



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

JAN 24 2013

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

Dear Paul:

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

GOM Cod

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



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

GOM Haddock

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

SNE/MA Winter Flounder

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

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

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

Carryover

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

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

Sincerely,



for John K. Bullard
Regional Administrator