers weigh all landings related to mackerel transactions over 20,000 lb (9.07 mt) (alternative 2d), and all longfin squid transactions over 2,500 lb (1.13 mt) (alternative 2f), and if these transactions were not sorted by species, would be required to document, with each transaction, how they estimated the relative composition of catch. Dealers would be permitted to use volume-to-weight conversions if they were not able to weigh landings (alternative 2g). However, NMFS disapproved the proposed measure, so this action maintains the no action alternative. Dealers currently report the weight of fish, obtained by scale weights and/or volumetric estimates. Because the proposed action does not specify how fish are to be weighed, the proposed action is not anticipated to change dealer behavior, and, therefore, is expected to have neutral impacts in comparison to the no action alternative. Amendment 14 considered four alternatives to the proposed action: The no action alternative; and alternatives 2b, 2c and 2e. Alternative 2b would require that a vessel confirm MSB dealer reports for mackerel landings over 20,000 lb (9.07 mt), Illex squid landings over 10,000 lb (4.53 mt), and longfin squid landings over 2,500 lb (1.13 mt). Alternatives 2c and 2e are similar to the proposed alternative in that they would require dealers to weigh all landings related to mackerel transactions over 20,000 lb (9.07 mt) (alternative 2c), and all longfin squid transactions over 2,500 lb (1.13 mt) (alternative 2e), but would have required that relative species composition be documented annually instead of at each transaction. Overall, relative to the no action alternative, the proposed action and Alternatives 2c and 2e may have low negative impacts on dealers due to the regulatory burden of documenting how species composition is estimated. In comparison, Alternative 2b may have a low positive impact on fishery participants, despite an increased regulatory burden, if it minimizes any lost revenue due to data errors in the dealer reports and/or the tracking of MSB catch.

## **2. Adjustments to the At-Sea Catch Monitoring**

Amendment 14 requires a 48-hr pre-trip notification for all vessels intending to retain, possess or transfer 20,000 lb (9.07 mt) or more of Atlantic mackerel in order to facilitate observer placement (alternative 1d48). In addition to the no action alternative (alternative 1a), Amendment 14 also considered requiring a 72-hr pre-trip notification requirement (alternative 1d72). Compared to the no action alternative, both action alternatives may mean that fishermen are not able to embark on fishing trips on short notice, especially if they are selected to take an observer. The selected alternative would, however, improve observer placement compared to the no action alternative; the no action alternative was rejected for this reason. The 72-hr pre-trip notification requirement (alternative 1d72), is inconsistent in timing with 48-hr pre-trip notification requirements for other fisheries in the Northeast. In addition, the 72-hr requirement is even more likely

than the selected 48-hr requirement to prevent vessels from departing quickly to target fleeting aggregations of mackerel.

Amendment 14 proposed increases in the observer coverage in the mackerel fishery, specifically 100-percent observer coverage on all (Tiers 1, 2, and 3) midwater mackerel trawl vessels (alternative 5b4) and Tier 1 small-mesh bottom trawl mackerel vessels, 50-percent coverage on Tier 2 small-mesh \*10045 bottom trawl mackerel vessels, and 25-percent on Tier 3 small-mesh bottom trawl mackerel vessels (alternative 5c4), with an industry contribution of \$325 per day (alternative 5f). However, the proposed measure was disapproved, so this action maintains the no action alternative. Amendment 14 considered four alternatives to the proposed coverage level recommendations: The no action alternative (alternative 5a); 25-percent (alternative 5b1), 50-percent (alternative 5b2), and 75-percent (alternative 5b3) coverage levels for all (Tiers 1, 2 and 3) mid-water trawl mackerel vessels; 25-percent (alternative 5c1), 50-percent (alternative 5c2), and 75-percent (alternative 5c3) coverage levels for all (Tiers 1, 2 and 3) small-mesh bottom trawl mackerel vessels; and coverage levels necessary to achieve target coefficients of variation for river herring bycatch using midwater trawl gear (alternatives 5e1 and 5e2) and small-mesh bottom trawl gear (5e3 and 5e4).

Additionally, Amendment 14 considered a phased-in industry funding option (5g) that would shift the cost of the at-sea portion of observer coverage from NMFS to the industry over a 4-yr period. The specific coverage levels under the no action alternative and the 5e alternatives are unknown at this time, because they would depend on an analysis of fishery data from previous years, but coverage levels under these alternatives are expected to be less than 100 percent. Compared to the no action alternative, the proposed \$325 contribution per day would increase daily trip costs by 9 percent for single midwater trawl mackerel vessels, 12 percent for paired midwater trawl mackerel vessels, and 20 percent for small-mesh bottom trawl vessels. In general, higher coverage levels, which would result in higher increases in daily costs for fishery participants, would have a negative economic impact on fishery participants, potentially resulting in less effort and lower catch. In the long-term, increased monitoring and improved data collections for the mackerel fishery may translate to improved management of the mackerel fishery that would benefit fishery-related businesses and communities.

Amendment 14 requires limited access mackerel and longfin squid/butterfish moratorium permit holders to bring all catch aboard the vessel and make it available for sampling by an observer (alternative 3j). If catch was slipped before it was sampled by an observer, it would count against a slippage cap and require a released catch affidavit to be completed. Amendment 14 proposed that, if the slippage cap was reached, a vessel would be required to return to port immediately following any additional slippage events (alternative 3l). However, the proposed

slippage cap was disapproved and, instead, this action only implements the slippage prohibition and released catch affidavit. Amendment 14 considered the no action alternative, and nine other alternatives to the proposed action. The no action alternative would not establish slippage prohibitions, released catch affidavit requirements, the slippage cap, or trip termination requirements, and was rejected because it was not expected to improve information on catch in the mackerel or longfin squid fisheries or reduce the discarding of catch in these fisheries before it has been sampled. The other non-selected alternatives include various elements of the proposed action. The requirement for mackerel and longfin squid permit holders to complete a released catch affidavit (alternative 3e), a requirement to prohibit mackerel (alternative 3f) and longfin squid (alternative 3g) permit holders from releasing discards before they are bought aboard for sampling were rejected because these requirements were already included in the selected alternative (alternative 3j). Alternatives that included trip termination, including trip terminations requirements after 1 (alternative 3h), 2 (alternative 3i), 5 (alternative 3k), or 10 (alternative 3n) fleet-wide slipped hauls on mackerel or longfin squid vessels carrying observers, individual slippage caps resulting in trip termination (alternative 3p), and a requirement that vessels that terminate a trip would have to take observers on the immediate subsequent trip (alternative 3o), are structures similarly to the proposed trip termination requirement that was disapproved. Negative impacts associated with all of these alternatives include increased time spent pumping fish aboard the vessel to be sampled by an observer, potential decrease in vessel safety during poor operating conditions, and the administrative burden of completing a released catch affidavit. The penalties associated with slippage vary slightly across the alternatives. The overall impacts of the options that propose trip termination (proposed action) are negative in comparison to the no action alternative. Costs associated with mackerel and longfin squid fishing trips are high, particularly with the current cost of fuel. Trips terminated prematurely could result in unprofitable trips, leaving not only the owners with debt, but crewmembers without income, and negative impacts on fishery-related businesses and communities. Alternatives 3e and 3j may improve information on catch in the mackerel and longfin squid fisheries by requiring vessels operators to document when and why slippage occurs. Alternatives 3f, 3g, and 3j may improve information by prohibiting catch from being discarded before it was sampled by an observer.

### **3. Measures To Address River Herring Interactions**

Amendment 14 establishes catch caps for river herring (alternative 6b) and shad (alternative 6c) in the mackerel fishery. Two alternatives, the proposed action and the no action, were considered. Compared to the no action alternative, the action alternatives have the possibility of resulting in a closure of the directed mackerel

fishery before the mackerel quota is reached. This could result in revenue losses as high as \$15 million based on 2010 ex-vessel prices, depending on how early the fishery is closed. While there is no direct linkage between river herring and shad catch and stock status, a closure that results from a catch cap in the mackerel fishery could limit the fisheries mortality on these stocks, and was the reason why the no action alternative was rejected.

The selected action also includes support for the existing river herring bycatch avoidance program involving SFC, MA DMF, and SMAST. This voluntary program seeks to reduce river herring bycatch with real-time information on river herring distribution and mackerel fishery encounters. This aspect of the selected action has the potential to mitigate some of the negative impacts of the proposed action by developing river herring bycatch avoidance measures in cooperation with the fishing industry.

#### ***Small Entity Compliance Guide***

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency will publish one or more guides to assist small entities in complying with the rule, and will designate such publications as “small entity compliance guides.” The agency will explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Greater Atlantic \*10046 Regional Fisheries Office, and the guide (i.e., permit holder letter) will be sent to all holders of permits for the herring fishery. The guide and this final rule will be available upon request.

#### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: February 18, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

#### **PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

50 CFR § 648.2

2. In § 648.2, the definition of “Slippage in the Atlantic mackerel and longfin squid fisheries” is added in alphabetical order to read as follows:

50 CFR § 648.2

**§ 648.2 Definitions.**

\* \* \* \* \*

Slippage in the Atlantic mackerel and longfin squid fisheries means catch that is discarded prior to being brought aboard a vessel issued an Atlantic mackerel or longfin squid permit and/or prior to making the catch available for sampling and inspection by a NMFS-approved observer. Slippage includes catch released from a codend or seine prior to the completion of pumping catch aboard and catch released from a codend or seine while the codend or seine is in the water. Fish that cannot be pumped and that remain in the net at the end of pumping operations are not considered slippage. Discards that occur at sea after the catch is brought on board and sorted are also not considered slippage.

\* \* \* \* \*50 CFR § 648.7

3. In § 648.7, paragraphs (b)(3)(ii) and (b)(3)(iii) are added, and paragraph (f)(2)(i) is revised to read as follows:

50 CFR § 648.7

**§ 648.7 Recordkeeping and reporting requirements.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) Atlantic mackerel owners or operators. The owner or operator of a vessel issued a limited access mackerel permit must report catch (retained and discarded) of mackerel daily via VMS, unless exempted by the Regional Administrator. The report must include at least the following information, and any other information required by the Regional Administrator: Fishing Vessel Trip Report serial number; month, day, and year mackerel was caught; total pounds of mackerel retained and total pounds of all fish retained. Daily mackerel VMS catch reports must be submitted in 24-hr intervals for each day and must be submitted by 0900 hr on the following day. Reports are required even if mackerel caught that day have not yet been landed. This report does not exempt the owner or operator from other applicable reporting requirements of this section.

(iii) Longfin squid/butterfish moratorium permit owners or operators. The owner or operator of a vessel issued a longfin squid/butterfish moratorium permit must report catch (retained and discarded) of longfin squid daily via VMS, unless exempted by the Regional Administrator. The report must include at least the following information, and any other information required by the Regional Administrator: Fishing Vessel Trip Report serial number; month, day, and year longfin squid was caught; total pounds longfin squid retained and total pounds of all fish retained. Daily longfin squid VMS catch reports must be submitted in 24-hr intervals for each day and must be submitted by 0900 hr on the following day. Reports are required even if longfin squid caught that day have not yet been

landed. This report does not exempt the owner or operator from other applicable reporting requirements of this section.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(i) For any vessel not issued a NE multispecies; Atlantic herring permit; or any Atlantic mackerel, longfin squid, Illex squid, or butterfish permit; fishing vessel log reports, required by paragraph (b)(1)(i) of this section, must be postmarked or received by NMFS within 15 days after the end of the reporting month. If such a vessel makes no fishing trip during a particular month, a report stating so must be submitted, as instructed by the Regional Administrator. For any vessel issued a NE multispecies permit; Atlantic herring permit; or any Atlantic mackerel, longfin squid, Illex squid, or butterfish permit; fishing vessel log reports must be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If such a vessel makes no fishing trip during a reporting week, a report stating so must be submitted and received by NMFS by midnight of the first Tuesday following the end of the reporting week, as instructed by the Regional Administrator. For the purposes of this paragraph (f)(2)(i), the date when fish are offloaded will establish the reporting week or month the VTR must be submitted to NMFS, as appropriate. Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) will constitute fishing during that reporting week and will eliminate the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel issued a NE multispecies permit; Atlantic herring permit; or Atlantic mackerel, longfin squid, Illex squid or butterfish permit; begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the third week, but a negative report (i.e., a “did not fish” report) would not be required for either earlier week.

\* \* \* \* \*50 CFR § 648.10

4. In § 648.10, paragraphs (b)(9), (b)(10), (n), and (o) are added to read as follows:  
50 CFR § 648.10

**§ 648.10 VMS and DAS requirements for vessel owners/operators.**

\* \* \* \* \*

(b) \* \* \*

(9) Vessels issued a Tier 1, Tier 2, or Tier 3 limited access Atlantic mackerel permit; or

(10) Vessels issued a longfin squid/butterfish moratorium permit.

\* \* \* \* \*

(n) Limited access Atlantic mackerel VMS notification requirements. (1) A vessel issued a limited access Atlantic mackerel permit intending to declare into the mackerel fishery must notify NMFS by declaring a mackerel trip prior to leaving port at the start of each trip in order to harvest, possess, or land mackerel on that trip.

(2) A vessel issued a limited access Atlantic mackerel permit intending to land more than 20,000 lb (9.07 mt) of mackerel must notify NMFS of the time and place of offloading at least 6 hr prior to arrival, or, if fishing ends less than 6 hours before arrival, immediately upon leaving the fishing grounds. The Regional Administrator may adjust the prior notification minimum time through publication in the Federal Register consistent with the Administrative Procedure Act.

(o) Longfin squid/butterfish VMS notification requirements. A vessel issued a longfin squid/butterfish moratorium permit intending to declare into the longfin squid fishery must notify NMFS by declaring a longfin \*10047 squid trip prior to leaving port at the start of each trip in order to harvest, possess, or land longfin squid on that trip.

50 CFR § 648.11

5. In § 648.11, paragraph (n) is added to read as follows:

50 CFR § 648.11

**§ 648.11 At-sea sea sampler/observer coverage.**

\* \* \* \* \*

(n) Atlantic mackerel, squid, and butterfish observer coverage—(1) Pre-trip notification. (i) A vessel issued a limited access Atlantic mackerel permit or longfin squid/butterfish moratorium permit, as specified at § 648.4(a)(5)(i), must, for the purposes of observer deployment, have a representative provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, telephone number or email address for contact; and the date, time, port of departure, gear type (for mackerel trips), and approximate trip duration, at least 48 hr, but no more than 10 days, prior to beginning any fishing trip, unless it complies with the possession restrictions in paragraph (n)(1)(iii) of this section.

(ii) A vessel that has a representative provide notification to NMFS as described in paragraph (i) of this section may only embark on a mackerel or longfin squid trip without an observer if a vessel representative has been notified by NMFS that the vessel has received a waiver of the observer requirement for that trip. NMFS shall notify a vessel representative whether the vessel must carry an observer, or if a waiver has been granted, for the specified mackerel or longfin squid trip, within 24 hr of the vessel representative's notification of the prospective mackerel or longfin squid trip, as specified in paragraph (i) of this section. Any request to carry an observer may be waived by NMFS. A vessel that fishes with an observer waiver

confirmation number that does not match the mackerel or longfin squid trip plan that was called in to NMFS is prohibited from fishing for, possessing, harvesting, or landing mackerel or longfin squid except as specified in paragraph (iii) of this section. Confirmation numbers for trip notification calls are only valid for 48 hr from the intended sail date.

(iii) Trip limits. (A) A vessel issued a longfin squid and butterfish moratorium permit, as specified in § 648.4(a)(5)(i), that does not have a representative provide the trip notification required in paragraph (a) of this section is prohibited from fishing for, possessing, harvesting, or landing more than 2,500 lb (1.13 mt) of longfin squid per trip at any time, and may only land longfin squid once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(B) A vessel issued a limited access mackerel permit, as specified in § 648.4(a)(5)(i), that does not have a representative provide the trip notification required in paragraph (i) of this section is prohibited from fishing for, possessing, harvesting, or landing more than 20,000 lb (9.07 mt) of mackerel per trip at any time, and may only land mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(iv) If a vessel issued a longfin squid and butterfish moratorium permit, as specified in § 648.4(a)(5)(i), intends to possess, harvest, or land more than 2,500 lb (1.13 mt) of longfin squid per trip or per calendar day, or a vessel issued a limited access Atlantic mackerel permit, as specified in § 648.4(a)(5)(i), intends to possess, harvest, or land more than 20,000 lb (9.07 mt) of mackerel per trip or per calendar day, and has a representative notify NMFS of an upcoming trip, is selected by NMFS to carry an observer, and then cancels that trip, the representative is required to provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, and telephone number or email address for contact, and the intended date, time, and port of departure for the cancelled trip prior to the planned departure time. In addition, if a trip selected for observer coverage is cancelled, then that vessel is required to carry an observer, provided an observer is available, on its next trip.

(2) Sampling requirements for limited access Atlantic mackerel and longfin squid/butterfish moratorium permit holders. In addition to the requirements in paragraphs (d)(1) through (7) of this section, an owner or operator of a vessel issued a limited access Atlantic mackerel or longfin squid/butterfish moratorium permit on which a NMFS-approved observer is embarked must provide observers:

(i) A safe sampling station adjacent to the fish deck, including: A safety harness, if footing is compromised and grating systems are high above the deck; a safe method to obtain samples; and a storage space for baskets and sampling gear.

(ii) Reasonable assistance to enable observers to carry out their duties, including but not limited to assistance with: Obtaining and sorting samples; measuring decks, codends, and holding bins; collecting bycatch when requested by the observers; and collecting and carrying baskets of fish when requested by the observers.

(iii) Advance notice when pumping will be starting; when sampling of the catch may begin; and when pumping is coming to an end.

(3) Measures to address slippage. (i) No vessel issued a limited access Atlantic mackerel permit or a longfin squid/butterfish moratorium permit and carrying a NMFS-approved observer may release fish from the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea, unless the fish has first been brought on board the vessel and made available for sampling and inspection by the observer, except in the following circumstances:

(A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(B) A mechanical failure precludes bringing some or all of the catch on board the vessel for sampling and inspection; or

(C) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish that can be pumped from the net prior to release.

(ii) If fish are released prior to being brought on board the vessel, including catch released due to any of the exceptions in paragraphs (n)(3)(i)(A)-(C) of this section, the vessel operator must complete and sign a Released Catch Affidavit detailing the vessel name and permit number; the VTR serial number; where, when, and for what reason the catch was released; the estimated weight of each species brought on board (if only part of the tow was released) or released on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.  
50 CFR § 648.14

6. In § 648.14, paragraphs (g)(2)(v) through (vii) are added to read as follows:  
50 CFR § 648.14

**§ 648.14 Prohibitions.**

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(v) Reporting requirements in the limited access Atlantic mackerel and longfin squid/butterfish moratorium fisheries. (A) Fail to declare via VMS into the mackerel or longfin squid/butterfish fisheries by entering the fishery code prior to leaving port at the start of each trip to harvest, possess, or land Atlantic mackerel

or longfin squid, if a vessel has been issued a Limited Access Atlantic mackerel permit or **\*10048** longfin squid/butterfish moratorium permit, pursuant to § 648.10.

(B) Fail to notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to arrival, or, if fishing ends less than 6 hours before arrival, immediately upon leaving the fishing grounds, if a vessel has been issued a Limited Access Atlantic mackerel permit, pursuant to § 648.10.

(vi) Release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea before bringing the fish aboard and making it available to the observer for sampling, unless subject to one of the exemptions defined at § 648.11(n)(3) if issued a Limited Access Atlantic mackerel permit, or a longfin squid/butterfish moratorium permit.

(vii) Fail to complete, sign, and submit an affidavit if fish are released pursuant to the requirements at § 648.11(n)(3).

\* \* \* \* \*50 CFR § 648.22

7. In § 648.22, paragraphs (b)(2)(vi) and (b)(4) are added to read as follows:  
50 CFR § 648.22

**§ 648.22 Atlantic mackerel, squid, and butterfish specifications.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(vi) River herring and shad catch cap. The Monitoring Committee shall provide recommendations regarding a cap on the catch of river herring (alewife and blueback) and shad (American and hickory) in the Atlantic mackerel fishery based on best available scientific information, as well as measures (seasonal or regional quotas, closure thresholds) necessary for implementation.

\* \* \* \* \*

(4) Additional measures. The Monitoring Committee may also provide recommendations on the following items, if necessary:

(i) Observer provisions to maximize sampling at § 648.11(n)(2);

(ii) Exceptions for the requirement to pump/haul aboard all fish from net for inspection by at-sea observers in § 648.11(n)(3);

\* \* \* \* \*50 CFR § 648.25

8. In § 648.25, paragraph (a)(1) is revised to read as follows:  
50 CFR § 648.25

**§ 648.25 Atlantic mackerel, squid and butterfish framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The

MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions, recreational possession limit; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial quota system, including commercial quota allocation procedure and possible quota set-asides to mitigate bycatch; recreational harvest limit; annual specification quota setting process; FMP Monitoring Committee composition and process; description and identification of EFH (and fishing gear management measures that impact EFH); description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on vessel size (LOA and GRT) or shaft horsepower; any other management measures currently included in the FMP, set aside quota for scientific research, regional management; process for inseason adjustment to the annual specification; mortality caps for river herring and shad species; time/area management for river herring and shad species; and provisions for river herring and shad incidental catch avoidance program, including adjustments to the mechanism and process for tracking fleet activity, reporting incidental catch events, compiling data, and notifying the fleet of changes to the area(s); the definition/duration of 'test tows,' if test tows would be utilized to determine the extent of river herring incidental catch in a particular area(s); the threshold for river herring incidental catch that would trigger the need for vessels to be alerted and move out of the area(s); the distance that vessels would be required to move from the area(s); and the time that vessels would be required to remain out of the area(s). Measures contained within this list that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.27

9. Remove § 648.27.

50 CFR § 648.27

**§ 648.27 [Removed]**

[FR Doc. 2014-03906 Filed 2-21-14; 8:45 am]

BILLING CODE 3510-22-P

**76 FR 23042-01**, 2011 WL 1527174(F.R.)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100923469-1211-02]

RIN 0648-BA27

Magnuson-Stevens Fishery Conservation and Management Act Provisions;  
Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery;  
Framework Adjustment 45  
Monday, April 25, 2011

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**\*23042 ACTION:** Final rule.

**SUMMARY:** This final rule partially approves Framework Adjustment (FW) 45 to the NE Multispecies Fishery Management Plan (FMP) and implements the approved measures. FW 45 was developed by the New England Fishery Management Council (Council) to make adjustments necessary to ensure that conservation and management objectives of the FMP, including preventing overfishing, rebuilding overfished stocks, achieving optimum yield (OY), and minimizing the economic impact of management measures on affected vessels, are being met in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Specifically, this action revises the biological reference points and stock status for pollock, updates annual catch limits (ACLs) for several stocks for fishing years (FYs) 2011-2012, adjusts the rebuilding program for Georges Bank (GB) yellowtail flounder, increases scallop vessel access to the Great South Channel Exemption Area, approves five new sectors, modifies the existing dockside and at-sea monitoring requirements, revises several sector administrative provisions, establishes a Gulf of Maine (GOM) Cod Spawning Protection Area, and refines measures affecting the operations of NE multispecies vessels fishing with handgear. This action approves the Council's proposed FY 2011 U.S./Canada Management Area total allowable catch (TAC), acceptable biological catch (ABC), and ACL for GB yellowtail flounder, but replaces them with new catch limits for this stock through a parallel emergency action, included as part of this final rule, based on the International Fisheries Agreement Clarification Act (IFACA) that provides new flexibility in setting catch limits for this stock. In addition, this action disapproves a measure to delay fishing industry responsibility for paying for at-sea monitoring coverage costs in FY 2012.

AA0276

This action is necessary to ensure that the fishery is managed on the basis of the best available science, to comply with the ABC control rules adopted in Amendment 16 to the FMP, and to enhance the viability of the fishery.

**DATES:** This rule is effective at 0001 hr on May 1, 2011. The specification of the GB yellowtail flounder ABC and ACL and their distribution are effective May 1, 2011, through October 24, 2011.

**ADDRESSES:** Copies of FW 45, its Regulatory Impact Review (RIR), a draft of the environmental assessment (EA) prepared for this action, and the draft Initial Regulatory Flexibility Act (IRFA) analysis prepared by the Council are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. A supplemental EA was also prepared for this action that outlines analysis in support of increased FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL implemented by this action. Also, an errata sheet was prepared to augment the FW 45 EA's analysis of the impacts of the proposed action on distinct population segments of Atlantic sturgeon and loggerhead sea turtles. The draft IRFA prepared by the Council was expanded upon in the preamble to the proposed rule for this action. The Final Regulatory Flexibility Act (FRFA) analysis consists of the IRFA, public comments and responses, and the summary of impacts, and alternatives contained in the Classification section of the preamble of this final rule and applicable sections of Framework 45. Copies of the small entity compliance guide, the errata sheet for the FW 45 EA, and the supplemental EA associated with this action are available from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930-2298. The FW 45 EA/RIR/IRFA, errata sheet, supplemental EA prepared for this action, and the relevant analyses for Amendment 16 and other recent actions are also accessible via the Internet at <http://www.nefmc.org/nemulti/index.html> or <http://www.nero.noaa.gov>. Copies of recent stock assessments for stocks managed by the FMP are also accessible via the Internet at <http://www.nefsc.noaa.gov/groundfish>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to the Office of Management and Budget (OMB) by e-mail at [OIRA-Submission@omb.eop.gov](mailto:OIRA-Submission@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:** Douglas W. Christel, Fishery Policy Analyst, phone: 978-281-9141, fax: 978-281-9135.

**SUPPLEMENTARY INFORMATION:**

### **Background**

Amendment 13 (April 27, 2004; 69 FR 22906) included the establishment of rebuilding programs for stocks managed by the FMP and measures necessary to end overfishing, rebuild overfished stocks, and help mitigate the economic impacts of effort reductions in the fishery to the extent practicable. In addition to revising existing days-at-sea (DAS) measures and substantially expanding sector measures, Amendment 16 (April 9, 2010; 75 FR 18262) established a process for specifying ABCs and ACLs and distributing available catch among components of the fishery that catch regulated species and ocean pout, and also specified accountability measures (AMs) necessary to prevent overfishing on these stocks and address overages of ACLs, as required by the Magnuson-Stevens Act. 16 U.S.C. 1801 et seq. In another action, FW 44 (April 9, 2010; 75 FR 18356), NMFS set the ACLs for FYs 2010 through 2012, and distributed such allocations among the various components of the fishery that catch these stocks.

The Council developed FW 45 as part of the established framework adjustment process to revise measures necessary to ensure consistency with the FMP in order to prevent overfishing and rebuild overfished stocks, while achieving OY in the fishery and minimizing economic impact to the extent practicable. Updated stock assessments for pollock and GB yellowtail flounder conducted in 2010 require the ACLs originally established under FW 44 pursuant to the ABC/ACL process established in Amendment 16 to be updated based upon revised stock status for pollock and a revised rebuilding program for GB yellowtail flounder. Further, following the transition to sectors under Amendment 16, the Council realized that several changes to existing measures are necessary to make the Amendment 16 measures work more effectively, as described below.

**\*23043** This rule also implements the parallel, but separate, emergency action that replaces the FW 45 FY 2011 GB yellowtail flounder TAC, ABC, and ACL based on the flexibility to increase catch limits provided by the IFACA, which President Obama signed into law on January 4, 2011. This Act provides authority to the Council and NMFS to increase the FY 2011 U.S./Canada Management Area TAC, ABC, and ACL for GB yellowtail flounder originally proposed by the Council under FW 45 and approved by this action. Specifically, the new statute recognizes the U.S./Canada Resource Sharing Understanding (Understanding) as an international agreement for the purposes of section 304(e)(4)(A)(ii) of the Magnuson-Stevens Act. Based on this recognition, the IFACA provides for additional flexibility regarding the range of catch levels that may be considered for GB yellowtail flounder, and allows for a higher yearly TAC and, therefore, ABC and ACL for this stock in FY 2011, provided that overfishing is ended immediately and that the fishing mortality rate (F) ensures rebuilding consistent with the Understanding. The justification for implementing these increases through

emergency action, as provided for in section 305(c) of the Magnuson-Stevens Act, is explained in the preamble to the proposed rule and is not repeated here.

Following the passage of the IFACA, NMFS requested a special meeting of the Transboundary Management Guidance Committee (TMGC), a group that consists of NMFS, Council members and staff, and United States fishing industry representatives and their counterparts in the Department of Fisheries and Ocean of Canada (DFO) that makes recommendations of the yearly TACs for stocks managed by the Understanding, to reconsider the FY 2011 U.S./Canada Management Area TAC for GB yellowtail flounder pursuant to the IFACA and the Understanding. On February 9, 2011, the TMGC held a conference call to consider revising the FY 2011 TAC for this stock, and concluded that the original combined U.S./Canada Management Area TAC for GB yellowtail flounder (1,900 mt) could be increased to 2,650 mt for FY 2011.

A proposed rule to implement measures proposed in FW 45 was published on March 3, 2011 (76 FR 11858), with public comments accepted through March 18, 2011. That proposed rule included a detailed description of the proposed management measures, and other factors that influenced the development of this action. Specifically, that rule indicated that NMFS was considering disapproving the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC adopted by the Council under FW 45, and implementing the increased TAC for this stock agreed to by the TMGC on February 9, 2011, through a parallel, but separate emergency action pursuant to section 305(c) of the Magnuson-Stevens Act. This parallel emergency action was proposed and justified in the same Federal Register notice as the proposed rule for this action, and is being promulgated as a final rule in this action as well. NMFS also published, at the same time as and in conjunction with the proposed rule for FW 45, a proposed rule to approve the FY 2011 operations plans and sector contracts for 19 sectors authorized by Amendment 16 and FW 45 (February 28, 2011; 76 FR 10852). Public comments on that rule were accepted through March 15, 2011. If approved, that rule would also specify the annual catch entitlements (ACEs, or sector quotas) for each stock allocated to each sector pursuant to Amendment 16 and sector rosters submitted to NMFS on December 1, 2010. This roster deadline was later extended to allow vessels involved in an ownership change to either join a sector or change its sector affiliation. A final rule implementing approved FY 2011 sector operations plans and ACE is expected to publish in conjunction with this final rule and become effective on May 1, 2011.

### **Disapproved Measures**

#### ***Delay in Industry Responsibility for At-Sea Monitoring Coverage***

In Amendment 16, the Council established monitoring measures to ensure that sector allocations of the ACLs for particular species could be accurately

monitored. These measures included the requirement for sectors to develop and pay for an at-sea monitoring program beginning in FY 2012 that meet a minimum level of coverage based on the precision of bycatch estimates. In the development of these measures, the Council noted that “effective management of sectors requires that catch be accurately known.” Thus, the at-sea monitoring provisions were developed to ensure that landings were accurately monitored for each sector. To reduce monitoring costs to industry, the Council proposed to delay the requirement for the fishing industry to pay for at-sea monitoring coverage in FW 45 by one year. However, without industry funding, NMFS funding would be the sole source for any at-sea or observer monitoring coverage during FY 2012. During the deliberation of this measure, NMFS expressed continued concern about the Council's reliance upon NMFS funding to fully support a provision required by the FMP, particularly the specific at-sea monitoring coverage levels outlined for sector-developed at-sea monitoring programs in Amendment 16 for FY 2012. Because NMFS' funding is not guaranteed and depends upon Congressional appropriations, it is likely that funding levels will fluctuate on a yearly basis and may not be sufficient to fully fund the at-sea monitoring coverage requirements in the FMP. The NMFS budget for FY 2012 has yet to be finalized. Accordingly, NMFS remains uncertain whether sufficient funding will exist in FY 2012 to provide sufficient coverage to accurately monitor sector catch, as required under Amendment 16.

NMFS has determined, therefore, that the proposed delay of industry funding for at-sea monitoring coverage in FY 2012 is inconsistent with the FMP and the requirements of the Magnuson-Stevens Act. First, such a delay, without sufficient federal funding for at-sea monitoring, would likely fail to maintain conservation and management measures that are necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, as required by section 303(a)(1) of the Magnuson-Stevens Act. As noted above, Amendment 16 indicated that sufficient at-sea monitoring coverage is necessary to ensure that catch is accurately known. Without the requirement for the industry to fund at sea monitoring in the absence of sufficient federal funding, it would not likely be possible to obtain sufficient accurate catch information, including information on discards that is most reliably acquired through observer and at-sea monitoring coverage. As a result, it would not likely be possible to effectively estimate F, evaluate whether overfishing is occurring, and develop ACLs and other measures that would prevent overfishing and rebuild overfished stocks. Further, by reducing the likelihood that sufficient funding will be available to provide adequate at-sea monitoring coverage necessary to accurately monitor catch in the fishery, the disapproved measure would have undermined measures in Amendment 16 that helped to ensure that the standardized reporting methodology

is capable of assessing the amount and type of bycatch occurring in the fishery, as required in section 303(a)(11). Accordingly, NMFS has disapproved \*23044the measure to delay making the industry responsible for the costs associated with at-sea monitoring in FY 2012 to the extent that the federal funds are not available. NMFS intends to pay for at least some level of at-sea monitoring coverage in 2012, as it has done every year, based on the amount of available funding, and will work toward trying to secure the funds necessary to fully support such coverage in 2012. However, industry shall be responsible for that balance of at-sea monitoring coverage costs that are not covered by available Federal funding starting in FY 2012.

### **Approved Measures**

The following summarizes the approved FW 45 measures, based on the order in which applicable provisions appear in the regulations at 50 CFR part 648. These measures build upon the provisions implemented by previous management actions, and are intended to either supplement or replace existing regulations, as described for each measure. This final rule also includes, through authority granted to NMFS by section 305(d) of the Magnuson-Stevens Act, revisions to regulations that are not specifically identified in FW 45, but that are necessary to implement measures to achieve, but not exceed the sub-ACLs available to the common pool fishery during FY 2011 and to correct errors in, or clarify, existing provisions, as described further below. A more detailed explanation of the rationale for each approved measure can be found in the proposed rule for this action.

Although NMFS proposed to disapprove the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL originally adopted by the Council under FW 45, NMFS ultimately decided not to disapprove these measures through this final rule, based upon further review of the FW 45 measures and applicable law. Disapproval of the TAC, ABC, and ACL proposed by FW 45 was not appropriate, because disapproval of a measure is only permissible if it is inconsistent with Magnuson-Stevens Act requirements and other applicable law. In the context of FW 45, these catch limits are consistent with the FMP and the Magnuson-Stevens Act requirements and other applicable law. These catch limits comply with the Magnuson-Stevens Act requirements to end overfishing and rebuild overfished stocks within 10 years. In addition, the FW 45 catch limits comply with the advice of the Council's Scientific and Statistical Committee in setting an ABC for this stock using the ABC control rule specified in the FMP and the best available scientific information. Further, the FW 45 ABC and ACL for GB yellowtail flounder incorporate both scientific and management uncertainty, consistent with the National Standard 1 guidelines. The fact that these proposed specifications for GB yellowtail flounder could be increased pursuant to IFACA does not undermine their approvability in FW 45. Moreover, if the emergency rule

increasing the ACL expires before the Council has recommended a new ACL for FY 2012, the approved Framework 45 measure could go into place automatically, thereby avoiding a gap in TACs, ABCs and ACLs for this stock.

Accordingly, this final rule approves the FY 2011 GB yellowtail flounder TAC, ABC, and ACL in FW 45, but temporarily replaces them, through NMFS' emergency action authority provided in section 305(c) of the Magnuson-Stevens Act, with the revised TAC, ABC, and ACL described further below in Item 5 of this preamble.

This parallel emergency action increasing FW 45's specifications of FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL is justified by, and based on, new legal authority stemming from the January 4, 2011, enactment of the IFACA, as more fully explained in the preamble to the proposed rule for this action. Pursuant to the requirements of IFACA that any new catch levels still prevent overfishing and are consistent with the U.S. Canada Understanding, NMFS held a TMGC conference call. As noted in the preamble of the proposed rule for this action, based on this TMGC conference call, a report was generated that concluded that the higher FY 2011 TAC for this stock specified in the proposed rule for this action and described further in Item 5 of this preamble would still likely prevent overfishing (i.e., result in a  $F$  below  $F$  at maximum sustainable yield ( $F_{MSY}$ , or  $F_{ref}$ , as listed in the Understanding)) and result in a 5 percent increase in median biomass from 2011 to 2012. Therefore, the increased TAC is consistent with the provisions of the IFACA and National Standards 1 and 8 of the Magnuson-Stevens Act because it prevents overfishing, is consistent with the  $F$  outlined in the Understanding, continues to rebuild this overfished stock, optimizes OY, and minimizes adverse economic impacts to fishing communities through higher catch limits and increased revenues, without compromising conservation objectives of the FMP and applicable law. Further, consistent with National Standard 9 of the Magnuson-Stevens Act, an increased TAC reduces bycatch and associated bycatch mortality in the fishery by increasing the amount of GB yellowtail flounder that can be caught during FY 2011 and minimizing incentives to discard this stock and others caught concurrently. However, this increase in catch limits for GB yellowtail flounder is only valid for the duration of the emergency and one extension (i.e., FY 2011). To justify comparable increases in catch limits for future fishing years, the Council must adjust the FMP to establish a new rebuilding program and timeline consistent with IFACA as more fully discussed below in item 2.

### **1. Status Determination Criteria for Pollock**

Based upon an updated peer-reviewed benchmark stock assessment conducted in July 2010 (Stock Assessment Workshop, or SAW, 50), pollock is not overfished or subject to overfishing. Thus, this species no longer requires the rebuilding program

established in Amendment 16. As noted in the preamble of the proposed rule for this action, NMFS implemented an emergency action on July 20, 2010 (75 FR 41996) to incorporate the results of this assessment and update the status determination criteria and the associated FY 2010 ABC and ACL for this species. These increased catch limits were renewed through July 17, 2011, or until replaced by another action through a notice published on December 1, 2010 (75 FR 74661). Therefore, formally integrating the results of the 2010 pollock stock assessment, updated status determination criteria, ABC, and ACLs for this species into the FMP through this final rule is necessary to replace the measures implemented by the emergency action that would expire in July 2011. Table 1 lists the revised status determination criteria, with numerical estimates of these parameters listed in Table 2. The revised biomass target parameter for pollock, where spawning stock biomass is at maximum sustainable yield (SSB<sub>MSY</sub>) or its proxy, is SSB at 40 percent maximum spawning potential (MSP). The maximum F threshold is the F<sub>MSY</sub> proxy, or F<sub>40%MSP</sub>.

**Table 1—Description of the Updated Pollock Status Determination Criteria**

Species	Biomass target ( $B_{\text{target}}$ )	Minimum biomass threshold	Maximum fishing mortality threshold
Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 45; Final Rule and Interim Final Rule Pollock	SSB— G073MSY: SSB/R (40%MSP)	$\frac{1}{2} B$ — G073target	F— G07340%MSP

**Table 2—Numerical Estimates for the Updated Pollock Status Determination Criteria**

Species	Biomass target (SSB <sub>MSY</sub> or proxy) in mt	Maximum fishing mortality	MSY in mt
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		<b>threshold (F<sub>MSY</sub> or proxy)</b>	
Pollock	91,000	0.41	16,200

### **\*23045 2. Rebuilding Program for GB Yellowtail Flounder**

Recent estimates of the status of GB yellowtail flounder conducted by the Transboundary Resource Assessment Committee (TRAC) in July 2010 indicate that overfishing is not occurring, but that the stock is still in an overfished condition (TRAC 2010/05). This report concludes that it is not possible to rebuild this stock by 2014, the end of the eight-year rebuilding period originally adopted in FW 42 (October 23, 2006; 71 FR 62156), with a 75 percent probability of success even at  $F = 0$ . Accordingly, this action revises the GB yellowtail flounder rebuilding program to rebuild the stock by 2016, with a 50-percent probability of success. This revision extends the rebuilding program for this stock out to a 10-year rebuilding period and lowers the probability of success from 75 percent to 50 percent in order to maximize the amount of GB yellowtail flounder that could be caught while the stock rebuilds.

IFACA allows the Secretary and the Council to extend the rebuilding period for stocks, or portions of stocks, managed by the Understanding. However, because IFACA was enacted after FW 45 was developed and approved by the Council, the extension of the rebuilding period for GB yellowtail flounder was restricted to 10 years. To maintain increases in GB yellowtail flounder catch comparable to the emergency increase for FY 11 after the emergency increase for FY 2011 expires, the Council would need to consider revising the FMP's rebuilding program and timeline for this stock consistent with the flexibility provided by IFACA. This would allow the Council to further mitigate the adverse economic impacts of efforts to rebuild this stock beyond that which was considered by the Council in the development of the revised GB yellowtail flounder rebuilding program included in FW 45. Therefore, NMFS recommends that the Council reevaluate the GB yellowtail flounder rebuilding program approved under FW 45, and consider extending the rebuilding program for this stock consistent with IFACA and implementing, if justified, the higher catch limits for this stock for future FYs.

### **3. Overfishing Levels and ABCs for Particular Stocks**

This action revises the OFLs and ABCs of particular stocks, including GB cod, GB haddock, GB yellowtail flounder, and pollock for FYs 2011 and 2012. Revisions to the OFLs and ABCs for pollock and GB yellowtail flounder are based upon the updated assessments and revised rebuilding strategies for these stocks, as described in Items 1 and 2 of this preamble, respectively, and on the flexibility afforded by IFACA for GB yellowtail flounder, as described in Item 5 of this preamble.

Revisions to the OFLs and ABCs for the GB cod and GB haddock stocks are based

upon updated TRAC assessments of the eastern components of the stock. It is anticipated that the FY 2012 values of the ABCs for GB cod, GB haddock, and GB yellowtail flounder will be revised during 2011, based on new transboundary stock assessments conducted by the TRAC, and will likely be specified again in conjunction with the FY 2012 U.S./Canada Management Area TAC levels, as further described in Item 5 of this preamble. Table 3 contains the OFLs and ABCs for FYs 2011 and 2012 approved under FW 45, with the exception of GB yellowtail flounder.

For GB yellowtail flounder, the FY 2011 U.S. ABC shown in Table 3 represents a revised shared U.S./Canada Management Area TAC based upon, and consistent with, determinations and decisions about this stock by the TMGC, pursuant to the Understanding and the flexibility afforded by the IFACA. Because the U.S./Canada Management Area represents the entire stock area for GB yellowtail flounder, the shared U.S./Canada Management Area TAC for this stock that is available to the U.S. fishery also represents the ABC for this stock. The revised ABC agreed to by the TMGC is consistent with the provisions of IFACA and the harvest strategy of the Understanding that requires overfishing to be prevented and the facilitation of the rebuilding of overfished stocks. NMFS is implementing the revised FY 2011 ABC for this stock as a separate, but parallel, action to FW 45 pursuant to its emergency action authority specified in section 305(c) of the Magnuson-Stevens Act, as further described in the proposed rule for this action. As noted above, the duration of this proposed revision to the GB yellowtail flounder ABC is limited by the Magnuson-Stevens Act to 180 days (i.e., through October 24, 2011), but may be extended to make the revised ABC and ACL effective for the duration of FY 2011 (through April 30, 2012).

**Table 3—Revisions to Overfishing Levels and Acceptable Biological Catches**

Stock	OFL (mt, live weight) FY 2011	U.S. ABC (mt, live weight)		
		FY 2012	FY 2011	FY 2012
GB cod	7,311	* 8,090	4,766	* 5,364
GB haddock	59,948	* 51,150	34,244	* 29,016
GB yellowtail flounder:				
Proposed in FW 45	3,495	* 4,335	** 1,458	* 1,222
Emergency Action	3,495	* 4,335	1,099	* 1,222
White hake	4,805	5,306	3,295	3,638
Pollock	21,853	19,887	16,900	15,400

**\*23046 4. Revisions to ACLs**

Similar to adjustments in the OFLs and ABCs described in Item 3 of this preamble, this action revises the ACLs for several stocks, including GB cod, GB haddock,

GB yellowtail flounder, white hake, and pollock. Pursuant to Magnuson-Stevens Act requirements and the process specified in Amendment 16, the ACLs adopted in this action are lower than the ABCs listed above for these stocks to account for management uncertainty, as detailed in Appendix II of FW 45 (see ADDRESSES) and summarized in the proposed rule for this action. For most stocks and components of the fishery (ABC components), the default adjustment (reduction) to the catch level for a fishery component to account for management uncertainty was 5 percent. For stocks with less management uncertainty, the adjustment was 3 percent, and for those stocks or components with more management uncertainty, the adjustment was 7 percent. The total ACL for a stock represents the catch limit for a particular FY, considering both biological and management uncertainty, and the limit includes all sources of catch (landed and discards) and all fisheries (commercial and recreational groundfish fishery, state-waters catch, and non-groundfish fisheries).

The allocation of yellowtail flounder to the scallop fishery is not changed by this action. Thus, the SNE/MA yellowtail flounder allocations to the scallop fishery listed in Tables 5 and 6 are the same amounts implemented under FW 44, with the allocation of SNE/MA yellowtail flounder remaining at 82 and 127 mt, live weight, during FYs 2011 and 2012, respectively; the GB yellowtail flounder allocations to the scallop fishery listed in Tables 11 and 12 remain at 200.8 and 307.5 mt, live weight, during FYs 2011 and 2012, respectively. No specific allocation of Cape Cod (CC)/GOM yellowtail flounder is made to the scallop fishery, because the incidental catches of this stock by the scallop fishery are relatively low. Catches of this stock will be considered part of the “other sub-component” of the ACL.

Current regulations set a cap on the amount of yellowtail flounder that may be harvested from the scallop access areas in the SNE/MA and GB yellowtail flounder stock areas. Specifically, current regulations cap yellowtail flounder harvest from scallop access areas at 10 percent of the “total TAC” for each of the stock areas. In light of the ACL components, “total TAC” means “total ACL.” For FY 2011, this means 10 percent of 1,416 mt (141.6 mt) for GB yellowtail flounder, as listed in Table 11.

This action updates the existing allocation of 0.2 percent of the U.S. ABC for GB and GOM haddock to the mid-water trawl fishery based on changes to the GB haddock ABC described above. The values for the allocations to the mid-water trawl fishery listed in Table 5 are slightly less than 0.2 percent, due to the 7-percent reduction of these allocations to account for management uncertainty for this stock. For example, the FY 2011 ABC of 32,244 mt was multiplied by 0.002 ( $32,244 \text{ mt} \times .002 = 68.5 \text{ mt}$ ), and then reduced by 4.79 mt ( $68.5 \text{ mt} \times 0.07 = 4.79 \text{ mt}$ ) to arrive at the proposed allocation of 64 mt. Because the herring fishery already has AMs

associated with this allocation that were developed as part of FW 43 (August 15, 2006; 71 FR 46871), all of the haddock allocations to the mid-water trawl fishery are characterized as sub-ACLs.

Tables 5 through 8 list the distribution of the total ACL for stocks affected by measures in FW 45 to the groundfish fishery, the scallop fishery, the mid-water trawl herring fishery, state waters fisheries, and other fishery sub-components, such as exempted fisheries. A full list of the FY 2011 ACLs will be sent to NE multispecies permit holders and posted on the NMFS Northeast Regional Office Web site (<http://www.nero.noaa.gov>). As noted in the FW 44 final rule, while ACLs are specified through FY 2012 for most stocks, it is likely that the Council will adopt ACLs for FYs 2012 through 2014 through a future Council action. Therefore, ACLs specified through FY 2012 in FW 44 and this action will only be implemented if the anticipated Council action is delayed. In contrast, the pollock ACLs are not expected to be revisited until FY 2013, with any changes effective for FY 2014. The ACL listed in Table 5 for white hake corrects an error published in Table 4 of both the FW 44 proposed (February 1, 2010; 75 FR 5021) and final rules, respectively, that listed the commercial sub-ACL for white hake for FY 2011 as 2,566 mt (the FY 2010 value) instead of the correct value of 2,974 mt.

**Table 5—Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2011**

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters sub-component	Other ACL sub components
GB cod	4,540	4,301	0	0	48	191
GB haddock	32,616	30,840	0	64	342	1,370
SNE/MA yellowtail flounder	641	524	82	0	0	27
White hake	3,138	2,974	0	0	33	132
Pollock	16,166	13,952	0	0	769	1,445

**Table 6—Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2012**

[Mt, live weight]

<b>Stock</b>	<b>Total ACL</b>	<b>Groundfish sub-ACL</b>	<b>Scallop fishery</b>	<b>Mid-water trawl herring fishery</b>	<b>State waters ACL sub-component</b>	<b>Other ACL sub components</b>
GB cod *	5,109	4,841	0	0	54	215
GB haddock *	27,637	26,132	0	54	290	1,161
SNE/MA Yellowtail flounder	936	759	127	0	0	40
White hake	3,465	3,283	0	0	36	146
Pollock	14,736	12,612	0	0	754	1,370

**Table 7—Pollock Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2013**

[Mt, live weight]

<b>Stock</b>	<b>Total ACL</b>	<b>Groundfish sub-ACL</b>	<b>Scallop fishery</b>	<b>Mid-water trawl herring fishery</b>	<b>State waters ACL sub-component</b>	<b>Other ACL sub components</b>
Pollock	14,927	12,791	0	0	756	1,380

**Table 8—Pollock Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2014**

[Mt, live weight]

<b>Stock</b>	<b>Total ACL</b>	<b>Groundfish sub-ACL</b>	<b>Scallop fishery</b>	<b>Mid-water trawl herring fishery</b>	<b>State waters ACL sub-component</b>	<b>Other ACL sub components</b>
Pollock	15,308	13,148	0	0	760	1,400

\*23047 The commercial groundfish sub-ACL is further divided into the non-sector (common pool vessels) sub-ACL and the sector sub-ACL, based on the total vessel/permit enrollment in all sectors and the cumulative Potential Sector Contributions (PSCs) associated with those sectors. Table 9 lists the preliminary

distribution of the groundfish sub-ACL between common pool and sectors based on rosters submitted to NMFS as of December 1, 2010. FY 2011 sector rosters will not be finalized until May 1, 2011, because the owners of individual permits signed up to participate in sectors have until April 30, 2011, to drop out of a sector and fish in the common pool and can either join a sector or change its sector affiliation based on an ownership change that occurred after December 1, 2011. Therefore, it is possible that the FY 2011 sector sub-ACL listed in Table 9 and the final rule to approve the FY 2011 sector operations plans will be changed at a later date. Based on the final sector rosters, NMFS intends to publish a rule in early May 2011 to modify these sub-ACLs, and notify the public if these numbers change. In addition, it is almost certain that all of the FY 2012 sub-ACLs for the common pool and sectors will change and be re-specified prior to FY 2012 due to annual changes to the sector rosters and changes to the ABCs for GB cod, GB haddock, and GB yellowtail flounder based on the specification of Canadian TACs for these stocks, as described above in Item 5 of this preamble.

**Table 9—Preliminary Distribution of Groundfish Sub-ACL Between Common Pool and Sector Vessels**

[Mt, live weight]\*

Stock	Groundfish sub-ACL		Common pool sub-ACL			Sector sub-ACL	
	FY 2011	FY 2012	FY 2011	FY 2012	FY 2011	FY 2012	
GB cod	4,301	4,841	99	111	4,202	4,730	
GB haddock	30,840	26,132	129	109	30,711	26,023	
GB yellowtail flounder:							
	Proposed in FW 45 **##790.7	686.3	23.7	20.6	767	665.7	
	Emergency Action ***##1,142	1,142	17.4	17.4	1,124.6	1,124.6	
White hake	2,974	3,283	35	39	2,939	3,244	
Pollock	13,952	12,612	138	125	13,814	12,487	

**\*23048 5. Annual Specifications for the U.S./Canada Management Area**

Annual TACs for transboundary stocks jointly managed with Canada as part of the Understanding (Eastern GB cod, Eastern GB haddock, and GB yellowtail flounder) are determined through a process involving the Council, the TMGC, and the U.S./Canada Steering Committee. The recommended FY 2011 TACs for Eastern GB cod and Eastern GB haddock were based on the most recent stock assessments (TRAC Status Reports for 2010), and the fishing mortality strategy shared by NMFS and the DFO. The TMGC concluded that the most appropriate combined

U.S./Canada TAC for Eastern GB cod and Eastern GB haddock for FY 2011 is 1,050 mt and 22,000 mt, respectively. The annual allocation shares between countries for FY 2011 are based on a combination of historical catches (10-percent weighting) and resource distribution based on trawl surveys (90-percent weighting). Applying this formula results in an allocation of 19 percent of the shared Eastern GB cod TAC to the U.S. and 81 percent for Canada, or a FY 2011 quota of 200 mt for the U.S. and 850 mt for Canada. Applying the same formula for Eastern GB haddock results in an allocation of 43 percent of the shared TAC to the U.S. and 57 percent to Canada, or a FY 2011 quota of 9,640 mt for the U.S. and 12,540 mt for Canada.

For GB yellowtail flounder, the TMGC originally recommended, the Council adopted, and NMFS approved under FW 45, a combined U.S./Canada Management Area TAC of 1,900 mt, resulting in a FY 2011 quota of 1,045 mt for the U.S. and an 855 mt quota for Canada. However, the TMGC agreed to a revised shared GB yellowtail flounder TAC for FY 2011 of 2,650 mt that is being implemented through a parallel emergency action, based on the new flexibility provided by IFACA for FY 2011, as discussed above in this preamble.

Table 10 lists the FY 2011 U.S./Canada Management Area TACs for all stocks managed by the Understanding, with the FY 2011 GB yellowtail flounder TAC reflecting the increased TAC recommended by the TMGC following its February 9, 2011, conference call.

**Table 10—2011 U.S./Canada TACs (Mt, Live Weight) and Percentage Shares [In parentheses]**

		<b>Eastern GB cod</b>	<b>Eastern GB haddock</b>	<b>GB Yellowtail flounder</b>
Proposed in FW 45	Total Shared TAC	1,050	22,000	1,900
	U.S. TAC	200 (19%)	9,640 (43%)	1,045 (55%)
	Canada TAC	850 (81%)	12,540 (57%)	855 (45%)
Emergency Action	Total Shared TAC	1,050	22,000	2,650
	U.S. TAC	200 (19%)	9,640 (43%)	1,458 (55%)
	Canada TAC	850 (81%)	12,540 (57%)	1,193 (45%)

Because the U.S./Canada Management Area represents the entire stock area for GB yellowtail flounder, the U.S./Canada Management Area TAC that is available to the U.S. fishery also represents the ABC for this stock. After management uncertainty is deducted from the ABC, the amount that is available to the U.S. fishery represents the ACL for this stock. Thus, the revised GB yellowtail flounder TAC specified in this action also requires applicable changes to the ACL, and how the ACL for this stock is distributed to the various components of the fishery that

catch this stock that were adopted by the Council in FW 45. The revised GB yellowtail flounder ACL, sub-ACL, and ACL sub-components are specified in Tables 11 and 12 for FYs 2011 and 2012, respectively. The revised U.S./Canada TAC for GB yellowtail flounder does not affect the sub-ACL for the scallop fishery specified by FW 45 as 200.8 mt.

**Table 11—GB Yellowtail Flounder Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2011**

[Mt, live weight]

Action	Total ACL*	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Proposed in FW 45	1,045	790.7	200.8	0	0	53.5
Emergency Action	1,416	1,142	200.8	0	0	73

**Table 12—Revised GB Yellowtail Flounder Total ACL, Sub-ACL, and ACL-Subcomponents for FY 2012**

[Mt, live weight]

Action	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Proposed in FW 45	1,045	686.3	307.5	0	0	51.2
Emergency Action	1,426	1,046	307.5	0	0	77

\***23049** The regulations related to the Understanding, promulgated by the final rule implementing Amendment 13, state that “any overages of the GB cod, haddock, or yellowtail flounder TACs that occur in a given fishing year will be subtracted from the respective TAC in the following fishing year.” Therefore, if an analysis of the catch of the shared stocks by U.S. vessels indicates that an over-harvest occurred during FY 2010, the pertinent components of the ACL would be adjusted

downward in order to be consistent with the FMP and Understanding. If an adjustment to one of the FY 2011 TACs of cod, haddock, or yellowtail flounder is necessary, it will be done consistent with the Administrative Procedure Act, and the fishing industry will also be notified.

#### **6. Incidental Catch TACs and Allocations to Special Management Programs**

Incidental catch TACs are specified for certain stocks of concern (i.e., stocks that are overfished or subject to overfishing) for common pool vessels fishing in the special management programs (i.e., special access programs (SAPs) and the Regular B DAS Program), in order to limit the amount of catch of these stocks caught under such programs. The incidental catch TACs apply to catch (landings and discards) on trips that end on a Category B DAS (either Regular or Reserve B DAS). Catch of such stocks on trips that start under a Category B DAS and then flip to a Category A DAS do not accrue toward incidental catch TACs, but rather the overall common pool sub-ACL for that stock. Because pollock is no longer considered overfished or subject to overfishing, this action removes this species from the list of stocks of concern, and eliminates the incidental catch TAC for this stock.

This final rule specifies incidental catch TACs applicable to the NE multispecies special management programs for FYs 2011 and 2012, based on the common pool sub-ACLs listed in Item 4 of this preamble (see Tables 13-15). As noted above, FY 2011 sector rosters will not be finalized until May 1, 2011. Therefore, the amount of the common pool sub-ACL may change based upon changes to the number of vessels participating in the common pool during FY 2011. Based on the final rosters, NMFS will publish a rule in early May 2011 to modify these sub-ACLs, and notify the public if these numbers change.

**Table 13—Preliminary Common pool Incidental Catch TACs by Stock for FY 2011—2012**

<b>[Mt, live weight]</b>			
<b>Stock</b>	<b>Percentage of sub-ACL</b>	<b>2011</b>	<b>2012</b>
		<b>Incidental catch TAC</b>	
		<b>Incidental catch TAC</b>	
GB cod	2	2.0	2.2
GOM cod	1	1.3	1.3
GB yellowtail flounder	2	0.3	0.3
CC/GOM yellowtail flounder	1	0.3	0.4

SNE/MA yellowtail flounder	1	1.1	1.7
American plaice	5	3.9	4.1
Witch flounder	5	1.2	1.2
SNE/MA winter flounder	1	7.3	7.6
GB winter flounder	2	0.3	0.3
White hake	2	0.7	0.8

**Table 14—Distribution of Incidental Catch TACs Among Special Management Programs**

[Mt, live weight]

Stock	Regular B DAS program	Closed area I hook gear haddock SAP (%)	Eastern U.S./Canada haddock SAP (%)
GB cod	50	16	34
GOM cod	100	na	na
GB yellowtail flounder	50	na	50
CC/GOM yellowtail flounder	100	na	na
SNE/MA yellowtail flounder	100	na	na
Plaice	100	na	na
Witch flounder	100	na	na
SNE/MA winter flounder	100	na	na
GB winter flounder	50	na	50
White hake	100	na	na
Pollock	50	16	34

**Table 15—Incidental Catch TACs for Special Management Programs by Stock for FY 2011-2012**

[Mt, live weight]

Stock	Regular B DAS program		Closed area I hook gear haddock SAP		Eastern U.S./Canada haddock SAP	FY 2012
	FY 2011	FY 2012	FY 2011	FY 2012	FY 2011	
GB cod	1.0	1.1	0.3	0.4	0.7	0.8
GOM cod	1.3	1.3	na	na	na	na
GB yellowtail flounder	0.15	0.15	na	na	0.1	0.1
CC/GOM yellowtail flounder	0.3	0.4	na	na	na	na
SNE/MA yellowtail flounder	1.1	1.7	na	na	na	na
American plaice	3.9	4.1	na	na	na	na
Witch flounder	1.2	1.2	na	na	na	na
SNE/MA winter flounder	7.3	7.6	na	na	na	na
GB winter flounder	0.1	0.2	na	na	0.1	0.2
White hake	0.7	0.8	na	na	na	na

**\*23050** In addition to the incidental catch TAC for GB cod, overall fishing effort by both common pool and sector vessels in the Closed Area I Hook Gear Haddock SAP is also controlled by an overall TAC for GB haddock, the target species for this SAP. For FY 2011, the overall haddock TAC for the Closed Area I Hook Gear Haddock SAP applicable to both common pool and sector vessels participating in this SAP is 3157.5 mt (6,961,096 lb or 3,157,553 kg) based on TACs specified in FW 44. Once this overall haddock TAC is caught, the Closed Area I Hook Gear Haddock SAP will be closed to all groundfish vessels for the remainder of FY 2011.

### **7. Great South Channel Exemption Area**

This action eliminates the yellowtail flounder spawning closure areas within the Great South Channel Exemption Area, and allows all scallop vessels, including limited access general category (LAGC) scallop vessels, to fish within this area throughout the entire year in accordance with applicable scallop regulations. Since the August 31, 2006, rulemaking (71 FR 51779) that created the Great South Channel Exemption Area and the associated yellowtail flounder spawning closure areas, the general category scallop permits have become limited access permits

subject to an individual fishing quota (IFQ) that limit the amount of scallops and, therefore, regulated species and ocean pout, particularly yellowtail flounder, caught by these vessels. Thus, the main justification for the spawning protection areas for LAGC scallop vessels is no longer relevant.

### **8. GOM Cod Spawning Protection Area**

To protect spawning aggregations of GOM cod and prevent fishing from interfering with spawning activity, this final rule creates the GOM Cod Spawning Protection Area. This area is rectangular in shape and is located just south of the Isle of Shoals off the New Hampshire coastline, with its long axis oriented in a northwest to southeast direction. All commercial fishing vessels using gear capable of catching groundfish are prohibited from fishing within the proposed area from June 1 through June 30 of each year, while all recreational vessels (private and charter/party vessels) are prohibited from using gear capable of catching groundfish in the area from April 1 through June 30 of each year. For commercial vessels, only vessels fishing with “exempted gear,” as defined in the current regulations, are allowed into this area during the closure periods. Exempted gear includes pelagic hook and line gear, pelagic longline gear, spears, rakes, diving gear, cast nets, tongs, harpoons, weirs, dipnets, stop nets, pound nets, pelagic gillnets, pots and traps, shrimp trawls with a properly configured grate, and surfclam and ocean quahog dredges. Therefore, because midwater trawl gear and purse seine gear is not listed as exempted gear, vessels fishing with these gear types may not fish in this area during June of each year. Only pelagic hook-and-line gear, as defined in the current regulations, is allowed to be used in the area by recreational vessels. The catch or possession of any regulated species or ocean pout by vessels using the exempted gear from April 1 through June 30 of each year is prohibited. Both recreational and commercial vessels are allowed to transit the proposed area, provided all gear is stowed according to existing regulations.

### **\*23051 9. Handgear A and B Measures**

#### **Cod Trip Limit**

Through this final rule, the cod trip limits applicable to NE multispecies Handgear A (limited access) and B (open access) vessels are revised to be specific to either the GOM or GB cod stock, including any adjustments to such trip limits. Handgear A vessels are subject to an initial cod limit of 300 lb (135 kg) per trip for both the GOM and GB cod stocks, until NMFS adjusts the cod trip limit applicable to common pool vessels fishing under a NE multispecies DAS for either of these stocks below 300 lb (135 kg) per trip. Once either the GOM or the GB cod trip limit for common pool DAS vessels is reduced below 300 lb (135 kg) per DAS, the applicable cod trip limit for Handgear A vessels will be adjusted to be the same as the daily limit for common pool DAS vessels. For example, if only the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per

DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area (i.e., the area specified for the GOM cod trip limit) would also be reduced to 250 lb (113.4 kg) per trip; however, under this example, the cod trip limit for a Handgear A vessel fishing for GB cod south of the GOM Regulated Mesh Area (RMA) (the GB cod stock area is considered the GB, SNE, and MA RMAs) would be maintained at 300 lb (135 kg) per trip. The initial Handgear B cod limit for both the GOM and GB stocks is maintained at 75 lb (90.7 kg) per trip, but will be adjusted proportional (rounded up to the nearest 25 lb (11.4 kg)) to any changes in the daily GOM or GB cod trip limits for DAS vessels in the future, as necessary. For example, if the GOM cod trip limit was reduced by 50 percent from 800 lb (362.9 kg) per DAS to 400 lb (181.4 kg) per DAS, then the cod trip limit for a Handgear B vessel fishing in the GOM Regulated Mesh Area would also be reduced by 50 percent to 37.5 lb (17 kg), rounded to the nearest 25 lb (11.3 kg), or 50 lb (22.7 kg) per trip. In this example, the cod trip limit for a Handgear B vessel fishing for GB cod south of the GOM RMA would be maintained at 75 lb (90.7 kg) per trip.

To fish for GB cod south of the GOM Regulated Mesh Area for a particular period of time, the owner or operator of a Handgear A or B vessel must obtain and retain on board a paper letter of authorization (LOA) from the Regional Administrator (RA) to fish, unless otherwise noted below. The minimum participation period for this LOA is 7 consecutive days to minimize the administrative burden of this provision, consistent with existing practice for LOAs issued to DAS vessels. Once a vessel owner or operator has obtained a paper LOA to fish south of the GOM RMA, the owner or operator may not fish in the GOM RMA for the duration of the LOA. This requirement is necessary to more effectively enforce this measure.

Alternatively, the owner or operator of a Handgear A permitted vessel, who does not obtain the paper LOA, but elects or is required to have a VMS may fish for GB cod south of the GOM RMA by declaring an intent to fish for GB cod south of the GOM RMA prior to each trip via a vessel monitoring system (VMS) (i.e., when fishing in multiple broad stock areas on the same trip). If a vessel declares via VMS instead of obtaining a paper LOA, this VMS declaration is required on a trip-by-trip basis, and no minimum participation period is necessary. These declarations enable at-sea enforcement personnel to identify the applicable cod trip limits and effectively enforce the appropriate regulations during boarding operations.

#### **Access to Seasonal Closure Areas**

To ensure that handgear-permitted vessels are provided an opportunity to fish during at least the early part of the FY, this action exempts both Handgear A and B vessels from the GB Seasonal Closure Area defined in § 648.81(g), and allows Handgear A vessels to also fish in the Sector Rolling Closure Areas defined in §

648.81(f)(2)(vi)(A) through (C), and depicted in section 4.3.3 of FW 45. These latter areas represent smaller portions of the GOM Rolling Closure Areas, and enable Handgear A vessels fishing in the GOM a greater chance at catching some of the available sub-ACLs for cod and haddock during a particular FY before such trip limits are reduced to prevent the ACL from being exceeded.

#### **10. Dockside/Roving Monitor Requirements**

##### **Delay in Requirement for Industry To Fund Dockside/Roving Monitors**

To address concerns regarding the ability of the fishing industry to pay for the costs of a dockside/roving monitoring program, as originally implemented under Amendment 16 in 2010, this action delays the industry's responsibility for paying for dockside/roving monitoring coverage until FY 2013. None of the costs associated with dockside/roving monitors during FYs 2011 and 2012 will be imposed upon the owner or operator of a NE multispecies vessel. NMFS will attempt to provide sufficient dockside/roving monitoring coverage to observe the offloads of up to 100 percent of sector trips and, starting in FY 2012, common pool trips as well, if funds are available. If funds are not available for monitoring 100 percent of commercial groundfish trips, NMFS must first provide dockside/roving monitor coverage to trips that do not have an observer, at-sea monitor, or an approved electronic monitoring program. To enable dockside/roving monitors to more easily identify trips that are assigned an observer or at-sea monitor, vessels must declare whether an observer or at-sea monitor has been assigned to that trip via the trip-start hail report. For FY 2011, NMFS estimates that it has sufficient funding to cover approximately 100 percent of sector trips that are not assigned an observer or at-sea monitor. NMFS will specify coverage levels for FY 2012 based upon available NMFS funding.

##### **Dockside/Roving Monitoring Program Requirements Beginning in FY 2013**

Starting in 2013, sectors must develop and pay for a dockside/roving monitoring program as part of their annual operations plans, common pool vessels will be subject to dockside/roving monitoring upon the transition to a trimester TAC AM, vessels must comply with the trip-start and trip-end hail reporting requirements associated with at-sea and dockside monitoring programs, and dockside/roving monitoring service providers must observe the landings of 20 percent of all common pool and sector trips in a statistically random manner. To facilitate administration and compliance with the dockside/roving monitoring operational standards specified at § 648.87(b)(5), this action revises the regulations at § 648.82(n)(2)(iv) to clearly state that the owner or operator of each common pool vessel subject to dockside/roving monitoring requirements must contract for such services with a service provider approved by NMFS by 2013. The need for vessel owners to contract with a specific service provider is necessary in the absence of any NMFS-controlled dockside/roving monitoring program in which NMFS can

act as a mediator between the fishing industry and approved service providers. Further, because each individual permit is considered a separate legal entity, NMFS is not inclined to mandate that common pool vessels use a particular service provider in a particular FY in order to increase competition among service providers and potentially \*23052 decrease costs to the affected vessel owners. Groups of vessel owners, however, may elect to contract with the same service provider to help lower the costs associated with such requirements.

### **Exemption of the Dockside/Roving Monitor Requirements for Certain Permit Categories**

Vessels issued a limited access NE multispecies Handgear A, Handgear B, and Small Vessel category permit are exempt from any dockside/roving monitoring requirements when operating in the common pool. Given this exemption, it is not possible for dockside/roving monitor service providers to provide statistically random coverage of all common pool trips, as required under Amendment 16, because not all common pool trips are subject to dockside/roving monitoring requirements. Therefore, the dockside/roving monitoring coverage regulations have been revised to accommodate this exemption, and specify that service providers must provide random coverage of all trips subject to the dockside/roving monitoring requirements.

### **Trip-End Hail Requirement**

To facilitate dockside intercepts by both state and Federal enforcement personnel, beginning in FY 2011, all sector vessels and common pool vessels fishing under a DAS must submit a trip-end hail report via VMS prior to returning to port on each trip. Vessels subject to dockside monitoring (i.e., sector vessels starting in FY 2010 and common pool vessels starting in FY 2012) are required to submit both a trip-start and a trip-end hail report for that trip, consistent with current practice. The trip-end hail report must contain the same information as the trip-end hail report implemented by Amendment 16.

### **Inspection of Fish Holds**

Amendment 16 established approval requirements for entities providing dockside/roving monitoring services. These standards included hiring individual dockside monitors that were capable of climbing ladders and inspecting fish holds. For FY 2010, NMFS developed operational standards necessary to implement the Amendment 16 dockside monitoring provisions, based on a pilot dockside/roving monitoring program conducted during the summer of 2009. These standards did not require dockside monitors to inspect fish holds for FY 2010. However, based on further evaluation of the performance of the dockside monitoring program and consideration of concerns expressed by enforcement personnel, this action now requires that dockside monitors inspect the fish holds for any trip that is assigned a dockside/roving monitor beginning in FY 2011. This requirement will enhance the

enforceability of existing provisions and minimize the incentives to under-report/misreport the amount of regulated species landed.

## **11. Sector Measures**

### **Distribution of the PSC From Cancelled Permits**

As described in Amendment 16, a PSC represents an individual permit's portion of the total historical landings of each regulated species or ocean pout stock during FYs 1996-2006 by all permits, including those in confirmation of permit history (CPH), that were eligible to participate in the NE multispecies fishery as of May 1, 2008. If a permit had been cancelled after May 1, 2008, its historic landings between FYs 1996-2006 have still been used to calculate the total landings by eligible permits.

As noted above, the current regulations calculate the ACL available to sector and common pool vessels based on the cumulative PSCs of each permit participating in each sector. By default, if the owner of a particular permit has not elected to participate in a sector, that permit is considered to be participating in the common pool, and its PSC contributes to the sub-ACL available to the common pool at large. Similarly, if a permit or CPH is permanently cancelled for any reason, that permit or CPH cannot participate in sectors, or any fishery, and the PSC is used to contribute to the sub-ACL available to the common pool. Thus, the PSCs of cancelled permits artificially inflate the PSCs of those permits operating in the common pool and are not equitably distributed among all permits remaining in the fishery.

Beginning in FY 2011, the PSC of all valid permits, including those held in CPH, that are eligible to participate in the fishery must be recalculated as of June 1 of each year, unless another date is specified by the RA, to redistribute the landings histories of cancelled permits to all remaining eligible permits. To do so, the PSCs for each stock calculated pursuant to the process specified in Amendment 16 must be multiplied by a factor of "1/PSC of the remaining permits." These recalculated PSCs shall then be used to calculate ACEs for each sector during the following FY. For FY 2012 and beyond, a PSC that is calculated on June 1, shall affect sector ACE for the FY that begins on May 1, of the following year.

This provision means that each permit's PSC may increase on a yearly basis to reflect its higher portion of the historic landings of each regulated species and ocean pout stock due to the removal of the landings histories of any permits that were cancelled by June 1 of each year. This will ensure that the yearly PSC calculations reflect eligible permits at the beginning of each FY (May 1), and allow NMFS time to process such renewals. On or about July 1 of each year, NMFS will inform permit holders of updated PSCs through a permit holder letter sent to owners of a valid limited access NE multispecies permit or CPH.

The FW 45 proposed rule specified that the RA would recalculate FY 2011 PSCs for each permit using valid permits as of May 1, 2011, to update PSCs for FY 2011 and reflect permits cancelled through FY 2010. However, to ensure that permit owners had sufficient information to make informed decisions about whether or not to participate in sectors before the start of FY 2011 on May 1, 2011, the RA recalculated FY 2011 PSCs for each permit using valid permits as of February 11, 2011, to reflect permits cancelled through that date. This information was sent out to permit holders on February 11, 2011, to facilitate their decision to join a sector based on measures proposed in FW 45. The RA will recalculate PSCs for each permit as of June 1, 2011, to account for permits cancelled through FY 2010 and determine the PSCs that will be used to calculate FY 2012 sector ACE for each stock, consistent with the procedures outlined above.

### **Operations Plan Requirements**

Amendment 16 specified that sectors must submit final rosters, proposed operations plans, including rosters and associated environmental analyses by September 1, so that NMFS could review such documents as part of the process to approve sector operations for the following FY. Based on industry input, this action increases the flexibility of these deadlines by requiring sectors to submit preliminary rosters and proposed operations plans to NMFS by September 1, and final rosters by December 1 of each year. Following further industry input submitted during the public comment period for this action and ongoing discussions with industry participants, NMFS will allow for a limited opportunity for additional changes to FY 2011 sector rosters to accommodate changes in vessel ownership that occurred after the submission of final sector rosters on \*23053 December 1, 2010. This window to reopen FY 2011 sector rosters began on March 24, 2011, and will end on April 30, 2011. A sector is not required to accept additional changes to sector rosters during this window; each sector may decide whether or not a member may leave the sector, and whether or not to accept new members. Reopening the rosters is intended to provide additional flexibility to new permit holders without disrupting the organization of sectors. An announcement of this limited opportunity to reopen sector rosters was sent out to all sector managers on March 16, 2011, and to all limited access NE multispecies permit holders on March 23, 2011. In future years, a window for additional sector roster changes would begin with the publication of proposed measures for the common pool for the following year and end on April 30, and would be limited to ownership changes occurring after the December 1 roster deadline. These measures are designed to provide NMFS with the information it needs to review or conduct environmental analyses associated with draft sector operations plans, while allowing vessel owners additional time to decide whether to participate in sectors, or which sector to join during the following FY.

## **Sector Exemptions**

To reduce dockside/roving monitoring costs, especially due to infrequent landings of regulated species in more southerly ports, this action allows sectors to request an exemption from the dockside/roving monitoring requirements implemented under Amendment 16. Therefore, because Amendment 16 specified that sectors cannot request an exemption from the existing reporting requirements, this rule removes dockside/roving monitoring requirements from the list of reporting requirements at § 648.87(c)(2)(i). This enables sectors to request exemptions, or at least partial exemptions, from the dockside/roving monitoring requirements to minimize monitoring costs for sector trips targeting monkfish in southern waters, for example.

## **12. Authorization of New Sectors**

This final rule authorizes the creation of five new sectors, include the State of Maine Permit Banking Sector, the State of Rhode Island Permit Bank Sector, the State of New Hampshire Permit Bank Sector, the Commonwealth of Massachusetts Permit Bank Sector, and the Sustainable Harvest Sector III, as described in Section 4.2.1 of the FW 45 EA. All operational aspects of these sectors are specified in their annual operations plans, as submitted to NMFS. Details of these operations plans were published in a parallel rulemaking, as noted above. Vessels/permits participating in these sectors must comply with the existing sector provisions, unless otherwise exempted by a future action.

## **13. Measures for FY 2011 Under RA Authority**

The FMP provides authority for the RA to implement certain types of inseason management measures for the common pool fishery, the U.S./Canada Management Area, and Special Management Programs, as described further below. Although these measures were not proposed by the Council for implementation through FW 45, this final rule makes the public aware of measures implemented for FY 2011 by the RA. Once effective, the RA may revise these measures, as necessary, to ensure that the objectives of the FMP, including preventing the sub-ACLs from being exceeded, are met during FY 2011. Any necessary adjustments will be implemented through an inseason action consistent with the Administrative Procedures Act and communicated to the affected public.

## **Initial FY 2011 Common Pool Trip Limits**

The current regulations at § 648.86(o) allow the RA to revise trip limits applicable to common pool vessels if the RA projects that the catch of any NE multispecies stock allocated to common pool vessels will exceed the pertinent sub-ACL in order to prevent exceeding the common pool sub-ACL. Table 16 summarizes the initial FY 2011 common pool trip limits as adjusted by the RA. These initial trip limits were developed after considering changes to the FY 2011 common pool sub-ACLs and sector rosters, catch rates of these stocks during FY 2010, price of fish during

FY 2010, bycatch considerations, the potential for differential DAS counting during FY 2011, public comment on proposed trip limits, and other available information. Although the slow catch rate of SNE/MA yellowtail flounder by common pool vessels in FY 2010 suggests that the trip limit could be increased substantially to increase the catch of this stock in FY 2011, due to concerns that a potential increased SNE/MA yellowtail flounder trip limit would increase the bycatch and discard of SNE/MA winter flounder (a stock that cannot be possessed by any vessel to help ensure this stock rebuilds according to the approved rebuilding program), only a small increase in the trip limit for this stock is implemented at this time.

**Table 16—Initial FY 2011 Trip Limits for the Common Pool**

<b>Stock</b>	<b>Initial FY 2011 limit</b>
GOM cod	500 lb (226.8 kg) per DAS, up to 2,000 lb (907.2 kg) per trip.
GB cod	2,000 lb (907.2 kg) per DAS, up to 20,000 lb (9,072 kg) per trip.
GOM haddock	1,000 lb (453.6 kg) per trip.
GB haddock	10,000 lb (4,535.9 kg) per trip.
GOM winter flounder	250 lb (113.4 kg) per trip.
GB winter flounder	1,000 lb (453.6 kg) per trip.
CC/GOM yellowtail flounder	500 lb (226.8 kg) per DAS, up to 2,000 (907.2 kg) per trip.
GB yellowtail flounder	1,500 (680.4 kg) per trip.
SNE/MA yellowtail flounder	500 lb (226.8 kg), up to 2,000 (907.2 kg) per trip.
American plaice	unrestricted.
Pollock	unrestricted.
Witch flounder	250 lb (113.4 kg) per trip.
White hake	1,500 lb (680.4 kg) per trip.
Redfish	unrestricted.

**\*23054 Differential DAS Counting for Common Pool Vessels**

Following the implementation of Amendment 16 measures, the FMP requires that the RA implement a differential DAS counting rate for FY 2011 if the catch of the relevant stocks by common pool vessels is projected to exceed the pertinent common pool groundfish sub-ACLs during FY 2010. The differential DAS counting factor that will apply to common pool vessels is based on the proportion of the sub-ACL projected to be caught by common pool vessels during FY 2010, rounded to the nearest tenth. If the RA projects that common pool catch will exceed the sub-ACL for multiple regulated species within a particular area, then the most restrictive differential DAS counting factor will apply.

Catch information available through March 19, 2011, indicates that common pool catch of witch flounder during FY 2010 has exceeded the witch flounder sub-ACL by 32 percent. As defined at § 648.82(n)(1)(i), any differential DAS counting rate to address an overage of the witch flounder sub-ACL shall be applied to Category A DAS used in the Offshore GOM Differential DAS Area, the Offshore GB Differential DAS Area, and the Inshore GB Differential DAS Area. Therefore, beginning on May 1, 2011, any Category A DAS used by common pool vessels in the Offshore GOM Differential DAS Area, the Offshore GB Differential DAS Area, and the Inshore GB Differential DAS Area shall be charged at a rate of 1.3:1, or 31 hours for each 24 hr fished (i.e., 1.3 times 24-hr DAS counting), for the time spent fishing in the applicable DAS counting areas specified above. Differential DAS shall accrue based upon the first VMS position into the applicable differential DAS counting area, and the first VMS position outside of the applicable differential DAS counting area. NMFS provides an estimate of the status of the common pool catch throughout the year at the following address:  
<http://www.nero.noaa.gov/ro/fso/reports/common—pool/Common—Pool—Summary.html>.

#### **Delayed Opening of the Eastern U.S./Canada Area**

The regulations at § 648.85(a)(3)(iv)(D) provide the RA the authority to adjust various measures in order to optimize the harvest of the transboundary stocks managed under the Understanding. Pursuant to this authority, NMFS is postponing the opening of the Eastern U.S./Canada Area for common pool vessels fishing with trawl gear in FY 2011 from May 1, 2011, through July 31, 2011. This measure delays trawl fishing in the Eastern U.S./Canada Area during the time when cod bycatch is likely to be very high, and should prolong access to this area in order to maximize the catch of available cod, haddock, and yellowtail flounder, as well as other valuable stocks such as winter flounder.

Similar to restrictions implemented in FY 2009 and FY 2010, the proposed rule for this action proposed to limit the amount of cod that could be caught by common pool vessels fishing with non-trawl gear in the Eastern U.S./Canada Area prior to August 1, 2011, to 5 percent of the Eastern GB cod TAC available for common pool vessels. This was intended to further constrain fishing mortality on GB cod and prolong access to this area. The proposed rule for this action inaccurately specified this cod bycatch limit as 10 mt, but, inadvertently, that was based upon 5 percent of the Eastern GB cod TAC available to all groundfish vessels, not just common pool vessels as intended. The correct number for cod bycatch for just common pool vessels in FY 2011 is 477 lb (216.4 kg), based on a calculation of vessels that will be in the common pool according to sector rosters submitted to NMFS as of December 1, 2010. Because this bycatch amount is very low and difficult to effectively monitor in a timely manner and because no common pool

vessels actually fished in the Eastern U.S./Canada Area during FY 2010, NMFS has not implemented the proposed cod bycatch limitation for common pool vessels fishing with non-trawl gear in the Eastern U.S./Canada Area from May 1, 2011, through July 31, 2011.

### **Closed Area II Yellowtail Flounder/Haddock SAP**

The current regulations provide the RA with the authority to determine the total number of allowed trips by common pool vessels into the Closed Area II Yellowtail Flounder/Haddock SAP to target yellowtail flounder based on several criteria, including the GB yellowtail flounder TAC and the amount of GB yellowtail flounder caught outside of the SAP. As implemented in 2005 by FW 40B (June 1, 2005; 70 FR 31323), no trips to this SAP should be allocated if the available GB yellowtail flounder catch, after considering the amount of catch of this stock that would occur outside of the SAP, is insufficient to support at least 150 trips with a 15,000-lb (6,804-kg) trip limit (i.e., 2,250,000 lb (1,020,600 kg)). The difference between the minimum level of GB yellowtail flounder sub-ACL necessary to allow targeting of yellowtail flounder within the Closed Area II Yellowtail Flounder/Haddock SAP and the updated FY 2011 GB yellowtail flounder sub-ACL of 1,142 mt (2,517,679 lb; or 1,142,019 kg) specified in Table 11 is only 267,679 lb (121,419 kg). Based on past fishing practices, it is likely that catch rates outside of this SAP are more than adequate to fully harvest the FY 2011 GB yellowtail flounder sub-ACL, leaving little, if any, quota available to open this SAP to targeting GB yellowtail flounder. Thus, the FY 2011 GB yellowtail flounder sub-ACL is considered insufficient to warrant opening of this SAP to targeting yellowtail flounder. Therefore, based on existing authority, no trips are allocated by this final rule to target yellowtail flounder within the Closed Area II Yellowtail Flounder/Haddock SAP for FY 2011. Further, as required at § 648.85(a)(3)(iii)(B) and (x)(A), this final rule specifies that the SAP is open from August 1, 2011, through January 31, 2012, and prohibits the use of the flounder net by both common pool and sector vessels in this SAP during FY 2011. All limited access NE multispecies vessels can still fish in this SAP during FY 2011, but must only fish with a haddock separator trawl, a Ruhle trawl, or hook gear while in the SAP area.

### **14. Corrections and Clarifications**

This final rule corrects or clarifies a number of inadvertent errors, omissions, and provisions in existing regulations in order to ensure consistency with, and accurately reflect the intent of previous actions under the FMP, or to more effectively administer and enforce existing provisions pursuant to the authority provided to the Secretary in section 305(d) of the Magnuson-Stevens Act. The following measures are listed in the order in which they appear in the regulations.

The proposed rule for this action discusses the reason why such corrections are necessary.

Amendment 16 requires the owner or operator of any vessel issued a limited access NE multispecies permit fishing on either a common pool or a sector trip to declare its intent to fish within one or more of the NE multispecies broad stock areas (BSAs) and provide the vessel trip report (VTR) serial number for the first page of the VTR for that particular trip via VMS or interactive voice response (IVR) system prior to leaving port at the start of a fishing trip and to submit a VMS catch report detailing the amount of each species retained in each BSA for trips that fish in more than one BSA per trip. To eliminate duplicative reporting requirements, this final rule modifies \*23055 the timing requirements for the submission of the VMS catch report in § 648.10(k)(1) to require all limited access NE multispecies vessels, regardless of the number of broad stock areas fished, to submit the VMS catch report listing the VTR serial number applicable for that trip prior to crossing the VMS demarcation line upon its return to port following each fishing trip on which regulated species were caught.

To further clarify the administration and enforcement of dockside/roving monitoring provisions originally implemented under Amendment 16 and revised by this action, this action adds a prohibition at § 648.14(k)(18)(i)(D) to state that, if the offloads of a particular trip are assigned to be monitored by a dockside/roving monitor, the vessel cannot offload its catch until the assigned dockside/roving monitor arrives at the designated offloading site specified by the vessel owner or operator.

To close a perceived loophole that could have allowed a vessel carrying passengers for hire to possess and land fish smaller than the minimum fish size specified for commercial vessels and to sell their catch from such operations, this action revises the regulations at § 648.82(a)(2) to also state that, in addition to a vessel fishing under a NE multispecies DAS, a vessel issued a NE multispecies limited access permit may not fish under a sector trip or under the limited access NE multispecies Small Vessel Category or Handgear A permits, if such vessel carries passengers for hire for any portion of a fishing trip.

This action modifies the phrase “vessels participating in sectors” to read “vessels/permits participating in sectors” in the regulations at §§ 648.87(b)(1)(i)(A) and 648.90(a)(4)(iii)(E)(2) to reflect that vessels issued permits, including those held in CPH, can participate in sectors.

To provide more flexibility to sectors, Amendment 16 allowed the transfer of ACE between sectors, and also permitted carrying over ACE from one FY to the next. To clarify how the ACE carry over provision shall be applied, this action revises the regulations at § 648.87(b)(1)(i)(C) to state that a NE multispecies sector may carry over up to 10 percent of its allocated ACE for each stock, with the exception

of GB yellowtail flounder, into the following FY. This provision limits the applicability of ACE carry over to only 10 percent of the ACE allocated to a sector at the start of a FY and not 10 percent of the total ACE available to a sector at the end of the fishing year, which may include any ACE acquired from another sector as part of an ACE transfer. The preamble of the proposed rule for this action included text that could be interpreted to mean that a sector could not carry over any ACE if it had harvested more than 90 percent of its original ACE allocation for that stock by the end of the FY. This interpretation does not reflect the intent of NMFS in clarifying the amount of ACE that can be carried over into the next FY. Consistent with the proposed regulatory text, the intent of NMFS was to merely clarify that the amount of ACE that can be carried over for each stock shall be calculated based upon the amount of ACE originally allocated to that sector. For example, if a sector was originally allocated 100 mt of GOM cod at the beginning of FY 2010, that sector would be allowed to carry over up to 10 mt of GOM cod into FY 2011, even if it had acquired an additional 50 mt from another sector through an ACE transfer. Thus, the amount of ACE that could be carried over into FY 2011 would be based upon the 100 mt originally allocated to that sector for FY 2010, not the 150 mt that the sector had ultimately acquired by the end of FY 2010. Finally, NMFS clarifies that it interprets the term “unused ACE” in the context of the regulations at § 648.87(b)(1)(i)(C) to mean any ACE that has not been fished by the sector originally allocated that ACE, or leased to another sector during that FY.

In addition to the revisions to the calculation of PSCs noted above for cancelled permits, this final rule revises the regulatory text describing the calculation of PSCs at § 648.87(b)(1)(i)(E)(1) and (b)(1)(i)(E)(2) to clarify and more accurately reflect the processes that were, and continue to be, applied to implement such calculations. Specifically, this rule clarifies that the landings histories of any limited access NE multispecies permit, including those that were put into CPH, and those of an open access NE multispecies handgear permit that eventually qualified for, and resulted in, the issuance of a limited access NE multispecies Handgear A permit during FYs 1996 through 2006 shall be used to calculate the PSCs for each valid permit as of June 1 each year. In addition, these revisions include an example of the landings of regulated species and ocean pout that may not be used to calculate PSC; namely, any landings of yellowtail flounder by scallop vessels operating under a scallop DAS. Finally, this rule clarifies that the PSC that results from such a calculation is considered the PSC for each stock.

The regulations at §§ 648.87(b)(1)(iii)(C) and (viii) allow sectors to transfer ACE for up to 2 weeks into the subsequent FY, and provide NMFS with 61 days to process ACE transfers and determine whether a sector has exceeded its ACE for the previous FY. Such measures are dependent upon the completion of NMFS'

evaluation of year-end sector catch, including sector ACE overages, and may not fully account for the timing of NMFS' year-end evaluation process. Therefore, to allow for additional time to complete these tasks, if necessary, the phrase “unless otherwise instructed by NMFS” is being added to reference to the 2-week and 61-day deadlines in the regulatory text.

### **Comments and Responses on Measures Proposed in the FW 45 Proposed Rule**

Twenty-four comments were received during the comment period on the proposed rule for this action from 13 individuals, 4 fishing industry groups (the Northeast Hook Fisherman's Association (NEHFA), the Associated Fisheries of Maine (AFM), the Northeast Seafood Coalition (NSC), and the Northeast Sector Support Network (NSSN)), 4 conservation groups (Center for Biological Diversity (CBD), Oceana, Food and Water Watch (FWW), and PEW Environmental Trusts (PEW)), 1 dockside/roving monitor service provider (AIS, Inc.), 1 community group (Penobscot East Resource Center (PERC)), and the Council. Only comments that were applicable to the proposed measures, including the analyses used to support these measures, are addressed in this preamble. Comments on the overarching sector measures implemented in 2010 by Amendment 16, or the anticipated or realized impacts of those measures, are not addressed in this preamble. Please note in considering the responses to comments below that NMFS may only approve or disapprove measures proposed in a fishery management plan, amendment, or framework adjustment and may not change or substitute any measure in a substantive way, pursuant to section 304(a)(3) of the Magnuson-Stevens Act.

### **General Comments**

Comment 1: The CBD commented that the EAs prepared in support of both FW 45 and the 2011 sector operations plans do not adequately evaluate the impacts on a number of species proposed for listing under the Endangered Species Act (ESA), particularly Atlantic sturgeon and loggerhead sea turtles. The CBD noted that the GOM distinct population segment (DPS) and the New York Bight and Chesapeake Bay DPSs of Atlantic sturgeon were proposed to be listed as threatened and endangered \*23056 under the ESA, respectively, by NMFS' Northeast Regional Office on October 6, 2010 (75 FR 61872), while the Northwest Atlantic loggerhead sea turtle DPS was proposed to be listed as endangered under the ESA on March 16, 2010 (75 FR 12598). They contend that the FW 45 and FY 2011 sector operations plans EAs rely upon previous assessments of impacts to protected species specified in the Amendment 16 EIS that was completed on October 16, 2009. Therefore, they claimed that the analysis for these actions is not appropriate, given the proposed listings of Atlantic sturgeon and loggerhead sea turtles occurred after previous analysis was completed. Further, they indicated that the FW 45 EA does not consider impacts of eliminating the yellowtail flounder closure areas in the Great South Channel Exemption Area, noting that sea turtles are present in this

area at the time that the yellowtail flounder spawning protection areas were in effect.

Response: NMFS agrees that the analysis originally included in the FW 45 EA did not describe the impacts to DPS of Atlantic sturgeon and loggerhead sea turtles. To meet the ESA requirements of § 402.12(a), NMFS has updated the analysis supporting this action in an addendum to the FW 45 EA to include analysis of FW 45 measures on the DPS for these species in light of their proposed listings. This impacts analysis concluded that the measures implemented under this final rule are not likely to jeopardize the continued existence of Atlantic sturgeon between now and the time a final listing determination will be made, and concludes that there will be no significant impact on Atlantic sturgeon or loggerhead sea turtles for the duration of this regulation. It also concluded that a conference, per the ESA regulations, for the proposed loggerhead sea turtle DPS is not required based on the determinations and the incidental take statement in the 2010 Biological Opinion for the Multispecies FMP. For Atlantic sturgeon, NMFS Sustainable Fisheries Division engaged in an informal conference with NMFS Protected Resources per the ESA regulations, and no additional measures were recommended by NMFS Protected Resources. While it is possible that there may be interactions between Atlantic sturgeon or loggerhead sea turtles on the one hand and, on the other, gear used in the NE multispecies fishery, based on prior analyses and current observer bycatch data for the groundfish fishery, the number of interactions that will occur between now and the time a final listing determination will be made is not likely to cause an appreciable reduction in survival and recovery. A final listing determination for the Atlantic sturgeon DPS is expected by October 6, 2011. With the publication of a final listing rule, the existing Section 7 consultation for the NE multispecies fishery would need to be reinitiated, consistent with the requirement to reinitiate formal consultation where discretionary Federal agency involvement or control of the action has been retained and a new species is listed that may be affected by the action. During the reinitiation, the effects of the NE multispecies fishery on the five DPS for Atlantic sturgeon would be fully examined.

Comment 2: Oceana stated that there are no effective AMs for several stocks managed by the FMP, and that FW 45 must include AMs for all stocks managed under the FMP, including stocks not allocated to sectors under Amendment 16 (SNE/MA winter flounder, ocean pout, windowpane flounder, Atlantic halibut, and Atlantic wolffish). Oceana cited the January 21, 2010, letter from NMFS to the Council informing the Council that AMs for these stocks should be implemented as quickly as possible through a future Council action, and stated that the FW 45 final rule is the first opportunity to implement such measures.

Response: Because of the timing needed to more fully account for the bycatch of haddock in the Atlantic herring fishery before herring fishing operations began to increase rapidly during the early fall, the Council elected to develop FW 46 to revise the existing allocations of portions of the GOM and GB haddock ACL to the herring fishery before they worked on any other actions in 2011. Further, because the Council intended to develop an action later on in 2011 that would implement NE multispecies ACLs for FYs 2012-2014, the Council decided to address outstanding issues associated with AMs for ocean pout, windowpane flounder and Atlantic halibut through the next action, or FW 47.

Consistent with the Magnuson-Stevens Act, Amendment 16 implemented AMs that would be sufficient to prevent overfishing of any stock managed by the FMP in FYs 2010 and 2011. However, because Amendment 16 did not provide a specific allocation of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, or Atlantic wolffish to sectors, these stocks are not subject to any sector-specific AMs, which is acknowledged by NMFS in the letter cited in the comment. The ACL available to the commercial NE multispecies fishery for each of these stocks is allocated entirely to common pool vessels, and the only specific AM established for these stocks during FYs 2011 and 2012 is the differential DAS counting AM specified for common pool vessels at § 648.82(n). NMFS has determined there is no immediate need for FW 45 to implement AMs for these stocks, as overfishing is prevented during FYs 2010 and 2011, and any overages of the FY 2010 or 2011 ACLs would be addressed, at least partially, through differential DAS counting applicable to common pool vessels in FY 2011 or 2012, respectively (see § 648.90(a)(5)(ii)). In making this determination, NMFS points out that, pursuant to section 304(a)(3) of the Magnuson-Stevens Act, it may only approve or disapprove measures proposed in a fishery management plan, amendment, or framework action, and may not change or substitute any measure in a substantive way. Therefore, since FW 45 does not include any measure to disapprove regarding AMs for these stocks, NMFS finds that it should approve the measures that are consistent with the Magnuson-Stevens Act and other applicable law for all of the other stocks with the understanding that the Council has committed to address the lack of specific AMs for these stocks in FW 47. This leads to the functional equivalence of disapproving and remanding the entire framework to address the lack of a required measure, but without sacrificing the implementation of those measures that are needed to ensure conservation for all of the other stocks.

Comment 3: Oceana suggested that FW 45 must include AMs for yellowtail flounder caught by the Atlantic sea scallop fishery, based on the premise that the FMP must include measures that account for all catches of regulated species and ocean pout stocks by other fisheries. Oceana acknowledged that the Council

developed AMs to account for yellowtail flounder catch in the scallop fishery as part of Amendment 15 to the Atlantic Sea Scallop FMP. However, they are concerned that such AMs will not become effective until at least 6 months into FY 2011 for the scallop fishery (the scallop FY begins on March 1 of each year) and may not be adequate to ensure that any overages of the FY 2010 yellowtail flounder sub-ACLs allocated to the scallop fishery are addressed during FY 2011. Further, they claimed that it is unclear how the proposed Amendment 15 yellowtail flounder AMs for the scallop fishery \*23057 would be implemented in FY 2011, particularly if preliminary data indicate that the yellowtail flounder sub-ACLs for the scallop fishery may be exceeded. They suggested that NMFS should better explain how such AMs would be implemented during FY 2011. In addition, Oceana recommended that NMFS implement an inseason closure provision as an interim measure to prevent excessive harvest of yellowtail flounder until the Amendment 15 AMs become effective, pursuant to the National Standard 1 Guidelines at § 600.310(g)(2).

Response: The AMs applicable to the NE multispecies fishery are consistent with the National Standard 1 Guidelines and sufficient to prevent overfishing on each stock by all components of the fishery that catch regulated species and ocean pout, including yellowtail flounder catch by scallop vessels prior to the implementation of measures proposed in Amendment 15 to the Atlantic Sea Scallop FMP. If these components of the fishery exceed their allocations, and the overall ACL for a particular stock is exceeded, the AMs applicable to the NE multispecies fishery, including those specified for sectors and the common pool, will be triggered to ensure that overfishing does not occur on the stock as a whole (see § 648.90(a)(5)(ii)).

The proposed rule for Amendment 15 to the Atlantic Sea Scallop FMP published on April X, 2011 (76 FR XXXXX). This rule, and its associated EIS, contains a complete description of the yellowtail flounder AMs for the scallop fishery, including the closure of specific statistical areas that have the highest bycatch of yellowtail flounder by the scallop fishery if either the GB or SNE/MA yellowtail flounder sub-ACL allocated to the scallop fishery is exceeded in the previous FY. This rule also clarifies the Council proposal that any overage of either the GB or SNE/MA yellowtail flounder sub-ACLs allocated to the scallop fishery for FY 2010 shall have a resulting AM applied as soon as Amendment 15 is implemented during FY 2011, but only if the FY 2010 overall ACL for SNE/MA yellowtail flounder is exceeded.

As explained in the response to Comment 2 above, pursuant to section 304(a)(3) of the Magnuson-Stevens Act, NMFS may only approve or disapprove measures proposed in a fishery management plan or amendment, and may not change or substitute any measure in a substantive way. Therefore, NMFS does not have the

legal authority to implement AMs to account for potentially excessive yellowtail flounder bycatch in the scallop fishery through this final rule. Such AMs were not adopted by the Council in FW 45, and the AMs in place for yellowtail flounder stocks for FY 2011 are sufficient to address any excessive catch by the scallop fishery until the AMs proposed in Amendment 15, if approved, become effective. Finally, both the common pool and sector AMs currently in place are adequate to ensure that overfishing does not occur on yellowtail flounder, even if the implementation of Amendment 15 is delayed until later in FY 2011. As of March 22, 2011, available data indicated that the scallop fishery caught 76,508 lb of GB yellowtail flounder and 401,313 lb of SNE/MA yellowtail flounder during FY 2010 in the scallop fishery (March 1, 2010, through February 28, 2011). This represents 24 percent of the GB yellowtail flounder and 135 percent of the SNE/MA yellowtail flounder allocated to the scallop fishery in the FW 44 final rule. It is projected that the common pool will only harvest 7.7 mt (16,976 lb) of its 75-mt (165,347-lb) sub-ACL for SNE/MA yellowtail flounder, leaving 148,371 lb of SNE/MA yellowtail flounder unharvested during FY 2010. In addition, all sectors have cumulatively caught only 42.6 percent (100 mt, or 220,462 lb) of the overall sub-ACL of this stock allocated to sectors (234.7 mt, or 517,425 lb) through March 12, 2011. Therefore, even after incorporating the 103,689 lb (47 mt) of SNE/MA yellowtail flounder caught by the scallop fishery in excess of the allocation to that fishery during FY 2010, it is highly unlikely that the overall FY 2010 ACL for SNE/MA yellowtail flounder will be exceeded, and that the implementation of any AMs to prevent overfishing of this stock will be necessary. While it is still too early to accurately predict future bycatch rates, based upon available data, it is unlikely that the scallop fishery bycatch of yellowtail flounder during FY 2011 will exceed allocated sub-ACLs before Amendment 15 AMs, if approved, become effective. Thus, the current lack of scallop-specific AMs is not a serious conservation or management problem in the fishery.

Finally, Oceana's recommendation to establish an interim in-season closure AM is not required by applicable law. Neither the Magnuson-Stevens Act nor the National Standard 1 Guidelines mandate the use of fishery closures or the use of in-season controls as AMs. Reactionary AMs similar to the differential DAS counting AM may be used and can be just as valid as inseason AMs. Although an FMP can include in-season closures, under the cited national standard guideline, neither NMFS nor the Council is obligated to institute such closures. In-season closures are merely one tool that may be used by the Council and NMFS to prevent overfishing and ensure that ACLs are not exceeded. In any event, short of a temporary emergency action or Secretarial amendment, NMFS is not in a position to implement this kind of AM in deciding whether to approve or disapprove FW

45. Accordingly, NMFS has not implemented yellowtail flounder AMs for the scallop fishery through this final rule.

#### **Status Determination Criteria for Pollock**

Comment 4: Both PEW and an industry group (NSC) supported revisions to the status determination criteria for pollock and its associated revisions to stock status and ABCs and ACLs. Both groups applauded the rapid incorporation of updated scientific information into the FMP, with the industry group stating that such measures ensure that significant economic benefits of higher catch limits for this species will continue in future FYs.

Response: NMFS agrees that it is appropriate to incorporate updated scientific information into management measures as quickly as possible. Therefore, the proposed revisions to the status determination criteria for pollock and associated ABCs and ACLs are implemented through this action.

#### **Rebuilding Program for GB Yellowtail Flounder**

Comment 5: PEW opposed the proposed reduction of the GB yellowtail flounder rebuilding program from the existing 75-percent probability of success to a 50-percent probability of success. PEW stated that a 50-percent probability of success is not adequate because the chance of failure is too high. They further stated that maximizing catch should not be the highest priority when managing the rebuilding of an overfished stock. They suggested that the existing rebuilding program with a minimum 75-percent probability of success should be maintained, noting that typical statistical analyses rely upon a 95-percent probability of success.

Response: The decision to extend the GB yellowtail flounder rebuilding program is based on a number of factors beyond simply increasing catch over the short term. Updated stock assessment conducted by the TRAC indicated that the strength of the 2005 year class was much lower than originally estimated. Therefore, the stock is no longer \*23058 expected to rebuild by 2014 with a 75-percent probability of success. Although extending the rebuilding timeframe to 10 years reduces the probability of success to 50 percent, the extension is still within the probability limits recognized by courts which have reviewed challenged FMPs. Although a rebuilding program with a higher probability of success would be more likely to rebuild overfished stocks within established rebuilding timeframes than one with a lower probability, based on analysis supporting FW 45, the revised rebuilding program is still capable of rebuilding the stock within the established rebuilding period. Faced with this information, the Council elected, consistent with National Standard 8, to revise the rebuilding program for this stock in way to minimize the adverse economic impacts on fishing communities to the extent practicable, without compromising the conservation requirements of the FMP or the Magnuson-Stevens Act. NMFS agrees with the Council that allowing for increased catch over the short-term, while still ending overfishing and enabling the stock to

rebuild more effectively, balances the multiple and somewhat competing objectives of the national standards of the Magnuson-Stevens Act. Further, extending the rebuilding timeframe increases the capacity of the Council to negotiate yearly TACs with Canadian representatives through the TMGC process, as Canadian law does not have a requirement for a defined rebuilding period. Maintaining successful collaborative management with Canada is crucial to ensuring the effective management of this transboundary stock by preventing overfishing and continuing to rebuild this overfished stock. Therefore, NMFS approves and implements the proposed revisions to the GB yellowtail flounder rebuilding program.

### **ACLs**

Comment 6: Oceana recommended that NMFS disapprove the proposed allocation of yellowtail flounder to the scallop fishery because it relies upon an outdated analysis of the expected catch of yellowtail flounder by the scallop fishery and is inconsistent with the use of the best available scientific information mandated by National Standard 2. Instead, they recommend that NMFS implement allocations that are based on updated estimates of actual anticipated yellowtail flounder catch by the scallop fishery during FY 2011.

Response: NMFS recognizes that there are updated estimates of anticipated catch of yellowtail flounder by the scallop fishery. However, as noted in the FW 45 EA, there is uncertainty associated with these estimates. For example, Table 113 of the FW 45 EA illustrates that scallop catches of yellowtail flounder have not shown clear trends, despite the increased abundance of yellowtail flounder in recent years. If the updated estimates of yellowtail flounder bycatch underestimate actual catch by the scallop fishery, as implied in Oceana's comment, then the yellowtail flounder sub-ACLs allocated to the scallop fishery are likely to be exceeded, which could result in overfishing this stock. Overages of the yellowtail flounder sub-ACL, if leading to the overage of the overall ACL for a stock, would trigger AMs for the directed groundfish fishery to account for such an overage and ensure that overfishing does not occur in the future. Any AMs that may be triggered by exceeding this sub-ACL could redistribute either common pool or sector fishing effort, resulting in adverse biological impacts on a wider range of species compared to the existing allocations. In addition, lowering the yellowtail flounder allocations to the scallop fishery based upon this updated information puts much more total revenue and optimum yield at risk than maintaining the existing allocations, particularly if AMs are triggered and the available scallop or yellowtail flounder catch is not fully harvested. Although updated estimates of the expected yellowtail flounder bycatch in the scallop fishery are less than the existing allocations, maintaining the existing allocations to the scallop fishery, on balance, will likely reduce the chance of a derby fishery in the scallop fishery, better

achieve the biological targets for both scallops and yellowtail flounder, and place less revenue and optimum yield at risk for both fisheries. Thus, there are potentially substantial adverse economic and biological impacts associated with revising these allocations using the updated bycatch estimates.

As noted above, NMFS may only approve or disapprove measures proposed in a fishery management plan or amendment, and may not change or substitute any measure in a substantive way. The yellowtail flounder allocation to the scallop fishery is a continuation of the allocation implemented by FW 44. NMFS cannot substitute another alternative for this provision as part of this final rule. Even if NMFS could disapprove the FW 45 yellowtail flounder allocation to the scallop fishery, the yellowtail flounder allocation to the scallop fishery for FY 2011 would revert to that implemented by FW 44 which is the same as proposed in FW 45. Therefore, NMFS has not revised the FY 2011 yellowtail flounder allocations to the scallop fishery in this final rule.

#### **Annual Specifications for the U.S./Canada Management Area**

Comment 7: One industry group (NSC) strongly supported the proposed action to disapprove the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC and associated ABC and ACLs, and to implement a revised FY 2011 TAC, ABC, and ACL for this stock based upon revised recommendations of the TMGC following the recent adoption of IFACA. They noted that the adoption of IFACA represents new information and unforeseen circumstances that justify the use of emergency Secretarial authority to revise this TAC. They also group suggested that the updated TAC prevents overfishing and rebuilds stock consistent with broader goals of section 304(e) of the Magnuson-Stevens Act, provides very important economic benefits to both the groundfish and scallop fisheries, and results in an increased chance of achieving OY in these fisheries.

Response: NMFS agrees with the substance of this comment, although, as noted above in the background section of this preamble, instead of disapproving the FW 45 TAC for this stock, NMFS has approved it, because the originally proposed TAC is still consistent with the FMP and applicable law. However, NMFS is replacing the FW 45 TAC for this stock with the revised FY 2011 TAC, pursuant to emergency Secretarial authority, for the reasons stated in the preamble of the proposed rule for this action.

#### **GOM Cod Spawning Protection Area**

Comment 8: Four individual private recreational anglers opposed the proposed GOM Cod Spawning Protection Area, while one environmental group (PEW) and one community group (PERC) strongly supported the implementation of this area. While one recreational angler was opposed to closure areas in general, the other three anglers indicated that such a closure unnecessarily and unfairly prevents small private recreational vessels from accessing cod closer to shore. Two of these

respondents suggested that the GOM cod stock is improving and does not warrant further action to protect spawning aggregations. They indicated that, if further protection \*23059 for this stock is necessary, they would prefer alternative measures, including possession or size limits. One respondent also claimed that fishing with hook gear does not disturb spawning aggregations. In contrast, both PEW and PERC supported this provision because it was based on a careful analysis of available scientific information. They recommended that the Council and NMFS should continue to identify and protect additional key habitat areas for spawning fish. Further, PERC advised that mid-water trawl gear should not be allowed in this area because they claim that this gear catches large amounts of groundfish stocks and would undermine efforts to rebuild overfished stocks.

Response: NMFS agrees that the GOM cod stock is recovering. The latest stock assessment, the Groundfish Assessment Review Meeting (GARM) III, indicates that the stock is nearly rebuilt (i.e., that SSB is nearly at the level to sustain MSY), but notes that the success of continued rebuilding relies upon the strength of recent year classes, particularly the 2003 and 2005 year classes. Therefore, without continuing high levels of recruitment, the stock may not be able to achieve and maintain a high level of biomass.

Council efforts to specifically protect spawning aggregations of GOM cod date back to the implementation of FW 26 in 1999 (January 15, 1999; 64 FR 2601). That action revised the existing GOM Rolling Closure Areas established under FW 25 (March 31, 1998; 63 FR 15326), and reclassified their designation as “inshore ‘cod spawning’ closures.” The intended purpose of such measures under FW 26 was to protect cod during the spawning season, because cod stocks are “particularly vulnerable to fishing pressure” during spawning periods. Thus, since 1998, commercial fishing vessels have been excluded from areas in which cod are likely to be spawning. However, private recreational and charter/party vessels, including those fishing with gear capable of catching groundfish, have been able to access these areas even during the spawning season for GOM cod.

As noted in the FW 45 EA and the preamble to the proposed rule for this action, the GOM Cod Spawning Protection Area is intended to provide protection to spawning cod by limiting all fishing activities using gear that may catch groundfish in a discrete area and during a time in which cod spawning activity is documented to be occurring. The area and season proposed in FW 45 was based on research conducted by the University of New Hampshire in collaboration with the Northeast Consortium. This research represents the first study in which western Atlantic cod were examined on such a fine scale to determine both temporal and spatial distribution of this species. According to this research, cod spawning within the GOM Cod Spawning Protection Area exhibit site fidelity, congregate in this specific area for the duration of the spawning season, and return to this area each

year to spawn. These fish represent a “discrete management unit” that is confirmed by genetic study, and constitute the largest distinctly identified spawning group left in the western Atlantic Ocean. Further, this research documents that trawl-caught fish are affected by fishing activity, requiring several days to resume normal behavioral patterns following capture. Finally, this study reiterated a concern expressed by members of the fishing industry and state resource management agencies that the recreational fishing fleet, particularly charter/party vessels, that continue to be able to access spawning aggregations of cod may decrease the rate at which the GOM cod stock rebuilds. Thus, continued fishing pressure or disruption to spawning activity could adversely affect cod recruitment within the GOM.

As proposed, the GOM Cod Spawning Protection Area prohibits both commercial and recreational vessels fishing with gear considered to be capable of catching groundfish from fishing in this area from April through June of each year. Under this measure, all vessels are treated equally, and neither group has access to this area during this time. This is in contrast to the existing GOM Rolling Closure Areas in that commercial vessels are prohibited from fishing for groundfish in these areas, but recreational vessels can target groundfish in these areas throughout the spawning season. Although the GOM Cod Spawning Protection Area would essentially close some near-shore fishing grounds to recreational vessels during the spawning season, this measure would not eliminate small vessel access to available cod resources. This area is relatively small (roughly 82 square miles, or 212 square km) and represents the only area closure applicable to recreational vessels at all, let alone during the spawning season. Therefore, recreational vessels have access to available cod resources in other locations and throughout the rest of the FY. Finally, while measures such as possession or size limits are capable of affecting fishing mortality, such measures cannot protect or improve recruitment in the same way that area closures can. FW 45 does not propose to further reduce fishing mortality on this stock. Instead, this provision is intended specifically to reduce fishing activity on spawning aggregations and, in turn, preserve opportunities for successful recruitment of this stock in the future. Because the preservation of sufficient levels of recruitment is critical for the continued success of efforts to rebuild GOM cod, possession or size limits would not effectively achieve the objectives for the GOM Cod Spawning Protection Area in FW 45. Existing regulations, including the GOM Seasonal Rolling Closure Areas at § 648.81(f) and the Sector Rolling Closure Areas at § 648.81(f)(2)(vi), already prohibit vessels fishing on either a sector or a common pool trip from targeting regulated species and ocean pout in this area during April and May. For these reasons, NMFS has approved the GOM Cod Spawning Protection Area, including the proposed prohibition of midwater trawl gear fishing in this area during June of each year.

### **Handgear A and B Measures**

Comment 9: Two commercial fishermen strongly supported any measures that would benefit small vessels fishing near shore with handgear. One of these individuals indicated that fishing with handgear has no detrimental effects to stock recovery or bycatch because all fish can be released alive. Because they consider handgear to be a more sustainable gear type, PERC further stated that NMFS should expand opportunities for the use of handgear instead of restricting their trip limits.

Response: NMFS believes the measures implemented by this final rule, including revisions to handgear trip limits, exemption of handgear vessels from common pool dockside monitoring requirements, and access to seasonal closure areas encourage participation in the NE multispecies fishery by handgear vessels, and minimize economic impacts to such vessels, without compromising efforts to end overfishing and rebuild overfished stocks.

Comment 10: The NEHFA and PERC suggested that handgear vessels should be given a specific sub-ACL to avoid being adversely impacted by potentially excessive catch by common pool vessels.

Response: The Council considered specifying a specific sub-ACL for handgear vessels during the development of FW 45, but did not ultimately adopt such a measure due to a concern that allocation decisions \*23060 cannot be implemented through a FW action. The Council ultimately concluded that such allocations must rather be implemented through an amendment to the FMP because they are considered substantial revisions to existing management measures and require additional public input. NMFS agrees with this interpretation.

Comment 11: The NEHFA and one commercial fisherman supported the proposed revisions to the cod trip limits applicable to handgear vessels. They indicated that such revisions will provide relief from the impacts of the “race to fish” during the early part of the FY in the common pool.

Response: NMFS agrees, and has implemented these revisions through this final rule.

Comment 12: One commercial fisherman, PERC, and the NEHFA expressed support for the proposed requirement for handgear vessels to be issued a LOA to fish south of the GOM RMA for GB cod. NEHFA recommended that vessel owners could request a LOA annually when renewing their NE multispecies permits, declare through the permit renewal application that the vessel would be fishing south of the GOM RMA for the duration of the FY and not have to request a LOA, or be issued a LOA automatically through a Web site similar to the existing NMFS VTR Web site. This group contends that these recommendations would help minimize the burden on fishermen and NMFS. In addition, NEHFA

was concerned that the issuance of the LOA would adversely impact the ability of vessel owners to participate in other fisheries.

Response: NMFS implements the requirement for handgear vessels fishing south of the GOM RMA to either obtain a paper LOA or declare their intent to fish south of the GOM via VMS through this final rule. Under the LOA provisions implemented through this final rule and existing protocols, a vessel owner could specify that he/she intends to fish south of the GOM RMA for the entire year and be issued a LOA to reflect that decision during the annual renewal of his/her NE multispecies permit. Automated or web-based declaration and issuance of this LOA would require further consideration by NMFS, including ensuring that such declarations do not compromise the enforceability of the LOA, would not unintentionally restrict the ability of vessel operators to fish in the area of their choosing, and can be technically administered. NMFS has the authority to revise the mechanism by which such LOAs are issued to fishery participants and could implement the recommendations offered by the public in the future if feasible. Any changes to how LOAs are issued will be communicated to all affected stakeholders through a permit holder letter, as appropriate.

Comment 13: The NEHFA supported the proposed exemption of vessels issued a limited access NE multispecies Handgear A permit from the GB Seasonal Closure Area and allowing such vessels to fish in the Sector Rolling Closure Areas in the GOM. The NEHFA noted that Handgear A vessels are currently precluded from fishing in the GOM until June or July based on the existing GOM Rolling Closure Areas. This group stated that, without exemptions, Handgear A vessels will not remain economically viable due to competition with other gear types for available common pool sub-ACLs. They contested that the proposed exemptions would provide needed economic relief through increased access to traditional fishing grounds that are within reach of the small Handgear A vessels. Another commercial fisherman also supported these measures, stating that they would help small vessels compete against larger and more efficient vessels in the common pool. Both PEW and PERC supported promoting the use of handgear through these proposed measures, stating that handgear is the gear type with the least impacts to habitat and the fishery.

Response: NMFS agrees with the comments, and this final rule implements the proposed exemption.

### **Dockside/Roving Monitoring Requirements**

Comment 14: The NSC questioned the utility of dockside/roving monitoring requirements, suggesting that FW 45 should eliminate such requirements completely. The NSC believes the current requirements to be highly inefficient, representing an unsustainable and unjustified cost to the fishing industry. Further, they suggested that NMFS should allow sectors to use dockside monitoring data as

a proxy for dealer data in the weekly sector catch reports submitted to NMFS to increase the utility of the dockside/roving monitoring program. Finally, NSC indicated that roving monitors should not have to observe offloads to a truck and also to a dealer, asserting that roving monitors should only be required to observe offloads from the vessel to a truck, to increase the efficiency and reduce costs associated with these provisions.

Response: The Council considered completely eliminating dockside/roving monitoring requirements during the development of FW 45. However, due to lingering concerns over the ability to enforce existing provisions to monitor sector ACE and minimize incentives to misreport catch, the Council retained dockside/roving monitoring requirements in FW 45. NMFS may only approve or disapprove measures proposed in FW 45, and may not change or substitute any measure in a substantive way. Therefore, NMFS cannot eliminate dockside/roving monitoring requirements through this final rule.

During the development of Amendment 16, it was anticipated that sectors would rely upon dockside/roving monitor data to document sector landings immediately following a vessel's offload until the official dealer reports become available approximately a week later. This practice has been discussed with sector managers through several sector workshops held during 2009 and 2010. NMFS recognizes that dockside/roving monitoring data cannot currently be reported as part of the weekly sector catch reports submitted to NMFS based upon existing guidance and database structures. To date, many dockside/roving monitoring data are not systematically collected in a format that can be easily transferred to a catch monitoring database. Instead, they are often merely scanned images of a dockside/roving monitor report. NMFS has the regulatory authority to accept dockside/roving monitoring data in the future and may reconsider the acceptance of dockside/roving monitoring data if such data become available in an acceptable electronic format. Further, dealer landings, as documented through official dealer reports, have been the standard by which landings are monitored for many years, and were used as the basis for the calculation of potential sector contributions and, therefore, sector ACE. Accordingly, even if dockside/roving monitor data could be considered as a proxy for dealer landings in weekly sector catch report, dealer landings data would continue to be the official record of species landed by each federally permitted vessel.

The Council required sectors to develop and implement an independent third-party weighmaster system satisfactory to NMFS for monitoring landings and utilization of ACE. The original intent of dockside/roving monitoring coverage was to verify landings of a vessel at the time it is weighed by a dealer to certify the landing weights are accurate as reported on the official dealer report for compliance purposes. Therefore, NMFS implemented regulations under **\*23061** Amendment

16 that require that a roving monitor must observe the offloads from a vessel to a truck and again from the truck to a dealer, unless the vessel offloads directly to a dealer. These regulations were based upon a pilot program and existing dockside/roving monitoring programs developed in other regions and in Canada. During sector implementation workshops conducted in 2009 and 2010, and ongoing communications with sector managers, NMFS indicated that it would allow a roving monitor to only observe offloads from a vessel to a truck, provided a representative from the dealer ultimately receiving the fish was present at the time of the offload, and that all fish were weighed at the time of the offload. This ensures that the weight of fish offloaded corresponds to the weight of the fish recorded in the official dealer report, consistent with the intent of Amendment 16. Thus, existing regulations and protocols already allow for the behavior requested by the NSC in their comment.

Comment 15: The NEHFA, PERC, PEW, and one commercial fisherman supported exempting vessels issued a limited access NE multispecies Handgear A or a Small Vessel Exemption permit or an open access NE multispecies Handgear B permit that is fishing in the common pool from the existing dockside/roving monitoring requirements. They stated that dockside/roving monitoring costs may be more than the value of fish landed on a particular trip and would make the operation of such permits economically unviable. The NEHFA also noted that many handgear vessels are launched and retrieved at public boat ramps, thereby creating logistical difficulties for waiting for the dockside/roving monitor to arrive because a boat may be forced to move off of the dock to accommodate the launching of other boats. This group also contended that the current system of monitoring landings is sufficient for these vessels due to the small amount of fish landed on each trip. Finally, PERC suggested that handgear vessels fishing in sectors should also be exempted from the dockside/roving monitoring requirements.

Response: NMFS agrees that the costs associated with the existing dockside/roving monitoring requirements could make fishing with a Handgear A, Handgear B, or Small Vessel Exemption permit uneconomical for the reasons noted above and specified in FW 45. Therefore, NMFS implements the proposed exemption from the common pool dockside/roving monitoring requirements for these permit categories through this final rule. Because the Council did not adopt a provision that would have exempted sector vessels fishing with a handgear permit from the dockside/roving monitoring requirements as part of FW 45, NMFS cannot implement such a provision through this action.

Comment 16: Three commercial fishermen and two commercial fishing industry groups (AFM and NSC) opposed the proposal to require dockside/roving monitors to inspect the fish holds of vessels offloading groundfish. AIS, Inc., a

dockside/roving monitoring service provider, also expressed concerns that the proposed requirement for dockside monitors to inspect fish holds presents safety issues. All commenters highlighted the risk of serious injury from having dockside/roving monitors board vessels, climb down ladders into the fish holds, and inspect the holds or other compartments for fish that have not been offloaded. AIS noted that there are no standards in FW 45 that address potentially dangerous conditions in inspecting holds, or requirements for vessels to provide a standardized safe boarding system. AIS also stated that there is no guidance as to how to inspect fish holds, including whether dockside monitors must inspect piles of ice or look for fish in other compartments, giving the impression that dockside/roving monitors may be acting as enforcement personnel instead of data collectors. Several commenters suggested that this potential risk will force vessel owners to buy more insurance to ensure that they are adequately covered for any potential liability lawsuits that might result from this provision. In doing so, they contested that this would contradict the FW 45 economic analysis that indicates that this measure should not impact either vessel owners or service providers. They noted that, even if the dockside/roving monitoring service providers had sufficient insurance coverage, vessel owners might still be sued and face financial liability from the injury claims of individual dockside/roving monitors. Further, they claimed that the proposed rule does not provide any rationale that enhanced enforceability is needed, or that underreporting is occurring. They contested that the existing provisions that require dockside/roving monitors to ask vessel operators if all fish have been offloaded, and classify providing false statements to dockside/roving monitors as a violation, should be sufficient to enforce this provision. They recommended that NMFS Office of Law Enforcement should inspect fish holds, instead of dockside/roving monitors.

Response: As noted throughout the development of Amendment 16 and FW 45 by both fishing industry representatives and NMFS, the transition to expanded sector management and ACLs increases incentives to misreport or under report catch and landings. Dockside/roving monitoring programs established in other regions of the United States and Canada that are managed by harvest quotas are considering, or have required, dockside/roving monitors to inspect fish holds to ensure that all fish are offloaded. The potential for dockside/roving monitors to inspect fish holds was explicitly discussed throughout the development of Amendment 16 as part of both the Council process and parallel meetings to discuss the development of sector measures sponsored by the Gulf of Maine Research Institute. Section 4.2.3.5.4 of the Amendment 16 FEIS documents this discussion and clearly indicates that to be approved as a dockside/roving monitor, a dockside/roving monitor must meet several criteria, including:

“Physical capacity for carrying out the responsibilities of a dockside/roving monitor pursuant to standards established by NMFS such as being certified by a physician to be physically fit to work as a dockside/roving monitor. The physician must understand the monitor's job and working conditions, including the possibility that a monitor may be required to climb a ladder to inspect fish holds.”

Therefore, the general public, including both vessel owners and dockside/roving monitoring service providers, were well aware of the potential that dockside/roving monitors might be required to inspect fish holds and the risks that such activity might incur. However, no comments opposing this practice were raised to NMFS during the public comment period on the Amendment 16 proposed rule.

The final rule implementing Amendment 16 measures did not require dockside/roving monitors to inspect the fish holds based, in part, on a pilot dockside/roving monitoring program conducted in the summer of 2009. Similar to comments received on this action, some safety concerns were identified with inspecting fish holds during the pilot program, even though fish holds were actually inspected as part of that pilot program. As a result, in the Amendment 16 proposed (74 FR 69382; December 31, 2009) and final rules, NMFS intentionally included language in the dockside/roving monitoring program operational\***23062** standards at § 648.87(b)(5)(ii)(B)(1) that allow individual dockside/roving monitors or service providers to inspect fish holds if they elect to do so.

Section 311 of the Magnuson-Stevens Act provides the Secretary of Commerce with the general authority to enforce the provisions of the Magnuson-Stevens Act. NMFS acknowledges that existing dockside/roving monitoring provisions make it a violation for a vessel operator to provide false statements to a dockside/roving monitor about whether all catch is offloaded. However, that is just one of many ways to ensure compliance with existing regulations. NMFS does not agree that such measures are completely sufficient to ensure that all catch is offloaded. The only way to validate statements made by a vessel operator is to actually inspect fish holds. NMFS Office of Law Enforcement personnel already have the authority to board and inspect vessels. However, requiring dockside/roving monitors to also inspect fish holds, as anticipated during the development of Amendment 16, provides another means to ensure that vessel operators are complying with existing requirements, and that all fish that are landed are recorded in dealer databases or other data sources such as dockside/roving monitor reports. Dockside/roving monitors are not enforcement personnel, but their observations, including the reports summarizing the offloads of individual trips, are available to law enforcement personnel, as described in Section 4.2.3.5.4 of the Amendment 16 FEIS and the existing regulations at § 648.87(b)(4). The training provided to dockside/roving monitors by NMFS explicitly states that it is the dockside/roving

monitor's responsibility to account for all catch, whether or not it is properly weighed or recorded by other parties. Monitors must record any species that is not weighed in their incident report to facilitate compliance with existing requirements. Therefore, based on the need to ensure that NMFS is accurately monitoring the amount of fish landed, NMFS has retained the requirement that dockside/roving monitors must inspect fish holds as part of this final rule. NMFS recognizes that dockside/roving monitors must proceed with caution when conducting inspections of fish holds. As part of the dockside/roving monitoring training curriculum and certification process overseen by NMFS, individual dockside/roving monitors are trained and tested for competency in safety procedures, including slips, trips, and falls; electrical safety; climbing stairs and ladders; overhead dangers; unstable items; and fire. In addition, NMFS will likely require all previously certified dockside/roving monitors to attend a refresher safety training session on issues specific to boarding vessels and inspecting fish holds. Based on examples in other U.S. and Canadian fisheries, NMFS is currently developing standardized protocols that outline the major elements that dockside/roving monitors must comply with when inspecting fish holds. These elements include, but are not limited to, requesting permission from the vessel captain to board a vessel, following the instructions of the vessel's captain and crew to safely enter and exit the fish holds, and inspecting only areas of the vessel that would normally be used to store fish. Such standards will be integrated into the dockside/roving monitoring training curriculum developed and conducted by the Northeast Fishery Observer Program.

The dockside/roving monitor service provider approval standards adopted in Amendment 16 explicitly included the requirement for service providers to have adequate insurance to cover injury, liability, or accidental death that might befall dockside/roving monitors. NMFS recognizes that despite such coverage, individual dockside/roving monitors still have the capacity to bring a lawsuit against vessel owners for any injuries incurred while inspecting fish holds. NMFS encourages sectors and dockside/roving monitor service providers to seek agreement on how to best address the issues and problems raised by the comment. As to whether FW 45 sufficiently considers possible increases in cost for liability insurance for inspecting fish holds, NMFS does not have sufficient information to do so. While NMFS has information on the amount and type of insurance dockside/roving monitoring service providers have purchased, it would be difficult for NMFS to speculate on the costs of additional insurance for individual vessels. However, NMFS is committed to reviewing the requirement to inspect fish holds and the costs associated with it over time as more information becomes available.

Comment 17: Two industry groups (AFM and NSC) supported the proposal to delay the industry's responsibility for dockside and at-sea monitoring costs until

FY 2013. They stated that this accurately reflects the fishing industry's inability to pay for the high costs of such monitoring at this time. However, the NSC cautioned that the economic viability of the fishing industry is not likely to improve sufficiently to enable sectors to cover such monitoring costs in FY 2013.

Accordingly, they recommended that the Council and NMFS should consider further postponing industry responsibility for such costs until the fishing industry is profitable again. In contrast, PEW suggested that sectors should be in a better position to assume monitoring costs in FY 2013. PEW offered that the proposed delay would help ensure the success of the established sector program, arguing that the long-term benefits of fishing under sectors outweigh any potential impacts associated with reduced dockside monitoring in the short term.

Oceana opposed delaying industry responsibility for dockside and at-sea monitoring costs, claiming that NMFS does not have the authority to modify sector monitoring provisions in a FW action because such a measure would be a fundamental change in the FMP and that implementing this delay through a FW action would circumvent the public process. Citing a recent court case (*Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 255 (D.D.C. 2005)), they contended that such measures can only be modified through an amendment, with an associated NEPA document. They also suggested that the proposed delay would undermine the Magnuson-Stevens Act requirements to monitor bycatch and implement measures to ensure accountability for ACLs, especially considering the concerns expressed by NMFS in a November 15, 2010, letter to the Council highlighting concerns about the potential limitation of NMFS funding in 2012 to support dockside and at-sea monitoring. FWW echoed this concern, noting that this might cause a "gap in the necessary enforcement required due to increased incentives for high-grading, misreporting, and underreporting." They recommended that delaying or removing monitoring costs should be based on vessel size/capacity, or an individual business's revenue.

Response: NMFS recognizes that the costs of requiring the fishing industry to pay for sufficient at-sea monitoring coverage could reduce profitability. However, a FMP must continue to maintain measures that prevent overfishing and promote the long-term health and stability of the fishery, as required by section 303(a) of the Magnuson-Stevens Act. As noted above, NMFS is concerned that relying exclusively on available NMFS funding for at-sea monitoring coverage during FY 2012 may reduce the amount of at-sea monitoring coverage available during that FY due to the yet uncertain amount of available NMFS funding for FY 2012.

NMFS agrees that delaying industry responsibility for paying for at- \*23063 sea monitoring coverage may reduce the amount of at-sea monitoring coverage during FY 2012 and undermine efforts to obtain accurate information regarding catch in the fishery. Therefore, NMFS has disapproved the proposed measure to delay

industry responsibility for the costs at-sea monitoring coverage during FY 2012. NMFS expects at least some funding that will offset at least some of the at-sea monitoring coverage costs during FY 2012. Accordingly, the fishing industry would only be responsible for the costs of at-sea monitoring coverage that is not accounted for by available Federal funding.

As noted in the FW 45 EA, delaying industry responsibility for funding dockside/roving monitoring coverage in FYs 2011 and 2012 will immediately reduce operational costs to industry, without reducing the availability of landings information. This is because the dockside/roving monitoring data are primarily used for enforcement purposes, not catch monitoring. The trip-end hail report, in conjunction with the requirement for dockside/roving monitors to inspect fish holds implemented by this final rule, is intended to provide sufficient information to ensure compliance with existing regulations. Moreover, NMFS is expected to have sufficient funding in FY 2011 to continue the levels of observer and at-sea monitoring coverage for both sector and common pool trips implemented in FY 2010, and to augment that with sufficient dockside/roving monitoring coverage for trips not monitored by observers or at-sea monitors. Even if insufficient funding available to NMFS results in a short-term reduction in dockside/roving monitoring data, NMFS agrees that such reductions in data would likely be offset by long-term benefits of fishing under sectors. Therefore, NMFS is approving the delay in industry responsibility for dockside/roving monitoring costs through this final rule. Further changes could be considered by the Council through a future management action, but because NMFS does not have the authority to revise measures adopted by the Council in FW 45, NMFS cannot unilaterally postpone industry responsibility for such costs beyond FY 2012 through this action.

NMFS disagrees that the proposed postponement of industry responsibility for dockside/roving and at-sea monitoring costs represents a fundamental revision of the FMP and would circumvent the public process. First, the fundamental dockside/roving and at-sea monitoring provisions implemented by Amendment 16 are retained. The only aspect of these provisions that changes through FW 45 is the entity paying for the costs of such monitoring. Although NMFS will pay for at least some of the costs of dockside/roving and at-sea monitoring coverage for FYs 2011 and 2012, and will endeavor to achieve the coverage requirements specified in Amendment 16 for industry-funded dockside/roving and at-sea monitoring coverage, these changes do not constitute a fundamental change to the FMP requiring an amendment to the FMP. Second, the Council fully anticipated that measures adopted under Amendment 16 could be revised in the future through a FW action. This is documented in the Amendment 16 FEIS's executive summary when it states, "The periodic adjustment process is modified so that all measures adopted can be adjusted on a framework action" (see page 10 of that document)

and in Section 4.2.8. This was codified in the regulations at § 648.90(a)(2)(iii) and (c)(1)(i). Both the Amendment 16 FEIS and the proposed regulations to implement Amendment 16 measures were made available for extensive public comment. Therefore, because the fundamental aspects of the Amendment 16 sector and common pool monitoring measures are not affected by the proposed delay in responsibility for monitoring costs, and that the public was afforded substantial opportunity to comment on the ability of the Council and NMFS to revise existing management measures through a FW action as part of the Amendment 16 proposed rule, NMFS has not remanded this provision back to the Council for implementation through an amendment to the FMP.

### **Sector Measures**

Comment 18: FWW claimed that it was unfair to distribute the PSCs of cancelled NE multispecies permits to all valid limited access NE multispecies permits, suggesting that it was a poor use of available and “un-owned” quota. Instead, they recommended that the PSC of cancelled permits should be distributed to state-operated permit banks. They contended that this would signify a return to the general public for the use of its resources.

Response: NMFS disagrees that it is unfair to distribute the PSCs of cancelled NE multispecies permits to all valid limited access NE multispecies permits. The National Standard 4 Guidelines state that, if it becomes necessary to allocate or assign fishing privileges among U.S. fishermen, such allocations shall be “fair and equitable to all such fishermen.” The proposed distribution to all valid limited access permits is consistent with National Standard 4 because it treats all permits equally and distributes PSCs associated with cancelled permits among all permits that may participate in the NE multispecies fishery. Therefore, NMFS implements this measure through this action.

Comment 19: An individual commercial fisherman recommended that sector rosters should be reopened now that common pool trip limits are proposed. He contended that there was not enough information about potential common pool trip limits to make an informed decision whether to join a sector by either the September or December sector roster deadlines. The Council also suggested that NMFS consider reopening sector rosters for the reasons noted above following public input at the March 17, 2011, Groundfish Oversight Committee meeting.

Response: As highlighted in Item 11 of this preamble and in a March 23, 2011, letter to permit holders, based on industry input, NMFS is allowing for a limited opportunity for additional changes to FY 2011 sector rosters to accommodate changes in vessel ownership that occurred after the submission of final sector rosters on December 1, 2010. This window to reopen FY 2011 sector rosters began on March 23, 2011, and will end on April 30, 2011. In future years, a window for additional sector roster changes would begin with the publication of proposed

measures for the common pool for the following year and end on April 30, and would be limited to ownership changes occurring after the December 1 roster deadline. This is intended to provide vessel owners with the information they need to make an informed decision about whether to participate in sectors during the following FY, without undermining public consideration of likely sector operations in the following fishing year by substantially revising sector rosters following an opportunity to comment on proposed sector operations plans.

Comment 20: One industry group (NSSN) and the Council supported the proposed delay of the existing 14-day window for sectors to complete ACE transfers after the end of the FY to ensure that sectors had sufficient time to consider and incorporate final NMFS evaluations of sector catch before they sought to acquire additional ACE to rectify any overages of sector ACE from the previous FY.

Response: NMFS agrees, and implements revisions to the existing regulations at § 648.87(b)(1)(iii)(C) and (b)(1)(viii) to allow for additional time that might be necessary to determine \*23064 estimates of final sector catch and balance sector overages from the previous FY through this action.

Comment 21: PEW expressed strong support for the approval of new sectors, including state-operated permit banks. They suggested that permit banks offer an important mechanism for preserving fishing opportunities for small-scale fishermen operating out of small ports and helping to protect against excessive consolidation in the fishery.

Response: NMFS agrees and approved the creation of new sectors, including state-operated permit banks through this final rule.

Comment 22: FWW stated that there was some conflicting language about the approval of new sectors as part of FW 45. In the preamble to the FW 45 proposed rule, they state that language suggests that new sectors have not been approved, yet language on page 39 of the FW 45 EA states that they are already approved and will become effective on May 1, 2011. Overall, however, comments by FWW did not outright oppose the implementation of new state-operated permit bank sectors, but rather suggested that such permit banks are indicative of their underlying concern with the privatization that occurs with catch shares. They suggest an alternative approach that would allow catch shares to be rented out to eligible entities. This would avoid the need to fund permit banks with taxpayer dollars and allow the Federal government to control pricing so that cost of fishing is always reasonable and can facilitate participation of small vessels in the fishery, thereby allowing managers to prioritize environmental, economic, and social goals of the fishery.

Response: Five new sectors were adopted by the Council in FW 45. However, to become effective, these sectors must still be approved by the Secretary through proposed and final rulemaking. Therefore, the language in the FW 45 EA

incompletely described the process for approving sectors and their operations on a yearly basis. The Council adopted the creation these new sectors as part of FW 45, but they are not officially approved until the Secretary approves measures contained in FW 45 and the regulations implementing such provisions. Because the creation of these sectors is consistent with the FMP and applicable law, they are officially approved through FW 45 and implemented through this final rule. However, to operate on a yearly basis, all sectors must submit an operations plan and contract by specific deadlines. These yearly operations plans must further be approved by the sector through a separate rulemaking from the rulemaking to approve the creation of such sectors.

In their comment, FWW suggested that rather than allocating fishing privileges to fishing entities, fishery managers should require eligible fishing entities to rent fishing rights. As noted above, NMFS cannot substitute existing management measures with FWW's suggested approach through this final rule. However, this approach could be considered by the Council through a future management action. Nevertheless, it should be noted that their proposal would likely increase operational costs to all vessel owners that are interested in actively participating in the NE multispecies fishery, as both small and large vessels would be potentially obligated to purchase catch shares at the beginning of each FY. Depending on other operational costs associated with each particular vessel, it may not be feasible to continue to participate in the fishery given such expenses. This could lead to economic impacts to both these entities and supporting fishing communities that would be beyond those associated with the current management regime. Further, it may not be fair and equitable to impose different costs on different vessels based on size alone. Accordingly, FWW's proposal may not be consistent with National Standards 4 and 8 of the Magnuson-Stevens Act, as summarized in FWW's comment.

#### **Measures for FY 2011 Under RA Authority**

Comment 23: One commercial fisherman expressed concern that the proposed initial common pool trip limits for FY 2011 are insufficient to allow vessels to cover operational expenses. He stated that he prefers higher DAS counting rates and proportional increases in trip limits to allow vessel owners/operators to cover expenses and decrease bycatch by turning discards into landings. The Council also suggested that NMFS consider increasing trip limits and DAS counting so common pool trips are profitable and ACLs are not exceeded during FY 2011, following public input at the March 17, 2011, Groundfish Oversight Committee meeting.

Response: Because the realized fishing activity and associated expenses for each vessel may be very different, as documented in the Amendment 16 FEIS, it is very difficult to determine the appropriate combination of trip limits and DAS counting rates that would ensure that all common pool trips are profitable. Some vessel

owners/operators may elect to target some species early in the FY based on historic operations and operator knowledge, while others may prefer to operate later in the FY to target other species and capitalize on the generally higher prices during the winter when fish supply is lower. Therefore, any combination of trip limits and DAS rates would likely benefit some, but not all vessels operating in the common pool.

The RA has the authority to revise trip limits and DAS rates to ensure that the common pool achieves, but does not exceed allocated sub-ACLs throughout the FY. Generally, NMFS has endeavored to ensure that the fishery remains open throughout the FY to provide the most flexibility in fishing operations to accommodate seasonal distribution of fish, fluctuations in market price, and operational preferences of vessel owners/operators. This was the approach employed in proposing initial FY 2011 common pool trip limits in the proposed rule for this action. The proposed FY 2011 DAS counting rate was based on a formulaic rate necessary to account for projected overages of specific sub-ACLs by the common pool during FY 2010. Because NMFS has the flexibility to adjust trip limits and DAS counting rates throughout the year, NMFS can adapt to fishing behavior to either increase or decrease trip limits and, to some degree, DAS counting rates. Therefore, NMFS implements the common pool trip limits and DAS counting rates outlined in Item 13 of this preamble for FY 2011. For some stocks, these trip limits reflect the highest trip limit from the range of trip limits considered in Table 16 of the proposed rule for this action to increase the profitability of common pool trips without compromising efforts to ensure that the common pool sub-ACLs are not exceeded during FY 2011. NMFS will continue to monitor catch rates and will adjust such measures as necessary to achieve the goals of the FMP, including increasing the profitability of individual trips, if available data suggest that such an action is warranted.

#### **Corrections and Clarifications**

Comment 24: The NEHFA and one commercial fisherman expressed support for the clarification of PSC text to specifically clarify how PSCs will be calculated for handgear permits using landings histories of handgear permits during FYs 1996-2006.

Response: As outlined in the preamble of the proposed rule for this action, NMFS believes these changes are necessary to accurately reflect the intent of the Council in Amendment 16 and the manner in which PSC are actually \*23065 calculated by NMFS starting in FY 2011. Therefore, these changes have been implemented through this final rule.

Comment 25: One sector manager, commenting on the proposed rule to approve FY 2011 sector operation plans, commented in support of delaying the opening of the Eastern U.S./Canada Area only to common pool vessels until August 1, 2011,

and allowing sector vessels to access this area on May 1, 2011. He noted that all sector vessels fish under a hard TAC in all areas, including the Eastern and Western U.S./Canada Areas. He suggested that access to these offshore fishing areas when the weather is better during the summer months is very important for smaller trawl vessels that are not suitable for fishing in offshore waters during the winter.

Response: As outlined in the preamble of the proposed rule for this action, NMFS proposed applying the delayed opening of the Eastern U.S./Canada Area only to common pool vessels during FY 2011 for the reasons offered by the sector manager. Therefore, NMFS implements the measures originally proposed in the proposed rule for this action through this final rule.

Comment 26: The NSC expressed support for the proposed change to the regulations at § 648.87(b)(1)(i)(C) to clarify that any sector ACE carried over into the next FY would be calculated based on 10 percent of the ACE originally allocated to the sector at the start of the previous FY. However, the NSC disagreed with the characterization of that proposed change in the preamble of the proposed rule for this action that states “a NE multispecies sector may carry-over up to 10 percent of its allocated ACE for each stock \* \* \* into the following FY, provided the sector has not harvested more than 90 percent of its original allocation for that stock by the end of the FY.” They contend that the preamble text suggests that if a sector leases in ACE from another and used more than 90 percent of its allocation, then it would not be able to carry over any ACE into the next FY. In doing so, this interpretation would destroy the utility of carry over provisions and distorts ACE trading system. They recommend that NMFS remove the contested preamble text from the final rule, as it could be used to interpret any ambiguities in the implementation of this provision in the future.

Response: NMFS recognizes that the preamble text referenced in NSC's comment could be interpreted in a way that is counter to the intent of NMFS in proposing this correction. Consistent with the proposed regulatory text, the intent of NMFS was to merely clarify that the amount of ACE that can be carried over for each stock shall be calculated based upon the amount of ACE originally allocated to that sector. To more accurately reflect the intent of NMFS and the Council in originally adopting the original ACE carry-over provision in Amendment 16, NMFS has removed the disputed preamble text and inserted an example clarifying how NMFS will calculate ACE that can be carried over into the next FY into the preamble text for this final rule.

### **Changes From the Proposed Rule**

NMFS has made two changes to the proposed rule, including changes as a result of public comment and the disapproval of the proposed measure to delay industry responsibility for at-sea monitoring costs during FY 2012. In §

648.87(b)(5)(i)(A)(1), the phrase “As instructed by the Regional Administrator” was added to the trip-start hail reporting requirements to enable the Regional Administrator to augment the data elements contained in this report to more effectively administer this provision and the associated dockside/roving monitor coverage levels on a yearly basis. This change allows the Regional Administrator to require that vessel operators declare whether an observer or at-sea monitor is assigned for a particular trip to facilitate the appropriate deployment of dockside/roving monitors in FYs 2011 and 2012 and achieve the desired coverage levels based on available funding, as described in Item 10 above. In addition, the regulations at § 648.87(b)(1)(v)(B)(2) were revised to reflect that the fishing industry was responsible for developing and paying for any at-sea monitoring program developed starting in FY 2012.

### **Classification**

The Administrator, Northeast Region, NMFS, determined that FW 45 is necessary for the conservation and management of the NE multispecies fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

There is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after the date of publication for the measures implemented by this final rule. The effective date of this action affects a parallel rulemaking to approve sector operations plans for the start of FY 2011 on May 1, 2011. Therefore, these actions must be in effect at the beginning of FY 2011 to fully capture their environmental and economic benefits of FW 45 measures as well as the FY 2011 sector operations plans. The time available for FW 45 was constrained by multiple factors, preventing such actions from being completed sufficiently in advance of May 1, 2011, to facilitate the 30-day cooling off period. These factors included additional time necessary to fully analyze measures included in this action following revisions to draft measures when the Council adopted final FW 45 measures at its November 2010 meeting, and coordinate a special meeting of the TMGC to evaluate the impacts of the approval of IFACA in January 2011 on measures included in FW 45. Due to these constraints and rationale, this rulemaking could not be completed further in advance of May 1, 2011. Therefore, in order to have this action effective at the beginning of FY 2011, it is necessary to waive a portion of [retain as necessary] the 30-day delay period for this rule. The waiver of a portion of [retain as necessary] the 30-day delayed effectiveness for this final rule is in the public interest because it is necessary to implement a number of measures by the start of FY 2011 that would benefit the NE multispecies fishery at large. Specifically, this action incorporates the best available scientific information for both pollock and GB yellowtail flounder, specifies and distributes revised ACLs for several stocks, implements a spawning

closure area to protect spawning cod in the GOM, delays industry responsibility for costs associated with catch monitoring, increases access to near-shore seasonal closure areas by smaller Handgear-permitted vessels, increases LAGC vessel access to the Great South Channel Exemption Area, and approves the creation of five new sectors, among other measures. This final rule also includes measures that would control fishing effort by common pool vessels to help prevent the premature or excessive harvest of sub-ACLs allocated to the common pool during FY 2011. A May 1, 2011, effective date is necessary in order to specify catch levels and implement management measures necessary to eliminate overfishing and continue stock rebuilding, help mitigate the adverse economic impacts resulting from continued efforts to end overfishing and rebuild overfished stocks, increase the economic efficiency of vessel operations, and prevent industry confusion. Failure to waive the 30-day delay in effectiveness would prevent such measures from being implemented on May 1, 2011, and could \*23066 result in short-term adverse economic impacts to NE multispecies vessels and associated fishing communities that were neither anticipated by the Council and industry participants, nor analyzed in the FW 45 EA and the associated FY 2011 sector operations plans EA. In particular, access to available fishery resources would be unnecessarily delayed for scallop and Handgear-permitted vessels, and commercial vessels would not be able to benefit from the substantially increased FY 2011 GB yellowtail flounder ACL. This could result in additional economic impacts and reduce the economic efficiency of the fleet until such measures become effective. Without the timely implementation of measures specified in this rule, the risk of excessive catch by common pool vessels would be increased, along with potential that the common pool will once again exceed its sub-ACL for specific stocks. In addition, allowing for a full 30-day delayed effectiveness period would delay the implementation of the GOM Cod Spawning Protection Area for up to an additional 30 days during which cod will continue to spawn. Thus, this delay could potentially jeopardize existing efforts to end overfishing and rebuild overfished stocks. This would be contrary to not only the interest of the fishing communities, but to the public at large, as overfishing and overfished stocks decreases the ability of the public to enjoy that stock for commercial, recreational, aesthetic, or other reasons, and reduces the availability of seafood to the nation. Therefore, delayed implementation of these measures beyond May 1, 2011, is impracticable and contrary to the public interest, and the requirement to delay implementation of this rule for a period of 30 days is hereby waived.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule does not contain policies with federalism or “takings” implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

A FRFA was prepared for this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, a summary of the analyses completed in the FW 45 EA and any supplements thereto to support the action, and this portion of the preamble. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in FW 45 and in the preamble to the proposed and this final rule, and is not repeated here. All of the documents that constitute the FRFA are available from NMFS (see ADDRESSES). In the FRFA, the baseline (no-action alternative) is the set of measures that were in place during FY 2010 (i.e., the measures implemented under Amendment 16 and FW 44). Tables and sections that are referenced in this FRFA refer to those contained in the EA developed for FW 45. A copy of FW 45 is available from the Council (see ADDRESSES).

A supplemental EA was developed to analyze the impacts of the emergency action to increase the FY 2011 GB yellowtail flounder TAC for the U.S./Canada Management Area and the associated ABC and ACL for this stock. The economic impact on affected entities resulting from increasing the FY 2011 GB yellowtail flounder TAC, ABC, and ACL is expected to be positive, because it will provide additional fishing opportunity and fishing revenue for vessels participating in NE multispecies fishery and the scallop fishery during FY 2011. Based on historic information, the groundfish fishery is able to land close to the full amount of GB yellowtail flounder allowed. The estimated revenue from the sale of GB yellowtail flounder under the increased catch limits is approximately \$2 million, compared with \$1.4 million if the original FY 2011 TAC, ABC, and ACL adopted in FW 45 were to be implemented instead. Based on a conservative estimate using FY 2010 data, for every dollar of yellowtail flounder revenue, there is at least \$10 of revenue from other species. The additional revenue due to the catch of other species could be worth approximately ten times the difference between the GB yellowtail flounder revenue under the original catch limits and the increased catch limits implemented by this action ( $10 \times \$641,272$ ), or approximately \$6.4 million (if the total GB yellowtail flounder TAC is caught, and fishing effort on GB ceases consistent with existing regulations).

With respect to the scallop fishery, the increased catch limit implemented by this action will result in a larger cap on the amount of GB yellowtail flounder than can be caught in the scallop access areas. A larger cap may indirectly enable greater scallop revenue for the scallop fishery, particularly if the GB yellowtail flounder cap becomes limiting to the scallop fishery in the Closed Area II Scallop Access Area. It is difficult to predict the amount of GB yellowtail flounder that will be caught in the Closed Area II Scallop Access Area in FY 2011 due to the variability

of scallop fishing effort, as well as scallop and yellowtail flounder catch rates. However, a larger cap on the amount of GB yellowtail flounder that can be caught in the scallop access areas enhances the ability of the scallop industry to plan fishing operations, and will minimize disruption to fishing activities.

***Summary of the Significant Issues Raised by Public Comments in Response to the IRFA. A Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made From the Proposed Rule as a Result of Such Comments***

Comment A: As noted above in Comment 16, several commenters suggested that the proposed requirement for dockside/roving monitors to inspect fish holds will expose vessel owners to a risk of a lawsuit stemming from any potential injury to such monitors when boarding the vessel or inspecting fish holds even if the dockside/roving monitoring service providers had sufficient insurance coverage. These commenters asserted that this potential risk will force vessel owners to buy more insurance to ensure that they are adequately covered for any potential liability lawsuits that might result from this provision. In doing so, they contest that this would contradict the FW 45 economic analysis that indicates that this measure should not impact either vessel owners or service providers.

Response: The existing regulations require dockside/roving monitor service providers to have adequate insurance to cover injury, liability, or accidental death that might befall dockside/roving monitors in the conduct of their duties. However, NMFS recognizes that despite such coverage, individual dockside/roving monitors still have the capacity to file a lawsuit against vessel owners for any injuries incurred while inspecting fish holds. As noted in the response to Comment 16 above, NMFS encourages sectors and dockside/roving monitor service providers to seek agreement on how to best address the issues and problems raised by the comment. NMFS does not have sufficient information to evaluate the potential increase in costs associated with any additional insurance coverage that vessel owners may be inclined to purchase to protect them from any liability associated with dockside/roving monitors inspecting fish holds. The risks associated with the liability for injuries to dockside/roving monitors inspecting fish holds appear to be \*23067 somewhat similar to those associated with having to accommodate an observer and, therefore, may be instructive on how to consider insurance costs for dockside monitoring. NMFS is committed to reviewing the requirement to inspect fish holds and the costs associated with it over time as more information becomes available.

***Description of and Estimate of the Number of Small Entities to Which the Final Rule Will Apply***

The measures implemented by this action affect recreational anglers and any vessel issued a limited access NE multispecies permit, an open access NE multispecies

Handgear B permit (Handgear B permit) or charter/party permit, or a LAGC scallop permit. In addition, because this action affects the dockside/roving and at-sea or electronic monitoring program requirements and require dockside monitors to inspect fish holds, this action also affects any entity intending to provide dockside/roving or at-sea or electronic monitoring services. As of December 20, 2010, the maximum number of small fishing entities (as defined by the Small Business Administration (SBA)) that may be affected by this action is 3,935 entities. These affected entities include 1,144 limited access NE multispecies DAS permit holders; 133 limited access NE multispecies Handgear A (Handgear A) permit holders; 11 limited access NE multispecies Small Vessel Exemption (Category C) permit holders; 1,156 open access NE multispecies Handgear B (Handgear B) permit holders; 824 open access NE multispecies charter/party permits; and 667 Atlantic sea scallop LAGC permits. It is likely that the actual number of small fishing entities affected by this action would be much smaller. For instance, information contained in Section 10.11.2 of the FW 45 EA indicates that only 397 vessels had reported any sales of regulated species and ocean pout as of December 2010, including 18 Handgear A vessels, 50 Handgear B vessels, and 329 other vessels issued limited access NE multispecies DAS permits. Further, according to that analysis, only 18 entities conducted party/charter operations in the GOM Cod Spawning Protection Area implemented by this action. It is difficult to estimate the number of private recreational anglers that may be affected by this action, as the GOM Cod Spawning Protection Area implemented by this action is too small to accurately determine the number of anglers that fish in this area based on available data. Finally, it is expected that the five entities currently providing dockside/roving monitoring and at-sea or electronic monitoring services would continue to do so in FYs 2011 and 2012, and would be affected by this action. As of March 28, 2011, four of these entities have submitted an application to provide dockside/roving monitoring services for FY 2011.

It is important to note that past fishing activity and enrollment in sectors may not be an accurate predictor of future fishing activity. In particular, it is possible that revisions to measures affecting both the Handgear A and Handgear B fisheries may increase participation by vessels issued such permits. As of December 1, 2010, 836 permits had elected to join a sector during FY 2011, as determined through the submission of sector rosters to NMFS, indicating that 452 permits would be enrolled in the common pool during FY 2011. However, vessels may withdraw from sectors through April 30, 2011. Therefore, because participation in sectors is voluntary, the number of vessels that will actually participate in sectors during FY 2011 and future years is likely to fluctuate based upon whether joining a sector or fishing under common pool measures offers the greater economic advantage to each individual vessel.

The SBA considers commercial fishing entities (NAICS code 114111) to be small entities if they have no more than \$4 million in annual sales, while the size standard for charter/party operators (part of NAICS cod 487210) is \$7 million in sales. Based on 2005-2007 average conditions, median gross sales by commercial fishing vessels were just over \$200,000, and no single fishing entity earned more than \$2 million. For regulated charter/party operators, the median value of gross receipts from passengers was just over \$9,000, and did not exceed \$500,000 in any year during 2001 to 2007. The vessels in the Atlantic sea scallop fishery are considered small business entities because all of them grossed less than \$3 million according to the dealer's data for FYs 1994 to 2009, consistent with analyses under the RFA for recent scallop actions. Although multiple vessels may be owned by a single owner, available tracking of ownership is not readily available to reliably ascertain affiliated entities. Therefore, for the purposes of this analysis, each permitted vessel is treated as a single small entity and is determined to be a small entity under the RFA. Accordingly, there are no differential impacts between large and small entities under this final rule.

***Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule***

The only reporting and recordkeeping requirements affected by this final rule are the request for a LOA to fish south of the GOM RMA by Handgear A and Handgear B vessels, or a similar declaration via VMS prior to each trip by Handgear A vessels required to use VMS under the existing regulations, and the trip-end hail report already approved as part of Amendment 16. This action does not impose any new reporting or recordkeeping requirements that have not already been in existence. However, it requires additional vessels (handgear-permitted vessels) to comply with the LOA requirements and mandates that common pool vessels submit trip-end hail reports earlier than expected when originally implemented under Amendment 16. Existing reporting and recordkeeping requirements for the dockside/roving and at-sea or electronic monitoring programs approved under Amendment 16 have been included below for reference.

The costs associated with the reporting and recordkeeping requirements supporting measures implemented by this action are detailed in the Paperwork Reduction Act (PRA) analysis associated with Amendment 16 and the permit family of forms for the Northeast Region of NMFS. The time burden associated with a telephone call to request for a LOA to fish south of the GOM RMA is estimated at 5 minutes, with no costs to vessels requesting such a LOA. The cost associated with a similar declaration via VMS is estimated to be \$0.50 per submission. For the trip-end hail reports, the yearly cost to each vessel is estimated to be approximately \$17, assuming that such reports were made via VMS. Costs would likely be lower if such reports were submitted via another medium. Costs to vessels receiving

dockside/roving monitoring services implemented under Amendment 16 include \$10 per year for confirming pre-trip hail reports and \$13 per year to confirm trip-end hail reports and specify whether a particular trip would be observed by a dockside monitor. Requirements to maintain and enter data into a dockside monitoring database are estimated to cost approximately \$4,225 per service provider annually, while submitting dockside monitoring data to NMFS is likely to cost each service provider approximately \$36,000 per year. Similar costs to service providers are expected to notify sector vessels of selection for at-sea/electronic monitoring coverage \*23068 (\$3,125 per year) and to submit at-sea or electronic monitoring data to NMFS (\$36,000 per year).

This final rule contains a collection-of-information requirement subject to the PRA and which has been approved by OMB under the various OMB control numbers listed below. Public reporting burden for these collections of information are estimated to average, as follows:

1. VTR submissions, OMB# 0648-0605, (5 min/response);
2. Sector operations plan and associated NEPA analysis, OMB# 0648-0605, (640 hr/response);
3. Dockside/at-sea monitoring service provider application, OMB# 0648-0605, (10 hr/response);
4. Dockside/at-sea monitoring service provider response to application disapproval, OMB# 0648-0605, (10 hr/response);
5. Data entry for sector discard monitoring system, OMB# 0648-0605, (3 min/response);
6. Sector weekly catch report, OMB# 0648-0605, (4 hr/response);
7. Sector annual report, OMB# 0648-0605, (12 hr/response);
8. Notification of expulsion from a sector, OMB# 0648-0605, (30 min/response);
9. Request to transfer ACE, OMB# 0648-0605, (5 min/response);
10. VMS certification form, OMB# 0648-0605, (10 min/response);
11. VMS confirmation call, OMB# 0648-0605, (5 min/response);
12. VMS area and DAS declaration, OMB# 0648-0605, (5 min/response);
13. VMS trip-level catch reports, OMB# 0648-0605, (15 min/response);
14. Request for a LOA to participate in the GOM Haddock Gillnet Pilot Program, OMB# 0648-0605, (5 min/response);
15. Request for a LOA to fish in a NE multispecies RGA, OMB# 0648-0605, (5 min/response);
16. VMS declaration to fish in a NE multispecies RGA, OMB# 0648-0605, (5 min/response);
17. Pre-trip hail report to a dockside monitoring service provider, OMB# 0648-0605, (2 min/response);

18. Trip-end hail report to a dockside monitoring service provider, OMB# 0648-0605, (15 min/response);
19. Confirmation of dockside monitoring trip-end hail report, OMB# 0648-0605, (2 min/response);
20. Dockside/roving service provider data entry, OMB# 0648-0605, (3 min/response);
21. Dockside/roving or at-sea monitor deployment report, OMB# 0648-0605, (10 min/response);
22. Dockside/roving or at-sea monitoring service provider catch report to NMFS upon request, OMB# 0648-0605, (5 min/response);
23. Dockside/roving or at-sea monitor report of harassment and other issues, OMB# 0648-0605, (30 min/response);
24. OLE debriefing of dockside/roving or at-sea monitors, OMB# 0648-0605, (2 hr/response);
25. Copy of dockside/roving or at-sea monitoring service provider contract upon request, OMB# 0648-0605, (30 min/response);
26. Copy of dockside/roving or at-sea monitoring service provider information materials upon request, OMB# 0648-0605, (30 min/response);
27. Observer program pre-trip notification, OMB# 0648-0605, (2 min/response);
28. Daily VMS catch reports when fishing in the U.S./Canada Management Area and CA II SAPs, OMB# 0648-0605, (15 min/response);
29. Daily VMS catch reports when fishing in the CA I Hook Gear Haddock SAP, OMB# 0648-0605, (15 min/response);
30. Daily VMS catch reports when fishing in the Regular B DAS Program, OMB# 0648-0605, (15 min/response);
31. Copy of the dealer weigh-out slip or dealer signature of the dockside monitor report, OMB# 0648-0605, (2 min/response);
32. Forward trip start/end hails to NMFS, OMB# 0648-0605 (2 min/response);
33. Notification to vessel/sector/NMFS of monitor emergency, OMB# 0648-0605 (5 min/response);
34. Initial vessel application for a limited access Handgear A permit, OMB Control Number 0648-0202, (10 min/response);
35. DAS Transfer Program application, OMB Control Number 0648-0202, (5 min/response);
36. VMS purchase and installation, OMB Control Number 0648-0202, (1 hr/response);
37. Automated VMS polling of vessel position twice per hour while fishing within the U.S./Canada Area, OMB Control Number 0648-0202, (5 sec/response);
38. VMS proof of installation, OMB Control Number 0648-0202, (5 min/response);

39. Expedited submission of a proposed SAP, OMB Control Number 0648-0202, (20 hr/response);
40. Request to power down VMS for at least 1 month, OMB Control Number 0648-0202, (5 min/response);
41. Request for an LOA to participate in the GOM Cod Landing Exemption, OMB Control Number 0648-0202, (5 min/response);
42. Request for an LOA to participate in the Skate Bait-only Possession Limit Exemption, OMB Control Number 0648-0202, (5 min/response);
43. Submission of a sector allocation proposal, OMB Control Number 0648-0202, (50 hr/response);
44. DAS “flip” notification via VMS for the Regular B DAS pilot program, OMB# 0648-0202 (5 min/response);
45. DAS “flip” notification via VMS for the Eastern U.S./Canada Haddock SAP Pilot Program, OMB# 0648-0202 (5 min/response);
46. NMFS Office of Law Enforcement landings notice requirement for Category 1 herring vessels operating with an observer waiver, OMB# 0648-0521, (5 min/response);
47. Notification and Communication with USCG and Center for Coastal Studies, OMB# 0648-0521, (10 min/response);
48. Written requests to receive a DAS credit for standing by an entangled whale, OMB# 0648-0521, (30 min/response);
49. Vessel baseline downgrade request for the DAS Leasing Program, OMB# 0648-0475, (1 hr/response);
50. Spawning block declaration, OMB# 0648-0202 (2 min/response);
51. Sector Manager daily reports for CA I Hook Gear Haddock SAP, OMB# 0648-0212 (2 hr/response);
52. DAS Leasing Program application, OMB# 0648-0475 (10 min/response); and
53. Declaration of intent to fish inside and outside of the Eastern U.S./Canada Area on the same trip, OMB# 0648-0202 (5 min/response).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by e-mail to OIRA—Submission@omb.eop.gov, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

***Description of Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes***

During the development of Framework 45, NMFS and the Council \*23069 considered ways to reduce the regulatory burden on and provide flexibility to the regulated community. The approach taken is consistent with the recent Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation (January 18, 2011). The measures implemented by this final rule, in conjunction with the final rule to approve FY 2011 sector operations plans, minimize the long-term economic impacts on small entities to the extent practicable. Overall, long-term impacts of this final rule, as well as the related actions of the FMP, are minimized by ensuring that management measures and catch levels result in fishing mortality rates are sustainable and contribute to rebuilding stocks and, therefore, maximizing yield, as well as providing additional flexibility for fishing operations in the short term. In particular, this final rule implements several measures that directly or indirectly provide small entities with some ability to offset at least some portion of the estimated economic impacts associated with proposed measures. The major mitigating measures include formal recognizing the rebuilt status of pollock; extending the rebuilding period for GB yellowtail flounder; increasing the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC; maintaining existing yellowtail flounder allocations to the scallop fishery; allowing LAGC scallop vessels greater access to the Great South Channel Exemption area; increasing access to the seasonal closure areas for Handgear A and Handgear B permits and exempting vessels issued these permits and limited access Small Vessel Exemption permits from existing dockside/roving monitoring requirements; delaying requiring sectors and common pool vessels to pay for dockside/roving and at-sea or electronic monitoring; redistributing PSC from cancelled permits to all remaining valid limited access NE multispecies permits; and approving new sectors, including state permit banks and a lease-only sector. A complete description of why each measure was selected can be found in the Section 4.0 of the FW 45 EA (see ADDRESSES).

The specification of ACLs for components of the groundfish and non-groundfish fisheries, as well as additional management measures to ensure that such catch levels are not exceeded, increase the likelihood that the biological objectives of the FMP will be met, resulting greater sustainable revenue over the long term. Specifically, this action formally recognizes that pollock is rebuilt, incorporates updated biological reference points, and specifies higher ACLs for this stock based upon updated stock assessment data first implemented on a temporary basis through a July 20, 2010, emergency action (75 FR 41996). This action also extends the rebuilding program for GB yellowtail flounder and indirectly reduces economic

impacts on NE multispecies vessels by allowing higher ACLs to be specified for the remainder of the rebuilding program compared to the existing rebuilding program adopted for this stock. Further, this action substantially increases the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC and the associated ABC and ACL available to commercial vessels based on the flexibility provided by IFACA. Such increases in available ACL and associated vessel revenue would not be realized if this action was not implemented, as the increased pollock ACL implemented by the July 20, 2010, emergency rule would expire on July 17, 2011, and the GB yellowtail flounder U.S./Canada Management Area TAC and the associated ABC and ACL would expire on April 30, 2011, because this TAC is approved on a yearly basis following annual recommendations by the TMGC. Finally, this action maintains the actual yellowtail flounder allocations to the scallop fishery that were implemented by the FW 44 final rule for FY 2010, instead of updating those allocations to reflect revised estimates of the amount of yellowtail flounder bycatch expected in the scallop fishery during FY 2011. Updated estimates would have lowered the yellowtail allocations to the scallop fishery for FY 2011 and potentially resulted in reduced fishing revenue for the scallop fishery. Together, these provisions increase the amount of these stocks available to commercial vessels without compromising the conservation of objectives of the FMP to prevent overfishing and rebuild overfished stocks, thereby likely increasing vessel revenues from landing these and other stocks by reducing the likelihood that low ACLs for these stocks will unnecessarily restrict vessel operations in FY 2011 and mitigating adverse economic impacts of recent effort controls in the fishery.

This final rule mitigates economic impacts to LAGC scallop vessels by eliminating the yellowtail flounder peak spawning closure areas in the Great South Channel Exemption Area and enabling LAGC scallop vessels greater access to this area. If this measure reduces operational costs by allowing vessels to operate in a more efficient manner, it could increase the economic efficiency of vessel operations and increase the value of the IFQ permits. Not implementing this measure would likely cause fishing operations by LAGC scallop vessels to be less efficient, increasing operational costs by requiring such vessels to steam farther to open fishing grounds. This action does not compromise efforts to protect overfished stocks of yellowtail flounder, as the yellowtail flounder spawning closure areas were first implemented at a time when LAGC scallop vessels were not as restricted in the amount scallop trips that they could take as they are now. Therefore, these closures were necessary to prevent the excessive harvest of yellowtail flounder as bycatch by LAGC scallop vessels, but are now no longer required following the implementation of more restrictive measures to control scallop catch by these

vessels in the form of an individual fishing quota system as part of Amendment 11 to the Atlantic Sea Scallop FMP (April 14, 2008; 72 FR 20090).

This action implements several measures that reduce operational costs to vessels, on both a temporary and indefinite basis. Specifically, this action indefinitely exempts NE multispecies Handgear A, Handgear B, and Small Vessel Exemption Category permits from dockside/roving monitoring requirements, delays industry responsibility for paying for dockside/roving monitoring coverage until FY 2013, and delays industry responsibility for paying for a sector at-sea monitoring program until FY 2013. Delaying the fishing industry's responsibility to pay for dockside/roving monitors and exempting handgear and Small Vessel category permits from the dockside/roving monitoring requirements would save approximately \$281,000 per year (assuming 20 percent of trips would be covered), while delaying the responsibility for paying for at-sea monitoring would save industry about \$5 million per year (assuming 30 percent of trips would be covered). Such cost savings would not be realized if such measures are not implemented. Therefore, this action attempts to minimize operational costs to affected vessels as the fishery continues to adapt to substantial changes to management measures, including ACLs, AMs, and an expansion of sector measures, and overfished stocks continue to rebuild.

Allowing vessels with handgear permits access to at least some of the seasonal closure areas is likely to increase the chance that such permits could increase their catch of regulated species, particularly during the early months of the fishing season before trip\***23070** limits may be reduced to prevent the overall ACLs from being exceeded. In addition to increasing the operational efficiency of such vessels by increasing catch rates and reducing operational costs (fuel, primarily), because these vessels are small and use relatively inefficient gear to catch fish, these measures allow vessels to fish closer to shore during periods of better weather instead of forcing them to fish farther offshore in areas that are not subject to seasonal closures. Such benefits would not be realized if this action is not implemented.

This action recalculates the PSC for each stock on a yearly basis to reflect the elimination of landings histories from cancelled permits, and redistributes such landings histories to all valid limited access NE multispecies permits. This replaces the previous practice of using the landing histories of cancelled permits to contribute to the sub-ACL specified for the common pool based on the interpretation that if a permit has not signed up to join a sector it is, by default, in the common pool. The magnitude of the impact from this provision is likely to be small, as few permits have been cancelled since the PSCs were calculated using permits valid as of May 1, 2008. Cancelled permits represent only about 72,000 lb (32,659 kg) of all species combined that is divided among the 1,288 valid limited

access NE multispecies permits based on each permit's individual fishing history. Thus, this measure, in itself, is unlikely to make an unprofitable fishing operation marginally profitable. Nevertheless, this action provides some positive benefit and increased economic opportunity to all remaining permit holders, and may increase the amount of ACE available on the market to lease.

As noted in the proposed rule for this action, the approval of new sectors, including state permit banks and a lease-only sector, as part of this action is likely to help to reduce vessel operational costs by increasing the amount of DAS and ACE available on the leasing market, reducing market price for such additional fishing opportunities, and increasing competition in the leasing market by providing alternative means to acquire the ACE necessary for to help vessels remain financially solvent. In addition, it is possible that the lease-only sector could reduce sector monitoring fees due to the presumption that participating vessels would not be actively fishing, but rather exist for the sole purpose of providing PSC that the sector may use to enable other sectors to continue fishing.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide (i.e., permit holder letter) will be sent to all holders of permits for the fishery. The guide and this final rule will be available upon request.

#### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 18, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

#### **PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

50 CFR § 648.10

2. In § 648.10, revise paragraph (k)(1) to read as follows:

50 CFR § 648.10

**§ 648.10 VMS and DAS requirements for vessel owners/operators.**

\* \* \* \* \*

(k) \* \* \*

(1) Reporting requirements for all limited access NE multispecies vessel owners or operators. In addition to any other reporting requirements specified in this part, the owner or operator of any vessel issued a limited access NE multispecies permit on either a common pool or sector trip must declare the following information via VMS or IVR, as instructed by the Regional Administrator:

(i) Broad stock area(s) to be fished. To fish in any of the broad stock areas, the vessel owner or operator must declare his/her intent to fish within one or more of the NE multispecies broad stock areas, as defined in paragraph (k)(3) of this section, prior to leaving port at the start of a fishing trip;

(ii) VTR serial number. On its return to port, prior to crossing the VMS demarcation line, as defined at § 648.10, the vessel owner or operator must provide the VTR serial number for the first page of the VTR for that particular trip, or other applicable trip ID specified by NMFS; and

(iii) Trip-end hail report. Unless otherwise required to comply with both the dockside/roving monitoring trip-start and trip-end hail reports pursuant to § 648.87(b)(5), beginning in fishing year 2011 (May 1, 2011), upon its return to port and prior to crossing the VMS demarcation line as defined in § 648.10, the owner or operator of any vessel issued a limited access NE multispecies permit that is subject to the VMS requirements specified in paragraph (b)(4) of this section must submit a trip-end hail report to NMFS via VMS, as instructed by the Regional Administrator. The trip-end hail report must include at least the following information, as instructed by the Regional Administrator: The vessel permit number; VTR serial number, or other applicable trip ID specified by NMFS; intended offloading location(s), including the dealer name/offload location, port/harbor, and state for the first dealer/facility where the vessel intends to offload catch and the port/harbor, and state for the second dealer/facility where the vessel intends to offload catch; estimated date/time of arrival; estimated date/time of offload; and the estimated total amount of all species retained, including species managed by other FMPs (in pounds, landed weight), on board at the time the vessel first offloads its catch from a particular trip. The trip-end hail report must be submitted at least 6 hr in advance of landing for all trips of at least 6 hr in duration or occurring more than 6 hr from port. For shorter trips, the trip-end hail reports must be submitted upon the completion of the last tow or hauling of gear, as instructed by the Regional Administrator.

\* \* \* \* \*50 CFR § 648.14

3. In § 648.14, revise paragraph (k)(7)(i)(B); and add paragraphs (k)(9)(i), (k)(15)(ii)(A)(5), and (k)(18)(i)(D) to read as follows:

50 CFR § 648.14

**§ 648.14 Prohibitions.**

\* \* \* \* \*

(k) \* \* \*

(7) \* \* \*

(i) \* \* \*

(B) Fish for, harvest, possess, or land regulated species in or from the closed areas specified in § 648.81(a) through (f) and (o), unless otherwise specified in § 648.81(c)(2)(iii), (f)(2)(i), (f)(2)(iii), \*23071 (f)(2)(vi), (i), (o)(2)(i), or as authorized under § 648.85.

\* \* \* \* \*

(9) \* \* \*

(i) If operating under the provisions of a limited access NE multispecies Handgear A permit south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), fail to declare the vessel operator's intent to fish in this area via VMS or fail to obtain or retain on board a letter of authorization from the Regional Administrator, as required by § 648.82(b)(6)(iv).

\* \* \* \* \*

(15) \* \* \*

(ii) \* \* \*

(A) \* \* \*

(5) If operating under the provisions of a limited access NE multispecies Handgear B permit south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), fail to obtain or retain on board a letter of authorization from the Regional Administrator, as required by § 648.88(a)(2)(iv).

\* \* \* \* \*

(18) \* \* \*

(i) \* \* \*

(D) Offload fish before a dockside/roving monitor arrives, if selected to have its offloading events observed by a dockside/roving monitor, as specified by § 648.87(b)(1)(v)(B)(1) and (b)(5)(i)(C).

\* \* \* \* \*50 CFR § 648.80

4. In § 648.80, revise the introductory text to paragraph (a)(18), and remove paragraphs (a)(18)(ii)(C) and (D).

The revision reads as follows:

50 CFR § 648.80

**§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.**

\* \* \* \* \*

(a) \* \* \*

(18) Great South Channel Scallop Dredge Exemption Area. Vessels issued a LAGC scallop permit, including limited access scallop permits that have used up their DAS allocations, may fish in the Great South Channel Scallop Dredge Exemption Area, as defined under paragraph (a)(18)(i) of this section, when not under a NE multispecies or scallop DAS or on a sector trip, provided the vessel complies with the requirements specified in paragraph (a)(18)(ii) of this section and applicable scallop regulations in subpart D of this chapter.

\* \* \* \* \*50 CFR § 648.81

5. In § 648.81:

- a. Revise the introductory text of paragraph (f)(2)(vi);
- b. Add paragraph (g)(2)(vi);
- c. Revise paragraph (i); and
- d. Add paragraph (o).

The revisions and additions read as follows:

50 CFR § 648.81

**§ 648.81 NE multispecies closed areas and measures to protect EFH.**

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(vi) That are fishing on a sector trip, or under the provisions of a Northeast multispecies Handgear A permit, as specified at § 648.82(b)(6), provided such vessels comply with the following restricted areas referred to as the Sector Rolling Closure Areas:

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(vi) That are fishing under the provisions of a Northeast multispecies Handgear A permit, as specified at § 648.82(b)(6), or the provisions of a Northeast multispecies Handgear B permit, as specified at § 648.88(a).

\* \* \* \* \*

(i) Transiting. Unless otherwise restricted or specified in this paragraph (i), a vessel may transit CA I, the Nantucket Lightship Closed Area, the Cashes Ledge Closed Area, the Western GOM Closure Area, the GOM Rolling Closure Areas, the GB Seasonal Closure Area, the EFH Closure Areas, and the GOM Cod Spawning Protection Area, as defined in paragraphs (a)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), and (o)(1), of this section, respectively, provided that its gear is stowed in accordance with the provisions of § 648.23(b). A vessel may transit CA II, as defined in paragraph (b)(1) of this section, in accordance with paragraph (b)(2)(iv) of this section. Private recreational or charter/party vessels fishing under the Northeast multispecies provisions specified at § 648.89 may transit the GOM Cod

Spawning Protection Area, as defined in paragraph (o)(1) of this section, provided all bait and hooks are removed from fishing rods, and any regulated species on board have been caught outside the GOM Cod Spawning Protection Area and has been gutted and stored.

\* \* \* \* \*

(o) GOM Cod Spawning Protection Area. (1) Except as specified in paragraph (o)(2) of this section, from April through June of each year, no fishing vessel or person on a fishing vessel may enter, fish in, or be in; and no fishing gear capable of catching NE multispecies may be used, on, or be on board, a vessel in the GOM Cod Spawning Protection Area, as defined by straight lines connecting the following points in the order stated (a chart depicting this area is available from the Regional Administrator upon request):

**GOM Cod Spawning Protection Area**

<b>Point</b>	<b>N. Latitude</b>	<b>W. Longitude</b>
CSPA1	42°50.95'	70°32.22'
CSPA2	42°47.65'	70°35.64'
CSPA3	42°54.91'	70°41.88'
CSPA4	42°58.27'	70°38.64'
CSPA1	42°50.95'	70°32.22'

(2) Paragraph (o)(1) of this section does not apply to persons on a fishing vessel or fishing vessels:

(i) That have not been issued a NE multispecies permit and that are fishing exclusively in state waters;

(ii) That are fishing with or using exempted gear as defined under this part, excluding pelagic gillnet gear capable of catching NE multispecies, except for vessels fishing with a single pelagic gillnet not longer than 300 ft (91.4 m) and not greater than 6 ft (1.83 m) deep, with a maximum mesh size of 3 inches (7.6 cm), provided:

(A) The net is attached to the boat and fished in the upper two-thirds of the water column;

(B) The net is marked with the vessel owner's name and vessel identification number;

(C) There is no retention of regulated species or ocean pout; and

(D) There is no other gear on board capable of catching NE multispecies;

(iii) That are fishing as a charter/party or recreational fishing vessel, provided that:

(A) With the exception of tuna, fish harvested or possessed by the vessel are not sold or intended for trade, barter, or sale, regardless where the species are caught;

(B) The vessel has no gear other than pelagic hook and line gear, as defined in this part, on board unless that gear is properly stowed pursuant to § 648.23(b); and

(C) There is no retention of regulated species, or ocean pout; and

(iv) That are transiting pursuant to paragraph (i) of this section.

50 CFR § 648.82

6. In § 648.82:

a. Revise paragraphs (a)(2) and the introductory text of paragraph (b)(6);

b. Add paragraph (b)(6)(iv); and

c. Revise paragraph (n)(2)(iv).

The revisions and addition read as follows:

50 CFR § 648.82

**§ 648.82 Effort-control program for NE multispecies limited access vessels.**

(a) \* \* \*

(2) Notwithstanding any other provision of this part, any vessel issued \*23072 a NE multispecies limited access permit may not call into the DAS program and fish under a DAS, fish on a sector trip, or fish under the provisions of a limited access Small Vessel Category or Handgear A permits pursuant to paragraphs (b)(5) and (6) of this section, respectively, if such vessel carries passengers for hire for any portion of a fishing trip.

(b) \* \* \*

(6) Handgear A category. A vessel qualified and electing to fish under the Handgear A category, as described in § 648.4(a)(1)(i)(A), may retain, per trip, up to 300 lb (135 kg) of cod, one Atlantic halibut, and the daily possession limit for other regulated species and ocean pout, as specified under § 648.86. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is reduced below 300 lb (135 kg) per DAS by NMFS, the cod trip limit specified in this paragraph (b)(6) shall be adjusted to be the same as the applicable cod trip limit specified for NE multispecies DAS permits. For example, if the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area would also be reduced to 250 lb (113.4 kg). Qualified vessels electing to fish under the Handgear A category are subject to the following restrictions:

\* \* \* \* \*

(iv) Declaration. For any such vessel that is not required to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator stating an intent to fish south of the GOM Regulated Mesh Area and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. For any such vessel that is required, or elects, to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as

defined at § 648.80(a)(1), a vessel owner or operator must declare an intent to fish south of the GOM Regulated Mesh Area on each trip through the VMS prior to leaving port, in accordance with instructions provided by the Regional Administrator. Such vessels may transit the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), provided that their gear is stowed in accordance with the provisions at § 648.23(b).

\* \* \* \* \*

(n) \* \* \*

(2) \* \* \*

(iv) Monitoring requirements. Except as specified in paragraph (n)(2)(iv)(C), starting in fishing year 2012 (May 1, 2012), landings of regulated species or ocean pout by common pool vessels shall be monitored at the point of offload by independent, third-party service providers approved to provide such services by NMFS, as specified in paragraphs (n)(2)(iv)(A) and (B) of this section. Unless otherwise instructed by NMFS, these service providers shall deploy dockside monitors to monitor the offload of catch directly to a dealer, and roving monitors to monitor the offload of catch onto a truck for subsequent shipment to a dealer. For fishing year 2012 only, common pool vessels must comply with any dockside/roving monitoring program specified by NMFS pursuant to § 648.87(b)(1)(v)(B)(1). None of the costs associated with dockside/roving monitors during fishing year 2012 shall be paid by the owner or operator of a vessel subject to these requirements. Starting in fishing year 2013 and thereafter, the costs associated with monitoring vessel offloads shall be the responsibility of individual vessels, unless otherwise instructed by NMFS. An individual vessel owner or operator may only use one dockside/roving monitoring service provider per fishing year beginning in fishing year 2013, and must contract for such services with a service provider approved by NMFS pursuant to § 648.87(b)(4), as instructed by the Regional Administrator. Both common pool vessels and service providers providing offloading monitoring services will be subject to the requirements specified in § 648.87(b)(5).

(A) Coverage levels. For fishing year 2012, dockside/roving monitoring coverage levels shall be determined by NMFS based on available funding. If NMFS does not require 100-percent coverage of all common pool trips, NMFS shall first provide dockside/roving monitoring for trips that are not also assigned an observer or at-sea monitor pursuant to § 648.11. Starting in fishing year 2013, at least 20 percent of the trips taken by vessels operating under the provisions of the common pool shall be monitored. To ensure that these levels of coverage are achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip must be monitored by a dockside/roving monitor, as specified in paragraph (n)(2) of this section, and a vessel may not offload any of

its catch until the dockside/roving monitor arrives. For example, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during offload at each location. All landing events at remote ports that are selected to be observed by a dockside/roving monitor must have a roving monitor present to witness offload activities to the truck, as well as a dockside monitor present at each dealer to certify weigh-out of all landings. Except as provided in this paragraph (n)(2)(iv)(A) or paragraph (n)(2)(iv)(C) of this section, or as instructed by the Regional Administrator, any service provider providing dockside/monitoring services required under this paragraph (n)(2)(iv) must ensure that coverage is randomly distributed among all such trips, and that the landing events monitored are representative of fishing operations by common pool vessels throughout the fishing year.

(B) Dockside/roving monitor service provider standards. Starting in fishing year 2013, a common pool vessel must employ a service provider approved by NMFS to provide dockside/roving monitor services, as identified by the Regional Administrator. To be approved to provide the services specified in paragraph (n)(2) of this section, dockside/roving monitor service providers must meet the standards in § 648.87(b)(4).

(C) Exemption. Common pool vessels operating under the provisions of either a limited access Northeast multispecies Small Vessel Category permit or Handgear A permit, as specified at §§ 648.82(b)(5) and (6), respectively, or an open access Northeast multispecies Handgear B permit, as specified at § 648.88(a), are exempt from the dockside/roving monitoring requirements specified in this paragraph (n)(2)(iv).

\* \* \* \* \*50 CFR § 648.87

7. In § 648.87:

- a. Revise paragraphs (b)(1)(i)(A), (b)(1)(i)(C), (b)(1)(i)(E) introductory text, (b)(1)(i)(E)(1), (b)(1)(i)(E)(2)(i) and (ii), (b)(1)(iii)(C), (b)(1)(v)(B) introductory text, (b)(1)(v)(B)(1), (b)(1)(v)(B)(3) introductory text, (b)(1)(v)(B)(3)(i), (b)(1)(v)(B)(4) and (5), (b)(1)(viii) introductory text, and (b)(1)(viii)(C);
- b. Revise paragraph (b)(2) introductory text;
- c. Revise paragraphs (b)(5) introductory text and (b)(5)(i)(A)(1);
- d. Add paragraph (b)(5)(ii)(E);
- e. Revise paragraph (c)(2)(i); and
- f. Add paragraphs (d)(20) through (24).

\*23073 The revisions and additions read as follows:

50 CFR § 648.87

**§ 648.87 Sector allocation.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) Allocated stocks. Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock, with the exception of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder (both the GOM/GB and the SNE/MA stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels/permits participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section. In the event that a future allocation of SNE/MA winter flounder can be made available pursuant to the biennial adjustment or framework process specified in § 648.90(a)(2), an ACE for this stock will be specified pursuant to paragraph (b)(1)(i)(E)(1) of this section.

\* \* \* \* \*

(C) Carry-over. With the exception of GB yellowtail flounder, a sector may carry over an amount of ACE equal to up to 10 percent of its original ACE allocation for each stock that is unused at the end of one fishing year into the following fishing year. Any unused ACE allocated for Eastern GB stocks pursuant to paragraph (b)(1)(i)(B) of this section will contribute to the 10-percent carry-over allowance for each stock, as specified in this paragraph (b)(1)(i)(C), but will not increase an individual sector's allocation of Eastern GB stocks during the following year. This carry-over ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

\* \* \* \* \*

(E) Potential sector contribution (PSC). For the purposes of allocating a share of the available ACL for each NE multispecies stock to approved sectors pursuant to § 648.90(a)(4), the landings history of all limited access NE multispecies permits shall be evaluated to determine each permit's share of the overall landings for each NE multispecies stock as specified in paragraphs (b)(1)(i)(E)(1) and (2) of this section. When calculating an individual permit's share of the overall landings for a particular regulated species or ocean pout stock, landed weight shall be converted to live weight to maintain consistency with the way ACLs are calculated pursuant to § 648.90(a)(4) and the way ACEs are allocated to sectors pursuant to this paragraph (b)(1)(i). This calculation shall be performed on July 1 of each year, unless another date is specified by the Regional Administrator, to redistribute the landings history associated with permits that have been voluntarily relinquished or otherwise canceled among all remaining valid limited access NE multispecies permits as of that date during the following fishing year. The PSC calculated pursuant to this paragraph (b)(1)(i)(E) shall remain with the permit indefinitely, but may be permanently reduced or eliminated due to a permit sanction or other enforcement action.

(1) Calculation of PSC for all NE multispecies stocks except GB cod. Unless otherwise specified in paragraph (b)(1)(i)(E)(2) of this section, for each valid limited access NE multispecies permit, including limited access NE multispecies Handgear A permits, landings recorded in the NMFS dealer database of each stock of NE multispecies determined by NMFS to be the landings history associated with that permit while subject to the NE multispecies regulations based on whether the vessel fishing under that permit was issued a limited access NE multispecies permit or subsequently qualified for a limited access NE multispecies permit pursuant to § 648.4(a)(1)(i), including regulated species or ocean pout caught under a NE multispecies DAS when participating in the skate or monkfish fisheries, but excluding, for example, landings by scallop vessels operating under a scallop DAS, shall be summed for fishing years 1996 through 2006. This sum shall then be divided by the total landings of each NE multispecies stock during the same period by all permits eligible to join sectors as of May 1, 2008. The resulting figure shall then be multiplied by a factor of 1/PSC of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the PSC for each individual valid limited access NE multispecies permit for each regulated species or ocean pout stock allocated to sectors in the NE multispecies fishery for the following fishing year pursuant to this paragraph (b)(1)(i)(E)(1).

(2) \* \* \*

(i) GB cod PSC for permits committed to participate in the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector. For each owner of a valid NE multispecies permit, or CPH, that committed to participate in either the GB Cod Hook Gear Sector or the GB Cod Fixed Gear Sector as evidenced by a valid authorized signature executed on or before March 1, 2008, on a preliminary roster for either of these sectors, the PSC for GB cod shall be equal to the sum of dealer landings of GB cod for fishing years 1996 through 2001, divided by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period. The PSC for all other regulated species or ocean pout stocks specified for these permits shall be calculated pursuant to paragraph (b)(1)(i)(E)(1) of this section. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(2)(i) shall then be multiplied by a factor of 1/PSC of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit for the following fishing year.

(ii) GB cod PSC for all other permits. For each owner of a valid NE multispecies permit or CPH that has not committed to participate in either the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector, as specified in paragraph (b)(1)(i)(E)(2)(i) of this section, the GB cod PSC for each such permit or CPH shall be based upon the GB cod PSC available after accounting for the GB cod

PSC calculated pursuant to paragraph (b)(1)(i)(E)(2)(i) of this section. To determine the GB cod PSC for each of these permits, the sum of the individual permit's landings of GB cod available in the NMFS dealer database for fishing years 1996 through 2006 shall be divided by the total landings of GB cod during that period by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period, after subtracting the total landings of GB cod by permits that committed to participate in either the GB Cod Hook Sector or GB Cod Fixed Gear Sector as of March 1, 2008. This individual share shall then be multiplied by the available GB cod PSC calculated by subtracting the GB cod PSC allocated pursuant to paragraph (b)(1)(i)(E)(2)(i) of this section from one. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(2)(ii) shall then be multiplied by a factor of 1/PSC of remaining permits as of July 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit.

\* \* \* \* \*

(iii) \* \* \*

(C) ACE buffer. At the beginning of each fishing year, NMFS shall withhold 20 percent of a sector's ACE for each stock for a period of up to 61 days (i.e., through June 30), unless otherwise specified by NMFS, to allow time to process any ACE transfers submitted at\*23074 the end of the fishing year pursuant to paragraph (b)(1)(viii) of this section and to determine whether the ACE allocated to any sector needs to be reduced, or any overage penalties need to be applied to individual permits/vessels in the current fishing year to accommodate an ACE overage by that sector during the previous fishing year, as specified in paragraph (b)(1)(iii) of this section.

\* \* \* \* \*

(v) \* \* \*

(B) Independent third-party monitoring program. A sector must comply with any dockside/roving monitoring program specified by NMFS for fishing years 2011 and 2012, pursuant to paragraph (b)(1)(v)(B)(1) of this section, including the dockside/roving monitoring operational standards specified in paragraph (b)(5) of this section, and develop and implement an independent third-party dockside/roving monitoring program by fishing year 2013. A sector must also develop, implement, and pay for, to the extent not funded by NMFS, an at-sea or electronic monitoring program by fishing year 2012 (May 1, 2012) consistent with paragraph (b)(1)(v)(B)(2) of this section. Both the dockside/roving and at-sea or electronic monitoring program developed by sectors must be approved by NMFS for monitoring landings and utilization of sector ACE, as specified in this paragraph (b)(1)(v)(B). Any service provider providing dockside/roving and at-sea or electronic monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet

the service provider standards specified in paragraph (b)(4) of this section, and any dockside/roving and at-sea or electronic monitoring program proposed by sectors must meet the operational standards specified in paragraphs (b)(5) and (b)(6) of this section, respectively, and be approved by NMFS in a manner consistent with the Administrative Procedure Act. None of the costs associated with any dockside/roving monitor monitoring requirements shall be paid by the owner or operator of a vessel subject to these requirements during fishing years 2011 and 2012. Starting in fishing year 2013, sectors shall be responsible for paying the costs associated with dockside/roving monitoring coverage, unless otherwise instructed by NMFS.

(1) Dockside/roving monitoring program. Dockside/roving monitors shall monitor landings of regulated species and ocean pout at every offload for which a trip has been selected to be observed by a dockside/roving monitor, whether directly to a federally permitted dealer or to a truck for transfer to a federally permitted dealer, to verify such landings at the time the landings are weighed by a federally permitted dealer and to certify the landing weights are accurate as reported on the dealer report. Unless otherwise specified in this part, the level of coverage for landings is specified in paragraph (b)(1)(v)(B)(3) of this section. To ensure that these levels of coverage are achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip, regardless of how many or the location of offloading events, must be monitored, and a vessel may not offload any of its catch until the dockside/roving monitor arrives. For example, if a trip is selected to be observed by a dockside/roving monitor, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during the offload at each location. All landing events at remote ports that are selected to be observed by a dockside/roving monitor must have a roving monitor present to witness offload activities to the truck, as well as a dockside monitor present at each dealer to certify weigh-out of all landings. Any service provider providing dockside/roving monitoring services pursuant to this paragraph (b)(1)(v)(B)(1) must meet the service provider standards specified in paragraph (b)(4) of this section. The details of the dockside/roving monitoring program used by each sector starting in fishing year 2013 pursuant to paragraph (b)(1)(v)(B) of this section must be specified in the sector's operations plan, and must be consistent with the operational standards specified in paragraph (b)(5) of this section. The Regional Administrator shall review the dockside/roving monitoring program and approve/disapprove it as part of the yearly operations plan in a manner consistent with the Administrative Procedure Act. Common pool vessels operating under the provisions of the either a limited access Northeast multispecies Small Vessel Category permit or Handgear A permit, as specified at §§ 648.82(b)(5) and (6), respectively, or an open access Northeast multispecies

Handgear B permit, as specified at § 648.88(a), are exempt from the dockside/roving monitoring requirements specified in this paragraph (b)(1)(v)(B)(1). Except as provided in this paragraph (b)(1)(v)(B)(1), all common pool and sector vessels, along with service providers providing dockside monitoring services, will be subject to the dockside monitoring operational requirements specified at § 648.87(b)(5).

\* \* \* \* \*

(3) Coverage levels. Except as specified in paragraph (b)(1)(v)(B)(3)(i), any service provider providing dockside/roving or at-sea or electronic monitoring services required under this paragraph (b)(1)(v)(B)(3) must provide coverage that is 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 the common pool or each sector, and by all operations of common pool vessels or vessels operating in each sector throughout the fishing year.

(i) Dockside/roving monitoring. For fishing years 2011 and 2012, NMFS shall determine the level of coverage for any NMFS-sponsored dockside/roving monitoring program specified pursuant to paragraph (b)(1)(v)(B)(1) of this section based on available funding. If 100-percent coverage of all sector and common pool trips is not possible, NMFS shall first provide coverage to trips without an observer or at-sea monitor assigned pursuant to § 648.11(k), or approved electronic monitoring equipment assigned pursuant to paragraph (b)(1)(v)(B) of this section for sector vessels. Starting in fishing year 2013, at least 20 percent of all sector and common pool trips shall be monitored by dockside/roving monitors.

\* \* \* \* \*

(4) Hail reports. For the purposes of the dockside/roving and at-sea monitoring requirements specified in this paragraph (b)(1)(v)(B), sector vessels must submit all hail reports for a sector trip in which the NE multispecies catch applies against the ACE allocated to a sector, as specified in this part, to service providers offering dockside/roving and at-sea monitoring services pursuant to this paragraph (b)(1)(v)(B). The mechanism and timing of the transmission of such hail reports must be consistent with instructions provided by the Regional Administrator for any dockside/roving monitoring program required by paragraph (b)(1)(v)(B)(1) of this section, or specified in the annual sector operations plan, consistent with paragraphs (b)(5) and (6) of this section.

(5) Notification of service provider change. If for any reason a sector decides to change approved service providers used to provide dockside/roving or at-sea or electronic monitoring services required in this paragraph (b)(1)(v), the sector manager must first inform NMFS in writing in advance of the effective date of the change in **\*23075** approved service providers in conjunction with the submission of the next weekly sector catch report specified in paragraph (b)(1)(vi)(B) of this

section. A sector may employ more than one service provider at any time, provided any service provider employed by a sector meets the standards specified in paragraph (b)(4) of this section.

\* \* \* \* \*

(viii) ACE transfers. All or a portion of a sector's ACE for any NE multispecies stock may be transferred to another sector at any time during the fishing year and up to 2 weeks into the following fishing year (i.e., through May 14), unless otherwise instructed by NMFS, to cover any overages during the previous fishing year. A sector is not required to transfer ACE to another sector. An ACE transfer only becomes effective upon approval by NMFS, as specified in paragraph (b)(1)(viii)(B) of this section.

\* \* \* \* \*

(C) Duration of transfer. Notwithstanding ACE carried over into the next fishing year pursuant to paragraph (b)(1)(i)(C) of this section, ACE transferred pursuant to this paragraph (b)(1)(viii) is only valid for the fishing year in which the transfer is approved, with the exception of ACE transfer requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section, unless otherwise instructed by NMFS.

\* \* \* \* \*

(2) Operations plan and sector contract. To be approved to operate, each sector must submit an operations plan and preliminary sector contract to the Regional Administrator no later than September 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. A final roster, sector contract, and list of Federal and state permits held by participating vessels for each sector must be submitted by December 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. The operations plan may cover a 1- or 2-year period, provided the analysis required in paragraph (b)(3) of this section is sufficient to assess the impacts of sector operations during the 2-year period and that sector membership, or any other parameter that may affect sector operations during the second year of the approved operations plan, does not differ to the point where the impacts analyzed by the supporting NEPA document are compromised. Each vessel and vessel operator and/or vessel owner participating in a sector must agree to and comply with all applicable requirements and conditions of the operations plan specified in this paragraph (b)(2) and the letter of authorization issued pursuant to paragraph (c)(2) of this section. It shall be unlawful to violate any such conditions and requirements unless such conditions or restrictions are identified in an approved operations plan as administrative only. If a proposed sector does not comply with the requirements of this paragraph (b)(2), NMFS may decline to propose for approval such sector

operations plans, even if the Council has approved such sector. At least the following elements must be contained in either the final operations plan or sector contract submitted to NMFS:

\* \* \* \* \*

(5) Dockside monitoring operational standards. In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any dockside monitoring program developed by NMFS pursuant to paragraph (b)(1)(v)(B)(1) of this section must meet the following operational standards to be approved by NMFS:

(i) \* \* \*

(A) \* \* \*

(1) Trip-start hail report. As instructed by the Regional Administrator, the vessel operator must submit a trip-start hail report prior to departing port at the beginning of each trip notifying the sector manager and/or dockside/roving monitor service provider of the vessel permit number; trip ID number in the form of the VTR serial number of the first VTR page for that trip, or another trip identifier specified by NMFS; and an estimate of the date and time of arrival to port. Trip-start hail reports by vessels operating less than 6 hours or within 6 hours of port must also include estimated date and time of offload. If the vessel operator does not receive confirmation of the receipt of the trip-start hail report from the dockside/roving monitor service provider within 10 minutes of sending the original trip-start hail report, the operator must contact the service provider to confirm the trip-start hail report via an independent back-up system developed by the service provider.

\* \* \* \* \*

(ii) \* \* \*

(E) Inspection of fish holds. A dockside/roving monitor assigned to observe the offloading of fish from a particular trip shall inspect the fish holds, or any other areas of the vessel in which fish are stored, to determine if all fish are offloaded for that particular trip.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) Regulations that may not be exempted for sector participants. The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: NE multispecies year-round closure areas; permitting restrictions (e.g., vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); and reporting requirements. For the purposes of this paragraph (c)(2)(i), the DAS reporting requirements specified at § 648.82; the SAP-specific reporting requirements specified at § 648.85; and the reporting requirements associated with a dockside monitoring program specified in

paragraph (b)(5)(i) of this section are not considered reporting requirements, and the Regional Administrator may exempt sector participants from these requirements as part of the approval of yearly operations plans. This list may be modified through a framework adjustment, as specified in § 648.90.

\* \* \* \* \*

(d) \* \* \*

(20) State of Maine Permit Banking Sector.

(21) State of Rhode Island Permit Bank Sector.

(22) State of New Hampshire Permit Bank Sector.

(23) State of Massachusetts Permit Bank Sector.

(24) Sustainable Harvest Sector III.

50 CFR § 648.88

8. In § 648.88, revise paragraph (a)(1), and add paragraph (a)(2)(iv) to read as follows:

50 CFR § 648.88

**§ 648.88 Multispecies open access permit restrictions.**

(a) \* \* \*

(1) The vessel may possess and land up to 75 lb (90.7 kg) of cod, and up to the landing and possession limit restrictions for other NE multispecies specified in § 648.86, provided the vessel complies with the restrictions specified in paragraph (a)(2) of this section. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is adjusted by NMFS, the cod trip limit specified in this paragraph (a)(1) shall be adjusted proportionally (rounded up to the nearest 25 lb (11.3 \***23076** kg)). For example, if the GOM cod trip limit specified at § 648.86(b)(1) doubled, then the cod trip limit for the Handgear B category fishing in the GOM Regulated Mesh Area would also double to 150 lb (68 kg).

(2) \* \* \*

(iv) Declaration. To fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator declaring an intent to fish south of the GOM Regulated Mesh Area, and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. Such a vessel may transit the GOM Regulated Mesh Area, provided that their gear is stowed in accordance with the provisions at § 648.23(b).

\* \* \* \* \*50 CFR § 648.89

9. In § 648.89, revise paragraph (e)(1) to read as follows:

50 CFR § 648.89

**§ 648.89 Recreational and charter/party vessel restrictions.**

\* \* \* \* \*

(e) \* \* \*

(1) GOM Closed Areas. Unless otherwise specified in this paragraph (e)(1), a vessel fishing under charter/party regulations may not fish in the GOM closed areas specified at § 648.81(d)(1) through (f)(1) during the time periods specified in those paragraphs, unless the vessel has on board a valid letter of authorization issued by the Regional Administrator pursuant to § 648.81(f)(2)(iii) and paragraph (e)(3) of this section. The conditions and restrictions of the letter of authorization must be complied with for a minimum of 3 months if the vessel fishes or intends to fish in the seasonal GOM closure areas; or for the rest of the fishing year, beginning with the start of the participation period of the letter of authorization, if the vessel fishes or intends to fish in the year-round GOM closure areas. A vessel fishing under charter/party regulations may not fish in the GOM Cod Spawning Protection Area specified at § 648.81(o)(1) during the time period specified in that paragraph, unless the vessel complies with the requirements specified at § 648.81(o)(2)(iii).

\* \* \* \* \*50 CFR § 648.90

10. In § 648.90, revise paragraph (a)(4)(iii)(E)(2) to read as follows:  
50 CFR § 648.90

**§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.**

(a) \* \* \*

(4) \* \* \*

(iii) \* \* \*

(E) \* \* \*

(2) Commercial allocation. The ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(E)(1) of this section, shall be divided between sectors operating under an approved sector operations plan, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels/permits participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(E)(2) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

\* \* \* \* \*

[FR Doc. 2011-9705 Filed 4-19-11; 4:15 pm]

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## Footnotes

\*

Preliminary estimates that may be revised in 2012 based on TRAC and TMGC considerations.

\*\*

This value represents the flexibility afforded by IFACA and described further in Item 5 of this preamble that supersedes the 1,099 mt FY 2011 GB yellowtail flounder U.S. ABC originally adopted by the Council in FW 45.

\*

Preliminary estimate that may be revised in 2012 based on TRAC and TMGC considerations.

\*

Preliminary estimate that may be revised based on updated sector rosters and TRAC and TMGC considerations.

\*\*

These values represent an increase from the ACLs adopted by the Council in FW 45, as described further in Item 5 of this preamble.

\*\*\*

These values represent an estimate of the ACLs adopted by the Council in FW 45 based upon preliminary sector roster information and do not reflect updated rosters submitted to NMFS.

\*

Preliminary estimate that may be revised in 2011 based on TRAC and TMGC considerations.

## End of Document

78 FR 26117

### MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT PROVISIONS; FISHERIES OF THE NORTHEASTERN UNITED STATES; NORTHEAST (NE) MULTISPECIES FISHERY; FRAMEWORK ADJUSTMENT 48

Amendment 16 to the FMP (Amendment 16) established a process for setting acceptable biological catches (ABCs) and ACLs for regulated species and ocean pout, as well as distributing the available catch among the various components of the groundfish fishery. Amendment 16 also established AMs for these 20 groundfish stocks in order to prevent overfishing of these stocks and correct or mitigate any overages of the ACLs. Framework 44 to the FMP (Framework 44) set

the ABCs and ACLs for FYs 2010–2012. In 2011, Framework 45 to the FMP (Framework 45) revised the ABCs and ACLs for five stocks for FYs 2011–2012. Framework 47 to the FMP (Framework 47) updated specifications for most stocks for FYs 2012–2014 and modified management measures in the fishery after more than 1 year under ACLs and AMs. Framework 48 is one of two actions developed by the Council to respond to benchmark and assessment updates completed for all groundfish stocks in 2012 and 2013. Updated information in these assessments requires revisions to the status determination criteria for GOM cod, GB cod, SNE/MA yellowtail flounder, and white hake and implementation of updated ABCs and ACLs for most stocks for FYs 2013–2015. These measures are necessary to prevent overfishing and facilitate the rebuilding of groundfish stocks as required by the FMP. In Framework 48, the Council proposed administrative changes to the FMP to make way for Framework 50, which specifies ABCs and ACLs for all stocks for FY 2013–2015. The Council also included several measures in Framework 48 intended to mitigate negative economic impacts to the groundfish fishery anticipated from the substantial reductions in catch limits proposed in Framework 50 to end overfishing. Framework 48 also implements AMs for Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder in response to a Court Order and remand in *Oceana v. Locke et al.* 831 F.Supp.2d 95 (D.D.C. 2011) that held that so-called “reactive” AMs had not been developed for the 6 stocks not allocated to sectors (“non-allocated stocks”) in Amendment 16. Framework 48 recommended reactive AMs for 3 of these stocks, for which reactive AMs had not been established since Amendment 16. A more extensive discussion of the development of Frameworks 48 and 50 is available in the proposed rules for these two actions (78 FR 18188; March 25, 2013 and 78 FR 19368; March 29, 2013, respectively) and is not repeated here. NMFS also proposed several corrections to the NE multispecies regulations through the Framework 48 proposed rule under the authority of section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), which allows the Secretary of Commerce to implement regulations necessary to ensure that fishery management plans or amendments are carried out consistent with the Magnuson-Stevens Act. These changes are not part of Framework 48, but are necessary to clarify existing regulations and achieve the objectives of the FMP. Public comments were accepted on the Framework 48 proposed rule through April 9, 2013. After review of public comments, NMFS has partially approved Framework 48 as consistent with the goals and objectives of the NE Multispecies FMP, and the requirements of the Magnuson-Stevens Act and other applicable law. Disapproved Measures This section summarizes the Framework 48 measures NMFS has disapproved as not consistent with goals and objectives of the NE Multispecies FMP or the requirements of the Magnuson-

Stevens Act and other applicable law. NMFS also withdraws a correction to the NE multispecies regulations that NMFS proposed in the Framework 48 proposed rule regarding accounting of catch against quotas established for the Eastern U.S./Canada Management Area, for reasons discussed below.

1. Delay Industry At-Sea Monitoring Cost Responsibility Framework 48 proposed to delay sectors' responsibility to implement and pay for their own at-sea monitoring programs to FY 2014. The Council included this measure in Framework 48 out of concern that the industry would not be able to support this cost burden in FY 2013 due to the substantial catch reductions proposed in Framework 50. Coverage levels would instead be set at the level that NMFS can fund. The Council proposed a similar measure in Framework 45, which NMFS disapproved due to concerns that there would not be Federal funds to ensure adequate monitoring of sector operations. A complete description of the development this measure was included in the Framework 48 proposed rule (Item 8) and is not repeated here. NMFS is disapproving this measure as it did in Framework 45 because it is inconsistent with the requirements of the FMP and the Magnuson-Stevens Act. However, due to fishermen's concerns about their ability to pay for at-sea monitoring costs in FY 2013, NMFS intends to cover 100 percent of the costs of sector at-sea monitoring once again in FY 2013 using the NMFS At-sea Monitoring Program. But, relying on NMFS appropriations to determine an at-sea monitoring coverage rate does not ensure that coverage will be sufficient to monitor sector annual catch entitlements (ACEs) or to meet the purpose and goals for sector monitoring described in Amendment 16 and Framework 48. Because NMFS funding depends on Congressional appropriations, funding levels fluctuate, and NMFS cannot guarantee sufficient funding to meet the coverage levels required by the FMP to monitor ACLs and sector ACEs. If sector at-sea monitoring depended on NMFS funding alone and that funding fell short of required coverage levels, NMFS may not be able to reliably estimate total catch, undermining the effectiveness of ACLs and sector ACEs to prevent overfishing and facilitate the rebuilding of groundfish stocks as required by National Standard 1 and section 303(a)(1) of the Magnuson-Stevens Act. NMFS was able to locate funding to provide the NMFS At-sea Monitoring Program again in FY 2013, but such funding is not certain. Without additional appropriations to support sector monitoring specifically, relying solely on the Federal Government to provide sector at-sea monitoring coverage could also undermine other programs. Inadequate funding could potentially force NMFS to spread existing resources too thin, undermining the Standard Bycatch Reporting Methodology (SBRM) coverage requirements of section 303(a)(11) and information used to assess Northeast fish stocks. Thus, NMFS has disapproved this measure in Framework 48. Sectors will be responsible for any costs of at-sea monitoring that are not covered by Federal funding in FY 2013.

2. At-Sea

Monitoring Cost-Sharing To serve as a more long-term solution to the cost burden of at-sea monitoring to sectors, Framework 48 proposed a mechanism for sharing of at-sea monitoring costs between sectors and NMFS. Framework 48 proposed that the industry would only ever be responsible for paying the direct costs of at-sea monitoring, specifically the daily salary of the at-sea monitor. All other programmatic costs would be the responsibility of NMFS, including, but not limited to: Briefing, debriefing, training and certification costs (salary and non-salary); sampling design development; data storage, management and security; data quality assurance and VerDate Mar2010 14:55 May 02, 2013 Jkt 229001 PO 00000 Frm 00003 Fmt 4701 Sfmt 4700 E:\FR\FM\03MYR2.SGM 03MYR2 erowe on DSK2VPTVN1PROD with RULES\_2 26120 Federal Register / Vol. 78, No. 86 / Friday, May 3, 2013 / Rules and Regulations control; administrative costs; maintenance of monitoring equipment; at-sea monitor recruitment, benefits, insurance and taxes; logistical costs associated with deployment; and at-sea monitor travel and lodging. This measure was intended to reduce the cost burden of at-sea monitoring to sectors and thereby increase their profitability. NMFS has disapproved this costsharing measure because it is not consistent with other applicable laws as developed. Specifically, the AntiDeficiency Act and other appropriations law prohibits Federal agencies from obligating the Federal government except through appropriations and from sharing the payment of government obligations with private entities. Framework 48 proposed to require NMFS to pay for some portion of the costs of at-sea activities, such as logistical costs generated by deployment, which are outside its statutory obligations under the Magnuson-Stevens Act. As written, this measure would also have required NMFS and sectors to share payment of obligations defined as belonging to one or the other. For example, Framework 48 proposed to require NMFS to pay some costs related to at-sea activities, such as benefits and insurance for at-sea monitors, while sectors would pay other portions of at-sea costs, like the salary for at-sea monitors. Because such action would be prohibited under the law, NMFS has disapproved this measure in Framework 48. Although this measure was not approvable as developed, NMFS shares the Council and industry's concern about the ability of sectors to bear the full costs of monitoring in future fishing years. NMFS believes this approach to cost sharing, which defines the items that NMFS versus sectors should be responsible for, could be viable if restructured and may be worth pursuing in a future action. NMFS is already working with the New England and Mid-Atlantic Councils' joint HerringMackerel Plan Development Team (PDT)/Fishery Management Action Team (FMAT) to pursue cost-sharing options such as this one for those fisheries for FY 2014. The Council could consider including the NE Multispecies FMP in this joint effort to develop a workable and consistent cost-sharing mechanism for the Northeast region. 3. GB Yellowtail

Flounder Management Measures Framework 48 proposed to change the stratification of discard estimates for sectors for GB yellowtail flounder, by splitting the GB yellowtail flounder trawl discard strata between statistical area 522 and statistical areas 525/561/ 562. This measure was intended to revise sector discard rates to more closely reflect actual discards of yellowtail flounder in different areas of Georges Bank and potentially lengthen the fishing season for sector vessels in those areas. Based on public comment, NMFS has disapproved this measure in Framework 48, because it would complicate and increase the cost and burden of monitoring and potentially increase uncertainty of catch estimates without any measurable benefits for sectors. Accordingly, this measure is inconsistent with or may lead to inconsistency with National Standards 5 and 7 of the Magnuson Stevens Act. As more fully discussed below, because of the added complications of administering this measure, it may increase costs more than it provides benefits to the fishing industry or the efficient management and monitoring of catches. Although finer scale strata would allow discard rates to more closely reflect actual discard rates of yellowtail flounder in different parts of Georges Bank, NMFS does not believe this measure would have any real benefits for sectors that could not be achieved with existing discard rate strata. A separate discard rate in statistical area 522 could benefit an individual vessel with a lower GB yellowtail flounder discard rate that would not be influenced by higher discards by other vessels in its sector fishing elsewhere on Georges Bank. However, the sector's fishing season on GB would still be limited by the total catch of GB yellowtail flounder by all its member vessels. A finer stratum would not eliminate the need for a sector to manage discards of yellowtail flounder by all its vessels on Georges Bank to prevent an early end to their fishing season. In contrast, the proposed measure could have real effects on the administrative burden for both NMFS and sectors that NMFS believes are not justified in light of the lack of real benefits from this measure. Some sector representatives and members of sectors raised these concerns in public comments on the Framework 48 proposed rule. Both sectors and NMFS would have to modify and reprogram quota monitoring programs and reports to accommodate the new strata, increasing the administrative burden for sector managers and NMFS, without any corresponding benefits for sectors, which could reduce efficiency inconsistent with National Standards 5 and 7. Some sectors have developed software to calculate and manage catch and compile sector weekly reports to NMFS. These sectors would have to retain programmers to reprogram this software to accommodate the new strata and method. The administrative burden to generate sector weekly reports could be even greater for sector managers that do not use software to compile their sector's reports, but rather calculate catch manually on a weekly basis. NMFS is also concerned about how this revised strata, combined with other changes to the

discard rate method in FY 2013, will affect the variance of discard rates and thereby affect our ability to reliably estimate catch to ensure that overfishing is not occurring. Concerns that this measure could further complicate monitoring and increase uncertainty of catch estimates by creating an incentive to misreport catches of GB yellowtail flounder is also justified. There is a potential for this measure to create an incentive for sector vessels fishing inside and outside statistical area 522 without an observer to misreport GB yellowtail catch from outside area 522 as from inside area 522 in order to get a lower discard rate, thereby jeopardizing NMFS's ability to ensure that catches are consistent with preventing overfishing and rebuilding fish stocks. This could potentially inflate area 522 GB yellowtail discard estimates and negate any benefit of this measure. Thus, out of concern that this measure could increase the uncertainty of catch estimates and the costs of monitoring and administration of sectors without any corresponding benefits to sectors, NMFS has disapproved this measure in Framework 48.

4. Requirement to Stow Trawl Gear While Transiting The regulations currently specify that fishing gear must be stowed in a specific way, as described at 50 CFR 648.23(b), when transiting closed areas to facilitate the enforcement of closed areas at sea. Framework 48 proposed to remove this requirement for only trawl vessels on a groundfish trip because the Council believed that these measures are no longer necessary with the use of the vessel monitoring system (VMS) on all limited access multispecies vessels. After consideration of public comments received on this measure, NMFS has disapproved this measure in Framework 48 and is maintaining the requirements for all vessels to stow their gear when transiting closed areas on the basis that it may lead to difficulties in detecting and prosecuting unlawful fishing in closed areas, which would undermine the effectiveness of these areas to achieve the objectives for which

75 FR 18262-01, 2010 WL 1407078(F.R.)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 90250 CFR Part 648

[Docket No. 0808071078-0019-02]

RIN 0648-AW72

Magnuson-Stevens Fishery Conservation and Management Act Provisions;  
Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery;

Amendment 16

Friday, April 9, 2010

AA0365

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**\*18262 ACTION:** Final rule.

**SUMMARY:** This final rule implements measures approved under Amendment 16 to the NE Multispecies Fishery Management Plan (FMP). Amendment 16 was developed by the New England Fishery Management Council (Council) as part of the biennial adjustment process in the FMP to update status determination criteria for all regulated NE multispecies or ocean pout stocks; to adopt rebuilding programs for NE multispecies stocks newly classified as being overfished and subject to overfishing; and to revise management measures, including significant revisions to the sector management measures, necessary to end overfishing, rebuild overfished regulated NE multispecies and ocean pout stocks, and mitigate the adverse economic impacts of increased effort controls. This final rule also implements new requirements under Amendment 16 for establishing acceptable biological catch (ABC), annual catch limits (ACLs), and accountability measures (AMs) for each stock managed under the FMP, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Finally, this action adds Atlantic wolffish to the list of species managed by the FMP. This action is necessary to address the results of the most recent stock assessment, which indicate that several additional regulated species are overfished and subject to overfishing, and that stocks currently classified as overfished require additional reductions in fishing mortality to rebuild by the end of their rebuilding periods.

**DATES:** Effective at 0001 hr on May 1, 2010.

**ADDRESSES:** Copies of Amendment 16, its Regulatory Impact Review (RIR), and the Final Environmental Impact Statement (FEIS) are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. NMFS prepared an Initial Regulatory Flexibility Act (IRFA) analysis, which was summarized in the Classification section of the proposed rule. The Final Regulatory Flexibility Act (FRFA) analysis consists of the IRFA, public comments and responses, and the summary of impacts and alternatives contained in the Classification section of the preamble of this final rule. Copies of the small entity compliance guide and the Record of Decision for the FEIS associated with this action are available from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930-2298. The EIS/RIR/IRFA is also accessible via the Internet at <http://www.nefmc.org/nemulti/index.html>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to David Rostker, Office of

Management and Budget (OMB), by e-mail at David-Rostker@omb.eop.gov, or fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: Douglas W. Christel, Fishery Policy Analyst, phone: 978-281-9141, fax: 978-281-9135.

SUPPLEMENTARY INFORMATION:

### **Background**

Amendment 13 (April 27, 2004; 69 FR 22906) established a biennial adjustment process whereby the Council would review the FMP and make any changes to management measures necessary to achieve the goals and objectives of the FMP. This adjustment process provides for an update of the scientific information regarding the status of the stocks, and an evaluation of the effectiveness of the regulations. The biennial review scheduled to occur in 2008, with necessary changes to the FMP to be implemented in 2009, included a peer-reviewed benchmark assessment and a review of the biological reference points (stock status determination criteria) for each stock. This benchmark assessment and review of the biological reference points (Groundfish Assessment Review Meeting (GARM III)) was also part of the adaptive rebuilding strategy described in Amendment 13 to the FMP, which sought to evaluate the more fundamental scientific information mid-way through the rebuilding period for most stocks.

GARM III, completed in August 2008, concluded that 11 stocks were still subject to overfishing (i.e., the fishing mortality rate ( $F$ ) was above the  $F$  at maximum sustainable yield ( $MSY$ ), or  $F_{MSY}$ ), and that 11 stocks were overfished (i.e., biomass levels were less than one half of the biomass at  $MSY$  ( $B_{MSY}$ )), with 9 stocks classified as both overfished and subject to overfishing. Further survey data for pollock that became available in January 2009 indicated that pollock is also overfished and subject to overfishing. GARM III also indicated that some stocks improved in status from the previous assessment, with Gulf of Maine (GOM) haddock and Georges Bank (GB) haddock classified as rebuilt in 2000 and 2006, respectively, and GOM cod expected to be rebuilt by 2009.

Amendment 16 was developed by the Council as part of the biennial adjustment process established in the FMP to update status determination criteria for all NE multispecies stocks; adopt rebuilding programs for groundfish stocks newly classified as being overfished and subject to overfishing; and revise management measures necessary to end overfishing, rebuild overfished groundfish stocks, and mitigate the adverse economic impacts of increased effort controls based upon the results of GARM III. In addition, Amendment 16 was developed to establish a mechanism to establish ACLs and AMs for each stock managed by the FMP, to comply with the Magnuson-Stevens Act.

The Council began development of Amendment 16 in 2006, with the intent of implementing any necessary revisions to management measures based upon the

results of GARM III by the start of fishing year (FY) 2009 on May 1, 2009. A notice of intent to prepare a supplemental EIS and hold scoping meetings designed to solicit public input on any revisions to management measures was published in the Federal Register on November 6, 2006 (71 FR 64941). In September 2008, the Council agreed to postpone implementation of Amendment 16 until the start of FY 2010 on May 1, 2010, to provide additional time to further develop Amendment 16 measures, requesting that NMFS implement an interim action for FY 2009. A proposed rule to implement interim management measures published on January 16, 2009 (74 FR 2959), with final interim measures published on April 13, 2009 (74 FR 17030), and effective on May 1, \*18263 2009. The Council adopted draft Amendment 16 management measures and an associated draft EIS (DEIS) at its February 2009 meeting. A notice of availability for the DEIS published on April 24, 2009 (74 FR 18705), with public comments accepted through June 8, 2009. Final measures for Amendment 16 were adopted by the Council at its June 2009 meeting, with revisions to the discard provisions adopted at its September 2009 meeting. A notice of availability for Amendment 16 was published in the Federal Register on October 23, 2009 (74 FR 54773), with public comments accepted through December 22, 2009. A separate notice of availability for the Amendment 16 FEIS, as submitted by the Council for review by the Secretary of Commerce (Secretary), was published on October 30, 2009 (74 FR 56194). A proposed rule to implement measures in Amendment 16 was published on December 31, 2009 (74 FR 69382), with public comments accepted through January 20, 2010. The Amendment 16 proposed rule included a detailed description of the biennial adjustment process, the results of GARM III, the proposed management measures, and other factors that influenced the development of this action. A final decision to partially approve Amendment 16 was made on January 21, 2010.

Three separate, but related rulemakings associated with Amendment 16 have been published and, if approved, will be applicable to NE multispecies permit holders for FY 2010. The Amendment 16 proposed rule detailed rebuilding programs for NE multispecies stocks newly classified as being overfished and subject to overfishing and proposed revisions to existing management measures necessary to end overfishing, rebuild overfished stocks, and mitigate adverse economic impacts of increased effort controls. That rule also proposed significant revisions to sector management measures. A second proposed rule (74 FR 68015, December 22, 2009) proposes FY 2010 operations plans and sector contracts for 17 sectors authorized by Amendment 16. A third proposed rule for Framework Adjustment (FW) 44 (75 FR 5016, February 1, 2010), proposed specifications of catch levels for FY 2010-2012, in accordance with the process approved in Amendment 16, and additional management measures to augment Amendment 16 measures.

The final rules for Amendment 16, sector operations, and FW 44 are closely related it is necessary to implement all three rules in order for Amendment 16 to be implemented in its entirety for FY 2010, as intended by the Council. This final rule implements approved management measures in Amendment 16; the sector operations rule would authorize the operation of sectors in FY 2010, and FW 44 would set catch levels according to approved measures in Amendment 16 for FY 2010-2012. As a result, these three rulemakings have been published nearly simultaneously. Approved measures in all three actions will become effective concurrently on May 1, 2010. Therefore, NMFS suggests that interested readers review all three final rules in order to fully understand the measures being implemented.

### **Disapproved Measures**

#### ***GOM Haddock Sink Gillnet Pilot Program***

This pilot program would have allowed all limited access NE multispecies vessels to target haddock in the GOM while using up to 30 stand-up sink gillnets (tie-down gillnets would have been prohibited) consisting of 6-inch (15.24-cm) mesh, a mesh size that is less than the minimum mesh size currently required, from January through April of each year. This pilot program would have expired after 2 years, unless otherwise renewed by the Council. The Amendment 16 FEIS and recent catch data suggest that this pilot program, implemented on a fishery-wide basis, could increase catch and, therefore, fishing mortality on GOM cod and pollock, stocks that require reductions in fishing mortality in order to rebuild under established rebuilding programs in the FMP, without substantially increasing the catch of haddock. Further, research used to support this pilot program concludes that further work must be done to reduce cod bycatch before a spring haddock gillnet fishery can be reestablished in the GOM and that, due to the low numbers of haddock caught in the study, the results of that research should not be used to support regulatory changes. Based upon this information, NMFS determined that the proposed pilot program is inconsistent with National Standards 1 and 9 of the Magnuson-Stevens Act because it could increase catch and fishing mortality, and may lead to excessive discards of overfished stocks of GOM cod and pollock. Moreover, it is inconsistent with the FMP provisions, including the special access program (SAP) provisions in Amendment 13; and Objectives 3 (constrain fishing mortality to levels compliant with the Sustainable Fisheries Act), 4 (prevent overfishing), and 10 (minimize bycatch) of the FMP. Therefore, NMFS disapproved this measure in this action.

### **Approved Measures**

#### ***1. Incorporation of Atlantic Wolffish Into the FMP***

Because this species was recently determined to be overfished and is occasionally caught by both the commercial and recreational NE multispecies fisheries, this

action incorporates Atlantic wolffish into the FMP. Although the proposed rule indicated that the term “regulated species” would be revised to include large-mesh species, ocean pout, and Atlantic wolffish, this final rule revises that definition to only include large-mesh species and Atlantic wolffish, to accurately reflect that ocean pout will remain classified as a small-mesh species. Status determination criteria, a rebuilding plan, and management measures to rebuild this stock are also established through this action. Incorporation of this species into the FMP is consistent with section 304(e) of the Magnuson-Stevens Act, which requires the development of regulations to end overfishing and rebuild a stock within 2 years of notice that the fishery is overfished.

**2. Status Determination Criteria**

This final rule updates the status determination criteria (also known as biological reference points) for existing regulated species and ocean pout stocks based upon GARM III. Because this action adds Atlantic wolffish to the FMP, status determination criteria are also established for this species. Status determination criteria adopted by this action use F at 40 percent of maximum spawning potential (F40% MSP) as a proxy for  $F_{MSY}$  for most of the age-based stocks. Spawning stock biomasses at MSY ( $SSB_{MSY}$ ) were calculated using F40% MSP, with an assumption on the recruitment that should occur at  $SSB_{MSY}$ . GARM III represents the best scientific information available, so these updated status determination criteria are consistent with National Standard 2 of the Magnuson-Stevens Act. Table 1 lists the approved status determination criteria, and numerical estimates of these parameters are listed in Table 2.

**Table 1-Approved Status Determination Criteria**

Species	Stock	Biomass target ( $B_{target}$ )	Minimum biomass threshold	Maximum fishing mortality threshold
Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 16; Final Rule				

Cod	GB	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Cod	GOM	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Haddock	GB	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Haddock	GOM	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Yellowtail flounder	GB	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Yellowtail flounder	Southern New England (SNE)/Mid- Atlantic (MA)	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Yellowtail flounder	Cape Cod (CC)/GOM	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
American plaice		SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Witch flounder		SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Winter flounder	GB	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Winter flounder	GOM	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Winter flounder	SNE	SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Redfish		SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F50% MSP.
White hake		SSB <sup>MSY</sup> :SSB/R 1/2 B <sup>target</sup> (40% MSP)	F40% MSP.
Pollock		External	1/2 B <sup>target</sup> Relative F at replacement.
Windowpane flounder	Northern	External	1/2 B <sup>target</sup> Relative F at replacement.
Windowpane flounder	Southern	External	1/2 B <sup>target</sup> Relative F at replacement.
Ocean pout		External	1/2 B <sup>target</sup> Relative F at replacement.

Atlantic halibut Internal  $\frac{1}{2} B^{\text{target}}$   $F^{0.1}$ .  
 Atlantic wolffish  $SSB^{\text{MSY}}$ :  $\frac{1}{2} B^{\text{target}}$   $F40\% \text{MSP}$ .  
 $SSB/R(40\%$   
 $\text{MSP})$

**Table 2-Numerical Estimates for the Approved Status Determination Criteria**

Species	Stock	Biomass target ( $B_{\text{target}}$ ) in mt	Minimum biomass threshold ( $\frac{1}{2} B_{\text{target}}$ ) in mt	Maximum fishing mortality threshold ( $F_{\text{MSY}}$ or proxy)	MSY in mt
Cod	GB	148,084	74,042	0.25	31,159
Cod	GOM	58,248	29,124	0.24	10,014
Haddock	GB	153,329	76,664	0.35	33,604
Haddock	GOM	5,900	2,950	0.43	1,360
Yellowtail flounder	GB	43,200	21,600	0.25	9,400
Yellowtail flounder	SNE/MA	27,400	13,700	0.25	6,100
Yellowtail flounder	CC/GOM	7,790	3,895	0.24	1,720
American plaice		21,940	10,970	0.19	4,011
Witch flounder		11,447	5,724	0.20	2,352
Winter flounder	GB	16,000	8,000	0.26	3,500
Winter flounder	GOM	3,792	1,896	0.28	917
Winter flounder	SNE	38,761	19,380	0.25	9,742
Redfish		271,000	135,500	0.04	10,139
White hake		56,254	28,127	0.13	5,800
Pollock *		2.00 kg/tow	1.00 kg/tow	5.65 c/i	11,320
Windowpane flounder *	Northern	1.4 kg/tow	0.7 kg/tow	0.50 c/i	700
Windowpane flounder *	Southern	0.34 kg/tow	0.17 kg/tow	1.47 c/i	500
Ocean pout *		4.94 kg/tow	2.47 kg/tow	0.76 c/i	3,754
Atlantic halibut		49,000	24,500	0.07	3,500

Atlantic wolffish	1,747-2,202	400-500	<0.35	278-311
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### **\*18264 3. Rebuilding Programs**

According to GARM III, two NE multispecies stocks have achieved their target biomass levels and are no longer considered overfished; the GB haddock stock was rebuilt in 2006, while GOM haddock was rebuilt in 2000. However, GARM III, and the subsequent data available for pollock, also indicated that several other NE multispecies stocks are now overfished; these stocks are witch flounder, GB winter flounder, northern windowpane flounder, and pollock. As a result, this action establishes rebuilding programs for these newly overfished stocks that begin in FY 2010. For witch flounder and GB winter flounder, the new rebuilding programs would rebuild these stocks by 2017, with a 75-percent probability of success. The rebuilding programs established for pollock and northern windowpane flounder would rebuild these stocks by 2017, but because status determination criteria for these stocks are based upon survey indices, a probability of success cannot be calculated at this time. Previous stock assessments for Atlantic halibut were insufficient to calculate a rebuilding F. As a result, although the stock was classified as overfished, no target F was calculated. GARM III included an analytic assessment for this species that was able to calculate a rebuilding F shown in Table 3 and an end date for rebuilding of 2055, based upon the biology of this species. Because the life history of Atlantic wolffish is not well understood, there is **\*18265** considerable uncertainty in the evaluation of stock status and stock projections and a rebuilding period or a rebuilding F for this species at this time. Measures to reduce F for this stock are implemented by this action, as described below.

Based upon GARM III data, projections indicate that SNE/MA winter flounder is unlikely to rebuild by 2014 in the absence of any fishing mortality, but would likely rebuild between FYs 2015 and 2016. Since this stock is caught as non-targeted catch in other large-mesh fisheries, small-mesh fisheries, and the scallop dredge fishery, the only way to achieve zero F would be to eliminate all fishing activity in the SNE/MA winter flounder stock area, including fisheries for scallops, summer flounder, and other non-groundfish species, resulting in substantial adverse economic impacts to affected entities and associated fishing communities. Instead, this action prohibits possession and landings of SNE/MA winter flounder by all vessels and requires all non-sector vessels fishing within two restricted gear areas to use selective gear to minimize the catch of SNE/MA winter flounder and other stocks. These measures are expected to result in achieving an F as close to zero as practicable, eliminate overfishing on this stock, and facilitate the rebuilding of this stock by FY 2015 or 2016. Projections of stock status under an F of zero are similar to those using an F of as close to zero as practicable, as implemented by

this action, indicating that there is little difference between when this stock is expected to rebuild under either scenario (see Section 7.2.1.1.3.1 of the Amendment 16 FEIS). Therefore, to impose a complete closure of commercial and recreational fisheries in the SNE/MA winter flounder stock area and still not achieve the objectives of rebuilding this stock by 2014 is contrary to the objectives of the Magnuson-Stevens Act and would result in severe economic impacts without biological benefits. Pursuant to section 304(e)(7) of the Magnuson-Stevens Act which recognizes that an FMP may not always make adequate progress to achieving rebuilding objectives and allows time for revisions to be made to make adequate progress toward rebuilding overfished stocks, this action eliminates targeting of this stock to reduce  $F$  to the extent practicable, without delaying the projected rebuilding of this stock.

The GARM III review of GOM winter flounder indicated that it is highly likely that the stock is overfished. However, due to the high degree of uncertainty of the assessment, the GARM III review panel suggested that the assessment could not be used to provide management advice or stock projections. As a result, a formal rebuilding program has not been developed for this stock under Amendment 16, although rebuilding for this stock is expected to result from measures proposed under Amendment 16 to rebuild other stocks. This stock will continue to be monitored and, should additional information lead to a determination that the stock is overfished, a formal rebuilding program would be developed in a subsequent action.

#### ***4. ABC Control Rule and Mortality Reductions Necessary to Achieve Rebuilding Targets***

The mortality reductions used to design management measures implemented by this final rule are listed in Table 3. These mortality reductions were determined based upon the ABC control rule specified by the Council's Scientific and Statistical Committee (SSC) and the  $F$  necessary to rebuild overfished stocks within the rebuilding period ( $F_{\text{rebuild}}$ ). The ABC control rule proposed by the SSC and established through this action replaces the MSY control rule that was added to the FMP by Amendment 13. The ABC control rule specifies that the ABC for each stock would be determined as the catch at 75 percent of  $F_{\text{MSY}}$ , and that, if the catch at 75 percent of  $F_{\text{MSY}}$  would not achieve the mandated rebuilding requirements, ABC would be based upon  $F_{\text{rebuild}}$ . For stocks that cannot be rebuilt within existing rebuilding periods, the ABC would be based upon incidental bycatch, including a reduction in the existing bycatch rate. Finally, for stocks with unknown status, ABC would be determined on a case-by-case basis by the SSC. Table 3 lists the percentage change in  $F$  necessary to achieve the target  $F$  (either  $F_{\text{rebuild}}$  or the catch at 75 percent of  $F_{\text{MSY}}$ ), as appropriate, from  $F$  estimated for FY 2008. Mortality reductions for several stocks are not available because the assessments for these

stocks did not produce reliable estimates of F that could be used in projection models to estimate  $F_{\text{rebuild}}$ .

**Table 3-Summary of Reductions in F Necessary to Achieve the Target F in 2010 for Each Stock**

Species	Stock	2007 F	Targeted F (either $F_{\text{rebuild}}$ or 75% of $F_{\text{MSY}}$ )	$F_{\text{msy}}$	2008 F from 2008 catch data	% Change in F necessary to achieve $F_{\text{rebuild}}$ using catch and F 2008
Cod	GB	0.300	0.184	0.2466	0.410	-55%
Cod	GOM	0.456	0.18	0.237	0.300	-40%
Haddock	GB	0.230	0.26	0.350	0.079	229%
Haddock	GOM	0.350	0.32	0.430	0.250	28%
Yellowtail flounder	GB	0.289	0.109	0.254	0.130	-16%
Yellowtail flounder	SNE/MA	0.413	0.072	0.254	0.120	-40%
Yellowtail flounder	CC/GOM	0.414	0.18	0.239	0.289	-38%
American plaice	GB/GOM	0.090	0.14	0.190	0.099	41%
Witch flounder		0.290	0.15	0.200	0.296	-49%
Winter flounder	GB	0.280	0.20	0.260	0.131	49%
Winter flounder	GOM	0.417	N/A	0.283	0.317	N/A
Winter flounder	SNE/MA	0.649	0.000	0.248	0.265	-100%
Redfish		0.005	0.03	0.038	0.008	275%
White hake	GB/GOM	0.150	0.084	0.125	0.065	29%
Pollock	GB/GOM	10.464	4.245	5.66	15.516	-73%
Windowpane flounder	Northern	1.960	N/A	0.50	N/A	N/A
Windowpane flounder	Southern	1.850	N/A	1.47	N/A	N/A
Ocean pout		0.380	N/A	0.760	N/A	N/A

Atlantic halibut	0.065	0.044	0.073	0.060	-27%
Atlantic wolffish	N/A	N/A	N/A	N/A	N/A

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**\*18266 5. ABC/ACL Specifications and Distribution Process**

The recent reauthorization of the Magnuson-Stevens Act required fishery management councils to establish a mechanism for specifying ACLs for each managed fishery such that overfishing does not occur in the fishery, and measures to ensure accountability. The Magnuson-Stevens Act requires that ACLs must take effect in FY 2010 for fisheries subject to overfishing, and in FY 2011 for all other fisheries. Because several stocks managed under the FMP are subject to overfishing, this final rule establishes a process to specify ABCs and ACLs for the NE multispecies fishery for implementation in FY 2010, to comply with new requirements of the Magnuson-Stevens Act, based upon the National Standard 1 Guidelines published in the Federal Register (January 16, 2009; 74 FR 3178).

**ABC/ACL Specifications Process**

This action approves the ABCs/ACL specification process described in Section 4.2.1 of the Amendment 16 FEIS. The Groundfish Plan Development Team (PDT) is required to develop recommendations for setting an ABC, ACL, and overfishing level (OFL) for each stock for each of the next 3 years following the implementation of the biennial adjustment, or yearly for stocks managed by the U.S./Canada Resource Sharing Understanding (Understanding) (currently, GB yellowtail flounder, Eastern GB cod, and Eastern GB haddock) through a specifications package. These recommendations will be based upon the ABC control rule, as described above; updated information regarding the status of each stock, including  $F_{rebuild}$  for overfished stocks; recommendations of the Transboundary Management Guidance Committee (TMGC) for appropriate catch levels for stocks managed by the Understanding; and any other guidance provided by the SSC. The ABCs developed through the process will be distributed among the various segments of the fishery that catch NE multispecies. These sub-ABCs will then be reduced to account for management uncertainty to derive how the overall ACL for each stock is divided into various sub-components of the fishery, as described further below. The PDT will develop an informal document that describes how these recommendations were developed, including estimates of scientific and management uncertainty considered by the PDT, whether different levels of management uncertainty were applied to different components of the fishery, and whether total allowable catches (TACs) have been exceeded during previous FYs. The SSC will then approve the PDT's ABC recommendations, or provide alternative ABC recommendations, describing elements of scientific uncertainty used to develop its recommendations, and offer any other

recommendations regarding ACLs or other relevant issues. The Council will then consider the recommendations of the SSC, PDT, and TMGC, and adopt ABCs and ACLs for each stock. As required by the Magnuson-Stevens Act, the Council must adopt ACLs that are equal to or lower than the ABC recommended by the SSC, taking into account management uncertainty. The Council will adopt the ABC/ACL specifications and submit them to NMFS by December 1, for approval and implementation for the following FY in a manner consistent with the Administrative Procedure Act.

As stated above, the actual ABCs and ACLs that result from the process established in this action were adopted by the Council at its November 2009 meeting as part of FW 44. If approved, measures in FW 44 would become effective on May 1, 2010, at the same time as measures implemented through this final action. The ABCs and ACLs for FY 2013 and beyond would be specified according to the process described above, unless otherwise modified through a future Council action.

#### **ACL Distribution**

This action also approves the process to distribute ACLs among various segments of the fishery that catch regulated species and ocean pout in Amendment 16. The PDT will recommend distributing the ABC among various segments of the fishery and reducing such sub-ABCs to account for management uncertainty for each individual sub-component of the fishery based upon the catch available to U.S. fishermen. These sub-components of the fishery include vessels operating in state waters that catch regulated species and ocean pout, but do not hold Federal NE multispecies permits; other non-specified sub-components of the fishery that may catch regulated species and ocean pout as bycatch when prosecuting other fisheries (i.e., exempted fisheries and fisheries for exempted species); vessels participating in the Atlantic sea scallop fishery that catch yellowtail flounder stocks as bycatch; vessels participating in the Atlantic herring fishery that catch haddock as bycatch; and catch of regulated species and ocean pout by the commercial and recreational NE multispecies fisheries. Some sub-components of the fishery will not be subject to any automatic AMs under Amendment 16 and will, thus, be allocated sub-components of the ACL. The sub-components of the fishery that are subject to AMs will be allocated sub-ACLs for each stock of regulated species and ocean pout that they catch. These distributions, and the stocks that are allocated to the recreational fishery, can be revised through the framework adjustment process established in the existing regulations.

The sub-components of the fishery that are not subject to AMs include vessels fishing in exempted fisheries that occur in Federal waters (e.g., the northern shrimp exempted fishery and the Cultivator Shoal whiting fishery exemption) and vessels targeting exempted species (e.g., the summer flounder fishery in SNE)-fisheries

that are not allowed to land regulated species or ocean pout and that have demonstrated very low NE multispecies bycatch-as well as the Atlantic sea scallop fishery, which catches yellowtail flounder as bycatch. If catch from such fisheries exceeds the amount allocated, AMs would be developed and implemented in a separate future management action to prevent the \*18267 overall ACL for each stock from being exceeded, pursuant to the biennial review, or framework adjustment process in the FMP.

The ACLs for all three stocks of yellowtail flounder will be reduced to account for projected yellowtail flounder bycatch in the Atlantic sea scallop fishery. The level of yellowtail flounder bycatch in the scallop fishery would vary from year-to-year, based upon scallop and NE multispecies abundance, the rotational management program specified for the scallop fishery, and other factors. At a minimum, the yellowtail flounder sub-component of the ACL allocated to the scallop fishery would be consistent with the incidental catch amounts for closed area access programs specified in the current regulations (e.g., at least 10 percent of the GB yellowtail flounder ACL would be specified to account for closed area access programs on GB, when open under the rotational management program). With the exception of GB yellowtail flounder, yellowtail flounder bycatch in the scallop fishery will initially be treated as a sub-component of the ACL, rather than a sub-ACL, and, therefore, will not be subject to any specific AMs under this action. However, the Council is currently developing Amendment 15 to the Atlantic Sea Scallop FMP that is expected to establish yellowtail flounder AMs for the scallop fishery by FY 2011. The existing regulations regarding the Understanding require that any overages of the TACs managed by the Understanding be deducted from the available U.S. portion of the appropriate TAC during the following FY. Therefore, any overages of the U.S. portion of the GB yellowtail flounder TAC, including those by the scallop fishery, will be deducted from the U.S. portion of the GB yellowtail flounder TAC during the following FY.

This final rule clarifies that the allocation of GOM and GB haddock to the Atlantic herring fishery through FW 43 to the FMP (August 15, 2006; 71 FR 46871) reflects 0.2 percent of the GOM and GB haddock ACL. This allocation is considered a sub-ACL because the regulations implementing FW 43 already contain AMs in the form of elimination of the directed herring fishery in particular areas, and haddock possession restrictions, once this sub-ACL is projected to be caught. Because the existing regulations combine catches from both stocks of haddock, the haddock sub-ACL allocated to the herring fishery is not currently monitored on a stock-specific basis.

Finally, this action allocates the remaining ACL for each regulated species and ocean pout stock to the NE multispecies commercial and recreational fisheries. With the exception of GOM cod and GOM haddock, the remaining ACL for each

regulated species and ocean pout stock will be allocated to the commercial NE multispecies fishery. This is then further divided between vessels participating in approved sectors and those fishing under the provisions for the common pool (i.e., those vessels not participating in an approved sector), as described further in Item 14 of this preamble. An allocation for a particular stock would not be made to the recreational fishery if it is determined that, based upon available information, the ACLs for regulated species and ocean pout stocks are not being fully harvested by the NE multispecies fishery, or if the recreational harvest, after accounting for state-waters catch is less than 5 percent of the overall catch for a particular stock. If a stock is allocated to the recreational fishery, the distribution of the available ACLs for these stocks between the commercial and recreational fisheries will be determined based upon the average proportional catch of each component for each stock during FYs 2001 through 2006. Beginning in FY 2010, only two NE multispecies stocks will be allocated to the recreational fishery: GOM cod and GOM haddock. For GOM cod and GOM haddock, state-waters catch will be deducted from the sub-ACL available to the commercial fishery (i.e., vessels issued a limited access NE multispecies permit or open access NE multispecies Handgear B permit). The sub-ACL available to recreational vessels would include catch of GOM cod and GOM haddock in both state waters and Federal waters, and any associated recreational AMs would be triggered by the cumulative catch of such stocks by all recreational vessels.

#### **6. AMs**

This action establishes AMs for both the commercial and recreational fisheries, as described in Amendment 16 and summarized below, including separate AMs for sector vessels, vessels fishing in the common pool, and private recreational and charter/party vessels. Under this action, if the overall ACL for a stock is exceeded, the AMs applicable to the NE multispecies fishery, including those specified for sector, common pool, and recreational and charter/party vessels, will be triggered, as specified below. These measures are required to comply with new requirements of the Magnuson-Stevens Act and reflect the spectrum of AMs recognized in the National Standard 1 Guidelines.

#### **Sector AMs**

This final rule prohibits sector vessels from fishing in a particular stock area unless that sector is allocated, or acquires, quota for all regulated species or ocean pout stocks allocated to sectors and caught in that stock area. In addition, this action requires that sector vessels cease fishing in a particular stock area if the sector exceeds its allocation of any regulated species or ocean pout stocks caught in a particular stock area. Any overages at the end of the FY would be deducted from that sector's allocation during the subsequent FY, after considering any transfers of quota from another sector. As described below for the AMs effective if the overall

ACL for a particular stock is exceeded, the catch used to determine an individual sector's overage includes catch by each sector's vessels, as well as catch by other sub-components of the fishery. If either the catch of a particular stock by a sector's vessels alone, or the catch of a particular stock by a sector's vessels added to a sector's portion of the overall ACL overage caught by other sub-components of the fishery exceeds the amount of that stock's ACL allocated to an individual sector, the amount of the overage will be deducted from that sector's allocation for that stock during the following FY. If a sector disbands following an overage, or does not have sufficient allocation to cover the overage, an appropriate DAS or sector share penalty or fishing prohibition will apply to each individual participating vessel during the subsequent FY, as further described in Item 14 of this preamble. If a sector exceeds its allocations multiple times or by a large amount, the sector operations plan or monitoring program may be insufficient to control fishing effort and could justify disapproval of the sector in future years. These measures are intended to ensure that sectors avoid exceeding their allocations and help prevent overfishing for each managed stock.

### **Common Pool AMs**

This action approves two types of AMs for the common pool: A differential DAS counting AM during FYs 2010 and 2011, and a hard-TAC AM overlaid upon the DAS effort controls in FYs 2012 and beyond. This reflects the Council's intent to transition from an effort control fishery to one managed through hard TACs. This transition also enables monitoring systems and service providers to prepare for the increase in infrastructure and personnel necessary \*18268 to accommodate the influx of higher volumes of catch data and the need to monitor greater numbers of offloads, as further described below.

Under the differential DAS counting AM, if the NMFS Regional Administrator projects that the sub-ACL available to common pool vessels for each regulated species or ocean pout stock would be exceeded or underharvested by the end of the FY based upon catch data available through January of that year, a differential DAS counting factor would be applied to each Category A DAS used in the stock area for which the sub-ACL was exceeded or underharvested, during the following FY. The catch used in this projection includes catch by common pool vessels as well as a projection of the catch by other sub-components of the fishery. If either the catch of a particular stock by common pool vessels alone, or the catch of a particular stock by common pool vessels plus the common pool's portion of any catch from other sub-components of the fishery that is projected to exceed the overall ACL for a particular stock, is projected to exceed the common pool's allocation for a particular stock, the differential DAS counting AM would be triggered for the following FY. This projection will be updated after the end of the FY to help determine if the catch by other sub-components of the fishery are

accurately estimated for the purposes of determining whether the differential DAS counting AM is triggered. The areas in which differential DAS counting apply are defined further in this final rule.

The differential DAS counting factor that will apply to common pool vessels under this AM is based upon the projected proportion of the sub-ACL that is expected to be caught by common pool vessels plus the common pool's portion of any overage of the overall ACL for any stock caused by other sub-components of the fishery, if appropriate, rounded to the nearest even tenth, as listed in Table 4. If it is projected that catch in a particular FY will exceed or underharvest the sub-ACLs for several regulated species or ocean pout stocks within a particular stock area, the Regional Administrator will apply the most restrictive differential DAS counting factor within that particular stock area. For example, if it were projected that common pool vessels will be responsible for catch that is 1.2 times the GOM cod sub-ACL and 1.1 times the CC/GOM yellowtail flounder sub-ACL, the Regional Administrator will apply a differential DAS counting factor of 1.2 to any Category A DAS fished by common pool vessels only within the Inshore GOM Stock Area during the following FY (i.e., Category A DAS would be charged at a rate of 28.8 hr for every 24 hr fished, or 1.2 times 24-hr DAS counting). If it is projected that common pool vessels will underharvest all stocks within a particular stock area by at least 10 percent, and that the overall ACL for a particular stock is not exceeded by all sub-components of the fishery, the Regional Administrator will reduce the rate at which DAS are counted to allow the fishery to achieve the ACLs for all stocks within that area. For example, if the common pool catches 0.65 times the CC/GOM yellowtail flounder sub-ACL and 0.80 times the sub-ACL for all other stocks within the Inshore GOM Differential DAS Counting Area, the Regional Administrator will apply a differential DAS factor of 0.80 to all Category A DAS used only in the Inshore GOM Differential DAS Counting Area during the following FY (i.e., Category A DAS would be charged at a rate of 19.2 hr for every 24 hr fished, or 0.80 times 24-hr DAS counting). If the Regional Administrator determines that similar DAS adjustments are necessary in all stock areas (either to reduce or to increase effort), the Regional Administrator will adjust the ratio of Category A: Category B DAS to reduce/increase the number of Category A DAS available, based upon the amount of the overage or underage, rather than applying a differential DAS counting factor to all Category A DAS used in all stock areas. Any differential DAS counting factor implemented in FY 2012 for any ACL overages in a particular stock area during FY 2011 will be applied against the DAS counting rate implemented in that stock area for FY 2011. This is necessary to ensure that the differential DAS counting rate applied during FY 2012 is sufficient to prevent the ACLs specified for FY 2012 from being exceeded if the differential DAS counting rate applied in FY 2011 was insufficient

to control catch during that FY. For example, if a projection by the Regional Administrator concluded that 1.2 times the GOM cod ACL was caught during FY 2010, a differential DAS factor of 1.2 would be applied to any Category A DAS used in the Inshore GOM Stock Area during FY 2011 (i.e., Category A DAS would be charged at a rate of 28.8 hr for every 24 hr fished, or 1.2 times 24-hr DAS counting). However, if even this higher DAS counting rate were insufficient to prevent the GOM cod ACL from being exceeded again in FY 2011 and 1.5 times the GOM cod ACL was caught during FY 2011, a differential DAS factor of 1.5 would be applied to the DAS charging rate during FY 2011 (i.e., Category A DAS would be charged at a rate of 43.2 hr for every 24 hr fished (1.2 x 1.5 x 24-hr DAS charge)) for FY 2012. This more accurately reflects the likely reduction in effort needed to prevent overfishing from occurring, and increase the likelihood that catch during FY 2012 would not exceed the ACL in that stock area and result in the trimester TAC area closures being triggered.

**Table 4-Differential DAS Factor Applied as an Accountability Measure During FYs 2010/2011**

<b>Proportion of ACL caught</b>	<b>Differential DAS factor</b>
0.5	0.5
0.6	0.6
0.7	0.7
0.8	0.8
0.9	No change.
1.0	No change.
1.1	1.1
1.2	1.2
1.3	1.3
1.4	1.4
1.5	1.5
1.6	1.6
1.7	1.7
1.8	1.8
1.9	1.9
2.0	2.0

Starting in FY 2012, common pool vessels will be subject to a hard-TAC AM. Under this AM, the sub-ACL available to common pool vessels for each regulated species or ocean pout stock will be apportioned into trimesters of 4 months duration, beginning at the start of the FY (i.e., Trimester 1: May 1-August 31; Trimester 2: September 1-December 31; Trimester 3: January 1-April 30), as listed in Table 5. The distribution of these sub-ACLs into trimesters was based upon a preferred distribution of recent landing patterns, but would be adjusted through the

biennial adjustment process to reflect the landing patterns of the most recent 5-yr period available at the time of each adjustment. If a trimester TAC is exceeded/underharvested, the overage/underage will be applied to the following trimester, with the exception that any underage could not be applied to the following FY's trimester TACs. With the exception of windowpane flounder, ocean pout, and Atlantic halibut, if the Regional Administrator projects that 90 percent of the trimester TAC for a regulated species or ocean pout stock will be caught, the Regional Administrator shall close the area where the stock is predominantly caught to all NE multispecies common pool vessels \*18269 using gear capable of catching that species, as listed in Table 6, for the remainder of that trimester. The areas to be closed to particular gears are further described in this final rule, and are based upon the area that accounted for 90 percent of the catch of each stock according to available vessel trip report (VTR) data for calendar years 2006 through 2008. These areas differ slightly from those originally described in the Amendment 16 DEIS, as discussed further in Section 4.3.7.1.2 of the Amendment 16 FEIS. The Regional Administrator has the authority to expand or narrow the closure areas based upon additional catch information to reflect where each stock is actually caught. If the entire common pool sub-ACL for a particular stock is exceeded (i.e., the common pool catch of that stock at the end of the FY exceeds all three trimester TACs for that stock combined, including the common pool's share of any overage of the overall ACL for a particular stock caused by excessive catch of that stock by vessels fishing in state waters outside of the FMP, exempted fisheries, or the scallop fishery), an amount equal to the overage will be deducted from the sub-ACL for that stock that is allocated to common pool vessels during the following year. Because a targeted fishery for windowpane flounder, ocean pout, and Atlantic halibut is eliminated by the restrictive trip limits approved by this action (i.e., a prohibition on the retention of these stocks, or, in the case of halibut, a one-fish-per-trip restriction), the catch of these stocks will be monitored for the purposes of deducting overages, but will not trigger an area closure. Although particular areas will not close when these trimester TACs for these stocks are harvested, trip limits may be adjusted for these stocks to prevent overfishing in future years once the stock rebuilds and the fishery can once again target these stocks. Once 60 percent of the trimester TAC for any of these stocks is projected to be caught, the Regional Administrator has the authority to specify a trip limit to prevent the trimester TAC or sub-ACL allocated to the common pool vessels from being exceeded. Beginning in FY 2012, the white hake trip limit will be reduced to 500 lb (227 kg) per DAS, up to 2,000 lb (907.2 kg) per trip.

**Table 5-Portion of Common Pool ACLs Apportioned to Each Trimester Under the Common Pool Trimester TAC AM**

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<b>Stock</b>	<b>Trimester 1 (percent)</b>	<b>Trimester 2 (percent)</b>	<b>Trimester 3 (percent)</b>
GOM cod	27	36	37
GB cod	25	37	38
GOM haddock	27	26	47
GB haddock	27	33	40
CC/GOM yellowtail flounder	35	35	30
GB yellowtail flounder	19	30	52
SNE/MA yellowtail flounder	21	37	42
GOM winter flounder	37	38	25
GB winter flounder	8	24	69
SNE/MA winter flounder	36	50	14
Witch flounder	27	31	42
American plaice	24	36	40
Pollock	28	35	37
Redfish	25	31	44
White hake	38	31	31
Northern windowpane flounder	33	33	34
Southern windowpane flounder	33	33	34
Ocean pout	33	33	34
Atlantic halibut	33	33	34
Atlantic wolffish	75	13	12

**Table 6-Gear/Area Prohibitions Under the Common Pool Trimester TAC AM**

<b>Species</b>	<b>Stock</b>	<b>Area/gear prohibited when TAC is caught</b>	<b>Gear</b>
		<b>Statistical areas</b>	
Cod	GB	521, 522, 525, 526, 561	Trawl, gillnet, longline/hook.
	GOM	513, 514, 515	Trawl, gillnet, longline/hook.
Haddock	GB	521, 522, 561	Trawl, gillnet, longline/hook.
	GOM	512, 513, 514, 515	Trawl, gillnet, longline/hook.
Yellowtail flounder	GB	522, 525, 561, 562	Trawl, gillnet.
	SNE/MA	537, 539, 612, 613	Trawl, gillnet.

	CC/GOM	514, 521	Trawl, gillnet.
American plaice		512, 513, 514, 515, 521, 522	Trawl.
Witch flounder		512, 513, 514, 515, 521, 522	Trawl.
Winter flounder	GB	522, 562	Trawl.
	GOM	514	Trawl, gillnet.
	SNE/MA	521, 526, 537, 539, 612, 613	Trawl.
Redfish		513, 514, 515, 521, 522, 561	Trawl.
White hake		511, 512, 513, 514, 515, 521, 522, 525, 561, 613, 616	Trawl, gillnet, longline/hook.
Pollock		513, 514, 515, 521, 522, 561	Gillnet, trawl, longline/hook.
Atlantic wolffish		513, 514, 521, 522	Trawl, gillnet.

**\*18270** To facilitate monitoring trimester TACs under the common pool trimester TAC AM beginning in FY 2012, 20 percent of trips by common pool vessels will have their offloads monitored by an independent third-party service provider approved/certified by NMFS to provide such services. These service providers are required to randomly deploy dockside monitors to monitor the offload of catch directly to a dealer, and roving monitors to monitor the offload of catch onto a truck for subsequent shipment to a dealer. To ensure coverage is randomly deployed, common pool vessels may only use one dockside monitoring service provider per fishing year. The costs associated with monitoring vessel offloads are the responsibility of individual vessels. Vessels are required to submit trip-start and trip-end haul reports to facilitate the deployment of such dockside/roving monitors, as further described in Item 14 of this preamble.

### **Recreational AMs**

For the recreational fishery, once recreational catch information is available for the previous FY (expected by July), the Regional Administrator will evaluate whether recreational catch exceeded the recreational allocation for GOM cod or GOM haddock. For FY 2010, recreational catch will be compared to the recreational ACL for each stock for FY 2010. For FY 2011, the average recreational catch for FYs 2010 and 2011 will be compared to the average recreational ACL for each stock during FYs 2010 and 2011. Beginning with FY 2012, the 3-year average recreational catch will be compared to the most recent 3-year average of the recreational ACL for each stock. If it is determined that the recreational fishery has exceeded its allocation for GOM cod or haddock, NMFS will develop and

implement appropriate measures necessary to prevent the recreational fishery from exceeding the applicable sub-ACL in future years, in consultation with the Council. Appropriate AMs for the recreational fishery will include adjustments to fishing season, minimum fish size, and/or possession limits.

### **AMs If an Overall ACL for a Particular Stock Is Exceeded**

The National Standard 1 Guidelines state that AMs must be sufficient to prevent overfishing on each stock as a whole. This action implements the Amendment 16 provision that specified that the AMs applicable to the NE multispecies fishery must be sufficient to prevent overfishing on each stock by all components of the fishery that catch regulated species and ocean pout, including catch by components of the fishery that are not subject to AMs at this time (i.e., vessels fishing in state waters outside of the FMP, exempted fisheries, and the scallop fishery). If these later components exceed their allocations, and the overall ACL for a particular stock is exceeded, the AMs applicable to the NE multispecies fishery described above, including those specified for sector, common pool, and recreational and charter/party vessels, could be triggered to ensure that overfishing does not occur on the stock as a whole. Because catch data for components of the fishery that are not subject to AMs are not always available either within the FY, or at the end of the FY, NMFS will implement or adjust any AMs applicable to the NE multispecies fishery during the next FY, or as soon as practicable thereafter, once catch data for all such fisheries are available. If excessive catch by vessels fishing in state waters outside the FMP, exempted fisheries, or the scallop fishery exceeds these fisheries' individual allocations for a particular stock, but the overall ACL for a particular stock is not exceeded, then no AMs would be triggered in the NE multispecies fishery due to catch by such fisheries. However, if an individual component of the NE multispecies fishery subject to a sub-ACL exceeds its allocation of a particular stock, then the applicable AM for that component of the fishery will be triggered, even if the overall ACL for that stock is not exceeded. The amount of the overage caused by excessive catch by other sub-components of the fishery will be divided among the entire NE multispecies fishery, including common pool vessels, approved sectors, and private recreational and charter/party vessels, based upon each component's share of that stock's ACL available to the NE multispecies fishery for the applicable FY. Each component's share of the ACL overage for a particular stock will then be added to the catch of that stock by each component of the NE multispecies fishery to determine if the resulting sum for each component of the fishery exceeds that individual component's share of that stock's ACL available to the NE multispecies fishery. If it does, that component will automatically be subject to the applicable AM. For example, if in FY 2010, there is an overall ACL of 1,000 mt of CC/GOM yellowtail flounder allocated across all fisheries, 5 percent of the 1,000 mt (50 mt) would be allocated to vessels

fishing in state waters outside the FMP, exempted fisheries, and the Atlantic sea scallop fishery, while the remaining 95 percent (950 mt) would be allocated to the NE multispecies fishery. The 950 mt allocated to the NE multispecies fishery would be further divided between common pool vessels (allocated 200 mt), Sector 1 (allocated 450 mt), and Sector 2 (allocated 300 mt). Suppose also that, in FY 2010, vessels fishing in state waters outside the FMP, exempted fisheries, and the scallop fishery cumulatively catch 300 mt of CC/GOM yellowtail flounder, exceeding their allocation by 250 mt (i.e., 300 mt caught-50 mt allocated), and components of the NE multispecies fishery each caught less than or equal to their allocations for this stock, with common pool vessels catching 150 mt, Sector 1 vessels catching 450 mt, and Sector 2 vessels catching 300 mt, and cumulatively, the overall ACL for CC/GOM yellowtail flounder was exceeded by 200 mt based upon the catch of all fisheries (see Table 7 below). To determine how to distribute the overage of the overall ACL among the components of the NE multispecies fishery, it would be necessary to first determine each component's share of that stock's ACL that is available to the NE multispecies fishery by dividing each component's allocation for that stock (i.e., 200 mt to common pool vessels, 450 mt to Sector 1 vessels, and 300 mt to Sector 2 vessels) by the total amount allocated to the NE multispecies fishery (200 mt + 450 mt + 300 mt = 950 mt). In this example, the common pool is allocated 21 percent of the CC/GOM yellowtail flounder sub-ACL available to NE multispecies vessels (200 mt / 950 mt), while Sector 1 is allocated 47 percent (450 mt / 950 mt), and Sector 2 is allocated 32 percent of the CC/GOM yellowtail flounder sub-ACL available to NE multispecies vessels (300 mt / 950 mt). Therefore, to determine whether the common pool and sector AMs would be triggered, 42 mt of the overage (21 percent times 200 mt overage) would be added to the actual common pool catch (150 mt), 94 mt of the overage (47 percent times the 200 mt overage) would be added to the actual catch by Sector 1 vessels (450 mt), and 64 mt of the overage (32 percent times the 200 mt overage) would be added to the actual catch by Sector 2 vessels of (300 mt). In this example, because vessels in both Sector 1 and Sector 2 caught their full allocation of CC/GOM yellowtail flounder, when the overage of the overall ACL was proportionally distributed among the components of the NE multispecies fishery, the total catch of CC/GOM yellowtail flounder by Sector 1 vessels exceeded its CC/GOM \*18271 yellowtail flounder allocation by 94 mt (i.e., 450 mt catch by Sector 1 vessels + 94 mt share of the overage = 544 mt, or a 94 mt overage of its allocation), while the total catch of CC/GOM yellowtail flounder by Sector 2 vessels exceeded its CC/GOM yellowtail flounder allocation by 64 mt (i.e., 300 mt catch by Sector 2 vessels + 64 mt share of the overage = 364 mt, or a 64 mt overage of its allocation). Accordingly, the AMs for both sectors would be triggered, resulting in Sector 1's CC/GOM yellowtail flounder allocation being

reduced by 94 mt, and Sector 2's CC/GOM yellowtail flounder allocation being reduced by 64 mt during FY 2011. However, if the common pool's share of the overage of the overall ACL (42 mt) is added to the common pool's catch of CC/GOM yellowtail flounder (150 mt), the total catch did not exceed the CC/GOM yellowtail flounder allocation to the common pool (42 mt + 150 mt < 200 mt), the common pool would not be subject to the differential DAS counting AM in FY 2011 (see Table 7 below).

**Table 7-Example of How AMs Apply if the Overall ACL for a Stock Is Exceeded by Other Sub-Components of the Fishery**

Component of the fishery	Share of ACL (%)	Amount of sub-ACL (mt)	Share of multis ACL (%)	Catch in FY 2010 (mt)	Overage (mt)	Distribution of exempted fisheries and scallop overage (mt)	Total catch plus exempted fisheries and scallop overage (mt)	Amount of sub-ACL exceeded after addition of overage (mt)
Sector 1	45	450	47	450	0	94	544	95
Sector 2	30	300	32	300	0	64	364	63
Common Pool	20	200	21	150	-50	42	192	-8
State Waters Fisheries, Exempted Fisheries, and the Scallop Fishery	5	50	NA	300	250	NA	NA	NA
Total	100	1,000	100	1,200	200	200	1,100	150

**7. Issuance of Limited Access NE Multispecies and Atlantic Sea Scallop Permits**

Amendment 16 allows a vessel to be issued both a limited access NE multispecies permit and a limited access Atlantic sea scallop permit at the same time. In addition, the owner of a vessel currently issued a limited access Atlantic sea scallop trawl permit is allowed to convert to a dredge gear permit without relinquishing his/her limited access NE multispecies permit. Changes to the permitting and VMS declaration procedures are necessary to implement these provisions and will be described in the small entity compliance guide (i.e., permit

holder letter) that will be sent to all permit holder letters in conjunction with the implementation of this final rule.

## ***8. Recordkeeping and Reporting Requirements***

### **VTRs**

This final rule revises the current VTR submission frequency for all vessels issued a NE multispecies permit from monthly to weekly. These changes now require that vessel owners/operators submit VTRs, including “did not fish reports,” by midnight of the first Tuesday following the end of the reporting week (i.e., 0001 hr local time Sunday through 2400 hr local time the following Saturday). Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) constitutes fishing during that reporting week, but the date when fish are offloaded dictates the reporting week for which the VTR must be submitted to NMFS. Therefore, if a trip started, ended, or offloaded fish during a reporting week, a VTR is only necessary for the reporting week in which fish were offloaded, and a negative fishing report is not necessary for the reporting week in which a trip was started. For example, if a vessel issued a NE multispecies permit begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for that fishing trip must be submitted by midnight Tuesday of the third week, but a negative report (i.e., a “did not fish” report) is not required for either week. These measures make the VTR submission requirements consistent with dealer report submission requirements and increase the accuracy and timeliness of catch data available for monitoring and assessment purposes.

### **Area Declarations**

This final action establishes four broad stock areas that encompass multiple statistical areas for the purposes of providing more accurate and timely data to apportion catch to individual stock areas, including providing area information for stock apportionment if VTR data are missing or delayed. Operators of all vessels issued a limited access NE multispecies permit that are fishing for NE multispecies under a NE multispecies DAS, under the provisions of a small vessel category (Category C) or Handgear A permit when fishing in multiple stock areas, or on a sector trip are required to declare their intent to fish in one or more of these broad stock areas via vessel monitoring system (VMS) prior to each trip on which NE multispecies may be landed. In addition, all vessels are required to submit the VTR serial number associated with the first page of the VTR for that trip, as instructed by the Regional Administrator. The VTR serial number will be used to link VTRs with dealer reports and VMS data to increase the accuracy of data used for monitoring catch.

### **Trip-Level Catch Reports**

If the operator of a limited access NE multispecies vessel, including vessels issued a limited access Handgear A permit, declares his/her intent to fish in multiple broad stock areas on the same trip, as described above, the operator is required to submit a trip-level catch report to NMFS via VMS that details the amount of each regulated species or ocean pout species kept (in pounds, landed weight) from each broad stock area on that trip prior to crossing the VMS demarcation line upon the return to port, as instructed by NMFS. In addition, to allow NMFS to calculate an assumed discard rate for trips not observed by either a NMFS observer or an industry-funded at-sea monitor, vessel operators are also required to declare the total amount of all species \*18272 kept in each broad stock area, including species outside of the FMP. Requiring vessels to declare total catch by each stock area was not specified in the proposed rule, but is necessary to allow NMFS and sectors to calculate discard rates applicable for each trip. This report is required for all trips in multiple areas, unless the vessel is required to submit a daily VMS catch report when operating in one of the special management programs (SMPs), as described further below. These reports will be used to provide more timely data on catch apportionment to stock areas until VTR data become available.

This action approves the provision in Amendment 16 that allows NMFS to exempt a vessel participating in an approved sector from the trip-level VMS catch reports described above to reduce unnecessary duplication with sector reporting requirements (described below in Item 14 of this preamble). At this time, NMFS has determined that these trip-level catch reports are necessary to accurately monitor catch of regulated species and ocean pout by all NE multispecies vessels, including those that are fishing under an approved sector operations plan. If further review of available catch monitoring data indicates that trip-level catch reports are no longer necessary to accurately monitor regulated species and ocean pout catch, and duplicate other available catch data, NMFS may exempt sector vessels from such reporting requirements in subsequent FYs.

### **SMP Reporting Requirements**

This action maintains the existing reporting requirements for vessels that participate in a SMP (i.e., SAPs, the U.S./Canada Management Area, and the Regular B DAS Program). However, this action revises the daily VMS catch report for SMPs by eliminating the current requirement for vessel operators fishing in SMPs to report species discards, and requiring vessel operators to specify the VTR serial number or other universal trip ID specified by NMFS, the date fish were caught (applicable only for SMP trips), and the amount of each NE multispecies species, and the total amount of all species, including both NE multispecies and those managed in another FMP, kept in each broad stock reporting area. While the proposed rule indicated that the requirement to report statistical area fished would be removed, this final rule maintains this requirement to ensure that NMFS can

accurately attribute catch of GB cod and GB haddock against the Eastern U.S./Canada Area TACs for these stocks.

This final rule also implements a provision that provides the Regional Administrator with the authority to remove SMP-specific reporting requirements if it is determined that the reporting requirements are unnecessary. With the exception noted below, NMFS has determined that daily SMP-specific VMS catch reports for vessels participating in sectors are unnecessary, because sectors are allocated ACE for most regulated species and ocean pout stocks through this action and, therefore, are not subject to any SMP-specific TACs or other restrictions on catch; are responsible for ensuring that sector allocations are not exceeded; and provide sufficient information to monitor all sector catch through the submission of weekly sector catch reports described further in Item 14 of this preamble. This exemption from the SMP reporting requirements for sector vessels does not apply to vessels participating in the Closed Area (CA) I Hook Gear Haddock SAP. This SAP includes an overall haddock TAC that is applicable to both sector and common pool vessels fishing in this SAP. Therefore, the existing requirement for sector managers to provide daily catch reports by participating sector vessels is maintained. Consistent with Amendment 16, NMFS retains the authority to reinstate such reporting requirements if it is later determined that the weekly sector catch reports are insufficient to adequately monitor catch by sector vessels in SMPs.

#### **Dealer Reporting and Record Retention Requirements**

Because this action implements new requirements for dockside/roving monitors for common pool vessels beginning in FY 2012, and for sector vessels beginning in FY 2010, as described in Items 6 and 14 of this preamble, respectively, the dealer reporting and record retention requirements currently specified in § 648.7(a) and (e), respectively, are revised to require dealers to provide a copy of any dealer weigh-out documents or dealer receipts for a particular offloading event to dockside/roving monitors, allow the dockside/roving monitor to sign a copy of the official weigh-out document or dealer receipt retained by the dealer, or sign a dockside monitoring report provided by a dockside/roving monitor. In addition, this action requires that vendors providing dockside/roving monitor services retain and make available for review any records relating to fish offloaded and observed by dockside/roving monitors for 3 yr after the fish were first offloaded. This measure is intended to maintain consistency with existing record retention requirements and facilitate enforcement of measures proposed under Amendment 16.

#### **Pre-Trip Observer Notification**

To better monitor regulated species and ocean pout catch under Amendment 16, NMFS has received sufficient funding to increase observer coverage in the NE

multispecies fishery for FY 2010, with additional funding possibly available in future years. At this time, funding is available to observe up to 30 percent of common pool trips, and up to 38 percent of sector trips. To ensure that NMFS can achieve targeted observer coverage levels, this action requires that any vessel issued a limited access NE multispecies permit and fishing under a NE multispecies DAS or on a sector trip provide NMFS with the vessel name, permit number, and sector to which the vessel belongs, if applicable; contact name and telephone number for coordination of observer deployment; date, time, and port of departure; area to be fished; and gear type to be used at least 48 hr prior to departing port on any trip declared into the NE multispecies fishery based on the authority provided the Secretary to request additional information to implement an FMP in sections 305(d) and 402(a) of the Magnuson-Stevens Act. For trips lasting 48 hr or less, the vessel owner, operator, or manager would be able to make a weekly notification, rather than a separate notification prior to each trip. Such weekly notifications must occur by 0001 hr of the Friday preceding the week (Sunday through Saturday) that they intend to complete at least one NE multispecies DAS or sector trip during the following week. Trip notification calls must be made no more than 10 days in advance of each fishing trip. NMFS will inform the vessel whether an observer has been assigned for that trip, or a waiver issued within 24 hr of notification. This pre-trip notification fulfills the current and proposed observer notification requirements for trips into SMPs. If funding is no longer sufficient to provide high levels of observer coverage for the entire fishery, the Regional Administrator may eliminate this pre-trip notification requirement for all trips, as it would no longer be necessary to facilitate observer deployment for all NE multispecies vessels. If this occurs, the pre-trip observer notification requirements for trips into SMPs would remain in effect.

### ***9. Effort Controls***

This action approves all of the revisions to existing effort controls \*18273 listed in Amendment 16, including revisions to NE multispecies DAS allocations, NE multispecies DAS accrual provisions, gear restricted areas, and trip limits, as described in further detail below.

#### **DAS Allocation**

This action revises the way NE multispecies DAS allocated to both common pool and sector vessels are distributed between Category A and Category B DAS, as originally implemented under Amendment 13. Starting in FY 2010, the DAS allocations of common pool vessels will be distributed as follows: 27.5 percent of a vessel's Amendment 13 DAS baseline are allocated as Category A DAS, 36.25 percent of the Amendment 13 DAS baseline are allocated as Category B Regular DAS, and 36.25 percent of the Amendment 13 DAS baseline are allocated as Category B Reserve DAS. For example, a common pool vessel with an

Amendment 13 DAS baseline of 88 DAS will be allocated 24.2 Category A DAS, 31.9 Category B Regular DAS, and 31.9 Category B Reserve DAS. This represents a 50-percent reduction from each vessel's 2006 DAS allocation, or an approximately 32-percent reduction from each vessel's 2009 DAS allocation. This final rule implements a provision that exempts sector vessels from the DAS allocation reductions for common pool vessels described above, because sector vessels are now be subject to hard TACs rather than DAS to control fishing effort. As a result, this action retains the existing 2009 DAS allocations for vessel's participating in a sector for the purposes of participating in the monkfish fishery, a fishery that still requires the concurrent use of a NE multispecies DAS with a monkfish DAS for vessels issued a limited access Category C and D monkfish permit. If a vessel fishes in the common pool in one FY, but in an approved sector during the next FY, its DAS allocation for each FY will reflect whether the vessel is fishing under the common pool, or participating in an approved sector.

### **DAS Counting**

Under Amendment 16, all NE multispecies DAS used by vessels fishing in the common pool will be counted in 24-hr increments, based upon the time called into the DAS program via VMS or the IVR system. For example, if a vessel fishes 6 hr, it will be charged for 24 hr of DAS usage; a vessel that fishes 25 hr will be charged for 48 hr of DAS usage. The existing differential DAS counting areas and minimum DAS charge for Day gillnet vessels (i.e., the 3-15 DAS counting rule where Day gillnet vessels were charged 15 hr for any trip greater than 3 hr or less than or equal to 15 hr in duration, but actual time fished for any trip less than or equal to 3 hr or greater than 15 hr in duration) are eliminated. Because sector vessels are exempt from the Amendment 16 NE multispecies DAS counting provisions for common pool vessels, sector vessels, including sector vessels fishing under the Day gillnet designation, will be charged NE multispecies DAS to the nearest minute based upon the time called into the DAS program via VMS or the IVR call-in system.

### **Restricted Gear Areas (RGAs)**

This action implements two RGAs to reduce the catch of flatfish species (predominantly SNE/MA winter flounder and SNE/MA yellowtail flounder) by common pool vessels. Common pool vessels fishing any part of a NE multispecies trip in either the Western GB RGA or the SNE RGA are restricted to using the following gear: A haddock separator trawl, a Ruhle trawl, a rope trawl, longline/tub trawls, handgear, or sink gillnets. Tie-down gillnets are allowed to be used or stowed on board, provided the mesh is greater than or equal to 10 inches (25.4 cm). Gear other than those listed above may not be allowed on board when fishing within these RGAs. The Regional Administrator has the authority to approve the use of additional gear within these RGAs, provided the new gear

meets the standards established for the approval of additional gear in SMPs. The existing gear performance standards apply to gear used in these areas to ensure that selective gear is used properly (e.g., restrictive trip limits for flatfish and other bottom-oriented species, such as 500 lb (226.8 kg) of all flatfish species combined, and zero lobsters). Common pool vessels fishing in the RGAs are required to declare into these areas via VMS, as instructed by the Regional Administrator. In lieu of a VMS declaration, the Regional Administrator may authorize such vessels to obtain a letter of authorization (LOA) to fish in these RGAs. The minimum participation period for these LOAs would be 7 consecutive days, meaning that a vessel must agree to fish in these areas for a minimum of 7 consecutive days. If issued a LOA, a vessel must retain the LOA on board for the duration of the participation period. A vessel can fish inside and outside of these RGAs on the same trip, but will be subject to the most restrictive measures (gear, trip limits, etc.) for the areas fished for the entire trip. A vessel fishing outside of these areas can transit the RGAs, provided gear other than the selective gear specified above is properly stowed. Both the areas and the gear required to be used in these areas are further defined in this final rule.

### **Trip Limits**

The following changes to trip limits are implemented by this action, but may be superseded by trip limits proposed in FW 44:

GOM cod: The possession limit is increased to 2,000 lb (907.2 kg) per DAS, up to 12,000 lb (5,443.2 kg) per trip for vessels fishing under a NE multispecies DAS or under the Small Vessel permit exemption (Category C permit).

GB cod: The possession limit is increased to 2,000 lb (907.2 kg) per DAS, up to 20,000 lb (9,072 kg) per trip for vessels fishing under a NE multispecies DAS or under the Small Vessel permit exemption. The existing trip limit for GB cod caught within the Eastern U.S./Canada Area or the Eastern U.S./Canada Haddock SAP remains the same at 500 lb (226.8 kg) per DAS, up to 5,000 lb (2,268 kg) per trip; and 1,000 lb (453.6 kg) per trip, respectively. Consistent with existing regulations, a vessel is required to declare its intent to fish exclusively within the GB Regulated Mesh Area (RMA) via VMS to be exempt from the GOM cod limit of 12,000 lb (5,443.2 kg) per trip.

Cod limit for Handgear A vessels: The possession limit is increased to 750 lb (340.2 kg) per trip, consistent with the automatic possession limit adjustment provision implemented under Amendment 13.

Cod limit for Handgear B vessels: The possession limit is increased to 200 lb (90.7 kg) per trip, consistent with the automatic possession limit adjustment provision implemented under Amendment 13.

CC/GOM and SNE/MA yellowtail flounder: The possession limit is increased to 250 lb (113.4 kg) per DAS, up to 1,500 lb (680.4 kg) per trip.

GB yellowtail flounder: There is no possession limit specified for this stock at the beginning of each FY. However, the Regional Administrator could implement a possession limit either prior to, or during, the FY to prevent the available GB yellowtail flounder TAC specified for common pool vessels fishing in the U.S./Canada Management Area from being exceeded.

Atlantic halibut: The current trip limit of one fish per trip is maintained.

SNE/MA winter flounder, windowpane flounder, ocean pout, and Atlantic

wolffish: Landing of these stocks is prohibited in any fishery.

**\*18274** In addition to the trip limits specified above, this action allows common pool vessels to land only one landing limit of regulated species in any 24-hr period. If fishing in multiple stock areas, the most restrictive possession limits for each species applies to the entire trip. Because DAS used by common pool vessels are now counted in 24-hr increments, the existing cod running clock provision is eliminated through this action.

#### ***10. DAS Leasing and Transfer Programs***

All of the revisions to the DAS Leasing and Transfer Programs in Amendment 16 were approved and are implemented by this final rule, including: (1) Allowing permits held in confirmation of permit history (CPH) to participate in the DAS Leasing and Transfer Programs without being activated by being placed onto a vessel, (2) elimination of the DAS conservation tax in the DAS Transfer Program (any DAS reduced due to the conservation tax applied to previously approved transfers would not be reinstated), and (3) elimination of the DAS leasing cap added to the FMP by Amendment 13 (i.e., there would be no limit on the number of DAS that a permit holder could lease from another permit holder). Existing restrictions on leasing DAS between vessels participating in sectors and those fishing in the common pool are continued under this action. A similar restriction on DAS transferred under the DAS Transfer Program is described in Item 14 of this preamble.

#### ***11. Minimum Fish Size***

This action reduces the minimum fish size of haddock from 19 inches (48.3 cm) to 18 inches (45.7 cm) for all NE multispecies vessels, including both commercial and recreational vessels, to reduce discards and increase landings of this healthy species due to slower than expected growth rates of mature fish. This action also increases the minimum fish size for halibut from 36 inches (91.4 cm) to 41 inches (104.1 cm) for both commercial and recreational vessels to reflect the median length at maturity for female halibut in the GOM, increase opportunities for halibut to spawn prior to capture, and improve the likelihood that this stock will meet rebuilding objectives.

#### ***12. SMPs and SAPs***

All of the changes to existing SAPs for both common pool vessels and those fishing in an approved sector proposed in Amendment 16 have been approved and implemented in this action, as described in further detail below.

#### **U.S./Canada Management Area**

This final rule revises the provision first implemented under FW 42 that counted all catch of cod, haddock, and yellowtail flounder against the Eastern U.S./Canada TACs for GB cod and GB haddock, and the overall TAC for GB yellowtail flounder for vessels fishing inside/outside of the Eastern U.S./Canada Area to accommodate the allocation of these stocks to sectors, as further described in Item 14 of this preamble.

#### **Incidental Catch TAC**

The current regulations specify incidental catch TACs to limit the catch of species of concern (i.e., stocks that were overfished or subject to overfishing) when vessels were targeting healthier regulated species or ocean pout stocks under a Category B DAS in SMPs. This action revises these provisions to reflect that incidental catch TACs will be based upon the ACL available to the commercial common pool fishery and to specify an incidental catch TAC for pollock. The incidental catch TAC for pollock is specified as 2 percent of the ACL available to common pool vessels and will be distributed to all SAPs, as follows: 50 percent to the Regular B DAS Program, 16 percent to the CA I Hook Gear Haddock SAP, and 34 percent to the Eastern U.S./Canada Haddock SAP. Consistent with existing SAP provisions, once the pollock incidental catch TAC is projected to be caught by common pool vessels, the use of Category B DAS in that particular SAP would be prohibited for the remainder of the season, as specified by the Regional Administrator.

#### **Eastern U.S./Canada Haddock SAP**

The Eastern U.S./Canada Haddock SAP, scheduled to expire at the end of FY 2009, is extended indefinitely through this action. In addition, participating vessels may use codends with a minimum mesh size of 6 inches (15.24 cm) diamond or square mesh when participating in this program and using selective trawl gear such as the haddock separator trawl or the Ruhle trawl. All catch by sector vessels when participating in this SAP will count against the sector's allocation for each stock, including those specific to the Eastern U.S./Canada Area. Because sectors will be restricted by their allocations for each stock, sector vessels will not be restricted in the gear that could be used when participating in this SAP. Sector vessels will be allowed to continue to fish in this Eastern U.S./Canada Area Haddock SAP for the entire season specified for this SAP as long as the sector to which they belong has been allocated quota for all stocks caught in this SAP.

#### **CA I Hook Gear Haddock SAP**

The CA I Hook Gear Haddock SAP is revised to expand both the area and the season of this SAP. The season is extended to run from May 1 through January 31.

The seasonal split between sector and common pool vessels is eliminated, as is the division of the available GB haddock quota between sector and common pool seasons. This means that once the available GB haddock quota specified for the SAP is caught, the SAP will be closed to all vessels, including sector vessels. Sector vessels and common pool vessels would be able to fish under this SAP throughout the proposed season, provided the SAP is not closed and sectors to which vessels belong have been allocated quota for all stocks caught in this SAP. The SAP area is extended to cover most of the northern portion of CA I, as described further in this final rule. All other requirements of this SAP remain unchanged by this action. Finally, this action prohibits vessels participating in the SAP from using squid or mackerel for bait, or even possessing squid or mackerel on board the vessel to reduce the catch rates of cod in this SAP.

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

Because F on SNE/MA winter flounder must be reduced to as close to zero as practicable, and no vessels will be allowed to possess SNE/MA winter flounder under this action, the SNE/MA Winter Flounder SAP is temporarily suspended until improving stock conditions warrant its re-implementation under a future Council action.

#### **CA II Yellowtail Flounder/Haddock SAP**

The CA II Yellowtail Flounder SAP is revised by this action to facilitate the harvest of GB haddock within CA II, even when the SAP is closed to targeting GB yellowtail flounder. This revised CA II Yellowtail Flounder/Haddock SAP builds upon the existing provisions of the CA II Yellowtail Flounder SAP by modifying the gear requirements and season when the area is open to targeting haddock. When the SAP is open to targeting yellowtail flounder based upon the amount of GB yellowtail flounder available, the existing CA II Yellowtail Flounder SAP provisions apply. This includes the season (July 1 through December 31), individual vessel trip limits (one trip per vessel per month), cumulative \*18275 fishery trip limits (320 trips per year, unless otherwise specified by the Regional Administrator), gear requirements (one of two types of flounder nets specified in the regulations, the haddock separator trawl, or the Ruhle trawl), GB yellowtail flounder trip limit (10,000-30,000 lb (4,536-13,608 kg) per trip), GB cod trip limit (1,000 lb (453.6 kg) per trip), and other provisions. When the SAP is not open to the targeting of GB yellowtail flounder, either because there is insufficient GB yellowtail flounder available to open the SAP, or because the maximum number of trips has been taken, the SAP will open to target GB haddock, provided the Eastern GB haddock ACL has not been caught by common pool vessels, or there is sufficient quota for all stocks caught in the SAP for vessels participating in an approved sector. If the SAP is open to target haddock, the following provisions apply, unless otherwise noted below: Season (August 1

through January 31), gear requirements (a vessel is not allowed to use a flounder net and must instead use a haddock separator trawl, a Ruhle trawl, or hook gear), trip limits (no haddock trip limit, and the existing trip limits for GB cod and GB yellowtail flounder), and the existing SAP DAS and discard provisions. All catches of GB haddock apply to the Eastern GB haddock quotas allocated to either common pool or vessels participating in individual sectors. Sector vessels are not subject to the trip limits, limits to the number or frequency of trips (i.e., the current restriction of 1 trip per month or the maximum 320 trips per year) or DAS restrictions specified for this SAP, but are subject to the gear requirements for this SAP. Individual sector vessels will be allowed to continue to fish in this modified CA II Yellowtail Flounder/Haddock SAP should it close to common pool vessels, as long as the applicable sector has allocated quota remaining for all stocks caught in this SAP.

### ***13. Recreational Measures***

To ensure that management measures can be tailored to address the components of the fishery responsible if mortality targets are exceeded, this action allocates portions of the GOM cod and GOM haddock ACLs to the recreational fishery based upon the criteria proposed to allocate regulated species and ocean pout stocks between the NE multispecies commercial/recreational fishery, as described in Item 5 of this preamble. To meet the target F for GOM cod, this action also extends the existing seasonal GOM cod prohibition for recreational vessels, including both private recreational and charter/party vessels for 2 weeks, to run from November 1 through April 15. Other recreational measures implemented by this action include the elimination of the limit on the number of hooks that can be used (recreational anglers are still limited to one line per angler), and the requirement that all fillets landed by private recreational and charter/party vessels must have at least 2 sq inches (5.08 sq cm) of contiguous skin that allows for the ready identification of the fish species. Such fillets are required to be from legal-sized fish, but the fillets themselves would not need to meet the minimum size requirements in the regulations. Finally, as stated above for commercial vessels, this final rule reduces the minimum size for haddock from 19 inches (48.3 cm) to 18 inches (45.7 cm) total length, indefinitely, and increases the minimum size for Atlantic halibut from 36 inches (91.4 cm) to 41 inches (104.1 cm) total length. Atlantic wolffish would be added to the FMP, with zero possession allowed for all recreational vessels.

Consistent with language in the Amendment 16 FEIS, the preamble of the proposed rule for this action indicated that the possession of SNE/MA winter flounder is prohibited in any fishery. However, while the proposed rule included regulatory text that prohibited common pool and sector vessels from possessing this stock, it did not include similar language for private recreational and

charter/party vessels. To accurately reflect the intent of the Council under Amendment 16, this final rule revises the regulatory text at § 648.89 to insert a prohibition on the retention of SNE/MA winter flounder by all recreational vessels.

#### ***14. Sector Measures***

This action approves all sector measures proposed under Amendment 16, including the formation of 17 additional sectors and revisions to many existing sector requirements such as sector allocation provisions, operations plan requirements, and monitoring and reporting requirements, as specified further below. In addition, vessels participating in an approved sector are required to comply with the sector-specific AMs specified in Item 6 of this preamble, sector reporting requirements described in Item 8 of this preamble, and sector provisions specified for individual SMPs outlined in Item 12 of this preamble.

Based upon the comments received on the proposed rule for this action, there remains some confusion as to whether a sector is a limited access privilege program (LAPP), as defined in the Magnuson-Stevens Act. NMFS would like to clarify that NMFS does not consider sectors to be LAPPs, and they are not subject to the referendum or cost-recovery requirements of the Magnuson-Stevens Act. There is no permit issued to a sector, and no permanent or long-term allocation of fish is made to any sector. Unlike individual fishing quotas (IFQs), sectors are temporary, voluntary, fluid associations of vessels that can join together to take advantage of flexibilities and efficiencies that sectors are afforded. Vessel owners may choose to join a sector or not, and can change their decisions from one year to the next, based on what they believe are the best opportunities for them at that point in time. Additional details regarding NMFS' interpretation of the LAPP and IFQ provisions of the Magnuson-Stevens Act are provided in the response to Comment 49, below.

#### **Sector Eligibility and Definition**

This action allows permits held in CPH to join sectors. In addition, because this action now controls sector effort through hard TACs instead of a combination of hard TACs and DAS, vessels issued a limited access NE multispecies Handgear A permit (a permit that is not subject to DAS effort controls) are now eligible to participate in sectors. Only those vessels that were issued a limited access NE multispecies permit or CPH as of May 1, 2008, are eligible to participate in sectors. Finally, consistent with the Council's sector policy, this action defines a sector as a group of three or more persons, none of whom have an ownership interest in the other two persons in the sector to address concerns that sectors may be used as a means to circumvent the individual transferable quota referendum required by the Magnuson-Stevens Act, and minimize the administrative burden associated with implementing a large number of very small sectors.

#### **Operations Plan Requirements**

Amendment 13 specified a number of required elements that must be included in each sector operations plan. This final rule adds to those requirements to provide additional details regarding sector reporting and monitoring provisions, as well as to better understand the composition and effort distribution of participating vessels so that the Council can better evaluate the impacts of sectors. These additional operations plan requirements include information about overage penalties if a sector exceeds its allocation for any \*18276 stock; detailed information about the sector's independent third-party dockside/roving monitor service provider that meets NMFS standards to monitor sector landings; detailed information about a monitoring program for discards; a list of all Federal and state permits held by vessels participating in the sector; a list of specific ports where sector members will land fish with specific exemptions provided for safety, weather, and other reasons; TAC thresholds and how the sector would notify NMFS once the threshold has been reached; identification of potential redirection of effort as a result of sector operations and any efforts to limit the adverse effects of such redirection of effort; and finally how regulated species or ocean pout would be avoided while participating in other fisheries that have a bycatch of regulated species and ocean pout if the sector does not anticipate being allocated or acquiring an allocation of such species from another sector. This last requirement is only required if the sector anticipates operating in this manner. Sector operations plans are required to be submitted by September 1 of each year to ensure that the operations plans and associated analysis are reviewed in time to implement such operations by the start of the next FY on May 1. Operations plans may address sector operations over either a 1- or a 2-year period, provided the analysis is sufficient to cover the duration of the applicability of the operations plan. The Regional Administrator will review each sector operations plan and associated analysis and approve or disapprove such operations, with implementation through publication of a rule in the Federal Register.

### **Universal Sector Exemptions**

This final rule maintains the existing restriction that sectors cannot be exempted from year-round closures, permitting restrictions, gear restrictions designed to reduce habitat impacts, and reporting requirements. However, this final rule also establishes several “universal exemptions” in which all sectors will be exempt, including trip limits on stocks for which the sector receives an allocation (described in more detail below); seasonal closed areas; NE multispecies DAS restrictions; the requirement to use a 6.5-inch (16.5-cm) mesh codend when fishing with selective gear (i.e., the haddock separator trawl, the Ruhle trawl, or other approved gear) on GB, provided such vessels fish with a 6-inch (15.24-cm) mesh codend; and portions of the GOM Rolling Closure Areas (described in more detail below). Sectors may still request and analyze additional exemptions as part of their

yearly operations plans, but such exemptions need to be approved by the Regional Administrator. The provisions applicable to a sector, including any exemptions from existing regulations, will be specified in a LOA issued to sectors by the Regional Administrator, which must be possessed on board participating vessels at all times to facilitate enforcement of sector provisions.

**Sector Allocations, Potential Sector Contribution (PSC), and Annual Catch Entitlement (ACE)**

Consistent with the Council's intent to transition from input controls to output controls, this action does not rely upon DAS to control sector effort on regulated species or ocean pout, relying instead on hard TACs to control sector catch. Under this action, sectors will be allocated fishery resources for all regulated species stocks, with the exception of Atlantic halibut, windowpane flounder, Atlantic wolffish, and SNE/MA winter flounder, and ocean pout based upon the fishing histories of participating vessels. Although SNE/MA winter flounder is not allocated to sectors at this time, if the status of SNE/MA winter flounder improves, this stock would be allocated in a manner similar to how other stocks are allocated, as described below.

Sector allocations are in the form of an ACE for each stock, or the maximum amount of a particular stock that a sector could catch-including both landings and discards-on a yearly basis. Each individual sector's ACE for a particular stock represents a share of that stock's ACL available to commercial NE multispecies vessels based upon the cumulative PSCs of vessels participating in each sector. A PSC represents an individual permit's share of the ACL for each regulated species or ocean pout stock based upon the individual permit's dealer landings available to NMFS (see below for further detail), including the landings histories for any permit histories consolidated onto one vessel prior to May 1, 2008, as part of the existing DAS Transfer Program provisions. These PSCs remain with the limited access permit indefinitely, including upon replacement of a vessel, or consolidation with another limited access NE multispecies permit on another vessel. The ACE allocated to a sector is valid only for one FY and is recalculated on a yearly basis based upon changes to sector rosters. While Amendment 13 specifically restricted the size of an individual sector allocation to no more than 20 percent of the yearly TAC for any regulated species or ocean pout stock, this action eliminates that restriction to further facilitate participation in sectors.

The PSC for each regulated species or ocean pout stock is based upon historic landings of each stock while operating under the restrictions of a limited access NE multispecies permit, including regulated species or ocean pout caught under a NE multispecies DAS when participating in the skate or monkfish fisheries. With the exception of GB cod, the PSC for each stock is calculated by summing the dealer landings for each permit during FYs 1996 through 2006. This value is then divided

by the total landings of each NE multispecies stock during the same period by all permits eligible to join sectors to get the individual permit's share of the available commercial ACL for each stock. The landings history for each permit includes all landings that can be attributed to that permit. For limited access NE multispecies Handgear A permits, this includes landings by the permitted vessel during FYs 1996 through 2003, before the adoption of the limited access Handgear A permit category in 2004. For GB cod, any vessel owner that indicated his/her intent to participate in one of the existing sectors (i.e., the GB Cod Hook Sector or the GB Cod Fixed Gear Sector) by signing a preliminary roster for these sectors by March 1, 2008, is allocated a GB cod PSC based upon documented landings histories of this stock between FYs 1996-2001, the years selected to determine the GB cod allocation for existing sectors under Amendment 13. A process to correct data used to calculate each permit's PSC for each stock was outlined in a May 1, 2009, letter to all limited access NE multispecies permit holders and updated on July 27, 2009, and again on November 2, 2009. These letters are available on the NMFS Northeast Regional Office Web site (<http://www.nero.noaa.gov>).

Each sector allocated ACE for stocks managed under the terms of the U.S./Canada Understanding (i.e., GB yellowtail flounder, GB cod, and GB haddock) will be allocated a specific portion of such ACEs that could only be harvested from the Eastern U.S./Canada Area. The ACE specified for the Eastern U.S./Canada Area portions of these stocks will be proportional to the sector's allocation of the overall ACL available to commercial NE multispecies vessels for these stocks. For example, if a sector is allocated 10 percent of the GB cod ACL available to commercial NE multispecies vessels, \*18277 that sector would also be allocated and allowed to harvest 10 percent of that ACE from the Eastern U.S./Canada Area. In this example, if the overall GB cod ACL available to commercial NE multispecies vessels is 1,000 mt, of which 100 mt is specified to the Eastern U.S./Canada Area, this sector would be allocated 100 mt of GB cod, of which 10 mt would be allocated to, and could be harvested from, the Eastern U.S./Canada Area.

A sector can only fish in a particular stock area if it is allocated, or acquires through transferring ACE from another sector, ACE for all stocks allocated to sectors in that stock area. Catch for all allocated regulated species or ocean pout stocks, including both landings and discards, count against a sector's ACE for a particular stock. Sector vessels are required to retain all legal-sized regulated species and ocean pout and are only allowed to discard undersized fish for all allocated stocks. Once a sector's ACE for a particular stock is caught, a sector is required to cease fishing operations in that stock area for the rest of the FY, or until it acquires additional ACE for that stock. If, in a particular FY a sector exceeds its ACE for a particular stock after considering all ACE allocated to that sector or

acquired from another sector, that sector's ACE for that stock will be reduced by the amount of the overage in the following FY. If there is insufficient ACE allocated to a particular sector to cover the overage, vessels participating in that sector will not be allowed to fish in the stock area for which the overage occurred unless and until that sector acquires sufficient ACE from another sector to cover the remaining overage (i.e., the overage that exists after reducing the ACE for that stock to zero for the following FY). For example, if a sector is allocated 10 mt of GB cod ACE, but catches 25 mt of GB cod during the previous FY, the GB cod ACE for the following FY would be reduced to zero and that sector would be required to acquire at least 5 mt (i.e., 15 mt overage-10 mt ACE allocated = 5 mt overage remaining) of GB cod ACE in order to fish in the GB cod stock area during the following FY. If the sector disbands, individual participating vessels will be subject to a reduction in PSC if participating in another sector, or a reduction in allocated DAS if participating in the common pool, proportional to the individual vessel's share of the maximum overage that occurred. For example, if a sector exceeds its GB cod ACE by 10 percent and its pollock ACE by 15 percent, each permit in that particular sector that enters the common pool during the subsequent FY would receive a 15-percent reduction in its Category A DAS allocation for that FY. If a sector comprised of 10 permits/vessels exceeds its GB cod ACE by 10,000 lb (4,536 kg) during the previous FY, but later disbands, each permit in that sector that joins another sector during the subsequent FY would have its GB cod PSC temporarily reduced by 1,000 lb (453.6 kg) during that FY. A sector could also specify additional penalties to participating vessels as part of its yearly operations plan. If the sector does not exceed its ACE for any stock, but other vessels in the common pool or another sector exceed their sub-ACLs or ACEs, respectively, the sector's ACE in the following FY would not be reduced as a result of such overages by other groups. This is intended to ensure that groups responsible for exceeding their portion of the ACL for a particular stock do not negatively impact other groups.

If a sector exceeds its ACE at the end of the FY, it could be held jointly and severally liable for such an overage and may be subject to a permanent reduction in the sector's ACE (i.e., a permanent reduction in individual vessel's PSCs) or a withdrawal of the approval of that sector in addition to the penalties described above. In addition to ACE overages, a sector and its participants could be held jointly and severally liable for discarding legal-sized fish or misreporting catch (both landings and discards).

With the exception of GB yellowtail flounder, a sector is allowed to carry over up to 10 percent of unused ACE for each stock into the following FY, even if a sector's roster has changed between those FYs. Any unused ACE allocated for Eastern GB stocks contributes to the 10-percent carry-over allowance for each

stock as a whole, but will not increase an individual sector's allocation of Eastern GB stocks during the following year. In addition, a sector is not allowed to carry over any unused ACE for GB yellowtail flounder into the next FY. Because the U.S. portions of the TACs for GB yellowtail flounder and Eastern GB cod and Eastern GB haddock are specified on a yearly basis as part of the Understanding, allowing sectors to carry over any of these stocks could result in U.S. harvest of these stocks exceeding the U.S. portions of these stocks for a particular FY if all vessels fully harvested the TACs specified to either sectors or the common pool. This could result in a violation of the Understanding and the need to deduct such overages during the following year based upon existing regulations implementing the Understanding.

### **ACE Trading**

All or a portion of a sector's ACE for any regulated species or ocean pout stock may be transferred to another sector at any time during the FY, and up to 2 weeks into the following FY. ACE transfers will be approved by the Regional Administrator through the submission of an ACE transfer request form that details the amount of ACE transferred and any compensation exchanged. The Regional Administrator will approve/disapprove such a transfer request based upon whether the sector is compliant with applicable reporting requirements, including the weekly sector catch report described below, and individual VTR requirements. Such transfers are only valid for the FY requested on the transfer request form. To ensure that such ACE trading does not lead to overfishing, NMFS will withhold 20 percent of each sector's ACE for each stock for a period of 61 days (i.e., through June 31) to accommodate any transfers of ACE late in the FY and to allow sufficient time for NMFS to evaluate sector catch data to determine if an overage actually occurred.

### **DAS Transfer Requests by Sector Vessels**

The DAS Transfer Program involves the permanent transfer of a vessel's NE multispecies DAS, along with any other limited access permits and associated fishing history. Because the fishing history of each permit affects the ACE allocated to each sector, this action allows a sector vessel to transfer DAS and associated fishing history to another vessel participating in that vessel's sector, but prohibits a sector vessel from transferring any DAS to or from common pool vessels or vessels participating in a different sector. This is necessary to facilitate the administration of the DAS Transfer Program without affecting the ACE allocation of each sector due to such transfers.

### **Sector Monitoring and Reporting Requirements**

Amendment 16 and this final rule requires sectors to develop mechanisms to adequately monitor catch and discards by participating vessels. One of these mechanisms is an independent third-party dockside/roving monitoring program

that observes offloads by sector vessels to ensure that landings are accurately reported. This dockside/roving monitoring program is required starting in FY 2010, and will be funded by sectors, unless otherwise specified by NMFS. Dockside monitors observe \*18278 offloadings directly to a dealer, while roving monitors are used to monitor offloads to a truck for later delivery to a dealer. Such a program must employ a dockside/roving monitor service provider approved/certified by NMFS based upon specific provider and operational standards developed by the Gulf of Maine Research Institute (GMRI) and members of the fishing industry, in consultation with NMFS, as further described in this final rule. During FY 2010, the offloads of 50 percent of trips by each sector will be randomly observed, with 20 percent randomly observed in future years. In addition, because discards and area fished are critical elements in the monitoring of sector catch, sectors are required to develop an adequate independent third-party at-sea/electronic monitoring program no later than FY 2012. This program will be used to verify area fished and catch (landings and discards), by species and gear type, for the purposes of monitoring sector ACE utilization. Coverage levels will be specified by NMFS on a yearly basis, based upon a list of participating vessels and gear types for each sector. At a minimum, such coverage will be sufficient to ensure that the resulting estimate of discards meets the coefficient of variation specified in the Standardized Bycatch Reporting Methodology (SBRM), but it is expected that coverage is likely to be higher than this minimum standard to monitor catch (both landings and discards) as closely as possible and to minimize coverage bias in each sector. Electronic monitoring could be used in lieu of actual at-sea monitors in the future, provided the technology is deemed sufficient by NMFS for a specific gear type and area fished; NMFS has not yet deemed electronic monitoring technology sufficient for any gear or area fished. Existing NMFS-funded observer coverage will continue under this action. Any at-sea monitoring coverage provided by an approved sector at-sea monitoring program will be in addition to the coverage provided by NMFS-funded observers. If a NMFS-funded observer and an industry-funded at-sea monitor are assigned to the same trip, the NMFS-funded observer will take precedence and will cover that trip, and the at-sea monitor will not be deployed on that trip, to minimize costs to industry. To facilitate deployment of dockside/roving and at-sea monitors and enforcement of these provisions, vessels must submit trip-start and trip-end hail reports to the dockside/roving and at-sea/electronic monitoring service providers and to NMFS Office of Law Enforcement, unless otherwise specified in an approved sector operations plan, as further described in this final rule. The details for any dockside/roving and at-sea/electronic monitoring program must be specified in each sector's annual operations plan.

Discards will be monitored through the use of a sector-specific assumed discard rate, unless NMFS deems that there are sufficient observer or at-sea monitor data available to specify a sector-specific, inseason discard estimate for each stock/gear combination specified in the FMP. Once sufficient data are available, the sector-specific inseason discard rate will apply to all trips taken by sector vessels for the remainder of the FY, in lieu of the assumed discard rate. If a trip is observed by either an observer or an at-sea monitor, the discards reported by the observer or at-sea monitor will be used to document discards for that particular trip instead of using an assumed discard rate, regardless of whether the sector has developed an approved at-sea monitoring program for that FY (see the NMFS Northeast Regional Office Web site for further details:

<http://www.nero.noaa.gov/sfd/sfdmultisector.html>).

The data and methodology used to calculate a Sector-specific assumed or inseason discard rate is considered an administrative measure necessary to administer the FMP and monitor sector catch. As a result, the manner in which such rates are calculated may change on a yearly basis. For FY 2010, NMFS will calculate the assumed discard rate based upon observed trips by sector vessels during FY 2009, by stock and gear type, as specified in Section 4.2.3.5.3 of the Amendment 16 FEIS. If there are insufficient data to develop an assumed discard rate at this level, a fleet-wide stock and gear discard rate will be used instead. When calculating these discard rates, regulatory discards of legal-sized fish caused by trip limits will be excluded to represent anticipated behavior under sectors. These assumed discard rates will be calculated as often as practicable, and will be used to add a discard estimate to each landing by a sector vessel so that total catch can be determined for each stock for each trip. Based upon available funding, NMFS intends to increase the NMFS-funded observer and at-sea monitor coverage to include approximately 38 percent of sector trips and 30 percent of common pool trips during FY 2010, and possibly future FYs.

Sectors are required to submit an annual report to NMFS by July 1 of each year that provides information necessary to evaluate the biological, economic, and social impacts of sectors. The report must include harvest levels of all vessels for all federally managed species, enforcement actions, and other information needed to evaluate the performance of the sector. In addition, sectors must submit weekly catch reports that provide sector catch and discard for each stock allocated to that sector, as instructed by the Regional Administrator. Sectors must provide trip-level catch data, if requested, to facilitate the auditing of sector catch data to ensure that data used by sectors are consistent with those submitted to NMFS, based upon the provision in Amendment 16 that allows other requirements of sector monitoring plans to be implemented, as directed by the Regional Administrator.

### **Authorization of Sectors**

Amendment 16 authorizes 17 new sectors and revises the provisions for 2 existing sectors. These sectors include the GB Cod Hook Gear Sector, GB Cod Fixed Gear Sector, Sustainable Harvest Sector, Port Clyde Community Groundfish Sector, Northeast Fishery Sectors I through XIII, Tristate Sector, and the Northeast Coastal Communities Sector. All operational aspects of these sectors have been proposed in their annual operations plans, as submitted to NMFS.

#### ***15. VMS Requirement***

Because this action relies upon VMS to submit area declaration, hail reports, and catch information necessary to implement provisions approved in Amendment 16, all vessels issued a limited access NE multispecies permit and fishing under either a NE multispecies DAS or on a sector trip must use a VMS for each NE multispecies trip. In addition, any vessel issued a limited access NE multispecies small vessel Category C or Handgear A permit that fishes in multiple broad stock areas must also use a VMS for each NE multispecies trip. The preamble to the proposed rule for this action inaccurately stated that all vessels issued a limited access NE multispecies permit would be required to use VMS. However, the proposed regulations correctly reflected the intent described above. Consistent with existing VMS regulations, upon taking either a common pool or a sector trip, a vessel issued a limited access NE multispecies permit must maintain an operational VMS for the remainder of the FY.

#### ***16. Framework Items***

This action revises the management measures that may be modified by a \*18279 framework action by adding the following measures to the list of measures that can be adjusted through a framework action: Process for specifying and distributing ABCs and ACLs; trimester TAC distribution; sector provisions, including authorized sectors; PSC calculations; and any other provision implemented under the FMP.

#### ***17. Corrections***

As described in the proposed rule for this action, a number of inadvertent errors, omissions, and ambiguities in existing regulations must be corrected in order to ensure consistency with, and accurately reflect the intent of previous actions under the FMP. This final rule clarifies that although the replacement vessel size restrictions do not apply to Handgear A vessels, the limitation on one vessel replacement per year does apply to these vessels. Outdated references to the gillnet tag requirements for Trip gillnet vessels eliminated by FW 40B are removed. The Atlantic sea scallop access program regulations are revised to cross reference the correct SNE/MA yellowtail flounder trip limit and eliminate references to incorrect trip limits. Regulations providing the Regional Administrator with the authority to modify or delete exemptions to the existing exempted fisheries are reinserted to reflect regulations originally implemented on a permanent basis by FW 9 (60 FR

19364; April 18, 1995). This action clarifies that limited access general category scallop vessels, and limited access scallop vessels not fishing under a scallop DAS, that are fishing in the GOM RMA must fish in the GOM Scallop Dredge Exemption Area, and are prohibited from fishing in any other part of the GOM RMA, and must use dredge gear to harvest scallops in the GOM Scallop Dredge Exemption Area to reflect the intent of measures in FW 21 (62 FR 8404; February 25, 1997). In addition, general category scallop vessels, and limited access scallop vessels not fishing under a scallop DAS, that are fishing in the SNE RMA must fish in the SNE Scallop Dredge Exemption Area, and are prohibited from fishing in any other part of the SNE RMA, and must use dredge gear to harvest scallops in the SNE Scallop Dredge Exemption Area. The western border of the SNE Scallop Dredge Exemption Area is corrected to coincide with the eastern border of the MA Exemption Area. An incorrect reference to midwater trawl gear as exempted gear in the GOM Rolling Closure Area regulations is removed to reflect measures implementing FW 43. Restricted Gear Area 1 point 72 is added to make the regulations consistent with FW 22 (March 10, 1997; 62 FR 10747) and the regulations for the American lobster fishery. The regulations for the DAS Leasing Program are clarified to allow a one-time DAS leasing baseline downgrade opportunity for a NE multispecies permit that results from the combination of two limited access NE multispecies permits merged under the DAS Transfer Program. This final rule also clarifies that the upgrade of any baseline specification under the DAS Transfer Program precludes any future upgrades through subsequent transactions and removes outdated references that a permit involved in a DAS transfer must forfeit all other permits. Regulatory text regarding closure of the Eastern U.S./Canada Area once 100 percent of the Eastern GB cod TAC is harvested is inserted to reflect the intent of the provisions originally implemented under Amendment 13. Several coordinate points defining the CC/GOM and SNE/MA stock areas for yellowtail flounder in the Regular B DAS Program are revised to maintain consistency with the areas adopted under FW 42. Finally, the existing regulations are revised to allow the stowage of other types of gear when fishing in the Eastern U.S./Canada Haddock SAP to be consistent with the overall regulations for the Eastern U.S./Canada Area.

#### ***18. Transfer of ACE by NOAA-Sponsored Permit Banks***

The proposed rule for this action considered allowing any state-operated permit bank sponsored by NOAA to be a sector to enable such permit banks to lease ACE to qualifying sectors to minimize any adverse socio-economic impacts to fishing communities associated with catch-share programs. Public comment received on this action indicated that, although many supported the concept to allow permit banks to transfer ACE and DAS, others believed there was insufficient information provided in the proposed rule to effectively evaluate the implications of such

measures. Some public comments expressed a concern that such provisions would have broader implications on the definition of a sector, as developed by the Council in Amendment 16, and on the ability of existing and future permit banks to operate under the sector provisions approved under Amendment 16. To foster further discussion on permit banks and how they are affected by the provisions approved under Amendment 16 and implemented by this action, NMFS has removed proposed measures specific to NOAA-sponsored permit banks from this final rule and will recommend that the Council develop a means to address public comments regarding permit banks, including those sponsored by NOAA, in a subsequent Council action.

***19. Approval of Service Providers for FY 2010 Sector Dockside and At-Sea Monitoring Programs***

As described in Items 6 and 14 of this preamble, Amendment 16 requires that service providers interested in providing dockside and/or at-sea monitoring services to common pool and sector vessels apply to, and be approved/certified by, NMFS. Based upon consultation with the GMRI and industry participants, NMFS expanded the service provider approval/certification standards listed in Section 4.2.3.5.4 of the Amendment 16 FEIS to include operational standards necessary to effectively implement both dockside and at-sea monitoring programs in Amendment 16. These expanded standards were listed in the Amendment 16 proposed rule and were used to approve/certify dockside and at-sea monitoring service providers under this action.

Potential service providers identified by the sector proponents were invited to a workshop at the NMFS Northeast Fisheries Science Center (NEFSC) in August 2009. This workshop presented the service provider requirements of the Amendment 16 DEIS. In order to implement Amendment 16 sector requirements by May 1, 2010, NMFS specified that service providers intending to provide dockside and/or at-sea monitoring services to sectors during FY 2010 would be required to demonstrate their compliance with the service provider standards as part of the operations plan of each sector interested in retaining their services. Because sectors were required to submit operations plans to NMFS by September 1, 2009, potential service providers needed to demonstrate compliance with these standards by September 1, 2009. NMFS received complete applications from four service providers intending to provide dockside and/or at-sea monitoring services to sectors, and one service provider intending to provide only dockside monitoring services to sectors in FY 2010.

Discussions with members of industry and service provider applicants identified the need to approve service providers ahead of the sector operations plans final rule to allow time for industry and service providers to arrange contracts before May 1, 2010. It was decided that service providers and proposed FY 2010 sectors could

be **\*18280** notified of a preliminary determination about service provider approval/disapproval as soon as possible, and that the Regional Administrator's final determination would be published concurrent with the approval of sector monitoring measures in this Amendment 16 final rule. On December 24, 2009, service provider applicants and proposed FY 2010 sectors were notified of NMFS's preliminary approval of all five applicants as eligible to provide monitoring services to sectors in FY 2010. In this final rule, the Regional Administrator is announcing the final approval of dockside/at-sea monitoring service providers based upon the completeness of their applications and a determination of their ability to perform the duties and responsibilities of a dockside/at-sea monitoring service provider, as specified by Amendment 16 and the proposed rule for this action.

The Regional Administrator has approved the following four service providers as eligible to provide both dockside and/or at-sea monitoring services to sectors in FY 2010:

- A.I.S., Inc., 89 North Water Street, New Bedford, MA 02747, phone 508-990-9054, fax 508-990-9055, Web site <http://www.aisobservers.com>.
- East West Technical Services, 34 Batterson Drive, New Britain, CT 06053, phone 860-223-5165, fax 860-223-6005, email [ewtsct@ewts.com](mailto:ewtsct@ewts.com).
- MRAG Americas, 65 Eastern Ave., Unit B2C, Essex, MA 01929, phone 978-768-3880, fax 978-768-3878, Web site <http://www.mragamericas.com>.
- Saltwater Inc., 733 N. Street, Anchorage, AK 99501, phone 907-276-3241, fax 907-258-5999, Web site <http://www.saltwaterinc.com>.

The Regional Administrator has approved the following service provider as eligible to provide dockside monitoring services to sectors in FY 2010:

- Atlantic Catch Data Ltd., 99 Wyse Road, Suite 815, Dartmouth, Nova Scotia, CANADA B3A 4S5, phone 1-902-422-4745, fax 1-902-422-9780, Web site <http://www.atlanticcatchdata.ca>.

### **Comments and Responses for Amendment 16**

Fifty comments were received during the comment period specifically on the proposed rule for this action from 28 individuals, 7 fishing industry groups, 6 conservation groups, a group of scientists from 1 university, 1 fish dealer, 1 state resource management agency (Massachusetts Division of Marine Fisheries (DMF)), 2 community groups, 1 sector, and 3 professional organizations. Only comments that were specifically directed to the proposed measures, including the analyses used to support these measures, are addressed in this preamble. Other comments were received in connection with the notice of availability for Amendment 16. Many of these overlap with comments addressing the proposed rule to implement Amendment 16. NMFS responses to these comments, as set forth in its Record of Decision for approval/disapproval of Amendment 16, are

incorporated herein by reference. Please note in considering the responses to comments below that NMFS may only approve or disapprove measures proposed in a fishery management plan or amendment, and may not change or substitute any measure in a substantive way, pursuant to section 304(a)(3) of the Magnuson-Stevens Act.

### **General Comments**

Comment 1: The Northeast Hook Fisherman's Association (NEHFA) suggested that Amendment 16 is inconsistent with National Standard 6 because it does not allow for variations among, and contingencies in, fisheries and catches among participants. This group notes that the number of active limited access NE multispecies Handgear A vessels had been reduced by nearly 50 percent since 2004 and that the proposed measures may force the remaining permits out of business.

Response: NMFS disagrees. The commenter offered minimal explanation as to why NEHFA believes that Amendment 16 is inconsistent with National Standard 6, and seems to misinterpret National Standard 6 to mean that current or historical participation in the fishery must be preserved. In the National Standard 6 Guidelines, NMFS has interpreted this national standard to require that FMPs have the capacity to respond to changes in fishing practices, catches, stock conditions, or other uncertainties inherent in managing marine resources by building in flexibility to adapt to such changes and uncertainties. Amendment 16 includes a number of provisions that are meant to provide flexibility to adapt to changing resource and fishery conditions, including a process to establish ACLs and revise management measures on a biennial basis that reflect updated estimates of stock status and management conditions; increasing incentives to participate in the DAS Leasing and Transfer Programs that help provide additional access to DAS for vessels to remain economically viable; dual management regimes that allow a vessel to choose to continue to operate under DAS and/or trip limits, or operate under hard-TAC management of sectors; and increasing incentives to fish selectively through expanded SAPs and the establishment of RGAs. Although not all of these measures are available to Handgear A vessels, Amendment 16 expanded the sector eligibility provisions to specifically allow these permits to join sectors to provide the necessary flexibility to participate in either the common pool or sectors, based on which management regime would offer the most benefit to the individual vessel. Previously, Handgear A vessels were not allowed to participate in sectors. Thus, the measures implemented by this action do take into consideration variations and contingencies in fisheries, fishery resources, and catches, consistent with National Standard 6.

Comment 2: The Environmental Defense Fund (EDF) and Penobscot East Resource Center (PERC) supported efforts to transition the fishery from a DAS

management regime to a catch share regime in the form of sectors, but suggested that the Council should continue to improve the design and adaptability of sector management measures. Specifically, EDF recommended, and PERC supported, that the Council consider an adaptive management set-aside of quota once stocks rebuild to facilitate additional management needs and objectives, including biological, economic, or social issues. In addition, PERC recommended that that Council consider who should be able to hold or land a sector's ACE, and restricting ACE trades based upon vessel size or gear usage.

Response: The Council did not explicitly consider measures recommended by EDF and PERC in Amendment 16 and they are not considered to be necessary at this time to ensure consistency of Amendment 16 with Magnuson-Stevens Act requirements. Therefore, this action need not implement such measures. However, the Council could develop such measures through a future Council action.

Comment 3: One industry member suggested revising the current definitions of the haddock separator trawl and the Ruhle trawl. Revisions to the haddock separator trawl include requiring the separator panel to begin at the forward edge of the first belly of the net and run the full length of all of the bellies of the net. Revisions to the Ruhle trawl include removing the requirements for a minimum fishing circle, kite panel size, and size and placement of rockhoppers in the sweep *\*18281* of the net and are intended to facilitate its use by smaller vessels.

Response: The original haddock separator trawl description was based upon gear research available at the time it was proposed under Amendment 13. At that time, there were conflicting recommendations within available research regarding the placement of the separator panel. The definition that was finally implemented reflects input from participants in some of that research, as well as other gear experts. Further, the Ruhle trawl definition was based upon extensive experimentation. Another experiment testing a smaller version of the Ruhle trawl is under review. Because these revisions to gear definitions have not been previously made available for public comment and could likely change the behavior and performance of these nets, it is not appropriate to revise such definitions through this final rule. Instead, it would be more appropriate to consider such revisions in a future Council action.

Comment 4: The New Hampshire Commercial Fisherman's Association (NHCFA) suggested that the Council reconsider a means of converting DAS to an allocation of pounds, and recommended that pollock be considered a transboundary stock for the purposes of adjusting management measures to accommodate management inequities between the United States and Canada and lessen the mortality reductions necessary under Amendment 16. NHCFA also stated that Amendment 16 underestimates the economic impacts of proposed measures. Mayor Lang of New Bedford, MA stated that the economic analysis must include impacts on

communities, including impacts to the tax base and infrastructure if vessels will no longer remain economically viable.

Response: The Council considered including DAS as an element in the calculation of PSCs, but elected, based on reasons included in Amendment 16, to adopt options only involving historic landings. The Council may reconsider a means of converting DAS to an allocation of pounds similar to the DAS Performance Plan, a plan that was proposed by the NHCFA, during the development of Amendment 17 or another future action. Consideration of pollock as a transboundary stock is ongoing, with a joint U.S./Canada assessment being developed for 2010. However, a formal agreement to jointly manage this stock has not yet been developed. Therefore, the mortality reductions necessary under Amendment 16 consider fishing mortality from all sources, including catch by both U.S. and Canadian vessels. Finally, a full analysis of the economic impacts of Amendment 16 measures was conducted for the FEIS. The scope of this analysis was based on established guidelines. This analysis uses the best available scientific information, but notes that there are a number of sources of uncertainty associated with measures in Amendment 16 that make precise evaluation of impacts difficult. A full discussion of the impacts of changes in occupational opportunities and community infrastructure is in Section 7.6.3.4 of the FEIS.

Comment 5: One individual, the Association of Professional Observers (APO), and the United National Fisherman's Association (UNFA) recommended that the Amendment 16 public comment period should be extended to end upon the completion of the comment period for the draft national catch share policy on April 10, 2010, stating that there was not enough time to comment on proposed measures and that Amendment 16 sector provisions should not be finalized until the national policy is defined.

Response: The measures in Amendment 16 are necessary to end overfishing and ensure that overfished stocks continue to rebuild. The rebuilding plans in the FMP rely upon implementation of management measures beginning in FY 2010 on May 1, 2010, otherwise the success of such rebuilding programs may be compromised. Due to the time necessary to review and respond to public comments and make determinations about the final measures under this action, it is not possible to extend the public comment period to April 10, 2010, and still implement final measures by the start of FY 2010. Because it is administratively difficult and disruptive to the fishery to implement measures during the middle of the FY, particularly measures that involve hard TACs, it would be impractical and contrary to the public interest to further delay this action to accommodate further public review and implement this action mid-year. While the Amendment 16 sector measures may not fully reflect the final catch share policy, the Council has the capacity to revise management measures in the future to comply with such a

policy, as necessary. The measures in Amendment 16 have been under development for over 3 years, and have involved substantial public involvement through the Council process. Further, public comment either on Amendment 16 itself, or the proposed rule to implement measures in Amendment 16, has been solicited since the Amendment 16 NOA was published on October 23, 2009. Therefore, NMFS believes that there has been sufficient time to consider and comment on the Amendment 16 measures implemented by this action.

Comment 6: The Northwest Atlantic Marine Alliance (NAMA) and PERC recommended that community fishing associations be formally recognized in Amendment 16. These groups stated that these associations are necessary to help ensure that sectors do not lead to the elimination of community-based fisheries, and is consistent with, and furthering the purposes of, the Magnuson-Stevens Act. Response: As the group pointed out in their comment, the current regulations do not prohibit community fishing associations from forming or participating in the current DAS Leasing/Transfer Programs, or in an approved sector. Formally recognizing such associations in Amendment 16, or any other action, would not affect their ability to participate in the fishery or achieve their goals. Moreover, such organizations were not proposed to be and were not formally recognized by the Council in Amendment 16. Due to the absence of any measures on how such community fishing associations would be integrated into Amendment 16 measures, there would be neither the justification for, nor any purpose served in recognizing such associations, particularly without any consideration or public input regarding such a recognition.

#### **Incorporation of Atlantic Wolffish and Associated Measures**

Comment 7: One commercial fisherman, the Conservation Law Foundation (CLF), and the Nature Conservancy (TNC) supported adding Atlantic wolffish to the FMP. However, TNC did not support designating essential fish habitat (EFH) for this species to include the entire exclusive economic zone (EEZ). CLF suggested that cusk should be added to the FMP as well.

Response: This final rule adds Atlantic wolffish to the FMP to end overfishing and to implement management measures to rebuild the species through a possession prohibition. Because the Amendment 16 FEIS notes that there is little information and a high degree of uncertainty regarding population status and the reliability of survey data for this stock, designation of EFH throughout the EEZ was considered appropriate at this time, until further information can be acquired to narrow the scope of the EFH, as necessary. The notice of intent to prepare an SEIS, seeking comment on measures to incorporate during the \*18282 development of Amendment 16, suggested that the Council was considering incorporating cusk and wolffish into the FMP, pending the results of stock assessments for both species. As part of the Data Poor Working Group, a stock assessment was completed for

Atlantic wolffish, but a stock assessment for cusk was not completed. Therefore, there is not enough information available at this time to add cusk to the FMP.

Comment 8: The NEHFA opposed the zero possession limit restrictions for Atlantic wolffish specified for both the commercial and recreational fisheries, stating that it is not warranted at this time. Drawing parallels to the management of Atlantic halibut, this group recommended implementing a one-fish-per-trip limit instead. This group stated that such an approach toward wolffish would not create a directed fishery, but would preserve valuable catch data that can be used to assess the status of this species, especially considering that trawl surveys cannot produce reliable information due to the complex habitat that wolffish prefer.

Response: The report of the Data Poor Working Group concluded that wolffish was overfished, but could not determine whether overfishing is occurring. The report noted the high level of uncertainty regarding many of the parameters used to determine stock status, including natural mortality, maximum age, and fecundity, and recommended that catch remain low. Research indicates that this species has a high survival rate if returned to the sea quickly. For these reasons, the Council developed the initial rebuilding program in Amendment 16 and adopted a zero possession allowance for this species to reduce F to the extent practicable. Because the Council did not consider allowing vessels to land one-fish-per-trip, as recommended by the NEHFA, NMFS cannot revise this action to implement the one fish per trip limit. Because the zero possession limit is consistent with National Standard 1 Guidelines requirements to rebuild overfished stocks, NMFS implements the zero possession limit in Amendment 16 though this final rule.

#### **Status Determination Criteria**

Comment 9: CLF and the Northeast Seafood Coalition (NSC) recognized the high level of uncertainty associated with the GOM and SNE/MA winter flounder stock assessments, respectively, and recommended that NMFS work with the NEFSC to improve the assessments of these stocks.

Response: NMFS recognizes that GARM III indicates that there is a lot of uncertainty associated with the assessments of GOM and SNE/MA winter flounder. Efforts are currently underway to improve the assessments of these stocks, including updating histological maturity data and considering alternative forward projecting models. These improvements will be incorporated into the next assessments for these stocks.

#### **Rebuilding Programs**

Comment 10: CLF accepted the rationalization for adopting an F of as close to zero as practicable for SNE/MA winter flounder under Amendment 16, but stated that there will be significant bycatch associated with this strategy.

Response: NMFS believes that, given the circumstances associated with this stock, as described in the preamble to the proposed rule for this action, the rebuilding

approach specified in Amendment 16 is reasonable and consistent with applicable law, including section 304(e)(7) of the Magnuson-Stevens Act. NMFS acknowledges that bycatch remains a concern with this stock as it continues to rebuild, but contends that there are a number of provisions in Amendment 16 that help minimize bycatch to the extent practicable, including RGAs and an ABC control rule that increases incentives to reduce bycatch by basing the ABC on incidental bycatch, including a reduction in the bycatch rate, until the stock is rebuilt.

Comment 11: The NSC indicated that the proposed rule did not clarify whether rebuilding programs could be revised through a biennial adjustment, a framework adjustment, or as part of the specifications process.

Response: The regulations at § 648.90(a)(2)(iii) and (a)(6)(i), as highlighted in NSC's comment, provide the Council with the authority to revise any measure currently specified in the FMP, including rebuilding programs, through one of the cited regulatory actions. As an example of the application of such authority, the Council previously established a rebuilding program for GB yellowtail flounder through FW 42 in 2006, and plans on revising that same rebuilding program through FW 45 for 2011.

Comment 12: The Cape Cod Commercial Hook Fishermen's Association (CCCHFA) supported efforts to establish rebuilding programs with a 75-percent probability of success.

Response: This action implements new rebuilding programs for witch flounder and GB winter flounder, both of which include a 75-percent probability of success for rebuilding by 2017. For the other new rebuilding programs established under this action (i.e., pollock, wolffish, and northern windowpane flounder), it is not possible to determine a probability of success due to uncertainty in the assessments, or because the assessments are based upon survey indices.

### **ABC Control Rule and Mortality Reductions Necessary To Achieve Rebuilding Targets**

Comment 13: The PEW Environmental Group (PEW) suggested that the ABC control rule in Amendment 16 is not lawful, in that Amendment 16 should specify a probability that an actual catch equal to the ABC for each stock would result in overfishing, does not identify a stock biomass level below which no fishing should occur, and failed to specify a cap that would limit bycatch based upon the best scientific information available. CLF shared similar concerns, suggesting that future revisions to the ABC control rules should more closely reflect the letter of the National Standard 1 Guidelines.

Response: The ABC control rule is consistent with the Magnuson-Stevens Act and associated National Standard Guidelines. Section 7.2.1.1.2 of the FEIS provides a qualitative assessment of the impacts of the ABC control rule on overfishing. The

ABC control rule specifies the ABC of a particular stock at the median catch associated with 75 percent  $F_{MSY}$  or  $F_{rebuild}$ , whichever is lower. Because the ABC for all stocks is set at the median catch associated with a level of  $F$  that is already below the level associated with overfishing (i.e., at 75 percent of  $F_{MSY}$ ), the ABC control rule will always result in ABCs with at least a 50-percent probability of avoiding overfishing. Thus, the ABC control rule will specify a level of catch such that the resulting  $F$  will always be less than the maximum  $F$  threshold when the stock is less than the biomass at MSY or its proxy, especially when additional information is not available to more accurately estimate uncertainty. Analysis included in the environmental assessment (EA) prepared for FW 44, currently under NMFS review, indicates that, although probabilities that overfishing would occur cannot be determined for all stocks, the FY 2010-2012 ABCs that result from the application of the control rule in Amendment 16 have between a zero and 20-percent chance of resulting in overfishing for stocks for which such a probability can be calculated. Thus, the application of the Amendment 16 ABC control rule has less than a 50-percent ~~\*18283~~ chance of resulting in overfishing, and is consistent with applicable court rulings. As specified in the response to comments in the final rule promulgating National Standard 1 Guidelines (January 16, 2009; 74 FR 3190), the ABC control rule need not stipulate a level of biomass below which fishing is prohibited. Although ABC control rules could specify such a threshold, failure of this ABC control rule to specify such a threshold does not mean that the ABC control rule is inconsistent with National Standard 1. Finally, the Amendment 16 ABC control rule developed by the SSC specifies that, for stocks that cannot rebuild in the specified rebuilding period, the ABC should be based on incidental bycatch, including a reduction in bycatch rate (i.e., the proportion of the stock caught as bycatch). Because Amendment 16 measures prohibit all vessels from landing SNE/MA winter flounder, the ACL specified in FW 44 based on the Amendment 16 ABC control rule becomes the de facto bycatch cap. The SSC recommended the ABC that result in the ACL, and NMFS has determined that the bycatch cap for this species is based upon the best available scientific information.

#### **ABC/ACL Specifications and Distribution Process**

Comment 14: Several commercial fishermen commented that the ACLs for pollock and GOM winter flounder are too low, do not match recent catch history for these stocks, and would result in substantial economic impacts to vessels and associated fishing communities. One commercial fisherman suggested that a trip limit be specified for sector vessels during FY 2010, or until the stock assessment can be corrected to reflect recent landing patterns, to ensure that sectors do not exceed their ACE for pollock and have to cease fishing. Another commercial fisherman questioned the accuracy of data that led to the specification of the GOM winter

flounder ACL, stating that the GOM winter flounder ACL should be at least as high as the ACL for CC/GOM yellowtail flounder.

Response: Amendment 16 specified the process for implementing ACLs in the fishery, but the actual ACLs for FY 2010 are proposed in FW 44. FW 44 and its associated EA state that the proposed ACLs are based upon the best scientific information available and reflect the ABC recommended by the SSC and the ACLs adopted by the Council. It is true that ACLs specified for the fishery at large, and the resulting ACEs to individual sectors, are not likely to be similar to recent catches, because F for many stocks must be reduced during FY 2010, and the ABCs/ACLs specified must incorporate consideration of both scientific and management uncertainty, as required by the Magnuson-Stevens Act. NMFS believes that the ACL process in Amendment 16 is necessary and consistent with the requirements of the Magnuson-Stevens Act. Because the Council did not propose implementing a pollock trip limit for sectors under Amendment 16, NMFS cannot unilaterally implement such a provision in this final rule. However, sectors may independently impose a pollock trip limit for participating vessels to regulate catch and ensure that the sector does not prematurely harvest available pollock ACE allocated to that sector and require the sector to cease fishing.

Comment 15: One commercial fisherman noted that the ACLs established by the Amendment 16 ACL specification process would not account for the catch of NE multispecies as a result of cooperative research. This individual stated that it is unreasonable to expect that a sector vessel owner will utilize valuable ACE to participate in a research project. Because such research is vital to fisheries management, this individual recommended that NMFS must identify a process to accommodate such research, including using ACL management reserves (presumably the amount of the ACL reduced to accommodate management uncertainty), or risk reducing industry participation in cooperative research.

Response: Cooperative research is important to the management of NE multispecies. NMFS recognizes that sector vessel owners might be reluctant to use ACE to participate in cooperative research. However, there is currently no mechanism in the FMP to reserve a portion of the total catch to support cooperative research. The Council considered, but did not adopt, a research set-aside program under Amendment 16 that would have reserved 1 percent of the available catch of all stocks toward supporting research projects. Further, when quantifying the ACLs for FY 2010-2012 under FW 44, the Council did not specifically incorporate scientific research into considerations of management uncertainty. NMFS cannot unilaterally add a provision in this final rule to accommodate catch associated with cooperative research. However, the Council could reconsider a research set-aside program, or revise the components that contribute to management uncertainty through a future Council action. Based upon

the ACL specification process in Amendment 16, this action accounts for the catch associated with cooperative research toward the ACL in two ways. First, if a vessel meets the definition of a scientific research vessel conducting a scientific research activity, as defined in the Magnuson-Stevens Act, catch associated with that research will be attributed to the other non-specified sub-components of the ACL for each stock, because such catch is outside of the authority of the FMP, similar to state-waters catch. Second, if the vessel is conducting an activity that does not meet the definition of a scientific research vessel conducting a scientific research activity, the vessel is subject to commercial fishing regulations and any catch will be attributed to either the ACL available to the common pool, or to a particular sector's ACE for each stock. Thus, absent other alternatives to accommodate cooperative research catch that avoid deducting it from a sector's ACE, all catch by cooperative research vessels is accommodated under this action.

#### **AMs**

Comment 16: CLF contends that imposing AMs on the NE multispecies fishery for excessive catch in other fisheries is a form of inequitable punishment.

Response: Consistent with the Magnuson-Stevens Act, Amendment 16 specified AMs that would be sufficient to prevent overfishing of any stock regulated by the FMP. Because the FMP could not impose AMs on any other fishery, unless through a joint management action (Amendment 16 is not a joint action), it was only possible to specify AMs that apply to the NE multispecies fishery in this action. With the exception of the Atlantic sea scallop and herring fisheries, most other fisheries catch minimal amounts of NE multispecies. The Council is already developing an AM to address yellowtail flounder bycatch in the scallop fishery under Amendment 15 to the Atlantic Sea Scallop FMP and could develop similar AMs for other fisheries through other actions. For the bycatch of regulated species and ocean pout stocks by the herring fishery, NMFS interprets the measures implemented by FW 43 for that fishery to be AMs for the purpose of controlling bycatch of stocks managed by the FMP. In the meantime, however, enforcing AMs on the NE multispecies is unavoidable in order to ensure compliance with the Magnuson-Stevens Act conservation objectives. Finally, National Standard 4 Guidelines recognize that disadvantaging one group of fishermen may be necessary to serve overarching conservation objectives of the FMP.

**\*18284** Comment 17: CLF and the CCCHFA suggest that the Amendment 16 common pool differential DAS counting AM is not consistent with the National Standard 1 Guidelines because there are no inseason controls and no payback provision in the case of an overage. These groups, along with PEW, recommended that NMFS immediately impose a hard-TAC backstop, stating that there is no true catch limit for common pool vessels during FY 2010-2011. CLF supported implementation of the trimester TAC AM for the common pool, but noted that it

expects NMFS will calculate an offset into the differential DAS counting rate to accommodate an overage payback mechanism.

Response: The differential DAS counting AM is consistent with National Standard 1. Neither the Magnuson-Stevens Act, nor the National Standard 1 Guidelines mandate the use of fishery closures or the use of inseason controls as AMs. As outlined in the National Standard 1 Guidelines, reactionary AMs similar to the differential DAS counting AM are just as valid as inseason AMs, although the guidelines recommend that inseason AMs be utilized whenever adequate inseason information is available. Amendment 16 requires the type of AMs described by commenters, but delays the implementation until FY 2012 in order to allow orderly transition from the current DAS management regime to one with many sectors, hard TACs, and fishery closures. In the meantime, Amendment 16 requires the use of a combination of accepted approaches to implement AMs beginning in FY 2010, employing a reactionary differential DAS counting AM for FYs 2010 and 2011. Although fishery closures would not be triggered upon the catch of common pool ACLs during FYs 2010 and 2011, management measures would be revised in the following FY through the implementation of differential DAS counting if these ACLs are exceeded, to prevent overfishing and exceeding such ACLs in the future, which is the intent of the new requirements of the Magnuson-Stevens Act. Further, if measures adopted under FW 44 are approved, the Regional Administrator would have the authority to revise common pool trip limits and DAS charging rates inseason to further assure that common pool catch rates would be controlled such that ACLs would not be exceeded. NMFS cannot unilaterally implement such a hard-TAC backstop AM for FY 2010 under Amendment 16. Also, the Council did not specifically include an overage payback provision for the common pool in the differential DAS counting AM, despite adopting such a provision in the trimester TAC AM for FY 2012. Therefore, no changes to the differential DAS counting AM are implemented in this action.

Comment 18: Five commercial fishermen and the NSC opposed the application of differential DAS counting for wolffish. One fisherman suggested that such protection is unnecessary, as most of the areas in which wolffish are caught are already off limits to commercial vessels due to permanent closure areas, and predicted that if such an AM is applied to wolffish, it would cause a derby fishery in the common pool. The NSC opposed the general application of differential DAS counting rates to smaller areas if the catch of that stock that contributes to triggering that AM would come from a much larger area.

Response: The Magnuson-Stevens Act mandates that FMPs include AMs for all managed species to prevent overfishing. Because the Council added wolffish to the FMP in Amendment 16, an AM should be established for this stock to comply with applicable law, regardless of other measures in the FMP to protect this species,

such as closure areas. Section 4.3.7.1.1 of the Amendment 16 FEIS describes that the common pool would be subject to the differential DAS counting AM for FYs 2010 and 2011, but Amendment 16 does not specifically exempt any of the species managed under the FMP from this AM. In fact, the Council evaluated where each stock was caught to determine which areas would be subject to differential DAS counting if the AM for a particular stock was caught. Table 26 of the Amendment 16 FEIS identifies the areas in which differential DAS counting AM would apply for each stock managed by the fishery, including wolffish. Although the Council did not specifically identify wolffish catch as a trigger for a differential DAS AM, wolffish was not exempted from this AM either. In fact, Amendment 16 specifically listed the areas that would be affected by differential DAS counting if the ACL available to the common pool for this species was exceeded. Therefore, NMFS, under the authority provided in section 305(d) of the Magnuson-Stevens Act, has reasonably concluded that this species is not, nor was ever intended by the Council to be, exempt from the differential DAS counting AMs under this action. Wolffish is a bycatch species that is not targeted by the fishery. As a result, the FY 2010 ACL specified for wolffish for the common pool is very low. Although this could increase the risk that the differential DAS counting AM could be triggered, it is not likely that the fishery will revise its behavior to target this species as part of a derby fishery knowing that differential DAS counting might be triggered during the subsequent fishing year. Finally, even though wolffish is caught throughout the NE, it is caught predominantly in the inshore GOM and inshore GB areas. Therefore, it is unlikely that large amounts will be caught outside of these areas and contribute to triggering the AM for this stock. If catch shifts to other areas, the Council could revise these areas through a future Council action.

Comment 19: The CCCHFA suggested that all vessels should be subject to fishery closures to ensure consistency with National Standard 4, and noted that common pool AMs are more lenient than sector AMs because they do not involve fishery closures, at least for FY 2010 and 2011.

Response: NMFS disagrees that all segments of the fishery must be subject to the same measures to be fair and equitable, or that fishery closures are required as AMs, as noted in the response to Comment 17. The AMs in Amendment 16 reflect a balancing of different factors, including transition factors, regarding the multiple types of management measures to be implemented, are reasonably calculated to promote conservation, and do not discriminate between residents of different states. All AMs in Amendment 16 apply to all vessels in all states, even though the AMs applicable to individual vessels may be different. Each vessel owner has the choice to fish under hard TACs and fishery closure AMs in sectors, or to fish under the DAS system and its associated differential DAS counting AM. Therefore, the

AMs implemented for the common pool for FY 2010 and 2011 are consistent with National Standard 4.

Comment 20: CLF fully supports the proposed sector AMs, stating that they are fully compliant with applicable law. The NSC and associated members request that NMFS clarify what constitutes an overage regarding the requirement for sectors to cease fishing once or before an ACE is exceeded, by including regulatory text at § 648.87(b)(1)(ii) that references the date fish are received or purchased by a dealer after considering all ACE transfer requests received or approved by NMFS.

Response: Based in part on NSC's comment regarding the clarification of an ACE overage, the regulations at § 648.87(b)(1)(ii) have been revised to include language that ACE overages will be determined on the date fish are received or purchased by a dealer, after considering all requests for ACE \*18285 transfers that are ultimately approved by the Regional Administrator.

Comment 21: The NHCFA stated that the recreational AMs are not of the same proportion or consequence as the AMs specified for the commercial fishery. CLF suggested that there are no inseason or post-season recreational AMs specified in Amendment 16. They suggested that NMFS should require the Council to develop a more robust AM program under Amendment 17 so that no component of the fishery is under the false impression that AMs are not applicable.

Response: Amendment 16 indicates that the recreational AMs include adjustments to season, minimum fish size, or possession limits, with the ability to specify separate AMs for the private boat and charter/party components of the recreational fishery. Further, Amendment 16 indicated that these AMs would be triggered if the recreational fishery exceeded its allocations of GOM cod and GOM haddock, or if the catch of these stocks by other components of the fishery not subject to an AM exceed their allocations and the overall ACL for either stock is exceeded, as described in detail in the proposed rule for this action. These measures will be implemented by January of the FY following the overage of the recreational AMs of GOM cod and/or GOM haddock. However, Amendment 16 does not include any specific recreational AM for a particular FY due to the uncertainty in the number of participants and the expected catches from year to year, and the need to coordinate the development of recreational AMs with the directors of state marine resource management agencies who sit on the Council. This is similar in approach to that applied to the differential DAS counting AM for the commercial fishery, in that the actual differential DAS counting rate and the area in which such a rate would apply will be specified by the start of the next FY based upon the projected catch for the commercial common pool fishery as of January of each year. The recreational angler permits/registry recently implemented will help reduce the uncertainty associated with the number of anglers fishing in a particular FY. However, the impact of changes to recreational possession limits, minimum fish

size changes, and revisions to fishing seasons depend upon the amount and distribution of fishing effort, size of fish caught, and stock abundance and are difficult to quantify in advance, compared to commercial fishing effort. Therefore, recreational AMs will be developed once it is known how many fish were caught during a particular year, as necessary. Further, coordination with state resource management agencies through the Council is the most efficient way to ensure that recreational AMs can be effectively developed and implemented on the state level, where a substantial portion of recreational fishing activity occurs. All AMs implemented under this action are designed to prevent overfishing by either preventing ACLs from being exceeded, or addressing any overages of ACLs. Amendment 16 is clear that the appropriate AMs will be developed by NMFS in consultation with the Council, should the recreational fishery exceed its allocation of GOM cod or GOM haddock during a particular FY. Therefore, while the Council could consider developing a more robust AM program in a future management action, it is not necessary to clarify the Council's intent regarding the applicability of AMs for the recreational fishery.

#### **Issuance of Limited Access NE Multispecies and Atlantic Sea Scallop Permits**

Comment 22: PEW, CLF, CCCHFA, NAMA, and PERC strongly opposed the measure in Amendment 16 that allows the concurrent issuance of a limited access Atlantic sea scallop and a limited access NE multispecies permit. PEW, CLF, and CCCHFA claimed that it would undermine the successful transition to sectors and result in the loss of NE multispecies permits from several New England states due to acquisition of NE multispecies permits by scallop vessel owners. NAMA, PERC, and CCCHFA stated that such a provision eliminates incentives to reduce scallop bycatch and could turn the scallop fishery into a directed groundfish fishery. Finally, CLF suggested that there is inadequate analysis in the FEIS to support this measure, which does not meet the requirements of section 303(a)(9) of the Magnuson-Stevens Act; that there was no discussion of this measure by the Council; and that it is inconsistent with National Standard 8 because it fails to minimize adverse economic impacts on fishing communities. CLF urged NMFS to disapprove this measure unless it is clear that individual states fully support the potential reallocations of fishing effort that might occur.

Response: In addition to the current limited access NE multispecies Combination permit, Amendment 16 expands the allowance of a vessel to be issued both a limited access NE multispecies permit and a limited access Atlantic sea scallop permit at the same time to enable vessels to operate in a more profitable manner and reduce the costs of having to purchase, operate, and maintain multiple vessels to participate in both fisheries. In doing so, Amendment 16 also increases the value of such permits and the economic efficiency of vessel operations. This measure has no direct impacts on allocations within or between fisheries, and does not

compromise the conservation measures of the fishery, as existing effort controls and permit restrictions in both fisheries, including DAS allocations, gear restrictions, trip limits and permit-splitting provisions, are maintained. Therefore, a limited access scallop dredge permit vessel could not retain more groundfish than is already allowed. Further, only in a limited circumstance will a vessel be able to fish for both scallops and groundfish on the same trip. In this circumstance, the vessel will be required to fish with trawl gear and comply with the applicable regulations under both the NE Multispecies and Atlantic Scallop FMPs.

Furthermore, the scallop fishery will still be subject to any groundfish ACLs distributed to the fishery, and limited in the amount of groundfish that could be caught. Only landings history of limited access NE multispecies permits will be used to contribute to sector ACE allocations. Therefore, this measure, by itself, will not eliminate incentives to reduce the catch of groundfish in the scallop fishery, or affect the allocations detailed in Amendment 16 or FW 44. Because conservation controls in both fisheries are maintained, there is little chance that this measure will adversely impact the F in either fishery. A full analysis of the expected impacts of this measure is in Section 7.0 of the FEIS. This analysis, along with the other analyses in the FEIS, complies with all of the elements of a fishery impact statement required by section 303(a)(9) of the Magnuson-Stevens Act, and no further analysis is required. Although this analysis indicates that this measure may shift effort from New England states to MA states because the scallop fishery is predominantly based in SNE, the analysis notes that such shifts in effort are difficult to predict. While shifts in effort to different ports could result in the loss of revenue in affected communities, other measures in Amendment 16 help to foster continued participation in the NE multispecies fishery through the expansion of authorized sectors, increased access to haddock through revised SAPs and the Regular B DAS Program, and revisions to the DAS Leasing and Transfer **\*18286** Programs. Taken as a whole, this action meets the conservation objectives of the FMP and applicable law, while minimizing the economic impacts and providing for the sustained participation of fishing communities to the extent practicable, consistent with National Standard 8. The Council first considered this measure early in the development of Amendment 16, voting unanimously to include this provision in Amendment 16 at its February 2007 meeting. This sentiment was reaffirmed in June 2009, when the Council adopted the final measures for Amendment 16, with a 15-0-2 vote for including this particular provision. Therefore, the Council has discussed this measure and there is universal support for this provision by all states participating in the Council, even those that some fear may lose NE multispecies permits as a result of this measure. Accordingly, NMFS has approved this measure in Amendment 16 and implements it through this action.

### **Recordkeeping and Reporting Requirements**

Comment 23: CLF offered general support for the reporting requirements in Amendment 16, but Oceana expressed concerns that the reporting requirements were inadequate. Oceana did not explain why the proposed monitoring and reporting requirements were inadequate other than to state that key studies for the use of different data collection methodologies exist (such studies were not identified by the commenter), and that many of the monitoring issues were resolved in closed-door workshops that were not open to the public. Oceana insisted that the monitoring issues discussed at these workshops must be communicated through the Amendment 16 rulemaking.

Response: The workshops referenced by Oceana were not widely advertised and public participation was limited because they were designed to bring together NMFS staff and sector proponents and managers to work through some of the more difficult monitoring and reporting tasks associated with the Amendment 16 sector requirements. Based upon these meetings, reporting and monitoring strategies were refined and monitoring methodologies communicated to affected industry. NMFS believes that these workshops were essential to increasing the effective implementation of such requirements, increasing the accuracy of catch monitoring data under this action, and fostering cooperation between NMFS and sector participants. All of the discussions regarding how to effectively implement the Amendment 16 reporting requirements, including the workshops referenced by Oceana, are available to the public on the NERO Web site

(<http://www.nero.noaa.gov/sfd/sfdmultisectorinfo.html>). Further information on these workshops and the monitoring and reporting requirements implemented by this action are available from the Regional Administrator (see ADDRESSES).

Comment 24: Five commercial fishermen, NHCFA, the Associated Fisheries of Maine (AFM), and the UNFA opposed increasing the submission frequency of “did not fish” reports. They stated that increasing the frequency of “did not fish” reports is too burdensome, as NMFS will receive sufficient catch information for a majority of the fleet through weekly sector catch reports and will be able to identify whether a vessel fished or not through VMS. Two commercial fishermen and the AFM specifically recommended that “did not fish” reports should only be submitted on a monthly basis, consistent with existing regulations. CCCHFA supported weekly VTR submission requirements.

Response: Increased reporting is critical to provide the data necessary for effectively monitoring catch under Amendment 16. Because several of the ACLs and sector ACEs are expected to be very small during FY 2010, it is not only important to identify when a vessel has fished and what it caught, but also to know when the vessel did not fish to identify if any catch data are missing. Therefore, “did not fish” reports are vital pieces of information that reduce the uncertainty of

catch monitoring data. While there may be other data sources that can provide such information, including VMS position reports, not all vessels that land groundfish are required to use VMS. Therefore, it is not possible to rely on VMS at this time to accurately identify whether or not all vessels have actually fished during a particular reporting week. NMFS's Fisheries Statistics Office is attempting to develop ways to minimize the burden associated with submitting "did not fish" reports, including reevaluating the reporting frequency for such trips, electronic submission of "did not fish" reports, and offering alternative ways to confirm that a vessel did not fish during a reporting week. Any such changes would be implemented consistent with the Administrative Procedure Act, as appropriate.

Comment 25: Four commercial fishermen, NSC, and CCCHFA support the implementation of electronic VTRs through this action, stating that such technology is necessary to comply with the reporting requirements of Amendment 16.

Response: Current regulations allow the Regional Administrator to authorize the use of electronic VTRs instead of the conventional paper VTRs. To date, the Regional Administrator has not authorized the use of such electronic VTRs, as the existing technology has not yet been determined to be adequate. There are several pilot programs currently underway that are testing the efficacy of available electronic VTR software. Should efforts to develop and test new electronic VTR systems that meet the goals of the FMP and the existing regulations be determined to be successful, the Regional Administrator can authorize the use of such systems through rulemaking consistent with the Administrative Procedure Act.

Comment 26: One commercial fisherman opposed requirements for vessel operators to declare their intent to fish in one or more of the broad stock areas prior to each trip, and to submit trip-level VMS catch reports detailing the amount of NE multispecies kept from each broad stock area. This individual recommended that the existing catch reporting requirements be maintained, as there is no need for such additional reporting burdens.

Response: The current catch reporting requirements are not sufficient to address the additional monitoring requirements associated with implementing ACLs and sector measures under Amendment 16. It was widely recognized during the development of Amendment 16 that the existing reporting requirements did not provide timely information to attribute catch to stock areas. Even with the increased VTR submission requirements implemented by this final action, there is still a delay in receiving, processing, and validating such VTR data. Amendment 16 included a number of revisions to the existing reporting requirements to increase the timeliness and accuracy of catch data by helping attribute NE multispecies catch to the correct stock area until VTRs become available. Without additional reporting data, it would not be possible to accurately monitor catch in

the NE multispecies fishery and ensure that sub-ACLs allocated to common pool vessels and ACEs allocated to sectors are not exceeded and result in overfishing. Because the Council specifically adopted new reporting requirements that involve reporting catch by broad stock area, NMFS cannot replace such reporting requirements in this action. Therefore, this action implements the additional reporting \*18287 requirements approved in Amendment 16.

Comment 27: The AFM suggested that NMFS revise the GB broad stock areas to reflect the division between the Eastern and Western U.S./Canada Area. They suggested that this would reduce confusion over the new reporting requirements and increase the accuracy of the reporting requirements.

Response: The Eastern and Western U.S./Canada Areas are used to facilitate the management of transboundary stocks of yellowtail flounder, cod, and haddock with Canada as part of the Understanding. The differentiation between Eastern and Western U.S./Canada Areas is necessary to ensure that NMFS can accurately monitor the catch of Eastern GB cod and Eastern GB haddock toward the harvest of area-specific quotas specified as part of that agreement. Thus, the differentiation between these areas is only necessary for 2 of the 20 stocks managed by the FMP. While revising the Offshore GB Broad Stock Area to reflect the current division between the Eastern and Western U.S./Canada Area may better reflect reporting areas familiar to many vessels, it would unnecessarily increase, not decrease, the complexity associated with the new catch reporting requirements, and would likely lead to less accurate catch reporting overall. This is because all vessels fishing in this area would be required to report catch of each species in each area, which could lead to misreporting and data entry errors. The existing VMS declaration provisions require vessels to declare their intent to fish in either the Eastern or Western U.S./Canada Areas, or both areas, on the same trip. Such declarations are used to ensure that DAS counting, gear requirements, and applicable trip limits can be enforced, but also to differentiate catch for Eastern GB cod and Eastern GB haddock stocks for catch monitoring purposes. Because differentiating catch between the Eastern and Western U.S./Canada Areas is not necessary for a vast majority of stocks, the recommendations by the AFM would unnecessarily increase the cost and time burden associated with complying with such reporting requirements without further contributing to catch monitoring under this action. Therefore, this action does not revise the Offshore GB Broad Stock Area to differentiate between the Eastern and Western U.S./Canada Area.

Comment 28: The CCCHFA supported the declaration and reporting requirements involving broad stock areas, but suggested that vessels should not be allowed to fish in multiple broad stock areas without 100-percent observer coverage.

Response: The suggestion to require 100-percent observer coverage for vessels fishing in multiple broad stock areas on the same trip is likely intended to reduce

incentives for vessels to misreport catch. The Council did consider restricting vessels to fish in only one broad stock area per trip to simplify administration and increase the accuracy of catch reporting. However, the Council concluded that such an approach would be overly restrictive on vessel flexibility and efficiency of vessel operations. Various sources of data are used to validate one another, including self-reported catch data. For example, VMS positional data could be used to validate self-reported catch data by stock area to increase the accuracy of monitoring data and enforce the reporting requirements implemented by this action.

Comment 29: One commercial fisherman, AFM, and the Sustainable Harvest Sector supported the provision that would exempt sector vessels from the daily VMS reporting requirements associated with the U.S./Canada Management Areas.

Response: For the reasons listed in the discussion of the SMP reporting requirements in Item 8 of the preamble of the proposed rule for this action, NMFS determined that daily SMP-specific VMS catch reports for sector vessels are unnecessary, and is not implementing such requirements in this final rule.

However, consistent with the provision adopted by the Council in Amendment 16, NMFS reserves the authority to reinstate such reporting requirements if it is later determined that the weekly sector catch reports are insufficient to adequately monitor catch by sector vessels in SMPs.

Comment 30: The Sustainable Harvest Sector believed that the proposed rule incorrectly specified that sector managers must provide daily catch reports to NMFS for sector vessels participating in the CA I Hook Gear Haddock SAP and believes that this provision should have been applied to individual vessels instead.

Response: The final rule implementing FW 41 (September 14, 2005; 70 FR 54302) included regulations at § 648.85(b)(7)(v)(D) that specify sector vessels fishing in the CA I Hook Gear Haddock SAP must submit a daily catch report to the sector manager based upon instructions provided by the Sector manager. The sector manager is responsible, in turn, for providing daily catch reports for participating vessels to NMFS. Therefore, this final rule only continues already existing requirements.

Comment 31: Two individual fishermen, the Sustainable Harvest Sector, and the NHCFA supported the pre-trip notification requirements proposed in this action, but suggested that 24-hr notice instead of 48-hr notice would be more effective, particularly for smaller vessels that fish nearshore. The AFM supported the notification requirements as proposed, while one other fisherman suggested that they were an unnecessary burden on industry. Two other fishermen suggested that a vessel should be able to notify the Observer Program of its intent to fish for the entire week, similar to current practices in the CA I Hook Gear Haddock SAP.

Response: As stated in the proposed rule, NMFS believes the pre-trip observer program notification requirements are necessary to effectively implement observer/at-sea monitoring coverage objectives under this action. Forty-eight hours is considered the minimum amount of time necessary to determine observer/at-sea monitoring coverage and deploy an observer/at-sea monitor once assigned. Therefore, this action does not revise the 48-hr advanced notice requirement. The proposed regulations included a weekly notification provision to accommodate small vessels that fish closer to shore that was, at least in part, based upon the practices deployed for the CA I Hook Gear Haddock SAP. That weekly notification requirement is implemented through this final rule.

### **Effort Controls**

Comment 32: One commercial fisherman indicated that the Amendment 16 effort controls would pose a serious economic burden on common pool vessels. He suggested that, because Day gillnet vessels do not catch much flounder, they should not be subject to further effort controls under this action. The NEHFA expressed similar concerns, stating that such effort controls will eliminate the GOM cod hook fishery and might cause a derby fishery.

Response: The Amendment 16 effort controls are necessary to reduce  $F$  for a number of overfished stocks, most notably cod and pollock, species that are caught by both gillnet and hook gear.  $F$  on GOM cod must be reduced by 40 percent, while  $F$  on pollock must decrease by 73 percent compared to the  $F$  from catch in FY 2008 to achieve the conservation objectives of this action. Therefore, effort controls on these two gear types are necessary to end overfishing and rebuild these overfished stocks. Economic impacts associated with effort reductions to achieve the **\*18288** conservation objectives of the FMP and applicable law are unavoidable. The analysis prepared for this action suggests that these effort controls would result in greater impacts on gillnet vessels than other gear types, but that impacts on hook vessels would be the least affected among all gear types. However, Amendment 16 strove to minimize the economic impacts of management measures without compromising rebuilding efforts by removing obstacles that limit participation in the DAS Leasing and Transfer Programs and sectors, increased access to haddock resources, and increased trip limits for some stocks, among other provisions. The potential for a derby fishery in the common pool was a concern expressed by several fishermen upon the adoption of Amendment 16 by the Council in June 2009. Based upon these concerns, the Council provided the Regional Administrator with the authority to revise DAS counting rates and trip limits for NE multispecies stocks under FW 44 to ensure that the ACLs available to the common pool are not prematurely harvested and to minimize the potential for a derby fishery in the common pool.

Comment 33: CLF and CCCHFA suggested that small gillnet boats will be disproportionately burdened by the 24-hr DAS counting measure for the common pool. They also indicate that this measure causes safety concerns, and recommended that the Council evaluate the impacts to small day-boat fishermen if this provision is implemented.

Response: The Amendment 16 analysis indicates that small gillnet vessels will be more affected by 24-hr DAS counting than larger vessels and vessels using other gear types. Despite the different impacts on vessels of different sizes and gear types, all vessels will be subject to the same effort controls, and this measure does not discriminate between permit holders from different states. The 24-hr DAS counting measure more accurately reflects the manner in which DAS allocations were first calculated in the FMP, and is designed to end overfishing and rebuild overfished stocks consistent with the conservation objectives of the FMP and the requirements of the Magnuson-Stevens Act. During previous actions, safety concerns were raised regarding differential DAS areas because vessels could be encouraged to fish farther from shore. There is no evidence to support claims that changes in DAS counting rates affect fishing behavior in ways that would compromise safety, and there is no evidence that the measures implemented by this action would compromise safety any more than previous management measures, as described in Section 7.6 of the FEIS. Examination of historical fishing patterns in the Day gillnet fleet suggest that, despite being charged more DAS than actually fished, many vessels elect to return to port early to reduce operational costs. This suggests that it is not likely that the 24-hr DAS counting measure would compromise vessel safety. Moreover, there is nothing in this measure that requires a vessel to operate in an unsafe manner to catch or harvest fish. Therefore, NMFS concludes that this measure is consistent with National Standards 4 and 10.

Comment 34: The NSC and associated members stated that the impacts of the common pool measures are not properly documented in the FEIS and that makes it difficult for the public to evaluate the impacts and comment on the proposed measures.

Response: The impacts of the common pool measures are thoroughly documented in Section 7.0 of the FEIS. Because of uncertainty in the degree and scope of participation in sectors, the FEIS analyzed the impacts of common pool measures assuming that all vessels would participate in the common pool. This is a worst-case scenario, necessary to ensure that common pool measures will effectively meet the conservation objectives of this action, as noted in the FEIS. As highlighted earlier in this preamble, the impact of Amendment 16 measures can only be fully understood by considering other related actions, namely FW 44 and the final rule to approve sector operations plans. Accordingly, a more accurate evaluation of the likely impacts of common pool measures can be found in the EA

prepared for FW 44, as that action revises some of the common pool measures in Amendment 16, specifies the ACLs for FYs 2010-2012, and evaluates common pool impacts based upon sector rosters submitted to NMFS as of September 1, 2009. The EA for that action is available from the Council (see ADDRESSES). Comment 35: CLF supported the implementation of RGAs under this action.

Response: This action implements RGAs to create incentives to fish more selectively on GB and SNE, and to reduce the catch of overfished stocks such as cod, pollock, witch flounder, SNE/MA winter flounder, and SNE/MA yellowtail flounder.

Comment 36: Ten commenters, including seven commercial fishermen, AFM, NSC, and the Sustainable Harvest Sector supported the GOM Haddock Sink Gillnet Pilot Program, stating that it was the only way to access abundant resources of GOM haddock due to the fact that 6.5-inch (16.51-cm) mesh gillnets cannot effectively catch haddock. They suggested that there are sufficient controls to control mortality on affected stocks. Three commercial fishermen, AFM, and NSC suggested that if this pilot program is disapproved, a process for consideration of sector exemption requests for relief from gillnet requirements should be provided. CLF expressed concern about the impact of this pilot program on wolffish, considering that wolffish migrate through the proposed pilot program area.

Response: This pilot program would have allowed vessels on a fishery-wide basis to target haddock while using 6-inch (15.24-cm) mesh gillnets, which is less than the minimum mesh size currently required, from January through April. As stated in the preamble to the proposed rule, NMFS considers this pilot program a SAP under the FMP, as it would have provided access to regulated multispecies that would otherwise be prohibited. According to Amendment 13, SAPs are intended to facilitate the targeting of healthy stocks, without compromising efforts to end overfishing or rebuild overfished stocks by using selective gear or fishing when interaction with stocks of concern (i.e., stocks that must have fishing mortality reduced to end overfishing or rebuild the overfished stock) are minimized.

Research cited in the Amendment 16 FEIS to support this pilot program indicated that the catch of the target species (haddock) was too low to evaluate the selectivity of gillnets for haddock adequately, while the catch of cod and pollock was too high to reasonably conclude that this pilot program would not have an adverse impact on these overfished stocks. During this experiment, only 71 haddock were caught, while 264 cod and 873 pollock were caught. The report concludes that “bycatch of cod is likely to be a challenge for a directed springtime haddock fishery on this portion of Jeffreys Ledge,” that “make(ing) a regulatory change based upon this study alone (is) unwise,” and that “further work must be done on avoiding cod bycatch if a haddock gillnet fishery is to be reestablished in this area” (Marciano, et al., 2005). Researchers suggest that gear modifications that raise the webbing of

gillnets several feet off the bottom would enhance the selectivity of gillnet gear and promote the objectives of this pilot program. While this work was reportedly conducted in 2006, a final **\*18289** report of the work has not been made available, and, thus, its results have not been used to enhance the effectiveness of the proposed pilot program. As this research demonstrates, gillnets are effective at catching both pollock and cod, stocks that require reductions in F to rebuild. Section 7.2.1.3.1.4 of the FEIS indicates that, if the catch rates of these species remain the same or increase under the proposed pilot program, F on these species may increase. While the FEIS also indicates that F might decrease if catch rates decrease, the FEIS does not provide any evidence that catch rates of cod and pollock would actually decrease as a result of using smaller mesh in this program. The research used to support this pilot program, and recent landings data, indicate that haddock catches by gillnet gear in the GOM are minimal in January and February, and peak in March. However, large amounts of both cod and haddock are regularly landed in January and February. This suggests that this pilot program, as proposed, would encounter larger amounts of cod and pollock early in the proposed season, while haddock catch rates would not increase until later in the season. As a result, the proposed pilot program could either maintain or increase catches of these species compared to current measures, particularly considering the proposed use of smaller mesh, as also suggested in the FEIS. Thus, this program could undermine rebuilding programs for these stocks without substantially increasing the catch of haddock. Based upon the above information, NMFS determined that the proposed pilot program was inconsistent with National Standards 1 and 9 because it could increase catch and fishing mortality, and may lead to excessive discards of overfished stocks of GOM cod and pollock. Moreover, it was inconsistent with the FMP provisions, including the SAP provisions outlined in Amendment 13 and Objectives 3 (constrain fishing mortality to levels compliant with the Sustainable Fisheries Act), 4 (prevent overfishing), and 10 (minimize bycatch) of the FMP. Therefore, this proposed pilot program was disapproved under Amendment 16 and is not implemented by this action. The Council could revise the proposed pilot program in a future action to better reflect months when low catch rates of cod and pollock correlate with high catch rates of haddock (i.e., March and April) to maximize opportunities to increase the catch of haddock without unnecessarily increasing mortality on cod and pollock. It also appears that elements of this program could be used to increase access to haddock on a smaller, more controlled scale by sector vessels, without unnecessarily compromising efforts to eliminate overfishing and rebuild overfished stocks of cod and pollock. Therefore, NMFS would consider approval of such opportunities for sectors through another means, and will work with the Council to explore such

possibilities, including granting additional exemptions to approved sectors through an additional rulemaking consistent with the Administrative Procedure Act.

### **DAS Leasing and Transfer Programs**

Comment 37: CLF expressed general support for revisions to the DAS Leasing and Transfer Programs, while the UNFA suggested that vessels not fishing in sectors should be allowed to lease their landings history percentage (presumably PSC) to other sector vessels.

Response: Revisions to the DAS Leasing and Transfer Programs are necessary to increase participation in these programs to help mitigate the economic impacts of continued effort controls and increase the economic efficiency of vessels to the extent practicable. Therefore, this action implements the proposed revisions to these programs. NMFS does not agree that common pool vessels should be allowed to lease PSCs to other vessels, particularly to vessels that are participating in sectors. PSC is not a commodity or allocation unto itself that can be traded among vessels, but rather a characteristic of the permit. A permit's PSC can only be used to contribute to the ACE allocated to a sector through the participation of that permit in a particular sector. Without further details about how to implement such a measure, the suggestion by UNFA implies that a common pool vessel could fish under its DAS, but allow another vessel to lease its PSC to fish under a sector. This would essentially double count the fishing history associated with each common pool permit because it would increase the PSC and, therefore, ACE available to sector vessels without also decreasing the available ACL specified for the common pool caused by the transfer of that PSC. This could lead to excessive effort and, possibly, overfishing in the fishery. Therefore, the suggestion by the UNFA is not implemented in this final rule.

Comment 38: Three commercial fishermen and the AFM supported the elimination of the DAS Transfer Program's conservation tax. One of these fishermen and the AFM suggest that catch history for other permits should be preserved upon transfer to another vessel, even if duplicate permits are voluntarily relinquished.

Response: This action eliminates the DAS Transfer Program conservation tax. The DAS Transfer Program was originally implemented in Amendment 13 as a means to reduce capacity in the fishery. Preserving the fishing history of permits that are voluntarily relinquished would not reduce capacity in the fishery, as originally intended. Because the Council did not propose such a provision in Amendment 16, NMFS cannot implement such a revision through this final rule.

### **SMPs and SAPs**

Comment 39: The CCCHFA supported the continuation of the delayed opening of the Eastern U.S./Canada Area to trawl vessels until August 1, and opposed the continuation of the 5-percent cap of the Eastern U.S./Canada Area GB TAC that could be landed by hook gear vessels prior to August 1.

Response: The delayed opening of the Eastern U.S./Canada Area to trawl vessels and its associated limitation on the amount of Eastern GB cod that could be harvested by hook gear vessels is a measure that was previously implemented through existing Regional Administrator authority as part of the yearly specifications package implementing U.S./Canada Management Area TACs. Accordingly, these comments are more appropriate for FW 44, the action that would implement ACLs and U.S./Canada Management Area TACs for FY 2010. As proposed, FW 44 would delay the opening of the Eastern U.S./Canada Area to trawl vessels until August 1, but would retain the existing cap on the amount of Eastern GB cod that may be caught by hook vessels prior to August 1.

Comment 40: The CCCHFA supported the renewal of the Eastern U.S./Canada Haddock SAP. One commercial fisherman, AFM, and the Sustainable Harvest Sector suggested that sectors should be able to use any gear type in this SAP, provided the individual sectors are allocated ACE for stocks caught in the SAP area.

Response: Consistent with the approved measures in Amendment 16, this final rule allows sectors to use any gear type in this SAP, provided the sector is allocated ACE for all stocks caught in this SAP, and renews this SAP indefinitely.

Comment 41: Two commercial fishermen, AFM, and the CCCHFA supported the expansion of both the CA I Hook Gear Haddock SAP area and season. One other commercial fisherman and the AFM recommended **\*18290** that sectors should be able to use any bait they choose in this SAP, considering all catch would count against the sector's ACE for each stock.

Response: The expansion of the CA I Hook Gear Haddock SAP is implemented through this final rule. As explained in the preamble to the proposed rule, the bait restrictions originally adopted by the Council in FW 41 were inadvertently omitted from the regulations implemented by the final rule for that action. This final rule implements these bait restrictions to ensure that the regulations accurately reflect provisions adopted by the Council in FW 41. Because the Council did not provide for a specific exemption from such bait restrictions in Amendment 16, NMFS cannot provide a sector exemption from the bait requirements for this SAP in this final rule. The Council could reconsider its decision, however, any changes, would be implemented through a future action.

Comment 42: One commercial fisherman and the AFM support proposed revisions to the CA II Yellowtail Flounder/Haddock SAP. This fisherman recommended that NMFS revise the final regulations to clarify that sector vessels fishing in this SAP may have other gear on board, provided it is stowed, and allow such vessels to fish in other areas on the same trip. The CCCHFA, however, only supported revisions to the CA II Yellowtail Flounder SAP if they were supported by similar standards of research as were required to approve revisions to the CA I Hook Gear Haddock

SAP. Further, they supported increased access to haddock, but only by gear proven to selectively harvest that species-specifically hook gear.

Response: The proposed rule included revisions to the regulations at § 648.85(b)(3)(v) that would specify that vessels could fish inside and outside of CA II Yellowtail Flounder/Haddock SAP, provided they declared their intent to do so in accordance with instructions provided by the Regional Administrator and complied with the most restrictive DAS counting requirements, trip limits, and reporting requirements for the area fished. Further, the proposed rule included revised regulations at § 648.85(b)(3)(x) that would clearly note that other gear may be on board vessels participating in this SAP, provided it is stowed according to § 648.23(b). These proposed revisions are implemented in this final rule and, therefore, no additional changes to the regulations are necessary to address issues raised by the public. The CA II Yellowtail Flounder SAP was originally approved in Amendment 13 based upon research reviewed by the Council prior to the approval of that action. That research evaluated the catch of yellowtail flounder, cod, haddock, and other species using trawl gear in the proposed SAP area. Other research to support the Eastern U.S./Canada Haddock SAP using a haddock separator trawl, the expansion of the CA I Hook Gear Haddock SAP, and the development of the Ruhle trawl demonstrate that such gears can selectively target haddock, while reducing the catch of cod and flatfish species. Although these gears had different successes at increasing the selectivity of the fishery, they were all evaluated in the same manner and all contribute to furthering the objectives of the FMP and the Magnuson-Stevens Act. Only gear supported by applicable research was approved for use by the Council in Amendment 16, as listed in Table 182 of the Amendment 16 FEIS.

### **Recreational Measures**

Comment 43: CLF expressed general support for recreational measures, but three commercial fisherman, NSC, and the NHCFA suggested that the recreational allocation of GOM cod and GOM haddock was unfair and inconsistent with National Standard 4, stating that to be equitable, allocations between commercial and recreational fishermen, and between sectors and common pool vessels need to be the same and cannot benefit one group to the detriment of another group. One individual opposed any allocation to the recreational fishery on the grounds that it would negatively impact the private angler from accessing fishery resources.

Response: As stated in the August 12, 2009, letter from Council Chairman John Pappalardo to the Secretary regarding the Council minority report on the adoption of Amendment 16, the allocation of available resources between commercial and recreational components of the fishery are entirely separate from and unrelated to the calculation of PSCs that establish sector ACE allocations. The use of the more recent time period for the recreational allocation in Amendment 16 reflects the

Council's consideration of the potential inaccuracy of recreational catch data in earlier years and the current conditions in the fishery. The more recent time period is considered to be more representative of where the fishery is at present, and where it is likely to be going in terms of the proportions caught by the two components of the fishery. Accordingly, NMFS does not find an inconsistency between the different standards for allocating ACE versus the recreational allocation of groundfish. The National Standard 4 Guidelines indicate that management measures must not discriminate between residents of different states, and that any allocations of fishing privileges must be fair and equitable to all fishermen and reasonably calculated to promote conservation. Amendment 16 establishes a process to allocate portions of the ACLs of GOM cod and GOM haddock to the recreational fishery based upon the proportion of recreational catch between FYs 2001 and 2006. Both commercial and recreational catch are evaluated using the same time period, a period during which both fisheries were subject to restrictions on the catch of such stocks, to determine the amount of these stocks caught by each fishery. These allocations are necessary to provide accountability to every segment of the fishery that catches groundfish, and to develop more segment-specific management measures that more effectively reduce F for such segments. Therefore, this measure is consistent with National Standard 4, as described in Section 9.1.1 of the Amendment 16 FEIS. Amendment 16 did not distribute the recreational allocation of GOM cod and GOM haddock between the private angler and charter/party components of the recreational fishery. Therefore, this action does not inhibit either component of the recreational fishery from catching these stocks. However, the Council specifically included the capacity to develop separate AMs for the private and charter/party components of the fishery to ensure that excessive catch by one component does not compromise the continued access to these resources by the other component.

### **Sector Measures**

Comment 44: Two commercial fishermen, EDF, PEW, CLF, and TNC expressed strong general support for sector management measures proposed in Amendment 16.

Response: For the reasons specified in Amendment 16 and the preamble to the proposed rule for this action, NMFS approved, and this final rule implements, the Amendment 16 sector measures.

Comment 45: Four commercial fishermen opposed sector management in general, stating that it is akin to privatizing fishery resources and will lead to the elimination of the small vessel fleet. These individuals preferred to continue to operate under the DAS management regime.

Response: Sector management does not privatize fishery resources, or lead to the elimination of the small vessel fleet. A sector is a group of persons holding limited

access permits that *\*18291* agree to work together for a specific period of time and under specific regulations to harvest a share of the available ACLs. Thus, sector allocations are temporary, changeable, and do not constitute a property right in the most common use of the term, or even an allocation of fishing privileges, as such terms are used in the Magnuson-Stevens Act. Under Amendment 16, each vessel may choose to enter a sector, or fish under the common pool and remain subject to DAS management. It is up to each individual vessel owner to decide which management regime would offer the most benefits to him/her. Because small vessels fish closer to shore and will likely be more adversely affected by the 24-hr DAS counting provisions in Amendment 16 than larger vessels, sector management may actually offer a better means to remain economically viable compared to DAS management, because sectors are universally exempted from DAS restrictions. Small vessels can form their own sector if they so choose, or enter another existing sector if it offers sufficient benefits.

Comment 46: The NEHFA commented that it is impossible for limited access Handgear A vessels to make a profit under sector management due to the costs to enter, administer, and monitor sector operations. This group recommended that Handgear A vessels should be exempt from all sector measures that require vessels to pay any associated costs, and suggested that Amendment 16 is inconsistent with National Standard 7 in that it does not minimize costs and requires Handgear A vessels to comply with all of the sector provisions. Finally, the NSC and three associated commercial fishermen indicated that the fishing industry cannot afford to pay for all of the sector management costs and must rely upon Federal funding to remain economically viable. The Northeast Coastal Communities Sector also noted that NMFS needs to ensure that the dockside monitoring costs for all sectors are fully covered for FY 2010 and that no individual sector be allowed to carry a balance of funds into 2011 if another sector has insufficient funds to over their dockside monitoring.

Response: Amendment 16 anticipated a number of costs associated with sectors, including costs to join a sector and pay for a sector manager, and costs associated with monitoring and reporting provisions. Amendment 16 includes estimates of the costs associated with sector measures. The Council believed that these provisions are necessary to administer and effectively monitor sector operations, and that the benefits of transitioning from the current effort control system to a quota management system under sectors outweigh the costs associated with sector provisions. Under Amendment 16, the Council specified that the fishing industry would pay for the costs associated with sector provisions, and did not provide for alternative funding sources. While many of the administrative and monitoring costs associated with sector operations during FY 2010 will be paid by NMFS through Congressional appropriations dedicated to supporting Sector development, it is

unclear whether such funding will remain available to support sector operations in future FYs. Additional funding has been made available from individual states, as well as from several environmental groups, to support individual sector development. If such funding from one or more of these sources is no longer available, the fishing industry will be responsible for paying these costs. Some management measures considered in Amendment 16 were not selected in part because of concerns over the costs and burdens of administering the program. The costs associated with 100-percent at-sea and dockside monitoring coverage were deemed to outweigh the benefits expected from such measures. Therefore, this action minimized costs to the extent practicable, consistent with National Standard 7. As discussed in the response to Comment 41, each individual vessel owner must choose which management regime would provide the most benefits based upon his/her intended operations. Further, if costs to join an already existing sector are considered too high, vessels may form their own sector with similarly situated vessels.

The NMFS funding available to help offset costs associated with dockside monitoring during FY 2010 have been awarded by grant to a third party, GMRI, who is working directly with sector representatives to ensure the funds are distributed equitably to each sector relative to their particular monitor needs. Variables affecting dockside monitoring costs include the volume of catch, the number of trips, the need to provide service to remote ports, the need for roving monitors, or any combination of the above. However, these costs are difficult to estimate without full knowledge of how fishing operations will be executed during FY 2010. The amount of the total grant to be distributed to sectors exceeds the current estimated total cost of dockside monitoring for all of the sectors. If necessary, funds can be shifted to optimize their effectiveness. However, should dockside monitoring costs exceed the amount of the grant, the sectors will be responsible for paying the additional costs, consistent with Amendment 16.

Comment 47: The Northeast Coastal Communities Sector stated that NMFS should establish a minimum threshold requirement for dockside monitoring to ensure that vessels that land low amounts of fish for each trip are not subject to unnecessarily high dockside monitoring costs, particularly for small ports in eastern Maine where the low availability of regulated species does not result high volumes of fish being landed for each trip.

Response: As noted above in the response to Comment 46, the costs associated with dockside monitoring are affected by several variables, including the amount of fish landed, or the amount of time the dockside monitor is required to observe landings. If dockside monitoring costs are based primarily upon these factors, it is possible that the costs will be lower for smaller volumes of fish landed by vessels operating in eastern Maine than for other vessels landing higher volumes of fish.

However, Amendment 16 did not propose a minimum threshold of landings that would exempt a trip from the requirements to use a dockside monitor. Instead, Amendment 16 specified that dockside monitoring coverage will be randomly assigned to 50 percent of sector trips. Because Amendment 16 did not include a specific exemption from the dockside monitoring provisions for small volumes of fish landed, NMFS has not revised the dockside monitoring provisions implemented by this final rule.

Comment 48: The NHCFA, UNFA, and one seafood dealer commented that sector development was rushed and, therefore, should be delayed until data used to calculate sector allocations can be corrected. NHCFA specifically objected to the fact that vessels had to comply with sector provisions before they were implemented, while the seafood dealer suggested that sector measures will force many vessels and shoreside infrastructure companies out of business.

Response: Sector measures have been in place since 2004 with the implementation of Amendment 13, and the revised sector measures of Amendment 16 have been under development for over 3 years. These revised sector measures were the subject of extensive debate during this time, including numerous meetings open to the public. Therefore, NMFS disagrees that the implementation of sectors has **\*18292** been rushed and should be delayed. In fact, the Council was originally scheduled to implement Amendment 16 at the start of FY 2009 on May 1, 2009, but delayed the action to further develop Amendment 16, including its sector measures. Therefore, further delay of sector implementation is not warranted to further develop sector provisions. Although NMFS recognizes that some of the landings data used to calculate PSCs are incorrect, these data represent the best data available to NMFS. A process to correct landings data and, therefore, PSCs is currently underway. However, it may not be possible to correct all landings data and be able to recalculate PSCs and associated sector ACEs in time for implementation on May 1, 2010. Because any revisions to a single PSC requires the recalculation of PSCs for all other vessels, updates to PSCs can only be implemented at the start of a FY. Otherwise, implementing such corrections during the middle of the fishing year could result in disruptions to the fishery that could compromise the ability of the fishery to effectively meet the conservation objectives of the FMP, especially if such corrections reduce the PSCs for a particular sector and cause that sector to exceed its ACE based upon ACE harvested prior to the correction. Delaying the implementation of sector measures until May 1, 2011, would mean that vessels whose PSCs were accurate would be denied the benefits of fishing under sectors at the start of FY 2010. Any corrections to the landings data and PSCs are relative and would change an individual vessel's PSC, but would not increase the amount of fish that could be caught in a particular FY. To ensure that the fishery can take advantage of the benefits associated with

sectors as quickly as possible, this action implements sector measures effective May 1, 2010. Any updates to PSCs are intended to become effective for the start of FY 2011 on May 1, 2011. The sector-related deadlines in Amendment 16, which have been communicated to the public since the Council adoption of Amendment 16, are necessary to ensure that sector measures can be implemented by the start of the 2010 FY on May 1, 2010. While these deadlines are not mandatory, NMFS has made the industry aware that failure to comply with these deadlines could result in the delayed implementation of individual sectors beyond the start of the 2010 FY. Existing sectors require participants to land at particular ports, thereby preserving local fishing communities and shoreside infrastructure. Similar provisions could be implemented in future sector operations plans. If such provisions are included, Sector management could actually preserve the viability of shoreside infrastructure. Evidence suggests that the existing sectors were able to increase the economic efficiency of vessel operations and realize higher vessel revenue streams. Because Amendment 16 provides further opportunities to increase the economic efficiency of vessel operations through additional sector exemptions, increased access to haddock through revisions to existing SAPs, and other measures, it is possible that sector provisions implemented by this action will enable more vessels to remain economically viable.

Comment 49: The NHCFA, Food and Water Watch (FWW), and the DMF claimed that sectors are analogous to an IFQ program and require a referendum under the Magnuson-Stevens Act. Therefore, this group claimed that Amendment 16 is in violation of the Magnuson-Stevens Act because it failed to develop a referendum to implement sectors. Further, the NSC, three associated commercial fishermen, and FWW believe that sectors are a type of LAPP and, therefore, should have been developed pursuant to the requirements in section 303A of the Magnuson-Stevens Act.

Response: The Magnuson-Stevens Act explicitly states that a sector allocation is not an IFQ for the purposes of the referendum requirement. Moreover, NMFS has determined, as explained in a September 1, 2007, letter to the Council, that the sector program, as currently implemented in the FMP, is neither an IFQ program, nor a LAPP program as those terms are used in the Magnuson-Stevens Act. Further, none of the revisions to the current sector program in this final rule change the conclusions reached in that letter. To summarize the September 1, 2007, letter, according to the definition of a LAPP in the Magnuson-Stevens Act, a LAPP involves the issuance of a “Federal permit issued as part of a limited access system under section 303A to harvest a quantity of fish \* \* \* representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person.” Individual sectors are not issued a permit, they are not allocated a portion of the TAC, and they are not clearly “persons” eligible to hold a LAPP

under section 303A(c)(1)(D). Therefore, NMFS does not believe that sector measures, as approved in Amendment 16 and implemented by this action, are LAPPs that must comply with the requirements in section 303A of the Magnuson-Stevens Act.

Comment 50: CLF recommended that sectors should be categorically excluded from future NEPA analysis based upon the analysis already contained in the Amendment 16 FEIS, and that NMFS should prepare the appropriate analysis of environmental impacts with the assistance of individual sectors.

Response: The analysis of sector formation in the Amendment 16 FEIS was never intended to address the particular operations of individual sectors, but rather to evaluate the overall impacts of the formation of sectors and their compliance with other sector-specific measures proposed in Amendment 16. Another, more detailed analysis of the specific impacts associated with the intended operations plans and rosters of participating vessels for each FY is required to allow the Council, NMFS, and the public to evaluate the expected impacts of these sectors and to comply with NEPA. Information on the vessels participating in each sector or the intended operations was not available at the time the Amendment 16 FEIS was being prepared and finalized. Therefore, a supplemental analysis is necessary to fully comply with NEPA. To assist new sectors in developing such analysis, NMFS hired contractors to work directly with NMFS and individual sectors to prepare EAs for Sector operations in FY 2010. In addition, NMFS worked very closely with sector proponents to ensure that such documents comply with NEPA and other applicable law. NMFS will continue to offer support in the future, although funding to draft future EAs may not be available. Upon the completion of this initial analysis of sector operations, if sector participants and operations in future years are similar to those incorporated in the original analysis, more abbreviated NEPA compliance may be possible in future FYs.

Comment 51: NAMA recommended that the Council encourage future sectors to form based on the concept of area management.

Response: Sectors may form for any number of reasons, and may adopt area-specific management measures if they so choose. In fact, the existing sectors were originally restricted to fishing in specific areas surrounding the communities in which they were based. The Council did not mandate similar area-based restrictions in Amendment 16 to provide the maximum flexibility for the formation of sectors.

Comment 52: The CCCHFA supported provisions in Amendment 16 that insulate sectors from the overages of **\*18293** common pool vessels. However, they observed that while sector vessels were subject to overage penalties if participating vessels left a sector following an overage, common pool vessels would not be subject to similar penalties. They contended that Amendment 16 should include

overage penalties that follow common pool vessels if they join a sector in the FY after they contributed to an overage of the common pool allocations of a particular stock.

Response: The absence of an overage penalty for common pool vessels that contribute to an overage of common pool ACLs, but join a sector for the next fishing year does not compromise the ability of Amendment 16 measures to trigger applicable AMs and ensure that overfishing does not occur. Further, the deadlines to join a sector for the next FY necessitate that a vessel owner must decide to join a sector prior to September 1 of each year. Thus, the decision to join a sector will likely be made long before it is known whether there will be any overages of ACLs allocated to the common pool. Furthermore, a sector could specify conditions under which vessels may join that sector, including conditions that would preclude participation in a sector if a vessel fished in the common pool and contributed to an overage of common pool ACLs. Moreover, Amendment 16 does not include any overage penalties for common pool vessels if they contributed to an overage of common pool allocations, but later join a sector to avoid the increase in DAS counting associated with the differential DAS counting AM. NMFS can only approve or disapprove Amendment 16 measures, and cannot revise or add measures. However, the Council could consider adding such penalties in a subsequent action. Therefore, no common pool overage penalties are implemented by this final rule.

Comment 53: The NSC, three associated commercial fishermen, and the Sustainable Harvest Sector recommended that sectors should not be required to provide discard estimates as part of their weekly sector catch report. Instead, these commenters wanted to use the discard estimates calculated by NMFS to minimize the burden on sectors and increase the coordination of catch data used to monitor sector ACE.

Response: As part of a sector's weekly catch report, Section 4.2.3.5.3 of Amendment 16 states that sectors, or a private contractor hired to facilitate monitoring sector operations, must apply discard estimates to landings and deduct catch from sector ACEs. This section also requires that sectors develop an "adequate monitoring system and demonstrate to NMFS that discards can be accurately monitored and counted as part of the ACE, at the sector's expense" as part of a sector's yearly operation plan. The Council determined that these elements are important for sector managers and the sectors themselves to be confident that all sectors are held to the same standard. Thus, each sector will be evaluated on its capacity to accurately monitor sector catch and prevent sector ACEs from being exceeded. Further, even though NMFS will provide the applicable discard rates to individual sectors, sectors may have more timely and accurate data regarding landings by gear type than is available to NMFS, particularly for vessels that fish

with more than one gear type on a particular trip. This is because data regarding whether vessels fished with multiple gear types on the same trip are not captured through the VMS declaration requirements specified in this action, but will be reflected in VTR data. Even though the frequency of VTR submissions has been increased through this action, such data will not be immediately available to NMFS due to the time required to receive, process, and validate VTRs under current NMFS protocols. However, it is likely that sectors will have such data on a more timely basis due to proximity to affected vessels and the availability of sectors to rely upon electronic VTR software, developed in part to facilitate sector catch monitoring, to provide much of the data necessary to monitor sector landings. While NMFS will concurrently monitor sector catch using data available to NMFS, it would be inconsistent with Amendment 16, as well as the intent of sector management itself (i.e., self-management), to have NMFS calculate sector discards and apply it to sector landings on a weekly basis to determine sector catch, as Amendment 16 clearly indicates that it is the sector's responsibility to accurately monitor sector catch so that sector ACEs are not exceeded.

Comment 54: The NSC and three associated commercial fishermen commented that the weekly sector reporting requirements are burdensome on sectors. To reduce such burdens, NSC felt compelled to develop and utilize electronic reporting mechanisms that have yet to be authorized by NMFS, or that were evaluated in Amendment 16. NSC and its members recommended that NMFS approve the use of electronic VTRs for sector operations.

Response: As explained in the response to Comment 25, to date, the Regional Administrator has not determined that the existing electronic VTR technology is sufficient to meet the existing reporting requirements, but could authorize the use of specific systems once such a determination is made.

Comment 55: The CCCHFA supported Amendment 16 requirements for sectors to prepare an annual report. However, the Sustainable Harvest Sector opposed the requirement to include the catch of all species. This group contended that a 1-year snapshot of sector catch of other species is insufficient to understand shifts in effort to other fisheries. Instead, they recommended using NMFS's data to evaluate shifts in effort, as they include many years of landings and are more effective at determining if any shifts in effort have occurred. Further, this group suggested that the list of enforcement actions should be limited to only those resulting from a sector trip.

Response: The purpose of the annual sector report is to identify the full complement of sector operations conducted during a FY to allow the Council, NMFS, and the public to evaluate the biological, economic, and social impacts that such operations had on the NE multispecies fishery and other fisheries in which participating vessels were engaged. Although alternative sources of such data exist,

it is important for the sector to specify how much catch the sector believes was caught in other fisheries, as it provides a means to not only evaluate shifts in effort, but also the efficacy of sector catch monitoring practices during a particular FY. Further, by summarizing the fishing activities of sector vessels, the public can understand the strategies employed by sectors to maximize the benefits of fishing operations. Furthermore, it would be inconsistent with the provision adopted by the Council in Amendment 16 to rely upon NMFS data and exempt sectors from submitting an annual report detailing the catch of all species. Reporting all enforcement actions associated with sector vessels, including those associated with other fishing activities, is critical to understanding how the sector operates and if sector operations are having an adverse effect on any fisheries. Therefore, this final rule does not revise the sector annual report requirements.

Comment 56: The NEHFA suggested that Handgear A vessels did not receive a fair and equitable allocation of available resources because measures in effect during the allocation period selected to determine PSCs, including GOM Rolling Closure Areas and trip \*18294 limits, reduced the amount of fish that such vessels could catch. Therefore, this group argued that the Amendment 16 PSC measures are inconsistent with National Standard 4. The NHCFA, PERC, NSC, and three commercial fishermen also contended that PSC measures are inconsistent with National Standard 4 because different time series were used to benefit individual groups, arguing that the allocation measures must be the same for all vessels, including recreational and commercial vessels and sector and non-sector vessels. Further, NHCFA commented that the allocation periods used reflect a time when GOM haddock abundance was depressed, causing PSC to be low and minimizing the potential that vessels will be able to access this stock once rebuilt. Furthermore, they contended that such measures would jeopardize the continued participation of traditional fishing communities, contrary to National Standard 8, while an elected official stated that sector allocations must be sufficient to sustain the fishery and reduce impacts to fishing communities. PERC specifically noted that the PSC measures would punish small vessels that had fewer landings during this period than other vessels. One other commercial fisherman supported using landings history alone for FYs 1996-2006, including for SNE/MA winter flounder once an allocation of that stock is appropriate, while the CCCHFA supported using landings of GB cod during FYs 1996-2001 for existing sectors. PERC further recommended that the Council establish a method to reallocate rebuilding stocks that includes set-asides in the initial allocation process that would accommodate “segments of the fishery that were marginalized during the transition to quotas.”

Response: Many of the issues raised by the public in opposition to the sector allocation measures in Amendment 16 were considered either directly or indirectly by the Council prior to adoption of these measures, as detailed in the FEIS and in

the Council Chairman's August 12, 2009, letter to the Secretary regarding the minority report for the adoption of Amendment 16. Under Amendment 16, all vessels are subject to the same sector allocation measures (i.e., PSC calculations) for all stocks with the exception of GB cod. The 11-yr period for allocation of most stocks (i.e., 1996-2006) is meant to minimize the impact on catch history that results from changes to groundfish regulations, such as trip limits and area closures during this period. For GB cod, a different allocation window was adopted to preserve the business plans developed by participants in those existing sectors and to maintain the value of investments in permits made by such participants by maintaining Council decisions regarding the allocation of GB cod from previous management actions. The August 12, 2009, letter noted that 1996-2006 baseline to calculate PSCs for all stocks except GB cod was considered the "best method for ensuring a fair and equitable allocation using as much sound data as possible," while promoting "stability in the fishery and fostering an environment where sectors can create efficient and effective business plans." This letter references that Amendment 13 utilized landings histories during FYs 1996-2001 to establish the existing sectors' allocations of GB cod and essentially froze this baseline once it was created. In a similar manner, the Council indicated its intent to freeze catch history for newly formed sectors as of the implementation of Amendment 16 to preserve the allocation decisions made in Amendment 13 and promote economic stability in the fishery by increasing the confidence that allocations are unlikely to change in the future. Existing sectors require participants to land at particular ports, thereby preserving local fishing communities and shoreside infrastructure, consistent with Goal 4 of the FMP. In addition, because these sectors represent cohesive groups of smaller vessels fishing with hook and gillnet gear, preserving existing sector allocations promotes the continuation of a diversified fishery in both size and gear type near Chatham, MA, consistent with Objective 7 of the FMP. Revising existing sector allocations by not treating GB cod sector allocations differently than other stocks could reduce fishing opportunities for these sectors, increasing costs and economic impacts to such sectors, and adversely affect associated communities. Therefore, the measures in Amendment 16 are justified based upon furthering the goals and objectives of the FMP, providing for the sustained participation of fishing communities, and minimizing the economic impacts on such communities. Finally, the use of different PSC baselines for different stocks resulted in only a small quantitative difference regarding the amount of GB cod PSC specified for participants in existing sectors. Sector allocations will be calculated in such a manner that only 100 percent of the GB cod ACL will be allocated in any FY, thereby ensuring that sector measures achieve the conservation measures of the FMP. Thus, the decision to use different allocation periods was not arbitrary, but specifically developed to provide stability

and the sustained participation of vessels and fishing communities in the NE multispecies fishery without compromising efforts to rebuild overfished stocks, consistent with Goal 5 of the FMP.

Amendment 16 measures will allocate portions of the ACLs of GOM cod and GOM haddock to the recreational fishery based upon the proportion of recreational catch between FYs 2001-2006. These allocation measures are intended to reflect recent participation in the fishery in the form of recent landings of groundfish and to account for concerns over the inaccuracy of historic data on recreational catch. As summarized in the response to Comment 43, the more recent time period is considered to be more representative of where the fishery is at present, and where it is likely to be going in terms of the proportions caught by the both the commercial and recreational components of the fishery. The catch of each component will be evaluated using the same time period, a period during which both fisheries were subject to restrictions on the catch of such stocks, including trip limits, closed areas, size limits, and other provisions necessary to prevent overfishing and help rebuild overfished stocks. Because all fisheries were subject to measures designed to achieve the conservation objectives during the same allocation period, one group is not advantaged over the other, despite the fact that different allocation periods result in different allocations to various segments of the fishery, and all are provided the same access to rebuilt stocks, including GOM haddock, which is projected to have rebuilt in 2009. These allocations are necessary to determine the amount of these stocks caught by each fishery and provide accountability to every segment of the fishery that catches groundfish, and to develop more segment-specific management measures that more effectively reduce F for such segments.

Allocations between commercial and recreational fisheries and between sector and common pool vessels are designed to minimize the economic impacts on fishing communities without jeopardizing the conservation requirements of the Magnuson-Stevens Act, including preventing overfishing and rebuilding overfished stocks. Measures affecting either group have indirect economic impacts on supporting businesses within such communities, such as restaurants, \*18295 marinas, fish processors, ice and fuel suppliers, etc. An allocation of available resources among these groups facilitates the development of effective management measures for each group that can selectively address overages by one group, while avoiding unnecessarily penalizing the other group for such excessive catch due to implementing effort reductions on other groups, in contrast to effort reductions applied across the entire fishery in previous management actions. In doing so, this measure contributes to the overall effort of Amendment 16 to provide for the sustained participation of such communities in the groundfish fishery through the furtherance of sustainable fisheries, while minimizing the adverse economic

impacts associated with broadly applied effort reductions that would result without an allocation of available resources to each group.

Based on the above, NMFS has determined that sector and recreational allocations under Amendment 16 are consistent with each other, the goals and objectives of the FMP, the Magnuson-Stevens Act, including National Standards 4 and 8. Thus, NMFS implements such provisions through this final rule. If the Council determines that it is appropriate to establish set-asides to address a particular management objective, including setting aside catch for research or to promote initial entry into the fishery, it could revise these allocation measures through a future action.

Comment 57: The CCCHFA supported sector-specific allocations for stocks managed by the Understanding.

Response: NMFS is implementing such allocations through this final rule. These allocations ensure that access to the Eastern U.S./Canada Area by common pool and sector vessels is not adversely affected by the actions of other sectors or the common pool. This is consistent with Objective 8 of the FMP to insure accountability in achieving fishery management objectives, and to distribute fishery access based upon recent participation in the fishery.

Comment 58: The NHCFA suggested that the Amendment 16 allocation measures fail to recognize investments in DAS and, thus, devalue DAS permits without a sufficient analysis of the impacts.

Response: Amendment 16 did consider other options for sector allocation that included either vessel capacity and/or allocated DAS as part of the allocation formula. These factors would have resulted in all vessels being allocated at least some PSC for some or all stocks, even though not all vessels actually fished for and landed groundfish during this period. As a result, such options do not reflect current participation in the fishery and would be inconsistent with the intent of this measure in Amendment 16. Section 7.5.1.2.3.3 of the FEIS discusses the economic impacts of PSC options adopted in Amendment 16 on those vessel owners that invested in permits to increase their access to DAS under the existing DAS effort controls. This discussion acknowledges that vessel owners may have invested in permits with allocated DAS, but little landings history in the area in which the owner has traditionally operated. Owners who invested heavily in permits with many DAS, but little landings history, could continue to participate in the common pool and be regulated by DAS instead of sector allocations. Thus, owners must make decisions as to which management system is most advantageous to them based upon opportunities presented by either management system. Therefore, Amendment 16 adequately considered the impacts on such vessels.

Comment 59: PEW, NHCFA, CLF, CCCHFA, and PERC opposed the removal of the sector allocation cap and recommended that NMFS retain the existing 20-

percent cap, or develop suitable alternatives to ensure that phases in the allocation cap to avoid excessive shares in the fishery. These commenters claim that the absence of an allocation cap could compromise small-vessel operations due to consolidation of fishing effort by larger corporations, and that there is not a sufficient analysis of the potential consequences in Amendment 16, claiming that the absence of a cap could impact markets or cause unknown negative impacts. EDF also opposed removal of the cap because it believes that such a removal fails to address the goal of the FMP to preserve the day-boat fishery and that it would be arbitrary and capricious to implement a regulation that directly contravenes a stated objective of the FMP. Further, EDF argued that Amendment 16 is inconsistent with National Standard 4 because it fails to prevent an entity from acquiring an excessive share of the resource, although it acknowledged that an allocation cap is not the only means to address the requirements of National Standard 4. Although this group opposed the removal of the cap, it recommended that NMFS specifically not reinstate the existing cap due to disruptions in the fishery for FY 2010, but rather instruct the Council to develop an appropriate allocation cap in a future action. EDF also suggested that NMFS freeze permanent quota transfers until an allocation cap is implemented, pursuant to the authority granted in section 305(d) of the Magnuson-Stevens Act.

Response: Amendment 13 first implemented an allocation cap that prevented sectors from being allocated more than 20 percent of the yearly TAC for a particular stock in part due to perceived concerns over the possibility that one sector could lead to an excessive share of a particular stock and exert market control for that resource. National Standard 4 Guidelines provide useful guidance on whether removal of the allocation cap is inconsistent with the “excessive share” provision of National Standard 4. National Standard 4 Guidelines state that an “ ‘allocation’ or ‘assignment’ of fishing privilege is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4.” Amendment 16 does not directly or deliberately allocate any fishing privileges. Instead, Amendment 16, in addition to removing the allocation cap, establishes several new rules for sectors and identifies specific sectors that have been formed to operate under the revised sector rules. Sectors themselves are merely vehicles for allowing individual fishermen to voluntarily enter into an arrangement to fish under certain exemptions to the FMP based on their individual fishing histories. Nothing in Amendment 16 or the related actions of Framework 44 or the sector operations plan proposed rule actually allocate directly or even indirectly any new fishing privileges to individual fishermen, and,

sectors themselves do not acquire any privileges that were not already in existence based on fishermen's preexisting histories. Therefore, sectors are not "acquiring" excessive shares of fishing privileges, as contemplated by National Standard 4. NMFS recognizes that the fact that one sector may have a significant cumulative total of ACE on a temporary basis for one fishing season may raise potential concerns for incidental allocative or market effects, and such possibilities should be closely monitored. However, commenters offer no explanation as to what constitutes an excessive share in the sector context \*18296 under National Standard 4 Guidelines, or which sectors fall into the excessive share category, nor do they show how the sector program will result in inordinate control on buyers or sellers in the market, a factor suggested in National Standard 4 Guidelines as evidence of an excessive share.

Analysis by the PDT during the development of Amendment 16 suggests it is unlikely that any one sector could accumulate a sufficient share of a stock to exercise market power over the rest of the fishery. Further, because sector ACEs are temporary in nature and depend upon the collective PSCs of participating vessels, no one sector will be allocated a permanent share of any resource. This further limits the ability of a sector to influence market conditions for a particular stock over the long term. Amendment 16 will allow sectors to trade ACE for use during that FY. This will minimize the influence of the initial sector allocation, including any cap on initial allocations, on market control, as a sector could acquire an unlimited amount of ACE from another sector by transferring ACE. Consolidation in the fleet has already occurred under the DAS management regime due to continued effort controls, DAS Leasing/Transfer Programs, and other provisions. It is possible to allow for consolidation in the fleet without compromising the diversity of the fleet. Maintaining a diverse fleet is one of the objectives of the FMP, and future Council actions could be directed to explicitly increase, or at least maintain, the existing diversity of the fleet. In fact, the PDT analysis of sector allocation caps specifically noted that an allocation cap could be used to address other objectives in the fishery. However, the Council elected not to do so in Amendment 16.

On balance, retaining the 20 percent would unquestionably have more negative impacts on the sector program than eliminating it in the context of current Amendment 16 measures and approve sectors. The elimination of the sector allocation cap has been considered by the Council since December 2007. Since that time, sectors have operated under the assumption that the allocation cap would be removed under Amendment 16. Accordingly, five sectors submitted rosters to NMFS that will result in ACE allocations that exceed the current 20-percent allocation cap, if the membership is maintained for FY 2010. If NMFS had disapproved the removal of the sector allocation cap in Amendment 16, the

existing sector allocation cap would have remained in effect; NMFS could not have simultaneously disapproved the proposed Amendment 16 measure and eliminated the existing 20-percent allocation cap. If the 20-percent allocation cap were maintained, five sectors would either need to be disapproved under the sector operations plan proposed rule because they would exceed the 20-percent allocation cap for one or more stocks, or sufficient members of the sectors would need to be removed from the sector rosters to ensure that the remaining vessels would not cause the allocation cap to be exceeded. This would have meant requiring such vessels to fish in the common pool. Another alternative would have been to allow vessels removed from a sector to join together and operate under one of the sectors authorized by the Council that did not submit an operations plan to date. However, any sector that has not submitted an operations plan could not be approved by the start of FY 2010 on May 1. This would have resulted in tremendous disruption and economic impacts to the fishery for FY 2010, particularly for those sectors that would have had to be disapproved, or vessels that would have been forced to fish under the provisions of the common pool or another sector. Such a disruption in the fishery could compromise the ability of sector measures to achieve other goals of the FMP, including giving industry members greater control over their own fate; providing a mechanism for economics to shape the fleet, rather than regulations (while working to achieve fishing and biomass targets); minimizing bycatch; increasing economic efficiency; and transitioning the fishery from effort controls to quota management. Therefore, NMFS did not disapprove the Amendment 16 measure to remove the sector allocation cap. However, NMFS recognizes the potential legitimate concerns raised by the public, and has pledged in its letter to the Council announcing partial approval of Amendment 16, to work with the Council in addressing these potential problems of the incidental allocative effects of the sector program as well as individual permit holders acquiring excessive control of fishing privileges. To that effect, NMFS will work with the Council's Interspecies Committee to consider developing measures that would address the issue of sector ACEs as they relate to the FMP's social and economic objectives, the Council's sector management policy, the national policy on catch share management, and the requirements of National Standard 4, pursuant to a motion adopted by the Council on January 28, 2010.

The only mechanism that exists to allow the permanent transfers of quota is the DAS Transfer Program. If NMFS were to freeze this program, as recommended, vessels fishing in the common pool would also be prohibited from consolidating fishing effort and increasing the economic efficiency of vessel operations, as such vessels could participate in sectors during a future FY. This would conflict with the goals and objectives of the FMP, as well as requirements of the Magnuson-Stevens Act to reduce costs and economic impacts to vessels by requiring entities to

maintain multiple operational fishing platforms and pay for associated dockage, insurance, etc. Thus, this final rule does not temporarily suspend the DAS Transfer Program, as requested.

Comment 60: TNC and PERC supported the indefinite specification of PSC and the freeze on catch history under Amendment 16. However, the NSC and three associated commercial fishermen opposed such indefinite specification of PSC, stating that PSCs should only be used for sector allocations in Amendment 16 and that alternative allocations should be developed if the fishery transitions to an IFQ regime through a future action.

Response: Although Amendment 16 specified conditions by which PSCs were calculated for sectors, such provisions do not limit the Council's ability to revise such measures in the future, or develop alternative allocation measures to support an IFQ regime through a subsequent action.

Comment 61: EDF, PEW, CLF, NAMA, and the CCCHFA indicated that additional observer coverage is necessary to effectively implement sector provisions and increase the accuracy of discard estimates in the fishery. PEW and CLF suggested that at-sea monitoring coverage should be increased to 100 percent, even if that means reducing dockside monitoring coverage. NAMA suggested that such increased coverage should be applied to at least FYs 2010 and 2011 to establish a baseline of sector operations. EDF recommended that if at-sea monitoring cannot be increased to 100 percent without delaying Amendment 16, NMFS should implement more restrictive enforcement measures that require individual vessels to pay for 100 percent observer coverage for the rest of the FY if reported discards are significantly higher or lower compared to observed trips, with positive incentives for sectors that "outperform the fleet average" for reporting quality. Two commercial fishermen, PEW, CLF, \*18297 and CCCHFA also recommended that NMFS implement 100-percent dockside monitoring coverage. Oceana further claimed that Amendment 16 does not specify the precise level of observer coverage in the FMP, as alleged in a lawsuit brought against NMFS based on the approval of Amendment 13 to the FMP.

Response: When the Council adopted Amendment 16, the Council neither selected the option to require 100-percent observer coverage, nor required sectors or the common pool to be subject to an at-sea monitoring program in FY 2010. However, NMFS agrees with the basic concept advocated by the commenters that higher levels of observer coverage are more effective at collecting the data necessary to monitor groundfish landings and discards under Amendment 16 and reducing the potential of an observer effect that could potentially compromise data collected with less than 100-percent coverage. As stated earlier in the preamble of this final rule, NMFS has funding to provide approximately 38-percent at-sea monitoring coverage for sector vessels, and about 30-percent at-sea monitoring coverage for

common pool vessels, in addition to fully funding 50-percent dockside monitoring coverage for FY 2010. Such coverage levels should provide sufficient information to more than meet the minimum requirements of the SBRM, while providing the additional coverage suggested by commenters to monitor sector operations under Amendment 16. Distribution of such funds was intended to accomplish the dual goals of monitoring both at-sea catch and dockside landings to ensure that discards are accurately estimated and landings data are validated. Shifting resources to emphasize one over the other would not be consistent with the objectives of Amendment 16. Additional coverage would provide more data on groundfish catch, but even if available funds were shifted to emphasize at-sea monitoring over dockside monitoring, there may not be sufficient funding to provide 100-percent observer coverage across the entire fishery. Further, there is no guarantee that such funding will be available for future years. Requiring 100-percent coverage would, therefore, cause the fishing industry to bear such costs, absent additional funding for NMFS to pay for such coverage. Individual sectors may establish at-sea monitoring programs through their yearly operations plans that provide for additional observer coverage beyond that provided by NMFS. However, no sector has proposed such additional coverage for FY 2010.

Although EDF recommended implementing additional enforcement measures that would increase at-sea monitoring coverage based upon the accuracy of a sector's discard estimates compared to the fleet average, there were insufficient details provided to determine how to implement such a mechanism. Moreover, there is no enforcement authority that would allow the kind of real-time increase of observer coverage suggested by EDF. Further, it is unclear from the description whether it would even be possible for a sector to avoid triggering 100-percent at-sea monitoring coverage, as additional coverage would be required if the sector's reports were either statistically higher or lower than the fleet average. This approach could undermine incentives to accurately report discards and would, instead, create incentives to report discards that reflect the industry average. Because the Council did not include such a mechanism to increase at-sea monitoring coverage in Amendment 16, NMFS does not have the latitude to implement such a provision through this final rule. Finally, the Court's findings in the Amendment 13 lawsuit required that FMPs establish SBRM's, but did not mandate specified levels of observer coverage. Because Amendment 16 is in compliance with the omnibus amendment that implemented SBRMs for all FMPs managed in the NE in January 2008, Amendment 16 is not at odds with the Court's findings in the lawsuit referred to by the commenters.

Comment 62: Two commercial fishermen, PEW, CLF, and CCCHFA recommended that NMFS utilize electronic monitoring to reduce costs, including deploying electronic monitoring in other fisheries to record NE multispecies

bycatch. The APO commented that the standards for approving electronic monitoring technology are not clear and that the public should be involved with any decision to approve such technology.

Response: NMFS has not yet determined whether electronic monitoring technology is sufficiently developed to be applied in the NE multispecies fishery. Criteria to evaluate such technology are currently being refined by NMFS based upon existing research and pilot programs. Any electronic monitoring technology to be applied in the NE multispecies fishery will be subject to rulemaking consistent with the Administrative Procedure Act.

Comment 63: Two individuals, the Public Employees for Environmental Responsibility (PEER), and the APO opposed Amendment 16 measures that would change eligibility standards for at-sea monitors to require a minimum of a high-school education, or equivalent, with no science background specified. They claim that lowering the education standards undercuts the observer profession and would be contrary to regional, national, and international policy and best practices. Commenters noted that there have been problems with non-degreed observers in other fishery management programs, including both professional and data problems, which caused such programs to increase their observer program eligibility and training standards significantly. They also suggest that at-sea monitors would receive less training and be paid less than fisheries observers who are required to have an advanced science and mathematics education.

Response: The educational requirement for a high school diploma rather than a college degree is a minimum eligibility requirement and does not require vendors to hire only those candidates with the minimum qualifications. Although there may have been problems with non-degree observers in other programs, NMFS intends to provide thorough and rigorous training and oversight of at-sea monitors to avoid similar problems in the NE multispecies fishery. While the training program for at-sea monitors is not as long as the training program for observers (10 days versus 16 days), the amount of data collected by at-sea monitors will also be concomitantly less than the data required to be collected by observers, due to the different roles that at-sea monitors will undertake compared to observers. The primary role of at-sea monitors is to verify area fished, catch, and discards by species, by gear type. NMFS has taken into account the data collection needs for sector management in determining the training and educational requirements for at-sea monitors. For example, unlike observers, at-sea monitors will not be required to collect biological samples, will not collect as much gear information, and will not be responsible for conducting supplemental research projects that are sometimes required of observers. At-sea monitors are intended to complement, not replace, the work performed by observers, and at-sea monitors are not expected to compromise the utility of observers or undercut the profession in any way. Therefore, NMFS

concludes that the at-sea monitoring program, including standards for at-sea monitors, can be implemented in a manner consistent with regional, national, and other \*18298 policies and best practices. It is unknown whether at-sea monitors will be compensated at the same level as fisheries observers at this time.

Comment 64: One individual, PEER, APO, and Alaska Observers argued that the Amendment 16 at-sea monitoring standards would result in lower data quality and integrity. Oceana stated that Amendment 16 must include a full discussion of the effects of performance standards on uncertainty in catch estimates and overall management of the fishery. Although daily costs of at-sea monitors might be less than for fisheries observers, Alaska Observers and PEER contend that overall costs would likely increase due to complications in data oversight and accountability measures, and with the overall loss of data integrity. Six fishing industry representatives, including AFM and the NSC, supported the at-sea monitoring standards, stating that it is necessary to reduce the financial burden of such monitoring requirements as much as possible.

Response: NMFS disagrees that at-sea monitors will collect lower quality data, or data of less integrity. At-sea monitors will be required to pass rigorous training based upon the training regime developed and employed for observers. Therefore, it is expected that the data quality associated with at-sea monitors would be comparable to that associated with observers. Accordingly, NMFS does not believe that there will be any effects of the performance standards on the uncertainty in catch estimates and overall management of the fishery. At-sea monitors are meant to increase at-sea observations of fishing behavior to increase data collected in a more efficient and cost-effective manner, given the often limited resources to support a full observer program. Specifically, because at-sea monitors would not be required to collect and deliver biological samples, the costs and complexity of the logistical operations of the at-sea monitoring program are reduced compared to the existing observer program. Although NMFS cannot confirm whether at-sea monitors will be NMFS does not anticipate overall costs for implementing at-sea monitors to be higher than the cost for observers, and at-sea data collection and processing will be subject to the same standards as observer data. Because such standards are not expected to compromise data quality, but may lower the costs associated with at-sea monitoring provisions required by this action, this final rule implements the at-sea monitoring standards as proposed in Amendment 16.

Comment 65: PEER, one individual, and APO suggested that the Amendment 16 at-sea monitoring provisions would result in less public access to observer data. Although none of the commenters explained how they thought Amendment 16 would impact public access to fisheries monitoring data, it was suggested that sector management in general may limit the availability of such data for fisheries monitoring and management purposes. They also suggested that NMFS's authority

and management would be undercut by a host of waivers and exemptions, and the fishing industry would gain much of the authority over fisheries monitoring.

Response: At-sea monitoring data will be subject to the same confidentiality provisions as observer program data, in compliance with the Magnuson-Stevens Act. NMFS will not apply a different standard to data collected by at-sea monitors versus observers. All data submitted to NMFS as part of the sector reporting requirements implemented by this action will be made available to fisheries managers and the public, as appropriate, for the purpose of monitoring and managing the NE multispecies fishery. Although the intent of sector management is to provide individual sectors with the responsibility of monitoring and managing sector operations, the ultimate responsibility and authority for monitoring catch and associated fishing mortality resides with the Secretary and NMFS. Therefore, NMFS does not agree that Amendment 16 measures implemented by this final rule would limit public access to monitoring data or compromise NMFS's ability to effectively monitor and manage the NE multispecies fishery.

Comment 66: PEER claimed that at-sea monitors would collect significantly fewer protected species data than traditional observers because of the time necessary for monitors to complete catch data requirements, thereby compromising NMFS's ability to meet statutory requirements under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), noting that the at-sea monitoring "Marine Mammal, Sea Turtle, and Sea Bird Incidental Take Log" will have 60 percent fewer data fields.

Response: At-sea monitors will still be required to collect data on marine mammal, sea turtle, and sea bird interactions. Incidental takes (i.e., interactions of marine mammals, sea turtles, and sea birds with fishing gear) will still be documented and described in detail. The primary difference between at-sea monitors and observers is that at-sea monitors will not collect biological specimens. Because at-sea monitor coverage will be in addition to the current levels of observer coverage, at-sea monitors represent additional on-the-water observations of interactions with marine mammals and endangered species. Thus, at-sea monitors will increase, not decrease, the data available to estimate takes of such species in the NE multispecies fishery. This will enhance, not compromise, NMFS's ability to meet statutory requirements under the MMPA and ESA, and to estimate bycatch. The fields that were eliminated in the incidental take log are the result of improved format of data collection, as much of the information collected on the current forms will be collected and described in comments on a newly designed worksheet.

Comment 67: PEER suggested that, if the sector at-sea monitoring program proposed in Amendment 16 remains unchanged, additional agency management and training staff will be required, noting that two programs will be in operation simultaneously and thus have a different process for training, inseason

management, contract management, administrative oversight, data management and data modeling.

Response: The two programs will operate simultaneously and are integrated within the same group (the NEFSC Fisheries Sampling Branch). The training for at-sea monitors and observers is the same, where their roles overlap. For example, the vessel safety training, conflict resolution, species identification, and catch estimation is the same. Training of at-sea monitors will not include training for observer duties that do not apply to at-sea monitors, such as how to extract fish otoliths, vertebrae, and scales, and how to conduct a full necropsy of dead marine mammals. The inseason management, contract management, and administrative oversight of the at-sea monitoring program are not significantly different under the model being proposed for 2010 and 2011. Data management is similar, with the exception that the data collected by at-sea monitors will be submitted electronically, for the most part. Similar audits and data transfer methods are being designed for the at-sea monitoring data, in a robust relational Oracle database overseen by the NEFSC. As the integrity of the data collected are the same and of equal quality, the data modeling (use of data in fisheries management) does not have a different process. The data can be pooled and combined, but identifiers are included to be able to parse them out for quality assessment comparisons.

**\*18299** Comment 68: One individual noted that currently the Department of Labor (DOL) has job classifications for Fishery Observer 1, 2, or 3, and asks if the DOL have a job classification for “at-sea monitors,” if the duties of an at-sea monitor are sufficiently different from those of a Fisheries Observer as to warrant a separate job classification, and whether NMFS will realize any cost-savings from hiring at-sea monitors with only high school diplomas.

Response: The DOL does not have a separate job classification for at-sea monitors. Since the duties between at-sea monitors and observers are similar, it is likely that at-sea monitors will be classified and compensated at the same rate as Fishery Observer 1. NMFS may not realize any cost-savings in terms of salaries for at-sea monitors, but other overhead costs, such as training, will be reduced.

Comment 69: One individual highlighted that there are several catch share programs currently in place, including the North Pacific and the Pacific groundfish trawl individual quota programs, that require college degreed observers for at-sea data collection. He noted that implementing such a significant change in policy with regard to educational requirements in the Northeast will have repercussions throughout the fishing industry, observer provider industry, and observer programs, particularly as fisheries begin to transition to catch share programs and the need for additional data collection and monitoring increases. The commenter asked how NMFS plans to address this disparity in policy implementation.

Response: NMFS is aware of concerns regarding hiring at-sea monitors with only a high school diploma, and presented such concerns to the Council during the development of Amendment 16. However, the Council elected to specify lower educational standards for at-sea monitors than used in other programs for the reasons listed in Amendment 16. Despite the fact that educational standards for at-sea monitors differs from similar requirements in other programs, at-sea monitors are separate and distinct from fishery observers and do not necessarily have to be held to the same standards as fishery observers. Because the Amendment 16 at-sea monitor standards are consistent with applicable law, they are implemented by this final rule. The Council and NMFS are free to make changes to the at-sea monitoring program and its eligibility requirements if the Amendment 16 educational standards negatively affect the data quality of at-sea monitors. Each FMP must be evaluated on its own needs, concerns, stances, and merits. Therefore, NMFS does not agree that the standards in Amendment 16 and implemented by this final rule will necessarily affect monitoring programs in other FMPs.

Comment 70: One individual stated that current existing observer programs have significant requirements that prohibit observers from having a financial interest in the resources they are observing. The commenter stated that Amendment 16 contains ambiguous language stating that an at-sea monitor must have “independence” from the fishery in which he/she is collecting information, but does not provide sufficient details to reasonably prohibit conflicts of interest and or withstand legal challenge.

Response: As part of the approval process to become an at-sea and/or dockside monitor provider, providers must sign and submit a document to NMFS that states that they: (1) Do not have a direct or indirect interest in a fishery, managed under Federal regulations, including, but not limited to vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions; (2) will assign at-sea and dockside/roving monitors without regard to any preference by representatives of vessels other than when a monitor will be deployed; and (3) will not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of at-sea and/or dockside/roving providers. In addition, individual at-sea and dockside monitor approved/certified by NMFS will be required to sign a document stating that they do not have a direct or indirect interest in a fishery, managed under Federal regulations, including, but not limited to vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions.

Comment 71: One individual stated that the lack of a contract between the Federal government and the service provider severely limits oversight by Federal managers, creates an undue burden on the Federal agency to make programmatic changes to the monitoring program, does not prevent service providers from non-payment of observers and monitors, and does not provide a timely management mechanism to ensure consistently good performance by service providers. This individual recommended that NMFS should require a no-cost performance-based contract between NMFS and the service provider in order for NMFS to have sufficient program management oversight. If a no-cost contract is not implemented, the commenter believed NMFS should require service providers to be bonded to prevent non-payment of observers and at-sea monitors.

Response: Although there does not have to be a direct contract between NMFS and the service providers, there are detailed requirements to be met by the provider companies and the individual monitors. NMFS reviews the qualifications of the providers through an annual approval process. The individual monitors must meet requirements specified in Amendment 16, and pass the training in order to become certified. NMFS has the authority to disapprove or decertify if any requirements are not being met. NMFS has received sufficient appropriations to fund at-sea monitoring, for FY 2010 at least, and is in the process of issuing a Request for Proposals, which will be a performance-based contract for at-sea monitoring. NMFS will still maintain close oversight of the provider companies and monitors to ensure that performance and reporting expectations are being met, safety is not being compromised, and monitors are being treated fairly. NMFS is continuing to evaluate various service delivery models, such as the no-cost contract. There are provisions to transition to industry funding of at-sea monitors in FY 2012, and at that time NMFS and the Council may consider alternative service delivery models. NMFS is currently investigating mechanisms to protect service providers and individual monitors from failure of either a vessel or service provider to pay for particular services, including permit sanctions for clear non-payment cases.

However, many of these issues are private business matters that should be resolved by the parties involved, rather than requiring NMFS intervention. In sum, NMFS has determined that the system that will be in place addresses the concerns raised.

Comment 72: One individual recommended that NMFS should provide additional information addressing each of the key elements, including training, briefing and debriefing, at-sea training, bonus initiatives, fraud detection, at-sea monitor manuals, additional training requirements that are required in the NMFS observer eligibility policy, and identifying how each element will be implemented for observers and for at-sea monitors.

**\*18300** Response: The at-sea and dockside monitoring training is being designed and conducted by the Northeast Fisheries Observer Program Observer (NEFOP)

Training Center. The training for both certifications is 10 days and includes a full background security check, fish identification, tour of fish house, survival training at sea, vessel safety, safety at the docks and at seafood dealers, compliance reporting, marine mammal identification, sea turtle identification and resuscitation, sea bird identification, catch estimation, fish length measurements, basic gear information on bottom otter trawl, anchored sink gillnet, and bottom longline, hygiene, conflict resolution, data quality and probation policies, gear maintenance, and introduction to the NEFOP staff. The training includes a pre-study assignment, quizzes, required homework assignments, and exams that are required to be passed with a score of 85 percent or above. Attendance at all day's training is mandatory, and overall attitude is assessed by the trainers and service providers. The training will uphold the requirements noted in the NMFS observer eligibility policy, such as requiring a licensed physician note stating that the candidate is physically capable of serving as an at-sea monitor, candidates must be able to clearly and concisely communicate verbally and in writing in English, and candidates must be a U.S. citizen, or a non-citizen who has a green card, TN authorization, H1 visa, or valid work visa, and a social security card. At-sea monitors will be assigned to a NMFS editor with the NEFOP, and regular briefings and debriefings will be performed in person, by email, and by phone. Trip data will undergo a thorough check for patterns that would indicate fraud. Other data sources will be used as comparisons. Fishermen Comment Cards will be distributed, and captain interviews will be conducted. A full at-sea monitoring manual will be available to the public on the NEFOP's website once it has been fully developed.

Comment 73: Three commercial fishermen, the AFM, and the Sustainable Harvest Sector recommend that dockside monitors should not be required for trips in which either an at-sea monitor or fishery observer is deployed. They suggested that such a practice is redundant and a waste of resources.

Response: NMFS disagrees. The roles for dockside monitors and at-sea monitors are different; dockside monitors are intended to verify the landings of a vessel and certify that landings weights on the dealer report are accurate, while at-sea monitors are responsible for verifying area fished, catch, and discards by species and gear type. Furthermore, the responsibilities of a fishery observer differ from those of an at-sea monitor, in that observers are also required to collect biological samples and more comprehensive data on the interactions with protected species and marine mammals. Moreover, because both at-sea monitors and observers do not have the capacity to operate 24 hr per day, and are often required to sub-sample portions of the catch, data from at-sea monitors or observers do not represent a complete accounting of every pound of fish that is retained by a vessel, unlike dealer reports, and cannot be used to validate dealer reports. Finally, the Council did not differentiate in Amendment 16 between trips monitored by an at-sea

monitor or observer for the purposes of defining dockside monitoring coverage levels. Therefore, because the purposes of dockside monitors and at-sea monitors and observers are different, the associated data for each entity are not directly comparable, and because the Council did not consider the exemption requested by the commenters, NMFS is not implementing such an exemption through this final rule.

Comment 74: One commercial fisherman supported the ACE carry-over provisions.

Response: This final rule implements the ACE carry-over provisions, as proposed.

Comment 75: Five commercial fishermen, the AFM, the NSC, and the Sustainable Harvest Sector wanted clarification that an ACE overage is not a violation unless such an overage is not balanced at the end of the FY through acquisition of additional ACE through ACE transfer provisions. To treat an overage as a violation without considering ACE transfers, they believed, is inconsistent with Amendment 16.

Response: In Amendment 16, an overage for the purposes of triggering a violation is distinct from an overage that triggers a sector's AMs (overage deduction).

Section 4.2.3.4 of Amendment 16 explicitly states that sectors are required to ensure that ACEs are not exceeded during a FY and "should project when its ACE will be exceeded and should cease fishing operations prior to exceeding it." If a sector's ACE is exceeded, Amendment 16 prohibits any sector vessel from fishing in a stock area until it acquires additional ACE. Thus, if a sector exceeds its ACE, but fishing vessels in the sector continue to fish in a particular stock area, NMFS considers such fishing to be a violation. For the purposes of applying sector AMs, a sector is not considered to have exceeded its ACE, and is not in violation, unless it cannot rectify such an overage by acquiring ACE from another sector up to 2 weeks following the end of the FY. NMFS believes that the proposed regulations accurately reflected these restrictions, and no revisions to the applicable regulatory text are made in this final rule.

Comment 76: CLF and CCCHFA expressed general support for the universal sector exemptions proposed in Amendment 16.

Response: This final rule implements the proposed universal sector exemptions.

Comment 77: One individual strongly opposed allowing sectors into spawning areas in Ipswich Bay, MA while spawning is occurring, suggesting doing so under Amendment 16 could have disastrous consequences on one of the few large and healthy cod spawning components, including preventing successful spawning and rapidly depleting this unique spawning component. This individual highlights research indicating that fish spawning in Ipswich Bay show site fidelity, are genetically distinct, and contribute to recruitment from Massachusetts to Maine. This individual recommended revising Sector GOM Rolling Closure Area IV to

protect spawning areas and prohibiting recreational vessels from fishing in such areas during spawning periods.

Response: Much of the research highlighted by this individual was not available prior to the decision by the Council to allow sectors to access portions of the existing GOM Rolling Closure Areas and, therefore, was not considered when developing this action. This research could be used by the Council to modify such access in a future action.

Comment 78: The NSC, three associated commercial fishermen, and the AFM supported sector exemptions to use 6-inch (15.24-cm) mesh codends when fishing with the Ruhle trawl or haddock separator trawl on GB. However, five commercial fishermen, the NSC, the AFM, and the Sustainable Harvest Sector also supported similar exemptions in the GOM to facilitate the harvest of GOM haddock.

Response: This final rule implements the universal sector exemption to use 6-inch (15.24-cm) mesh codends when fishing with the Ruhle trawl or haddock separator trawl on GB. When the Groundfish Oversight Committee (Committee) developed this exemption for consideration by the Council at its June 2009 meeting, the Committee *\*18301* explicitly decided not to provide the flexibility for sectors to use 6-inch (15.24-cm) mesh codends in the GOM due to concerns over the potential for this measure to increase interactions with undersized fish. Because there was no justification or analysis provided in Amendment 16 for such an exemption, NMFS cannot modify the universal sector exemptions adopted by the Council in Amendment 16 to allow Sector vessels to use 6-inch (15.24-cm) mesh codends in the GOM through this final rule.

Comment 79: One commercial fisherman, the AFM, and the Sustainable Harvest Sector recommended that sector vessels fishing on a monkfish DAS in the Southern Fishery Management Area, any sector trip west of 72°30' W. long., any sector trip using exclusively 10-inch (25.4-cm) or greater mesh gillnets or codends, and any sector trip by vessels issued a Category F monkfish permit, should be exempt from the sector monitoring requirements, but still be required to comply with all other sector requirements. They argued that such trips catch very small amounts of NE multispecies and should not be subject to provisions that are only necessary to monitor the catch of NE multispecies.

Response: Section 4.2.3.4 of Amendment 16 clearly indicates that the ACE allocated to sectors applies to all catches of those stocks by sector vessels, regardless whether such catch was harvested during a directed NE multispecies trip, or on other trips. The proposed regulations to implement Amendment 16 indicate that applicable sector requirements would apply to all sector trips, and defined a sector trip as any trip taken by a sector vessel in which the vessel declared its intent to fish in the NE multispecies fishery. Therefore, a trip by a sector vessel in another fishery, such as the summer flounder fishery, that does not

require the concurrent use of a NE multispecies DAS would not be subject to the sector requirements. However, a trip by a sector vessel that is also issued a monkfish permit would be considered a sector trip, as defined in this action, because the current monkfish regulations would require the concurrent use of a NE multispecies DAS. Because the Amendment 16 monitoring provisions are designed to ensure that all sector catch is properly accounted for, it would be inconsistent with Amendment 16 to exempt trips that meet the definition of a sector trip from such reporting requirements, as it would not provide the assurance that NE multispecies catch on such trips would be properly accounted for. In addition, because the requested exemptions represent substantial revisions from the proposed measures, it is not appropriate to implement such changes outside of the Council process. Thus, this final rule does not provide the requested exemptions from sector monitoring requirements, as requested.

Comment 80: The PERC, CCCHFA, and TNC supported ACE trading provisions proposed in Amendment 16. TNC suggested that NMFS should develop a clearinghouse for ACE trading, while PERC and the CCCHFA recommended that requiring ACE to be traded within bins of vessel size, gear, or other criteria would help protect the small-boat fleet. The AFM was concerned that, due to the number of sectors affiliated with the NSC, such sectors would be unwilling to transfer ACE with other sectors. AFM argued that NMFS must take action to ensure that other sectors do not place limitations on ACE trades with other sectors. The NSC and associated members emphasized that ACE trades must be approved immediately upon receipt by the Regional Administrator.

Response: NMFS agrees that ACE trading is critical to the success of sector management. Section 4.2.3.7 of Amendment 16 describes ACE transfers as a private business arrangement between sectors that is not subject to any restrictions on the nature of the transactions between sectors. However, there is no reason that a sector could not stipulate such conditions as part of its negotiations to trade ACE with another sector. Further, the Council could implement such restrictions in a future action if data suggest that the small-boat fleet is being adversely affected by unrestricted ACE trading under Amendment 16. Because both the Council and NMFS consider ACE transfers to be a private business arrangement, NMFS is not inclined to dictate the conditions under which individual sectors may trade ACE with one another, including mandating that individual sectors must trade with one another. However, if problems arise due to obstacles in trading ACE that affect conservation and management objectives of the FMP, NMFS or the Council could make changes to measures governing such trading. In addition, these types of potential problems are going to be addressed as stated in response to Comment 59 (i.e., the response to the sector allocation cap removal). NMFS is considering posting ACE balances online to provide the data necessary for various sector

managers to negotiate ACE trades. As outlined in Amendment 16, an ACE transfer is not authorized until approved by NMFS. NMFS intends to review and process ACE transfer requests as quickly as possible. Consistent with Amendment 16, NMFS will approve/disapprove ACE transfer requests based upon whether the sectors requesting the transfer of ACE are complying with sector reporting and administrative requirements implemented by this action.

Comment 81: Despite acknowledging the likely substantial revisions to current record-keeping processes, TNC urged the Council and NMFS to consider ways to recognize private arrangements to distribute fishing history among individual sectors as part of approved ACE transfer requests, as specified in the ACE trading agreements.

Response: The Council froze catch history in Amendment 16, but could accommodate requests similar to those of TNC through a future action. NMFS agrees that recognizing alternative distributions in fishing history as a result of ACE transfers would require substantial revisions to existing record-keeping processes and databases that would significantly increase the complexity of catch monitoring processes currently being developed for approved Amendment 16 measures.

Comment 82: TNC and the CCCHFA expressed general support for Amendment 16 provisions that limit which measures may result in joint liability for sector vessels.

Response: This final rule implements the approved Amendment 16 joint/several liability provisions.

Comment 83: PERC and TNC expressed general support for allowing permits currently in CPH to participate in sectors. The Northeast Coastal Communities Sector noted that because sector catch will be regulated by hard TACs, the sector eligibility requirements should be revised to allow vessels issued an open access NE multispecies permit to participate in sectors and comply with sector provisions.

Response: This final rule allows permits currently in CPH to participate in sectors as approved in Amendment 16, but does not allow vessels issued an open access NE multispecies permit to participate in sectors. As observed in the Northeast Coastal Communities Sector's comment, at its June 2009 meeting, the Council considered requests by industry to revise the sector eligibility restrictions to allow open access permits to participate in sectors, but did not ultimately make such revisions, arguing that there were many opportunities to incorporate such a revision earlier in the development of Amendment 16 and that it would not be *\*18302* appropriate to add such a provision at the last minute due to the potential ramifications on other measures, including PSCs and VMS requirements.

Comment 84: UNFA opposed the Amendment 16 provision that would require that sectors be composed of at least 3 individuals, none of whom have an ownership

interest in one another, citing an example that 10 separate corporations owned by the same people would be prohibited from participating as a sector even though each corporation is a separate legal entity.

Response: Amendment 16 included minimum requirements for sector formation for a number of reasons, including to minimize the concern that one entity (or group of related entities) could obtain an excessive share of the available resource, address concerns that sectors would be a means to circumvent the ITQ referendum requirements of the Magnuson-Stevens Act, ensure accountability among sector members, and reduce the administrative burden of implementing a large number of very small sectors. The example highlighted by UNFA would not comply with the measures approved under Amendment 16, as they would undermine the objectives of this provision.

Comment 85: The CCCHFA supported, while NSC and three associated commercial vessels opposed, the proposed measure that prohibits sectors from carrying over unused ACE of GB yellowtail flounder, Eastern GB cod, and Eastern GB haddock. The NSC and associated commercial fishermen recommended that sectors should be allowed to carry over unused ACE for such stocks as long as the U.S. portion of the TACs specified pursuant to the Understanding are not exceeded, particularly if U.S. vessels are unable to fully harvest available TAC due to complying with more conservative rebuilding requirements than required by the Magnuson-Stevens Act.

Response: When the Council deemed the proposed regulations to be consistent with Amendment 16, they recognized that, although this provision was not specifically described in Amendment 16 itself, they could not identify any provision in Amendment 16 that would allow carry-over for these stocks without risking that the U.S./Canada Management Area TACs would be exceeded. Although projections could be used to determine if the U.S. TACs for these species would be exceeded during the following year to allow carry over on a year-to-year basis, it would not be possible to implement such a measure, yet ensure that the U.S./Canada TACs for these stocks would not be exceeded. Further, if the annual TACs are overestimated, as has occurred in the past several years, overfishing could occur if both the entire U.S. TACs for these species and any carry-over ACE are caught in the following FY. Accordingly, NMFS, under the authority of section 305(d) of the Magnuson-Stevens Act, has retained this measure in the final rule.

### **VMS Requirement**

Comment 86: CLF expressed general support for the proposed VMS provisions that would require all vessels participating in sectors or fishing under a DAS to use VMS.

Response: This final rule implements the VMS provisions as proposed.

### **Transfer of ACE by NOAA-sponsored Permit Banks**

Comment 87: CLF supported the development of permit banks as proposed by NMFS in the proposed rule as an important management tool that could support community-based fisheries and allow new entrants into the fishery. However, they commented that such provisions were neither analyzed by the Council, nor considered in the Amendment 16 FEIS, and that the details of such NOAA-sponsored permit banks are unknown. Based on this, CLF recommended that this provision should not be implemented in this action and that the Council should consider development of such programs in a future action. Similar comments were submitted by NSC and associated individual members. One commercial fisherman and NHCFA suggested that other institutions that formed permit banks should be recognized and allowed to operate in the same manner as NOAA-sponsored permit banks, while TNC requested clarification on what types of entities would qualify as a state-operated permit bank, what constitutes a NOAA-sponsored permit bank, and from what sector management provisions would such permit banks be exempt. Response: NMFS acknowledges that this measure was not considered by the Council in Amendment 16. The establishment of the NOAA-sponsored permit bank occurred independent of the Council process through a \$1 million Congressional appropriation to provide financial assistance to the New England fisheries and to “support a pilot permit banking program through which fishing opportunity will be preserved for small and remote communities in Maine.” Because the initial \$1 million appropriation was specific to the establishment of a pilot permit bank program, NMFS anticipated that, should the permit bank program with the State of Maine be successful, Congress may provide additional appropriations to establish similar permit bank programs in other states. Thus, NMFS intended this provision of the regulations to serve more broadly than simply the current permit bank program with the State of Maine so that any future permit bank programs established in partnership with other States may operate effectively. Upon consideration of public comment on the proposed rule, NMFS recognizes that the regulations specific to NOAA-sponsored permit banks have broader implications on the definition of a sector, as developed by the Council in Amendment 16, and on the ability of existing and future permit banks to operate under the sector provisions approved in Amendment 16. Therefore, it may be appropriate for the Council to consider if and how the measures originally proposed to apply only to the NOAA-sponsored permit banks should be revised to accommodate participation by other institutions or permit banks that are not sponsored by NOAA and operated by a state. To foster further discussion on permit banks and how they are affected by the provisions approved under Amendment 16 and implemented by this action, NMFS has removed proposed measures specific to NOAA-sponsored permit banks through this action and will

recommend that the Council consider addressing public comments received on this provision through a subsequent Council action.

### **Changes From the Proposed Rule**

NMFS has made several changes to the proposed rule, including changes as a result of public comment and the disapproval of the GOM Haddock Sink Gillnet Pilot Program in Amendment 16. Some of these changes are administrative in nature, clarify the new or existing management measures, or correct inadvertent omissions in the proposed rule. These changes are listed below in the order that they appear in the regulations.

The description of the reporting and recordkeeping requirements of this action has been revised to include burdens associated with forwarding trip start/end hauls to NMFS and notifications to vessels, sectors, and NMFS of a dockside or at-sea monitor emergency. These burdens were included in the PRA package reviewed by the OMB as part of this action.

In § 648.10, paragraph (k)(3)(iv), the SNE/MA Stock Area 4, has been reserved and not revised in this final rule, as proposed, so that revisions to the coordinates for this area can be more *\*18303* efficiently implemented in the final rule for Framework Adjustment 44.

In § 648.10(k)(2), the data elements required to be reported by vessels fishing in multiple broad stock areas on the same trip was clarified to reference reporting total catch of all species for each broad stock area fished. This is not expected to affect the public reporting burden associated with the information collection for this action.

In § 648.10(k)(3)(i), point G9 of the GOM Stock Area I has been revised to align the boundary of the GOM Stock Area 1 near the Cape Cod, MA, coastline at 70°00' W. long. with Northeast Region (NER) statistical areas 514 and 521. The area was also modified to terminate at the U.S./Canada maritime boundary.

In § 648.10(k)(3)(ii), point G9 of the Inshore GB Stock Area 2 has been revised to align the boundary of the Inshore GB Stock Area 2 near the Cape Cod, MA, coastline at 70°00' W. long. with NER statistical areas 514 and 521.

In § 648.10(k)(3)(iii), the Offshore GB Stock Area 3 has been revised to terminate the area at the U.S./Canada maritime boundary.

In § 648.14, paragraph (k)(12)(ix) was removed due to the disapproval of the GOM Haddock Sink Gillnet Pilot Program, and paragraphs (k)(13)(ii)(A) and (B) are not revised in this final rule, as proposed, so that revisions to these paragraphs resulting from measures approved under Framework Adjustment 44 may be more efficiently implemented in the final rule for that action.

In § 648.60, the introductory text for paragraph (a)(5)(ii) and paragraph (a)(5)(ii)(C)(2) are not revised in this final rule, as proposed, so that revisions to

these paragraphs resulting from measures approved under Framework Adjustment 44 may be more efficiently implemented in the final rule for that action.

In § 648.81(f)(2)(vi), paragraphs (A) and (D) were removed, and paragraphs (B), (C), and (D) were reclassified as paragraphs (A), (B), and (C), respectively, to delete inaccurate references to Sector Rolling Closure Areas I and V and accurately reflect the Council's intent to exempt sector vessels from the existing GOM Rolling Closure Areas I and V in March and October/November.

In § 648.81(f)(2)(vi)(B), the description for the Sector Rolling Closure Area III has been revised to intersect with the Maine coastline, not New Hampshire, as previously stated.

In § 648.81(f)(2)(vi)(C), the description for the Sector Rolling Closure Area IV has been revised to intersect with the New Hampshire coastline, not Massachusetts, as previously stated.

In § 648.81(n)(2), a duplicate point in the description of the SNE Multispecies Restricted Gear Area, MRAG1, has been removed because it was listed twice.

In § 648.82, the introductory text to paragraph (b)(6) and paragraphs (e)(1)(i) and (n)(1)(ii) are not revised in this final rule, as proposed, so that revisions to these paragraphs resulting from measures approved under Framework Adjustment 44 may be more efficiently implemented in the final rule for that action. Paragraphs (e)(1)(i) and (n)(1)(ii) are instead reserved by this final rule.

In § 648.82(n)(1)(i)(C), point G9 of the Inshore GB Differential DAS Area has been revised to align the boundary of the Inshore GB Differential DAS Area near the Cape Cod, MA, coastline at 70°00' W. long. with NER statistical areas 514 and 521.

In § 648.82(n)(1)(i)(D), the Offshore GB Differential DAS Area was revised to terminate the area at the U.S./Canada maritime boundary.

In § 648.82(n)(2)(ii)(A), point GB3 of the GB Cod Trimester TAC Area has been revised to align the boundary of the GB Cod Trimester TAC Area near the east-facing shoreline of Nantucket, MA, at 41°20' N. lat. with NER statistical areas 521 and 526. The area was also modified to terminate at the U.S./Canada maritime boundary.

In § 648.82(n)(2)(ii)(C), point GB3 of the GB Haddock Trimester TAC Area has been revised to align the boundary of the GB Haddock Trimester TAC Area near the east-facing shoreline of Nantucket, MA, at 41°20' N. lat. with NER statistical areas 521 and 526. The area was also modified to terminate at the U.S./Canada maritime boundary.

In § 648.82(n)(2)(ii)(E), point GB3 of the GB Yellowtail Flounder Trimester TAC Area has been revised to terminate the area at 40°30' N. lat. and the U.S./Canada maritime boundary.

In § 648.82(n)(2)(ii)(H), point GB8 of the American Plaice Trimester TAC Area has been removed because it was unnecessary and directly in line with two other points for area, with points following renumbered to reflect the removal of point GB8.

In § 648.82(n)(2)(ii)(I), point GB8 of the Witch Flounder Trimester TAC Area has been removed because it was unnecessary and directly in line with two other points for area, with points following renumbered to reflect the removal of point GB8.

In § 648.82(n)(2)(ii)(J), point GB5 of the GB Winter Flounder Trimester TAC Area has been revised to terminate the area at 40°30' N. lat. and the U.S./Canada maritime boundary. Point GB14 has been revised to align with the boundary of statistical area 562.

In § 648.82(n)(2)(ii)(L), point 8 of the SNE/MA Winter Flounder Trimester TAC Area has been revised to ensure that the coordinates accurately reflect intersections with the shoreline of Nantucket, MA.

In § 648.82(n)(2)(ii)(M), point RF18 of the Redfish Trimester TAC Area has been revised to align the boundary of the Redfish Trimester TAC Area near the east-facing shoreline of Nantucket, MA at 41°20' N. lat. with NER statistical areas 521 and 526.

In § 648.82(n)(2)(ii)(N), point RF18 of the White Hake Trimester TAC Area has been revised to align the boundary of the White Hake Trimester TAC Area near the east-facing shoreline of Nantucket, MA, at 41°20' N. lat. with NER statistical areas 521 and 526.

In § 648.82(n)(2)(ii)(O), point RF18 of the Pollock Trimester TAC Area has been revised to align the boundary of the Pollock Trimester TAC Area near the east-facing shoreline of Nantucket, MA, at 41°20' N. lat. with NER statistical areas 521 and 526.

In § 648.82(n)(2)(ii)(P), point ATWLF21 of the Atlantic Wolffish Trimester TAC Area has been revised to align the boundary of the Atlantic Wolffish Trimester TAC Area near the east-facing shoreline of Nantucket, MA, at 41°20' N. lat. with NER statistical areas 521 and 526.

In § 648.85, paragraph (b)(9) was removed due to the disapproval of the GOM Haddock Sink Gillnet Pilot Program. In addition, paragraphs (b)(6)(v)(A), (B), (D), (F) through (I), and (K) are not revised in this final rule, as proposed, so that revisions to these paragraphs resulting from adjustments specified in the Framework Adjustment 44 final rule may be more efficiently implemented through the final rule for that action. Instead, paragraphs (B), (D), and (F) of this section are reserved by this final rule.

In § 648.85(a)(3)(v)(B), (b)(6)(iv)(I), and (b)(7)(vi)(D), references to statistical area fished were inserted in the reporting requirements for special management programs to ensure that NMFS can accurately attribute catch to the Eastern

U.S./Canada Area, and references to ocean pout and Atlantic wolffish were removed to reduce the reporting burden associated with stocks that cannot be landed.

In § 648.85(b)(6)(v)(C), point CCGOM11 of the CC/GOM Yellowtail Flounder Stock Area of the Regular B DAS Program was added, and point CCGOM14 was revised to correct the nearshore boundary of the area as it intersects the east-facing shoreline of MA.

**\*18304** In § 648.85(b)(6)(v)(E), a duplicate point in the SNE/MA Yellowtail Flounder Stock Area for the Regular B DAS Program was removed, and point SNEMA9 was revised to correct the boundary of this area, as it intersects the south-facing shoreline of Cape Cod, MA.

In § 648.85(b)(6)(v)(G), points defining the Witch Flounder Stock Area of the Regular B DAS Program were revised to terminate the area at the U.S./Canada maritime boundary.

In § 648.85(b)(8)(v)(E)(1), text was inserted to allow sector vessels fishing in the Eastern U.S./Canada Haddock SAP to use gear other than the haddock separator trawl or the Ruhle trawl to maintain consistency with the preamble text of the proposed rule and measures adopted by the Council in Amendment 16.

In § 648.86, paragraphs (a)(1), (b)(1), and (m)(1) are not revised in this final rule, as proposed, so that revisions to these paragraphs resulting from measures approved under Framework Adjustment 44 may be more efficiently implemented in the final rule for that action. Paragraph (m)(1) of this paragraph is instead reserved by this final rule.

In § 648.87(b)(1)(ii), the introductory text was revised to include reference to ACE transfers when defining when an ACE is exceeded, and to remove an incorrect reference to gear capable of catching NE multispecies to define a sector trip to ensure that sector vessels may continue to participate in exempted fisheries, as proposed.

In § 648.87(b)(1)(ii)(A) through (F) are not revised in this final rule, as proposed, so that revisions to these paragraphs resulting from adjustments specified in the Framework Adjustment 44 final rule may be more efficiently implemented through the final rule for that action. Instead, these paragraphs are reserved by this final rule.

In § 648.87(b)(1)(iii)(B)(3), the regulatory text was revised to clarify that a sector vessel shall be prohibited from fishing on a sector trip in a stock area for which the sector's ACE was exceeded during the previous fishing year by removing an incorrect reference to gear capable of catching NE multispecies to define a sector trip in the example provided in this paragraph.

In § 648.87(b)(1)(iv)(B), a definition of “permit/vessel” has been inserted to clarify the application of vessel replacement and sector commitment restrictions to permits/vessels enrolled in sectors.

In § 648.87(b)(5)(i)(A)(1) and (2), the dockside monitoring trip-start and trip-end hail report requirements have been revised to clarify the data elements that must be reported. In the trip-start hail report, “trip duration” was clarified as the date and time of arrival in port, while language was added to specify that trips less than 6 hr in duration or within 6 hr from port must include the estimated date and time of offload. In the trip-end hail report, the data elements necessary for “all dealers/facilities” were revised to state that the dock/dealer, port/harbor, and state were required for the first dealer/facility where the vessel intends to offload catch, while only the port/harbor and state for the second dealer/facility where the vessel intends to offload catch must be reported. This reduces the amount of information that must be submitted by vessels. In addition, the requirement to report the “estimated total weight of each species on board” was clarified to state that vessels must report the total weight of all regulated NE multispecies species and the total weight of all other species on board. These changes were included in the public reporting burden associated with the information collection for this action.

In § 648.89, paragraph (c)(6) is added to reflect the intent of Amendment 16 to prohibit all vessels, including recreational vessels, from possessing winter flounder from the SNE/MA winter flounder stock area.

In § 648.90(a)(2)(iii), the phrase “the calculation of PSCs” was inserted to clarify the list of measures that may be revised through a framework adjustment.

Under NOAA Administrative Order 205-11, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated authority to sign material for publication in the Federal Register to the Assistant Administrator for Fisheries, NOAA.

### **Classification**

The Regional Administrator determined that the management measures implemented by this final rule are necessary for the conservation and management of the NE multispecies fishery, and are consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be significant for the purposes of Executive Order (E.O.) 12866.

This final rule does not contain policies with federalism or “takings” implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

The Council prepared a FEIS for Amendment 16 to the FMP. The FEIS was filed with the Environmental Protection Agency on October 23, 2009. A notice of availability was published on October 30, 2009 (74 FR 56195). In partially approving the Amendment 16 on January 21, 2010, NMFS issued a ROD

identifying the measures approved under this action. A copy of the ROD is available from NMFS (see ADDRESSES).

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(d)(3), NMFS finds good cause to waive the 30-day delay in effectiveness of this rule. This final rule is necessary to implement measures that will immediately end overfishing on all stocks, establish rebuilding programs for newly overfished stocks, implement measures to rebuild overfished stocks, and establish a process to specify ACLs and associated AMs to maintain compliance with the Magnuson-Stevens Act. In addition, this final rule includes several provisions that help mitigate the adverse economic impacts resulting from continued efforts to end overfishing and rebuild overfished stocks and increase the economic efficiency of vessel operations, including revisions to the DAS Leasing and Transfer Programs, authorization of 17 new sectors, and other measures. This rule must be in effect at the beginning of FY 2010 on May 1, 2010, to fully capture its environmental and economic benefits. In order to have this action effective at the beginning of FY 2010, it is necessary to waive the 30-day delay period for this rule.

The measures implemented by the 2009 interim action will expire on April 30, 2010. While these measures were expected to substantially reduce F for most stocks, overfishing was expected to continue for several stocks, notably GB cod, witch flounder, pollock, and northern windowpane flounder. As a result, it is imperative to implement measures to achieve  $F_{\text{rebuild}}$  for all overfished stocks in the FMP by the start of FY 2010 on May 1, 2010, to end overfishing, ensure that rebuilding programs are not compromised, and increase the likelihood that overfished stocks will rebuild within established rebuilding periods. Failure to waive the 30-day delay in effectiveness would prevent such measures from being implemented on May 1, 2010, and would, therefore, allow for the continuation of overfishing on specific groundfish stocks such as GB cod, witch flounder, pollock, and northern windowpane flounder; stocks in need of substantial F reductions for the start of FY 2010. This would be contrary to not only the interest of the fishing communities, but to the public at large, as overfishing and overfished stocks decreases the ability of the public to enjoy that stock for recreational, *\*18305* aesthetic, or other reasons, and reduces the availability of seafood.

In addition, delay in the implementation of this rule beyond May 1, 2010, could result in short-term adverse economic impacts to NE multispecies vessels and associated fishing communities caused by delaying the rebuilding of overfishing stocks and the benefits associated with sustainable fishery resources. Delaying implementation of this final rule would mean that vessels participating in sectors, at least 812 vessels (55% of the groundfish fleet) as of the January 22, 2010, sector rosters, would not be able to take advantage of the flexibility in vessel operations

provided by exemptions to trip limits and DAS use implemented by this final rule at the start of the year. Moreover, because vessels committed to a sector may not fish in both the common pool and a sector in the same FY, vessels currently signed into a sector would be forced to cease fishing operations entirely after May 1, 2010, until the end of the full 30-day delayed effectiveness period, or forego sector membership for the entire FY, thereby losing the mitigating economic efficiencies of the restrictions relieved for sector vessels. This would reduce the economic efficiency of the fleet until such measures become effective, and cause unnecessary adverse economic impacts to affected vessels, including the majority of active vessels. As a result, delayed implementation of these measures beyond May 1, 2010, would be contrary to the public interest.

#### **FRFA**

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), prepared this FRFA in support of the approved measures in Amendment 16. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, relevant analyses and comments and responses in Amendment 16, and a summary of the analyses completed to support the action. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in the preamble to the proposed and this final rule and is not repeated here.

#### **Summary of the Issues Raised by Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made From the Proposed Rule as a Result of Such Comments**

Comment A: Although not specific to the IRFA, NHCFA stated that Amendment 16 underestimates the economic impacts of proposed measures, but did not provide additional detail as to what this group contends would be the economic impacts of the proposed measures. Further, Mayor Lang of New Bedford, MA stated that the economic analysis must include impacts on communities, including impacts to the tax base and infrastructure if vessels will no longer remain economically viable.

Response: As stated in the response to Comment 4 in this preamble, a full analysis, consistent with guidelines concerning the scope and content of such analyses, of the economic impacts of proposed measures was conducted for this action using the best available scientific information. The analysis notes that there are a number of sources of uncertainty associated with measures in Amendment 16 that make precise evaluation of impacts difficult. A full discussion of the impacts of changes in occupational opportunities and community infrastructure is in Section 7.6.3.4 of the FEIS.

### **Description of and Estimate of the Number of Small Entities to Which the Final Rule Would Apply**

This final rule implements changes that affect any vessel holding a limited access NE multispecies permit, an open access handgear permit (Handgear B permit), and vessels that hold an open access charter/party permit. Based on FY 2007 data in Sections 6.2.3 and 6.2.5.5 of the FEIS, the total number of small entities that may be affected is 3,854 permit holders, including 1,530 limited access permit holders, 1,292 open access Handgear B permit holders, and 762 open access charter/party permits. Of the 1,292 vessels issued Handgear B permits, only 75 reported landing cod, suggesting that the number of such permits affected by this action may be substantially smaller than the number of vessels actually issued Handgear B permits. However, past fishing activity may not be an accurate predictor of future fishing activity, particularly because this action substantially increases cod possession limits for vessels issued Handgear B permits. During FY 2007, 128 of the 762 open access charter/party permit holders reported taking at least one for-hire trip, of which 74 reported keeping NE multispecies on one or more trips. An additional 29 limited access permit holders reported taking passengers for hire, of which 18 reported keeping NE multispecies on one or more for-hire trips. Thus, a total of 92 charter/party operators participated in the charter/party recreational NE multispecies fishery during FY 2007. As of January 22, 2010, 812 vessels elected to join a sector for FY 2010, as determined through the submission of annual sector operations plans. However, vessels may withdraw from sectors until the beginning of FY 2010 on May 1, 2010. Therefore, because participation in sectors is voluntary, the number of vessels that will actually participate in sectors during FY 2010 and future years is likely to fluctuate based upon whether joining a sector or fishing under common pool measures offers the greater economic advantage to each individual vessel.

The Small Business Administration (SBA) size standard for determining small entities for commercial fishing entities (NAICS code 114111) is \$4 million in sales, while the size standard for charter/party operators (part of NAICS code 487210) is \$7 million in sales. Available data indicate that, based on 2005-2007 average conditions, median gross sales by commercial fishing vessels were just over \$200,000, and no single fishing entity earned more than \$2 million. Available data are not adequate to identify affiliated vessels, so each operating unit is considered a small entity for purposes of the RFA. For regulated charter/party operators, the median value of gross receipts from passengers was just over \$9,000, and did not exceed \$500,000 in any year during 2001 to 2007. Therefore, all regulated commercial fishing and all regulated charter/party operators are determined to be small entities under the RFA, and, accordingly, there are no differential impacts between large and small entities under this final rule.

## **Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule**

### ***Reporting and Recordkeeping Requirements***

This final rule contains reporting and recordkeeping requirements and associated information collections subject to the Paperwork Reduction Act (PRA) that have been previously approved by OMB under control numbers 0648-0202, 0648-0212, and 0648-0605. Measures implemented by this final rule include several provisions \*18306 that require either new or revised collection-of-information requirements. Public reporting burden for these collections of information are estimated to average as follows:

1. Sector operations plan and associated NEPA analysis, OMB# 0648-0605, (640 hr/response);
2. Dockside/at-sea monitoring service provider application, OMB# 0648-0605, (10 hr/response);
3. Dockside/at-sea monitoring service provider response to application disapproval, OMB# 0648-0605, (10 hr/response);
4. Data entry for sector discard monitoring system, OMB# 0648-0605, (3 min/response);
5. Sector weekly catch report, OMB# 0648-0605, (4 hr/response);
6. Sector annual report, OMB# 0648-0605, (12 hr/response);
7. Notification of expulsion from a sector, OMB# 0648-0605, (30 min/response);
8. Request to transfer ACE, OMB# 0648-0605, (5 min/response);
9. VMS certification form, OMB# 0648-0605, (10 min/response);
10. VMS confirmation call, OMB# 0648-0605, (5 min/response);
11. VMS area and DAS declaration, OMB# 0648-0605, (5 min/response);
12. VMS trip-level catch reports, OMB# 0648-0605, (15 min/response);
13. Request for a LOA to participate in the GOM Haddock Gillnet Pilot Program, OMB# 0648-0605, (5 min/response);
14. Request for a LOA to fish in a NE multispecies RGA, OMB# 0648-0605, (5 min/response);
15. VMS declaration to fish in a NE multispecies RGA, OMB# 0648-0605, (5 min/response);
16. Pre-trip hail report to a dockside monitoring service provider, OMB# 0648-0605, (2 min/response);
17. Trip-end hail report to a dockside monitoring service provider, OMB# 0648-0605, (15 min/response);
18. Confirmation of dockside monitoring trip-end hail report, OMB# 0648-0605, (2 min/response);
19. Dockside/roving service provider data entry, OMB# 0648-0605, (3 min/response);

20. Dockside/roving or at-sea monitor deployment report, OMB# 0648-0605, (10 min/response);
21. Dockside/roving or at-sea monitoring service provider catch report to NMFS upon request, OMB# 0648-0605, (5 min/response);
22. Dockside/roving or at-sea monitor report of harassment and other issues, OMB# 0648-0605, (30 min/response);
23. OLE debriefing of dockside/roving or at-sea monitors, OMB# 0648-0605, (2 hr/response);
24. Copy of dockside/roving or at-sea monitoring service provider contract upon request, OMB# 0648-0605, (30 min/response);
25. Copy of dockside/roving or at-sea monitoring service provider information materials upon request, OMB# 0648-0605, (30 min/response);
26. Observer program pre-trip notification, OMB# 0648-0605, (2 min/response);
27. Daily VMS catch reports when fishing in the U.S./Canada Management Area and CA II SAPs, OMB# 0648-0605, (15 min/response);
28. Daily VMS catch reports when fishing in the CA I Hook Gear Haddock SAP, OMB# 0648-0605, (15 min/response);
29. Daily VMS catch reports when fishing in the Regular B DAS Program, OMB# 0648-0605, (15 min/response);
30. Copy of the dealer weigh-out slip or dealer signature of the dockside monitor report, OMB# 0648-0605, (2 min/response);
31. Forward trip start/end hails to NMFS, OMB# 0648-0605 (2 min/response); and
32. Notification to vessel/sector/NMFS of monitor emergency, OMB# 0648-0605 (5 min/response).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. NMFS will merge these new collections with existing collections approved under OMB control numbers 0648-0202 and 0648-0212 when possible. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see addresses) and by e-mail to David-Rostker@omb.eop.gov, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

### **Other Compliance Requirements**

The only other compliance requirements associated with this final rule are those associated with the gear requirements specified for the NE multispecies RGAs. Any NE multispecies vessel that elects to fish in the common pool is required to

utilize selective fishing gear when fishing in the NE multispecies RGAs. If a vessel does not already possess such selective gear, a new haddock separator trawl net, rope trawl, or Ruhle trawl is estimated to cost approximately \$13,000, or it would cost about \$750 to modify existing gear. Sector vessels are not subject to the RGA measures or the costs associated with such selective gear.

**Description of Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes**

This final rule implements a number of measures that minimize the long-term economic impacts on small entities and provide small entities with some degree of flexibility to be able to offset at least some portion of the estimated economic impacts associated with other measures implemented by this action. Rebuilding programs for overfished stocks implemented by this action ensure that sustainable fisheries can be achieved and maintained so that vessels can ultimately fish for, and land, all stocks managed by the FMP. Similarly, the process to specify ABCs and ACLs for each stock, distribute them among various fishery components that catch regulated species and ocean pout, and trigger applicable AMs once the ACLs are exceeded increases the likelihood that overfishing will be prevented and that overfished stocks will continue to rebuild. This would, in turn, increase vessel revenues by promoting sustainable fisheries over the longterm. Revised reporting requirements provide the timely data necessary to effectively monitor catch toward these ACLs and enhance data available to more accurately assess catch and, therefore, F for each stock. Failure to implement new rebuilding programs or a process to establish ACLs and AMs for each stock through this action would cause the FMP to be out of conformance with the Magnuson-Stevens Act. Further, without more timely and comprehensive reporting requirements, the data necessary to effectively monitor catch would not be available. This could cause ACLs to be unnecessarily exceeded and result in more stringent management measures in the future to end overfishing. Furthermore, if ACLs were not distributed among various components of the fishery that catch regulated species and ocean pout, all fisheries may be subject to additional reductions in fishing effort to end overfishing and achieve the conservation objectives of applicable law and the FMP. Thus, these further economic impacts are avoided through implementation of measures in this action.

*\*18307* Amendment 16 analysis (see Section 7.5.11.1.6 of the Amendment 16 FEIS) indicates that the effort control option selected for common pool vessels (i.e., 24-hr DAS counting in conjunction with an overall DAS reduction) is expected to result in substantially fewer adverse economic impacts, in both total fishing revenue and revenue from trips in which regulated species and ocean pout were the predominant species landed, than the other options considered. The

conclusion that the selected alternative was superior with respect to the potential estimated negative economic impacts was the primary reason this particular effort control option was selected by the Council and approved by NMFS. Even though the no action alternative would have resulted in the fewest economic impacts to affected vessels and likely would have provided sufficient DAS for vessels to meet annual expenses, the no action alternative would not have achieved the reductions in F necessary to end overfishing, rebuild overfished stocks, or achieve the biological objectives of the FMP. Therefore, the no action alternative is not consistent with applicable law and cannot be implemented through this action. RGAs implemented under this action help increase the selectivity of the fishery, reducing catch of overfished stocks such as yellowtail flounder and winter flounder, and increasing the likelihood that conservation objectives for these stocks will be achieved. In doing so, economic impacts should be mitigated over the long term by increasing the probability that stocks will rebuild in a timely manner. Recreational measures implemented by this action include an extended seasonal GOM cod prohibition. This measure is considered to be the most effective measure for reducing actual catch and, therefore, fishing mortality on GOM cod, in contrast to the other alternatives considered. By more effectively reducing catch of GOM cod, it is less likely that recreational catch of GOM cod will exceed the portion of the GOM cod ACL distributed to the recreational fishery and trigger AMs during the following FY. Avoiding implementation of AMs reduces economic impacts to recreational vessels, especially if less effective measures at reducing catch (trip or size limits) are implemented as AMs. These types of AMs would have to be implemented over a longer duration to achieve similar results as a possession prohibition, particularly if implemented late in the FY following an overage. As noted above, the recreational allocation implemented through this action ensures that the recreational fishery would not be subject to any further effort controls to reduce catch due to excessive catch by other components of the fishery. This should minimize adverse economic impacts to each component of the fishery, as each component would only be responsible for its portion of F on each stock. The elimination of the hook restriction allows the recreational fishery to more efficiently catch allowable limits, while the requirement to maintain at least 2 inches (5.08 cm) of contiguous skin on the fillets maintains existing practices that provide revenue to party/charter vessels, while facilitating the enforcement of size and trip limits.

The measures implemented by this action that specifically help minimize the significant economic impacts on small entities include revisions to the DAS Leasing and Transfer Programs, revisions to existing SAPs to facilitate the targeting of healthy stocks of haddock, increased trip limits for certain stocks, and revisions to sector measures. Changes to the DAS Leasing and Transfer Programs

in Amendment 16 are intended to eliminate administrative obstacles that limited participation in these programs. This is likely to increase participation in these programs and, therefore, the economic efficiency of vessel operations. Such changes will also likely increase the possibility that vessels fishing under a NE multispecies DAS, particularly common pool vessels, would be able to acquire sufficient DAS to meet annual operating expenses and remain economically viable, despite additional effort controls in the NE multispecies fishery. These benefits would not have accrued under the no action option for each of these measures. Revisions to the existing SAPs facilitate the harvest of haddock by continuing the Eastern U.S./Canada Haddock SAP, expanding both the season and area for the CA I Hook Gear Haddock SAP, and revising the existing CA II Yellowtail Flounder SAP to provide opportunities to access CA II to target haddock even when there is insufficient GB yellowtail flounder TAC to support a targeted fishery for GB yellowtail flounder both inside and outside the existing CA II Yellowtail Flounder SAP. These revisions increase the likelihood that the fishery will harvest more of the abundant stocks of haddock, particularly on GB. Accordingly, this action will increase vessel revenue due to increased catch of available haddock resources, which may at least help offset reductions in revenue expected from increased effort controls necessary to rebuild overfished stocks. Although the effort reductions implemented by this action convert some Category A DAS to Category B DAS for common pool vessels, this may increase incentives to fish more selectively within these SAPs to enable vessels to avoid stocks of concern and continue fishing under a Category B DAS, thereby maximizing the economic return on available Category A and B DAS without compromising efforts to rebuild overfished stocks. Increased trip limits for GB cod and CC/GOM and SNE/MA yellowtail flounder are intended to offset the substantial effort reductions in the form of reductions in Category A DAS and 24-hr DAS counting implemented by this action. Because of the commingled nature of the NE multispecies fishery, revisions to these trip limits are expected to narrow the gap between F reductions achieved and F reductions necessary for these stocks under this action. As a result, these trip limits will not only meet the biological objectives of this action based upon supporting analysis in Amendment 16, but will also increase revenue for common pool vessels.

Several of the revisions to sector measures could help mitigate the economic impacts of this action. All approved sectors are exempt from several provisions, including portions of the GOM Rolling Closure Areas, NE multispecies DAS restrictions, seasonal closure areas, trip limits on stocks allocated to sectors, and the requirement to use 6.5-inch (16.51-cm) mesh when using selective trawl gear on GB with a 6-inch (15.24-cm) codend. Such exemptions reduce operational costs of sectors by minimizing the scale and complexity of analyses that need to be

developed on a yearly basis to support approval of the sector's operation plans. All of these exemptions also help increase the operational efficiency of sector vessels and would likely lead to increased revenue for participating vessels. Because sector vessels are no longer be limited by DAS allocations and are instead limited by their available ACE, the economic incentive changes from maximizing the value of all species on a DAS to maximizing the value of the ACE. This change places a premium on timing of landings to market conditions, as well as changes in the selectivity and composition of species landed on fishing trips. Therefore, available information suggests that economic performance among sector vessels may be expected to improve relative to continuing to remain under effort controls. ACE trading is also expected to help ensure that sectors **\*18308** have sufficient ACE available to continue operations in key stock areas and match individual sector ACE portfolios with recent fishing activity by participating vessels or available fishing opportunities. In addition, vessels that declared their intent to participate in one of the existing sectors are allocated GB cod based upon landings history of this stock between FYs 1996 through 2001. This was meant to increase the stability of sector allocations and preserve the value of existing sector permits, particularly for those vessels that invested in permits with high landings histories of this stock during this period. This action also provides the Regional Administrator with the authority to exempt sector vessels from some of the proposed reporting requirements for multi-area trips, or when participating in SMPs. Although such exemptions have not been granted at this time, if such exemptions are granted in the future, this may reduce the operational costs to vessels, as they would not be required to submit daily or trip-level catch reports via VMS that cost as much as \$0.764 per submission. Finally, by authorizing 17 new sectors, participating vessels can pool harvesting resources and consolidate fishing effort onto fewer vessels to increase the flexibility and economic efficiency of fishing operations. Because sectors are self-selecting groups, they provide incentives to self-govern and assurance to participating vessels that sector members would not face catch reductions as a result of overages by other sectors or the common pool. Under the no action alternative, none of the above benefits associated with the proposed revised sector would be realized.

Many of the benefits of reducing costs and increasing the efficiency of vessel operations described above would not be realized had other options been selected by the Council and approved in this action. Even though the no action alternative for some measures would have resulted in the fewest economic impacts to affected vessels, the no action alternative, overall, would not have achieved the reductions in F necessary to rebuild overfished stocks or the biological objectives of the FMP and is, therefore, not consistent with applicable law. In contrast, the measures implemented by this action are consistent with applicable law because they would

achieve the biological objectives of the FMP, including implementing rebuilding plans for newly overfished stocks and reducing F for all stocks necessary to rebuild stocks within established rebuilding periods, while resulting in the fewest economic impacts to affected entities among the other alternatives considered. Over the long-term, economic benefits from rebuilt stocks would mean that this action would produce the most economic benefits to affected entities once stocks rebuild when compared to the alternatives considered in this action. Other measures implemented by this final rule, but not specifically mentioned above, such as sector definitions, sector overage penalties, dockside and at-sea monitoring standards, and Sector joint/several liability provisions are all administrative in nature and have little, if any, influence over economic impacts to affected entities. A complete description of why each measure was selected can be found in the ROD developed in support of this action and in Section 4.2 of the Amendment 16 FEIS (see ADDRESSES).

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide, i.e., permit holder letter, will be sent to all holders of permits for the multispecies, monkfish, and scallop fisheries, along with each individual issued a Federal dealer permit. The guide and this final rule will be available upon request.

### **List of Subjects**

#### ***15 CFR Part 902***

Reporting and recordkeeping requirements.

#### ***50 CFR Part 648***

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 25, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 15 CFR part 902, and 50 CFR part 648 are amended as follows:

**PART 902-NOAA INFORMATION COLLECTION REQUIREMENTS  
UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL  
NUMBERS**

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 et seq.

15 CFR § 902.1

2. In § 902.1, the table in paragraph (b) under 50 CFR is amended by:

a. Revising OMB control numbers for the existing entries for sections § 648.4, § 648.7, § 648.9, § 648.10, § 648.14, §§ 648.80 through 648.82, and §§ 648.85 through § 648.89; and

b. Adding new OMB control numbers in numerical order and new entries for § 648.90 to read as follows:

15 CFR § 902.1

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

\* \* \* \* \*

(b) Display.

<b>CFR part or section where the information collection requirement is located</b>	<b>Current OMB control number (all numbers begin with 0648-)</b>
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\* \* \* \* \*

50 CFR

\* \* \* \* \*

648.4

-0202, -0212, and -0529.

\* \* \* \* \*

648.7

-0018, -0202, -0212, -0229, -0590, and -0605.

\* \* \* \* \*

648.9

-0202, -0404, and -0529.

648.10

-0202, -0529, and -0605.

\* \* \* \* \*

648.14

-0202, -0212, -0469, -0602, and -0605.

\* \* \* \* \*

648.80

-0202, -0422, and -0602.

648.81

-0202, -0412, and -0605.

648.82

-0202 and -0605.

\* \* \* \* \*

648.85

-0202, -0212, and -0605.

648.86

-0202, -0391, and -0605.

648.87	-0202 and -0605.
648.88	-0202 and -0605.
648.89	-0202, -0412, and -0605.
648.90	-0202 and -0605.
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**\*18309 PART 648-FISHERIES OF THE NORTHEASTERN UNITED STATES**

3. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

50 CFR § 648.2

4. In § 648.2, revise the definitions for “NE multispecies or multispecies,” “Regulated species,” and “Sector,” and add new definitions for “Annual catch entitlement (ACE),” “At-sea monitor,” “Common pool trip,” “Common pool vessel,” “Dockside/roving monitor,” “Electronic monitoring,” “Observer/sea sampler,” “Potential Sector contribution (PSC),” “Sector trip,” and “Sector vessel” in alphabetical order to read as follows:

50 CFR § 648.2

**§ 648.2 Definitions.**

\* \* \* \* \*

Annual catch entitlement (ACE), with respect to the NE multispecies fishery, means the share of the annual catch limit (ACL) for each NE multispecies stock that is allocated to an individual sector based upon the cumulative fishing history attached to each permit participating in that sector in a given year. This share may be adjusted due to penalties for exceeding the sector's ACE for a particular stock in earlier years, or due to other violations of the FMP, including the yearly sector operations plan. When a sector's share of a NE multispecies stock, as determined by the fishing histories of vessels participating in that sector, is multiplied by the available catch, the result is the amount of ACE (live weight in pounds) that can be harvested (landings and discards) by participants in that sector during a particular fishing year.

At-sea monitor, with respect to the NE multispecies fishery, means any person responsible for observing, verifying, and reporting area fished, catch, and discards of all species by gear type for sector trips as part of an approved sector at-sea monitoring program.

\* \* \* \* \*

Common pool trip, with respect to the NE multispecies fishery, means any trip taken by a common pool vessel under a NE multispecies DAS or under the provisions of a limited access NE multispecies Small Vessel or Handgear A permit, or an open access Handgear B permit that lands regulated species or ocean pout.

Common pool vessel, with respect to the NE multispecies fishery, means any vessel issued a limited access NE multispecies permit or open access NE multispecies Handgear B permit that is not a member of an approved sector for a particular fishing year and that is not operating under the provisions of an approved sector operations plan. Such vessels must use a NE multispecies DAS, or be fishing under the provisions of a limited access NE multispecies Small Vessel or Handgear A permit, or an open access Handgear B permit, to land regulated species or ocean pout, and must comply with effort controls, trip limits, gear restricted areas, and other provisions specified in this part. Vessels fishing under the provisions of the common pool are also referred to as non-sector vessels.

\* \* \* \* \*

Dockside/roving monitor, with respect to the NE multispecies fishery, means any person responsible for observing/verifying the offloads of all species by common pool or sector vessels either directly to a federally permitted dealer or to a truck for later delivery to a federally permitted dealer, and for certifying the accuracy of landed weights, as reported by federally permitted dealers, pursuant to this part.

\* \* \* \* \*

Electronic monitoring, with respect to the NE multispecies fishery, means any equipment that is used to monitor area fished and the amount and identity of species kept and discarded in lieu of at-sea monitors as part of an approved Sector at-sea monitoring program.

\* \* \* \* \*

Northeast (NE) multispecies or multispecies means the following species:

American plaice-Hippoglossoides platessoides.

Atlantic cod-Gadus morhua.

Atlantic halibut-Hippoglossus hippoglossus.

Atlantic wolffish-Anarhichas lupus.

Haddock-Melanogrammus aeglefinus.

Ocean pout-Macrozoarces americanus.

Offshore hake-Merluccius albidus.

Pollock-Pollachius virens.

Redfish-Sebastes fasciatus.

Red hake-Urophycis chuss.

Silver hake (whiting)-Merluccius bilinearis.

White hake-Urophycis tenuis.

Windowpane flounder-Scophthalmus aquosus.

Winter flounder-Pleuronectes americanus.

Witch flounder-Glyptocephalus cynoglossus.

Yellowtail flounder-Pleuronectes ferruginea.

\* \* \* \* \*

Observer/sea sampler means any person certified/approved by NMFS to collect operational fishing data, biological data, or economic data through direct observation and interaction with operators of commercial fishing vessels as part of NMFS' Northeast Fisheries Observer Program and Northeast At-sea Monitoring Program. Observer/sea samplers are also referred to as fisheries observers, fisheries observers/sea samplers, and NMFS-certified fisheries observers/sea samplers.

\* \* \* \* \*

Potential Sector contribution (PSC), with respect to the NE multispecies fishery, means an individual vessel's share of the ACL for each stock of regulated species or ocean pout that is derived from the fishing history associated with the permit issued to that particular vessel for the purposes of participating in a sector and contributing to that sector's ACE for each stock allocated to sectors under the NE Multispecies FMP.

\* \* \* \* \*

Regulated species, means the subset of NE multispecies that includes Atlantic cod, witch flounder, American plaice, yellowtail flounder, haddock, pollock, winter flounder, windowpane flounder, redfish, white hake, Atlantic halibut, and Atlantic wolffish. Regulated species is also referred to as regulated NE multispecies.

\* \* \* \* \*

Sector, with respect to the NE multispecies fishery, means a group of persons holding limited access NE multispecies permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and that have been allocated a portion of the TACs of species managed under the NE Multispecies FMP to achieve objectives consistent with the applicable goals and objectives of the FMP. Each sector must meet the sector eligibility and minimum size requirements specified in § 648.87(a)(3) and (4) to be approved by NMFS.

Sector trip, with respect to the NE multispecies fishery, means any trip taken by a sector vessel subject to the restrictions and conditions of an approved sector operations plan, as specified in § 648.87(c), in which the vessel declared its intent to fish in the NE multispecies fishery pursuant to § 648.10.

**\*18310** Sector vessel, with respect to the NE multispecies fishery, means any vessel assigned a permit that is a member of an approved sector for a particular fishing year and that is subject to the restrictions and conditions of an approved sector operations plan, as specified in § 648.87.

\* \* \* \* \*50 CFR § 648.4

3. In § 648.4, remove paragraph (a)(1)(i)(I)(3) and revise paragraphs (a)(1)(i)(E) and (c)(2)(iii)(A) to read as follows:

50 CFR § 648.4

**§ 648.4 Vessel permits.**

(a) \* \* \*

(1) \* \* \*

(i) \* \* \*

(E) Replacement vessels. An owner of a vessel that has been issued any limited access or moratorium permit under this section is limited to one vessel replacement permit year, using the earliest permit year start date of the limited access or moratorium permits for which the vessel is eligible, unless the vessel has been rendered inoperable and non-repairable. With the exception of vessels that have obtained a limited access Handgear A permit described in § 648.82(b)(6), to be eligible for a limited access or moratorium permit under this section, the replacement vessel must meet the following criteria and any other applicable criteria under paragraph (a)(1)(i)(F) of this section:

(1) The replacement vessel's horsepower may not exceed by more than 20 percent the horsepower of the vessel's baseline specifications, as applicable.

(2) The replacement vessel's length, GRT, and NT may not exceed by more than 10 percent the length, GRT, and NT of the vessel's baseline specifications, as applicable.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) \* \* \*

(A) For vessels fishing for NE multispecies with gillnet gear, with the exception of vessels fishing under the Small Vessel permit category, an annual declaration as either a Day or Trip gillnet vessel designation as described in § 648.82(j). A vessel owner electing a Day gillnet designation must indicate the number of gillnet tags that he/she is requesting, and must include a check for the cost of the tags, unless the vessel already possesses valid gillnet tags, as identified by the Regional Administrator. A permit holder letter will be sent to the owner of each eligible gillnet vessel, informing him/her of the costs associated with this tagging requirement and providing directions for obtaining valid tags. Once a vessel owner has elected this designation, he/she may not change the designation or fish under the other gillnet category for the remainder of the fishing year. Incomplete applications, as described in paragraph (e) of this section, will be considered incomplete only for the purposes of obtaining authorization to fish in the NE multispecies gillnet fishery and otherwise will be processed or issued without a gillnet authorization.

\* \* \* \* \*50 CFR § 648.7

4. In § 648.7, revise paragraphs (b)(1)(i), (e), and (f)(2)(i); and add paragraphs (a)(4), (h), and (i) to read as follows:

50 CFR § 648.7

**§ 648.7 Recordkeeping and reporting requirements.**

\* \* \* \* \*

(a) \* \* \*

(4) Facilitation of a dockside/roving monitor report. Any federally permitted dealer, or any individual acting in the capacity of a dealer, that purchases or receives fish from a vessel operating under the provisions of an approved sector operations plan, as specified in § 648.87(c), or from a common pool vessel starting in fishing year 2012 must provide a copy of any weigh-out documents or dealer receipts for that particular offloading event to the dockside/roving monitor and vessel and allow the dockside/roving monitor to sign a copy of the official weigh-out document or dealer receipt retained by the dealer, or sign a dockside monitoring report provided by a dockside/roving monitor that verifies the amount of each species offloaded, as instructed by the Regional Administrator.

(b) \* \* \*

(1) \* \* \*

(i) The owner or operator of any vessel issued a valid permit or eligible to renew a limited access permit under this part must maintain on board the vessel, and submit, an accurate fishing log report for each fishing trip, regardless of species fished for or taken, on forms supplied by or approved by the Regional Administrator. As stated in paragraph (f)(2)(i) of this section, if no fishing trip is made during a week or month, a report stating so must be submitted for each week or month, as applicable, based upon whether any fishing activity occurred during a particular reporting week or month (i.e., starting a trip, landing, or offloading catch will constitute fishing during a reporting week or month). If authorized in writing by the Regional Administrator, a vessel owner or operator may submit reports electronically, for example by using a VMS or other media. With the exception of those vessel owners or operators fishing under a surfclam or ocean quahog permit, at least the following information and any other information required by the Regional Administrator must be provided: Vessel name; USCG documentation number (or state registration number, if undocumented); permit number; date/time sailed; date/time landed; trip type; number of crew; number of anglers (if a charter or party boat); gear fished; quantity and size of gear; mesh/ring size; chart area fished; average depth; latitude/longitude (or loran station and bearings); total hauls per area fished; average tow time duration; hail weight, in pounds (or count of individual fish, if a party or charter vessel), by species, of all species, or parts of species, such as monkfish livers, landed or discarded; and, in the case of skate discards, “small” (i.e., less than 23 inches (58.42 cm), total length) or “large” (i.e., 23 inches (58.42 cm) or greater, total length) skates; dealer permit number; dealer

name; date sold, port and state landed; and vessel operator's name, signature, and operator's permit number (if applicable).

\* \* \* \* \*

(e) Record retention-(1) Dealer records. Any record, as defined in § 648.2, related to fish possessed, received, or purchased by a dealer that is required to be reported, must be retained and made available for immediate review for a total of 3 years after the date the fish were first possessed, received, or purchased. Dealers must retain the required records and reports at their principal place of business.

(2) VTRs. Copies of fishing log reports must be kept on board the vessel and available for review for at least 1 year, and must be retained for a total of 3 years after the date the fish were last possessed, landed, and sold.

(3) Dockside/roving and at-sea monitor reports. Any record, as defined in § 648.2, related to fish offloaded and observed by a dockside/roving or at-sea monitor, including any reports provided to NMFS, sector managers, or another third-party service provider specified in paragraph (h) of this section, must be retained and made available for immediate review for a total of 3 years after the date the fish were first offloaded. Dockside/roving and at-sea monitor providers must retain the required records and reports at their principal place of business.

(f) \* \* \*

(2) \* \* \*

(i) For any vessel not issued a NE multispecies permit, fishing vessel log **\*18311** reports, required by paragraph (b)(1)(i) of this section, must be postmarked or received by NMFS within 15 days after the end of the reporting month. If no fishing trip is made during a particular month for such a vessel, a report stating so must be submitted, as instructed by the Regional Administrator. For any vessel issued a NE multispecies permit, fishing vessel log reports must be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If no fishing trip is made during a reporting week for such a vessel, a report stating so must be submitted and received by NMFS by midnight of the first Tuesday following the end of the reporting week, as instructed by the Regional Administrator. For the purposes of this paragraph (f)(2)(i), the date when fish are offloaded will establish the reporting week or month that the VTR must be submitted to NMFS, as appropriate. Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) will constitute fishing during that reporting week and will eliminate the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel issued a NE multispecies permit begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the

third week, but a negative report (i.e., a “did not fish” report) would not be required for either week.

\* \* \* \* \*

(h) Dockside/roving monitor reports. Any dockside/roving monitor assigned to observe the offload of a vessel on a sector trip must record the amounts of all species offloaded and report such amounts to that particular vessel's sector manager and a third-party service provider, if specified in the operations plan or the private contract between the dockside/roving monitor service provider and an individual sector. Such reports must be made available to dealers for signature, as instructed by the Regional Administrator.

(i) At-sea monitor/electronic monitoring reports. Any at-sea monitor assigned to observe a sector trip and any third-party service provider analyzing data from electronic monitoring equipment deployed on a sector trip must submit reports on catch, discard, and other data elements specified by the Regional Administrator to NMFS, the sector manager, and monitoring contractor, as instructed by the Regional Administrator.

50 CFR § 648.10

5. In § 648.10, revise paragraphs (b)(4) and (e)(1)(v), and add paragraph (k) to read as follows:

50 CFR § 648.10

**§ 648.10 VMS and DAS requirements for vessel owners/operators.**

\* \* \* \* \*

(b) \* \* \*

(4) A vessel issued a limited access NE multispecies permit that fishes or intends to fish under a NE multispecies Category A or B DAS, or catches regulated species or ocean pout while on a sector trip; or a vessel issued a limited access NE multispecies small vessel category or Handgear A permit that fishes in multiple stock areas pursuant to paragraph (k)(2) of this section;

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(v) The owner of a vessel issued a limited access NE multispecies permit that fishes or intends to fish under a NE multispecies Category A or B DAS, or that catches regulated species or ocean pout while on a sector trip, as specified in paragraph (b)(4) of this section, must provide documentation to the Regional Administrator that the vessel has an operational VMS unit installed on board, meeting all requirements of this part, prior to fishing under a NE multispecies DAS or under the provisions of an approved sector operations plan.

\* \* \* \* \*

(k) Area-specific reporting requirements for NE multispecies vessels.-(1) Reporting requirements for all limited access NE multispecies vessel owners or operators. In addition to any other reporting requirements specified in this part, the owner or operator of any vessel issued a limited access NE multispecies permit on either a common pool or sector trip must declare its intent to fish within one or more of the NE multispecies broad stock areas, as defined in paragraph (k)(3) of this section, and provide the VTR serial number for the first page of the VTR for that particular trip via VMS prior to leaving port at the start of a fishing trip, as instructed by the Regional Administrator.

(2) Reporting requirements for NE multispecies vessel owners or operators fishing in more than one broad stock area per trip. Unless otherwise provided in this paragraph (k)(2), the owner or operator of any vessel issued a NE multispecies limited access permit that has declared its intent to fish within multiple NE multispecies broad stock areas, as defined in paragraph (k)(3) of this section, on the same trip must submit a trip-level hail report via VMS detailing the amount of each regulated species retained (in pounds, landed weight) and the total amount of all species retained (in pounds, landed weight), including NE multispecies and species managed by other FMPs, from each broad stock area prior to crossing the VMS demarcation line, as defined in § 648.10, upon its return to port following each fishing trip on which regulated species were caught, as instructed by the Regional Administrator. This reporting requirement is in addition to the reporting requirements specified in paragraph (k)(1) of this section and any other reporting requirements specified in this part. A vessel is exempt from the reporting requirements specified in this paragraph (k)(2) if it is fishing in a special management program, as specified in § 648.85, and is required to submit daily VMS catch reports consistent with the requirements of that program. The Regional Administrator may adjust the reporting frequency specified in this paragraph and may exempt vessels on a sector trip from the reporting requirements specified in this paragraph (k)(2) if it is determined that such reporting requirements would duplicate those specified in § 648.87(b).

(3) NE multispecies broad stock areas. For the purposes of the area-specific reporting requirements listed in paragraphs (k)(1) and (2) of this section, the NE multispecies broad stock areas are defined in paragraphs (k)(3)(i) through (iv) of this section. Copies of a map depicting these areas are available from the Regional Administrator upon request.

(i) GOM Stock Area 1. The GOM Stock Area 1 is bounded on the east by the U.S./Canadian maritime boundary and straight lines connecting the following points in the order stated: frefee

**GOM Stock Area 1**

**Point N. latitude W. longitude**

G1	<sup>1</sup>	1
CII3	<sup>1</sup>	67°20'
G6	42°20'	67°20'
G10	42°20'	70°00'
G9	<sup>2</sup>	70°00'

(ii) Inshore GB Stock Area 2. The Inshore GB Stock Area 2 is defined by straight lines connecting the following points in the order stated:

**Inshore GB Stock Area 2**

**Point N. latitude W. longitude**

G9	<sup>2</sup>	70°00'
G10	42°20'	70°00'
IGB1	42°20'	68°50'
IGB2	41°00'	68°50'
IGB3	41°00'	69°30'
IGB4	41°10'	69°30'
IGB5	41°10'	69°50'
IGB6	41°20'	69°50'
IGB7	41°20'	70°00'
G12	<sup>2</sup>	70°00'

*\*18312* (iii) Offshore GB Stock Area 3. The Offshore GB Stock Area 3 is bounded on the east by the U.S./Canadian maritime boundary and defined by straight lines connecting the following points in the order stated:

**Offshore GB Stock Area 3**

**Point N. latitude W. longitude**

IGB1	42°20'	68°50'
G6	42°20'	67°20'
CII3	<sup>1</sup>	67°20'
SNE2	39°00'	<sup>1</sup>
SNE3	39°00'	69°00'
SNE4	39°50'	69°00'
SNE5	39°50'	68°50'
IGB1	42°20'	68°50'

(iv) [Reserved]

50 CFR § 648.11

6. In § 648.11, add paragraphs (j) and (k) to read as follows:

50 CFR § 648.11

**§ 648.11 At-sea sea sampler/observer coverage.**

\* \* \* \* \*

(j) In the event that a vessel is requested by the Regional Administrator to carry a NMFS-certified fisheries observer pursuant to paragraph (a) of this section and is also selected to carry an at-sea monitor as part of an approved sector at-sea monitoring program specified in § 648.87(b)(1)(v) for the same trip, only the NMFS-certified fisheries observer is required to go on that particular trip.

(k) NE multispecies observer coverage-(1) Pre-trip notification. Unless otherwise specified in this paragraph (k), or notified by the Regional Administrator, the owner, operator, or manager of a vessel (i.e., vessel manager or sector manager) issued a limited access NE multispecies permit that is fishing under a NE multispecies DAS or on a sector trip, as defined in this part, must provide advanced notice to NMFS of the vessel name, permit number, and sector to which the vessel belongs, if applicable; contact name and telephone number for coordination of observer deployment; date, time, and port of departure; area to be fished; and gear type to be used at least 48 hr prior to departing port on any trip declared into the NE multispecies fishery pursuant to § 648.10 or § 648.85, as instructed by the Regional Administrator, for the purposes of selecting vessels for observer deployment. For trips lasting 48 hr or less in duration from the time the vessel leaves port to begin a fishing trip until the time the vessel returns to port upon the completion of the fishing trip, the vessel owner, operator, or manager may make a weekly notification rather than trip-by-trip calls. For weekly notifications, a vessel must notify NMFS by 0001 hr of the Friday preceding the week (Sunday through Saturday) that they intend to complete at least one NE multispecies DAS or sector trip during the following week and provide the date, time, port of departure, area to be fished, and gear type to be used for each trip during that week. Trip notification calls must be made no more than 10 days in advance of each fishing trip. The vessel owner, operator, or manager must notify NMFS of any trip plan changes at least 24 hr prior to vessel departure from port. A vessel may not begin the trip without being issued an observer notification or a waiver by NMFS.

(2) Vessel selection for observer coverage. NMFS shall notify the vessel owner, operator, or manager whether the vessel must carry an observer, or if a waiver has been granted, for the specified trip within 24 hr of the vessel owner's, operator's or manager's notification of the prospective trip, as specified in paragraph (k)(1) of this section. All trip notifications shall be issued a unique confirmation number. A vessel may not fish in an area with an observer waiver confirmation number that does not match the trip plan that was called in to NMFS. Confirmation numbers for trip notification calls are valid for 48 hr from the intended sail date. If a trip is interrupted and returns to port due to bad weather or other circumstance beyond the operator's control, and goes back out within 48 hr, the same confirmation number

and observer status remains. If the layover time is greater than 48 hr, a new trip notification must be made by the operator, owner, or manager of the vessel.

50 CFR § 648.14

7. In § 648.14,

a. Revise the introductory text to paragraph (k)(12)(iii);

b. Revise paragraphs (e)(1), (k)(3)(i), (k)(5)(vi)(B), (k)(6)(ii)(A)(1), (k)(7)(i)(B), (k)(9)(iv)(B), (k)(11)(i)(A)(2), (k)(11)(ii), (k)(11)(iii)(D), (k)(11)(iv)(A), (k)(11)(v)(A), (k)(11)(vi), (k)(12)(iii)(A) through (E), (k)(12)(vi)(D), (k)(12)(vi)(G), (k)(12)(vi)(I), (k)(12)(vii)(A)(1) and (2), (k)(12)(viii), (k)(13)(i)(A), (k)(13)(ii)(C), and (k)(14);

c. Remove and reserve paragraph (k)(9)(i), (k)(9)(ii)(G) and (I), (k)(11)(v)(B)(1), (k)(12)(iv), and (k)(13)(ii)(D)(3); and

d. Add paragraphs (d)(3), (k)(2)(iii), (k)(7)(i)(C)(4), (k)(9)(ii)(M), (k)(9)(iii)(E) and (F), (k)(12)(iii)(F), (k)(13)(ii)(I) and (J), (k)(16)(v) through (vii), (k)(18), and (k)(19) to read as follows:

50 CFR § 648.14

**§ 648.14 Prohibitions.**

\* \* \* \* \*

(d) \* \* \*

(3) Fail to comply with the appropriate VMS reporting requirements, as specified in § 648.10.

\* \* \* \* \*

(e) \* \* \*

(1) Assault, resist, oppose, impede, harass, intimidate, or interfere with or bar by command, impediment, threat, or coercion any NMFS-approved observer or sea sampler conducting his or her duties; any authorized officer conducting any search, inspection, investigation, or seizure in connection with enforcement of this part; any official designee of the Regional Administrator conducting his or her duties, including those duties authorized in § 648.7(g); or any dockside/roving monitor conducting his or her duties, including those duties authorized in § 648.82(n)(2) or § 648.87(b)(1)(v)(B)(1).

\* \* \* \* \*

(k) \* \* \*

(2) \* \* \*

(iii) Fail to comply with the pre-trip notification requirements of the NE multispecies observer program specified in § 648.11(k).

(3) \* \* \*

(i) Purchase, possess, or receive as a dealer, or in the capacity of a dealer, regulated species or ocean pout in excess of the possession limits specified in § 648.82, § 648.85, § 648.86, or § 648.87 applicable to a vessel issued a NE multispecies

permit, unless otherwise specified in § 648.17, or unless the regulated species or ocean pout are purchased or received from a vessel that caught them on a sector trip and such species are exempt from such possession limits in accordance with an approved sector operations plan, as specified in § 648.87(c).

\* \* \* \* \*

(5) \* \* \*

(vi) \* \* \*

**\*18313** (B) Possess, land, or fish for regulated species or ocean pout, except winter flounder as provided for in accordance with § 648.80(i) from or within the areas described in § 648.80(i), while in possession of scallop dredge gear on a vessel not fishing under the scallop DAS program as described in § 648.53, or fishing under a LAGC permit, unless the vessel and the dredge gear conform with the stowage requirements of § 648.23(b), or unless the vessel has not been issued a Federal NE multispecies permit and fishes for, possesses, or lands NE multispecies exclusively in state waters.

\* \* \* \* \*

(6) \* \* \*

(ii) \* \* \*

(A) \* \* \*

(1) If the vessel has been issued a limited access NE multispecies permit and fishes under a NE multispecies DAS or on a sector trip with gillnet gear, fail to comply with gillnet tagging requirements specified in §§ 648.80(a)(3)(iv)(B)(4), (a)(3)(iv)(C), (a)(4)(iv)(B)(3), (b)(2)(iv)(B)(3), and (c)(2)(v)(B)(3), or fail to produce immediately, or cause to be produced immediately, gillnet tags when requested by an authorized officer.

\* \* \* \* \*

(7) \* \* \*

(i) \* \* \*

(B) Fish for, harvest, possess, or land regulated species in or from the closed areas specified in § 648.81(a) through (f), unless otherwise specified in § 648.81(c)(2)(iii), (f)(2)(i), (f)(2)(iii), (f)(2)(vi), or as authorized under § 648.85.

(C) \* \* \*

(4) Fail to comply with the restrictions on fishing and gear specified in § 648.81(n) for the NE multispecies restricted gear areas.

\* \* \* \* \*

(9) \* \* \*

(ii) \* \* \*

(M) Lease NE multispecies DAS to or from a common pool vessel if either the Lessor or the Lessee vessel is a sector vessel.

(iii) \* \* \*

(E) Transfer NE multispecies DAS to or from a common pool vessel if either the Transferor or the Transferee vessel is a sector vessel.

(F) Transfer NE multispecies DAS to or from a sector vessel if either the Transferor or the Transferee vessel is enrolled in a different sector for that particular fishing year.

(iv) \* \* \*

(B) For any common pool or sector vessel, fail to comply with the gillnet requirements and restrictions specified in § 648.82(j), unless otherwise exempted pursuant to § 648.87.

\* \* \* \* \*

(11) \* \* \*

(i) \* \* \*

(A) \* \* \*

(2) If fishing under a NE multispecies DAS in the Western U.S./Canada Area or Eastern U.S./Canada Area specified in § 648.85(a)(1), exceed the trip limits specified in § 648.85(a)(3)(iv), unless further restricted under § 648.85(b) or exempted under § 648.87.

\* \* \* \* \*

(ii) Gear requirements for all persons. If fishing with trawl gear under a NE multispecies DAS or on a sector trip in the Eastern U.S./Canada Area defined in § 648.85(a)(1)(ii), fail to fish with a haddock separator trawl, flounder trawl net, or Ruhle trawl, as specified in § 648.85(a)(3)(iii) and (b)(6)(iv)(J)(1), unless using other gear authorized under § 648.85(b)(6) or (8).

(iii) \* \* \*

(D) If fishing under a NE multispecies DAS or on a sector trip in the Eastern U.S./Canada Area specified in § 648.85(a)(1)(ii), but not in a SAP specified in § 648.85(b) on the same trip, fail to comply with the requirements specified in § 648.85(a)(3).

\* \* \* \* \*

(iv) \* \* \*

(A) If fishing under a NE multispecies DAS or on a sector trip in the Western U.S./Canada Area or Eastern U.S./Canada Area specified in § 648.85(a)(1), fail to report landings in accordance with § 648.85(a)(3)(v).

\* \* \* \* \*

(v) \* \* \*

(A) All persons. If fishing under a NE multispecies DAS in the Eastern U.S./Canada Area specified in § 648.85(a)(1)(ii), and in one of the SAPs specified in § 648.85(b)(3) or (8) on the same trip, fail to comply with the no discard and DAS flip provisions specified in § 648.85(b)(3)(xi) and (b)(8)(v)(I), or the

minimum Category A DAS requirement specified in § 648.85(b)(3)(xii) and (b)(8)(v)(J).

\* \* \* \* \*

(vi) Closure of the U.S./Canada Area for all persons. If fishing under a NE multispecies DAS or on a sector trip, declare into, enter, or fish in the Eastern U.S./Canada Area specified in § 648.85(a)(1) if the area is closed under the authority of the Regional Administrator as described in § 648.85(a)(3)(iv)(D) or (E), unless fishing in the Closed Area II Yellowtail Flounder/Haddock SAP specified in § 648.85(b)(3) or the Eastern U.S./Canada Haddock SAP Program specified in § 648.85(b)(8).

(12) \* \* \*

(iii) Closed Area II Yellowtail Flounder/Haddock SAP restrictions for all persons.

(A) If fishing under the Closed Area II Yellowtail Flounder/Haddock SAP, fish for, harvest, possess, or land any regulated NE multispecies or ocean pout from the area specified in § 648.85(b)(3)(ii), unless in compliance with § 648.85(b)(3)(i) through (xiii).

(B) Enter or fish in Closed Area II as specified in § 648.81(b), unless declared into the area in accordance with § 648.85(b)(3)(v) or § 648.85(b)(8)(v)(D).

(C) Enter or fish in Closed Area II under the Closed Area II Yellowtail Flounder/Haddock SAP outside of the season specified in § 648.85(b)(3)(iii).

(D) If fishing in the Closed Area II Yellowtail Flounder/Haddock SAP specified in § 648.85(b)(3), exceed the number of trips specified in § 648.85(b)(3)(vi) or (vii).

(E) If fishing in the Closed Area II Yellowtail Flounder/Haddock SAP specified in § 648.85(b)(3), exceed the trip limits specified in § 648.85(b)(3)(viii).

(F) If fishing in the Closed Area II Yellowtail Flounder/Haddock SAP specified in § 648.85(b)(3), fail to comply with the gear requirements specified in § 648.85(b)(3)(x).

\* \* \* \* \*

(vi) \* \* \*

(D) If fishing in the Closed Area I Hook Gear Haddock SAP specified in § 648.85(b)(7), fail to comply with the applicable DAS use restrictions specified in § 648.85(b)(7)(iv)(A) and (b)(7)(vi)(A).

\* \* \* \* \*

(G) If fishing in the Closed Area I Hook Gear Haddock SAP specified in § 648.85(b)(7), fail to comply with the applicable gear restrictions specified in § 648.85(b)(7)(iv)(E), and (b)(7)(v)(A) or (b)(7)(vi)(B).

\* \* \* \* \*

(I) If fishing in the Closed Area I Hook Gear Haddock SAP specified in § 648.85(b)(7), fail to comply with the applicable reporting requirement specified in § 648.85(b)(7)(v)(C) or (b)(7)(vi)(D).

(vii) \* \* \*

(A) \* \* \*

(1) If fishing under a NE multispecies DAS or on a sector trip in the Eastern U.S./Canada Haddock SAP specified in § 648.85(b)(8), in the area specified in § 648.85(b)(8)(ii), and during the season specified in § 648.85(b)(8)(iv), fail to comply with § 648.85(b)(8)(v).

(2) VMS and declaration requirements. (i) If fishing under a NE multispecies DAS or on a sector trip in the Eastern U.S./Canada Haddock SAP **\*18314** in the area specified in § 648.85(b)(8)(ii), fail to comply with the VMS requirements in § 648.85(b)(8)(v)(B).

(ii) If fishing under a NE multispecies DAS or on a sector trip, fish in the Eastern U.S./Canada Haddock SAP specified in § 648.85(b)(8), unless declared into the program in accordance with § 648.85(b)(8)(v)(D).

\* \* \* \* \*

(viii) Discard legal-sized NE regulated multispecies or ocean pout while fishing under a Special Access Program, as described in § 648.85(b)(3)(xi), (b)(6)(iv)(E), (b)(7)(iv)(H), or (b)(8)(v)(I), unless otherwise required pursuant to possession prohibitions specified in § 648.86 or § 648.87.

(13) \* \* \*

(i) \* \* \*

(A) Under § 648.85 or § 648.86, fail to offload a sufficient amount of regulated species or ocean pout subject to a daily possession limit at the end of a fishing trip, as required by § 648.86(i).

(ii) \* \* \*

(C) Fish for, possess at any time during a trip, or land regulated NE multispecies or ocean pout specified in § 648.86 after using up the vessel's annual DAS allocation or when not participating in the DAS program pursuant to § 648.82, unless otherwise exempted by § 648.82(b)(5), § 648.87, or § 648.89, or allowed pursuant to § 648.85(b)(6) or § 648.88.

\* \* \* \* \*

(I) For common pool vessels, including vessels issued a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions, land regulated species or ocean pout more than once within any 24-hr period.

(J) For common pool vessels, including vessels issued a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions, fail to comply with the most restrictive trip limits applicable when fishing in multiple areas, as specified in § 648.85 or § 648.86.

(14) Sector requirements. It is unlawful for any person, including any owner or operator of a vessel issued a valid Federal NE multispecies permit and fishing on a sector trip to do any of the following:

- (i) Fail to abide by the restrictions specified in § 648.87(b)(1).
- (ii) Catch regulated species or ocean pout in excess of ACE allocated or transferred to that sector pursuant to § 648.87(b)(1)(i) and (viii), respectively.
- (iii) Fish in a particular stock area, the Eastern U.S./Canada Area, or a SAP if the sector has not been allocated, does not acquire, or otherwise has insufficient ACE remaining/available for all stocks caught in that area, or fail to operate in a manner that would not catch stocks for which the sector has not been allocated ACE, as described in an approved sector operations plan pursuant to § 648.87(b)(2)(xiv), as prohibited in § 648.87(b)(1)(ii).
- (iv) Violate the provisions of an approved sector operations plan or letter of authorization issued by the Regional Administrator, as required by § 648.87(b)(1)(iv) and (b)(2).
- (v) Fail to remain in the sector for the remainder of the fishing year, as required by § 648.87(b)(1).
- (vi) Unless otherwise required to use a NE multispecies DAS to participate in another fishery, fish in the NE multispecies DAS program in a given fishing year or, for common pool vessels, fish in an approved sector in a given fishing year.
- (vii) If a vessel is removed from a sector for violating the Sector rules, fish under the NE multispecies regulations for common pool vessels.
- (viii) Discard legal-sized regulated species or ocean pout allocated to sectors pursuant to § 648.87(b)(1)(i), as prohibited by § 648.87(b)(1)(v).
- (ix) Fail to comply with the reporting requirements specified in § 648.87(b)(1)(v) or (vi).
- (x) Offload fish before a dockside/roving monitor arrives, if selected to have its offloading events observed by a dockside/roving monitor, as prohibited by § 648.87(b)(5)(i)(C).
- (xi) Leave port to begin a trip before an at-sea monitor has arrived and boarded the vessel or before electronic monitoring equipment has been properly installed if assigned to carry either an at-sea monitor or electronic monitoring equipment for that trip, as prohibited by § 648.87(b)(6)(iii)(A).
- (xii) Leave port to begin a trip if a vessel has failed a review of safety issues by an at-sea monitor and has not successfully resolved any identified safety deficiencies, as prohibited by § 648.87(b)(6)(iv)(A).

\* \* \* \* \*

(16) \* \* \*

(v) Size limits. If fishing under the recreational or charter/party regulations, possess regulated species or ocean pout that are smaller than the minimum fish sizes specified in § 648.89(b)(1) and (b)(3).

(vi) Identification. If fishing under the recreational or charter/party regulations, possess regulated species or ocean pout without at least 2 square inches (5.1 square cm) of contiguous skin that allows for the ready identification of the species of fish upon landing.

(vii) Atlantic wolffish. If fishing under the recreational or charter/party regulations, possess Atlantic wolffish.

\* \* \* \* \*

(18) Trimester TAC AM-(i) Vessel and operator permit holders. (A) Fish for, harvest, possess, or land regulated species or ocean pout in or from the closed areas specified in § 648.82(n)(2)(ii) once such areas are closed pursuant to § 648.82(n)(2)(i).

(B) Fail to comply with the reporting/recordkeeping requirements specified in § 648.87(b)(5).

(C) Employ a dockside/roving monitor service provider that is not approved/certified by NMFS, as specified in § 648.82(n)(2)(iv)(B).

(19) Dockside/roving and at-sea/electronic monitoring service providers. It is unlawful for any dockside/roving and at-sea/electronic monitoring service provider, including individual dockside/roving or at-sea monitors, to do any of the following:

(i) Fail to comply with the operational requirements, including the recordkeeping and reporting requirements, specified in § 648.87(b)(5) or (6).

(ii) Provide false or inaccurate information regarding area fished; species identification; or amount of each species kept, discarded, or landed.

\* \* \* \* \*50 CFR § 648.80

8. In § 648.80, revise the introductory text to paragraphs (a)(4)(iv), (a)(11), (b)(2)(iv), (b)(11), and (c)(2)(v); and revise paragraphs (a)(3)(i), (a)(3)(iv)(A)(1), (a)(3)(iv)(B)(1) and (2), (a)(3)(vi), (a)(4)(i), (a)(4)(iv)(A), (a)(4)(iv)(B)(1), (a)(8)(i), (a)(11)(i)(B), (b)(2)(i), (b)(2)(iv)(A), (b)(2)(iv)(B)(1), (b)(2)(vi), (b)(11)(i), (c)(2)(i), (c)(2)(v)(A), (c)(2)(v)(B)(1), and (h)(2) to read as follows:  
50 CFR § 648.80

**§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.**

\* \* \* \* \*

(a) \* \* \*

(3) \* \* \*

(i) Vessels using trawls. Except as provided in paragraphs (a)(3)(i) and (vi) of this section and § 648.85(b)(6), and unless otherwise restricted under paragraph

(a)(3)(iii) of this section, the minimum mesh size for any trawl net, except a midwater trawl, on a vessel or used by a vessel fishing under the NE multispecies DAS program or on a sector trip in the GOM Regulated Mesh Area is 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh, applied throughout the body and extension of the net, or any combination thereof, and 6.5-inch (16.5-cm) diamond mesh or square mesh applied to the *\*18315* codend of the net as defined in paragraphs (a)(3)(i)(A) and (B) of this section, provided the vessel complies with the requirements of paragraph (a)(3)(vii) of this section. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

(iv) \* \* \*

(A) \* \* \*

(1) Mesh size. Except as provided in paragraphs (a)(3)(iv) and (vi) of this section, and unless otherwise restricted under paragraph (a)(3)(iii) of this section, for any vessel that obtains an annual designation as a Trip gillnet vessel, the minimum mesh size for any sink gillnet when fishing in the NE multispecies DAS program or on a sector trip in the GOM Regulated Mesh Area is 6.5 inches (16.5 cm) throughout the entire net. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

\* \* \* \* \*

(B) \* \* \*

(1) Mesh size. Except as provided in paragraphs (a)(3)(iv) and (vi) of this section, and unless otherwise restricted under paragraph (a)(3)(iii) of this section, for any vessel that obtain an annual designation as a Day gillnet vessel, the minimum mesh size for any sink gillnet when fishing under the NE multispecies DAS program or on a sector trip in the GOM Regulated Mesh Area is 6.5 inches (16.5 cm) throughout the entire net. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

(2) Number of nets. A day gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the GOM Regulated Mesh Area may not fish with, haul, possess, or deploy more than 50 roundfish sink gillnets or 100 flatfish (tie-down) sink gillnets, each of which must be tagged pursuant to paragraph (a)(3)(iv)(C) of this section, except as provided in § 648.92(b)(8)(i). Vessels may fish any combination of roundfish and flatfish gillnets up to 100 nets, and may stow additional nets not to exceed 160 nets, counting deployed nets.

\* \* \* \* \*

(vi) Other restrictions and exemptions. A vessel is prohibited from fishing in the GOM or GB Exemption Area as defined in paragraph (a)(17) of this section, except if fishing with exempted gear (as defined under this part) or under the exemptions specified in paragraphs (a)(5) through (7), (a)(9) through (14), (d), (e), (h), and (i) of this section; or if fishing under a NE multispecies DAS; or if fishing on a sector trip; or if fishing under the Small Vessel or Handgear A permit specified in § 648.82(b)(5) and (6), respectively; or if fishing under a Handgear B permit specified in § 648.88(a); or if fishing under the scallop state waters exemptions specified in § 648.54 and paragraph (a)(11) of this section; or if fishing under a scallop DAS in accordance with paragraph (h) of this section; or if fishing pursuant to a NE multispecies open access Charter/Party or Handgear permit specified in § 648.88; or if fishing as a charter/party or private recreational vessel in compliance with § 648.89. Any gear on a vessel, or used by a vessel, in this area must be authorized under one of these exemptions or must be stowed as specified in § 648.23(b).

\* \* \* \* \*

(4) \* \* \*

(i) Vessels using trawls. Except as provided in paragraph (a)(3)(vi) of this section, this paragraph (a)(4)(i), § 648.85(b)(6) and (8), and § 648.87(c)(2)(ii), and unless otherwise restricted under paragraph (a)(4)(iii) of this section, the minimum mesh size for any trawl net, except a midwater trawl, and the minimum mesh size for any trawl net when fishing in that portion of the GB Regulated Mesh Area that lies within the SNE Exemption Area, as described in paragraph (b)(10) of this section, that is not stowed and available for immediate use in accordance with § 648.23(b), on a vessel or used by a vessel fishing under the NE multispecies DAS program or on a sector trip in the GB Regulated Mesh Area is 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh applied throughout the body and extension of the net, or any combination thereof, and 6.5-inch (16.5-cm) diamond mesh or square mesh applied to the codend of the net as defined in paragraph (a)(3)(i) of this section, provided the vessel complies with the requirements of paragraphs (a)(3)(vii) of this section. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

\* \* \* \* \*

(iv) Gillnet vessels. Except as provided in paragraph (a)(3)(vi) of this section and this paragraph (a)(4)(iv), for Day and Trip gillnet vessels, the minimum mesh size for any sink gillnet, and the minimum mesh size for any roundfish or flatfish gillnet when fishing in that portion of the GB Regulated Mesh Area that lies within

the SNE Exemption Area, as described in paragraph (b)(10) of this section, that is not stowed and available for immediate use in accordance with § 648.23(b), when fishing under a DAS in the NE multispecies DAS program or on a sector trip in the GB Regulated Mesh Area is 6.5 inches (16.5 cm) throughout the entire net. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

(A) Trip gillnet vessels. A Trip gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the GB Regulated Mesh Area may not fish with nets longer than 300 ft (91.4 m), or 50 fathoms (91.4 m) in length.

(B) \* \* \*

(1) Number of nets. A Day gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the GB Regulated Mesh Area may not fish with, haul, possess, or deploy more than 50 nets, except as provided in § 648.92(b)(8)(i).

\* \* \* \* \*

(8) \* \* \*

(i) Exemption allowing no incidental catch of regulated multispecies. An exemption may be added in an existing fishery for which there are sufficient data or information to ascertain the amount of regulated species bycatch, if the Regional Administrator, after consultation with the NEFMC, determines that the percentage of regulated species caught as bycatch is, or can be reduced to, less than 5 percent, by weight, of total catch, unless otherwise specified in this paragraph (a)(8)(i) of this section, and that such exemption will not jeopardize fishing mortality objectives. The 5-percent regulated species incidental bycatch standard could be modified for a stock that is not in an overfished condition, or if overfishing is not occurring on that stock. When considering modifications of the standard, it must be shown that the change will not delay a rebuilding program, or result in overfishing or an overfished condition. In determining *\*18316* whether exempting a fishery may jeopardize meeting fishing mortality objectives, the Regional Administrator may take into consideration various factors including, but not limited to, juvenile mortality, sacrifices in yield that will result from that mortality, the ratio of target species to regulated species, status of stock rebuilding, and recent recruitment of regulated species. A fishery can be defined, restricted, or allowed by area, gear, season, or other means determined to be appropriate to reduce bycatch of regulated species. The Regional Administrator may modify or delete an existing exemption if he/she determines that the catch of regulated species is equal to or greater than 5 percent, by weight of total catch, or another pertinent approved amount, or that continuing the exemption may jeopardize meeting fishing mortality objectives. Notification of additions, deletions, or modifications will be made through issuance of a rule in the Federal Register.

\* \* \* \* \*

(11) GOM Scallop Dredge Exemption Area. Unless otherwise prohibited in § 648.81, vessels with a limited access scallop permit that have declared out of the DAS program as specified in § 648.10, or that have used up their DAS allocations, and vessels issued a General Category scallop permit, may fish in the GOM Regulated Mesh Area specified in paragraph (a)(1) of this section, when not under a NE multispecies DAS, providing the vessel fishes in the GOM Scallop Dredge Exemption Area and complies with the requirements specified in paragraph (a)(11)(i) of this section. The GOM Scallop Dredge Fishery Exemption Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

**GOM Scallop Dredge Exemption Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SM1	41°35'	70°00'
SM2	41°35'	69°40'
SM3	42°49.5'	69°40'
SM4	43°12'	69°00'
SM5	43°41'	68°00'
SM6	43°58'	67°22'
SM7	1	1

(i) \* \* \*

(B) A vessel fishing in the GOM Scallop Dredge Fishery Exemption Area under the exemption specified in this paragraph (a)(11) must fish with dredge gear. The combined dredge width in use by, or in possession on board, may not exceed 10.5 ft (3.2 m), measured at the widest point in the bail of the dredge.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) Vessels using trawls. Except as provided in paragraphs (b)(2)(i) and (vi) of this section, and § 648.85(b)(6), and unless otherwise restricted under paragraph (b)(2)(iii) of this section, the minimum mesh size for any trawl net, not stowed and not available for immediate use in accordance with § 648.23(b), except midwater trawl, on a vessel or used by a vessel fishing under the NE multispecies DAS program or on a sector trip in the SNE Regulated Mesh Area is 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh, applied throughout the body and extension of the net, or any combination thereof, and 6.5-inch (16.5-cm) square or diamond mesh applied to the codend of the net, as defined in paragraph (a)(3)(i) of this section. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have

not been issued a NE multispecies permit and that are fishing exclusively in state waters.

\* \* \* \* \*

(iv) Gillnet vessels. For Day and Trip gillnet vessels, the minimum mesh size for any sink gillnet not stowed and not available for immediate use in accordance with § 648.23(b), when fishing under a DAS in the NE multispecies DAS program or on a sector trip in the SNE Regulated Mesh Area, is 6.5 inches (16.5 cm) throughout the entire net. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters. Day gillnet vessels must also abide by the tagging requirements in paragraph (a)(3)(iv)(C) of this section.

(A) Trip gillnet vessels. A Trip gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the SNE Regulated Mesh Area may not fish with nets longer than 300 ft (91.4 m), or 50 fathoms (91.4 m) in length.

(B) \* \* \*

(1) Number of nets. A Day gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the SNE Regulated Mesh Area may not fish with, haul, possess, or deploy more than 75 nets, except as provided in § 648.92(b)(8)(i). Such vessels, in accordance with § 648.23(b), may stow additional nets not to exceed 160, counting deployed nets.

\* \* \* \* \*

(vi) Other restrictions and exemptions. A vessel is prohibited from fishing in the SNE Exemption Area, as defined in paragraph (b)(10) of this section, except if fishing with exempted gear (as defined under this part) or under the exemptions specified in paragraphs (b)(3), (b)(5) through (9), (b)(11), (c), (e), (h), and (i) of this section; or if fishing under a NE multispecies DAS; or if fishing on a sector trip; or if fishing under the Small Vessel or Handgear A permit specified in § 648.82(b)(5) and (6), respectively; or if fishing under a Handgear B permit specified in § 648.88(a); or if fishing under a scallop state waters exemption specified in § 648.54; or if fishing under a scallop DAS in accordance with paragraph (h) of this section; or if fishing under a General Category scallop permit in accordance with paragraphs (b)(11)(i)(A) and (B) of this section; or if fishing pursuant to a NE multispecies open access Charter/Party or Handgear permit specified in § 648.88; or if fishing as a charter/party or private recreational vessel in compliance with the regulations specified in § 648.89. Any gear on a vessel, or used by a vessel, in this area must be authorized under one of these exemptions or must be stowed as specified in § 648.23(b).

\* \* \* \* \*

(11) SNE Scallop Dredge Exemption Area. Unless otherwise prohibited in § 648.81, or 50 CFR part 648, subpart D, vessels with a limited access scallop permit that have declared out of the DAS program as specified in § 648.10, or that have used up their DAS allocation, and vessels issued a General Category scallop permit, may fish in the SNE RMA when not under a NE multispecies DAS, provided the vessel fishes in the SNE Scallop Dredge Exemption Area and complies with the requirements specified in paragraph (b)(11)(ii) of this section.

(i) The SNE Scallop Dredge Exemption Area is that area (copies of a chart depicting this area are available from the Regional Administrator upon request):

(A) Bounded on the west, south and east by straight lines connecting the following points in the order stated:

**Point N. latitude W. longitude**

Sc1	<sup>1</sup>	72°30'
Sc2	40°00'	72°30'
Sc3	40°00'	71°40'
Sc4	39°50'	71°40'
Sc5	39°50'	70°00'
Sc6	<sup>2</sup>	70°00'
Sc7	<sup>3</sup>	70°00'
Sc8	<sup>4</sup>	70°00'

**\*18317** (B) Bounded on the northwest by straight lines connecting the following points in the order stated:

**Point N. latitude W. longitude**

Sc9	41°00'	<sup>1</sup>
Sc10	41°00'	71°40'
Sc11	<sup>2</sup>	71°40'

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) Vessels using trawls. Except as provided in paragraph (c)(2)(iii) of this section, and § 648.85(b)(6), the minimum mesh size for any trawl net not stowed and not available for immediate use in accordance with § 648.23(b), on a vessel or used by a vessel fishing under the NE multispecies DAS program or on a sector trip in the MA Regulated Mesh Area (§ 648.104(a)), applied throughout the body and extension of the net, or any combination thereof, and 6.5-inch (16.5-cm) diamond or square mesh applied to the codend of the net, as defined in paragraph (a)(3)(i) of this section. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

\* \* \* \* \*

(v) Gillnet vessels. For Day and Trip gillnet vessels, the minimum mesh size for any sink gillnet, not stowed and not available for immediate use in accordance with § 648.23(b), when fishing under a DAS in the NE multispecies DAS program or on a sector trip in the MA Regulated Mesh Area, is 6.5 inches (16.5 cm) throughout the entire net. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) x 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

(A) Trip gillnet vessels. A Trip gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the MA Regulated Mesh Area may not fish with nets longer than 300 ft (91.4 m), or 50 fathoms (91.4 m) in length.

(B) \* \* \*

(1) Number of nets. A Day gillnet vessel fishing under a NE multispecies DAS or on a sector trip and fishing in the MA Regulated Mesh Area, may not fish with, haul, possess, or deploy more than 75 nets, except as provided in § 648.92(b)(8)(i). Such vessels, in accordance with § 648.23(b), may stow additional nets not to exceed 160, counting deployed nets.

\* \* \* \* \*

(h) \* \* \*

(2) Limited access scallop vessels issued a limited access NE multispecies permit and fishing under a NE multispecies DAS are subject to the gear restrictions specified in this section and may possess and land unlimited amounts of regulated species or ocean pout, unless otherwise restricted by § 648.86. Such vessels may simultaneously fish under a scallop DAS, but are prohibited from using scallop dredge gear on such trips.

\* \* \* \* \*50 CFR § 648.81

9. In § 648.81, revise the introductory text for paragraph (f)(2)(ii); revise paragraphs (b)(2)(iii) and (j)(1); and add paragraphs (f)(2)(vi), (g)(2)(iv) and (v), and (n) to read as follows:

50 CFR § 648.81

**§ 648.81 NE multispecies closed areas and measures to protect EFH.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iii) Fishing in the CA II Yellowtail Flounder/Haddock SAP or the Eastern U.S./Canada Haddock SAP Program as specified in § 648.85(b)(3)(ii) or (b)(8)(ii), respectively; or

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) That are fishing with or using exempted gear as defined under this part, or in the Midwater Trawl Gear Exempted Fishery as specified under 648.80(d), and excluding pelagic gillnet gear capable of catching NE multispecies, except for vessels fishing with a single pelagic gillnet not longer than 300 ft (91.4 m) and not greater than 6 ft (1.83 m) deep, with a maximum mesh size of 3 inches (7.6 cm), provided:

\* \* \* \* \*

(vi) That are fishing on a sector trip, provided such vessels comply with the following restricted areas referred to as the Sector Rolling Closure Areas:

(A) Sector Rolling Closure Area II. From April 1 through April 30, the restrictions specified in this paragraph (f)(2)(vi) apply to Sector Rolling Closure Area II, which is the area bounded by straight lines connecting the following points in the order stated:

**Sector Rolling Closure Area II**

**[April 1-April 30]**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GM1	42°00'	1
GM2	42°00'	2
GM3	42°00'	3
SGM1	42°00'	70°00'
SGM2	43°00'	70°00'
SGM3	43°00'	4

(B) Sector Rolling Closure Area III. From May 1 through May 31, the restrictions specified in this paragraph (f)(2)(vi) apply to Sector Rolling Closure Area III, which is the area bounded by straight lines connecting the following points in the order stated:

**Sector Rolling Closure Area III**

**[May 1-May 31]**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SGM4	42°30'	1
SGM5	42°30'	70°00'
SGM6	43°00'	70°00'
SGM7	43°00'	69°30'
SGM8	43°30'	69°30'
GM18	43°30'	2

(C) Sector Rolling Closure Area IV. From June 1 through June 30, the restrictions specified in this paragraph (f)(2)(vi) apply to Sector Rolling Closure Area IV, which is the area bounded by straight lines connecting the following points in the order stated:

**Sector Rolling Closure Area IV**  
**[June 1-June 30]**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SGM9	43°00'	1
SGM6	43°00'	70°00'
SGM10	43°30'	70°00'
SGM11	43°30'	69°00'
GM22	2	69°00'

(g) \* \* \*

(2) \* \* \*

(iv) That are fishing in the CA I Hook Gear Haddock Access Area pursuant to § 648.85(b)(7).

(v) That are fishing under the restrictions and conditions of an approved sector operations plan, as specified in § 648.87(c).

\* \* \* \* \*

(j) \* \* \*

**\*18318** (1) Restricted Gear Area I is defined by straight lines connecting the following points in the order stated:

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
Inshore Boundary		
to 120		
69	40°07.9'	68°36.0'
70	40°07.2'	68°38.4'
71	40°06.9'	68°46.5'
72	40°08.7'	68°49.6'
73	40°08.1'	68°51.0'
74	40°05.7'	68°52.4'
75	40°03.6'	68°57.2'
76	40°03.65'	69°00.0'
77	40°04.35'	69°00.5'
78	40°05.2'	69°00.5'
79	40°05.3'	69°01.1'
80	40°08.9'	69°01.75'
81	40°11.0'	69°03.8'
82	40°11.6'	69°05.4'
83	40°10.25'	69°04.4'
84	40°09.75'	69°04.15'
85	40°08.45'	69°03.6'
86	40°05.65'	69°03.55'
87	40°04.1'	69°03.9'

88	40°02.65'	69°05.6'
89	40°02.00'	69°08.35'
90	40°02.65'	69°11.15'
91	40°00.05'	69°14.6'
92	39°57.8'	69°20.35'
93	39°56.65'	69°24.4'
94	39°56.1'	69°26.35'
95	39°56.55'	69°34.1'
96	39°57.85'	69°35.5'
97	40°00.65'	69°36.5'
98	40°00.9'	69°37.3'
99	39°59.15'	69°37.3'
100	39°58.8'	69°38.45'
102	39°56.2'	69°40.2'
103	39°55.75'	69°41.4'
104	39°56.7'	69°53.6'
105	39°57.55'	69°54.05'
106	39°57.4'	69°55.9'
107	39°56.9'	69°57.45'
108	39°58.25'	70°03.0'
110	39°59.2'	70°04.9'
111	40°00.7'	70°08.7'
112	40°03.75'	70°10.15'
115	40°05.2'	70°10.9'
116	40°02.45'	70°14.1'
119	40°02.75'	70°16.1'

to 181

Offshore Boundary

to 69

120	40°06.4'	68°35.8'
121	40°05.25'	68°39.3'
122	40°05.4'	68°44.5'
123	40°06.0'	68°46.5'
124	40°07.4'	68°49.6'
125	40°05.55'	68°49.8'
126	40°03.9'	68°51.7'
127	40°02.25'	68°55.4'
128	40°02.6'	69°00.0'
129	40°02.75'	69°00.75'
130	40°04.2'	69°01.75'

131	40°06.15'	69°01.95'
132	40°07.25'	69°02.0'
133	40°08.5'	69°02.25'
134	40°09.2'	69°02.95'
135	40°09.75'	69°03.3'
136	40°09.55'	69°03.85'
137	40°08.4'	69°03.4'
138	40°07.2'	69°03.3'
139	40°06.0'	69°03.1'
140	40°05.4'	69°03.05'
141	40°04.8'	69°03.05'
142	40°03.55'	69°03.55'
143	40°01.9'	69°03.95'
144	40°01.0'	69°04.4'
146	39°59.9'	69°06.25'
147	40°00.6'	69°10.05'
148	39°59.25'	69°11.15'
149	39°57.45'	69°16.05'
150	39°56.1'	69°20.1'
151	39°54.6'	69°25.65'
152	39°54.65'	69°26.9'
153	39°54.8'	69°30.95'
154	39°54.35'	69°33.4'
155	39°55.0'	69°34.9'
156	39°56.55'	69°36.0'
157	39°57.95'	69°36.45'
158	39°58.75'	69°36.3'
159	39°58.8'	69°36.95'
160	39°57.95'	69°38.1'
161	39°54.5'	69°38.25'
162	39°53.6'	69°46.5'
163	39°54.7'	69°50.0'
164	39°55.25'	69°51.4'
165	39°55.2'	69°53.1'
166	39°54.85'	69°53.9'
167	39°55.7'	69°54.9'
168	39°56.15'	69°55.35'
169	39°56.05'	69°56.25'
170	39°55.3'	69°57.1'
171	39°54.8'	69°58.6'

172	39°56.05'	70°00.65'
173	39°55.3'	70°02.95'
174	39°56.9'	70°11.3'
175	39°58.9'	70°11.5'
176	39°59.6'	70°11.1'
177	40°01.35'	70°11.2'
178	40°02.6'	70°12.0'
179	40°00.4'	70°12.3'
180	39°59.75'	70°13.05'
181	39°59.3'	70°14.0'

to 119

\*\*\*\*\*

(n) NE Multispecies Restricted Gear Areas. With the exception of a vessel on a sector trip, any vessel issued a limited access NE multispecies permit that is fishing any part of a trip in one or both of the NE Multispecies Restricted Gear Areas specified in paragraphs (n)(1) and (2) of this section must comply with all applicable restrictions specified in this paragraph (n). If such a vessel fishes inside/outside of these areas on the same trip, the most restrictive measures for the areas fished apply, including, but not limited to, gear restrictions and trip limits.

(1) Western GB Multispecies Restricted Gear Area. The Western GB Multispecies Restricted Gear Area is defined as the area bounded by straight lines connecting the following points in the order stated:

**Western GB Multispecies Restricted Gear Area**

Point	N. latitude	W. longitude
G8	42°00'	69°30'
GM5	42°00'	68°30'
MRGA1	41°00'	68°30'
YTA5	41°00'	69°30'
G8	42°00'	69°30'

(2) SNE Multispecies Restricted Gear Area. The SNE Multispecies Restricted Gear Area is defined as the area bounded by straight lines connecting the following points in the order stated:

**SNE Multispecies Restricted Gear Area**

Point	N. latitude	W. longitude
MRAG1	41°30'	<sup>1</sup>
MRGA2	41°30'	70°30'
MRGA3	<sup>2</sup>	70°30'
MRGA4	<sup>3</sup>	70°30'
MRGA5	40°00'	70°30'

MRGA6	40°00'	71°30'
MRGA7	40°30'	71°30'
SNEMA3	40°30'	72°00'
MRGA8	<sup>4</sup>	72°00'
MRGA9	<sup>5</sup>	72°00'
MRGA10	<sup>6</sup>	72°00'

(3) Gear restrictions. Unless otherwise authorized pursuant to paragraph (n)(3)(iv) of this section, a limited access NE multispecies vessel subject to the restrictions of paragraph (n) of this section may only use one or more of the gear types listed in paragraphs (n)(3)(i) through (iii) of this section. No other type of fishing gear may be on board the vessel when fishing in the NE Multispecies Restricted Gear Areas specified in paragraphs (n)(1) and (2) of this section.

(i) Trawl gear. A limited access NE multispecies vessel subject to the restrictions of paragraph (n) of this section using trawl gear may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(3); or a rope separator trawl, as specified in paragraph (n)(3)(i)(A) of this section.

(A) Rope separator trawl. A rope separator trawl is defined as a four-seam bottom trawl net (i.e., a net with a top and bottom panel and two side panels) modified to include both a horizontal separator panel and an escape opening in the bottom belly of the net below the separator panel, as further specified in ~~\*18319~~ paragraphs (n)(3)(i)(A)(1) through (3) of this section.

(1) Mesh size. Unless otherwise specified in this paragraph (n)(3)(i)(A)(1), the minimum mesh size applied throughout the body and extension of a rope separator trawl must be 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh, or any combination thereof. Mesh in the bottom belly of the net must be 13-inch (33-cm) diamond mesh. Unless otherwise specified in this part, the codend mesh size must be consistent with mesh size requirements specified in § 648.80. The mesh size of a particular section of the rope separator trawl is measured in accordance with § 648.80(f)(2), unless insufficient numbers of mesh exist, in which case the maximum total number of meshes in the section will be measured (between 2 and 20 meshes).

(2) Separator panel. The separator panel must consist of parallel lines made of fiber rope, the ends of which are attached to each side of the net starting at the forward edge of the square of the net and running aft toward the extension of the net. The leading rope must be attached to the side panel at a point at least  $\frac{1}{3}$  of the number of meshes of the side panel above the lower gore, and the panel of ropes shall slope downward toward the extension of the net. For example, if the side panel of the net is 42 meshes tall, the leading rope must be attached at least 14 meshes above the lower gore. The forward  $\frac{2}{3}$  of the separator ropes that comprise the separator panel

must be no farther than 26 inches (66 cm) apart, with the after  $\frac{1}{3}$  of the separator ropes that comprise the separator panel being no farther than 13 inches (33 cm) apart. The ends of the aftermost rope shall be attached to the bottom belly at a point  $\frac{1}{6}$  of the number of meshes of the after end of the bottom belly below the lower gore. The separator ropes should be of sufficient length not to impinge upon the overall shape of the net without being too long to compromise the selectivity of the net. The separator ropes may not be manipulated in any way that would inhibit the selectivity of the net by causing the separator ropes to dip toward the bottom belly of the net and obscure the escape opening, as defined in paragraph (n)(3)(i)(A)(3) of this section.

(3) Escape opening. The escape opening must be positioned in the bottom belly of the net behind the sweep and terminate under the separator panel, as described in paragraph (n)(3)(i)(A)(2) of this section. Longitudinal lines may be used to maintain the shape of the escape opening, as necessary. The escape opening shall be at least 18 meshes in both length and width.

(B) [Reserved]

(ii) Gillnet gear. A limited access NE multispecies vessel subject to the restrictions of paragraph (n) of this section using gillnet gear may only use roundfish gillnets or flatfish gillnets consistent with the gear requirements in § 648.80, provided the mesh size of the flatfish gillnet gear is greater than or equal to 10 inches (25.4 cm) throughout the entire net.

(iii) Hook gear. A limited access NE multispecies vessel subject to the restrictions of paragraph (n) of this section using hook gear may only use longline gear, tub trawls, or handgear.

(iv) Approval of additional gear. The Regional Administrator may authorize additional gear for use in the NE Multispecies Restricted Gear Areas in accordance with the standards and requirements specified in § 648.85(b)(6)(iv)(J)(2).

(4) VMS declaration. In addition to any other declaration requirements specified in this part, the operator of a limited access NE multispecies vessel intending to fish, or fishing, in one or both of the NE Multispecies Restricted Gear Areas, as specified in paragraphs (n)(1) and (2) of this section must declare into one or both of these areas via VMS, as instructed by the Regional Administrator, prior to departure from port. In lieu of a VMS declaration, the Regional Administrator may authorize such vessels to obtain a letter of authorization. If a letter of authorization is required, such vessel may not fish outside of the NE Multispecies Restricted Gear Areas for a minimum of 7 consecutive days (when fishing under the multispecies DAS program), and must carry the authorization letter on board.

(5) Trip limits. A limited access NE multispecies vessel subject to the restrictions of paragraph (n) of this section must comply with the trip limits specified in § 648.86, unless further restricted by the following trip limits:

(i) If fishing exclusively under a NE multispecies DAS or under both a NE multispecies DAS and a monkfish DAS with gear other than gillnet gear, 500 lb (227 kg) of all flatfish species (American plaice, witch flounder, winter flounder, windowpane flounder, yellowtail flounder, and Atlantic halibut), combined; 500 lb (227 kg) of monkfish (whole weight), unless also subject to the monkfish possession restrictions in § 648.94(b)(3); 500 lb (227 kg) of skates (whole weight); and zero possession of lobsters.

(ii) If fishing under both a NE multispecies DAS and a monkfish DAS with gillnet gear, 500 lb (227 kg) of all flatfish species (American plaice, witch flounder, winter flounder, windowpane flounder, yellowtail flounder, and Atlantic halibut), combined; the applicable monkfish possession limits specified in § 648.94(b); 500 lb (227 kg) of skates (whole weight); and zero possession of lobsters.

(6) Transiting. A limited access NE multispecies vessel that is not subject to the restrictions of this paragraph (n) may transit the NE Multispecies Restricted Gear Areas specified in paragraphs (n)(1) and (2) of this section, provided any gear that is not authorized under paragraph (n)(3) of this section is stowed and not available for immediate use in accordance with § 648.23(b).

10. In § 648.82:

(a) Revise the introductory text to paragraphs (d)(1), (d)(2)(i)(B), (d)(2)(ii)(B), (e)(1), (j), (j)(1), and (k)(4)(xi);

(b) Revise paragraphs (d)(1)(iii), (d)(2)(i)(B)(3), (d)(2)(ii)(B)(3), (e)(1)(ii), (e)(3), (g), (h), (j)(1)(ii) and (iii), (j)(2), (k)(2)(ii), (k)(4)(i), (k)(4)(v), (k)(4)(x), (k)(4)(xi)(B), (l)(1)(ii), (l)(1)(iv), (l)(1)(vi) through (viii), and (l)(2)(i);

(c) Remove and reserve paragraphs (c)(2), (e)(2), and (k)(4)(iv);

(d) Remove paragraphs (d)(4) and (l)(1)(ix); and

(e) Add paragraphs (d)(1)(iv), (d)(2)(i)(B)(4), (d)(2)(ii)(B)(4), (k)(4)(xi)(C), and (n) to read as follows:

50 CFR § 648.82

**§ 648.82 Effort-control program for NE multispecies limited access vessels.**

\* \* \* \* \*

(d) \* \* \*

(1) Category A DAS. Calculation of Category A DAS for each fishing year is specified in paragraphs (d)(1)(i) through (iv) of this section. An additional 36 percent of Category A DAS will be added and available for use for participants in the Large Mesh Individual DAS permit category, as described in paragraph (b)(4) of this section, provided the participants comply with the applicable gear restrictions. Category A DAS may be used in the NE multispecies fishery to harvest and land stocks of regulated species or ocean pout, in accordance with all of the conditions and restrictions of this part.

\* \* \* \* \*

(iii) For fishing year 2009 (May 1, 2009, through April 30, 2010), Category A DAS are defined as 45 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

**\*18320** (iv) Starting in fishing year 2010 (beginning May 1, 2010), Category A DAS are defined as follows:

(A) For a vessel fishing under the provisions of the common pool, as defined in this part, Category A DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section, or reduced pursuant to § 648.87(b)(1)(iii).

(B) For a sector vessel, Category A DAS allocated for use when fishing in other fisheries that require the concurrent use of a NE multispecies DAS are defined as 45 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(2) \* \* \*

(i) \* \* \*

(B) Calculation. Regular B DAS are calculated as follows:

\* \* \* \* \*

(3) For fishing year 2009 (May 1, 2009, through April 30, 2010), Regular B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(4) Starting in fishing year 2010 (beginning May 1, 2010), Regular B DAS are defined as follows:

(i) For a common pool vessel, Regular B DAS are defined as 36.25 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section.

(ii) For a sector vessel, Regular B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(ii) \* \* \*

(B) Calculation. Reserve B DAS are calculated as follows:

\* \* \* \* \*

(3) For fishing year 2009 (May 1, 2009, through April 30, 2010), Reserve B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

(4) Starting in fishing year 2010 (beginning May 1, 2010), Reserve B DAS are defined as follows:

(i) For a common pool vessel, Reserve B DAS are defined as 36.25 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section, unless otherwise revised pursuant to paragraph (n)(1) of this section.

(ii) For a sector vessel, Reserve B DAS are defined as 27.5 percent of the vessel's used DAS baseline specified in paragraph (c)(1) of this section.

\* \* \* \* \*

(e) \* \* \*

(1) When a vessel is participating in the NE multispecies DAS program, as required by the regulations in this part, NE multispecies DAS shall accrue as specified in paragraphs (e)(1)(i) and (ii) of this section and shall be based upon the time called, or logged into the DAS program, consistent with the DAS notification requirements specified in § 648.10. For the purpose of calculating trip limits specified in this part, the amount of DAS deducted from a vessel's DAS allocation shall determine the amount of fish the vessel can land legally.

(i) [Reserved]

(ii) Sector vessels. For the purposes of complying with the restrictions of other fisheries that require the use of a NE multispecies DAS, a vessel on a sector trip shall accrue DAS to the nearest minute and shall be counted as actual time called, or logged into the DAS program, consistent with the DAS notification requirements specified in § 648.10.

\* \* \* \* \*

(3) Regular B DAS Program 24-hr clock. For a vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), that remains fishing under a Regular B DAS for the entire fishing trip (without a DAS flip), DAS shall accrue at the rate of 1 full DAS for each calendar day, or part of a calendar day fished. For example, a vessel that fished on 1 calendar day from 6 a.m. to 10 p.m. would be charged 24 hr of Regular B DAS, not 16 hr; a vessel that left on a trip at 11 p.m. on the first calendar day and returned at 10 p.m. on the second calendar day would be charged 48 hr of Regular B DAS instead of 23 hr, because the fishing trip would have spanned 2 calendar days. For the purpose of calculating trip limits specified under § 648.86, the amount of DAS deducted from a vessel's DAS allocation shall determine the amount of fish the vessel can land legally. For a vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), while also fishing in an area subject to differential DAS counting pursuant to paragraph (n)(1)(i) of this section, Category B DAS shall accrue at the rate described in this paragraph (e)(3), unless the vessel flips to a Category A DAS, in which case the vessel is subject to the pertinent DAS accrual restrictions of paragraph (n)(1) of this section for the entire trip. For vessels electing to fish in both the Regular B DAS Program, as specified in § 648.85(b)(8), and in the Eastern U.S./Canada Area, as specified in § 648.85(a), DAS counting will begin and end according to the DAS rules specified in § 648.10(e)(5)(iv).

\* \* \* \* \*

(g) Spawning season restrictions. A vessel issued a valid Small Vessel or Handgear A category permit specified in paragraphs (b)(5) or (b)(6) of this section, respectively, or a vessel issued an open access Handgear B permit, as specified in § 648.88(a), may not fish for, possess, or land regulated species or ocean pout from March 1 through March 20 of each year. A common pool vessel must declare out and be out of the NE multispecies DAS program, and a sector must declare that the vessel will not fish with gear capable of catching NE multispecies (i.e., gear that is not defined as exempted gear under this part), for a 20-day period between March 1 and May 31 of each calendar year, using the notification requirements specified in § 648.10. A vessel fishing under a Day gillnet category designation is prohibited from fishing with gillnet gear capable of catching NE multispecies during its declared 20-day spawning block, unless the vessel is fishing in an exempted fishery, as described in § 648.80. If a vessel owner has not declared and been out of the fishery for a 20-day period between March 1 and May 31 of each calendar year on or before May 12 of each year, the vessel is prohibited from fishing for, possessing or landing any regulated species, ocean pout, or non-exempt species during the period May 12 through May 31, inclusive.

(h) Declaring DAS and blocks of time out. A vessel's owner or authorized representative shall notify the Regional Administrator of a vessel's participation in the DAS program; declaration of its 120 days out of the non-exempt gillnet fishery, if designated as a Day gillnet category vessel, as specified in paragraph (j) of this section; and declaration of its 20-day period out of the NE multispecies DAS program, or, for a sector vessel that the vessel will not fish with gear capable of catching NE multispecies, using the notification requirements specified in § 648.10.

\* \* \* \* \*

(j) Gillnet restrictions. A vessel issued a limited access NE multispecies permit may fish under a NE multispecies DAS, under the provisions of the small vessel permit category, or on a sector trip with gillnet gear, provided the owner of the vessel obtains an annual designation as either a Day or Trip gillnet vessel, as described in § 648.4(c)(2)(iii), and provided the vessel complies with the gillnet vessel gear requirements and restrictions specified in § 648.80.

(1) Day gillnet vessels. Unless otherwise exempted in this part, a Day gillnet vessel fishing with gillnet gear under a NE multispecies DAS, the *\*1832I* provisions of a small vessel permit category, or on a sector trip is not required to remove gear from the water upon returning to the dock and calling out of the DAS program, as appropriate, provided the vessel complies with the restrictions specified in paragraphs (j)(1)(i) through (iii) of this section. Vessels electing to fish under the Day gillnet designation must have on board written confirmation, issued by the Regional Administrator, that the vessel is a Day gillnet vessel.

\* \* \* \* \*

(ii) Declaration of time out of the gillnet fishery. (A) During each fishing year, a Day gillnet vessel must declare, and take, a total of 120 days out of the non-exempt gillnet fishery. Each period of time declared and taken must be a minimum of 7 consecutive days. At least 21 days of this time must be taken between June 1 and September 30 of each fishing year. The spawning season time out period required by paragraph (g) of this section shall be credited toward the 120 days time out of the non-exempt gillnet fishery. If a vessel owner has not declared and taken any or all of the remaining periods of time required to be out of the fishery by the last possible date to meet these requirements, the vessel is prohibited from fishing for, possessing, or landing regulated multispecies, ocean pout, or non-exempt species harvested with gillnet gear and from having gillnet gear on board the vessel that is not stowed in accordance with § 648.23(b) while fishing under a NE multispecies DAS, the provisions of the small vessel category permit, or on a sector trip from that date through the end of the period between June 1 and September 30, or through the end of the fishing year, as applicable, unless otherwise exempt pursuant to § 648.87.

(B) Any such vessel shall declare its required time periods through the notification procedures specified in § 648.10(j)(2).

(C) During each period of time declared out, any such vessel is prohibited from fishing with non-exempted gillnet gear and must remove such gear from the water. However, the vessel may fish in an exempted fishery, as described in § 648.80, or it may fish under a NE multispecies DAS, under the provisions of the small vessel category permit, or on a sector trip, provided it fishes with gear other than non-exempted gillnet gear.

(iii) Method of counting DAS. A Day gillnet vessel fishing with gillnet gear under a NE multispecies DAS shall accrue DAS as follows:

(A) A Day gillnet vessel fishing with gillnet gear that has elected to fish in the Regular B DAS Program, as specified in § 648.85(b)(6), under a Category B DAS, is subject to the DAS accrual provisions of paragraph (e)(1)(i) of this section.

(B) A Day gillnet vessel fishing with gillnet gear under a NE multispecies Category A DAS shall accrue DAS as follows:

(1) A Day gillnet vessel on a common pool trip is subject to the DAS accrual provisions of paragraph (e)(1)(i) of this section.

(2) A Day gillnet vessel on a sector trip is subject to the DAS accrual provisions of paragraph (e)(1)(ii) of this section.

\* \* \* \* \*

(2) Trip gillnet vessels. When fishing under a NE multispecies DAS, under the provisions of the small vessel category permit, or on a sector trip, a Trip gillnet vessel is required to remove all gillnet gear from the water before returning to port

upon the completion of a fishing trip and calling out of a NE multispecies DAS, as applicable, under § 648.10(e)(5) or (h)(5), respectively. When not fishing under a NE multispecies DAS, Trip gillnet vessels may fish in an exempted fishery with gillnet gear, as authorized by § 648.80. Vessels electing to fish under the Trip gillnet designation must have on board written confirmation issued by the Regional Administrator that the vessel is a Trip gillnet vessel.

(k) \* \* \*

(2) \* \* \*

(ii) Subject to the conditions and requirements of this part, DAS associated with a confirmation of permit history may be leased to another vessel without placing the permit on an active vessel.

\* \* \* \* \*

(4) \* \* \*

(i) Confirmation of permit history. Pursuant to paragraph (k)(2)(ii) of this section, DAS associated with a confirmation of permit history may be leased.

\* \* \* \* \*

(v) History of leased DAS use. The history of leased DAS use shall be presumed to remain with the Lessor vessel. In the case of multiple leases to one vessel, the history of leased DAS use shall be presumed to remain with the Lessor in the order in which such leases were approved by NMFS. For the purpose of accounting for leased DAS use, leased DAS will be accounted for (subtracted from available DAS) prior to allocated DAS.

\* \* \* \* \*

(x) Leasing by vessels fishing under a sector allocation. A sector vessel may not lease DAS to or from common pool vessels, but may lease DAS to or from another sector vessel during the fishing year in which the vessel is a member of a sector.

(xi) One-time downgrade of DAS Leasing Program baseline. Unless otherwise specified in paragraph (k)(4)(xi)(B) and (C) of this section, for the purposes of determining eligibility for leasing DAS only, a vessel owner may elect to make a one-time downgrade to the vessel's DAS Leasing Program baseline length and horsepower as specified in paragraph (k)(4)(ix) of this section to match the length overall and horsepower specifications of the vessel that is currently issued the permit.

\* \* \* \* \*

(B) Applicability of the one-time DAS Leasing Program baseline downgrade. The downgraded DAS Leasing Program baseline may only be used to determine eligibility for the DAS Leasing Program and does not affect or change the baseline associated with the DAS Transfer Program specified in paragraph (l)(1)(ii) of this section, or the vessel replacement or upgrade restrictions specified at § 648.4(a)(1)(i)(E) and (F), or any other provision.

(C) Duration of the one-time DAS Leasing Program baseline downgrade. Unless otherwise specified in this paragraph (k)(4)(xi)(C) of this section, the downgraded DAS Leasing Program baseline remains in effect until the DAS Leasing Program expires or the permit is transferred to another vessel via a vessel replacement, or through a DAS transfer. With the exception of vessels combining DAS Leasing Program baselines from two different vessels through the DAS Transfer Program as outlined in paragraph (k)(4)(xi)(C)(2) of this section, once the DAS Leasing Program baseline is downgraded for a particular permit, no further downgrades may be authorized for that permit.

(1) Vessel replacement. If the permit is transferred to another vessel via a vessel replacement, the DAS Leasing Program baseline reverts to the baseline horsepower and length overall specifications associated with the permit prior to the one-time downgrade.

(2) DAS Transfer Program. For vessels involved in a DAS Transfer Program transaction as described in paragraph (l) of this section, if the transferee vessel baseline is adopted, consistent with the regulations under paragraph (l)(1)(ii) of this section, and the DAS Leasing Program baseline of the transferee vessel was previously downgraded, consistent with the regulations under this paragraph (k)(4)(xi), the downgraded DAS Leasing Program baseline specifications remain valid. For vessels \*18322 involved in a DAS Transfer Program transaction where a combination of the transferor and transferee vessel baselines is adopted resulting in a new vessel baseline, any previous DAS Leasing Program baseline downgrade for either the transferor or transferee vessel will be voided and the transferee vessel would have an additional opportunity to downgrade its combined DAS Leasing Program baseline.

(1) \* \* \*

(1) \* \* \*

(ii) NE multispecies DAS may be transferred only to a vessel with a baseline main engine horsepower rating that is no more than 20 percent greater than the baseline engine horsepower of the transferor vessel. NE multispecies DAS may be transferred only to a vessel with a baseline length overall that is no more than 10 percent greater than the baseline length overall of the transferor vessel. For the purposes of this program, the baseline horsepower and length overall are those associated with the permit as of January 29, 2004. Upon approval of the transfer, the baseline of the transferee vessel would be the smaller baseline of the two vessels or, if the transferee vessel had not previously upgraded either its size (including LOA, GRT, and NT) or HP under the vessel replacement rules, the vessel owner could choose to adopt the larger baseline of the two vessels, which would constitute the vessel's one-time upgrade, provided such an upgrade is consistent with provisions of this paragraph (l)(1)(ii). A subsequent upgrade to

another specification through a subsequent action (either a vessel replacement or DAS transfer) is not permissible. A vessel that has executed a one-time downgrade of a DAS Leasing Program baseline in accordance with paragraph (k)(4)(xi) is subject to the restrictions of paragraph (k)(4)(xi)(C) of this section.

\* \* \* \* \*

(iv) DAS conservation tax. Starting in fishing year 2010, any NE multispecies DAS transferred to another vessel under the DAS Transfer Program pursuant to paragraph (l) of this section are not subject to a DAS conservation tax specified in this paragraph (l)(1)(iv). Any DAS transferred under the DAS Transfer Program prior to fishing year 2010 that were reduced due to the DAS conservation tax specified in this paragraph (l)(1)(iv) may not be reinstated to the permit associated with the transferor vessel.

\* \* \* \* \*

(vi) Confirmation of permit history. NE multispecies DAS associated with a Confirmation of Permit History may be transferred.

(vii) Transfer by sector vessels. A sector vessel may not transfer DAS to or from vessels that are fishing under the provisions of the common pool or another sector, but may transfer DAS to or from another vessel participating in that vessel's sector during the fishing year in which the vessel is a member of a particular sector.

(viii) Unless otherwise restricted by this part, a vessel with a NE multispecies limited access Category D permit may transfer DAS only to a vessel with a NE multispecies limited access Category D permit, but may receive transferred DAS from any eligible NE multispecies vessel.

\* \* \* \* \*

(2) \* \* \*

(i) Application information requirements. An application to transfer NE multispecies DAS must contain the following information: Seller's/transferor's name, vessel name, permit number and official number or state registration number; buyer's/transferee's name, vessel name, permit number and official number or state registration number; total price paid for purchased DAS; signatures of seller and buyer; and date the form was completed. Information obtained from the transfer application will be held confidential, and will be used only in summarized form for management of the fishery.

\* \* \* \* \*

(n) NE multispecies common pool accountability measure (AM). Common pool vessels are subject to the following AMs, in addition to the DAS accrual provisions specified in paragraph (e) of this section and other measures specified in this part.

(1) Differential DAS counting AM for fishing years 2010 and 2011. Unless otherwise specified pursuant to § 648.90(a)(5), based upon catch and other information available to NMFS by February of each year, the Regional

Administrator shall project the catch of regulated species or ocean pout by common pool vessels for the fishing year ending on April 30 and shall determine whether such catch will exceed any of the sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4). This projection shall be updated once available information regarding the catch of regulated species and ocean pout by vessels fishing for groundfish in state waters outside of the FMP, vessels fishing in exempted fisheries, and vessels fishing in the Atlantic sea scallop fishery to determine if excessive catch by such vessels resulted in the overall ACL for a particular stock to be exceeded. If such catch resulted in the overall ACL for a particular stock being exceeded, the common pool's share of the overage of the overall ACL for that stock shall be added to the catch of each stock of regulated species or ocean pout by common pool vessels pursuant to § 648.90(a)(5). If the Regional Administrator projects that any of the sub-ACLs specified for common pool vessels will be exceeded or underharvested, the Regional Administrator shall implement a differential DAS counting factor to all Category A DAS used within the stock area in which the sub-ACL was exceeded or underharvested, as specified in paragraph (n)(1)(i) of this section, during the following fishing year, in a manner consistent with the Administrative Procedure Act. The differential DAS counting factor shall be based upon the projected proportion of the sub-ACL of each NE multispecies stock caught by common pool vessels, rounded to the nearest even tenth, as specified in paragraph (n)(1)(ii) of this section, unless otherwise specified pursuant to § 648.90(a)(5). For example, if the Regional Administrator projects that common pool vessels will catch 1.18 times the sub-ACL for GOM cod during fishing year 2010, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to all Category A DAS used by common pool vessels only within the Inshore GOM Differential DAS Area during fishing year 2011 (i.e., Category A DAS will be charged at a rate of 28.8 hr for every 24 hr fished-1.2 times 24-hr DAS counting). If it is projected that catch in a particular fishing year will exceed or underharvest the sub-ACLs for several regulated species stocks within a particular stock area, including both exceeding and underharvesting several sub-ACLs within a particular stock area, the Regional Administrator shall implement the most restrictive differential DAS counting factor derived from paragraph (n)(1)(ii) of this section for the sub-ACLs exceeded or underharvested to any Category A DAS used by common pool vessels within that particular stock area. For example, if it is projected that common pool vessels will be responsible for 1.2 times the GOM cod sub-ACL and 1.1 times the CC/GOM yellowtail flounder sub-ACL, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to any Category A DAS fished by common pool vessels only within the Inshore GOM Differential DAS Area during the following fishing year. For any differential DAS counting **\*18323** factor implemented in fishing year

2011, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section for the time spent fishing in the applicable differential DAS counting area based upon the first VMS position into the applicable differential DAS counting area and the first VMS position outside of the applicable differential DAS counting area pursuant to § 648.10. For example, if a vessel fished 12 hr inside a differential DAS counting area where a differential DAS counting factor of 1.2 would be applied, and 12 hr outside of the differential DAS counting area, the vessel would be charged 48 hr of DAS use because DAS would be charged in 24-hr increments ((12 hr inside the area x 1.2 = 14.4 hr) + 12 hr outside the area, rounded to the next 24-hr increment to determine DAS charged). For any differential DAS counting factor implemented in fishing year 2012, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section, or if a differential DAS counting factor was implemented for that stock area during fishing year 2011, against the DAS accrual rate applied in fishing year 2011. For example, if a differential DAS counting factor of 1.2 was applied to the Inshore GOM Differential DAS Area during fishing year 2011 due to a 20-percent overage of the GOM cod sub-ACL, yet the GOM cod sub-ACL was exceeded again, but by 50 percent during fishing year 2011, an additional differential DAS factor of 1.5 would be applied to the DAS accrual rate applied during fishing year 2012 (i.e., the DAS accrual rate in the Inshore GOM Differential DAS Counting Area during fishing year 2012 would be 43.2 hr charged for every 24-hr fished-1.2 x 1.5 x 24-hr DAS charge). If the Regional Administrator determines that similar DAS adjustments are necessary in all stock areas, the Regional Administrator will adjust the ratio of Category A:Category B DAS specified in paragraph (d)(1) of this section to reduce the number of available Category A DAS available based upon the amount of the overage, rather than apply a differential DAS counting factor to all Category A DAS used in all stock areas.

(i) Differential DAS counting areas. The following differential DAS counting areas shall be used for the purposes of implementing the differential DAS counting AM specified in paragraph (n)(1) of this section:

(A) Inshore GOM Differential DAS Area. The Inshore GOM Differential DAS Area applies to the following stocks of regulated species: White hake, pollock, GOM cod, GOM haddock, CC/GOM yellowtail flounder, GOM winter flounder, and Atlantic wolffish. The Inshore GOM Differential DAS Area is defined as the area bounded on the west by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**Inshore GOM Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
INGOM1	<sup>1</sup>	69°30'

INGOM2	43°00'	69°30'
INGOM3	43°00'	70°00'
INGOM4	<sup>2</sup>	70°00'

(B) Offshore GOM Differential DAS Area. The Offshore GOM Differential DAS Area applies to the following stocks of regulated species: GOM haddock, white hake, pollock, redfish, witch flounder, American plaice, and Atlantic halibut. The Offshore GOM Differential DAS Area is defined as the area bounded on the north by the shoreline of Maine, bounded on the east by the U.S./Canadian maritime boundary, and bounded on the south and west by straight lines connecting the following points in the order stated:

**Offshore GOM Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
CII3	42°22'	67°20'
OFFGOM1	42°20'	67°20'
OFFGOM2	42°20'	70°00'
OFFGOM5	43°00'	70°00'
INGOM2	43°00'	69°30'
INGOM1	<sup>1</sup>	69°30'

(C) Inshore GB Differential DAS Area. The Inshore GB Differential DAS Area applies to the following stocks of regulated species: Witch flounder, American plaice, white hake, Atlantic halibut, redfish, pollock, CC/GOM yellowtail flounder, GB cod, GB haddock, SNE/MA winter flounder, and Atlantic wolffish. The Inshore GB Differential DAS Area is defined as the area bounded by straight lines connecting the following points in the order stated:

**Inshore GB Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
G9	<sup>1</sup>	70°00'
G10	42°20'	70°00'
IGB1	42°20'	68°50'
IGB2	41°00'	68°50'
IGB3	41°00'	69°30'
IGB4	41°10'	69°30'
IGB5	41°10'	69°50'
IGB6	41°20'	69°50'
IGB7	41°20'	70°00'
G12	<sup>2</sup>	70°00'

(D) Offshore GB Differential DAS Area. The Offshore GB Differential DAS Area applies to the following stocks of regulated species: Witch flounder, American plaice, Atlantic halibut, northern windowpane flounder, GB cod, GB haddock, GB

yellowtail flounder, and GB winter flounder. The Offshore GB Differential DAS Area is defined as the area bounded on the east by the U.S./Canadian maritime boundary and straight lines connecting the following points in the order stated:

**Offshore GB Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
IGB1	42°20'	68°50'
OGB1	42°20'	67°20'
CII3	<sup>1</sup>	67°20'
OGB2	40°10'	<sup>1</sup>
OGB3	40°10'	68°50'
IGB1	42°20'	68°50'

(E) SNE/MA Differential DAS Area. The SNE/MA Differential DAS Area applies to the following stocks of regulated species or ocean pout: SNE/MA winter flounder, SNE/MA yellowtail flounder, southern windowpane flounder, and ocean pout. The SNE/MA Differential DAS Area is defined as the area bounded on the north and west by the coastline of the United States, bounded on the east and south by straight lines connecting the following points in the order stated:

**SNE/MA Differential DAS Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
G12	<sup>1</sup>	70°00'
IGB7	41°20'	70°00'
IGB6	41°20'	69°50'
IGB5	41°10'	69°50'
IGB4	41°10'	69°30'
IGB3	41°00'	69°30'
IGB2	41°00'	68°50'
SNEDA1	40°10'	68°50'
SNEDA2	40°10'	73°10'
SNEDA3	39°50'	73°10'
SNEDA4	39°50'	<sup>2</sup>

**\*18324** (ii) [Reserved]

(iii) Mixed-stock exception. When determining the differential DAS counting AM specified in this paragraph (n)(1), the Regional Administrator shall conduct an analysis to determine whether the mixed-stock exception, as specified in § 600.310(m), may be applicable. If the analysis concludes that the mixed-stock exception is applicable, the Regional Administrator shall modify or not apply a differential DAS counting AM on specific stocks, as appropriate, in accordance with the mixed-stock exception.

(iv) Fishing year 2012. Any adjustments to DAS counting necessary as a result of either underharvesting or overharvesting any of the sub-ACLs specified for common pool vessels during the 2011 fishing year pursuant to § 648.90(a)(4) shall become effective and remain effective for the duration of fishing year 2012 in addition to the implementation of the trimester TAC AM specified in paragraph (n)(2) of this section.

(2) Trimester TAC AM for fishing years 2012 and beyond. Beginning in fishing year 2012, common pool vessels shall be subject to the following restrictions:

(i) Trimester TACs-(A) Trimester TAC distribution. Any sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4) shall be apportioned into trimesters of four months in duration, beginning at the start of the fishing year (i.e., Trimester 1: May 1-August 31; Trimester 2: September 1-December 31; Trimester 3: January 1-April 30), as follows):

**Portion of Common Pool Sub-ACLs Apportioned to Each Stock for Each Trimester**

<b>Stock</b>	<b>Trimester 1 (percent)</b>	<b>Trimester 2 (percent)</b>	<b>Trimester 3 (percent)</b>
GOM Cod	27	36	37
GB Cod	25	37	38
GOM Haddock	27	26	47
GB Haddock	27	33	40
CC/GOM Yellowtail Flounder	35	35	30
GB Yellowtail Flounder	19	30	52
SNE/MA Yellowtail Flounder	21	37	42
GOM Winter Flounder	37	38	25
GB Winter Flounder	8	24	69
SNE/MA Winter Flounder	36	50	14
Witch Flounder	27	31	42
American Plaice	24	36	40
Pollock	28	35	37
Redfish	25	31	44
White Hake	38	31	31
Northern Windowpane Flounder	33	33	34
Southern Windowpane Flounder	33	33	34
Ocean Pout	33	33	34
Atlantic Halibut	33	33	34
Atlantic Wolffish	75	13	12

(B) Trimester TAC adjustment. The distribution of trimester TACs specified in paragraph (n)(2)(i)(A) of this section may be adjusted pursuant to the biennial adjustment process specified in § 648.90. Future adjustments to the distribution of trimester TACs shall use catch data for the most recent 5-year period prior to the reevaluation of trimester TACs.

(ii) Stock area closures. With the exception of both stocks of windowpane flounder, ocean pout, and Atlantic halibut, if the Regional Administrator projects that 90 percent of the trimester TACs specified in paragraph (n)(2)(i) of this section will be caught based upon available information, the Regional Administrator shall close the area where 90 percent of the catch for each such stock occurred, according to available VTR data and other information, to all common pool vessels using gear capable of catching such stocks for the remainder of that trimester, as specified in paragraphs (n)(2)(ii)(A) through (P) of this section, in a manner consistent with the Administrative Procedure Act. For example, if the Regional Administrator projects that 90 percent of the CC/GOM yellowtail flounder Trimester 1 TAC will be caught, common pool vessels using trawl and gillnet gear shall be prohibited from fishing in the CC/GOM Yellowtail Flounder Closure Area specified in paragraph (n)(2)(ii)(G) of this section until the beginning of Trimester 2 on September 1 of that fishing year. For both stocks of windowpane flounder, ocean pout, and Atlantic halibut, the Regional Administrator shall monitor catch of these stocks and shall deduct any projected overages of the sub-ACLs for such stocks pursuant to paragraph (n)(2)(iii) of this section, instead of implementing a stock area closure when a Trimester TAC for any of these stocks is projected to be caught. Based upon all available information, the Regional Administrator is authorized to expand or narrow the areas closed under this paragraph (n)(2)(ii) in a manner consistent with the Administrative Procedure Act. If it is not possible to identify an area where only 90 percent of the catch occurred, the Regional Administrator shall close the smallest area possible where greater than 90 percent of the catch occurred.

(A) GB Cod Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Cod Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Cod Trimester TAC Area**

**Point N. latitude W. longitude**

GB1	42°20'	70°00'
GB2	42°20'	1
GB3	40°30'	1
GB4	40°30'	66°40'

GB5	39°50'	66°40'
GB6	39°50'	68°50'
GB7	41°00'	68°50'
GB8	41°00'	69°30'
GB9	41°10'	69°30'
GB10	41°10'	69°50'
GB11	41°20'	69°50'
GB12	41°20'	<sup>2</sup>
GB13	<sup>3</sup>	70°00'
GB14	<sup>4</sup>	70°00'
GB15	<sup>5</sup>	70°00'
GB1	42°20'	70°00'

**\*18325 (B) GOM Cod Trimester TAC Area.** For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Cod Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded on the south, west, and north by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**GOM Cod Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GOM1	<sup>1</sup>	69°20'
GOM2	43°40'	69°20'
GOM3	43°40'	69°00'
GOM4	43°20'	69°00'
GOM5	43°20'	69°10'
GOM6	43°00'	69°10'
GOM7	43°00'	69°20'
GOM8	42°50'	69°20'
GOM9	42°50'	69°40'
GOM10	42°20'	69°40'
GOM11	42°20'	70°00'
GOM12	<sup>2</sup>	70°00'

(C) GB Haddock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Haddock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Haddock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
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GB1	42°20'	70°00'
GB2	42°20'	1
GB3	40°30'	1
GB4	40°30'	66°40'
GB5	39°50'	66°40'
GB6	39°50'	68°50'
GB7	41°00'	68°50'
GB8	41°00'	69°30'
GB9	41°10'	69°30'
GB10	41°10'	69°50'
GB11	41°20'	69°50'
GB12	41°20'	2
GB13	3	70°00'
GB14	4	70°00'
GB15	5	70°00'
GB1	42°20'	70°00'

(D) GOM Haddock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Haddock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded on the south, west, and north by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

**GOM Haddock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GOM1	1	69°20'
GOM2	43°40'	69°20'
GOM3	43°40'	69°00'
GOM4	43°20'	69°00'
GOM5	43°20'	67°40'
GOM6	2	67°40'
GOM7	42°53.1'	67°44.4'
GOM8	2	67°40'
GOM9	42°20'	67°40'
GOM10	42°20'	70°00'
GOM12	3	70°00'

(E) GB Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GB1	42°20'	68°50'
GB2	42°20'	1
GB3	40°30'	1
GB4	40°30'	66°40'
GB5	39°50'	66°40'
GB6	39°50'	68°50'
GB1	42°20'	68°50'

(F) SNE/MA Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the SNE/MA Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**SNE/MA Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SNEMA1	1	70°00'
SNEMA2	2	70°00'
SNEMA3	3	70°00'
SNEMA4	39°50'	70°00'
SNEMA5	39°50'	71°40'
SNEMA6	40°00'	71°40'
SNEMA7	40°00'	73°00'
SNEMA8	4	73°00'
SNEMA9	41°00'	5
SNEMA10	41°00'	71°40'
SNEMA11	6	71°40'

(G) CC/GOM Yellowtail Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the CC/GOM Yellowtail Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**CC/GOM Yellowtail Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
CCGOM1	42°50'	1
CCGOM2	42°50'	69°40'
CCGOM3	42°20'	69°40'
CCGOM4	42°20'	68°50'
CCGOM5	41°00'	68°50'

CCGOM6	41°00'	69°30'
CCGOM7	41°10'	69°30'
CCGOM8	41°10'	69°50'
CCGOM9	41°20'	69°50'
CCGOM10	41°20'	<sup>2</sup>
CCGOM11	<sup>3</sup>	70°00'
CCGOM12	<sup>4</sup>	70°00'

**\*18326 (H)** American Plaice Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the American Plaice Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**American Plaice Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
AP1	<sup>1</sup>	68°00'
AP2	44°10'	67°50'
AP3	44°00'	67°50'
AP4	44°00'	67°40'
AP5	<sup>2</sup>	67°40'
AP6	42°53.1'	67°44.4'
AP7	<sup>2</sup>	67°40'
AP8	41°20'	67°40'
AP9	41°10'	67°40'
AP10	41°10'	67°10'
AP11	41°00'	67°10'
AP12	41°00'	67°00'
AP13	40°50'	67°00'
AP14	40°50'	66°50'
AP15	40°40'	66°50'
AP16	40°40'	66°40'
AP17	39°50'	66°40'
AP18	39°50'	68°50'
AP19	41°00'	68°50'
AP20	41°00'	69°30'
AP21	41°10'	69°30'
AP22	41°10'	69°50'
AP23	41°20'	69°50'
AP24	41°20'	<sup>3</sup>
AP25	<sup>4</sup>	70°00'
AP26	<sup>5</sup>	70°00'

(I) Witch Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Witch Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**Witch Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
AP1	<sup>1</sup>	68°00'
AP2	44°10'	67°50'
AP3	44°00'	67°50'
AP4	44°00'	67°40'
AP5	<sup>2</sup>	67°40'
AP6	42°53.1'	67°44.4'
AP7	<sup>2</sup>	67°40'
AP8	41°20'	67°40'
AP9	41°10'	67°40'
AP10	41°10'	67°10'
AP11	41°00'	67°10'
AP12	41°00'	67°00'
AP13	40°50'	67°00'
AP14	40°50'	66°50'
AP15	40°40'	66°50'
AP16	40°40'	66°40'
AP17	39°50'	66°40'
AP18	39°50'	68°50'
AP19	41°00'	68°50'
AP20	41°00'	69°30'
AP21	41°10'	69°30'
AP22	41°10'	69°50'
AP23	41°20'	69°50'
AP24	41°20'	<sup>3</sup>
AP25	<sup>4</sup>	70°00'
AP26	<sup>5</sup>	70°00'

(J) GB Winter Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Winter Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**GB Winter Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
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GB1	42°20'	68°50'
GB2	42°20'	67°40'
GB3	41°50'	67°40'
GB4	41°50'	1
GB5	40°30'	1
GB6	40°30'	66°40'
GB7	40°40'	66°40'
GB8	40°40'	66°50'
GB9	40°50'	66°50'
GB10	40°50'	67°00'
GB11	41°00'	67°00'
GB12	41°00'	67°10'
GB13	41°10'	67°10'
GB14	41°10'	67°40'
GB15	41°20'	67°40'
GB16	41°20'	68°10'
GB17	41°10'	68°10'
GB18	41°10'	68°20'
GB19	41°00'	68°20'
GB20	41°00'	68°50'
GB1	42°20'	68°50'

(K) GOM Winter Flounder Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Winter Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**GOM Winter Flounder Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
GOM1	42°50'	1
GOM2	42°50'	69°40'
GOM3	42°20'	69°40'
GOM4	42°20'	70°00'
GOM5	2	70°00'

(L) SNE/MA Winter Flounder Trimester TAC AM Closure Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the SNE/MA Winter Flounder Trimester TAC Areas I and II shall apply to common pool vessels using trawl gear. The SNE/MA Winter Flounder Trimester TAC Area I is bounded by straight lines connecting the following points in the order stated:

**SNE/MA Winter Flounder Trimester TAC Area I**

Point	N. latitude	W. longitude
1	42°20'	70°00'
2	42°20'	68°50'
3	41°00'	68°50'
4	41°00'	69°30'
5	41°10'	69°30'
6	41°10'	69°50'
7	41°20'	69°50'
8	41°20'	1
9	2	70°00'
10	3	70°00'
11	4	70°00'

SNE/MA Winter Flounder Trimester TAC Area II is bound on the west by the U.S. coastline, defined by straight lines connecting the following points in the order stated:

**SNE/MA Winter Flounder Trimester TAC Area II**

Point	N. latitude	W. longitude
SNE/MA12	1	71°10'
SNE/MA13	41°20'	71°10'
SNE/MA14	41°20'	2
SNE/MA15	41°20'	3
SNE/MA16	41°20'	4
SNE/MA17	5	70°00'
SNE/MA18	39°50'	70°00'
SNE/MA19	39°50'	71°40'
SNE/MA20	40°00'	71°40'
SNE/MA21	40°00'	6

**\*18327 (M) Redfish Trimester TAC Area.** For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Redfish Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

**Redfish Trimester TAC Area**

Point	N. latitude	W. longitude
RF1	1	69°20&prime;
RF2	43°40&prime;	69°20&prime;
RF3	43°40&prime;	69°00&prime;
RF4	43°20&prime;	69°00&prime;
RF5	43°20&prime;	67°40&prime;
RF6	2	67°40&prime;

RF7	42°53.1&prime;	67°44.4&prime;
RF8	<sup>2</sup>	67°40&prime;
RF9	41°20&prime;	67°40&prime;
RF10	41°20&prime;	68°10&prime;
RF11	41°10&prime;	68°10&prime;
RF12	41°10&prime;	68°20&prime;
RF13	41°00&prime;	68°20&prime;
RF14	41°00&prime;	69°30&prime;
RF15	41°10&prime;	69°30&prime;
RF16	41°10&prime;	69°50&prime;
RF17	41°20&prime;	69°50&prime;
RF18	41°20&prime;	<sup>3</sup>
RF19	<sup>4</sup>	70°00&prime;
RF20	<sup>5</sup>	70°00&prime;

(N) White Hake Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the White Hake Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**White Hake Trimester TAC Area**

<b>Point N.</b>	<b>latitude</b>	<b>W. longitude</b>
RF1	<sup>1</sup>	69°20&prime;
RF2	43°40&prime;	69°20&prime;
RF3	43°40&prime;	69°00&prime;
RF4	43°20&prime;	69°00&prime;
RF5	43°20&prime;	67°40&prime;
RF6	<sup>2</sup>	67°40&prime;
RF7	42°53.1&prime;	67°44.4&prime;
RF8	<sup>2</sup>	67°40&prime;
RF9	41°20&prime;	67°40&prime;
RF10	41°20&prime;	68°10&prime;
RF11	41°10&prime;	68°10&prime;
RF12	41°10&prime;	68°20&prime;
RF13	41°00&prime;	68°20&prime;
RF14	41°00&prime;	69°30&prime;
RF15	41°10&prime;	69°30&prime;
RF16	41°10&prime;	69°50&prime;
RF17	41°20&prime;	69°50&prime;
RF18	41°20&prime;	<sup>3</sup>
RF19	<sup>4</sup>	70°00&prime;

RF20 <sup>5</sup> 70°00&prime;

(O) Pollock Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Pollock Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

**Pollock Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
RF1	<sup>1</sup>	69°20&prime;
RF2	43°40&prime;	69°20&prime;
RF3	43°40&prime;	69°00&prime;
RF4	43°20&prime;	69°00&prime;
RF5	43°20&prime;	67°40&prime;
RF6	<sup>2</sup>	67°40&prime;
RF7	42°53.1&prime;	67°44.4&prime;
RF8	<sup>2</sup>	67°40&prime;
RF9	41°20&prime;	67°40&prime;
RF10	41°20&prime;	68°10&prime;
RF11	41°10&prime;	68°10&prime;
RF12	41°10&prime;	68°20&prime;
RF13	41°00&prime;	68°20&prime;
RF14	41°00&prime;	69°30&prime;
RF15	41°10&prime;	69°30&prime;
RF16	41°10&prime;	69°50&prime;
RF17	41°20&prime;	69°50&prime;
RF18	41°20&prime;	<sup>3</sup>
RF19	<sup>4</sup>	70°00&prime;
RF20	<sup>5</sup>	70°00&prime;

(P) Atlantic Wolffish Trimester TAC Area. For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Atlantic Wolffish Trimester TAC Area shall apply to common pool vessels using trawl gear and sink gillnet gear within the area bounded by straight lines connecting the following points in the order stated:

**Atlantic Wolffish Trimester TAC Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
ATWLF1	<sup>1</sup>	69°20&prime;
ATWLF2	43°40&prime;	69°20&prime;
ATWLF3	43°40&prime;	69°00&prime;
ATWLF4	43°20&prime;	69°00&prime;

ATWLF5 43°20′; 69°10′;  
 ATWLF6 43°00′; 69°10′;  
 ATWLF7 43°00′; 69°20′;  
 ATWLF8 42°50′; 69°20′;  
 ATWLF9 42°50′; 69°40′;  
 ATWLF10 42°20′; 69°40′;  
 ATWLF11 42°20′; 67°40′;  
 ATWLF12 41°20′; 67°40′;  
 ATWLF13 41°20′; 68°10′;  
 ATWLF14 41°10′; 68°10′;  
 ATWLF15 41°10′; 68°20′;  
 ATWLF16 41°00′; 68°20′;  
 ATWLF17 41°00′; 69°30′;  
 ATWLF18 41°10′; 69°30′;  
 ATWLF19 41°10′; 69°50′;  
 ATWLF20 41°20′; 69°50′;  
 ATWLF21 41°20′; <sup>2</sup>  
 ATWLF22 <sup>3</sup> 70°00′;  
 ATWLF23 <sup>4</sup> 70°00′;

(iii) Trimester TAC overage/underage. If any trimester TAC, as specified in paragraph (n)(2)(i) of this section, is not caught during Trimester 1 or 2, the uncaught portion of the trimester TAC shall be carried forward into the next trimester. Uncaught portions of any trimester TAC following Trimester 3 may not be carried over into the following fishing year. If any trimester TAC is exceeded during the Trimesters 1 or 2, the overage shall be deducted from the Trimester 3 TAC for that stock. If the entire sub-ACL for a particular stock that is allocated to the common pool is exceeded (i.e., the common pool catch of that stock at the end of the fishing year, including the common pool's share of any overage of the overall ACL for a particular stock caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5), exceeds all three trimester TACs for that stock combined), an amount equal to the overage shall be deducted from the sub-ACL for that stock that is allocated to common pool vessels pursuant to § 648.90(a)(4) for the following fishing year.

(iv) Monitoring requirements. Starting in fishing year 2012 (May 1, 2012), landings of regulated species or ocean \*18328 pout by common pool vessels shall be monitored at the point of offload by independent, third-part service providers approved/certified to provide such services by NMFS, as specified in paragraphs (n)(2)(iv)(A) and (B) of this section. These service providers shall deploy dockside monitors to monitor the offload of catch directly to a dealer and roving monitors to monitor the offload of catch onto a truck for subsequent shipment to a dealer. The

costs associated with monitoring vessel offloads shall be the responsibility of individual vessels and an individual vessel may only use one dockside monitoring service provider per fishing year. Both common pool vessels and service providers providing offloading monitoring services will be subject to the requirements specified in § 648.87(b)(5).

(A) Coverage levels. At least 20 percent of the trips taken by vessels operating under the provisions of the common pool shall be monitored. To ensure that this level of coverage is achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip must be monitored by a dockside/roving monitor, as specified in paragraph (n)(2) of this section. For example, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during offload at each location. All landing events at remote ports that are selected to be observed by a dockside/roving monitor will be required to have a roving monitor present to witness offload activities to the truck, as well as a dockside monitor present at each dealer to certify weigh-out of all landings. Any service provider providing dockside/monitoring services required under this paragraph (n)(2)(iv) must ensure that coverage is randomly distributed among all such trips and that the landing events monitored are representative of fishing operations by common pool vessels throughout the fishing year, unless otherwise directed.

(B) Dockside/roving monitor service provider standards. For fishing year 2012 and beyond, a common pool vessel must employ a service provider approved/certified by NMFS to provide dockside/roving monitor services, as identified by the Regional Administrator. To be approved/certified to provide the services specified in paragraph (n)(2) of this section, dockside/roving monitor service providers must meet the standards listed in § 648.87(b)(4).

(v) Adjustments to trimester TACs. The distribution of trimester TACs specified in paragraph (n)(2)(i) of this section may be revised pursuant to the biennial adjustment or framework process specified in § 648.90(a)(2) and shall use the distribution of landings of the most recent 5-year period available.

(vi) Trip limit adjustment. When 60 percent of the northern or southern windowpane flounder, ocean pout, or Atlantic halibut sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii)(E)(2) is projected to be caught, the Regional Administrator may specify a possession limit for these stocks that is calculated to prevent the yearly sub-ACL from being exceeded prior to the end of the fishing year.

50 CFR § 648.83

11. In § 648.83, revise paragraph (a)(1) to read as follows:

50 CFR § 648.83

**§ 648.83 Multispecies minimum fish sizes.**

(a) \* \* \*

(1) Minimum fish sizes for recreational vessels and charter/party vessels that are not fishing under a NE multispecies DAS are specified in § 648.89. Except as provided in § 648.17, all other vessels are subject to the following minimum fish sizes, determined by total length (TL):

**Minimum Fish Sizes (TL) for Commercial Vessels**

<b>Species</b>	<b>Size (inches)</b>
Cod	22 (55.9 cm)
Haddock	18 (45.7 cm)
Pollock	19 (48.3 cm)
Witch flounder (gray sole)	14 (35.6 cm)
Yellowtail flounder	13 (33.0 cm)
American plaice (dab)	14 (35.6 cm)
Atlantic halibut	41 (104.1 cm)
Winter flounder (blackback)	12 (30.5 cm)
Redfish	9 (22.9 cm)

\* \* \* \* \*50 CFR § 648.85

12. In § 648.85:

- a. Revise the introductory text to paragraph (a)(1), (a)(3), (a)(3)(iii), (b)(8)(v)(A);
- b. Revise paragraphs (a)(2), (a)(3)(i) and (ii), (a)(3)(iv) and (v), (a)(3)(vii), (b)(3) through (5), (b)(6)(iv)(D) through (F), (b)(6)(iv)(H) and (I), (b)(6)(iv)(J)(1), (b)(6)(v), (b)(7), (b)(8)(i), (b)(8)(v)(A)(2) through (4), (b)(8)(v)(B), (b)(8)(v)(D), (b)(8)(v)(E)(1) and (3), (b)(8)(v)(F), (b)(8)(v)(H) and (I), and (d); and
- c. Add paragraphs (b)(6)(iv)(J)(4) and (e) to read as follows:

50 CFR § 648.85

**§ 648.85 Special management programs.**

\* \* \* \* \*

(a) \* \* \*

(1) U.S./Canada Management Areas. A vessel issued a NE multispecies permit that meets the requirements of paragraph (a)(3) of this section may fish in the U.S./Canada Management Areas described in paragraphs (a)(1)(i) and (ii) of this section.

\* \* \* \* \*

(2) TAC allocation-(i) Process for establishing TACs. The amount of GB cod and haddock TAC that may be harvested from the Eastern U.S./Canada Area described in paragraph (a)(1)(ii) of this section, and the amount of GB yellowtail flounder TAC that may be harvested from the Western U.S./Canada Area and the Eastern U.S./Canada Area, as described in paragraphs (a)(1)(i) and (ii) of this section,

combined, shall be determined by the process specified in paragraphs (a)(2)(i)(A) through (D) of this section.

(A) To the extent practicable, by June 30 of each year, the Terms of Reference for the U.S./Canada shared resources for GB cod, haddock, and yellowtail flounder shall be established by the Steering Committee and the Transboundary Management Guidance Committee (TMGC).

(B) To the extent practicable, by July 31 of each year, a Transboundary Resource Assessment Committee (TRAC) joint assessment of the U.S./Canada shared resources for GB cod, haddock and yellowtail flounder shall occur.

(C) To the extent practicable, by August 31 of each year, the TMGC shall recommend TACs for the U.S./Canada shared resources for GB cod, haddock, and yellowtail flounder. Prior to October 31 of each year, the Council may refer any or all recommended TACs back to the TMGC and request changes to any or all TACs. The TMGC shall consider such recommendations and respond to the Council prior to October 31.

(D) To the extent practicable, by October 31 of each year, the Council shall review the TMGC recommended TACs for the U.S. portion of the U.S./Canada Management Area resources for GB cod, haddock, and yellowtail flounder. Based on the TMGC recommendations, the Council shall recommend to the Regional Administrator the U.S. TACs for the shared stocks for the subsequent fishing year as a subset of the ACLs for these stocks available to the commercial fishery pursuant to § 648.90(a)(4). NMFS shall review the Council's recommendations and shall publish the proposed TACs in the Federal Register and provide a 30-day public comment period. NMFS shall make a final determination concerning the TACs and publish notification of the approved TACs and responses to public comments in the Federal Register. The Council, at this time, may also consider **\*18329** modification of management measures in order to ensure compliance with the U.S./Canada Resource Sharing Understanding. Any changes to management measures will be modified pursuant to § 648.90.

(ii) Adjustments to TACs. Any overages of the GB cod and GB haddock TACs specified for either the common pool or individual sectors, or any overages of the GB yellowtail flounder TAC specified for the common pool, individual sectors, or the scallop fishery pursuant to this paragraph (a)(2) that occur in a given fishing year will be subtracted from the respective TAC in the following fishing year.

(iii) Distribution of TACs. For stocks managed by the U.S./Canada Resource Sharing Understanding, as specified in paragraph (a)(1) of this section, the TAC allocation determined pursuant to this paragraph (a)(2) shall be distributed between sectors approved pursuant to § 648.87(c), common pool vessels, and scallop vessels, as specified in § 648.90(a)(4). Approved sectors will be allocated ACE for Eastern GB cod and Eastern GB haddock proportional to the sector's allocation of

the overall ACL for these stocks, based upon the fishing histories of sector vessels, as specified in § 648.87(b)(1)(i). Any ACE for Eastern GB cod and Eastern GB haddock allocated to an individual sector is considered a subset of the overall GB cod and GB haddock ACE allocated to that sector and may only be harvested from the Eastern U.S./Canada Area, while the remaining ACE for GB cod and GB haddock available to that sector may only be harvested outside of the Eastern U.S./Canada Area. For example, if a sector is allocated 10 percent of the GB haddock ACL, it will also be allocated 10 percent of the Eastern GB haddock TAC for that particular fishing year.

(3) Requirements for vessels in U.S./Canada Management Areas. Any common pool or sector vessel, provided the sector to which a vessel belongs is allocated ACE for stocks caught in the Eastern U.S./Canada Area pursuant to paragraph (a)(2)(iii) of this section and § 648.87(b)(1)(i), may fish in the U.S./Canada Management Areas, provided it complies with conditions and restrictions of this section. A vessel other than a NE multispecies vessel may fish in the U.S./Canada Management Area, subject to the restrictions specified in paragraph (a)(3)(iv)(E) of this section and all other applicable regulations for such vessels.

(i) VMS requirement. A NE multispecies vessel fishing in the U.S./Canada Management Areas described in paragraph (a)(1) of this section must have installed on board an operational VMS unit that meets the minimum performance criteria specified in §§ 648.9 and 648.10.

(ii) Declaration. To fish in the U.S./Canada Management Area under a NE multispecies DAS or on a sector trip, a NE multispecies vessel must declare through the VMS the specific area within the U.S./Canada Management Areas, as described in paragraphs (a)(1)(i) or (ii) of this section, or the specific SAP within the U.S./Canada Management Areas, as described in paragraph (b) of this section, the vessel will be fishing in prior to leaving the dock, in accordance with instructions to be provided by the Regional Administrator, and must comply with the restrictions and conditions in paragraphs (a)(3)(ii)(A) through (C) of this section. Vessels other than NE multispecies vessels are not required to declare into the U.S./Canada Management Areas.

(A) A common pool vessel fishing under a NE multispecies DAS in the Eastern U.S./Canada Area may fish both inside and outside of the Eastern U.S./Canada Area on the same trip, provided it complies with the most restrictive DAS counting requirements specified in § 648.10(e)(5), trip limits, and reporting requirements for the areas fished for the entire trip, and the restrictions specified in paragraphs (a)(3)(ii)(A)(1) through (4) of this section. A vessel on a sector trip may fish both inside and outside of the Eastern U.S./Canada Area on the same trip, provided it complies with the restrictions specified in paragraphs (a)(3)(ii)(A)(1) through (3) of this section. When a vessel operator elects to fish both inside and outside of the

Eastern U.S./Canada Area, all cod, haddock, and yellowtail flounder caught on that trip shall count toward the applicable hard TAC specified for the U.S./Canada Management Area.

(1) The vessel operator must notify NMFS via VMS prior to leaving the Eastern U.S./Canada Area (including at the time of initial declaration into the Eastern U.S./Canada Area) that it is also electing to fish outside the Eastern U.S./Canada Area, as instructed by the Regional Administrator. With the exception of vessels participating in the Regular B DAS Program and fishing under a Regular B DAS and vessels on a sector trip that are not fishing under a NE multispecies DAS for the purposes of complying with the restrictions of other fisheries, once a vessel elects to fish outside of the Eastern U.S./Canada Area, Category A DAS shall accrue from the time the vessel crosses the VMS Demarcation Line at the start of its fishing trip until the time the vessel crosses the VMS Demarcation Line on its return to port, in accordance with § 648.10(e)(5)(iii).

(2) Unless otherwise exempted pursuant to this part, the vessel must comply with the reporting requirements of the U.S./Canada Management Area specified in § 648.85(a)(3)(v) for the duration of the trip.

(3) [Reserved]

(4) If a common pool vessel fishing under a NE multispecies DAS possesses yellowtail flounder in excess of the trip limits for CC/GOM yellowtail flounder or SNE/MA yellowtail flounder, as specified in § 648.86(g), the vessel may not fish in either the CC/GOM or SNE/MA yellowtail flounder stock area during that trip (i.e., may not fish outside of the U.S./Canada Management Area).

(B) A common pool vessel fishing under a NE multispecies DAS in the Western U.S./Canada Area may fish inside and outside the Western U.S./Canada Area on the same trip, provided it complies with the more restrictive regulations applicable to the area fished for the entire trip (e.g., the possession restrictions specified in paragraph (a)(3)(iv)(C)(4) of this section), and the reporting requirements specified in § 648.85(a)(3)(v). A vessel on a sector trip in the Western U.S./Canada Area may fish inside and outside the Western U.S./Canada Area on the same trip, provided it complies with the more restrictive reporting requirements specified in § 648.85(a)(3)(v), unless otherwise exempted pursuant to this part.

(C) For the purposes of selecting vessels for observer deployment, a vessel fishing in either of the U.S./Canada Management Areas specified in paragraph (a)(1) of this section must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; and the date, time, and port of departure, at least 48 hr prior to the beginning of any trip that it declares into the U.S./Canada Management Area as required under this paragraph (a)(3)(ii).

(iii) Gear requirements. A NE multispecies vessel fishing with trawl gear in the Eastern U.S./Canada Area defined in paragraph (a)(1)(ii) of this section, unless otherwise provided in paragraphs (b)(6) and (8) of this section, must fish with a Ruhle trawl, as described in paragraph (b)(6)(iv)(J)(1) of this section, or a haddock separator trawl, or a flounder trawl net, as described in paragraphs (a)(3)(iii)(A) and (B) of this section (all three nets may be onboard the fishing vessel simultaneously). Unless otherwise \***18330** restricted by § 648.80(n), gear other than the Ruhle trawl, haddock separator trawl, or the flounder trawl net, or gear authorized under paragraphs (b)(6) and (8) of this section, may be on board the vessel during a trip to the Eastern U.S./Canada Area, provided the gear is stowed according to the regulations in § 648.23(b). The description of the haddock separator trawl and the flounder trawl net, and the description of the Ruhle trawl may be further specified by the Regional Administrator through publication of such specifications in the Federal Register, in a manner consistent with the Administrative Procedure Act.

\* \* \* \* \*

(iv) Harvest controls. Unless otherwise specified in this paragraph (a)(3)(iv), any NE multispecies vessel fishing in the U.S./Canada Management Areas is subject to the following restrictions. For common pool vessels, the trip limits specified in this paragraph (a)(3)(iv) are in addition to any other possession or landing limits applicable to vessels not fishing in the U.S./Canada Management Areas. A sector vessel is subject to the trip limits specified in § 648.87(b)(1)(ix).

(A) Cod landing limit restrictions. Notwithstanding other applicable possession and landing restrictions under this part, a common pool vessel fishing in the Eastern U.S./Canada Area described in paragraph (a)(1)(ii) of this section may not land more than 500 lb (226.8 kg) of cod per DAS, or any part of a DAS, up to 5,000 lb (2,268 kg) per trip. A vessel fishing in the Eastern U.S./Canada Area may be further restricted by participation in other Special Management Programs, as required under this section.

(1) Initial cod landing limit. Unless modified pursuant to paragraph (a)(3)(iv)(D) of this section, notwithstanding other applicable possession and landing restrictions under this part, a common pool vessel fishing in the Eastern U.S./Canada Area described in paragraph (a)(1)(ii) of this section may not land more than 500 lb (226.8 kg) of cod per DAS, or any part of a DAS, up to 5,000 lb (2,268 kg) per trip. A vessel fishing in the Eastern U.S./Canada Area may be further restricted by participation in other Special Management Programs, as required under this section.

(2) Possession restriction when 100 percent of TAC is harvested. When the Regional Administrator projects that 100 percent of the TAC allocation for cod specified in paragraph (a)(2) of this section will be harvested, NMFS shall, in a

manner consistent with the Administrative Procedure Act, close the Eastern U.S./Canada Area to NE multispecies DAS vessels as specified in paragraph (a)(3)(iv)(E) of this section, and prohibit all vessels from harvesting, possessing, or landing haddock in or from the Eastern U.S./Canada Area.

(B) Haddock landing limit-(1) Initial haddock landing limit. The initial haddock landing limit for common pool vessels is specified in § 648.86(a), unless adjusted pursuant to paragraphs (a)(3)(iv)(B)(2) and (3) of this section.

(2) Implementation of haddock landing limit for Eastern U.S./Canada Area. When the Regional Administrator projects that 70 percent of the haddock TAC allocation specified for common pool vessels, as described in paragraph (a)(2) of this section, will be harvested, NMFS shall implement, in a manner consistent with the Administrative Procedure Act, a haddock trip limit for common pool vessels fishing in the Eastern U.S./Canada Area of 1,500 lb (680.4 kg) per day, and 15,000 lb (6,804.1 kg) per trip.

(3) Possession restriction when 100 percent of TAC is harvested. When the Regional Administrator projects that 100 percent of the TAC allocation for haddock distributed to either common pool vessels or a particular sector, as specified in paragraph (a)(2) of this section, will be harvested, NMFS shall, in a manner consistent with the Administrative Procedure Act, close the Eastern U.S./Canada Area to all limited access NE multispecies vessels subject to that particular TAC allocation, as specified in paragraph (a)(3)(iv)(E) of this section, and prohibit such vessels and all other vessels not issued a limited access NE multispecies permit from harvesting, possessing, or landing haddock in or from the Eastern U.S./Canada Area.

(C) Yellowtail flounder landing limit-(1) Initial yellowtail flounder landing limit. Unless further restricted under paragraphs (a)(3)(iv)(C)(2) or (D) of this section (gear performance incentives), or modified pursuant to paragraph (a)(3)(iv)(D) of this section, there is no initial limit to the amount of yellowtail flounder that could be landed for each fishing year.

(2) Regional Administrator authority to adjust the yellowtail flounder landing limit mid-season. If, based upon available information, the Regional Administrator projects that the yellowtail flounder catch may exceed the yellowtail flounder TAC for a fishing year, the Regional Administrator may implement, adjust, or remove the yellowtail flounder landing limit at any time during that fishing year in order to prevent yellowtail flounder catch from exceeding the TAC, or to facilitate harvesting the TAC, in a manner consistent with the Administrative Procedure Act. If, based upon available information, the Regional Administrator projects that the yellowtail flounder catch is less than 90 percent of the TAC, the Regional Administrator may adjust or remove the yellowtail flounder landing limit at any time during the fishing year in order to facilitate the harvest of the TAC, in a

manner consistent with the Administrative Procedure Act. The Regional Administrator may specify yellowtail flounder trip limits that apply to the entire U.S./Canada Management Area or to only the Western or Eastern Area.

(3) Possession restriction when 100 percent of TAC is harvested. When the Regional Administrator projects that 100 percent of the TAC allocation for yellowtail flounder distributed to either common pool vessels or a particular sector, as specified in paragraph (a)(2) of this section, will be harvested, NMFS shall, in a manner consistent with the Administrative Procedure Act, close the Eastern U.S./Canada Area to all limited access NE multispecies vessels subject to that particular TAC allocation, as specified in paragraph (a)(3)(iv)(E) of this section, and prohibit such vessels and all other vessels not issued a limited access NE multispecies permit from harvesting, possessing, or landing yellowtail flounder from the U.S./Canada Management Area.

(4) Yellowtail flounder landing limit for vessels fishing both inside and outside the Western U.S./Canada Area on the same trip. A vessel fishing both inside and outside of the Western U.S./Canada Area on the same trip, as allowed under paragraph (a)(3)(ii)(B) of this section, is subject to the most restrictive landing limits that apply to any of the areas fished, for the entire trip.

(D) Other restrictions or inseason adjustments. In addition to the possession restrictions specified in paragraph (a)(3)(iv) of this section, the Regional Administrator, in a manner consistent with the Administrative Procedure Act, may modify the gear requirements, modify or close access to the U.S./Canada Management Areas, or modify the total number of trips into the U.S./Canada Management Area, to prevent over-harvesting or to facilitate achieving the TAC specified in paragraph (a)(2) of this section. Such adjustments may be made at any time during the fishing year, or prior to the start of the fishing year. If necessary to give priority to using Category A DAS versus using Category B DAS, the Regional Administrator may implement *\*18331* different management measures for vessels using Category A DAS than for vessels using Category B DAS. If the Regional Administrator, under this authority, requires use of a particular gear type in order to reduce catches of stocks of concern, unless further restricted elsewhere in this part, the following gear performance incentives will apply: Possession of flounders (all species combined), monkfish, and skates is limited to 500 lb (226.8 kg) (whole weight) each (i.e., no more than 500 lb (226.8 kg) of all flounders, no more than 500 lb (226.8 kg) of monkfish, and no more than 500 lb (226.8 kg) of skates), and possession of lobsters is prohibited.

(E) Closure of Eastern U.S./Canada Area. Based upon available information, when the Regional Administrator projects that any individual TAC allocation specified in paragraph (a)(2)(iii) of this section will be caught, NMFS shall close, in a manner consistent with the Administrative Procedure Act, the Eastern U.S./Canada

Area to all vessels subject to that particular TAC allocation, unless otherwise allowed under this paragraph (a)(3)(iv)(E). For example, if the Eastern GB cod TAC specified for common pool vessels is projected to be caught, NMFS shall close the Eastern U.S./Canada Area to all common pool vessels operating under a NE multispecies DAS. Should the Eastern U.S./Canada Area close as described in this paragraph (a)(3)(iv)(E), common pool vessels fishing under a DAS may continue to fish in a SAP within the Eastern U.S./Canada Area, provided that the TAC for the target stock identified for that particular SAP (i.e., haddock for the Eastern U.S./Canada Haddock SAP or haddock or yellowtail flounder for the CA II Yellowtail Flounder/Haddock SAP) has not been fully harvested. A vessel fishing on a sector trip may only fish in a SAP if that vessel's sector has ACE available for all stocks caught in that SAP. For example, should the GB cod TAC allocation specified for common pool vessels in paragraph (a)(2)(iii) of this section be attained, and the Eastern U.S./Canada Area closure implemented for common pool vessels, common pool vessels could continue to fish for yellowtail flounder within the SAP identified as the Closed Area II Yellowtail Flounder/Haddock SAP, described in paragraph (b)(3) of this section, in accordance with the requirements of that program. Upon closure of the Eastern U.S./Canada Area, vessels may transit through this area as described in paragraph (a)(1)(ii) of this section, provided that its gear is stowed in accordance with the provisions of § 648.23(b), unless otherwise restricted under this part.

(v) Reporting. The owner or operator of a common pool vessel must submit reports via VMS, in accordance with instructions provided by the Regional Administrator, for each day of the fishing trip when declared into either of the U.S./Canada Management Areas. A vessel fishing on a sector trip is subject to the reporting requirements specified in this paragraph (a)(3)(v) unless the Regional Administrator determines that weekly sector catch reports, as required by § 648.87(b)(1)(v), are sufficient to monitor sector catch within the U.S./Canada Management Areas, and the Regional Administrator makes that determination in a manner consistent with the Administrative Procedure Act. Vessels subject to this reporting requirement must continue to report daily, even after exiting the U.S./Canada Management Area. The reports must be submitted in 24-hr intervals for each day, beginning at 0000 hr and ending at 2359 hr, and must be submitted by 0900 hr of the following day, or as instructed by the Regional Administrator. The reports must include at least the following information:

- (A) VTR serial number or other universal ID specified by the Regional Administrator;
- (B) Date fish were caught and statistical area in which fish were caught; and
- (C) Total pounds of cod, haddock, yellowtail flounder, winter flounder, witch flounder, pollock, American plaice, redfish, Atlantic halibut, ocean pout, Atlantic

wolffish, and white hake kept (in pounds, live weight) in each broad stock area, specified in § 648.10(k)(3), as instructed by the Regional Administrator.

\* \* \* \* \*

(vii) Transiting. A NE multispecies vessel that has declared into the Eastern U.S./Canada Area, as defined in paragraph (a)(1)(ii) of this section, and that is not fishing in the CA II Yellowtail Flounder/Haddock SAP described in paragraph (b)(3) of this section, may transit the CA II Yellowtail Flounder/Haddock SAP Area, as described in paragraph (b)(3)(ii) of this section, provided all fishing gear is stowed in accordance with the regulations in § 648.23(b).

\* \* \* \* \*

(b) \* \* \*

(3) Closed Area II Yellowtail Flounder/Haddock SAP-(i) Eligibility. Any vessel issued a valid limited access NE multispecies permit fishing under a NE multispecies DAS or on a sector trip, provided the sector to which the vessel belongs has been allocated ACE for all stocks that may be caught within the Eastern U.S./Canada Area pursuant to § 648.87(b)(1)(i), are eligible to participate in the Closed Area II Yellowtail Flounder/Haddock SAP, and may fish in the Closed Area II Yellowtail Flounder/Haddock Access Area, as described in paragraph (b)(3)(ii) of this section, for the period specified in paragraph (b)(3)(iii) of this section, provided the Eastern U.S./Canada Area, as described in paragraph (a)(1)(ii) of this section, is not closed according to the provisions specified in paragraph (a)(3)(iv)(E) of this section, or that the sector to which a vessel belongs no longer has ACE available for all stocks caught within the Eastern U.S./Canada Area pursuant to § 648.87(b)(1)(i). All eligible vessels must comply with the requirements of this section, unless otherwise specified in this paragraph (b)(3).

(ii) Closed Area II Yellowtail Flounder/Haddock SAP Area. The Closed Area II Yellowtail Flounder/Haddock SAP Area is the area defined by straight lines connecting the following points in the order stated:

**Closed Area II Yellowtail Flounder/Haddock SAP Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
Ytail 1	41°30'	67°20'
Ytail 2	41°30'	66°34.8'
G5	41°18.6'	66°24.8'1
CII 2	41°00'	66°35.8'
CII 1	41°00'	67°20'
Ytail 1	41°30'	67°20'

(iii) Season-(A) Season when the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder. When the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder, as specified in paragraph (b)(3)(vii) of this

section, eligible vessels may fish in the Closed Area II Yellowtail Flounder/Haddock SAP from July 1 through December 31.

(B) Season when the CA II Yellowtail Flounder/Haddock SAP is open only to target haddock. When the CA II Yellowtail Flounder/Haddock SAP is open only to target haddock, as specified in paragraph (b)(3)(vii) of this section, eligible vessels may fish in the CA II Yellowtail Flounder/Haddock SAP from August 1 through January 31.

(iv) VMS requirement. All NE multispecies vessels fishing in the U.S./Canada Management Areas described in paragraph (a)(1) of this section must have installed on board an operational VMS unit that meets the minimum \*18332 performance criteria specified in §§ 648.9 and 648.10.

(v) Declaration. For the purposes of selecting vessels for observer deployment, a vessel must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; date, time and port of departure; and special access program to be fished, at least 48 hr prior to the beginning of any trip that it declares into the SAP as required under this paragraph (b)(3)(v). To fish in the Closed Area II Yellowtail Flounder/Haddock SAP, a vessel must declare into this area through the VMS prior to departure from port, in accordance with instructions provided by the Regional Administrator. A vessel declared into the Closed Area II Yellowtail Flounder/Haddock SAP may also fish in the area outside the Eastern U.S./Canada Area, as defined in paragraph (a)(1)(ii) of this section, on the same trip, provided the vessel also declares into this area prior to departure from port and fishes under the most restrictive DAS counting requirements specified in § 648.10(e)(5), trip limits, and reporting requirements for the areas fished during the entire trip.

(vi) Number of trips per vessel-(A) Number of trips allowed when the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder. When the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder, as specified in paragraph (b)(3)(vii) of this section, eligible common pool vessels are restricted to one trip per calendar month during the season described in paragraph (b)(3)(iii) of this section.

(B) Number of trips allowed when the CA II Yellowtail Flounder/Haddock SAP is open only to target haddock. When the CA II Yellowtail Flounder/Haddock SAP is open only to target haddock, as specified in paragraph (b)(3)(vii) of this section, there is no limit on the number of trips that can be taken by eligible vessels during the season described in paragraph (b)(3)(iii) of this section.

(vii) Opening criteria-(A) Opening the CA II Yellowtail Flounder/Haddock SAP to target yellowtail flounder. Unless otherwise authorized by the Regional Administrator, as specified in paragraph (a)(3)(iv)(D) of this section, the total number of allowed trips by common pool vessels that may be declared into the

Closed Area II Yellowtail Flounder/Haddock SAP for each fishing year shall be as announced by the Regional Administrator on or about June 1, after consultation with the Council, in a manner consistent with the Administrative Procedure Act. Except as provided in paragraph (b)(3)(vii)(B) of this section, the total number of trips by all common pool vessels that may be declared into this SAP when the SAP is open to target yellowtail flounder shall not exceed 320 per year. When determining the total number of trips, the Regional Administrator shall consider the available yellowtail flounder TAC under the U.S./Canada Resource Sharing Understanding, the potential catch of GB yellowtail flounder by all vessels fishing outside of the SAP, recent discard estimates in all fisheries that catch yellowtail flounder, the expected number of SAP participants, and any other available information. If the Regional Administrator determines that the available catch, as determined by subtracting the potential catch of GB yellowtail flounder by all vessels outside of the SAP from the GB yellowtail flounder TAC allocation specified in paragraph (a)(2) of this section, is insufficient to allow for at least 150 trips with a possession limit of 15,000 lb (6,804 kg) of yellowtail flounder per trip, the Regional Administrator may choose not to authorize any trips into the SAP during a fishing year.

(B) Opening the CA II Yellowtail/Haddock SAP to only target haddock. If the CA II Yellowtail Flounder/Haddock SAP is not open to targeting yellowtail flounder due to an insufficient amount of yellowtail flounder TAC, or because the maximum number of trips allowed into the CA II Yellowtail Flounder/Haddock SAP to target yellowtail flounder has been achieved pursuant to paragraph (b)(3)(vii)(A) of this section, eligible vessels may target haddock in the CA II Yellowtail Flounder/Haddock Access Area, as specified in paragraph (b)(3)(ii) of this section, provided the Eastern GB haddock TAC specified in paragraph (a)(2) of this section has not been caught, the Eastern U.S./Canada Area is not closed pursuant to paragraph (a)(3)(iv)(D) of this section; and, for vessels on a sector trip, the sector to which the sector vessel belongs has ACE remaining for the stocks caught in the Eastern U.S./Canada Area.

(viii) Trip limits. Vessels subject to the provisions of the common pool that are fishing in the Closed Area II Yellowtail Flounder/Haddock SAP are subject to the following trip limits, unless otherwise restricted in this part. Vessels subject to the restrictions and conditions of an approved sector operations plan fishing in the Closed Area II Yellowtail Flounder/Haddock SAP are subject to the trip limits specified in § 648.87(b)(1)(ix).

(A) Yellowtail flounder trip limit-(1) Trip limits when the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder. Unless otherwise authorized by the Regional Administrator as specified in paragraph (a)(3)(iv)(D) of this section, when the CA II Yellowtail Flounder/Haddock SAP is open to target

yellowtail flounder, as specified in paragraph (b)(3)(vii) of this section, a vessel subject to the provisions of the common pool that is fishing in the CA II Yellowtail Flounder/Haddock SAP may fish for, possess, and land up to 10,000 lb (4,536 kg) of yellowtail flounder per trip. The Regional Administrator may adjust this limit to a maximum of 30,000 lb (13,608 kg) per trip after considering the factors listed in paragraph (b)(3)(vii) of this section for the maximum number of trips.

(2) Trip limits when the CA II Yellowtail Flounder/Haddock SAP is open to target haddock. Unless otherwise specified by the Regional Administrator pursuant to paragraph (a)(3)(iv)(D) of this section, when the CA II Yellowtail Flounder/Haddock SAP is only open to target haddock, as specified in paragraph (b)(3)(vii) of this section, the trip limit for yellowtail flounder is specified in paragraph (b)(3)(viii)(C) of this section.

(B) Cod and haddock trip limit. Unless otherwise restricted, a common pool vessel fishing any portion of a trip in the Closed Area II Yellowtail Flounder/Haddock SAP on a NE multispecies DAS may not fish for, possess, or land more than 1,000 lb (453.6 kg) of cod per trip, regardless of trip length. A common pool vessel fishing on a NE multispecies DAS in the Closed Area II Yellowtail Flounder/Haddock SAP is subject to the haddock requirements described in § 648.86(a), unless further restricted under paragraph (a)(3)(iv) of this section.

(C) Other species trip limits. A common pool vessel fishing on a NE multispecies DAS in the CA II Yellowtail Flounder/Haddock SAP using a haddock separator trawl, a Ruhle trawl, or any other gear specified pursuant to paragraph (b)(3)(x)(B) must comply with the trip limits specified in § 648.86, unless further restricted by the trip limits specified in paragraph (e) of this section.

(ix) Area fished. Eligible vessels that have declared a trip into the Closed Area II Yellowtail Flounder/Haddock SAP, and other areas as specified in paragraph (b)(3)(v) of this section, may not fish for, possess, or land fish in or from outside of the declared area during the same trip.

**\*18333** (x) Gear requirements-(A) Approved gear. When the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder, as specified in paragraph (b)(3)(vii) of this section, NE multispecies vessels must fish with a haddock separator trawl or a flounder trawl net, as described in paragraph (a)(3)(iii) of this section, or the Ruhle trawl, as described in paragraph (b)(6)(iv)(J)(3) of this section (all three nets may be onboard the fishing vessel simultaneously). When this SAP is only open to target haddock, NE multispecies vessels must use a haddock separator trawl, a Ruhle trawl, or hook gear. Gear other than the haddock separator trawl, the flounder trawl, or the Ruhle trawl may be on board the vessel during a trip to the Eastern U.S./Canada Area outside of the CA II Yellowtail Flounder/Haddock SAP, provided the gear is stowed according to the regulations at § 648.23(b).

(B) Approval of additional gear. The Regional Administrator may authorize additional gear for use in the CA II Yellowtail Flounder/Haddock SAP in accordance with the standards and requirements specified in paragraph (b)(6)(iv)(J)(2) of this section.

(xi) No-discard provision and DAS flips. A vessel fishing in the CA II Yellowtail Flounder/Haddock SAP under a NE multispecies DAS or on a sector trip may not discard legal-sized regulated NE multispecies, unless the possession of the species is prohibited pursuant to § 648.86, or unless otherwise specified in this paragraph (b)(3)(xi). A vessel may discard Atlantic halibut exceeding the one fish per trip possession limit. If a vessel fishing in the CA II Yellowtail Flounder/Haddock SAP exceeds an applicable trip limit, the vessel must exit the SAP. If a common pool vessel operator fishing in the CA II Yellowtail Flounder/Haddock SAP under a Category B DAS harvests and brings on board more legal-sized regulated NE multispecies or Atlantic halibut than the maximum landing limits allowed per trip, as specified in paragraph (b)(3)(iv) or (viii) of this section, or in § 648.86, the vessel operator must immediately notify NMFS via VMS to initiate a DAS flip (from a Category B DAS to a Category A DAS). Once this notification has been received by NMFS, the vessel's entire trip will accrue as a Category A DAS trip. For a vessel that notifies NMFS of a DAS flip, the Category B DAS that have accrued between the time the vessel started accruing Category B DAS (i.e., either at the beginning of the trip, or at the time the vessel crossed into the Eastern U.S./Canada Area) and the time the vessel declared its DAS flip shall be accrued as Category A DAS, and not Category B DAS.

(xii) Minimum Category A DAS. For vessels fishing under a Category B DAS, the number of Category B DAS that can be used on a trip cannot exceed the number of available Category A DAS the vessel has at the start of the trip.

(xiii) Catch distribution. All catch of GB haddock from vessels declared into the CA II Yellowtail Flounder/Haddock SAP shall be applied against the Eastern GB haddock TAC, as specified in paragraph (a)(2) of this section, for either common pool vessels or individual approved sectors.

(4) [Reserved]

(5) Incidental Catch TACs. Unless otherwise specified in this paragraph (b)(5), Incidental Catch TACs shall be based upon the portion of the ACL for a stock specified for the common pool vessels pursuant to § 648.90(a)(4), and allocated as described in this paragraph (b)(5), for each of the following stocks: GOM cod, GB cod, GB yellowtail flounder, GB winter flounder, CC/GOM yellowtail flounder, American plaice, white hake, SNE/MA yellowtail flounder, SNE/MA winter flounder, witch flounder, and pollock. Because GB yellowtail flounder and GB cod are transboundary stocks, the incidental catch TACs for these stocks shall be based

upon the portion of the ACL available to U.S. vessels. NMFS shall send letters to limited access NE multispecies permit holders notifying them of such TACs.

(i) Stocks other than GB cod, GB yellowtail flounder, GB winter flounder, and pollock. With the exception of GB cod, GB yellowtail flounder, GB winter flounder, and pollock, 100 percent of the Incidental Catch TACs specified in this paragraph (b)(5) shall be allocated to the Regular B DAS Program described in paragraph (b)(6) of this section.

(ii) GB cod and pollock. Each of the Incidental Catch TACs for GB cod and pollock specified in this paragraph (b)(5) shall be subdivided as follows: 50 percent to the Regular B DAS Program described in paragraph (b)(6) of this section; 16 percent to the CA I Hook Gear Haddock SAP described in paragraph (b)(7) of this section; and 34 percent to the Eastern U.S./Canada Haddock SAP described in paragraph (b)(8) of this section.

(iii) GB yellowtail flounder and GB winter flounder. Each of the Incidental Catch TACs for GB yellowtail flounder and GB winter flounder specified in this paragraph (b)(5) shall be subdivided as follows: 50 percent to the Regular B DAS Program described in paragraph (b)(6) of this section and 50 percent to the Eastern U.S./Canada Haddock SAP described in paragraph (b)(8) of this section.

(6) \* \* \*

(iv) \* \* \*

(D) Landing limits. Unless otherwise specified in this paragraph (b)(6)(iv)(D), or restricted pursuant to § 648.86, a NE multispecies vessel fishing in the Regular B DAS Program described in this paragraph (b)(6), and fishing under a Regular B DAS, may not land more than 100 lb (45.5 kg) per DAS, or any part of a DAS, up to a maximum of 1,000 lb (454 kg) per trip, of any of the following species/stocks from the areas specified in paragraph (b)(6)(v) of this section: Cod (both GOM and GB), American plaice, white hake, witch flounder, SNE/MA winter flounder, GB winter flounder, GB yellowtail flounder, and pollock; and may not land more than 25 lb (11.3 kg) per DAS, or any part of a DAS, up to a maximum of 250 lb (113 kg) per trip of CC/GOM or SNE/MA yellowtail flounder. In addition, trawl vessels, which are required to fish with a haddock separator trawl, as specified in paragraph (a)(3)(iii)(A), or a Ruhle trawl, as specified in paragraph (b)(6)(iv)(J) of this section, and other gear that may be required in order to reduce catches of stocks of concern as described in paragraph (b)(6)(iv)(J) of this section, are restricted to the trip limits specified in paragraph (e) of this section.

(E) No-discard provision and DAS flips. A vessel fishing in the Regular B DAS Program under a Regular B DAS may not discard legal-sized regulated species, ocean pout, or monkfish. This prohibition on discarding does not apply in areas or times where the possession or landing of regulated species or ocean pout is prohibited, as specified in §§ 648.85 and 648.86. If such a vessel harvests and

brings on board legal-sized regulated species or ocean pout in excess of the allowable landing limits specified in paragraph (b)(6)(iv)(D) of this section or § 648.86, the vessel operator must notify NMFS immediately via VMS to initiate a DAS flip from a B DAS to an A DAS. Once this notification has been received by NMFS, the vessel shall automatically be switched by NMFS to fishing under a Category A DAS for its entire fishing trip. Thus, any Category B DAS that accrued between the time the vessel declared into the Regular B DAS Program at the beginning of the trip (i.e., at the time the vessel crossed the demarcation line at the beginning of the trip) and the time the vessel declared its DAS flip shall be accrued as Category A DAS, and not Regular B DAS. After flipping to a Category A DAS, the vessel is subject to the applicable trip limits\*~~18334~~ specified in § 648.85(a) or § 648.86 and may discard fish in excess of the applicable trip limits.

(F) Minimum Category A DAS and B DAS accrual. For a vessel fishing under the Regular B DAS Program, the number of Regular B DAS that may be used on a trip cannot exceed the number of Category A DAS that the vessel has at the start of the trip. If a vessel is fishing in an area subject to differential DAS counting pursuant to § 648.82(n)(1), the number of Regular B DAS that may be used on a trip cannot exceed the number of Category A DAS that the vessel has at the start of the trip divided by the applicable differential DAS counting factor specified in § 648.82(n)(1)(ii). For example, if a vessel plans a trip under the Regular B DAS Program in the Inshore GOM Differential DAS Area during a fishing year in which the area is subject to a differential DAS counting factor of 1.2, and the vessel has 10 Category A DAS available at the start of the trip, the maximum number of Regular B DAS that the vessel may fish under the Regular B Program is 8 (10 divided by 1.2 = 8.33, but since Regular B DAS are charged in 24-hr intervals, 8 Regular B DAS is the maximum that can be used for this trip). A vessel fishing in the Regular B DAS Program for its entire trip shall accrue DAS in accordance with § 648.82(e)(1).

\* \* \* \* \*

(H) Closure of Regular B DAS Program and quarterly DAS limits. Unless otherwise closed as a result of the harvest of an Incidental Catch TAC as described in paragraph (b)(6)(iv)(G) of this section, or as a result of an action by the Regional Administrator under paragraph (b)(6)(vi) of this section, the use of Regular B DAS shall, in a manner consistent with the Administrative Procedure Act, be prohibited when 500 Regular B DAS have been used during the first quarter of the fishing year (May-July), or when 1,000 Regular B DAS have been used during any of the remaining quarters of the fishing year, in accordance with § 648.82(e)(1).

(I) Reporting requirements. The owner or operator of a NE multispecies DAS vessel must submit catch reports via VMS in accordance with instructions provided

by the Regional Administrator, for each day fished when declared into the Regular B DAS Program. The reports must be submitted in 24-hr intervals for each day, beginning at 0000 hr and ending at 2359 hr. The reports must be submitted by 0900 hr of the following day. For vessels that have declared into the Regular B DAS Program in accordance with paragraph (b)(6)(iv)(C) of this section, the reports must include at least the following information: VTR serial number or other universal ID specified by the Regional Administrator; date fish were caught; statistical area fished; and the total pounds of cod, haddock, yellowtail flounder, winter flounder, witch flounder, pollock, American plaice, redfish, Atlantic halibut, and white hake kept in each broad stock area (in pounds, live weight), specified in § 648.10(k)(3), as instructed by the Regional Administrator. Daily reporting must continue even if the vessel operator is required to flip, as described in paragraph (b)(6)(iv)(E) of this section.

(J) \* \* \*

(1) Vessels fishing with trawl gear in the Regular B DAS Program must use the haddock separator trawl or Ruhle trawl, as described in paragraphs (a)(3)(iii)(A) and (b)(6)(iv)(J)(3) of this section, respectively, or other type of gear if approved as described in this paragraph (b)(6)(iv)(J). Other gear may be on board the vessel, provided it is stowed when the vessel is fishing under the Regular B DAS Program pursuant to § 648.23(b).

\* \* \* \* \*

(4) Mesh size. An eligible vessel fishing in the Regular B DAS Program pursuant to paragraph (b)(6) of this section must use trawl gear described in this paragraph (b)(6)(iv)(J) with a minimum codend mesh size of 6-inch (15.24-cm) square or diamond mesh.

(v) Definition of stock areas. The species stock areas associated with the incidental catch TACs for the Regular B DAS Program are defined in paragraphs (b)(6)(v)(A) through (K) of this section. Where specified, these areas also identify stock areas applicable for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of ACE pursuant to § 648.87(b). Copies of a chart depicting these areas are available from the Regional Administrator upon request.

(A) [Reserved]

(B) [Reserved]

(C) CC/GOM yellowtail flounder stock area. For the purposes of the Regular B DAS Program, the CC/GOM yellowtail flounder stock area is the area defined by straight lines connecting the following points in the order stated:

**CC/GOM Yellowtail Flounder Stock Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
CCGOM 1	43°00'	1

CCGOM 2	43°00'	70°00'
CCGOM 3	42°30'	70°00'
CCGOM 4	42°30'	69°30'
CCGOM 5	41°30'	69°30'
CCGOM 6	41°30'	69°00'
CCGOM 7	41°00'	69°00'
CCGOM 8	41°00'	69°30'
CCGOM 5	41°30'	69°30'
CCGOM 9	41°30'	70°00'
CCGOM 10	<sup>2</sup>	70°00'
CCGOM 11	42°00'	70°00'
CCGOM 12	42°00'	<sup>3</sup>
CCGOM 13	42°00'	<sup>4</sup>
CCGOM 14	42°00'	<sup>5</sup>

(D) [Reserved]

(E) SNE/MA yellowtail flounder stock area. For the purposes of the Regular B DAS Program, the SNE/MA stock area is the area bounded on the north, east, and south by straight lines connecting the following points in the order stated:

**SNE/MA Yellowtail Flounder Stock Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
SNEMA1	40°00'	74°00'
SNEMA2	40°00'	72°00'
SNEMA3	40°30'	72°00'
SNEMA4	40°30'	69°30'
SNEMA5	41°10'	69°30'
SNEMA6	41°10'	69°50'
SNEMA7	41°20'	69°50'
SNEMA8	41°20'	<sup>1</sup>
SNEMA9	<sup>2</sup>	70°00'
SNEMA10	41°00'	70°00'
SNEMA11	41°00'	70°30'
SNEMA12	<sup>3</sup>	70°30'
SNEMA13	<sup>4</sup>	72°00'
SNEMA14	<sup>5</sup>	72°00'
SNEMA15	<sup>6</sup>	73°00'
SNEMA16	40°30'	73°00'
SNEMA17	40°30'	74°00'
SNEMA1	40°00'	74°00'

(F)-(I) [Reserved]

(J) White hake stock area. The white hake stock area, for the purposes of the Regular B DAS Program, identifying stock areas for trip limits specified in § 648.86, and determining areas applicable to sector allocations of ACE pursuant to § 648.87(b), is the area bounded on the north and west by the coastline of the United States, bounded \*18335 on the south and east by a line running east from the intersection of the east-facing coastline of Outer Banks, NC, at 35°00' N. lat. to the boundary of the EEZ, and running northward to the U.S.-Canada border.

\* \* \* \* \*

(7) CA I Hook Gear Haddock SAP-(i) Eligibility. A vessel issued a valid limited access NE multispecies permit operating under a NE multispecies DAS or on a sector trip, provided the sector to which the vessel belongs has been allocated ACE for all stocks caught within the CA I Hook Gear Haddock Access Area pursuant to § 648.87(b)(1)(i), is eligible to participate in the CA I Hook Gear Haddock SAP and may fish in the CA I Hook Gear Haddock Access Area, as described in paragraph (b)(7)(ii) of this section, for the season specified in paragraph (b)(7)(iii) of this section, provided any such vessel complies with the requirements of this section, the SAP is not closed according to the provisions specified in paragraph (b)(7)(iv)(H) or (b)(7)(vi)(F) of this section, or the sector in which the vessel is participating no longer has ACE available for all stocks caught within the CA I Hook Gear Haddock Access Area pursuant to § 648.87(b)(1)(i). Copies of a chart depicting this area are available from the Regional Administrator upon request.

(ii) CA I Hook Gear Haddock SAP Area. The CA I Hook Gear Haddock SAP Area is the area defined by straight lines connecting the following points in the order stated:

**CA I Hook Gear Haddock SAP Area**

<b>Point</b>	<b>N. latitude</b>	<b>W. longitude</b>
Hook 1	41°09'	68°30'
CI4	41°30'	68°30'
CI1	41°30'	69°23'
Hook 2	41°04'	69°01.1'

(iii) Season. The season for the CA I Hook Gear Haddock SAP is May 1 through January 31.

(iv) General program restrictions. General program restrictions specified in this paragraph (b)(7)(iv) apply to all eligible vessels, as specified in paragraph (b)(7)(i) of this section. Further program restrictions specific to sector and common pool vessels are specified in paragraphs (b)(7)(v) and (vi) of this section, respectively.

(A) DAS use restrictions. A vessel fishing in the Closed Area I Hook Gear Haddock SAP under a NE multispecies DAS may not initiate a DAS flip. A vessel is prohibited from fishing in the Closed Area I Hook Gear Haddock SAP while

making a trip under the Regular B DAS Program described in paragraph (b)(6) of this section. DAS will be charged as described in § 648.10.

(B) VMS requirement. An eligible NE multispecies vessel fishing in the CA I Hook Gear Haddock SAP specified in this paragraph (b)(7) must have installed on board an operational VMS unit that meets the minimum performance criteria specified in §§ 648.9 and 648.10.

(C) Observer notifications. For the purpose of selecting vessels for observer deployment, a vessel must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; and date, time, and port of departure at least 48 hr prior to the beginning of any trip that it declares into the CA I Hook Gear Haddock SAP, as required in paragraph (b)(7)(iv)(C) of this section, and in accordance with instructions provided by the Regional Administrator.

(D) VMS declaration. To fish in the CA I Hook Gear Haddock SAP prior to departure from port, a vessel must declare into the SAP via VMS, and, for a vessel fishing under a NE multispecies DAS, indicate the type of DAS that it intends to fish, prior to departure from port, as instructed by the Regional Administrator. A vessel declared into the CA I Hook Gear Haddock SAP may fish only in the CA I Hook Gear Haddock Special Access Area described in paragraph (b)(7)(ii) of this section on a declared trip.

(E) Gear restrictions. A vessel declared into and fishing in the CA I Hook Gear Haddock SAP may fish with and possess on board demersal longline gear or tub trawl gear only, unless further restricted as specified in paragraph (b)(7)(v)(A) of this section. Such vessels are prohibited from using as bait, or possessing on board, squid or mackerel during a trip into the CA I Hook Gear Haddock SAP.

(F) Haddock TAC. The maximum total amount of haddock that may be caught (landings and discards) in the CA I Hook Gear Haddock SAP Area in any fishing year is based upon the size of the TAC allocated for the 2004 fishing year (1,130 mt live weight), adjusted according to the growth or decline of the western GB (WGB) haddock exploitable biomass (in relationship to its size in 2004), according to the following formula:  $\text{Biomass}_{\text{YEAR X}} = (1,130 \text{ mt live weight}) \times (\text{Projected WGB Haddock Exploitable Biomass}_{\text{YEAR X}} / \text{WGB Haddock Exploitable Biomass}_{2004})$ . The size of the western component of the stock is considered to be 35 percent of the total stock size, unless modified by a stock assessment. The Regional Administrator shall specify the haddock TAC for the SAP, in a manner consistent with the Administrative Procedure Act.

(G) Trip restrictions. A vessel is prohibited from deploying fishing gear outside of the CA I Hook Gear Haddock SAP Area on the same fishing trip on which it is declared into the CA I Hook Gear Haddock SAP. A vessel operating under a NE

multispecies DAS must end the trip if the vessel exceeds the applicable landing limits described in paragraphs (b)(7)(v)(B) and (b)(7)(vi)(C) of this section.

(H) Landing limits. For all vessels legally declared into the CA I Hook Gear Haddock SAP described in paragraph (b)(7)(i) of this section, landing limits for NE multispecies are specified in paragraphs (b)(7)(v)(B) and (b)(7)(vi)(C) of this section, respectively. Unless otherwise specified in this part, such vessels are prohibited from discarding legal-sized regulated species and ocean pout, and must exit the SAP and cease fishing if any trip limit is achieved or exceeded.

(I) Mandatory closure of CA I Hook Gear Haddock Access Area. When the Regional Administrator determines that the haddock TAC specified in paragraph (b)(7)(iv)(F) of this section has been caught, NMFS shall close, in a manner consistent with the Administrative Procedure Act, the CA I Hook Gear Haddock SAP Area as specified in paragraph (b)(7)(ii) of this section, to all eligible vessels, including both common pool and sector vessels.

(v) Sector vessel program restrictions. In addition to the general program restrictions specified in paragraph (b)(7)(iv) of this section, a sector vessel declared into the CA I Hook Gear Haddock SAP is also required to comply with the restrictions specified in this paragraph (b)(7)(v).

(A) Gear restrictions. A sector vessel is subject to the gear requirements of the sector Operations Plan as approved under § 648.87(c) and those specified under paragraph (b)(7)(iv)(E) of this section.

(B) Landing limits. A sector vessel declared into the CA I Hook Gear Haddock SAP described in paragraph (b)(7)(i) of this section is subject to the landing limits for regulated species in effect under the sector's Operations Plan, as approved under § 648.87(c).

(C) Reporting requirements. The owner or operator of a sector vessel declared into the CA I Hook Gear Haddock SAP must submit reports to the sector Manager, consistent with instructions to be provided by the sector Manager, for each day fished in the CA I Hook Gear Haddock SAP Area. The \*18336 sector Manager shall provide daily reports to NMFS, including at least the following information: Total pounds of haddock, cod, yellowtail flounder, winter flounder, witch flounder, pollock, ocean pout, Atlantic halibut, Atlantic wolffish, and white hake kept; total pounds of haddock, cod, yellowtail flounder, winter flounder, witch flounder, pollock, ocean pout, Atlantic halibut, Atlantic wolffish, and white hake discarded; date fish were caught; and VTR serial numbers for each trip declared into the CA I Hook Gear Haddock SAP, as instructed by the Regional Administrator. Daily reporting must continue even if the vessel operator is required to exit the SAP as required under paragraph (b)(7)(iv)(G) or (H) of this section.

(D) Incidental catch TACs. There are no incidental catch TACs specified for regulated species or ocean pout for sector vessels declared into the CA I Hook

Gear Haddock SAP. All regulated species or ocean pout caught by sector vessels fishing in the SAP count toward the sector's annual ACE for each stock, as specified in § 648.87(b)(1)(i).

(vi) Common pool vessel program restrictions. In addition to the general program restrictions specified in paragraph (b)(7)(iv) of this section, a common pool vessel declared into the CA I Hook Gear Haddock SAP is also required to comply with the restrictions specified in this paragraph (b)(7)(vi).

(A) DAS use restrictions. A common pool vessel may only use Regular B or Reserve B DAS, in accordance with § 648.82(d)(2)(i)(A) and (d)(2)(ii)(A). A common pool vessel is prohibited from using Category A DAS and may not initiate a DAS flip when declared into the SAP. A common pool vessel is prohibited from fishing in the CA I Hook Gear Haddock SAP while making a trip under the Regular B DAS Program described under paragraph (b)(6) of this section. DAS will be charged as described in § 648.10.

(B) Gear restrictions. A common pool vessel is exempt from the maximum number of hooks restriction specified in § 648.80(a)(4)(v), but must comply with the gear restrictions in paragraph (b)(7)(iv)(E) of this section.

(C) Landing limits. A common pool vessel may not land, fish for, or possess on board more than 1,000 lb (453.6 kg) of cod per trip. A common pool vessel is not permitted to discard legal-sized cod prior to reaching the landing limit, and is required to end its trip if the cod trip limit is achieved or exceeded.

(D) Reporting requirements. The owner or operator of a common pool vessel must submit reports via VMS, in accordance with instructions to be provided by the Regional Administrator, for each day fished in the Closed Area I Hook Gear Haddock SAP Area. The reports must be submitted in 24-hr intervals for each day fished, beginning at 0000 hr local time and ending at 2359 hr local time. The reports must be submitted by 0900 hr local time of the day following fishing. The reports must include at least the following information: VTR serial number or other universal ID specified by the Regional Administrator; date fish were caught; statistical area fished; and the total pounds of cod, haddock, yellowtail flounder, winter flounder, witch flounder, pollock, American plaice, redfish, Atlantic halibut, and white hake kept in each broad stock area (in pounds, live weight), specified in § 648.10(k)(3), as instructed by the Regional Administrator. Daily reporting must continue even if the vessel operator is required to exit the SAP as required under paragraph (b)(7)(iv)(G) of this section.

(E) Incidental catch TACs. The maximum amount of GB cod and pollock (landings and discards) that may be cumulatively caught by a common pool vessel from the CA I Hook Gear Haddock SAP Area in a fishing year is the amount specified in paragraph (b)(5)(ii) of this section.

(F) Mandatory closure of CA I Hook Gear Haddock Access Area due to catch of any incidental catch TAC. When the Regional Administrator determines that either the GB cod or pollock incidental catch TAC specified in paragraph (b)(7)(vi)(E) of this section has been caught, the CA I Hook Gear Haddock SAP Area shall be closed to all common pool vessels in a manner consistent with the Administrative Procedure Act.

(8) \* \* \*

(i) Eligibility. A vessel issued a valid limited access NE multispecies permit and fishing with trawl gear as specified in paragraph (b)(8)(v)(E) of this section while operating under a NE multispecies DAS or on a sector trip, provided the sector to which the vessel belongs has been allocated ACE for all stocks caught within the Eastern U.S./Canada Area pursuant to § 648.87(b)(1)(i), is eligible to participate in the Eastern U.S./Canada Haddock SAP and may fish in the Eastern U.S./Canada Haddock SAP Area, as described in paragraph (b)(8)(ii) of this section, during the season specified in paragraph (b)(8)(iv) of this section, provided such vessel complies with the requirements of this section and provided the SAP is not closed according to the provisions specified in paragraph (b)(8)(v)(K) or (L) of this section, the Eastern U.S./Canada Area is not closed as described under paragraph (a)(3)(iv)(E) of this section, or the sector to which the vessel belongs no longer has ACE available for all stocks caught within the Eastern U.S./Canada Area pursuant to § 648.87(b)(1)(i).

\* \* \* \* \*

(v) \* \* \*

(A) Area and DAS use restrictions. A common pool vessel fishing under a NE multispecies DAS in the Eastern U.S./Canada Haddock SAP may elect to fish under a Category A or Category B DAS in accordance with § 648.82(d)(2), or in multiple areas in accordance with the restrictions of this paragraph (b)(8)(v)(A). A vessel on a sector trip in the Eastern U.S./Canada Haddock SAP may elect to fish in multiple areas in accordance with the restrictions of this paragraph (b)(8)(v)(A).

\* \* \* \* \*

(2) A vessel that is declared into the Eastern U.S./Canada Haddock SAP described in paragraph (b)(8)(i) of this section may fish, on the same trip, in the Eastern U.S./Canada Haddock SAP Area and in the Closed Area II Yellowtail Flounder/Haddock SAP Area, as described in paragraph (b)(3)(ii) of this section, and, for common pool vessels fishing a NE multispecies DAS, while under either a Category A DAS or a Category B DAS.

(3) A vessel may choose, on the same trip, to fish in either/both the Eastern U.S./Canada Haddock SAP Program and the Closed Area II Yellowtail Flounder/Haddock SAP Area, and in the portion of the Eastern U.S./Canada Area described in paragraph (a)(1)(ii) of this section that lies outside of these two SAPs,

provided a common pool vessel fishes under a Category A DAS and all eligible vessels comply with the VMS restrictions of paragraph (b)(8)(v)(D) of this section. Such a vessel may also elect to fish outside of the Eastern U.S./Canada Area on the same trip, in accordance with the restrictions of paragraph (a)(3)(ii)(A) of this section.

(4) A common pool vessel fishing under a NE multispecies DAS that elects to fish in multiple areas, as described in this paragraph (b)(8)(v)(A), must fish under the most restrictive DAS counting requirements specified in § 648.10(e)(5), trip limits, and reporting requirements of the areas fished for the entire trip. A vessel on a sector trip that elects to fish in multiple areas, as described in this paragraph (b)(8)(v)(A), must comply with the most restrictive reporting requirements of the areas fished for the entire trip, unless otherwise specified by the Regional Administrator in a manner consistent with the Administrative Procedure Act.

**\*18337** (B) VMS requirement. A vessel issued a limited access NE multispecies permit fishing in the Eastern U.S./Canada Haddock SAP Program specified in paragraph (b)(8)(i) of this section must have installed on board an operational VMS unit that meets the minimum performance criteria specified in §§ 648.9 and 648.10.

\* \* \* \* \*

(D) VMS declaration. To fish in the Eastern U.S./Canada Haddock SAP, a vessel issued a limited access NE multispecies permit must declare into the SAP via VMS and provide information on the areas within the Eastern U.S./Canada Area that it intends to fish and the type of DAS (Category A, Regular B, or Reserve B) that it intends to fish, if operating under the provisions of the common pool, prior to departure from port, in accordance with paragraph (b)(8)(v)(A) of this section and any instructions provided by the Regional Administrator.

(E) \* \* \*

(1) Unless otherwise specified in this paragraph (b)(8)(v)(E)(1), a vessel issued a limited access NE multispecies permit fishing in the Eastern U.S./Canada Haddock SAP must use the haddock separator trawl or the Ruhle Trawl, as described in paragraphs (a)(3)(iii)(A) and (b)(6)(iv)(J)(3) of this section, respectively, or another type of gear, if approved as described in this paragraph (b)(8)(v)(E). A vessel on a sector trip in the Eastern U.S./Canada Haddock SAP is not restricted to only using the haddock separator trawl or the Ruhle trawl, but may use any gear authorized in paragraph (a)(3)(iii) of this section, unless otherwise restricted by a sector operations plan approved pursuant to § 648.87(c). Other gear may be on board the vessel when on a trip in the Eastern U.S./Canada Haddock SAP, provided that the gear is stowed in accordance with § 648.23(b).

\* \* \* \* \*

(3) Mesh size. A vessel eligible to fish in the Eastern U.S./Canada Haddock SAP pursuant to paragraph (b)(8) of this section must use trawl gear described in this paragraph (b)(8)(v)(E) with a minimum codend mesh size of 6-inch (15.24-cm) square or diamond mesh.

(F) Landing limits. Unless otherwise restricted under this part, a vessel fishing any portion of a trip in the Eastern U.S./Canada Haddock SAP under a NE multispecies DAS may not fish for, possess, or land more than 1,000 lb (453.6 kg) of cod, per trip, regardless of trip length. A common pool vessel fishing in the Eastern U.S./Canada Haddock SAP under a NE multispecies DAS is subject to the haddock requirements described in § 648.86(a), unless further restricted under paragraph (a)(3)(iv) of this section. A common pool vessel fishing in the Eastern U.S./Canada Haddock SAP may not land more than 100 lb (45.5 kg) per DAS, or any part of a DAS, of GB yellowtail flounder and 100 lb (45.5 kg) of GB winter flounder, up to a maximum of 500 lb (227 kg) of all flatfish species, combined. Possession of monkfish (whole weight) and skates (whole weight) is limited to 500 lb (227 kg) each, unless otherwise restricted by § 648.94(b)(3), and possession of lobsters is prohibited.

\* \* \* \* \*

(H) Incidental TACs. The maximum amount of GB cod, GB yellowtail flounder, GB winter flounder, and pollock, both landings and discards, that may be caught when fishing in the Eastern U.S./Canada Haddock SAP Program in a fishing year by vessels fishing under a Category B DAS, as authorized in paragraph (b)(8)(v)(A), is the amount specified in paragraphs (b)(5)(ii) and (iii) of this section. All regulated species and ocean pout caught by a vessel on a sector trip will be applied against the ACE for each stock that is specified for the sector in which the vessel participates.

(I) No discard provision and DAS flips. A vessel fishing in the Eastern U.S./Canada Haddock SAP Program may not discard legal-sized regulated or ocean pout unless otherwise required due to a prohibition of the possession of such species specified in this part. If a common pool vessel fishing in the Eastern U.S./Canada Haddock SAP under a Category B DAS exceeds the applicable maximum landing limit per trip specified in paragraph (b)(8)(v)(F) of this section, or in § 648.86, the vessel operator must retain the fish and immediately notify NMFS via VMS to initiate a DAS flip (from a Category B DAS to a Category A DAS). After flipping to a Category A DAS, the vessel is subject to all applicable landing limits specified in § 648.85(a) or § 648.86. If a common pool vessel fishing in this SAP while under a Category B DAS or a Category A DAS exceeds a trip limit specified in paragraph (b)(8)(v)(F) of this section or § 648.86, or other applicable trip limit, the vessel must immediately exit the SAP area defined in paragraph (b)(8)(ii) of this section for the remainder of the trip. For a common pool

vessel that notifies NMFS of a DAS flip, the Category B DAS that have accrued between the time the vessel started accruing Category B DAS and the time the vessel declared its DAS flip will be accrued as Category A DAS pursuant to § 648.82(e)(1), and not Category B DAS.

\* \* \* \* \*

(d) Incidental catch allowance for some limited access herring vessels. The incidental catch allowance for all vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit is 0.2 percent of the combined ACLs for GOM haddock and GB haddock (U.S. landings only) specified according to § 648.90(a)(4) for a particular NE multispecies fishing year.

(e) Authorized gear performance standards. Unless otherwise restricted in this part, in areas and times when a special management program, as specified in this section, requires the use of gear authorized by that program to reduce catches of stocks of concern, participating vessels are restricted to the following trip limits: 500 lb (227 kg) of all flatfish species (American plaice, witch flounder, winter flounder, windowpane flounder, and GB yellowtail flounder), combined; 500 lb (227 kg) of monkfish (whole weight); 500 lb (227 kg) of skates (whole weight); and zero possession of lobsters, unless otherwise restricted by § 648.94(b)(3).

50 CFR § 648.86

13. In § 648.86, revise the introductory text to this section; revise paragraphs (a)(2)(iii), (b)(2) through (4), (e), (g), and (j); and add paragraphs (l), and (m) to read as follows:

50 CFR § 648.86

**§ 648.86 NE Multispecies possession restrictions.**

Except as provided in § 648.17 or elsewhere in this part, the following possession restrictions apply:

(a) \* \* \*

(2) \* \* \*

(iii) Unless otherwise authorized by the Regional Administrator as specified in paragraph (f) of this section, scallop dredge vessels or persons owning or operating a scallop dredge vessel that is fishing under a scallop DAS allocated under § 648.53 may land or possess on board up to 300 lb (136.1 kg) of haddock, except as specified in § 648.88(c), provided that the vessel has at least one standard tote on board. This restriction does not apply to vessels also issued limited access NE multispecies permits that are fishing under a multispecies DAS. Haddock on board a vessel subject to this possession limit must be separated from other species of fish and stored so as to be readily available for inspection.

\* \* \* \* \*

(b) \* \* \*

(2) GB cod landing and maximum possession limits. Unless otherwise restricted under § 648.85, a vessel \*18338 fishing under a NE multispecies DAS permit, including a vessel issued a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, may land up to 2,000 lb (907.2 kg) of cod per DAS, or part of a DAS, up to 20,000 lb (9,072 kg) provided it complies with the requirements specified in paragraph (b)(4) of this section and this paragraph (b)(2). Cod on board a vessel subject to this landing limit must be separated from other species of fish and stored so as to be readily available for inspection.

(3) [Reserved]

(4) Exemption. A common pool vessel fishing under a NE multispecies DAS is exempt from the landing limit described in paragraph (b)(1) of this section when fishing south of the GOM Regulated Mesh Area, defined in § 648.80(a)(1), provided that it complies with the requirement of this paragraph (b)(4).

(i) Declaration. With the exception of a vessel declared into the U.S./Canada Management Area, as described in § 648.85(a)(3)(ii), a common pool vessel that fishes or intends to fish under a NE multispecies DAS south of the line described in paragraph (b)(4) of this section, under the cod trip limits described in paragraph (b)(2) of this section, must, prior to leaving port, declare its intention to do so through the VMS, in accordance with instructions to be provided by the Regional Administrator. In lieu of a VMS declaration, the Regional Administrator may authorize such vessels to obtain a letter of authorization. If a letter of authorization is required, such vessel may not fish north of the exemption area for a minimum of 7 consecutive days (when fishing under the multispecies DAS program), and must carry the letter of authorization on board.

(ii) A common pool vessel exempt from the GOM cod landing limit pursuant to paragraph (b)(4)(i) of this section may not fish north of the line specified in paragraph (b)(4) of this section for the duration of the trip, but may transit the GOM Regulated Mesh Area, provided that its gear is stowed in accordance with the provisions of § 648.23(b). A vessel fishing north and south of the line on the same trip is subject to the most restrictive applicable cod trip limit.

\* \* \* \* \*

(e) White hake. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions is not restricted in the amount of white hake the vessel may land per trip during fishing years 2010 and 2011. Starting in fishing year 2012, unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited

access permit and fishing under the monkfish Category C or D permit provisions may land up to 500 lb (226.8 kg) of white hake per DAS, or any part of a DAS, up to 2,000 lb (907.2 kg) per trip.

\* \* \* \* \*

(g) Yellowtail flounder-(1) CC/GOM and SNE/MA yellowtail flounder landing limit. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, and fishing exclusively outside of the U.S./Canada Management Area, as defined in § 648.85(a)(1), may land or possess on board up to 250 lb (113.6 kg) of yellowtail flounder per DAS, or any part of a DAS, up to a maximum possession limit of 1,500 lb (680.4 kg) per trip. A vessel fishing outside and inside of the U.S./Canada Management Area on the same trip is subject to the more restrictive yellowtail flounder trip limit (i.e., that specified by this paragraph (g) or § 648.85(a)(3)(iv)(C)).

(2) GB yellowtail flounder landing limit. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions, and fishing in the U.S./Canada Management Area defined in § 648.85(a)(1) is subject to the GB yellowtail flounder limit described in paragraph § 648.85(a)(3)(iv)(c).

\* \* \* \* \*

(j) GB winter flounder. Unless otherwise restricted under this part, a common pool vessel fishing under a NE multispecies DAS, a limited access Handgear A permit, an open access Handgear B permit, or a monkfish limited access permit and fishing under the monkfish Category C or D permit provisions and fishing in the U.S./Canada Management Area defined in § 648.85(a)(1) is not restricted in the amount of GB winter flounder the vessel may land per trip.

\* \* \* \* \*

(l) Ocean pout, windowpane flounder, SNE/MA winter flounder, and Atlantic wolffish. A vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit, or a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions may not fish for, possess, or land ocean pout, windowpane flounder, or Atlantic wolffish. In addition, such vessels may not fish for, possess, or land winter flounder caught in or from the SNE/MA winter flounder stock area, as defined in § 648.85(b)(6)(v)(F). Vessels may transit this area with GOM or GB winter flounder on board the vessel, provided that gear is stowed in accordance with the provisions of § 648.23(b).

(m) Additional possession restrictions-

(1) [Reserved]

(2) Possession limits for vessels fishing in multiple areas. If a vessel fishes in more than one stock area on the same trip, as defined in § 648.85(b)(6)(v) or § 648.87(b)(1)(ii), the most restrictive trip limit for a species applies for the entire trip.

50 CFR § 648.87

14. Revise § 648.87 to read as follows:

50 CFR § 648.87

**§ 648.87 Sector allocation.**

(a) Procedure for approving/implementing a sector allocation proposal. (1) Any person may submit a sector allocation proposal for a group of limited access NE multispecies vessels to the Council and request that the sector be implemented through either a biennial adjustment or framework adjustment, as specified in § 648.90(a)(2), as long as it is submitted at least 1 year prior to the date the sector wants to begin operations in accordance with the conditions and restrictions of this section. The sector allocation proposal must contain an appropriate analysis that assesses the impact of the proposed sector, in compliance with the National Environmental Policy Act.

(2) Upon receipt of a sector allocation proposal, the Council must decide whether to initiate a management action to implement the sector proposal. Should a biennial adjustment or framework adjustment to authorize a sector allocation proposal be initiated, the Council will follow the framework adjustment provisions of § 648.90(a)(2). Any biennial adjustment or framework adjustment developed to implement a sector allocation proposal must be in compliance with the general requirements specified in paragraphs (b) and (c) of this section.

**\*18339** (3) Eligibility. Any valid limited access NE multispecies permit, including a Handgear A permit and those permits held in confirmation of permit history pursuant to § 648.4(a)(1)(i)(J) as of May 1, 2008, is eligible to join a NE multispecies sector, provided the permit complies with the restrictions specified in this section. Any valid limited access Category A or B monkfish permit may be eligible to join a NE multispecies sector, as described in this section, pursuant to any measures adopted by a future revision to the Monkfish FMP by both the New England and Mid-Atlantic Fishery Management Councils. Vessels that do not join a sector remain subject to the NE multispecies regulations for common pool vessels.

(4) Minimum size. To be authorized to operate as a sector under this section, a sector must be comprised of at least three NE multispecies permits issued to at least three different persons, none of whom have any common ownership interests in the permits, vessels, or businesses associated with the permits issued the other

two or more persons in that sector. Having an ownership interest in a permit includes, but is not limited to, persons or entities who are shareholders, officers, or partners in a corporation owning a permit; who are partners (general or limited) to a permit owner; who, in any way, partly own a permit; or who derive any financial benefit, or exercises any control over, another permit. As long as at least three persons issued a NE multispecies permit meet these requirements, permit owners may have common ownership interests in other permits, vessels, or businesses associated with such permits.

(b) General requirements applicable to all approved Sectors. (1) All sectors approved under the provisions of paragraph (a) of this section must submit the documents specified in paragraphs (a)(1), (b)(2), and (b)(3) of this section, and comply with the conditions and restrictions of this paragraph (b)(1).

(i) TAC allocation-(A) Allocated stocks. Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock with the exception of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder (both the GOM/GB and the SNE/MA stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section. In the event that a future allocation of SNE/MA winter flounder can be made available pursuant to the biennial adjustment or framework process specified in § 648.90(a)(2), an ACE for this stock will be specified pursuant to paragraph (b)(1)(i)(E)(1) of this section.

(B) Eastern GB stocks. Each sector allocated ACE for stocks managed under the terms of the U.S./Canada Resource Sharing Understanding in the Eastern U.S./Canada Area, as specified in § 648.85(a), shall be allocated a specific portion of the ACE for such stocks that can only be harvested from the Eastern U.S./Canada Area, as specified in § 648.85(a)(1). The ACE specified for the Eastern U.S./Canada Area portions of these stocks shall be proportional to the sector's allocation of the overall ACL available to all vessels issued a limited access NE multispecies permit for these stocks pursuant to § 648.90(a)(4). For example, if a sector is allocated 10 percent of the GB cod ACL available to all vessels issued a limited access NE multispecies permit, that sector would also be allocated and may harvest 10 percent of that ACE from the Eastern U.S./Canada Area. In this example, if the overall GB cod ACL available to all vessels issued a limited access NE multispecies permit is 1,000 mt, of which 100 mt is specified to the Eastern U.S./Canada Area, the Sector would be allocated 100 mt of GB cod, of which no more than 10 mt could be harvested from the Eastern U.S./Canada Area and no more than 90 mt could be harvested from the rest of the GB cod stock area.

(C) Carry-over. With the exception of GB yellowtail flounder, a sector may carry over up to 10 percent of unused ACE for each stock into the following fishing year. Any unused ACE allocated for Eastern GB stocks pursuant to paragraph

(b)(1)(i)(B) of this section will contribute to the 10-percent carry-over allowance for each stock, as specified in this paragraph (b)(1)(i)(C), but will not increase an individual sector's allocation of Eastern GB stocks during the following year. This carry-over ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

(D) Maximum ACE allocation. There is no maximum amount of ACE that can be allocated to a particular sector during each fishing year.

(E) Potential sector contribution (PSC). For the purposes of allocating a share of the available ACL for each NE multispecies stock to approved sectors pursuant to § 648.90(a)(4), the landings history of all limited access NE multispecies permits shall be evaluated to determine each permit's share of the overall landings for each NE multispecies stock as specified in paragraphs (b)(1)(i)(E)(1) and (2) of this section. When calculating an individual permit's share of the overall landings for a particular regulated species or ocean pout stock, landed weight shall be converted to live weight to maintain consistency with the way ACLs are calculated pursuant to § 648.90(a)(4) and the way ACEs are allocated to sectors pursuant to this paragraph (b)(1)(i). The PSC calculated pursuant to this paragraph (b)(1)(i)(E) shall remain with the permit indefinitely, but may be permanently reduced or eliminated due to a permit sanction or other enforcement action.

(1) Calculation of PSC for all NE multispecies stocks except GB cod. Unless otherwise specified in paragraph (b)(1)(i)(E)(2) of this section, for each valid limited access NE multispecies permit, including limited access NE multispecies Handgear A permits, dealer landings of each stock of NE multispecies caught while operating under the restrictions associated with a limited access NE multispecies permit, including regulated species or ocean pout caught under a NE multispecies DAS when participating in the skate or monkfish fisheries, that are available in the commercial dealer database to NMFS shall be summed for fishing years 1996 through 2006. This value shall then be divided by the total landings of each NE multispecies stock during the same period by all permits eligible to join sectors as of May 1, 2008. This produces an individual permit's share of the ACL for each regulated species or ocean pout stock available to the NE multispecies fishery. The landings history for each permit includes all landings that can be attributed to that permit pursuant to this paragraph (b)(1)(i)(E). For limited access NE multispecies Handgear A permits, this includes landings by the permitted vessel during fishing years 1996 through 2003 before the adoption of the limited access Handgear A permit category in 2004.

(2) Calculation of GB cod PSC. The GB cod PSC shall be calculated as specified in this paragraph (b)(1)(i)(E)(2) and shall remain with the permit indefinitely regardless whether the vessel participates in either the GB Cod Hook Gear Sector

or the GB Cod Fixed Gear Sector, as defined in § 648.87(d)(1) or (2), joins a new sector, or fishes pursuant to the provisions of the common pool.

(i) GB cod PSC for permits committed to participate in the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector. For each valid NE multispecies permit that committed to participate in either the \*18340 GB Cod Hook Gear Sector or the GB Cod Fixed Gear Sector as evidenced by a valid signature executed on or before March 1, 2008, on a preliminary roster for either of these sectors, the PSC for GB cod shall be based upon the sum of dealer landings of GB cod for fishing years 1996 through 2001, divided by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period. The PSC for all other regulated species or ocean pout stocks specified for these permits shall be calculated pursuant to paragraph (b)(1)(i)(E)(1) of this section.

(ii) GB cod PSC for all other permits. For all NE multispecies permits that have not committed to participate in either the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector, as specified in paragraph (o)(2)(i) of this section, the GB cod PSC shall be based upon the GB cod PSC available after accounting for the GB cod PSC calculated pursuant to paragraph (o)(2)(i) of this section. First, each permit's individual share of the available GB cod PSC shall be calculated by dividing the sum of the individual permit's landings of GB cod available in the commercial dealer database for fishing years 1996 through 2006 by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period, after subtracting the total landings of GB cod by permits that committed to participate in either the GB Cod Hook Sector or GB Cod Fixed Gear Sector as of March 1, 2008, during that period. This individual share shall then multiplied by the available GB cod PSC calculated by subtracting the GB cod PSC allocated pursuant to paragraph (b)(1)(i)(E)(2)(i) of this section from one. This shall provide each vessel's share of the available GB cod PSC.

(ii) Areas that can be fished. Vessels in a sector may only fish in a particular stock area, as specified in paragraphs (b)(1)(ii)(A) through (F) of this section, and § 648.85(b)(6)(v), or the Eastern U.S./Canada Area, as specified in § 648.85(a)(1), if the sector has been allocated, or acquires pursuant to paragraph (b)(1)(viii) of this section, ACE for all stocks caught in that stock area. A sector must project when its ACE for each stock will be exceeded and must ensure that all vessels in the sector cease fishing operations prior to exceeding it. Once a sector has harvested its ACE for a stock, all vessels in that sector must cease fishing operations in that stock area on a sector trip unless and until it acquires additional ACE from another sector pursuant to paragraph (b)(1)(viii) of this section, or as otherwise specified in an approved operations plan pursuant to paragraph (b)(2)(xiv) of this section. For the purposes of this paragraph (b)(1)(ii), an ACE overage means catch of regulated species or ocean pout by vessels participating in a particular sector that exceed the

ACE allocated to that sector, as of the date received or purchased by the dealer, whichever occurs first, after considering all ACE transfer requests ultimately approved by NMFS during the current fishing year, pursuant to paragraph (b)(1)(viii) of this section, unless otherwise specified pursuant to § 648.90(a)(5).

(A-F) [Reserved]

(iii) Sector AMs. At the end of the fishing year, NMFS shall evaluate sector catch using VTR, VMS, IVR, and any other available information to determine whether a sector has exceeded any of its ACE allocations based upon the cumulative catch by participating permits/vessels, as identified in the final operations plan approved by the Regional Administrator pursuant to paragraph (c) of this section, and each sector's share of any overage of the overall ACL for any stock caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5), if necessary. Should an ACE allocated to a sector be exceeded in a given fishing year, the sector's ACE shall be reduced by the overage on a pound-for-pound basis during the following fishing year, and the sector, each vessel, vessel operator and/or vessel owner participating in the sector may be charged, as a result of said overages, jointly and severally for civil penalties and permit sanctions pursuant to 15 CFR part 904. If an ACE allocated to a sector is not exceeded in a given fishing year pursuant to this paragraph (b)(1)(iii), the sector's ACE allocation shall not be reduced for the following fishing year as a result of an overage of an ACE by non-compliant sectors or an overage of sub-ACLs allocated to common pool vessels, but may be reduced if the excessive catch of a particular stock by other sub-components of the fishery causes the overall ACL of a particular stock to be exceeded pursuant to § 648.90(a)(5). If declining stock conditions result in a need to reduce fishing mortality, and all sectors and common pool vessels have operated within their ACE or sub-ACL limits, a sector's percentage share shall not be changed, but the amount this share represents may be reduced due to reduced overall ACL for a particular stock. If stock conditions improve, and certain sectors stay within their ACE while other sectors or the common pool exceed their respective ACEs or sub-ACLs, the sectors that stay within their ACEs shall receive a temporary increase in ACE equal to the amount that other sectors or the common pool exceeded their ACE or sub-ACL, divided among such sectors proportional to each sector's share of the ACL available to vessels issued a limited access NE multispecies permit.

(A) Overage penalty if there is sufficient ACE to cover the overage. If a sector exceeds an ACE allocated to it during the previous fishing year, but has sufficient ACE to address the overage pursuant to this paragraph (b)(1)(iii) based upon the cumulative PSCs of participating vessels during the fishing year following the overage, no overage penalty shall be applied to any member permit/vessel that leaves that sector to fish under the provisions of the common pool or in another

sector in the year following the overage. Any impacts to departing member permits/vessels may be specified and addressed by the sector operations plan and associated sector contract.

(B) Overage penalty if there is insufficient ACE to cover an overage. If a sector exceeds an ACE allocated to it during the previous fishing year, but disbands in the year following the overage, or otherwise does not have sufficient ACE to address the overage pursuant to this paragraph (b)(1)(iii) based upon the cumulative PSCs of permits/vessels participating in that sector during the fishing year following the overage, individual permit holders that participated in the sector during the fishing year in which the overage occurred shall be responsible for reducing their DAS/PSC to account for that overage in the subsequent fishing year, as follows:

(1) PSC reduction. If a sector disbands following an overage, and the owner of an individual permit joins another sector for the subsequent fishing year, that permit's contribution toward the ACE for the stock for which the overage occurred to the other sector in the subsequent fishing year shall be reduced by an amount equal to the overage divided by the number of permits/vessels participating in the sector during the fishing year in which the overage occurred. For example, if a sector comprised of 10 permits/vessels exceeded its GB cod ACE by 10,000 lb (4,536 kg) during the previous fishing year, but later disbands, each permit/vessel that was in that sector, but then joins another sector during the following fishing year shall have its contribution of GB cod to another sector temporarily reduced by 1,000 lb (453.6 kg) during the subsequent fishing year for the purposes of calculating the available GB cod ACE allocated to another sector during that fishing year.

**\*18341** (2) DAS reduction. If a sector disbands following an overage and the owner of an individual permit elects to fish under the provisions of the common pool during the subsequent fishing year, that permit/vessel's NE multispecies Category A DAS allocation for the subsequent fishing year shall be temporarily reduced by an amount proportional to the highest percentage overage by that sector of any of the stocks for which an overage occurred. For example, if a sector exceeded its GB cod ACE by 10 percent and its pollock ACE by 15 percent, each permit would receive a 15-percent reduction in its Category A DAS allocation for the subsequent fishing year if fishing under the provisions of the common pool.

(3) Fishing prohibition. If a sector does not disband following an overage, but otherwise does not have sufficient ACE to cover an overage based upon the PSC of participating permits, that sector's ACE for the stock for which the overage occurred shall be temporarily reduced to zero for the following fishing year, and that sector shall be prohibited from fishing on a sector trip in the stock area associated with the stock for which the ACE was exceeded during the following year, unless and until that sector can acquire sufficient ACE from another sector to cover the remaining overage from the previous fishing year. For example, if a

sector comprised of 10 permits/vessels was allocated 10 mt of GB cod ACE, but caught 25 mt during the previous fishing year (i.e., it exceeded its GB cod ACE by 15 mt), each permit/vessel that participating in that sector during the following fishing year would have its GB cod PSC temporarily reduced to zero during the subsequent fishing year, and that sector would not be able to fish on a sector trip in the GB cod stock area until it could acquire at least an additional 5 mt of GB cod ACE from another sector (i.e., 15 mt overage-10 mt ACE for the following year = 5 mt overage remaining).

(C) ACE buffer. At the beginning of each fishing year, NMFS shall withhold 20 percent of a sector's ACE for each stock for a period of up to 61 days (i.e., through June 30) to allow time to process any ACE transfers submitted by May 15 pursuant to paragraph (b)(1)(viii) of this section and to determine whether the ACE allocated to any sector needs to be reduced, or any overage penalties need to be applied to individual permits/vessels in the current fishing year to accommodate an ACE overage by that sector during the previous fishing year, as specified in paragraph (b)(1)(iii) of this section.

(iv) Sector enforcement-(A) Sector compliance and joint/several liability. Unless exempted through a letter of authorization specified in paragraph (c)(2) of this section, each vessel operator and/or vessel owner fishing under an approved sector must comply with all NE multispecies management measures of this part and other applicable law. Each vessel and vessel operator and/or vessel owner participating in a sector must also comply with all applicable requirements and conditions of the operations plan specified in paragraph (b)(2) of this section and the letter of authorization issued pursuant to paragraph (c)(2) of this section. Pursuant to 15 CFR part 904, each sector, permit/vessel owner, and vessel operator participating in the sector may be charged jointly and severally for violations of the following sector operations plan requirements, which may result in an assessment of civil penalties and permit sanctions: ACE overages, discarding of legal-sized NE multispecies, and misreporting of catch, including both landings and discards. For the purposes of enforcement, a sector is a legal entity that can be subject to NMFS enforcement action for violations of the regulations pertaining to sectors, as specified in this paragraph (b)(1)(iv).

(B) Commitment to a sector. A permit/vessel participating in a sector must remain in the sector for the remainder of the fishing year. Such permits/vessels cannot fish under both the sector provisions and the provisions of the common pool during that same fishing year for any reason, including, but not limited to, expulsion from the sector pursuant to enforcement actions or other measures specified in an approved sector operations plan, vessel replacement, or permit/vessel sale to another owner. For example, if a permit/vessel is sold by a sector participant during the fishing year, the new owner must comply with the sector regulations and the conditions of

the sector operations plan, sector contract, or any other binding agreements among participating sector vessels for the remainder of the fishing year. If a permit/vessel has been expelled from a sector, the sector must notify NMFS of such an expulsion immediately. Any permit/vessel, vessel operator, or vessel owner removed from a sector during a specific fishing year consistent with sector rules shall not be eligible to fish in another sector or under the NE multispecies regulations for common pool vessels specified in this part for the remainder of that fishing year. For the purposes of this paragraph, "permit/vessel" refers to the fishing and landings history associated with a particular permit/vessel enrolled in a specific sector at the start of the fishing year that was used to calculate the PSC for that permit/vessel and contribute to the ACE for each stock allocated to that specific sector.

(v) Sector monitoring. Each sector shall monitor catch by participating sector vessels to ensure that ACEs are not exceeded during the fishing year, as specified in this paragraph (b)(1)(v). The sector shall summarize trips validated by dealer reports; oversee the use of electronic monitoring equipment and review of associated data; maintain a database of VTR, dealer, observer, and electronic monitoring reports; determine all species landings by stock areas; apply discard estimates to landings; deduct catch from ACEs allocated to sectors; and report sector catch on a weekly basis to NMFS, as required in paragraph (b)(1)(vi) of this section. Unless otherwise specified in this paragraph (b)(1)(v), all catches of stocks allocated to sectors by vessels on a sector trip shall be deducted from the sector's ACE for each NE multispecies stock regardless of what the fishery the vessel was participating in when the fish was caught. For the purposes of this paragraph (b)(1)(v), any regulated species or ocean pout caught using gear capable of catching NE multispecies (i.e., gear not listed as exempted gear under this part) would be deducted from a sector's ACE if such catch contributed to the specification of PSC, as described in § 648.87(b)(1)(i)(E), and would not apply to another ACL sub-component pursuant to § 648.90(a)(4). For example, any regulated species or ocean pout landed while fishing for or catching skates or monkfish pursuant to the regulations for those fisheries would be deducted from the sector's ACE for each stock because such regulated species or ocean pout were caught while also operating under a NE multispecies DAS. However, if a sector vessel is issued a limited access General Category Atlantic Sea Scallop permit and fishes for scallops under the provisions specific to that permit, any yellowtail flounder caught by the vessel on such trips would be deducted from the other sub-component of the appropriate stock of yellowtail flounder's ACL specified for the Atlantic Sea Scallop fishery and not from the yellowtail flounder ACE for the sector.

(A) Discards. A sector vessel may not discard any legal-sized regulated species or ocean pout allocated to sectors pursuant to paragraph (b)(1)(i) of this section, unless otherwise required pursuant to § 648.86(l). Discards of undersized regulated species or ocean pout by a sector vessel must be reported \*18342 to NMFS consistent with the reporting requirements specified in paragraph (b)(1)(vi) of this section. Discards shall not be included in the information used to calculate a vessel's PSC, as described in § 648.87(b)(1)(i)(E), but shall be counted against a sector's ACE for each NE multispecies stock allocated to a sector.

(B) Independent third-party monitoring program. Beginning in fishing year 2010, a sector must develop, implement, and pay for, to the extent not funded by NMFS, an independent third-party dockside/roving and at-sea/electronic monitoring program that is satisfactory to, and approved by, NMFS for monitoring landings and utilization of sector ACE, as specified in this paragraph (b)(1)(v)(B). Any service providers providing dockside/roving and at-sea monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet the service provider standards specified in paragraph (b)(4) of this section, and any dockside/roving and at-sea/electronic monitoring program proposed by sectors must meet the operational standards specified in paragraph (b)(5) and (b)(6) of this section, respectively, and be approved/certified by NMFS in a manner consistent with the Administrative Procedure Act.

(1) Dockside/roving monitors. Dockside/roving monitors shall monitor landings of regulated species and ocean pout by sector vessels at the first point of offload, whether directly to a federally permitted dealer or to a truck for transfer to a federally permitted dealer, to verify such landings at the time the landings are weighed by a federally permitted dealer and to certify the landing weights are accurate as reported on the dealer report. The level of coverage for landings by sector vessels is specified in paragraph (b)(1)(v)(B)(3) of this section. To ensure that these levels of coverage are achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip, regardless of how many or the location of offloading events, must be monitored. For example, if a trip is selected to be observed by a dockside/roving monitor, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during the offload at each location. The details of the dockside/roving monitoring program used by each sector must be specified in the sector's operations plan and must be consistent with the operational standards specified in paragraph (b)(5) of this section. The Regional Administrator shall review the dockside/roving monitoring program and approve/disapprove it as part of the yearly operations plan in a manner consistent with the Administrative Procedure Act.

(2) At-sea/electronic monitoring program. Beginning in fishing year 2012, in addition to the dockside/roving monitoring requirement specified in paragraph (b)(1)(v)(B)(1) of this section, an at-sea/electronic monitoring program must be implemented to verify area fished as well as catch and discards by species and gear type. A sector may elect to develop an at-sea/electronic monitoring program before fishing year 2012 and specify the details of such a program in its operations plan. Electronic monitoring may be used in place of actual observers if the technology is deemed sufficient by NMFS for a specific trip type based on gear type and area fished, in a manner consistent with the Administrative Procedure Act. No electronic monitoring technology may be used in place of an at-sea monitor unless approved by NMFS as part of the sector's annual operations plan. If either an at-sea monitor or electronic monitoring is assigned to a particular trip, a vessel may not leave port without the appropriate at-sea monitor or electronic monitoring equipment on board. The at-sea/electronic monitoring program developed and implemented by each sector must be consistent with the operational standards specified in paragraph (b)(6) of this section, with details of the program specified in the sector's annual operations plan. The Regional Administrator shall review the at-sea/electronic monitoring program and approve/disapprove it as part of the annual operations plan in a manner consistent with the Administrative Procedure Act. The level of coverage for landings by sector vessels is specified in paragraph (b)(1)(v)(B)(3) of this section.

(3) Coverage levels. Any service provider providing dockside/roving or at-sea monitoring services required under this paragraph (b)(1)(v)(B)(3) must provide coverage that is fair, 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 sector vessel operations throughout the fishing year.

(i) Dockside/roving monitoring. For fishing year 2010, at least 50 percent of all sector trips shall be monitored by dockside/roving monitors. Beginning in fishing year 2011, at least 20 percent of all Sector trips shall be monitored by dockside/roving monitors.

(ii) At-sea/electronic monitoring. Beginning in fishing year 2012, coverage levels for an at-sea monitoring program shall be specified by NMFS, but shall be less than 100 percent of all sector trips. Such coverage levels must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology and accurately monitor sector operations. In the event that a NMFS-sponsored observer and a third-party at-sea monitor are assigned to the same trip, only the NMFS observer must observe that trip.

(4) Hail reports. For the purposes of the dockside/roving and at-sea monitoring requirements specified in this paragraph (b)(1)(v)(B), sector vessels must submit

all hail reports for a sector trip in which the NE multispecies catch applies against the ACE allocated to a sector, as specified in this part, to service providers offering dockside/roving and at-sea monitoring services pursuant to this paragraph (b)(1)(v)(B). The mechanism and timing of the transmission of such hail reports must be specified in the annual sector operations plan, consistent with paragraphs (b)(5) and (6) of this section.

(5) Notification of service provider change. If for any reason a sector decides to change service providers used to provide the dockside/roving and at-sea monitoring services required in this paragraph (b)(1)(v), the sector manager must first inform NMFS of the effective date of the change in service providers in conjunction with the submission of the next weekly sector catch report specified in paragraph (b)(1)(vi)(B) of this section. A sector may employ more than one service provider at any time, provide any service provider employed by a sector meets the standards specified in paragraph (b)(4) of this section.

(vi) Sector reporting requirements. In addition to the other reporting/recordkeeping requirements specified in this part, a sector's vessels must comply with the reporting requirements specified in this paragraph (b)(1)(vi).

(A) VMS declarations and trip-level catch reports. Prior to each sector trip, a sector vessel must declare into broad stock areas in which the vessel fishes and submit the VTR serial number associated with that trip pursuant to § 648.10(k). The sector vessel must also submit a VMS catch report detailing regulated species and ocean pout catch by broad stock areas when fishing in multiple stock areas on the same trip, pursuant to § 648.10(k).

(B) Weekly catch report. Each sector must submit weekly reports to NMFS stating the remaining balance of ACE allocated to each sector based upon regulated species and ocean pout \*18343 landings and discards of vessels participating in that sector and any compliance/enforcement concerns. These reports must include at least the following information, as instructed by the Regional Administrator: Week ending date; species, stock area, gear, number of trips, reported landings (landed pounds and live pounds), discards (live pounds), total catch (live pounds), status of the sector's ACE (pounds remaining and percent remaining), and whether this is a new or updated record of sector catch for each NE multispecies stock allocated to that particular sector; sector enforcement issues, including any discrepancies noted by dockside/roving monitors between dealers and offloads; summary of offloads witnessed by dockside/roving monitors for that reporting week; and a list of vessels landing for that reporting week. These weekly catch reports must be submitted no later than 2359 hr on Thursday of the week following the reporting week, as defined in this part. The frequency of these reports must be increased to more than a weekly submission when the balance of remaining ACE is low, as specified in the sector operations plan and approved by NMFS. If

requested, 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.

(C) Year-end report. An approved sector must submit an annual year-end report to NMFS and the Council, no later than 60 days after the end of the fishing year, that summarizes the fishing activities of participating permits/vessels, which must include at least the following information: Catch, including landings and discards, of all species by sector vessels; the permit number of each sector vessel that fished for regulated species or ocean pout; the number of vessels that fished for non-regulated species or ocean pout; the method used to estimate discards by sector vessels; the landing port used by sector vessels; enforcement actions; and other relevant information required to evaluate the biological, economic, and social impacts of sectors and their fishing operations consistent with confidentiality requirements of applicable law.

(vii) Interaction with other fisheries-(A) Use of DAS. A sector vessel must comply with all measures specified for another fishery pursuant to this part, including any requirement to use a NE multispecies DAS. If the regulations of another fishery require the use of a NE multispecies DAS, the DAS allocation and accrual provisions specified in § 648.82(d) and (e), respectively, apply to each trip by a sector vessel, as applicable. For example, if a sector vessel is also issued a limited access monkfish Category C permit and is required to use a NE multispecies DAS concurrent with a monkfish DAS under this part, any NE multispecies DAS used by the sector vessel accrues, as specified in § 648.82(e)(1)(ii) based upon the vessel's NE multispecies DAS allocation calculated pursuant to § 648.82(d)(1)(iv)(B).

(B) Availability of ACE. Notwithstanding the requirements in paragraph (b)(1)(vii)(A) of this section, if a sector has not been allocated or does not acquire sufficient ACE available to cover the catch of a particular stock of NE multispecies while participating in another fishery in which such catch would apply to the ACE allocated to a sector, vessels participating in that sector cannot participate in those other fisheries unless NMFS has approved a sector operations plan that ensures that regulated species or ocean pout will not be caught while participating in these other fisheries.

(viii) ACE transfers. All or a portion of a sector's ACE for any NE multispecies stock may be transferred to another sector at any time during the fishing year and up to 2 weeks into the following fishing year (i.e., through May 14) to cover any overages during the previous fishing year. A sector is not required to transfer ACE to another sector. An ACE transfer only becomes effective upon approval by NMFS, as specified in paragraph (b)(1)(viii)(B).

(A) Application to transfer ACE. ACE may be transferred from one sector to another through written request to the Regional Administrator. This request must include the name of the sectors involved, the amount of each ACE to be transferred, the fishing year in which the ACE transfer applies, and the amount of compensation received for any ACE transferred, as instructed by the Regional Administrator.

(B) Approval of an ACE transfer request. NMFS shall approve/disapprove a request to transfer ACE based upon compliance by each sector and its participating vessels with the reporting requirements specified in this part. The Regional Administrator shall inform both sectors in writing whether the ACE transfer request has been approved within 2 weeks of the receipt of the ACE transfer request.

(C) Duration of transfer. Notwithstanding ACE carried over into the next fishing year pursuant to paragraph (b)(1)(i)(C) of this section, ACE transferred pursuant to this paragraph (b)(1)(viii) is only valid for the fishing year in which the transfer is approved, with the exception of ACE transfer requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section.

(ix) Trip limits. With the exception of stocks listed in § 648.87(l), a sector vessel is not limited in the amount of allocated NE multispecies stocks that can be harvested on a particular fishing trip, unless otherwise specified in the operations plan.

(2) Operations plan and sector contract. To be approved to operate, each sector must submit an operations plan and sector contract to the Regional Administrator no later than September 1 prior to the fishing year in which the sector intends to begin operations. This operations plan may cover a 1- or 2-year period, provided the analysis required in paragraph (b)(3) of this section is sufficient to assess the impacts of sector operations during the 2-year period and that sector membership, or any other parameter that may affect sector operations during the second year of the approved operations plan, does not differ to the point where the impacts analyzed by the supporting NEPA document are compromised. Each vessel and vessel operator and/or vessel owner participating in a sector must agree to and comply with all applicable requirements and conditions of the operations plan specified in this paragraph (b)(2) and the letter of authorization issued pursuant to paragraph (c)(2) of this section. It shall be unlawful to violate any such conditions and requirements unless such conditions or restrictions are identified as administrative only in an approved operations plan. At least the following elements must be contained in either the operations plan or sector contract:

(i) A list of all parties, vessels, and vessel owners who will participate in the sector;

- (ii) A list of all Federal and state permits held by persons participating in the sector, including an indication for each permit whether it is enrolled and will actively fish in a sector, or will be subject to the provisions of the common pool;
- (iii) A contract signed by all sector participants indicating their agreement to abide by the operations plan;
- (iv) The name of a designated representative or agent of the sector for service of process;
- (v) If applicable, a plan for consolidation or redistribution of ACE detailing the quantity and duration of **\*18344** such consolidation or redistribution within the sector;
- (vi) A list of the specific management rules the sector participants will agree to abide by in order to avoid exceeding the allocated ACE for each stock, including a plan of operations or cessation of operations once the ACEs of one or more stocks are harvested and detailed plans for enforcement of the sector rules;
- (vii) A plan that defines the procedures by which members of the sector that do not abide by the rules of the sector will be disciplined or removed from the sector, and a procedure for notifying NMFS of such expulsions from the sector;
- (viii) If applicable, a plan of how the ACE allocated to the sector is assigned to each vessel;
- (ix) If the operations plan is inconsistent with, or outside the scope of the NEPA analysis associated with the sector proposal/framework adjustment as specified in paragraph (a)(1) of this section, a supplemental NEPA analysis may be required with the operations plan;
- (x) Detailed information about overage penalties or other actions that will be taken if a sector exceeds its ACE for any stock;
- (xi) Detailed plans for the monitoring and reporting of landings and discards by sector participants, including, but not limited to, detailed information describing the sector's dockside/roving and at-sea/electronic monitoring program for monitoring utilization of ACE allocated to that sector; identification of the independent third-party service providers employed by the sector to provide dockside/roving and at-sea/electronic monitoring services; the mechanism and timing of any hail reports necessary to coordinate the deployment of dockside/roving and at-sea monitors and electronic monitoring equipment; a list of specific ports where participating vessels will land fish, with specific exemptions noted for safety, weather, etc., allowed, provided the sector provides reasonable notification to NMFS concerning a deviation from the listed ports; and any other information about such a program required by NMFS;
- (xii) ACE thresholds that may trigger revisions to sector operations to ensure allocated ACE is not exceeded, and details regarding the sector's plans for notifying NMFS once the specified ACE threshold has been reached;

(xiii) Identification of any potential redirection of effort into other fisheries expected as a result of sector operations, and, if necessary, proposed limitations to eliminate any adverse effects expected from such redirection of effort;

(xiv) If applicable, description of how regulated species and ocean pout will be avoided while participating in other fisheries that have a bycatch of regulated species or ocean pout if the sector does not have sufficient ACE for stocks of regulated species or ocean pout caught as bycatch in those fisheries, as specified in paragraph (b)(1)(vii)(B) of this section; and

(xv) A list of existing regulations that the sector is requesting exemption from during the following fishing year pursuant to paragraph (c)(2) of this section.

(3) NEPA analysis. In addition to the documents required by paragraphs (a)(1) and (b)(2) of this section, before NMFS can approve a sector to operate during a particular fishing year, each sector must develop and submit to NMFS, in conjunction with the yearly operations plan and sector contract, an appropriate NEPA analysis assessing the impacts of forming the sector and operating under the measures described in the sector operations plan.

(4) Independent third-party monitoring provider standards. Any service provider intending to provide dockside/roving and at-sea/electronic monitoring services described in § 648.82(n)(2) and paragraph (b)(1)(v) of this section must apply to and be approved/certified by NMFS in a manner consistent with the Administrative Procedure Act. NMFS shall approve/certify service providers and associated dockside, roving, and/or at-sea monitors as eligible to provide sector monitoring services specified in this part and can disapprove/decertify service providers and/or individual monitors through notice in writing to individual service providers/monitors if the following criteria are no longer being met:

(i) Service provider information. As part of the application for service provider approval/certification, potential service providers must include at least the following information:

(A) Identification of corporate structure, including the names and duties of controlling interests in the company such as owners, board members, authorized agents, and staff; and articles of incorporation, or a partnership agreement, as appropriate;

(B) Contact information for official correspondence and communication with any other office;

(C) A statement, signed under penalty of perjury, from each owner, board member, and officer that they are free from a conflict of interest with fishing-related parties including, but not limited to, vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions and will not accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from such parties;

(D) A statement, signed under penalty of perjury, from each owner, board member, and officer describing any criminal convictions, Federal contracts they have had, and the performance rating they received on the contract, and previous decertification action while working as an observer or observer service provider;

(E) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments including, but not limited to, recruiting, hiring, deployment, and personnel administration;

(F) A description of the applicant's ability to carry out the responsibilities and duties of a sector monitoring/reporting service provider and the arrangements to be used, including whether the service provider is able to offer dockside and/or at-sea monitoring services;

(G) Evidence of adequate insurance (copies of which shall be provided to the vessel owner, operator, or vessel manager, when requested) to cover injury, liability, and accidental death to cover dockside, roving, and at-sea monitors (including during training); vessel owner; and service provider;

(H) Proof of benefits and personnel services provided in accordance with the terms of each monitor's contract or employment status;

(I) Proof that the service provider's dockside, roving, and at-sea monitors have passed an adequate training course sponsored by the service providers to the extent not funded by NMFS that is consistent with the curriculum used in the current yearly NEFOP training course, unless otherwise specified by NMFS;

(J) An Emergency Action Plan describing the provider's response to an emergency with a dockside, roving, and at-sea monitors, including, but not limited to, personal injury, death, harassment, or intimidation; and

(K) Evidence that the company is in good financial standing;

(ii) Service provider performance requirements. Dockside/roving and at-sea monitoring service providers must be able to document compliance with the following criteria and requirements:

(A) A service provide must establish and carry out a comprehensive plan to deploy NMFS-certified dockside, roving, and/or at-sea monitors, or other **\*18345** at-sea monitoring mechanism, such as electronic monitoring equipment that is approved by NMFS, according to a prescribed coverage level (or level of precision for catch estimation), as specified by NMFS, including all of the necessary vessel reporting/notice requirements to facilitate such deployment, as follows:

(1) A service provider must be available to industry 24 hr per day, 7 days per week, with the telephone system monitored a minimum of four times daily to ensure rapid response to industry requests;

(2) A service provider must be able to deploy dockside, roving, and/or at-sea monitors, or other approved at-sea monitoring mechanism to all ports in which

service is required by sectors, or a subset of ports as part of a contract with a particular sector;

(3) A service provider must report dockside, roving, and at-sea monitors and other approved at-sea monitoring mechanism deployments to NMFS and the sector manager in a timely manner to determine whether the predetermined coverage levels are being achieved for the appropriate sector;

(4) A service provider must assign dockside, roving, and at-sea monitors and other approved at-sea monitoring mechanisms without regard to any preference by the sector manager or representatives of vessels other than when the service is needed and the availability of approved/certified monitors and other at-sea monitoring mechanisms;

(5) A service provider's dockside, roving, and at-sea monitor assignment must be fair, equitable, representative of fishing activities within each sector, and able to monitor fishing activity throughout the fishing year;

(6) For service providers offering catch estimation or at-sea monitoring services, a service provider must be able to determine an estimate of discards for each trip and provide such information to the sector manager and NMFS, as appropriate and as required by this section;

(B) The service provider must ensure that dockside, roving, and at-sea monitors remain available to NMFS, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any monitored trip/offload;

(C) The service provider must report possible dockside, roving, and at-sea monitor harassment; discrimination; concerns about vessel safety or marine casualty; injury; and any information, allegations, or reports regarding dockside, roving, or at-sea monitor conflict of interest or breach of the standards of behavior to NMFS and/or the sector manager, as specified by NMFS;

(D) The service provider must submit to NMFS, if requested, a copy of each signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the service provider and those entities requiring services (i.e., sectors and participating vessels) and between the service provider and specific dockside, roving, or at-sea monitors;

(E) The service provider must submit to NMFS, if requested, copies of any information developed and used by the service providers distributed to vessels, such as informational pamphlets, payment notification, description of duties, etc.;

(F) A service provider may refuse to deploy a dockside, roving, or at-sea monitor or other approved at-sea monitoring mechanism on a requesting fishing vessel for any reason including, but not limited to, the following:

(1) If the service provider does not have an available dockside/roving monitor prior to a vessel's intended date/time of landing, or if the service provider does not have an available at-sea monitor or other at-sea monitoring mechanism approved by

NMFS within the advanced notice requirements established by the service provider;

(2) If the service provider is not given adequate notice of vessel departure or landing from the sector manager or participating vessels, as specified by the service provider;

(3) For the purposes of at-sea monitoring, if the service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described in § 600.746; and

(4) Failure to pay for previous deployments of dockside, roving, or at-sea monitors, or other approved at-sea monitoring mechanism.

(G) With the exception of a service provider offering reporting, dockside, and/or at-sea monitoring services to participants of another fishery managed under Federal regulations, a service provider must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, fishing vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions and may not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing-related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of service providers;

(H) A system to record, retain, and distribute the following information to NMFS, as requested, for a period specified by NMFS, including:

(1) Dockside, roving, and/or at-sea monitor and other approved monitoring equipment deployment levels, including the number of refusals and reasons for such refusals;

(2) Incident/non-compliance reports (e.g., failure to offload catch); and

(3) Hail reports, landings records, and other associated interactions with vessels and dealers.

(I) A means to protect the confidentiality and privacy of data submitted by vessels, as required by the Magnuson-Stevens Act; and

(J) A service provider must be able to supply dockside and at-sea monitors with sufficient safety and data-gathering equipment, as specified by NMFS.

(iii) Standards for individual dockside/roving monitors. For an individual to be approved/certified as a dockside or roving monitor, the service provider must demonstrate that each potential monitor meets the following criteria:

(A) A high school diploma or legal equivalent;

(B) Successful completion of all NMFS-required training and briefings before deployment;

(C) Physical and mental capacity for carrying out the responsibilities of a dockside/roving monitor pursuant to standards established by NMFS, such as being

certified by a physician to be physically fit to work as a dockside/roving monitor after consideration that a monitor may be required to climb a ladder to inspect fish holds and/or trucks;

(D) Absence of fisheries-related convictions based upon a thorough background check; and

(E) Independence from fishing-related parties including, but not limited to, vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions to prevent conflicts of interest.

(iv) Standards for individual at-sea monitors. For an individual to be approved/certified as an at-sea monitor, the service provider must demonstrate that each potential monitor meets the following criteria:

(A) A high school diploma or legal equivalent;

(B) Successful completion of all NMFS-required training and briefings before deployment;

(C) Physical and mental capacity for carrying out the responsibilities of an at-sea monitor on board fishing vessels, **\*18346** pursuant to standards established by NMFS such as being certified by a physician to be physically fit to work as an at-sea monitor after consideration of at least the following work-related issues:

(1) Susceptibility to chronic motion sickness;

(2) Ability to live in confined quarters;

(3) Ability to tolerate stress;

(4) Ability to lift and carry heavy objects up to 50 lb (22.7 kg);

(5) Ability to drag heavy objects up to 200 lb (90.7 kg); and

(6) Ability to climb a ladder.

(D) A current Red Cross (or equivalent) CPR/first aid certification;

(E) Absence of fisheries-related convictions, based upon a thorough background check; and

(F) Independence from fishing-related parties including, but not limited to, vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions to prevent conflicts of interest.

(5) Dockside monitoring operational standards. In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any dockside monitoring program developed as part of a sector's yearly operations plan pursuant to paragraph (b)(1)(v)(B)(1) of this section, or required as part of the trimester TAC AM specified in § 648.82(n)(2) must meet the following operational standards to be approved by NMFS:

(i) Vessel requirements-(A) Reporting/recordkeeping requirements. In addition to all other reporting/recordkeeping requirements specified in this part, to facilitate the deployment of independent dockside and roving monitors pursuant to § 648.82(n)(2)(iv) and paragraph (b)(1)(v) of this section, the operator of a vessel

fishing under the provisions of the common pool or on a sector trip must comply with the following requirements:

(1) Trip-start hail report. The vessel operator must submit a trip-start hail report prior to departing port at the beginning of each trip notifying the sector manager and/or dockside/roving monitor service provider of the vessel permit number; trip ID number in the form of the VTR serial number of the first VTR page for that trip, or another trip identifier specified by NMFS; and an estimate of the date and time of arrival to port. Trip-start hail reports by vessels operating less than 6 hours or within 6 hours of port must also include estimated date and time of offload. If the vessel operator does not receive confirmation of the receipt of the trip-start hail report from the dockside/roving monitor service provider within 10 minutes of sending the original trip-start hail report, the operator must contact the service provider to confirm the trip-start hail report via an independent back-up system developed by the service provider.

(2) Trip-end hail report. Prior to returning to port upon the completion of a fishing trip, the vessel operator must submit a trip-end hail report notifying the dockside/roving monitor service provider of the vessel permit number; trip ID submitted pursuant to paragraph (b)(5)(i)(A)(1) of this section; intended offloading location(s), including the dock/dealer, port/harbor, and state for the first dealer/facility where the vessel intends to offload catch and the port/harbor, and state for the second dealer/facility where the vessel intends to offload catch; estimated date/time of arrival; estimated date/time of offload; estimated total amount of regulated species on board (in pounds, landed weight); and estimated total amount of all other species retained (in pounds, landed weight), including species managed by other FMPs, on board. The trip-end hail report must be submitted at least 6 hr in advance of landing for all trips at least 6 hr in duration or occurring more than 6 hr from port. For shorter trips, the trip-end hail reports must be submitted within sufficient time to allow the deployment of the dockside/roving monitor to the offloading site, as specified by the dockside/roving monitoring service provider in consultation with NMFS Office of Law Enforcement. These reports may be in the form of an email to the dockside/roving monitor service provider or another means of communication specified by the service provider.

(B) Copies of trip documents. The operator of a sector vessel that is issued a waiver from the dockside/roving monitoring requirements specified in paragraph (b)(1)(v)(B) of this section for a particular trip must provide copies of all VTRs and dealer receipts associated with that trip to the sector or designated third party contractor, as appropriate, within 24 hr of offloading.

(C) Vessel offloads. A vessel may not offload any fish from a trip that was selected to be observed by a dockside/roving monitor until the dockside/roving monitor(s)

assigned to that trip is present, as specified in paragraph (b)(5)(ii)(A) of this section.

(ii) Dockside/roving monitor service provider requirements-(A) Confirmation of vessel hail reports. Upon receipt of a trip-start or trip-end hail reports pursuant to paragraphs (b)(5)(i)(A)(1) and (2) of this section, the service provider shall immediately send confirmation that the trip-start or trip-end hail report was received to the vessel. A service provider must establish an independent back-up system to the primary hail report system (e.g., a phone number if the primary hail report system is based upon email) to ensure receipt of such trip-start or trip-end hail reports. In confirming the receipt of a trip-end hail report, the service provider will inform the vessel operator that the offload(s) associated with that trip will be monitored by a dockside/roving monitor or that the vessel is issued a dockside/roving monitor waiver for that trip. If a dockside/roving monitor is assigned to observe a trip's offloads, but cannot meet the vessel as scheduled, the service provider must inform the vessel, the sector, and NMFS Office of Law Enforcement, as appropriate, as soon as possible, to specify the time when the dockside/roving monitor will arrive, or issue the vessel a waiver for that particular trip. The service provider or sector manager must also provide NMFS Office of Law Enforcement with the information contained in the trip-start and trip-end hail reports, including whether the vessel has been assigned a dockside/roving monitor for that trip, at the same time that the confirmation is sent to the vessel.

(B) Documentation of offloads-(1) Offloads directly to a dealer. Upon the completion of the offload, the dockside/roving monitor shall retain a copy of all VTRs associated with the trip, including all information submitted (i.e., no blocked cells) provided by the sector vessel; record whether the dealer scales were certified by an appropriate state agency; observe and record whether ice and box weights are tared by the dealer before catch is added, or record the estimated weight of ice and the box from the dealer; record the weight of catch offloaded by species (and market category, if culled); determine and record whether all fish have been offloaded, including an estimate of the weight of fish being retained by captain and crew for personal consumption or other use and the reason for retention of such catch; sign the dealer receipt associated with the offload for each trip (i.e., dealer/weighout slip or other form of documentation of the amount of catch offloaded by the dealer), or have the dealer sign the dockside/roving monitor report, as appropriate; provide data summarizing the offloads of each trip, including copies of the VTR(s), dockside/roving monitor report, and dealer receipt(s), if separate from the \*18347 dockside/roving monitor report, to the sector manager or designated third party contractor, as appropriate, within 24 hr of offloading; and retain a copy of such information to document that the offload was monitored, as instructed by the Regional Administrator.

(2) Offloads to a truck. A roving monitor observing offloads into a truck shall retain copies of all VTRs filled out for that trip with all information submitted (i.e., no blocked cells) provided by the sector vessel; if there are no scales at the offload site, record the number of totes of each species and the captain's estimate of the weight in each tote; if there are scales at the offload site, record whether the scales were certified by an appropriate state agency and observe and record whether ice and box weights are tared before catch is added, or record the estimated weight of ice and the box; determine and record whether all fish have been offloaded, including an estimate of the weight of fish being retained by captain and crew for personal consumption or other use and the reason for retention of such catch; record all offloaded catch by species and market class in a report, unless the driver creates such a report that the roving monitor may use which shall be signed by the roving monitor; document that each tote is labeled with the appropriate identifying information including, but not limited to, the serial number of the first VTR page filled out for that trip or another trip ID specified by NMFS, the roving monitor's name, tote number, and species; provide data summarizing the offloads of each trip, including copies of the VTR(s) and roving monitor report to the sector manager or designated third party contractor, as appropriate, within 24 hr of offloading; and retain a copy of such information to document that the offload was monitored, as instructed by the Regional Administrator. The roving monitor must submit copies of the VTR(s); driver manifest(s), if separate from the roving monitor's report; and the roving monitor's report to the sector manager or third-party service provider, as appropriate.

(C) Record retention. The dockside/roving monitor service provider shall retain an electronic record of each offload observed and make electronic and other records that document an offload available to NMFS upon request.

(D) Safe-harbor provision. The dockside/roving monitor service provider must work with the sector and NMFS Office of Law Enforcement to establish an acceptable process for safe-harbor situations where a vessel is unable to follow normal dockside/roving monitor protocols outlined in paragraph (b)(5) of this section due to an emergency situation.

(iii) Adjustment to operational standards. The dockside/roving monitor operational standards specified in paragraph (b)(5) of this section may be revised by the Regional Administrator in a manner consistent with the Administrative Procedure Act.

(6) At-sea/electronic monitoring operational standards. In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any at-sea/electronic monitoring program developed as part of a sector's yearly operations plan pursuant to paragraph (b)(1)(v)(B)(2) of this section must meet the following operational standards to be approved by NMFS:

(i) Gear. Each at-sea monitor must be provided with all of the equipment specified by the Northeast Fisheries At-sea Monitoring Program. A list of such equipment is available from the Northeast Fisheries Science Center upon request. At-sea/electronic monitoring service providers are responsible for the cost of providing such gear to at-sea monitors to the extent not funded by NMFS. This gear shall be inspected by NMFS upon the completion of training required pursuant to paragraph (b)(4)(i)(I) of this section.

(ii) Vessel selection protocol. An at-sea/electronic monitoring program service provider must develop a formal vessel-selection protocol to deploy at-sea monitors and electronic monitoring equipment in a statistically random manner consistent with the coverage levels required pursuant to paragraph (b)(1)(v)(B)(3) of this section. This protocol must include a method to allow for waivers in specific circumstances, including how waivers would be requested, assessed, and recorded.

(iii) Reporting/recordkeeping requirements-(A) Vessel requirements. In addition to all other reporting/recordkeeping requirements specified in this part, to facilitate the deployment of at-sea monitors and electronic monitoring equipment pursuant to paragraph (b)(1)(v)(B)(2) of this section, the operator of a vessel fishing on a sector trip must provide at-sea/electronic monitoring service providers with at least the following information: The vessel name, permit number, trip ID number in the form of the VTR serial number of the first VTR page for that trip or another trip identifier specified by NMFS, and an estimate of the date/time of departure in advance of each trip. The timing of such notice shall be sufficient to allow ample time for the service provider to determine whether an at-sea monitor or electronic monitoring equipment will be deployed on each trip and allow the at-sea monitor or electronic monitoring equipment to prepare for the trip and get to port, or to be installed on the vessel, respectively. The details of the timing, method (e.g., phone, email, etc.), and information needed for such pre-trip notifications shall be included as part of a sector's yearly operations plan. If a vessel has been informed by a service provider that an at-sea monitor or electronic monitoring equipment has been assigned to a particular trip pursuant to paragraph (b)(6)(iii)(B)(1) of this section, the vessel may not leave port to begin that trip until the at-sea monitor has arrived and boarded the vessel, or the electronic monitoring equipment has been properly installed.

(B) At-sea/electronic monitoring service provider requirements-(1) Confirmation of pre-trip notification. Upon receipt of a pre-trip notification pursuant to paragraph (b)(6)(iii)(A) of this section, the service provider shall inform the vessel operator whether the vessel will be monitored by an at-sea observer or electronic monitoring equipment for that trip, or will be issued an at-sea/electronic monitoring waiver for that trip based upon the vessel selection protocol specified in paragraph (b)(6)(ii) of this section.

(2) At-sea/electronic monitoring report. A report detailing area fished and the amount of each species kept and discarded shall be submitted electronically in a standard acceptable form to the appropriate sector and NMFS within 48 hr of the completion of the trip, as instructed by the Regional Administrator. The data elements to be collected and the format for submission shall be specified by NMFS and distributed to all approved at-sea/electronic monitoring service providers and sectors. At-sea/electronic monitoring data shall not be accepted until such data pass automated NMFS data quality checks.

(iv) Safety hazards-(A) Vessel requirements. The operator of a sector vessel must detail and identify any safety hazards to any at-sea monitor assigned pursuant to paragraph (b)(6)(iii)(B)(1) of this section prior to leaving port. A vessel cannot begin a trip if it has failed a review of safety issues pursuant to paragraph (b)(6)(iv)(B) of this section, until the identified safety deficiency has been resolved pursuant to § 600.746(i).

(B) At-sea/electronic monitoring service provider requirements. An at-sea monitor must complete a pre-trip vessel safety checklist provided by NMFS before an at-sea monitor can leave port \*18348 onboard a vessel on a sector trip. If the vessel fails a review of safety issues pursuant to this paragraph (b)(6)(iv)(B), an at-sea monitor cannot be deployed on that vessel for that trip.

(v) Adjustment to operational standards. The at-sea/electronic monitoring operational standards specified in paragraph (b)(6) of this section may be revised by the Regional Administrator in a manner consistent with the Administrative Procedure Act.

(c) Approval of a sector and granting of exemptions by the Regional Administrator. (1) Once the Regional Administrator has made a preliminary determination that the documents submitted pursuant to paragraphs (a)(1), (b)(2), and (b)(3) of this section appear to comply with the requirements of this section, NMFS may consult with the Council and approve or disapprove sector operations consistent with the Administrative Procedure Act and other applicable law.

(2) If a sector is approved, the Regional Administrator shall issue a letter of authorization to each vessel operator and/or vessel owner participating in the sector. The letter of authorization shall authorize participation in the sector operations and may exempt participating vessels from any Federal fishing regulation, except those specified in paragraphs (c)(2)(i) and (ii) of this section, in order to allow vessels to fish in accordance with an approved operations plan, provided such exemptions are consistent with the goals and objectives of the FMP. The letter of authorization may also include requirements and conditions deemed necessary to ensure effective administration of, and compliance with, the operations plan and the sector allocation. Solicitation of public comment on, and

NMFS final determination on such exemptions shall be consistent with paragraphs (c)(1) and (2) of this section.

(i) Regulations that may not be exempted for sector participants. The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: NE multispecies year-round closure areas, permitting restrictions (e.g., vessel upgrades, etc.), gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.), and reporting requirements (not including DAS reporting requirements or SAP-specific reporting requirements specified in this part). This list may be modified through a framework adjustment, as specified in § 648.90.

(ii) Universal sector exemptions. All sector vessels are exempt from the following Federal fishing regulations under this part:

(A) Trip limits on NE multispecies stocks for which a sector receives an allocation of ACE pursuant to paragraph (b)(1)(i) of this section (i.e., all stocks except Atlantic halibut, ocean pout, windowpane flounder, SNE/MA winter flounder, and Atlantic wolffish);

(B) The GOM Rolling Closure Areas and the GB Seasonal Closed Area specified in § 648.81(f)(1) and (g), respectively, provided sector vessels comply with the sector-specific GOM Rolling Closure Areas specified in § 648.81(f)(2)(vi);

(C) NE multispecies DAS restrictions other than those required to comply with effort controls in other fisheries, as specified in §§ 648.92 and 648.322; and

(D) The minimum codend mesh size restrictions for trawl gear specified in § 648.80(a)(4)(i) when using a haddock separator trawl defined in § 648.85(a)(3)(iii) or the Ruhle trawl defined in § 648.85(b)(6)(iv)(J)(3) within the GB RMA, as defined in § 648.80(a)(2), provided sector vessels use a codend with 6-inch (15.2-cm) minimum mesh.

(3) The Regional Administrator may withdraw approval of a sector, after consultation with the Council, at any time, if it is determined that sector participants are not complying with the requirements of an approved operations plan or that the continuation of the operations plan will undermine achievement of fishing mortality objectives of the FMP. Withdrawal of approval of a sector may only be done in a manner consistent with the Administrative Procedure Act and other applicable law.

(d) Approved sector allocation proposals. Eligible NE multispecies vessels, as specified in paragraph (a)(3) of this section, may participate in the sectors identified in paragraphs (d)(1) through (19) of this section, provided the operations plan is approved by the Regional Administrator in accordance with paragraph (c) of this section and each participating vessel and vessel operator and/or vessel owner complies with the requirements of the operations plan, the requirements and conditions specified in the letter of authorization issued pursuant to paragraph (c)

of this section, and all other requirements specified in this section. All operational aspects of these sectors shall be specified pursuant to the operations plan and sector contract, as required by this section.

- (1) GB Cod Hook Sector.
- (2) GB Cod Fixed Gear Sector.
- (3) Sustainable Harvest Sector.
- (4) Port Clyde Community Groundfish Sector.
- (5) Northeast Fishery Sector I.
- (6) Northeast Fishery Sector II.
- (7) Northeast Fishery Sector III.
- (8) Northeast Fishery Sector IV.
- (9) Northeast Fishery Sector V.
- (10) Northeast Fishery Sector VI.
- (11) Northeast Fishery Sector VII.
- (12) Northeast Fishery Sector VIII.
- (13) Northeast Fishery Sector IX.
- (14) Northeast Fishery Sector X.
- (15) Northeast Fishery Sector XI.
- (16) Northeast Fishery Sector XII.
- (17) Northeast Fishery Sector XIII.
- (18) Tristate Sector.
- (19) Northeast Coastal Communities Sector.

50 CFR § 648.88

15. In § 648.88, revise paragraph (a)(1) to read as follows:

50 CFR § 648.88

**§ 648.88 Multispecies open access permit restrictions.**

(a) \* \* \*

(1) The vessel may possess and land up to 200 lb (90.7 kg) of cod and up to the landing and possession limit restrictions for other NE multispecies specified in § 648.86, provided the vessel complies with the restrictions specified in paragraph (a)(2) of this section. Should the GOM cod trip limit specified in § 648.86(b)(1) be adjusted in the future, the cod trip limit specified in this paragraph (a)(1) shall be adjusted proportionally (rounded up to the nearest 25 lb (11.3 kg)).

\* \* \* \* 50 CFR § 648.89

16. In § 648.89, revise the heading of paragraph (c); revise paragraphs (a), (b)(1), (b)(4), (c)(1)(v), and (c)(2)(v); and add paragraphs (c)(6), (c)(7), and (f) to read as follows:

50 CFR § 648.89

**§ 648.89 Recreational and charter/party vessel restrictions.**

(a) Recreational gear restrictions. Persons aboard charter/party vessels permitted under this part and not fishing under the DAS program or under the restrictions and conditions of an approved sector operations plan, as specified in § 648.87(c), and recreational fishing vessels in the EEZ, are prohibited from fishing with more than one line per angler, and must stow all other fishing gear on board the vessel as specified in § 648.23(b).

(b) \* \* \*

(1) Minimum fish sizes. Unless further restricted under paragraph (b)(3) of this section, persons aboard charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program or under the restrictions and conditions of an approved sector operations plan, and recreational fishing vessels in or possessing fish from the EEZ, may not possess fish smaller than **\*18349** the minimum fish sizes, measured in total length (TL), as follows:

<b>Species</b>	<b>Size (inches)</b>
Cod	22 (55.9 cm)
Haddock	18 (45.7 cm)
Pollock	19 (48.3 cm)
Witch flounder (gray sole)	14 (35.6 cm)
Yellowtail flounder	13 (33.0 cm)
American plaice (dab)	14 (35.6 cm)
Atlantic halibut	41 (104.1 cm)
Winter flounder (blackback)	12 (30.5 cm)
Redfish	9 (22.9 cm)

\* \* \* \* \*

(4) Fish fillets, or parts of fish, must have at least 2 square inches (5.1 square cm) of skin on while possessed on board a vessel and at the time of landing in order to meet minimum size requirements. The skin must be contiguous and must allow ready identification of the fish species.

\* \* \* \* \*

(c) Possession restrictions.

(1) \* \* \*

(v) Seasonal GOM cod possession prohibition. Persons aboard private recreational fishing vessels fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1) may not fish for or possess any cod from November 1 through April 15. Private recreational vessels in possession of cod caught outside the GOM Regulated Mesh Area may transit this area, provided all bait and hooks are removed from fishing rods and any cod on board has been gutted and stored.

\* \* \* \* \*

(2) \* \* \*

(v) Seasonal GOM cod possession prohibition. Persons aboard charter/party fishing vessels permitted under this part and not fishing under the NE multispecies DAS program or on a sector trip that are fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1) may not fish for, possess, or land any cod from November 1 through April 15. Charter/party vessels in possession of cod caught outside the GOM Regulated Mesh Area may transit this area, provided all bait and hooks are removed from fishing rods and any cod on board has been gutted and stored.

\* \* \* \* \*

(6) Atlantic wolffish. Possession of Atlantic wolffish by charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program and recreational fishing vessels fishing in the EEZ is prohibited.

(7) SNE/MA winter flounder. Private recreational and charter/party vessels fishing in the SNE/MA winter flounder stock area, as defined in § 648.85(b)(6)(v)(F), may not fish for, possess, or land winter flounder. Recreational vessels in possession of winter flounder caught outside of the SNE/MA winter flounder may transit this area, provided all bait and hooks are removed from all fishing rods, and any winter flounder on board has been stored.

\* \* \* \* \*

(f) Recreational fishery AM-(1) Catch evaluation. As soon as recreational catch data are available for the entire previous fishing year, the Regional Administrator will evaluate whether recreational catches exceed any of the sub-ACLs specified for the recreational fishery pursuant to § 648.90(a)(4). When evaluating recreational catch, the components of recreational catch that are used shall be the same as those used in the most recent assessment for that particular stock. To determine if the regulated species or ocean pout sub-ACL specified for the recreational fishery was exceeded, the Regional Administrator shall compare the 3-year average of recreational catch to the 3-year average of the recreational sub-ACL for each stock, as follows:

(i) For fishing year 2010, recreational catch shall be compared to the recreational sub-ACL for that stock for fishing year 2010.

(ii) For fishing year 2011, the average recreational catch for fishing years 2010 and 2011 shall be compared to the average recreational sub-ACLs for that stock during fishing years 2010 and 2012.

(iii) Starting in fishing year 2012, the 3-year average recreational catch shall be compared to the 3-year average of the recreational sub-ACLs for that stock.

(2) Measure adjustment. If it is determined that any recreational sub-ACL was exceeded, as specified in paragraph (f)(1) of this section, the Regional Administrator, after consultation with the New England Fishery Management Council, shall develop measures necessary to prevent the recreational fishery from

exceeding the appropriate sub-ACL in future years. Appropriate AMs for the recreational fishery, including adjustments to fishing season, minimum fish size, or possession limits, may be implemented in a manner consistent with the Administrative Procedure Act, with final measures published in the Federal Register no later than January when possible. Separate AMs shall be developed for the private and charter/party components of the recreational fishery.

50 CFR § 648.90

17. In § 648.90, revise the introductory text for this section; revise paragraphs (a)(2)(i) through (iv), (a)(2)(vi), and (c)(1)(i); add introductory text to paragraph (a); and add paragraphs (a)(4) through (6) to read as follows:

50 CFR § 648.90

**§ 648.90 NE multispecies assessment, framework procedures, setting of ACLs and other allocations, AMs, specifications, and flexible area action system.**

For the NE multispecies framework specification process described in this section, the regulated species and ocean pout biennial review is considered a separate process from the small-mesh species annual review, as described under paragraphs (a)(2) and (b), respectively, of this section. In addition, the process for specifying ABCs and associated ACLs for regulated species and ocean pout, as described in paragraph (a)(4) of this section, is considered a separate process from the small-mesh species ABC and ACL process.

(a) NE multispecies. For the purpose of this paragraph (a), the term “NE multispecies fishery” is defined as common pool vessels, sector vessels, and private recreational and charter/party vessels, as defined in this part; the term “NE multispecies commercial fishery” is defined as vessels issued a limited access NE multispecies permit, or an open access NE multispecies Handgear B permit; and the term “NE multispecies recreational fishery” is defined as private recreational vessels and charter or party boats, as further defined in this part.

\* \* \* \* \*

(2) \* \* \*

(i) The NE multispecies PDT shall meet on or before September 30 every other year, unless otherwise specified in paragraph (a)(3) of this section, under the conditions specified in that paragraph, to perform a review of the fishery, using the most current scientific information available provided primarily from the NEFSC. Data provided by states, ASMFC, the USCG, and other sources may also be considered by the PDT. Based on this review, the PDT will develop ACLs for the upcoming fishing year(s) as described in paragraph (a)(4) of this section and develop options for consideration by the Council if necessary, on any changes, adjustments, or additions to DAS allocations, closed areas, or other measures necessary to rebuild overfished stocks and achieve the FMP goals and objectives, including changes to the Northeast Region SBRM.

(ii) The PDT shall review available data pertaining to: Catch and landings, discards, DAS allocations, DAS use, \*18350 sector operations, and other measures of fishing effort; survey results; stock status; current estimates of fishing mortality and overfishing levels; social and economic impacts; enforcement issues; and any other relevant information.

(iii) Based on this review, the PDT shall recommend ACLs and develop options necessary to achieve the FMP goals and objectives, which may include a preferred option. The PDT must demonstrate through analyses and documentation that the options they develop are expected to meet the FMP goals and objectives. The PDT may review the performance of different user groups or fleet sectors in developing options. The range of options developed by the PDT may include any of the management measures in the FMP, including, but not limited to: ACLs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the 12 regulated species and ocean pout if able to be determined; identification and distribution of ACLs and other sub-components of the ACLs among various segments of the fishery; AMs; DAS changes; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; description and identification of EFH; fishing gear management measures to protect EFH; designation of habitat areas of particular concern within EFH; and changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs. In addition, the following conditions and measures may be adjusted through future framework adjustments: Revisions to DAS measures, including DAS allocations (such as the distribution of DAS among the four categories of DAS), future uses for Category C DAS, and DAS baselines, adjustments for steaming time, etc.; modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; calculation of area-specific ACLs, area management boundaries, and adoption of area-specific management measures; sector allocation requirements and specifications, including the establishment of a new sector, the disapproval of an existing sector, the allowable percent of ACL available to a sector through a sector allocation, and the calculation of PSCs; sector administration provisions, including at-sea and dockside monitoring measures; sector reporting requirements; measures to implement the U.S./Canada Resource Sharing Understanding, including any specified TACs (hard or target); changes to administrative measures; additional uses for Regular B DAS; reporting requirements; the GOM Inshore Conservation and Management Stewardship Plan; adjustments to the Handgear A or B permits; gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; revisions to the ABC control rule and

status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass may be made either through a biennial adjustment or framework adjustment; and any other measures currently included in the FMP.

(iv) The Council shall review the ACLs recommended by the PDT and all of the options developed by the PDT and other relevant information; consider public comment; and develop a recommendation to meet the FMP objectives pertaining to regulated species or ocean pout that is consistent with applicable law. If the Council does not submit a recommendation that meets the FMP objectives and is consistent with applicable law, the Regional Administrator may adopt any option developed by the PDT, unless rejected by the Council, as specified in paragraph (a)(2)(vii) of this section, provided the option meets the FMP objectives and is consistent with applicable law.

\* \* \* \* \*

(vi) If the Council submits, on or before December 1, a recommendation to the Regional Administrator after one Council meeting, and the Regional Administrator concurs with the recommendation, the Regional Administrator shall publish the Council's recommendation in the Federal Register as a proposed rule with a 30-day public comment period. The Council may instead submit its recommendation on or before February 1, if it chooses to follow the framework process outlined in paragraph (c) of this section, and requests that the Regional Administrator publish the recommendation as a final rule, in a manner consistent with the Administrative Procedure Act. If the Regional Administrator concurs that the Council's recommendation meets the FMP objectives and is consistent with other applicable law, and determines that the recommended management measures should be published as a final rule, the action will be published as a final rule in the Federal Register, in a manner consistent with the Administrative Procedure Act. If the Regional Administrator concurs that the recommendation meets the FMP objectives and is consistent with other applicable law and determines that a proposed rule is warranted, and, as a result, the effective date of a final rule falls after the start of the fishing year on May 1, fishing may continue. However, DAS used or regulated species or ocean pout landed by a vessel on or after May 1 will be counted against any DAS or sector ACE allocation the vessel or sector ultimately receives for that year, as appropriate.

\* \* \* \* \*

(4) Process for setting ABCs and ACLs-(i) ABC/ACL recommendations. As described in this paragraph (a)(4), with the exception of stocks managed by the Understanding, the PDT shall develop recommendations for setting an ABC, ACL, and OFL for each NE multispecies stock for each of the next 3 years as part of the

biennial review process specified in paragraph (a)(2) of this section. ACLs can also be specified based upon updated information in the annual SAFE report, as described in paragraph (a)(1) of this section, and other available information as part of a specification package, as described in paragraph (a)(5) of this section. For NE multispecies stocks or stock components managed under both the NE Multispecies FMP and the Understanding, the PDT shall develop recommendations for ABCs, ACLs, and OFLs for the pertinent stock or stock components annually, as described in this paragraph (a)(4) and § 648.85(a)(2).

(A) ABC recommendations. The PDT shall develop ABC recommendations based on the ABC control rule, the fishing mortality rate necessary to rebuild the stock, guidance from the SSC, and any other available information. The PDT recommendations shall be reviewed by the SSC. Guided by terms of reference developed by the Council, the SSC shall either concur with the ABC recommendations provided by the PDT, or provide alternative recommendations for each stock of regulated species or ocean pout and describe the elements of scientific uncertainty used to develop its recommendations. Should the SSC recommend an ABC that differs from that originally recommend by the PDT, the PDT shall revise its ACL recommendations if necessary to be consistent with the ABC recommendations made by the SSC. In *\*18351* addition to consideration of ABCs, the SSC may consider other related issues specified in the terms of reference developed by the Council, including, but not limited to, OFLs, ACLs, and management uncertainty.

(B) ACL recommendations. The PDT shall develop ACL recommendations based upon ABCs recommended by the SSC and the pertinent recommendations of the Transboundary Management Guidance Committee (TMGC). The ACL recommendations of the PDT shall be specified based upon total catch for each stock (including both landings and discards), if that information is available. The PDT shall describe the steps involved with the calculation of the recommended ACLs and uncertainties and risks considered when developing these recommendations, including whether different levels of uncertainties were used for different sub-components of the fishery and whether ACLs have been exceeded in recent years. Based upon the ABC recommendations of the SSC and the ACL recommendations of the PDT, the Council shall adopt ACLs that are equal to or lower than the ABC recommended by the SSC to account for management uncertainty in the fishery.

(ii) Timing. The PDT recommendations for setting ABCs and ACLs shall be provided to the SSC prior to the September Council meeting, to the extent possible. The Council shall consider the ABC recommendations of the SSC and the ACL recommendations of the PDT (and TMGC) and shall make a decision on those recommendations prior to December 1, to the extent possible. Once the Council

has approved its recommended ACLs, they shall be submitted to NMFS prior to December 1, to the extent possible for approval and implementation. If the Council is submitting a management action as part of the biennial adjustment process, the ACLs can be included in that document along with any necessary analysis required by applicable law. After receipt of the Council recommendation for ACLs, either as part of a new management action or as part of a specification package, as described in paragraph (a)(5) of this section, NMFS shall review the Council's decision and, if consistent with applicable law, implement the ACL in a manner consistent with the Administrative Procedure Act.

(iii) ABC/ACL distribution. The ABCs/ACLs adopted by the Council for each regulated species or ocean pout stock pursuant to this paragraph (a)(4) shall be subdivided among the various sub-components of the fishery, as specified in paragraphs (a)(4)(iii)(A) through (E) of this section. For transboundary stocks managed by the Understanding, pursuant to § 648.85(a), the distribution of ABC/ACLs described in paragraphs (a)(4)(iii)(A) through (E) of this section shall be based upon the catch available to U.S. fishermen. The Council may revise its recommendations for the distribution of ABCs and ACLs among these and other sub-components through the process to specify ABCs and ACLs, as described in this paragraph (a)(4).

(A) Regulated species or ocean pout catch by vessels outside of the FMP. The catch of regulated species or ocean pout that is expected to be harvested by vessels operating in state waters that have not been issued a Federal NE multispecies permit and are not subject to the regulations specified in this part shall be deducted from the ABC/ACL of each regulated species or ocean pout stock pursuant to the process for specifying ABCs and ACLs, as described in this paragraph (a)(4).

(B) Regulated species or ocean pout catch by exempted fisheries. Regulated species or ocean pout catch by other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3) shall be deducted from the ABC/ACL of each regulated species or ocean pout stock, pursuant to the process to specify ABCs and ACLs described in this paragraph (a)(4). The catch of these non-specified sub-components of the ACL shall be monitored using data collected pursuant to this part. If catch from such fisheries exceeds the amount specified in this paragraph (a)(4)(iii)(B), AMs shall be developed to prevent the overall ACL for each stock from being exceeded, pursuant to the framework adjustment process specified in this section.

(C) Yellowtail flounder catch by the Atlantic sea scallop fishery. Yellowtail flounder catch in the Atlantic sea scallop fishery, as defined in subpart D, shall be deducted from the ABC/ACL for each yellowtail flounder stock pursuant to the restrictions specified in subpart D of this part and the process to specify ABCs and

ACLs, as described in paragraph (a)(4) of this section. Unless otherwise specified in subpart D of this part, the specific value of the sub-components of the ABC/ACL for each stock of yellowtail flounder distributed to the Atlantic sea scallop fishery shall be specified pursuant to the biennial adjustment process specified in paragraph (a)(2) of this section. At a minimum, these values must be consistent with the incidental catch amounts for yellowtail flounder specified for the closed area access programs described in §§ 648.60(a)(5) and 648.85(c).

(D) Haddock catch by the Atlantic herring fishery. The GOM and GB haddock ABC/ACL shall each be reduced by 0.2 percent to account for haddock bycatch in the Atlantic herring fishery, pursuant to the restrictions at §§ 648.85(d) and 648.86(a)(3) and pursuant to the process for specifying ABCs and ACLs described in this paragraph (a)(4).

(E) Regulated species or ocean pout catch by the NE multispecies commercial and recreational fisheries. Unless otherwise specified in the ACL recommendations developed pursuant to paragraph (a)(4)(i)(B), after all of the deductions and considerations specified in paragraphs (a)(4)(iii)(A) through (D) of this section, the remaining ABC/ACL for each regulated species or ocean pout stock shall be allocated to the NE multispecies commercial fishery, pursuant to this paragraph (a)(4)(iii)(E).

(1) Recreational allocation. Unless otherwise specified in paragraph (a)(5) of this section, recreational catches shall be compared to the ACLs allocated pursuant to this paragraph (a)(4)(iii)(E)(1) for the purposes of determining whether adjustments to recreational measures are necessary, pursuant to the recreational fishery AMs specified in § 648.89(f).

(i) Stocks allocated. Unless otherwise specified in this paragraph (a)(4)(iii)(E)(1), the ABCs/ACLs for GOM cod and GOM haddock available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(E) of this section shall be divided between commercial and recreational components of the fishery, based upon the average proportional catch of each component for each stock during fishing years 2001 through 2006.

(ii) Process for determining if a recreational allocation is necessary. A recreational allocation may not be made if it is determined that, based upon available information, the ACLs for these stocks are not being fully harvested by the NE multispecies fishery, or if the recreational harvest, after accounting for state waters catch pursuant to paragraph (a)(4)(iii)(A) of this section, is less than 5 percent of the overall catch for a particular stock of regulated species or ocean pout.

(2) Commercial allocation. The ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(E)(1) of this section, shall be divided between **\*18352** vessels operating under approved sector

operations plans, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(E)(2) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

(3) Revisions to commercial and recreational allocations. Distribution of the ACL for each stock available to the NE multispecies fishery between and among commercial and recreational components of the fishery may be implemented through a framework adjustment pursuant to this section. Any changes to the distribution of ACLs to the NE multispecies fishery shall not affect the implementation of AMs based upon the distribution in effect at the time of the overage that triggered the AM.

(iv) ACL monitoring-(A) Landings. For the purposes of monitoring the catch of regulated species or ocean pout towards the harvest of ACLs and other, non-specified sub-components of the ACLs specified in paragraph (a)(4) of this section, the reporting requirements specified in this part, including dealer reports, VTRs, VMS catch reports, sector catch reports, and other available information shall be used to identify and apportion regulated species or ocean pout landings by stock area.

(B) Discards. Unless otherwise specified in this paragraph (a)(4)(iv)(B), regulated species or ocean pout discards shall be monitored through the use of VTRs, observer data, VMS catch reports, and other available information, as specified in this part. Regulated species or ocean pout discards by vessels on a sector trip shall be monitored pursuant to paragraph (b)(1)(v)(A) of this section.

(v) Adjustments to ACLs. The Council may elect to revise the ACL for any regulated species or ocean pout stock in the second fishing year following a biennial review to account for any overages of an ACL in year one that may result in overfishing for a particular stock. Any adjustments to the ACLs in year two will be implemented pursuant to the process to specify ABCs and ACLs, as described in paragraph (a)(4) of this section.

(5) AMs. Except as specified in paragraphs (a)(4)(iii)(A) and (D) of this section, if any of the ACLs specified in paragraph (a)(4) of this section are exceeded based upon available catch information, the AMs specified in paragraphs (a)(5)(i) and (ii) of this section shall take effect in the following fishing year, or as soon as practicable, thereafter, once catch data for all affected fisheries are available, as applicable.

(i) AMs for the NE multispecies commercial and recreational fisheries. If the catch of regulated species or ocean pout by a sub-component of the NE multispecies fishery (i.e., common pool vessels, sector vessels, or private recreational and charter/party vessels) exceeds the amount allocated to each sub-component, as specified in paragraph (a)(4)(iii)(E) of this section, then the applicable AM for that sub-component of the fishery shall take effect, pursuant to paragraphs (a)(5)(i)(A) through (C) of this section. In determining the applicability of AMs specified for a sub-component of the NE multispecies fishery in paragraphs (a)(5)(i)(A) through (C) of this section, the Regional Administrator shall consider available information regarding the catch of regulated species and ocean pout by each sub-component of the NE multispecies fishery, plus each sub-component's share of any overage of the overall ACL for a particular stock caused by excessive catch by vessels outside of the FMP, exempted fisheries, or the Atlantic sea scallop fishery, as specified in this paragraph (a)(5), as appropriate.

(A) Excessive catch by common pool vessels. If the catch of regulated species and ocean pout by common pool vessels exceeds the amount of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(E)(2) of this section, then the AMs described in § 648.82(n) shall take effect. If such catch does not exceed the portion of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(E)(2) of this section, then no AMs shall take effect for common pool vessels.

(B) Excessive catch by sector vessels. If the catch of regulated species and ocean pout by sector vessels exceeds the amount of the ACL specified for sector vessels pursuant to paragraph (a)(4)(iii)(E)(2) of this section, then the AMs described in § 648.87(b)(1)(iii) shall take effect. For the purposes of this paragraph (a)(5)(i)(B), the catch of regulated species and ocean pout for each sector approved pursuant to § 648.87 shall be based upon the catch of vessels participating in each approved sector. If such catch does not exceed the portion of the ACL specified for an individual sector pursuant to paragraph (a)(4)(iii)(E)(2) of this section, then no AMs shall take effect for that sector.

(C) Excessive catch by the NE multispecies recreational fishery. If the catch of regulated species and ocean pout by private recreational and charter/party vessels exceeds the amount of the ACL specified for the recreational fishery pursuant to paragraph (a)(4)(iii)(E)(1) of this section, then the AMs described in § 648.89(f) shall take effect. If such catch does not exceed the portion of the ACL specified for the recreational fishery pursuant to paragraph (a)(4)(iii)(E)(1) of this section, then no AMs shall take effect for the recreational fishery.

(ii) AMs if the overall ACL for a regulated species or ocean pout stock is exceeded. If the catch of any stock of regulated species or ocean pout by vessels fishing outside of the NE multispecies fishery, including the catch of regulated

species or ocean pout by vessels fishing in state waters outside of the FMP, or in exempted fisheries, as defined in this part, or the catch of yellowtail flounder by the Atlantic sea scallop fishery, exceeds the sub-component of the ACL for that stock specified for such fisheries pursuant to paragraphs (a)(4)(iii)(A) through (C) of this section, and the overall ACL for that stock is exceeded, then the amount of the overage of the overall ACL for that stock shall be distributed among components of the NE multispecies fishery based upon each component's share of that stock's ACL available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(E) of this section. Each component's share of the ACL overage for a particular stock would be then added to the catch of that stock by each component of the NE multispecies fishery to determine if the resulting sum of catch of that stock for each component of the fishery exceeds that individual component's share of that stock's ACL available to the NE multispecies fishery. If the total catch of that stock by any component of the NE multispecies fishery exceeds the amount of the ACL specified for that component of the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(E) of this section, then the AMs specified in paragraphs (a)(5)(i)(A) through (C) of this section shall take effect, as applicable. If the catch of any stock of regulated species or ocean pout by vessels outside of the FMP exceeds the sub-component of the ACL for that stock specified pursuant to paragraphs (a)(4)(iii)(A) through (C) of this section, but the overall ACL for that stock is not exceeded, even after **\*18353** consideration of the catch of that stock by other sub-components of the fishery, then the AMs specified in this paragraph (a)(5)(ii) shall not take effect.

(6) Specifications process-(i) PDT recommendations. Unless otherwise developed pursuant to the biennial review process specified in paragraph (a)(2) of this section, the PDT shall develop recommendations for setting ACLs for each regulated species or ocean pout, including ACLs for stocks managed by the Understanding; revising rebuilding programs and associated management measures; or modifying AMs for consideration by the Council's Groundfish Oversight Committee based upon the SAFE report prepared pursuant to paragraph (a)(1) of this section. If the Council determines, based on information provided by the PDT or other stock-related information, that the ACLs should be adjusted between biennial reviews, it can do so through the same process outlined in this section during the interim year.

(ii) Guidelines. As the basis for its recommendations under paragraph (a)(5)(i) of this section, the PDT shall review available data pertaining to: Commercial and recreational catch data; current estimates of fishing mortality; discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information.

(iii) Groundfish Oversight Committee recommendations. Based on the PDT's recommendations and any public comment received, the Groundfish Oversight Committee shall recommend to the Council appropriate specifications a period of at least 1 year. The Council shall review these recommendations and, after considering public comment, shall recommend appropriate specifications to NMFS. NMFS shall review the recommendations and publish proposed specifications in a manner consistent with the Administrative Procedure Act. If the proposed specifications differ from those recommended by the Council, the reasons for any differences shall be clearly stated.

(iv) Analysis. Any specifications package developed pursuant to this paragraph (a)(5) shall be supported by the appropriate NEPA analysis, which shall be made available for public comment.

(c) \* \* \*

(1) \* \* \*

(i) After a management action has been initiated, the Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures, other than to address gear conflicts, must come from one or more of the following categories: DAS changes, effort monitoring, data reporting, possession limits, gear restrictions, closed areas, permitting restrictions, crew limits, minimum fish sizes, onboard observers, minimum hook size and hook style, the use of crucifer in the hook-gear fishery, sector requirements, recreational fishing measures, area closures and other appropriate measures to mitigate marine mammal entanglements and interactions, description and identification of EFH, fishing gear management measures to protect EFH, designation of habitat areas of particular concern within EFH, changes to the Northeast Region SBRM, and any other management measures currently included in the FMP. In addition, the Council's recommendation on adjustments or additions to management measures pertaining to small-mesh NE multispecies, other than to address gear conflicts, must come from one or more of the following categories: Quotas and appropriate seasonal adjustments for vessels fishing in experimental or exempted fisheries that use small mesh in combination with a separator trawl/grate (if applicable), modifications to separator grate (if applicable) and mesh configurations for fishing for small-mesh NE multispecies, adjustments to whiting stock boundaries for management purposes, adjustments for fisheries exempted from minimum mesh requirements to fish for small-mesh NE multispecies (if applicable), season adjustments, declarations, participation requirements for the Cultivator Shoal Whiting Fishery Exemption Area, and

changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs).

\* \* \* \* \*

[FR Doc. 2010-7233 Filed 3-31-10; 4:15 pm]

BILLING CODE 3510-22-P

**Footnotes**

MSY or proxy for these stocks use an index-based method to evaluate stock status and are based on a moving average, calculated as described in GARM III. Values represent catch (landings plus discards in 1,000's mt) per survey index of relative biomass

(kg/tow) for that stock. FN\* Estimates of F

1

The intersection of the shoreline and the U.S.-Canada maritime boundary.

2

The intersection of the Cape Cod, MA, coastline and 70°00' W. long.

1

The intersection of the Cape Cod, MA, coastline and 70°00' W. long.

2

South-facing shoreline of Cape Cod, MA.

1

The U.S.-Canada maritime boundary as it intersects with the EEZ.

1

Northward along the irregular U.S.-Canada maritime boundary to the shoreline.

1

South facing shoreline of Long Island, NY.

2

South facing shoreline of Nantucket, MA.

3

North facing shoreline of Nantucket, MA.

4

South facing shoreline of Cape Cod, MA.

1

East facing shoreline of the south fork of Long Island, NY.

2

South facing shoreline of RI.

1

MA shoreline.

2

Cape Cod, MA shoreline on Cape Cod Bay.

3

Cape Cod, MA shoreline on the Atlantic Ocean.

4

NH shoreline.

1

MA shoreline.

2

ME shoreline.

1

NH shoreline.

2

ME shoreline.

1

East-facing shoreline of RI.

2

North-facing shoreline of Martha's Vineyard, MA.

3

South-facing shoreline of Martha's Vineyard, MA.

4

South-facing shoreline of Long Island, NY.

5

North-facing shoreline of Long Island, NY.

6

South-facing shoreline of CT.

1

Intersection with ME shoreline.

2

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

1

The intersection of the Cape Cod, MA, coastline and 70°00' W. longitude.

2

South-facing shoreline of Cape Cod, MA.

1

The U.S./Canada maritime boundary as it intersects with the EEZ.

1

South-facing shoreline of Cape Cod, MA.

2

East-facing shoreline of NJ.

1

U.S./Canada maritime boundary.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Cape Cod, MA.

5

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

North-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Cape Cod, MA.

5

North-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

North-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary.

1

South-facing shoreline of Cape Cod, MA.

2

North-facing shoreline of Nantucket, MA.

3

South-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Long Island, NY.

5

East-facing shoreline of Long Island, NY.

6

Intersection with RI shoreline.

1

Intersection with MA shoreline.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

U.S./Canada maritime boundary.

1

Intersection with MA shoreline

2

North-facing shoreline of Cape Cod, MA

1

East-facing shoreline of Nantucket, MA.

2

North-facing shoreline of Nantucket, MA.

3

South-facing shoreline of Cape Cod, MA.

4

North-facing shoreline of Cape Cod, MA.

1

Intersection with RI shoreline.

2

West-facing shoreline of Martha's Vineyard, MA.

3

East-facing shoreline of Martha's Vineyard, MA.

4

West-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Nantucket, MA.

6

Intersection with NJ shoreline.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

U.S./Canada maritime boundary.

3

East-facing shoreline of Nantucket, MA.

4

North-facing shoreline of Nantucket, MA.

5

South-facing shoreline of Cape Cod, MA.

1

Intersection with ME shoreline.

2

East-facing shoreline of Nantucket, MA.

3

North-facing shoreline of Nantucket, MA.

4

South-facing shoreline of Cape Cod, MA.

1

Intersection with the NH coastline.

2

Intersection of the south-facing shoreline of Cape Cod, MA.

3

Intersection with the east-facing shoreline of Cape Cod, MA.

4

Intersection with the west-facing shoreline of Cape Cod, MA.

5

Intersection with the east-facing shoreline of Massachusetts.

1

East-facing shoreline of Nantucket, MA.

2

South-facing shoreline of Nantucket, MA.

3

Intersection of the south-facing shoreline of Cape Cod, MA.

4

South-facing shoreline of CT.

5

North-facing shoreline of Long Island, NY.

6

South-facing shoreline of Long Island, NY.

**End of Document**

81 FR 25650-02, 2016 WL 1700045(F.R.)

NOTICES

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XE583

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States;  
Northeast Multispecies Fishery; Approved Monitoring Service Providers  
Friday, April 29, 2016

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

\*25650 ACTION: Notice of approved monitoring service providers.

SUMMARY: NMFS has approved five companies to provide at-sea monitoring services to Northeast multispecies vessels in fishing year 2016. Regulations implementing Amendment 16 to the Northeast Multispecies Fishery Management Plan require third-party at-sea monitoring service providers to apply to, and be approved by, NMFS in a manner consistent with the Administrative Procedure Act in order to be eligible to provide at-sea monitoring services to sectors.

ADDRESSES: Copies of the list of NMFS-approved sector monitoring service providers are available at

<http://www.greateratlantic.fisheries.noaa.gov/sustainable/species/multispecies/> or by sending a written request to: 55 Great Republic Drive, Gloucester, MA 01930, Attn: Mark Grant.

FOR FURTHER INFORMATION CONTACT: Mark Grant, Fishery Policy Analyst, (978) 281-9145, fax (978) 281-9135, email [Mark.Grant@noaa.gov](mailto:Mark.Grant@noaa.gov).

SUPPLEMENTARY INFORMATION: Amendment 16 (75 FR 18262; April 9, 2010) to the Northeast Multispecies Fishery Management Plan (FMP) expanded the sector management program, including requirements to ensure accurate monitoring of sector at-sea catch and dockside landings, and common pool dockside landings. Framework Adjustment 48 to the FMP (Framework 48, 78 FR 26118; May 3, 2013) revised the goals and objectives for sector monitoring programs.

**Standards for Approving At-Sea Monitoring Service Providers**

Regulations at 50 CFR 648.87(b)(4) describe the criteria for NMFS approval of at-sea monitoring service providers. NMFS is approving service providers for fishing year 2016 (beginning May 1, 2016) based on: (1) Completeness and sufficiency of applications; (2) determination of the applicant's ability to meet the performance requirements of a sector monitoring service provider; and (3) documented successful performance as NMFS-funded providers in fishing year 2015. Northeast multispecies sectors are required to design and implement independent, third-party

at-sea monitoring programs in fishing year 2016, and are responsible for the at-sea portion of the costs of these monitoring requirements.

For fishing year 2015, NMFS approved A.I.S., Inc.; East West Technical Services, LLC; MRAG Americas, Inc.; Fathom Research, LLC; and ACD USA Ltd. as service providers. Once approved, providers must be able to document ongoing compliance with performance requirements in order to maintain eligibility (§ 648.87(b)(4)(ii)). NMFS can disapprove any previously approved service provider during the fishing year if the service provider in question ceases to meet the performance standards. NMFS must notify service providers of disapproval in writing.

### Approved Monitoring Service Providers

NMFS received complete applications from five companies interested in providing at-sea monitoring services in fishing year 2016; these were the same five service providers that were approved for fishing year 2015. The Regional Administrator has approved all five service providers as eligible to provide at-sea monitoring services in fishing year 2016 because they have met the application requirements, documented an ability to comply with service provider standards, and have been determined to have met the service provider performance criteria:

**Table 1—Approved Fishing Year 2016 Providers**

Provider name	Address	Phone	Fax	Web site
ACD USA Ltd	1801 Hollis St., Suite 1220, Halifax, Nova Scotia, Canada B35 3N4	902- 749- 5107	902- 749- 4552	www.atlanticcatchdata.ca.
A.I.S., Inc	14 Barnabas Rd., P.O. Box 1009, Marion, MA 02738	508- 990- 9054	508- 990- 9055	aisobservers.com.
East West Technical Services, LLC	1415 Corona Ln., Vero Beach, FL 32963	860- 214- 2435	860- 223- 6005	www.ewts.com.
Fathom Research, LLC	1213 Purchase St., New Bedford, MA 02740	508- 990- 0997	508- 991- 7372	www.fathomresearchllc.com.
MRAG Americas, Inc	65 Eastern Ave., Unit B2C, Essex, MA 01929	978- 768- 3880	978- 768- 3878	www.mragamericas.com.

\*25651 Authority: 16 U.S.C. 1801 et seq.

Dated: April 25, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016-09970 Filed 4-28-16; 8:45 am]  
BILLING CODE 3510-22-P

**End of Document**

**80 FR 37182-01**, 2015 WL 3943128(F.R.)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 140904749-5507-02]

RIN 0648-BE50

Magnuson-Stevens Fishery Conservation and Management Act Provisions;  
Fisheries of the Northeastern United States; Standardized Bycatch Reporting  
Methodology Omnibus Amendment

Tuesday, June 30, 2015

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

\***37182** ACTION: Final rule.

SUMMARY: This final rule implements approved management measures contained in the Standardized Bycatch Reporting Methodology Omnibus Amendment to the fishery management plans of the Greater Atlantic Region, developed and submitted to NMFS by the Mid-Atlantic and New England Fishery Management Councils. This amendment is necessary to respond to a remand by the U.S. District of Columbia Court of Appeals decision concerning observer coverage levels specified by the SBRM and to add various measures to improve and expand on the Standardized Bycatch Reporting Methodology previously in place. The intended effect of this action is to implement the following: A new prioritization process for allocation of observers if agency funding is insufficient to achieve target observer coverage levels; bycatch reporting and monitoring mechanisms; analytical techniques and allocation of at-sea fisheries observers; a precision-based performance standard for discard estimates; a review and reporting process; framework adjustment and annual specifications provisions; and provisions for industry-funded observers and observer set-aside programs.

**DATES:** This rule is effective July 30, 2015. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 30, 2015.

**ADDRESSES:** Copies of the Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment, and of the Environmental Assessment (EA), with its associated Finding of No Significant Impact (FONSI) and the Regulatory Impact Review (RIR), are available from the Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901; and from the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The SBRM Omnibus Amendment and EA/FONSI/RIR is also accessible via the Internet at: [www.greateratlantic.fisheries.noaa.gov](http://www.greateratlantic.fisheries.noaa.gov).

**FOR FURTHER INFORMATION CONTACT:** Douglas Potts, Fishery Policy Analyst, 978-281-9341.

**SUPPLEMENTARY INFORMATION:**

**Background**

This final rule implements the SBRM Omnibus Amendment management measures developed and submitted by the New England and Mid-Atlantic Regional Fishery Management Councils, which were approved by NMFS on behalf of the Secretary of Commerce on March 13, 2015. A proposed rule for this action was published on January 21, 2015 (80 FR 2898), with public comments accepted through February 20, 2015.

Section 303(a)(11) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that all Fishery Management Plans (FMPs) “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” The purpose of the amendment is to: Address the Appellate Court's remand by minimizing the discretion allowed in prioritizing allocation of observers when there are insufficient funds; explain the methods and processes by which bycatch is currently monitored and assessed for fisheries in the region; determine whether these methods and processes need to be modified and/or supplemented; establish standards of precision for bycatch estimation for these fisheries; and, thereby, document the SBRM established for all fisheries managed through the FMPs of the Greater Atlantic Region. Extensive background on the development of the SBRM Omnibus Amendment, including the litigation history that precipitated the need for the amendment, is provided in the proposed rule and supporting environmental assessment. For brevity, that information is not repeated here.

As detailed below (in the sections titled Bycatch Reporting and Monitoring Mechanisms and Analytical Techniques and Allocation of At-sea Fisheries Observers), this action incorporates by reference provisions of the SBRM Omnibus Amendment and EA/FONSI/RIR, identified formally as the **\*37183** Standardized

Bycatch Reporting Methodology: An Omnibus Amendment to the Fishery Management Plans of the Mid-Atlantic and New England Regional Fishery Management Councils, completed March 2015 by the New England Fishery Management Council, Mid-Atlantic Fishery Management Council, National Marine Fisheries Service Greater Atlantic Regional Fisheries Office, and National Marine Fisheries Service Northeast Fisheries Science Center. To ensure that the public can readily access and understand the provisions that are incorporated by reference, the full SBRM Omnibus Amendment is available online at [www.greateratlantic.fisheries.noaa.gov](http://www.greateratlantic.fisheries.noaa.gov), and from the Greater Atlantic Regional Fisheries Office or either the New England or Mid-Atlantic Fishery Management Councils (see ADDRESSES).

This final rule for the SBRM Omnibus Amendment establishes an SBRM for all FMPs administered by the Greater Atlantic Regional Fisheries Office comprised of seven elements: (1) The methods by which data and information on discards are collected and obtained; (2) the methods by which the data obtained through the mechanisms identified in element 1 are analyzed and utilized to determine the appropriate allocation of at-sea observers; (3) a performance measure by which the effectiveness of the SBRM can be measured, tracked, and utilized to effectively allocate the appropriate number of observer sea days; (4) a process to provide the Councils with periodic reports on discards occurring in fisheries they manage and on the effectiveness of the SBRM; (5) a measure to enable the Councils to make changes to the SBRM through framework adjustments and/or annual specification packages rather than full FMP amendments; (6) a description of sources of available funding for at-sea observers and a formulaic process for prioritizing at-sea observer coverage allocations to match available funding; and (7) measures to implement consistent, cross-cutting observer service provider approval and certification procedures and to enable the Councils to implement either a requirement for industry-funded observers or an observer set-aside program through a framework adjustment rather than an FMP amendment. These measures are described in detail as follows.

#### ***Bycatch Reporting and Monitoring Mechanisms***

This final rule incorporates by reference the SBRM Omnibus Amendment's use of the status quo methods by which data and information on discards occurring in Greater Atlantic Region fisheries are collected and obtained. The SBRM uses sampling designs developed to minimize bias to the maximum extent practicable. The Northeast Fisheries Observer Program (NEFOP) is the primary mechanism to obtain data on discards in all Greater Atlantic Region commercial fisheries managed under one or more of the regional FMPs. All subject FMPs require vessels permitted to participate in Federal fisheries to carry an at-sea observer upon request. All data obtained by the NEFOP under this SBRM are collected according

to the techniques and protocols established and detailed in the Fisheries Observer Program Manual and the Biological Sampling Manual, which are available online ([www.nefsc.noaa.gov/fsb/](http://www.nefsc.noaa.gov/fsb/)). Data collected by the NEFOP include, but are not limited to, the following items: Vessel name; date/time sailed; date/time landed; steam time; crew size; home port; port landed; dealer name; fishing vessel trip report (FVTR) serial number; gear type(s) used; number/amount of gear; number of hauls; weather; location of each haul (beginning and ending latitude and longitude); species caught; disposition (kept/discarded); reason for discards; and weight of catch. These data are collected on all species of organisms caught by the vessels. This includes species managed under the regional FMPs or afforded protection under the Endangered Species Act or Marine Mammal Protection Act, but also includes species of non-managed fish, invertebrates, and marine plants. The SBRM will incorporate data collection mechanisms implemented by NMFS and affected states as part of the Marine Recreational Information Program (MRIP) for information on recreational fishery discards.

#### ***Analytical Techniques and Allocation of At-Sea Fisheries Observers***

This final rule incorporates by reference the SBRM Omnibus Amendment's use of the existing methods by which the data obtained through the mechanisms included above are analyzed and utilized to determine the appropriate allocation of at-sea observers across the subject fishing modes, including all managed species and all relevant fishing gear types in the Greater Atlantic Region. At-sea fisheries observers will, to the maximum extent possible and subject to available resources, be allocated and assigned to fishing vessels according to the procedures established through the amendment. All appropriate filters identified in the amendment will be applied to the results of the analysis to determine the observer coverage levels needed to achieve the objectives of the SBRM. These filters are designed to aid in establishing observer sea day allocations that are more meaningful and efficient at achieving the overall objectives of the SBRM.

#### ***SBRM Performance Standard***

This action incorporates by reference the intention of the SBRM Omnibus Amendment to ensure that the data collected under the SBRM are sufficient to produce a coefficient of variation (CV) of the discard estimate of no more than 30 percent. This standard is designed to ensure that the effectiveness of the SBRM can be measured, tracked, and utilized to effectively allocate the appropriate number of observer sea days. Each year, the Regional Administrator and the Science and Research Director will, subject to available funding, allocate at-sea observer coverage to the applicable fisheries of the Greater Atlantic Region sufficient to achieve a level of precision (measured as the CV) no greater than 30 percent for each applicable species and/or species group, subject to the use of the filters noted above.

### ***SBRM Review and Reporting Process***

This final rule incorporates by reference the SBRM Omnibus Amendment's requirements for NMFS to prepare an annual report for the Councils on discards occurring in Greater Atlantic Region fisheries, and to work with the Councils to develop a report every 3 years that evaluates the effectiveness of the SBRM. Once each year, the Science and Research Director will present to the Councils a report on catch and discards occurring in fisheries in the Region. Details about the information to be included in the annual discard reports are included in the amendment. The specific elements of the discard report may change over time to adjust to the changing needs of the Councils. Every 3 years, the Regional Administrator and the Science and Research Director will appoint appropriate staff to work with staff appointed by the executive directors of the Councils to obtain and review available data on discards and to prepare a report assessing the effectiveness of the SBRM.

### ***Framework Adjustment and/or Annual Specification Provisions***

This rule implements regulations to enable the Councils to make changes to specific elements of the SBRM through framework adjustments and/or annual \*37184 specification packages rather than full FMP amendments. Framework adjustments and annual specification packages provide for an efficient yet thorough process to modify aspects of the SBRM if a Council determines that a change is needed to address a contemporary management or scientific issue in a particular FMP. Such changes to the SBRM may include modifications to the CV-based performance standard, the means by which discard data are collected/obtained in the fishery, the stratification (modes) used as the basis for SBRM-related analyses, the process for prioritizing observer sea-day allocations, reporting on discards or the performance of the SBRM. Such changes may also include the establishment of a requirement for industry-funded observers and/or observer set-aside provisions.

### ***Prioritization Process***

This rule incorporates by reference the SBRM Omnibus Amendment process to identify the funds that will be made available annually for SBRM, and how to prioritize the available observer sea-days if the funding provided to NMFS for such purposes is insufficient to fully implement the SBRM across all fishing modes. This measure is intended to limit the discretion the agency has in determining when funds are insufficient and how to reallocate observers under insufficient funding scenarios to address the concerns raised by the Court of Appeals in *Oceana v. Locke*.<sup>[FN1]</sup>

Under the new prioritization process, the amount of money available for the SBRM will be the funding allocated to the Region under four specific historically-appropriated observer funding lines (less deductions for management and

administrative costs). Of these, the funds made available by Congressional appropriation through the Northeast Fisheries Observers funding line must be dedicated to fund the proposed SBRM. In fiscal years 2011-2014, the Northeast Fisheries Observers funding line made up 53 percent to 59 percent of all observer funds for the Greater Atlantic Region under these four funding lines. Amounts from three of the funding lines are allocated among the fisheries in the five NMFS regions, including the Greater Atlantic Region, to meet national observer program needs. The total amount of the funds allocated for the Greater Atlantic Region from these three funding lines will constitute the remainder of the available SBRM funds. In fiscal year 2014, the amount appropriated under the Northeast Fisheries Observers funding line was \$6.6 million, and another \$5.9 million was made available for fisheries in the Greater Atlantic region under the other three funding lines. Funding in fiscal year 2015 for the Greater Atlantic Region under the other three funding lines is expected to be consistent with past allocations of these funds. Historically, the available funding has been insufficient to fully fund the SBRM to meet the performance standard. If the available funding continues to be insufficient to fully fund the SBRM, the amendment establishes a non-discretionary formulaic processes for prioritizing how the available observer sea-days would be allocated to the various fishing modes to maximize the effectiveness of bycatch reporting and bycatch determinations.

#### ***Industry-Funded Observers and Observer Set-Aside Program Provisions***

This final rule implements regulatory changes to establish consistent, cross-cutting observer service provider approval and certification procedures and measures to enable the Councils to implement either a requirement for industry-funded observers and/or an observer set-aside program through a framework adjustment, rather than an FMP amendment.

#### ***Corrections and Clarifications***

This final rule also makes minor modifications to the regulations under authority granted the Secretary under section 305(d) of the Magnuson-Stevens Act to ensure that FMPs are implemented as intended and consistent with the requirements of the Magnuson-Stevens Act. This action corrects the list of framework provisions under the Atlantic Surfclam and Ocean Quahog FMP at § 648.79(a)(1) to also include, “the overfishing definition (both the threshold and target levels).” This text was inadvertently removed from the regulations by the final rule to implement annual catch limits and accountability measures for fisheries managed by the Mid-Atlantic Fishery Management Council (76 FR 60606, September 29, 2011). The regulations at § 648.11(h)(5)(vii) are revised to remove reference to the requirement that observer service providers must submit raw data within 72 hours. The final rule to implement Framework 19 to the Atlantic Sea Scallop FMP (73 FR 30790, May 29, 2008) incorrectly stated the time an observer service provider has to provide raw

data collected by an observer to NMFS, and this correction better reflects the Council's intent for that action.

This action also implements a consistent deadline for payment of industry-funded observers in the scallop fishery. Previously, there was not a specific due date for payment of industry-funded observers following an observed trip. We are implementing a deadline of 45 days after the end of an observed fishing trip as a due date for payment for all industry-funded observer services rendered in the scallop fishery.

### ***Changes From Proposed Rule***

A minor change has been made to the proposed regulatory text. As stated in the proposed rule, this amendment proposed to implement consistent, cross-cutting observer service provider and certification procedures and measures. To do this, several paragraphs within § 648.11(h) were proposed to be revised for consistency and to remove references that were specific to the current industry-funded scallop observer program. However, the specific provision at § 648.11(h)(5)(viii)(A) only applies to the industry-funded scallop observer program, and the reference to scallop vessels in that paragraph should not have been removed. Therefore, this final rule clarifies that this paragraph applies specifically to scallop vessels.

### ***Comments and Responses***

A total of 11 individual comment letters with 15 distinct categories of comments were received on the proposed rule and SBRM Omnibus Amendment.

Comment 1: One member of the public expressed general support for the action as an overhaul of bycatch reporting methods.

Response: NMFS appreciates the support for the proposed action, although the comment did not address any specific provision of the SBRM Omnibus Amendment or its proposed rule.

Comment 2: A letter from the Cape Cod Commercial Fishermen's Alliance, an organization representing commercial fishermen, expressed concern with how the SBRM would trigger prioritization when funding is insufficient and the subsequent impact to the Northeast multispecies sector management program, and urged disapproval of the amendment. The group stated that the proposed SBRM is overly complicated and expensive; that it will hinder industry efforts to develop alternative monitoring solutions including electronic monitoring; that it will eliminate supplemental observer coverage on midwater trawl vessels fishing in groundfish closed areas; and that it negatively impacts the groundfish at-sea monitoring program and could put the Northeast multispecies sector **\*37185** system at risk because the system is heavily reliant on appropriate monitoring.

Response: NMFS acknowledges the prioritization process trigger may result in observer funding—previously used by the Agency to discretionarily fund at-sea

monitoring, electronic monitoring, and/or supplemental coverage of midwater-trawl vessels—being used exclusively for SBRM if the funding amounts are insufficient to realize the level of coverage estimated to achieve the 30-percent CV performance standard. This is a direct result of efforts to address the specific finding of the U.S. Appeals Court in *Oceana v. Locke* that the Agency had too much discretion to determine the available funding for SBRM. The impacts of this change on other monitoring priorities are real and will require adjusting expectations and evaluating whether other sources of funding for these priorities may be possible. NMFS has developed annual agency-wide guidance regarding how observer funding is allocated across regions to meet SBRM and other observer needs.

The groundfish sector at-sea monitoring program is separate from the SBRM and is specific to the Northeast Multispecies FMP. The at-sea monitoring program provides supplemental monitoring within this fishery to address specific management objectives of the New England Fishery Management Council. The SBRM Omnibus Amendment does not specifically modify the groundfish sector at-sea monitoring program or its objectives, including the requirement for the groundfish industry to pay for its portion of costs for at-sea monitors if the Federal government does not. The groundfish at-sea monitoring provisions were developed by the Council and have been in place since 2010. To date, we have been able to provide sufficient funding for the groundfish sector at-sea monitoring program such that industry did not have to pay for at-sea monitoring. With the constraints imposed by this final rule, funds previously used to cover groundfish sector at-sea monitoring will now be required to fund SBRM. It may be necessary for the Council to develop alternatives to ensure accountability with sector annual catch entitlements when there are funding shortages that reduce available at-sea monitoring coverage below the rates needed to ensure a CV of 30 percent. Electronic monitoring has been viewed as one possible means of addressing observer funding shortages. In recent years, NMFS has worked with groundfish sectors to develop and evaluate monitoring alternatives, including electronic monitoring. While electronic monitoring is not currently sufficiently developed or suitable to be a viable replacement for at-sea observers for the purpose of the SBRM for fisheries administered by the Greater Atlantic Regional Fisheries Office, there are circumstances where it may be appropriate to address other monitoring purposes. NMFS is committed to working with our industry partners to continue development and implementation of electronic monitoring to the extent that it meets management objectives and funding is available. The SBRM can be amended at any time in the future to incorporate other monitoring means such as electronic monitoring.

In recent years, the Northeast Multispecies FMP has authorized mid-water trawl vessels to fish in the groundfish closed areas if they carried observers. The SBRM Omnibus Amendment may result in the unavailability of the funds previously used for this coverage because the funds must first go to the SBRM requirements. The requirement for midwater trawl vessels to have an observer to fish in the groundfish closed areas, however, is not changed by this amendment. Accordingly, without funds to provide this supplemental observer coverage, fewer midwater trawl trips will have access to these areas.

Comment 3: Two nongovernmental environmental organizations, Oceana, Inc., and Earthjustice, both stated the amendment uses outdated catch data from 2004 and does not meet various legal requirements.

Response: NMFS disagrees with the commenters' assertion that the amendment uses outdated data. Where new data would not provide additional insight or value in the amendment, the analysis from the 2007 SBRM amendment was maintained. When new data informed decision making in the amendment, NMFS used the most recent data available. Much of the amendment describes a system of statistical calculations that remain valid and appropriate even when newer data are not analyzed to provide context. The descriptions of the fisheries and fishing modes and the analysis of the impacts of alternatives uses catch data from 2012. Other analysis used more recent data. Some analyses in Chapter 5 of the Omnibus Amendment Environmental Assessment are illustrative examples of the sample size analysis used to determine how many observer sea-days are needed to achieve the 30-percent CV performance standard, and the bycatch rate analysis that uses data from observed fishing trips to estimate bycatch across the whole fishery. These analyses are conducted each year with updated data as a part of the SBRM process. The validity of these examples is not dependent on using data from a specific fishing year. The detailed analysis and description of the process that was conducted and presented in the 2007 SBRM amendment is still valid today. Recreating this work for this specific action would have taken a significant amount of time and effort, but would not have provided any additional insight into the SBRM process. Therefore, updated analysis was conducted and added to the document where needed to reflect the changes in the fisheries since the initial 2007 SBRM amendment was developed and implemented.

Comment 4: Oceana and Earthjustice assert that the action does not contain a sufficient range of reasonable alternatives including a no-action alternative, and that some alternatives were improperly rejected from consideration, including using non-managed species as drivers of observer coverage and use of electronic monitoring as a component of the SBRM. Oceana states the SBRM would have significant impacts and should require a full environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).

Response: NMFS disagrees with the commenters' claim that the amendment does not meet the legal requirements of the NEPA, including that the amendment does not properly address cumulative impacts, does not have an adequate no-action alternative, does not have an adequate range of alternatives, and that it requires an EIS. Consistent with NEPA, Council for Environmental Quality (CEQ) regulations, and NOAA administrative policy, NMFS and the Councils collaborated to prepare an EA to evaluate the significance of the environmental impacts expected as a result of the management measures considered in the SBRM Omnibus Amendment. The results of this assessment are provided in section 8.9.2 of the amendment, which supports the finding of no significant impacts (FONSI) signed by the agency on March 10, 2015. The commenters provide no evidence that the conclusion in the FONSI is not supported by the facts presented in the EA for this finding. NMFS asserts that the EA considers a sufficient range of alternatives to satisfy the requirements of NEPA. As described throughout the amendment (the Executive Summary, chapters 6, 7, and 8), the alternatives considered by the Councils were structured around seven **\*37186** specific elements that together comprise the Greater Atlantic Region SBRM. Multiple alternatives were developed and considered for each element and, in some cases, various sub-options were also developed and considered. Section 7.3 of the amendment explicitly provides a discussion of the expected cumulative effects associated with this action. NMFS asserts that this treatment of cumulative effects is consistent with CEQ regulations and current NOAA policy.

Oceana presented these same contentions before the Court in its challenge to the 2007 SBRM amendment (*Oceana v. Locke*, 725 F. Supp. 2d 46 (D.D.C. 2010) reversed on other grounds (*Oceana v. Locke*, 670 F. 3d 1238 (D.C. 2011))). In that case, the U.S. District Court thoroughly reviewed their arguments and concluded that an EA for the 2007 SBRM amendment was consistent with NEPA. The Court specifically stated that, “NMFS sufficiently considered the issue of cumulative effects and concluded that any potential downstream impacts were not ‘reasonably foreseeable and directly linked’ to the Amendment” [FN2] and that “NMFS' consideration of alternatives in the EA was sufficient to meet the requirements of NEPA.” [FN3]

While some components of the amendment remain essentially unchanged from the 2007 SBRM amendment, several components, including the affected environment and cumulative impacts analyses have been updated to account for changes since 2007. NMFS asserts that the amendment continues to meet all legal requirements, including NEPA.

NMFS disagrees with the commenters' assertion that alternatives were improperly listed as considered but rejected. When the Councils initiated this action, they explicitly supported the previous Council decisions regarding the range of

alternatives, including the alternatives considered but rejected. Both Councils directed the plan development team for this action specifically to focus on the legal deficiencies identified by the Court of Appeals and some minor revisions suggested by the 3-year review report. Given the primary scope of this action to specifically focus on the Court's remand, alternatives previously considered but rejected in the 2007 amendment were deemed considered and rejected for this action. Chapter 6.8 of the SBRM Omnibus Amendment reiterates the discussion of why each alternative was considered but rejected in the prior action, and explains how each does not meet the purpose and need of the SBRM Omnibus Amendment. The commenters offer no new information or circumstances that show these alternatives should have not been rejected from further consideration for this action.

Comment 5: Oceana states that the adoption of annual catch limits and associated accountability measures in recent years has significantly changed the data collection needs for management and that the SBRM needs to fully discuss and meet all bycatch monitoring needs of each FMP, including inseason actions. Oceana asserts the annual discard reports described in the SBRM Omnibus Amendment will not provide bycatch data at a level of detail necessary to meet all management priorities of the Councils.

Response: NMFS disagrees with Oceana's claim that the SBRM Omnibus Amendment does not meet the monitoring needs of annual catch limits and accountability measures mandated by the Magnuson-Stevens Act. The Magnuson-Stevens Act requires each Council to develop annual catch limits for each of its managed fisheries. Further guidance on annual catch limit requirements was issued by NMFS in 2009 (74 FR 3178). The SBRM is designed to meet the statutory requirements to establish a mechanism for collecting bycatch information from each fishery and estimating the discards of each species on an annual basis, to effectively monitor these annual catch limits. The SBRM forms the basis for bycatch monitoring in the Region, but need not address all monitoring requirements of all fishery management plans. Oceana conflates the Magnuson-Stevens Act requirement for annual catch limits (ACLs), which are typically set for the whole stock at an annual level, and assessed after the conclusion of each fishing year, with the Councils' prerogative to manage fisheries using smaller scale requirements such as sub-ACLs for groundfish sector fisheries and other fisheries that may trigger inseason management actions. The specific monitoring requirements of these management programs may be addressed outside of the SBRM with separate observer or monitoring requirements. Most FMPs that use inseason actions to open or close fisheries use landings data to make that determination, and do not rely on near real-time estimates of discards. When the New England Council designed the Northeast multispecies sector program, it

recommended NMFS monitor catch, including discards, at the sector level and require measures designed to allow for inseason management actions. To meet this need, the Council created the sector at-sea monitoring program. The sector at-sea monitoring program requires additional monitoring coverage, beyond SBRM targets, which can then provide the additional information the Council determined was necessary for its groundfish-specific management objectives. If there is a need for more finely-tuned monitoring requirements in a particular fishery, the FMP for that fishery can be amended to address those requirements, including increasing monitoring or observer coverage over and above the SBRM levels. For example, the Industry-Funded Monitoring Omnibus Amendment currently under development by the New England and Mid-Atlantic Councils includes measures intended to facilitate the monitoring of incidental catch limits or bycatch events in the Atlantic Herring and the Atlantic Mackerel, Squids, and Butterfish FMPs. NMFS has determined that unless a specific FMP has requirements for such additional monitoring, the SBRM is sufficient for monitoring bycatch for the purposes of assessing total catch against annual catch limits. The commenters have not provided any evidence that the SBRM would not be sufficient to provide the estimated bycatch component of the total annual catch of a fishery that is used to monitor ACLs. Nor have they submitted any recommendations or alternatives that were not considered.

Comment 6: Oceana and Earthjustice claim the SBRM Omnibus Amendment does not adequately discuss the potential for bias in observer data that could adversely affect estimated bycatch. The commenters' are critical of the 30-percent CV standard, and suggest this level of precision is not sufficient for bycatch estimates. Supporting this contention, both groups cite a technical review of the 2007 SBRM Amendment by Dr. Murdoch McAllister of the University of British Columbia.

Response: NMFS disagrees with Oceana's contention that the amendment does not sufficiently address the issue of potential bias in observer data and the alleged impact of such bias on the accuracy of bycatch estimations. Chapter 5 of the SBRM Omnibus Amendment discusses at length and in detail bias and precision issues as they relate to the SBRM. As discussed in the SBRM Omnibus Amendment and described below, new research and analysis has been conducted since 2007 of potential **\*37187** observer bias and the implications for discard estimation.

Oceana cites the Agency's analysis of at-sea monitoring requirements for the Northeast multispecies sector fishery,[FN4] but draws an unsupported conclusion about potential bias in observed trips versus unobserved trips. An analysis contained in that report examined if there were indications of an observer effect on groundfish trips using trawl or gillnet gear that could result in either systematic or

localized biases, meaning that the observer data used to generate discard estimates may not be representative. This study essentially looked for differences in performance when a vessel carried an observer and when it did not. This analysis found evidence for some difference in fishing behavior between observed and unobserved groundfish trips; however, the analysis does not conclude whether the apparent differences would necessarily result in discard rates on unobserved trips that are different (higher or lower) than on observed trips. If the discard rate is unchanged, then the apparent differences would not affect total discard estimates. Additional analysis included in the report found that even if there is some bias, the discard rate for the groundfish sector trips studied would need to be five to ten times higher on unobserved trips for total catch to exceed the acceptable biological catch. None of the analyses conducted to date suggest behavioral differences on observed versus unobserved trips of this magnitude. In any event, the analysis for the Northeast multispecies sector fishery is not directly relevant for all fisheries covered by the SBRM.

Oceana made similar claims of potential bias about the 2007 SBRM amendment, but the U.S. District Court found that the amendment contained an extensive consideration of bias, precision, and accuracy. Commenters do not add any additional information or analysis that contradicts the finding of the District Court. NMFS, nevertheless, supports continued analysis of potential sources of bias, and the SBRM can be modified in the future to address any shortcomings that are identified.

NMFS disagrees with the commenters' contention that the choice of a 30-percent CV performance standard is inappropriate. The rationale for a 30-percent CV performance standard is explained in Chapters 5 and 6.3 of the SBRM Omnibus Amendment and in the 2004 NMFS technical memorandum "Evaluating bycatch: A national approach to standardized bycatch monitoring programs" (NMFS-F/SPO-66). The commenters' cite a technical review of the 2007 SBRM amendment to argue that this level of precision would not be suitable for stock assessments. However, the cited section of the technical review refers to a level of variability in estimates of total catch, while the SBRM is addressing the variability in estimated discards of a species group in a single fishing mode. For most fisheries in the Greater Atlantic Region, discards are a relatively small portion of total catch, and the subdivision by different fishing modes would result in estimates of total discards with much lower total variability. This error on the part of the commenters about relevant scale is a common and understandable confusion about precision. Oceana made a similar argument before the U.S. District Court in its challenge to the 2007 SBRM Amendment. In that case, the Court found that NMFS's decision to use a 30-percent CV, and the agency's response to the technical review, was reasonable and did not violate the Magnuson-Stevens Act or

any other applicable law. In its most recent comments, Oceana provides no new information or analysis that contradicts the Court's conclusion.

Comment 7: Oceana and Earthjustice state that the proposed prioritization process is not a sufficient response to the Appeals Court order in *Oceana v. Locke*. Oceana states the proposed funding trigger is not sufficiently distinct from the status quo. In the opinion of the commenters, the amendment does not adequately explain: Why only the named funding lines would be used for SBRM and not others; whether other discretionary sources of money exist; how the agency might handle new funding lines that might be applicable; and what the term “consistent with historic practice” means. Oceana suggests that the amendment must consider other sources of potential funding including other Federal funding sources and development of new industry-funding alternatives. Oceana states that the prioritization of observer coverage should affect catch buffers, and refers to National Standard 1 guidance to argue that any change in the anticipated precision of discard estimates should be directly tied to the uncertainty buffers around allowable catch.

Response: NMFS disagrees with the commenters' contentions that the prioritization process does not address the Court's finding in *Oceana v. Locke*. Contrary to Oceana's assertion, the prioritization funding trigger places real and significant restrictions on the Agency's discretion to determine the available funding for the SBRM. The four funding lines identified in the amendment were chosen because they represent the primary sources of observer funding in the Greater Atlantic Region, and had been used to fund the SBRM in previous years. By committing the Region to use the funds available in those specific lines to support the SBRM, NMFS is creating a transparent mechanism for determining under what circumstances the SBRM prioritization process would be triggered.

The Agency is not contending that it has no discretion in how to spend any other funding lines, or that there are no other funding lines that may be available to support other monitoring priorities in the Region. NMFS must maintain some flexibility to use appropriated funding to respond to appropriations changes and changes in conditions and priorities within the Region and across the country. To do otherwise would be irresponsible and could be counter to legal requirements and jeopardize the Agency's mission. NMFS acknowledges that Congressional appropriations may change over time. The SBRM Amendment does not speculate about potential future changes in existing or potential future funding lines. The provisions of the SBRM prioritization process may be adjusted to incorporate future changes through an FMP framework action. Framework adjustment development would occur through established Council public participation processes. NMFS has developed annual agency-wide guidance that further explains

how and why specific funding decisions are made for SBRM programs and other observer needs throughout the country.

Oceana expresses confusion regarding the meaning of the phrase “consistent with historic practice” used in the amendment. To provide context, this phrase is intended to reflect that not every dollar allocated to the Region through the specified funding lines will necessarily be converted into observer sea-days. All funding lines to regional offices and science centers are subject to standard overhead deductions that are used to support shared resources and infrastructure that do not receive their own appropriation of funds, such as building rent and maintenance, utilities, shared information technology, etc. In addition, the cost of the SBRM includes more than just observer sea-days. Additional costs include, but are not limited to, shore-side expenses to support the observer program, training \*37188 of observers, and development of improved sampling procedures. These expenses will necessarily vary from year to year, and it was not practicable to try to enumerate all possible expenses that may be needed to support the SBRM. The intent of specifying that funds will be used “consistent with historic practice” means that these additional costs will be incurred at levels that are consistent with what has occurred in the past such that not all specified funds will be converted to observer sea-days.

NMFS rejects Oceana's contention that the amendment must include an alternative for the fishing industry to pay for any funding shortfall. Industry-funded monitoring programs are complex and must be carefully tailored to each specific fishery as a management/policy decision in each specific FMP. As stated in Chapter 1 of the SBRM Omnibus Amendment, the SBRM is a methodology to assess the amount and type of bycatch in the fisheries and not a management plan for how each fishery operates. It is not necessary or practicable to develop such programs for all of the fisheries in the Region through this action. The Councils have the flexibility to consider industry-funded programs, to meet SBRM or other monitoring priorities, on a case by case basis, depending on the needs and circumstances of each fishery.

NMFS disagrees with Oceana's repeated assertions that the anticipated precision of estimated discards must be directly tied to changes in the uncertainty buffers around catch limits. Each data source has a certain degree of uncertainty associated with it. The specific amount of uncertainty can only be estimated and cannot be parsed into specific amounts at different catch levels of different species in different fisheries. NMFS' National Standard 1 guidelines recommend the use of buffers around catch thresholds to account for these various sources of management and scientific uncertainty (74 FR 3178; January 16, 2009). The Councils have adopted control rules and/or make use of scientific and technical expertise so that these buffers address numerous sources of potential uncertainty

that may be present in these catch limits into a single value. Each source of uncertainty may vary and the buffers are set conservatively to account for this variability and the complex interplay that may exist between sources of uncertainty. To propose adjusting these buffers to automatically account for changes in the precision estimate for one component of the total catch, in this case discards of a specific species in a specific fishing mode, misunderstands the general nature of these buffers and the complexities they are intended to address. The precision of a discard estimate does not necessarily reflect the magnitude or importance of that estimate. A very small amount of estimated discards could be very imprecise without having a significant impact on total catch. Similarly, if a species is discarded by several fishing modes, a change in precision in one mode may not significantly affect the precision of the total estimated discards for that stock. How the variability in discard estimates impacts the scientific uncertainty of overall catch estimates is outside the scope of this action and is best considered on a case by case basis, through the Councils' acceptable biological catch (ABC) control rules and Scientific and Statistical Committees. NMFS acknowledges that, in certain cases, the magnitude or importance of estimated discards may be cause for ABC control rules and/or Scientific and Statistical Committees to specifically consider discard estimate precision and underlying uncertainty when recommending an ABC, but not formulaically as the commenter suggests.

NMFS disagrees with Oceana's claim that the SBRM Omnibus Amendment fails to mandate that data be reported in a rational manner useful for fisheries management. As described in Chapter 1 of the SBRM amendment, the SBRM is a general, over-arching methodology for assessing bycatch in all fisheries managed by the New England and Mid-Atlantic Fishery Management Councils to meet the requirements of the Magnuson-Stevens Act. It is not designed as a specific, real-time quota monitoring process. The amendment specifies minimum components to include in the annual discard reports, and anticipates that the format and content of these reports will evolve over time. The 2007 SBRM amendment was very prescriptive of the detailed information to be included in the annual discard reports. However, this resulted in annual discard reports with over 1,000 pages of tables. While these reports contained a lot of information, they were not as useful for management as intended. The revised SBRM Omnibus Amendment calls for annual discard reports to contain more summarized data that could be presented in different ways. We intend to work with the Councils on an ongoing basis to ensure these reports continue to provide the information fishery managers need in a format that is useful in their work. As explained in Chapters 1 and 2 of the Omnibus Amendment, fishing modes are used as the operational unit for assigning observer coverage because it reflects information that is available when a vessel

leaves the dock. While data may be collected by fishing mode, the calculated discards can be reported in multiple ways. NMFS looks forward to working with the Councils to prepare annual discard reports that provide needed information to support their management decisions.

Comment 8: Earthjustice claims the importance filters remove coverage from important fleets, and the SBRM must not prevent NMFS from paying for the government costs of new industry-funded monitoring programs. The commenter also asserts that the implications of the amendment on supplemental observer coverage of mid-water trawl fisheries were first discussed in August 2014, after the Councils had taken final action. The commenter urges the agency to disapprove the amendment and initiate scoping for a new amendment and EIS.

Response: NMFS disagrees with the commenter's contention that the importance filters create a situation that "is not only absurd and irrational, but entirely inconsistent with the needs of the fishery" with regard to monitoring the bycatch of river herring and shad species caught in the midwater trawl fisheries. As described in Chapter 6.2.3 of the amendment, the importance filters are a tool to aid in establishing observer sea day allocations that are more meaningful and efficient at achieving the overall objectives of the SBRM. As the commenter acknowledges, midwater trawl vessels that incidentally catch these species typically retain and land them, and as such, those fish are not bycatch as defined by the Magnuson-Stevens Act. Therefore, such incidental catch is outside of the mandate of the SBRM. Not all monitoring priorities must be part of the SBRM. In cases where a Council determines monitoring of incidental catch of specific species is a management priority, NMFS works with the Council to design and evaluate monitoring options, including at-sea observers or monitors, dockside sampling, electronic monitoring, or other options that best address the needs of the specific fishery.

NMFS acknowledges the commenter's concern that the agency may not be able to fully fund the government's costs associated with a future industry-funded monitoring program. One of the goals of another initiative, the Industry-Funded Monitoring Omnibus Amendment, currently under development by the Councils is to create **\*37189** a process for prioritizing available appropriated government and industry funds to efficiently provide supplemental monitoring for management goals beyond the SBRM. Currently, the agency may not use private funds to finance the costs of fundamental government obligations in a manner that is not consistent with the Antideficiency Act, Miscellaneous Receipts Statute, and other appropriations laws or rules. In the Industry-Funded Monitoring Omnibus Amendment, the New England and Mid-Atlantic Councils are considering how to prioritize and coordinate government funds necessary for supporting at-sea observers and other monitoring needs consistent with the Councils'

recommendations for industry-funded observer programs outside of the SBRM requirements. Development of this process would ensure that when funds are available, they will be used consistent with the priorities regarding observer coverage and monitoring needs established by the Councils. NMFS will continue to work to identify potential funding sources that could be utilized to support the Councils' monitoring priorities.

NMFS disagrees with the commenter's assertion that the implications of how the SBRM impacts at-sea observer coverage in other fisheries were first discussed in August 2014. NMFS staff gave a special presentation about the funding of the Northeast Fisheries Observer Program at both the New England and Mid-Atlantic Council meetings in April 2014. These presentations highlighted the sources of funding and potential effect of the proposed SBRM funding trigger on available SBRM coverage and other monitoring programs previously funded by the effected funding lines. This message was then reiterated during the presentation of the SBRM Omnibus Amendment at the same meetings, before the Councils voted to take final action on the amendment.

Comment 9: The Center for Biological Diversity, an environmental group, submitted a letter focusing on the potential impact of the SBRM on endangered species. The commenter suggests that the allocation of observers should be focused on the conservation status of potential bycatch species, particularly those that are overfished, undergoing overfishing, or have been identified as endangered, threatened, or species of concern. The group also asserted that the amendment does not adequately consider potential adverse effects on endangered species.

Response: NMFS disagrees with the commenter's assertion that the SBRM should be driven primarily by the conservation status of the potential bycatch species.

Section 303(a)(11) of the Magnuson-Stevens Act requires that each FMP “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery” regardless of the conservation status of the species caught in the fishery. As stated in Chapter 1.3 of amendment, the primary purpose of bycatch reporting and monitoring is to collect information that can be used reliably as the basis for making sound fisheries management decisions for all managed species in the Greater Atlantic Region, including stock assessments and annual catch accounting. Figure 1 in Appendix H of the SBRM Omnibus Amendment illustrates that beyond a certain point, increased observer coverage provides diminishing returns as far as improved precision of estimated discards. As a result, prioritizing observer coverage by conservation status could risk sacrificing the precision of bycatch estimates for several species to achieve a marginal improvement in one, which is unlikely to meet the stated objectives of this action. NMFS disagrees with the commenter's contention that the SBRM Omnibus Amendment does not adequately consider adverse effects to endangered species.

As discussed in Chapter 5 of the amendment, the SBRM applies the 30-percent CV performance standard to species afforded protection under the Endangered Species Act, as it does for species managed under a FMP. This has been the case since the implementation of the 2007 SBRM Amendment. Since that time, the agency has continued to effectively use discard estimates for these species for management purposes, including monitoring incidental take limits, and there is no information indicating these estimates are inadequate. The SBRM Omnibus Amendment is primarily administrative in nature and is not expected to result in any changes in fishing effort or behavior, fishing gears used, or areas fished, and therefore will not adversely affect endangered and threatened species in any manner not considered in prior consultations.

Comment 10: One commercial fisherman expressed frustration with how observer coverage and at-sea monitors are allocated across the groundfish fleet. The commenter suggested assigning observers based on the amount of bycatch rather than the estimated variance in discards. The commenter was also very concerned about the potential cost to vessels of industry-funded monitoring.

Response: As described in Chapter 5 of the SBRM Omnibus Amendment, the target observer coverage rates are calculated based on the variance of discards (i.e., the CV performance standard) rather than on total amount of discards from any one fishing mode. This approach is designed to provide a suitable level of precision in discard estimates to meet the requirements of the Magnuson-Stevens Act. The SBRM focuses on providing a statistically rigorous sampling of fishing activity, which will provide a more precise estimate of total discards, rather than a direct measurement or census of discards. Thus, it is intended to provide a better measurement of overall discards, rather than trying to directly observe a high volume of discards that might lead to a less precise estimate of total discards when unobserved trips are factored in. The comment regarding the potential burden that paying for at-sea monitors would place on the groundfish industry is addressed under Comment 2, above.

Comment 11: One commercial fisherman expressed concerns that the proposed funding trigger would be too restrictive on the use of certain observer funds and would prevent funds from being used to cover the groundfish industry costs for at-sea monitors as it has in the past.

Response: NMFS agrees with this individual's observation. Funds previously used to cover groundfish at-sea monitors may be fully committed to the SBRM process by the amendment's measures to the extent that SBRM funding amounts are insufficient to realize the level of observer coverage estimated to achieve the 30-percent CV performance standard. Additional detail on this comment is addressed in the response to Comment 2, above.

Comment 12: One member of the public wrote in support of the proposed 45-day payment period for observer services to the scallop fishing fleet, and suggested that such a payment period be specified in any future action to develop industry-funded observer programs. The commenter also suggested that the proposed rule at § 648.11(h)(5)(vii)(A) incorrectly states that an observer has 24 hours for electronic submission of observer data after a trip has landed, and that the correct time should be 48 hours.

Response: This comment refers to one of three minor modifications to the regulations in the proposed rule that are not part of the SBRM Omnibus Amendment, but were proposed under authority granted the Secretary under section 305(d) of the Magnuson-Stevens Act to ensure that FMPs are **\*37190** implemented as intended and consistent with the requirements of the Magnuson-Stevens Act. NMFS agrees that a clear payment deadline is valuable for both the observer service providers and the vessel operators who are contracting observer services.

The requirement to submit electronic observer data within 24 hours reflects the current regulations. NMFS acknowledges that current practice is to allow 48 hours for electronic submission of observer data. The proposed rule did not specifically propose addressing this inconsistency, and as a result there was no opportunity for public comment. Therefore, NMFS is not changing this regulation in this rule. There may be other areas within this section of the regulations where current practice has evolved away from the specific provisions in the regulations. NMFS may address these inconsistencies in a future rulemaking.

Comment 13: A letter from The Nature Conservancy expressed support for improving fishery monitoring systems and cited the benefits of accurate and reliable data. The commenter urged NMFS to clarify the agency's intention to take steps necessary to implement additional tools for collecting timely and accurate fishery-related data, including the use of electronic monitoring. In particular, the commenter urged the agency to ensure that the SBRM support, and not hinder, the earliest possible implementation of electronic monitoring. The commenter also expressed support for the SBRM review and reporting process, and requested that the triennial review include a broader set of stakeholders beyond NMFS and the Councils.

Response: NMFS acknowledges that the funding-related prioritization trigger may require some funding sources that have previously been used to support development of electronic monitoring to be used exclusively for the SBRM. This may delay implementation of electronic monitoring in the Region. The commenter cited the recent adoption of electronic monitoring requirements to monitor bluefin tuna bycatch in the pelagic longline fishery under the Consolidated Atlantic Highly Migratory Species FMP as evidence that electronic monitoring is ready to meet the

bycatch monitoring goals of the SBRM. NMFS is very supportive of the new electronic monitoring program to monitor bycatch of bluefin tuna in the pelagic longline fishery. Lessons learned in the implementation of the bluefin tuna program should help inform other electronic monitoring programs in the future. However, a technology that is suitable for identification of bycatch of a distinctive species by a specific gear type, such as bluefin tuna in the pelagic longline fishery, may not yet be as suitable or affordable for monitoring more complex bycatch situations covered by the SBRM, such as differentiating flounder species in a multispecies trawl fishery, or providing length and weight data (all of which would be essential for electronic monitoring to effectively replace observers under the SBRM). Electronic monitoring is a technological tool that may be used to serve monitoring purposes that may differ between fisheries. The suitability and manner of using this tool for a particular purpose must be considered in the context of each proposed program. NMFS supports the continued development of electronic monitoring and will continue to evaluate its applicability as a component of a comprehensive SBRM and other coverage purposes.

The team that conducted the 3-year review of the SBRM in 2011 included staff from the Northeast Fisheries Science Center, the Greater Atlantic Regional Fisheries Office, the New England and Mid-Atlantic Fishery Management Councils, and the Atlantic States Marine Fisheries Commission. Because much of the data analyzed as part of the 3-year review are confidential under the Magnuson-Stevens Act, the team was limited to individuals authorized to access such information. The annual discard reports as well as the final 3-year review report present information in a format consistent with data confidentiality requirements and are all publically available. NMFS and the Councils will consider how additional stakeholders might be included in the next review in a way that could allow their input without compromising the confidentiality of catch and discard data.

Comment 14: The Marine Mammal Commission submitted a letter requesting NMFS include additional information in the final rule about whether the SBRM has implications for observer programs under the Marine Mammal Protection Act (MMPA). In addition, the letter noted particular support for the proposed use of a non-discretionary formulaic process for prioritizing available observer sea-days, and the provision to facilitate the future development of an industry-funded observer program through a framework adjustment.

Response: NMFS appreciates the commenter's support for the use of a non-discretionary formulaic process for prioritizing available observer sea-days, and the provision to facilitate the future development of an industry-funded observer program through the FMP's framework adjustment process. Observer programs explicitly funded to support the MMPA are not affected by this amendment. NMFS

receives dedicated funding for observers under the MMPA, which is a separate funding allocation from the SBRM program. Because the funding for these MMPA observers is outside of the funding lines dedicated to the SBRM, the allocation of MMPA observers is not directly subject to the observer allocation process or prioritization process described in the SBRM Omnibus Amendment. The MMPA observers are allocated across fisheries based on the estimated likelihood of marine mammal interactions. At-sea observers allocated under the SBRM actually provide additional marine mammal observer coverage as they record and report any interactions with marine mammals that occur on observed fishing trips. Likewise, at-sea monitors in the groundfish sector program record any interactions they witness. Similarly, in the absence of a marine mammal interaction, MMPA observers record information about the trip and observed bycatch that contributes to our overall estimation of bycatch in Greater Atlantic fisheries. However, if a marine mammal is present, these observers are required to focus their attention on that marine mammal interaction, and monitoring of other bycatch becomes a secondary priority. For additional information about how marine mammal interactions are monitored, please see the Greater Atlantic Region's Marine Mammal Program Web site at:

[www.greateratlantic.fisheries.noaa.gov/Protected/mmp/](http://www.greateratlantic.fisheries.noaa.gov/Protected/mmp/).

Comment 15: The comments submitted by Environmental Defense Fund, an environmental organization, expressed concerns about the impact of the proposed SBRM on the continued development and implementation of electronic monitoring in the Region. The commenter expressed concern that the amendment should have included electronic monitoring as an explicit component of the SBRM. The group asserts that 100-percent electronic monitoring would reduce uncertainty in catch data and improve stock assessments, and that electronic monitoring could provide a lower sea-day cost than current at-sea observers. The group is critical that the proposed funding trigger is not properly explained and would prevent funds from being available for electronic monitoring or to cover the government \*37191 costs associated with any future industry-funded monitoring programs.

Response: The responses above to Comment 3, Comment 4, and Comment 9 address many of the points raised by the commenter. NMFS does not agree with the commenter's characterization of the potential cost savings with electronic monitoring at this time. The commenter promotes the potential for a lower cost per sea-day with electronic monitoring than with at-sea observers, but also advocates for 100-percent electronic monitoring on every fishing trip. This is a substantial increase in coverage rate when compared to the current SBRM using at-sea observers. The affordability of electronic monitoring has yet to be determined. Electronic monitoring costs will be determined largely by the purpose and scope of particular electronic monitoring coverage and the available technology to meet

those needs. Even at a potentially lower cost per day, the increase in coverage to 100 percent of trips would likely result in a program that is significantly more expensive than the SBRM is currently. This does not take into account that electronic monitoring is not yet considered robust enough to replace observers for bycatch monitoring in some gears types or for identifying all bycatch to the species level. In addition, some amount of at-sea observer coverage is likely to still be required to collect biological samples, which would further increase the costs. NMFS will continue to support development of electronic monitoring as a potential tool where it is fitting and appropriate.

### **Classification**

The Administrator, Greater Atlantic Region, NMFS, determined that the SBRM Omnibus Amendment is necessary for the conservation and management of Greater Atlantic fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements, Incorporation by reference.

Dated: June 17, 2015.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

### **PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

50 CFR § 648.11

2. In § 648.11, add paragraph (g)(5)(iii), and revise paragraphs (h)(1), (h)(3)(iv), (h)(3)(vi), (h)(3)(viii), (h)(3)(ix), (h)(4), (h)(5), (h)(7) introductory text, (i)(1), (i)(2), (i)(3)(ii) and (v), (i)(4), and (i)(5) to read as follows:

50 CFR § 648.11

**§ 648.11 At-sea sea sampler/observer coverage.**

\* \* \* \* \*

(g) \* \* \*

(5) \* \* \*

(iii) Owners of scallop vessels shall pay observer service providers for observer services within 45 days of the end of a fishing trip on which an observer deployed.

\* \* \* \* \*

(h) Observer service provider approval and responsibilities—(1) General. An entity seeking to provide observer services must apply for and obtain approval from NMFS following submission of a complete application. A list of approved observer service providers shall be distributed to vessel owners and shall be posted on the NMFS/NEFOP Web site at: [www.nefsc.noaa.gov/femad/fsb/](http://www.nefsc.noaa.gov/femad/fsb/).

\* \* \* \* \*

(3) \* \* \*

(iv) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, describing any criminal conviction(s), Federal contract(s) they have had and the performance rating they received on the contracts, and previous decertification action(s) while working as an observer or observer service provider.

\* \* \* \* \*

(vi) A description of the applicant's ability to carry out the responsibilities and duties of a fishery observer services provider as set out under paragraph (h)(5) of this section, and the arrangements to be used.

\* \* \* \* \*

(viii) Proof that its observers, whether contracted or employed by the service provider, are compensated with salaries that meet or exceed the U.S. Department of Labor (DOL) guidelines for observers. Observers shall be compensated as Fair Labor Standards Act (FLSA) non-exempt employees. Observer providers shall provide any other benefits and personnel services in accordance with the terms of each observer's contract or employment status.

(ix) The names of its fully equipped, NMFS/NEFOP certified, observers on staff or a list of its training candidates (with resumes) and a request for an appropriate NMFS/NEFOP Observer Training class. The NEFOP training has a minimum class size of eight individuals, which may be split among multiple vendors requesting training. Requests for training classes with fewer than eight individuals will be delayed until further requests make up the full training class size.

\* \* \* \* \*

(4) Application evaluation. (i) NMFS shall review and evaluate each application submitted under paragraph (h)(3) of this section. Issuance of approval as an observer provider shall be based on completeness of the application, and a

determination by NMFS of the applicant's ability to perform the duties and responsibilities of a fishery observer service provider, as demonstrated in the application information. A decision to approve or deny an application shall be made by NMFS within 15 business days of receipt of the application by NMFS.

(ii) If NMFS approves the application, the observer service provider's name will be added to the list of approved observer service providers found on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section, and in any outreach information to the industry. Approved observer service providers shall be notified in writing and provided with any information pertinent to its participation in the fishery observer program.

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written **\*37192** denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, an observer provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be re-considered for being added to the list of approved observer service providers.

(5) Responsibilities of observer service providers. (i) An observer service provider must provide observers certified by NMFS/NEFOP pursuant to paragraph (i) of this section for deployment in a fishery when contacted and contracted by the owner, operator, or vessel manager of a fishing vessel, unless the observer service provider refuses to deploy an observer on a requesting vessel for any of the reasons specified at paragraph (h)(5)(viii) of this section.

(ii) An observer service provider must provide to each of its observers:

(A) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments, and to any debriefing locations, if necessary;

(B) Lodging, per diem, and any other services necessary for observers assigned to a fishing vessel or to attend an appropriate NMFS/NEFOP observer training class;

(C) The required observer equipment, in accordance with equipment requirements listed on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section, prior to any deployment and/or prior to NMFS observer certification training; and

(D) Individually assigned communication equipment, in working order, such as a mobile phone, for all necessary communication. An observer service provider may alternatively compensate observers for the use of the observer's personal mobile

phone, or other device, for communications made in support of, or necessary for, the observer's duties.

(iii) Observer deployment logistics. Each approved observer service provider must assign an available certified observer to a vessel upon request. Each approved observer service provider must be accessible 24 hours per day, 7 days per week, to enable an owner, operator, or manager of a vessel to secure observer coverage when requested. The telephone system must be monitored a minimum of four times daily to ensure rapid response to industry requests. Observer service providers approved under paragraph (h) of this section are required to report observer deployments to NMFS daily for the purpose of determining whether the predetermined coverage levels are being achieved in the appropriate fishery.

(iv) Observer deployment limitations. (A) A candidate observer's first four deployments and the resulting data shall be immediately edited and approved after each trip by NMFS/NEFOP prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(B) Unless alternative arrangements are approved by NMFS, an observer provider must not deploy any observer on the same vessel for more than two consecutive multi-day trips, and not more than twice in any given month for multi-day deployments.

(v) Communications with observers. An observer service provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed shoreside, in transit, or in port awaiting vessel assignment.

(vi) Observer training requirements. The following information must be submitted to NMFS/NEFOP at least 7 days prior to the beginning of the proposed training class: A list of observer candidates; observer candidate resumes; and a statement signed by the candidate, under penalty of perjury, that discloses the candidate's criminal convictions, if any. All observer trainees must complete a basic cardiopulmonary resuscitation/first aid course prior to the end of a NMFS/NEFOP Observer Training class. NMFS may reject a candidate for training if the candidate does not meet the minimum qualification requirements as outlined by NMFS/NEFOP minimum eligibility standards for observers as described on the NMFS/NEFOP Web site.

(vii) Reports—(A) Observer deployment reports. The observer service provider must report to NMFS/NEFOP when, where, to whom, and to what fishery (including Open Area or Access Area for sea scallop trips) an observer has been deployed, within 24 hours of the observer's departure. The observer service provider must ensure that the observer reports back to NMFS its Observer Contract (OBSCON) data, as described in the certified observer training, within 24 hours of

landing. OBSCON data are to be submitted electronically or by other means specified by NMFS. The observer service provider shall provide the raw (unedited) data collected by the observer to NMFS within 4 business days of the trip landing.

(B) Safety refusals. The observer service provider must report to NMFS any trip that has been refused due to safety issues, e.g., failure to hold a valid USCG Commercial Fishing Vessel Safety Examination Decal or to meet the safety requirements of the observer's pre-trip vessel safety checklist, within 24 hours of the refusal.

(C) Biological samples. The observer service provider must ensure that biological samples, including whole marine mammals, sea turtles, and sea birds, are stored/handled properly and transported to NMFS within 7 days of landing.

(D) Observer debriefing. The observer service provider must ensure that the observer remains available to NMFS, either in-person or via phone, at NMFS' discretion, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any observed trip. If requested by NMFS, an observer that is at sea during the 2-week period must contact NMFS upon his or her return.

(E) Observer availability report. The observer service provider must report to NMFS any occurrence of inability to respond to an industry request for observer coverage due to the lack of available observers by 5 p.m., Eastern Time, of any day on which the provider is unable to respond to an industry request for observer coverage.

(F) Other reports. The observer service provider must report possible observer harassment, discrimination, concerns about vessel safety or marine casualty, or observer illness or injury; and any information, allegations, or reports regarding observer conflict of interest or breach of the standards of behavior, to NMFS/NEFOP within 24 hours of the event or within 24 hours of learning of the event.

(G) Observer status report. The observer service provider must provide NMFS/NEFOP with an updated list of contact information for all observers that includes the observer identification number, observer's name, mailing address, email address, phone numbers, homeports or fisheries/trip types assigned, and must include whether or not the observer is "in service," indicating when the observer has requested leave and/or is not currently working for an industry funded program.

(H) Vessel contract. The observer service provider must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated **\*37193** into the contract) between the observer provider and those entities requiring observer services.

(I) Observer contract. The observer service provider must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and specific observers.

(J) Additional information. The observer service provider must submit to NMFS/NEFOP, if requested, copies of any information developed and/or used by the observer provider and distributed to vessels, such as informational pamphlets, payment notification, description of observer duties, etc.

(viii) Refusal to deploy an observer. (A) An observer service provider may refuse to deploy an observer on a requesting scallop vessel if the observer service provider does not have an available observer within 48 hours of receiving a request for an observer from a vessel.

(B) An observer service provider may refuse to deploy an observer on a requesting fishing vessel if the observer service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described at § 600.746 of this chapter.

(C) The observer service provider may refuse to deploy an observer on a fishing vessel that is otherwise eligible to carry an observer for any other reason, including failure to pay for previous observer deployments, provided the observer service provider has received prior written confirmation from NMFS authorizing such refusal.

\* \* \* \* \*

(7) Removal of observer service provider from the list of approved observer service providers. An observer service provider that fails to meet the requirements, conditions, and responsibilities specified in paragraphs (h)(5) and (6) of this section shall be notified by NMFS, in writing, that it is subject to removal from the list of approved observer service providers. Such notification shall specify the reasons for the pending removal. An observer service provider that has received notification that it is subject to removal from the list of approved observer service providers may submit written information to rebut the reasons for removal from the list. Such rebuttal must be submitted within 30 days of notification received by the observer service provider that the observer service provider is subject to removal and must be accompanied by written evidence rebutting the basis for removal. NMFS shall review information rebutting the pending removal and shall notify the observer service provider within 15 days of receipt of the rebuttal whether or not the removal is warranted. If no response to a pending removal is received by NMFS, the observer service provider shall be automatically removed from the list of approved observer service providers. The decision to remove the observer service provider from the list, either after reviewing a rebuttal, or if no rebuttal is submitted, shall be the final decision of NMFS and the Department of

Commerce. Removal from the list of approved observer service providers does not necessarily prevent such observer service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers under contract with an observer service provider that has been removed from the list of approved service providers must complete their assigned duties for any fishing trips on which the observers are deployed at the time the observer service provider is removed from the list of approved observer service providers. An observer service provider removed from the list of approved observer service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if an observer service provider may remain on the list of approved observer service providers:

\* \* \* \* \*

(i) Observer certification. (1) To be certified, employees or sub-contractors operating as observers for observer service providers approved under paragraph (h) of this section must meet NMFS National Minimum Eligibility Standards for observers. NMFS National Minimum Eligibility Standards are available at the National Observer Program Web site:

[www.nmfs.noaa.gov/op/pds/categories/science5Fand5Ftechnology.html](http://www.nmfs.noaa.gov/op/pds/categories/science5Fand5Ftechnology.html).

(2) Observer training. In order to be deployed on any fishing vessel, a candidate observer must have passed an appropriate NMFS/NEFOP Observer Training course. If a candidate fails training, the candidate shall be notified in writing on or before the last day of training. The notification will indicate the reasons the candidate failed the training. Observer training shall include an observer training trip, as part of the observer's training, aboard a fishing vessel with a trainer. A candidate observer's first four deployments and the resulting data shall be immediately edited and approved after each trip by NMFS/NEFOP, prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(3) \* \* \*

(ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board fishing vessels, pursuant to standards established by NMFS. Such standards are available from NMFS/NEFOP Web site specified in paragraph (h)(1) of this section and shall be provided to each approved observer service provider;

\* \* \* \* \*

(v) Accurately record their sampling data, write complete reports, and report accurately any observations relevant to conservation of marine resources or their environment.

(4) Probation and decertification. NMFS may review observer certifications and issue observer certification probation and/or decertification as described in NMFS policy found on the NMFS/NEFOP Web site specified in paragraph (h)(1) of this section.

(5) Issuance of decertification. Upon determination that decertification is warranted under paragraph (i)(4) of this section, NMFS shall issue a written decision to decertify the observer to the observer and approved observer service providers via certified mail at the observer's most current address provided to NMFS. The decision shall identify whether a certification is revoked and shall identify the specific reasons for the action taken. Decertification is effective immediately as of the date of issuance, unless the decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions. Decertification is the final decision of NMFS and the Department of Commerce and may not be appealed.

\* \* \* \* \*50 CFR § 648.18

3. Add § 648.18 to subpart A to read as follows:

50 CFR § 648.18

**§ 648.18 Standardized bycatch reporting methodology.**

NMFS shall comply with the Standardized Bycatch Reporting Methodology (SBRM) provisions established in the following fishery management plans by the Standardized Bycatch Reporting Methodology: An Omnibus Amendment to the Fishery Management Plans of the Mid-Atlantic and New England Regional Fishery Management Councils, completed \*37194 March 2015, also known as the SBRM Omnibus Amendment, by the New England Fishery Management Council, Mid-Atlantic Fishery Management Council, National Marine Fisheries Service Greater Atlantic Regional Fisheries Office, and National Marine Fisheries Service Northeast Fisheries Science Center: Atlantic Bluefish; Atlantic Mackerel, Squid, and Butterfish; Atlantic Sea Scallop; Atlantic Surfclam and Ocean Quahog; Atlantic Herring; Atlantic Salmon; Deep-Sea Red Crab; Monkfish; Northeast Multispecies; Northeast Skate Complex; Spiny Dogfish; Summer Flounder, Scup, and Black Sea Bass; and Tilefish. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the SBRM Omnibus Amendment from the Greater Atlantic Regional Fisheries Office ([www.greateratlantic.fisheries.noaa.gov](http://www.greateratlantic.fisheries.noaa.gov), 978-281-9300). You may inspect a copy at the Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:

[www.archives.gov/federal5Fregister/code5Fof5Ffederal5Fregulations/ibr5Flocatio ns.html](http://www.archives.gov/federal5Fregister/code5Fof5Ffederal5Fregulations/ibr5Flocatio ns.html).

50 CFR § 648.22

4. In § 648.22, add paragraph (c)(13) to read as follows:

50 CFR § 648.22

**§ 648.22 Atlantic mackerel, squid, and butterfish specifications.**

\* \* \* \* \*

(c) \* \* \*

(13) Changes, as appropriate, to the SBRM, including the coefficient of variation (CV) based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.25

5. In § 648.25, revise paragraph (a)(1) to read as follows:

50 CFR § 648.25

**§ 648.25 Atlantic Mackerel, squid, and butterfish framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions; recreational possession limit; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial quota system, including commercial quota allocation procedure and possible quota set-asides to mitigate bycatch; recreational harvest limit; annual specification quota setting process; FMP Monitoring Committee composition and process; description and identification of EFH (and fishing gear management measures that impact EFH); description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on vessel size (LOA and GRT) or shaft horsepower; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations,

reports, and/or industry-funded observers or observer set aside programs; any other management measures currently included in the FMP; set aside quota for scientific research; regional management; process for inseason adjustment to the annual specification; mortality caps for river herring and shad species; time/area management for river herring and shad species; and provisions for river herring and shad incidental catch avoidance program, including adjustments to the mechanism and process for tracking fleet activity, reporting incidental catch events, compiling data, and notifying the fleet of changes to the area(s); the definition/duration of 'test tows,' if test tows would be utilized to determine the extent of river herring incidental catch in a particular area(s); the threshold for river herring incidental catch that would trigger the need for vessels to be alerted and move out of the area(s); the distance that vessels would be required to move from the area(s); and the time that vessels would be required to remain out of the area(s). Measures contained within this list that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.41

6. In § 648.41, revise paragraph (a) to read as follows:

50 CFR § 648.41

**§ 648.41 Framework specifications.**

(a) Within season management action. The New England Fishery Management Council (NEFMC) may, at any time, initiate action to implement, add to or adjust Atlantic salmon management measures to:

- (1) Allow for Atlantic salmon aquaculture projects in the EEZ, provided such an action is consistent with the goals and objectives of the Atlantic Salmon FMP; and
- (2) Make changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.55

7. In § 648.55, revise paragraphs (f)(39) and (40), and add paragraph (f)(41) to read as follows:

50 CFR § 648.55

**§ 648.55 Framework adjustments to management measures.**

\* \* \* \* \*

(f) \* \* \*

(39) Adjusting EFH closed area management boundaries or other associated measures;

(40) Changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the

process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set-aside programs; and

(41) Any other management measures currently included in the FMP.

\* \* \* \* \*50 CFR § 648.79

8. In § 648.79, revise paragraph (a)(1) to read as follows:

50 CFR § 648.79

**§ 648.79 Surfclam and ocean quahog framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and ~~\*37195~~ biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting, and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; the overfishing definition (both the threshold and target levels); description and identification of EFH (and fishing gear management measures that impact EFH); habitat areas of particular concern; set-aside quota for scientific research; VMS; OY range; suspension or adjustment of the surfclam minimum size limit; and changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs. Issues that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require an amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.90

9. In § 648.90, revise paragraphs (a)(2)(i), (a)(2)(iii), (b)(1)(ii), and (c)(1)(i) and (ii) to read as follows:

50 CFR § 648.90

**§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.**

\* \* \* \* \*

(a) \* \* \*

(2) Biennial review. (i) The NE multispecies PDT shall meet on or before September 30 every other year to perform a review of the fishery, using the most current scientific information available provided primarily from the NEFSC. Data

provided by states, ASMFC, the USCG, and other sources may also be considered by the PDT. Based on this review, the PDT will develop ACLs for the upcoming fishing year(s) as described in paragraph (a)(4) of this section and develop options for consideration by the Council if necessary, on any changes, adjustments, or additions to DAS allocations, closed areas, or other measures necessary to rebuild overfished stocks and achieve the FMP goals and objectives, including changes to the SBRM.

\* \* \* \* \*

(iii) Based on this review, the PDT shall recommend ACLs and develop options necessary to achieve the FMP goals and objectives, which may include a preferred option. The PDT must demonstrate through analyses and documentation that the options they develop are expected to meet the FMP goals and objectives. The PDT may review the performance of different user groups or fleet sectors in developing options. The range of options developed by the PDT may include any of the management measures in the FMP, including, but not limited to: ACLs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the 12 regulated species and ocean pout if able to be determined; identifying and distributing ACLs and other sub-components of the ACLs among various segments of the fishery; AMs; DAS changes; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; describing and identifying EFH; fishing gear management measures to protect EFH; designating habitat areas of particular concern within EFH; and changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs. In addition, the following conditions and measures may be adjusted through future framework adjustments: Revisions to DAS measures, including DAS allocations (such as the distribution of DAS among the four categories of DAS), future uses for Category C DAS, and DAS baselines, adjustments for steaming time, etc.; modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; calculation of area-specific ACLs, area management boundaries, and adoption of area-specific management measures; sector allocation requirements and specifications, including the establishment of a new sector, the disapproval of an existing sector, the allowable percent of ACL available to a sector through a sector allocation, and the calculation of PSCs; sector administration provisions, including at-sea and dockside monitoring measures; sector reporting requirements; state-operated permit bank administrative provisions; measures to implement the U.S./Canada Resource Sharing Understanding, including any specified TACs (hard or target); changes to

administrative measures; additional uses for Regular B DAS; reporting requirements; the GOM Inshore Conservation and Management Stewardship Plan; adjustments to the Handgear A or B permits; gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; revisions to the ABC control rule and status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass may be made either through a biennial adjustment or framework adjustment; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; and any other measures currently included in the FMP.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) The Whiting PDT, after reviewing the available information on the status of the stock and the fishery, may recommend to the Council any measures necessary to assure that the specifications will not be exceeded; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; as well as changes to the appropriate specifications.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) After a management action has been initiated, the Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures, other than to address gear conflicts, must come from one or more of the following categories: DAS changes; effort monitoring; data reporting; possession limits; gear restrictions; closed areas; permitting restrictions; crew limits; minimum fish sizes; onboard observers; minimum hook size and hook style; the use of crucifer in the hook-gear fishery; sector requirements; \*37196recreational fishing measures; area closures and other appropriate measures to mitigate marine mammal entanglements and interactions; description and identification of EFH; fishing gear management measures to protect EFH; designation of habitat areas of particular concern within EFH;

changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; and any other management measures currently included in the FMP.

(ii) The Council's recommendation on adjustments or additions to management measures pertaining to small-mesh NE multispecies, other than to address gear conflicts, must come from one or more of the following categories: Quotas and appropriate seasonal adjustments for vessels fishing in experimental or exempted fisheries that use small mesh in combination with a separator trawl/grate (if applicable); modifications to separator grate (if applicable) and mesh configurations for fishing for small-mesh NE multispecies; adjustments to whiting stock boundaries for management purposes; adjustments for fisheries exempted from minimum mesh requirements to fish for small-mesh NE multispecies (if applicable); season adjustments; declarations; participation requirements for any of the Gulf of Maine/Georges Bank small-mesh multispecies exemption areas; OFL and ABC values; ACL, TAL, or TAL allocations, including the proportions used to allocate by season or area; small-mesh multispecies possession limits, including in-season AM possession limits; changes to reporting requirements and methods to monitor the fishery; and biological reference points, including selected reference time series, survey strata used to calculate biomass, and the selected survey for status determination; and changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.96

10. In § 648.96, revise paragraph (a)(3)(ii) to read as follows:

50 CFR § 648.96

**§ 648.96 FMP review, specification, and framework adjustment process.**

(a) \* \* \*

(3) \* \* \*

(ii) The range of options developed by the Councils may include any of the management measures in the Monkfish FMP, including, but not limited to: ACTs; closed seasons or closed areas; minimum size limits; mesh size limits; net limits; liver-to-monkfish landings ratios; annual monkfish DAS allocations and monitoring; trip or possession limits; blocks of time out of the fishery; gear restrictions; transferability of permits and permit rights or administration of vessel upgrades, vessel replacement, or permit assignment; measures to minimize the impact of the monkfish fishery on protected species; gear requirements or restrictions that minimize bycatch or bycatch mortality; transferable DAS

programs; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; changes to the Monkfish Research Set-Aside Program; and other frameworkable measures included in §§ 648.55 and 648.90.

\* \* \* \* \*50 CFR § 648.102

11. In § 648.102, add paragraph (a)(10) to read as follows:

50 CFR § 648.102

**§ 648.102 Summer flounder specifications.**

(a) \* \* \*

(10) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.110

12. In § 648.110, revise paragraph (a)(1) to read as follows:

50 CFR § 648.110

**§ 648.110 Summer flounder framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions; recreational possession limit; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial quota system including commercial quota allocation procedure and possible quota set asides to mitigate bycatch; recreational harvest limit; specification quota setting process; FMP Monitoring Committee composition and process; description and identification of essential fish habitat (and fishing gear management measures that impact EFH); description and identification of habitat areas of particular concern; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on

vessel size (LOA and GRT) or shaft horsepower; operator permits; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; any other commercial or recreational management measures; any other management measures currently included in the FMP; and set aside quota for scientific research. Issues that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require an amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.122

13. In § 648.122, add paragraph (a)(13) to read as follows:

50 CFR § 648.122

**§ 648.122 Scup specifications.**

(a) \* \* \*

(13) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.130

14. In § 648.130, revise paragraph (a)(1) to read as follows:

50 CFR § 648.130

**§ 648.130 Scup framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate ~~\*37197~~ management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rules; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear restricted areas; gear requirements or prohibitions; permitting restrictions; recreational possession limits; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial quota system including commercial quota allocation procedure and possible quota set asides to mitigate bycatch; recreational harvest limits; annual specification quota setting process; FMP Monitoring Committee composition and process; description and identification of EFH (and fishing gear management measures that

impact EFH); description and identification of habitat areas of particular concern; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on vessel size (LOA and GRT) or shaft horsepower; operator permits; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; any other commercial or recreational management measures; any other management measures currently included in the FMP; and set aside quota for scientific research.

\* \* \* \* \*50 CFR § 648.142

15. In § 648.142, add paragraph (a)(12) to read as follows:

50 CFR § 648.142

**§ 648.142 Black sea bass specifications.**

(a) \* \* \*

(12) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.162

16. In § 648.162, add paragraph (a)(9) to read as follows:

50 CFR § 648.162

**§ 648.162 Bluefish specifications.**

(a) \* \* \*

(9) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; and

\* \* \* \* \*50 CFR § 648.167

17. In § 648.167, revise paragraph (a)(1) to read as follows:

50 CFR § 648.167

**§ 648.167 Bluefish framework adjustment to management measures.**

(a) \* \* \*

(1) Adjustment process. After a management action has been initiated, the MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC shall provide the public with advance notice of the availability of both the proposals and the analysis and the opportunity to comment on them prior to and at the second MAFMC meeting. The MAFMC's recommendation on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy;

introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions; recreational possession limit; recreational season; closed areas; commercial season; description and identification of EFH; fishing gear management measures to protect EFH; designation of habitat areas of particular concern within EFH; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; and any other management measures currently included in the FMP. Measures that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require an amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.200

18. In § 648.200, revise the introductory text of paragraph (b) to read as follows:  
50 CFR § 648.200

**§ 648.200 Specifications.**

\* \* \* \* \*

(b) Guidelines. As the basis for its recommendations under paragraph (a) of this section, the PDT shall review available data pertaining to: Commercial and recreational catch data; current estimates of fishing mortality; discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. The specifications recommended pursuant to paragraph (a) of this section must be consistent with the following:

\* \* \* \* \*50 CFR § 648.206

19. In § 648.206, add paragraph (b)(29) to read as follows:  
50 CFR § 648.206

**§ 648.206 Framework provisions.**

\* \* \* \* \*

(b) \* \* \*

(29) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs;

\* \* \* \* \*50 CFR § 648.232

20. In § 648.232, add paragraph (a)(6) to read as follows:  
50 CFR § 648.232

**§ 648.232 Spiny dogfish specifications.**

(a) \* \* \*

(6) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs;

\* \* \* \* \*50 CFR § 648.239

21. In § 648.239, revise paragraph (a)(1) to read as follows:

50 CFR § 648.239

**§ 648.239 Spiny dogfish framework adjustments to management measures.**

(a) \* \* \*

(1) Adjustment process. After the Councils initiate a management action, they shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Councils shall provide ~~\*37198~~ the public with advance notice of the availability of both the proposals and the analysis for comment prior to, and at, the second Council meeting. The Councils' recommendation on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear requirements, restrictions, or prohibitions (including, but not limited to, mesh size restrictions and net limits); regional gear restrictions; permitting restrictions, and reporting requirements; recreational fishery measures (including possession and size limits and season and area restrictions); commercial season and area restrictions; commercial trip or possession limits; fin weight to spiny dogfish landing weight restrictions; onboard observer requirements; commercial quota system (including commercial quota allocation procedures and possible quota set-asides to mitigate bycatch, conduct scientific research, or for other purposes); recreational harvest limit; annual quota specification process; FMP Monitoring Committee composition and process; description and identification of essential fish habitat; description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional season restrictions (including option to split seasons); restrictions on vessel size (length and GRT) or shaft horsepower; target quotas; measures to mitigate marine mammal entanglements and interactions; regional management; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; any other management measures currently included in the Spiny Dogfish FMP; and measures to regulate aquaculture projects. Measures that require significant departures from

previously contemplated measures or that are otherwise introducing new concepts may require an amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*50 CFR § 648.260

22. In § 648.260, revise paragraph (a)(1) to read as follows:

50 CFR § 648.260

**§ 648.260 Specifications.**

(a) \* \* \*

(1) The Red Crab PDT shall meet at least once annually during the intervening years between Stock Assessment and Fishery Evaluation (SAFE) Reports, described in paragraph (b) of this section, to review the status of the stock and the fishery. Based on such review, the PDT shall provide a report to the Council on any changes or new information about the red crab stock and/or fishery, and it shall recommend whether the specifications for the upcoming year(s) need to be modified. At a minimum, this review shall include a review of at least the following data, if available: Commercial catch data; current estimates of fishing mortality and catch-per-unit-effort (CPUE); discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling, port sampling, and survey data or, if sea sampling data are unavailable, length frequency information from port sampling and/or surveys; impact of other fisheries on the mortality of red crabs; and any other relevant information.

\* \* \* \* \*50 CFR § 648.261

23. In § 648.261, revise paragraph (a)(1) to read as follows:

50 CFR § 648.261

**§ 648.261 Framework adjustment process.**

(a) \* \* \*

(1) In response to an annual review of the status of the fishery or the resource by the Red Crab PDT, or at any other time, the Council may recommend adjustments to any of the measures proposed by the Red Crab FMP, including the SBRM. The Red Crab Oversight Committee may request that the Council initiate a framework adjustment. Framework adjustments shall require one initial meeting (the agenda must include notification of the impending proposal for a framework adjustment) and one final Council meeting. After a management action has been initiated, the Council shall develop and analyze appropriate management actions within the scope identified below. The Council may refer the proposed adjustments to the Red Crab Committee for further deliberation and review. Upon receiving the recommendations of the Oversight Committee, the Council shall publish notice of its intent to take action and provide the public with any relevant analyses and opportunity to comment on any possible actions. After receiving public comment, the Council must take action (to approve, modify, disapprove, or table) on the

recommendation at the Council meeting following the meeting at which it first received the recommendations. Documentation and analyses for the framework adjustment shall be available at least 2 weeks before the final meeting.

\* \* \* \* \*50 CFR § 648.292

24. In § 648.292, revise paragraph (a) to read as follows:

50 CFR § 648.292

**§ 648.292 Tilefish specifications.**

\* \* \* \* \*

(a) Annual specification process. The Tilefish Monitoring Committee shall review the ABC recommendation of the SSC, tilefish landings and discards information, and any other relevant available data to determine if the ACL, ACT, or total allowable landings (TAL) requires modification to respond to any changes to the stock's biological reference points or to ensure that the rebuilding schedule is maintained. The Monitoring Committee will consider whether any additional management measures or revisions to existing measures are necessary to ensure that the TAL will not be exceeded, including changes, as appropriate, to the SBRM. Based on that review, the Monitoring Committee will recommend ACL, ACT, and TAL to the Tilefish Committee of the MAFMC. Based on these recommendations and any public comment received, the Tilefish Committee shall recommend to the MAFMC the appropriate ACL, ACT, TAL, and other management measures for a single fishing year or up to 3 years. The MAFMC shall review these recommendations and any public comments received, and recommend to the Regional Administrator, at least 120 days prior to the beginning of the next fishing year, the appropriate ACL, ACT, TAL, the percentage of TAL allocated to research quota, and any management measures to ensure that the TAL will not be exceeded, for the next fishing year, or up to 3 fishing years. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The Regional Administrator shall review these recommendations, and after such review, NMFS will publish a proposed rule in the Federal Register specifying the annual ACL, ACT, TAL and any management measures to ensure that the TAL will not be exceeded for the upcoming fishing year or years. After considering public comments, NMFS will publish a final rule in the Federal Register to implement the ACL, ACT, TAL and any management measures. The previous year's specifications will remain effective unless revised through the specification process and/or the **\*37199** research quota process described in paragraph (e) of this section. NMFS will issue notification in the Federal Register if the previous year's specifications will not be changed.

\* \* \* \* \*50 CFR § 648.299

25. In § 648.299, add paragraph (a)(1)(xviii) to read as follows:

50 CFR § 648.299

**§ 648.299 Tilefish framework specifications.**

(a) \* \* \*

(1) \* \* \*

(xviii) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs;

\* \* \* \* \*50 CFR § 648.320

26. In § 648.320, revise paragraphs (a)(5)(ii) and (iii), and add paragraph (a)(5)(iv) to read as follows:

50 CFR § 648.320

**§ 648.320 Skate FMP review and monitoring.**

(a) \* \* \*

(5) \* \* \*

(ii) In-season possession limit triggers for the wing and/or bait fisheries;

(iii) Required adjustments to in-season possession limit trigger percentages or the ACL-ACT buffer, based on the accountability measures specified at § 648.323; and

(iv) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*50 CFR § 648.321

27. In § 648.321, revise paragraphs (b)(22) and (23), and add paragraph (b)(24) to read as follows:

50 CFR § 648.321

**§ 648.321 Framework adjustment process.**

\* \* \* \* \*

(b) \* \* \*

(22) Reduction of the baseline 25-percent ACL-ACT buffer to less than 25 percent;

(23) Changes to catch monitoring procedures; and

(24) Changes, as appropriate, to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.

\* \* \* \* \*

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BILLING CODE 3510-22-P

**Footnotes**

1  
670 F. 3d 1238 (D.C. Cir. 2011).

2  
Oceana v. Locke, 725 F. Supp. 2d 46 (D.D.C. 2010) at pg 24, reversed on other grounds Oceana v. Locke, 670 F. 3d 1238 (D.C.C. 2011).  
FN3 Id. At pg 25.

4  
Summary of Analyses Conducted to Determine At-Sea Monitoring Requirements for Multispecies Sectors FY 2013.  
[www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/Sectors/ASM/FY20135FMultispecies5FSector5FASM5FRequirements5FSummary.pdf](http://www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/Sectors/ASM/FY20135FMultispecies5FSector5FASM5FRequirements5FSummary.pdf).

**End of Document**

**Federal Rules of Appellate Procedure Rule 4, 28 U.S.C.A.**

Rule 4. Appeal as of Right--When Taken

**(B)** The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

- (i)** the United States;
- (ii)** a United States agency;
- (iii)** a United States officer or employee sued in an official capacity; or
- (iv)** a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

**Federal Rules of Civil Procedure Rule 56**

Rule 56. Summary Judgment

**(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.