



June 24, 2020

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Dear Sirs:

Conservation Law Foundation submitted a petition for rulemaking to end overfishing and rebuild Atlantic cod on February 13, 2020 under 5 U.S.C. § 553(e) of the Administrative Procedure Act. It is our understanding based on a letter submitted to the New England Fishery Management Council (“Council”) from the Greater Atlantic Regional Fisheries Office (“GARFO”), that a final decision on the merits of our petition has not yet been made.

Please consider the attached documents (listed below), as well as the citations therein, as a supplement to our February 13, 2020 petition and as part of the basis for your final agency action on the petition:¹

¹ CLF submitted its petition for rulemaking and now this supplement under 5 U.S.C. § 553(e) of the Administrative Procedure Act. We are seeking to compel the National Marine Fisheries Service (“NMFS”) to end overfishing of Atlantic cod immediately and rebuild the two stocks in this fishery in as short a time as possible as required by the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). See 16 U.S.C. §§ 1853(a)(1)(A) and 1854(e)(3) & (4).

- CLF’s June 15, 2020 letter to GARFO opposing the fishing year 2020-2022 catch limits for Gulf of Maine cod and Georges Bank cod as proposed in Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan. We urged the agency to disapprove the proposed catch limits for both cod stocks because (1) they will not end overfishing immediately or rebuild the fishery within the statutory timeframe required and (2) there is no mechanism to ensure accountability in the fishery.
- A 2020 study from Robert Boenish and Yong Chen that assesses Atlantic cod mortality in the lobster fishery: Boenish R and Chen Y. 2020. “Re-evaluating Atlantic cod mortality including lobster bycatch: where could we be today?” *Canadian Journal of Fisheries and Aquatic Sciences* 77(6): 1049-1058.
- CLF’s June 17, 2020 letter to the Council urging it to request that the Secretary/NMFS take emergency action to protect known spawning areas of cod in the Western Gulf of Maine and perform a comprehensive data review of cod spawning times and locations in the Georges Bank and Southern New England regions. Our letter responds to the report from the Atlantic Cod Stock Structure Working Group that concluded that the current two stock management approach is inconsistent with the true biological stock structure of cod, which may be inhibiting stock rebuilding.

Thank you for taking this supplementary information under consideration. Please do not hesitate to reach out to us with any questions you may have.

Sincerely,

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June 15, 2020

Michael Pentony, Regional Administrator
National Marine Fisheries Service
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Submitted electronically to Regulations.gov

RE: Comments on the Proposed Rule for Groundfish Framework Adjustment 59

Dear Mr. Pentony:

Conservation Law Foundation (“CLF”) submits this letter to the National Marine Fisheries Service (“NMFS”) in response to the proposed rule for Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan¹ (“Framework 59”). These comments focus specifically on the proposed measures for Gulf of Maine (“GOM”) cod and Georges Bank (“GB”) cod. CLF has advocated for sustainable management of New England’s groundfish fishery for decades, and we are ever more concerned about NMFS’s failure to end overfishing and rebuild cod stocks in New England waters. The continued poor management of GOM cod and GB cod on behalf of the New England Fishery Management Council (“Council”) and NMFS has resulted in historically low population levels for both stocks, overfishing that has persisted for decades, and no prospects of rebuilding consistent with the rebuilding schedules—blatantly inconsistent with the most fundamental requirements of the Magnuson-Stevens Act (“MSA”).

Framework 59, the proposed measures of which “are intended to help prevent overfishing [and] rebuild overfished stocks . . .[.]”² presents an opportunity to begin to right the wrongs of decades of prior management decisions that have merely rubber-stamped the recommendations from an industry-biased regional fishery management council. CLF urges NMFS to disapprove the 2020-2022 catch limits for GOM cod and GB cod as proposed and to remand these measures back to the Council for immediate reconsideration with recommendations that bring the Northeast Multispecies Fishery Management Plan into conformity with requirements of the MSA. As NMFS knows, CLF has recommended a suite of conservation and management measures to end overfishing and rebuild Atlantic cod, including 100% at-sea monitoring, a prohibition on directed fishing for Atlantic cod, area closures to protect spawning locations and other favorable habitat for cod, gear modifications to reduce incidental catch, and measures to reduce mortality of incidentally caught cod in the recreational fishery.³ CLF has also requested emergency action to immediately implement the measures necessary to reduce overfishing of

¹ 85 Fed. Reg. 32,347 (May 29, 2020).

² *Id.* at 32,347.

³ See CLF Petition for Rulemaking to End Overfishing and Rebuild Atlantic Cod dated February 13, 2020. (Attachment #1).

GOM cod, including a prohibition on directed commercial or recreational fishing and a requirement to use modified gear in the GOM cod stock area.⁴ CLF reiterates these previous recommendations and requests.

A. MSA Requirements to End Overfishing Immediately and Rebuild Overfished Stocks as Quickly as Possible

Fishery management plans must comply with the MSA’s national standards for fishery conservation and management. The primary mandate of the MSA—to prevent overfishing—is set forth in National Standard 1: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”⁵ Further, National Standard 2 states: “Conservation and management measures shall be based upon the best scientific information available.”⁶ As such, the MSA requires that all fishery management plans “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 “establish a mechanism for specifying annual catch limits . . ., implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.”⁷

For overfished stocks like GOM cod and GB cod, the MSA is even more proscriptive. In these instances, a council “shall prepare and implement a fishery management plan, plan amendment, or proposed regulations . . . *to end overfishing immediately* and to rebuild affected stocks of fish.”⁸ The rebuilding plan “shall (A) specify a time period for rebuilding the fishery that shall—(i) be as short as possible . . .; and (ii) not to exceed 10 years . . .”⁹

To date, conservation and management measures for both cod stocks have failed to comply with these mandates of the MSA. The proposed catch limits contained in Framework 59 are no different. After decades of risky decisions, the agency should acknowledge that marginal improvements and slight management changes have not been effective to end overfishing and rebuild Atlantic cod. NMFS has responsibilities to ensure sound management in this fishery before overfishing causes irreversible effects. It cannot satisfy these obligations when it repeatedly approves management measures that have never worked and in a fishery that it acknowledges lacks accountability.

⁴ *Id.* at 57-58.

⁵ 16 U.S.C. § 1851(a)(1).

⁶ *Id.* § 1851(a)(2).

⁷ 16 U.S.C. § 1853(a)(1), (15).

⁸ *Id.* § 1854(e)(3)(A)(emphasis added).

⁹ *Id.* § 1854(e)(4)(A).

B. Best Scientific Information Available Confirms Continued Overfished and Overfishing Status of Cod

The proposed rule intends to “adopt catch limits for 14 groundfish stocks [including GOM cod and GB cod] for the 2020-2022 fishing years based on stock assessments completed in 2019[.]”¹⁰ The referenced assessments paint a bleak picture for GOM cod and GB cod.

Both cod stocks are overfished with overfishing occurring,¹¹ despite 16 years in rebuilding plans. The best scientific information available, including the 2019 operational assessments, confirm that the cod stocks have been subject to overfishing for 100 percent of the time periods covered by the assessments (GOM cod: 1982-2018, GB cod: 1978-2011) and have been overfished in all but two years.

According to the 2019 operational assessment, upon which the proposed catch limits in Framework 59 are based, GOM cod lingers at only 6 to 9 percent of its spawning stock biomass target.¹² The stock also exhibits a decline in stock size¹³ and geographic range¹⁴ as well as a severely truncated age structure,¹⁵ the latter of which is “consistent with a population experiencing high mortality.”¹⁶ To rebuild, new fish must enter the stock complex; yet the best scientific information indicates that recruitment remains near record low with little positive signs of incoming recruitment.¹⁷ Estimates from the Council’s Groundfish Plan Development Team (“PDT”) based on the 2019 operational assessment confirm the declining fate of GOM cod: halfway into its second 10-year rebuilding program, there is only a zero to one percent chance that GOM cod will rebuild on schedule (2024) even under a no-fishing scenario.¹⁸ The PDT’s most recent estimate is a 26-fold decline in rebuilding probability in just the two years between assessments.

¹⁰ 85 Fed. Reg. at 32,348.

¹¹ NEFSC. *Operational Assessment of 14 Northeast Groundfish Stocks, Updated Through 2018*. Pre-publication copy last revised Jan. 7, 2020 at 26 and 38. Available at: <https://nefsc.noaa.gov/saw/2019-groundfish-docs/Prepublication-NE-Grndfsh-1-7-2020.pdf> (“2019 Groundfish Operational Assessment”); Per NMFS policy, “where a known determination had previously been provided and a new assessment is rejected or the results are inconclusive, the [last] known status will continue to be the official stock status.” Letter from John K. Bullard to John F. Quinn, August 31, 2017, p. 2. Available at: https://s3.amazonaws.com/nefmc.org/A8_170831_Bullard-to-Quinn_Groundfish-Inadequate-Rebuilding-Progress.pdf.

¹² 2019 Groundfish Operational Assessment at 26.

¹³ NEFSC 2019. *Gulf of Maine Atlantic Cod. 2019 Assessment Update Report Draft Supplemental Tables* at 24.

¹⁴ NEFSC. 2017. *Gulf of Maine Atlantic Cod 2017 Assessment Update Report Supplemental Information (Draft)* at 78.

¹⁵ 2019 Groundfish Operational Assessment at 29.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Memorandum from Groundfish PDT to Scientific and Statistical Committee regarding “Candidate Groundfish OFLs and ABCs for fishing years 2020 to 2022” dated Oct. 10, 2019 & revised Oct. 15, 2019) at 7. Available at: https://s3.amazonaws.com/nefmc.org/A.8-GF-PDT-memo-to-SSC-re-FY2020-FY2022-Groundfish-OFLs-ABCs_20191001-REVISED.pdf.

The GB cod stock is in similarly dire straits. The best scientific information available estimates the stock at only 7 percent of its spawning stock biomass target.¹⁹ While that estimate is based on an assessment from roughly seven years ago, more recent survey indices—the primary basis for assessing the stock without an accepted analytical model—confirm low abundance.²⁰ Like GOM cod, the stock also exhibits a truncated age structure,²¹ and although quantitative projections cannot be made, there is no scientific reason to believe that GB cod will rebuild on schedule (2026).

C. Proposed Catch Limits for GOM Cod and GB Cod Do Not End Overfishing or Rebuild the Stocks

Despite decreases from previously approved catch limits, the proposed catch limits for GOM cod and GB cod in Framework 59 do not meaningfully address the extremely poor state of the stocks revealed in the 2019 operational assessments and result in catch limits that cannot meet statutory obligations. As discussed above, the MSA requires that, for overfished stocks like GOM cod and GB cod, fishery management plans must end overfishing immediately and rebuild overfished stocks in as short a time as possible not to exceed ten years. The cod catch limits as proposed by NMFS in Framework 59 fail to meet these most basic mandates of the MSA because they fail to (1) utilize the approved mechanism for specifying annual catch limits (“ACLs”) and (2) ensure accountability in the groundfish fishery.

1. Failure to Utilize the Approved Mechanism for Specifying Annual Catch Limits

An acceptable biological catch (“ABC”) control rule is the specified approach approved by NMFS for determining the ABC, and subsequently specifying ACLs, for a stock. The ABC control rule accounts for scientific uncertainty in the overfishing limit and is based on an analysis that shows how it will prevent overfishing.²² In the groundfish fishery, the ABC control rule (approved as part of Amendment 16) includes a hierarchy of options that become more conservative as stock biomass declines or uncertainty increases. Since 2010, the Council has utilized this ABC control rule (however reasonable or unreasonable) to recommend catch limits for the groundfish fishery, and NMFS has repeatedly approved those catch limits. In Framework 59, however, where it is unambiguous that the only reasonable option to specify catch limits for GOM cod and GB cod is “Option C” (an incidental catch only fishery), the Council threw the hierarchy to the wind and again recommend catch limits—those proposed by NMFS—that cannot end overfishing.

¹⁹ NEFSC. 2013. *55th Northeast Regional Stock Assessment Workshop (55th SAW), Assessment Summary Report*. NEFSC Reference Document 13-01 at 24.

²⁰ NEFSC. 2019. *Georges Bank Atlantic Cod Tables (Draft; Supplement to 2019 Operational Groundfish Assessments)* at 10.

²¹ 2019 Operational Groundfish Assessments at 40.

²² 50 C.F.R. § 600.310(f)(2).

Gulf of Maine Cod

In the case of GOM cod—a stock that will not rebuild on time even under a no fishing scenario—the relevant ABC control rule option is unequivocal, stating: “For stocks that cannot rebuild to B_{MSY} in the specified rebuilding period even in the absence of fishing, the ABC should be based on incidental bycatch, including a reduction in the bycatch rate (i.e., the proportion of the stock caught as bycatch.)”²³ The catch limits in the proposed rule, however, are specified in such a way, *i.e.*, determined from an ABC based on catch at $75\%F_{MSY}$, that would only be appropriate under the approved control rule if GOM cod was a healthy stock; the GOM cod stock is the exact opposite of healthy. ABCs based on catch at $75\%F_{MSY}$ —which allow for higher ACLs compared to ABCs based on incidental catch—have repeatedly failed to end overfishing and rebuild GOM cod in previous fishing years as evidenced by the 2019 operational assessments.

Unsurprisingly, the catch limits proposed in Framework 59 are not based on a unanimous recommendation from the Council’s Scientific and Statistical Committee (“SSC”):

The SSC did not reach consensus on GOM cod. There was a minority of the SSC that felt the majority recommendations were not appropriately using the harvest control rules for GOM cod. Because the stock could not rebuild per the projections offered, even at an F of zero, a minority of the SSC felt that we were required to use “Option C” of the groundfish control rule [i.e., ABC based on incidental catch with a reduction in the bycatch rate] . . . The minority recommendation would be for a bycatch only fishery with an ABC of 450.5 mt (the FY2018 bycatch/discard estimate as presented by the PDT).²⁴

While Framework 59’s proposed ABC and ACL for GOM cod are technically below the stock’s recommended overfishing limit (“OFL”), the agency provides no explanation of how these catch limits will avoid the pitfalls of previous fishing years. NMFS has repeatedly approved specifications package that set catch limits below the OFLs on paper yet never resulted in an end to overfishing or rebuilt the stocks. There is no rational reason to conclude that Framework 59’s proposed catch limits will be any different.

Further justification for an incidental catch only fishery is that the proposed GOM cod catch limits are based on a stock assessment that does not account for all sources of mortality, specifically cod mortality in the American lobster fishery. Mortality of Atlantic cod as a result of bycatch in the lobster fishery has been an issue repeatedly raised by industry and recently

²³ NEFMC. *Final Amendment 16 to the Northeast Multispecies Fishery Management Plan including its Environmental Impact Statement and Initial Regulatory Flexibility Analysis*. Submitted October 16, 2009 at 78-79. Available at: <https://s3.amazonaws.com/nefmc.org/091016FinalAmendment16.pdf>.

²⁴ NEFMC. *Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan, Appendix I* at 18. Available at: https://s3.amazonaws.com/nefmc.org/200218_Groundfish_FW59_Appendix_I_SSC_Reports.pdf.

documented in a study focused on the Maine lobster fishery by Robert Boenish and Yong Chen published in March 2020.²⁵ Most alarming, cod bycatch in the Maine lobster fishery has been as high as 242.87 mt in 2002 and has hovered at an average of 65 mt since 2007.²⁶ NMFS cannot “ensure that management measures are based on the best scientific information available”²⁷ until it considers cod bycatch in the lobster fishery.

NMFS should disapprove the 2020-2022 GOM cod catch limits and recommend that the Council set new catch limits for GOM cod based on incidental catch only with measures to reduce bycatch, consistent with the approved control rule.

Georges Bank Cod

Without an approved analytical model to advise management decisions, the ABC control rule’s hierarchy is less applicable in the case of GB cod, but its principles still hold true and should guide NMFS in making a responsible decision for the stock. Presumably, GB cod falls under the control rule option that states: “Interim ABCs should be determined for stocks with unknown status according to case-by-case recommendations from the SSC.”²⁸ As such, after the analytical model for GB cod was thrown out in 2015, the SSC adopted an empirical approach that combines recent catch levels with survey results to provide ABC recommendations for the stock. Prior to Framework 59, the empirical approach had been used to specify an OFL for GB cod; the SSC then applied a 25% scientific uncertainty buffer to recommend an ABC. As previously mentioned, the regulations clearly state that the ABC control rule should account for scientific uncertainty.²⁹ Framework 59, however, proposes catch limits for GB cod that have zero consideration of scientific uncertainty—in direct violation of this regulation—as the empirical approach here was used to recommend the ABC, not the OFL.

Again, unsurprisingly, these proposed catch limits are not based on a unanimous recommendation from the SSC. The minority report states:

Given the poor status of Georges Bank cod and the absence of any indication that the stock is increasing (in fact, the trend is downward), the concern is that the approach recommended by the majority of the SSC removes a crucial buffer that is used for other stocks and previously for this stock.³⁰

²⁵ Boenish R and Chen Y. 2020. “Re-evaluating Atlantic cod mortality including lobster bycatch: where could we be today?” *Canadian Journal of Fisheries and Aquatic Sciences* 77(6): 1049-1058.

²⁶ Boenish and Chen. 2020, Supplementary Information.

²⁷ 85 Fed. Reg. at 32,347.

²⁸ NEFMC. *Final Amendment 16 to the Northeast Multispecies Fishery Management Plan including its Environmental Impact Statement and Initial Regulatory Flexibility Analysis*. Submitted October 16, 2009, at 78-79. Available at: <https://s3.amazonaws.com/nefmc.org/091016FinalAmendment16.pdf>.

²⁹ 50 C.F.R. § 600.310(f)(2).

³⁰ NEFMC. *Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan, Appendix I* at 17-18. Available at: https://s3.amazonaws.com/nefmc.org/200218_Groundfish_FW59_Appendix_I_SSC_Reports.pdf.

And, again, the agency provided no justification that addressed the concerns raised by SSC members nor did it explain how it will account for scientific uncertainty. This failure to account for scientific uncertainty is particularly unreasonable given that scientists have been unable to quantitatively assess the GB cod stock due to lack of an analytical model for nearly five years.

NMFS should disapprove the 2020-2022 GB cod catch limits and recommend that the Council set new catch limits that include a buffer for scientific uncertainty consistent with the National Standard 1 guidelines. Given that the most recent trawl surveys continue to show a severely depleted stock, the utmost precaution should be taken in setting the catch limits for GB cod, and they too should be based on incidental catch with measures to reduce bycatch.

* * *

The MSA requires fishery management plans to “establish a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur in the fishery,”³¹ but it is not enough to simply establish a mechanism and then not follow it. To ensure that overfishing does not occur, the mechanism must be implemented. To date, neither the Council nor NMFS have demonstrated any intention to properly utilize the ABC control rule and its hierarchy of options to prevent overfishing, and Framework 59 is yet another example of sacrificing long term benefits to the fishery and the Nation in favor of short-term economic gains. NMFS must reverse this pattern and uphold the law.

2. Failure to Ensure Accountability in the Fishery

Even if the proposed catch limits were specified in the correct manner (which they weren't) and there was a rationale for keeping a directed fishery open despite lack of rebuilding (which there isn't), the proposed catch limits cannot end overfishing of Atlantic cod in New England in the absence of sector accountability to annual catch entitlement (“ACE”) allocations. All fishery management plans must “includ[e] measures to ensure accountability”³² to prevent overfishing. The Northeast Multispecies Fishery Management plan relies on sector catch reporting “to determine whether a sector has exceeded any of its ACE allocations based upon the cumulative catch by participating permits/vessels . . .”³³ In the event of an overage,

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 . . .³⁴

³¹ 16 U.S.C. § 1853(a)(15).

³² *Id.*

³³ 50 C.F.R. § 648.87(b)(iii).

³⁴ *Id.*

Paramount to complying with these measures and holding sectors accountable is accurately tracking catch, which NMFS publicly acknowledges is not currently possible.

The Groundfish PDT declared that the at-sea monitoring (“ASM”) program³⁵ as currently designed does not use “an appropriate method to set at-sea monitoring coverage levels because of the assumption that observed trips are representative of unobserved trips is false . . . [.]”³⁶ and as a result, the fishery needs “more comprehensive monitoring.”³⁷ Further, recent analyses from the U.S. Coast Guard concluded “that the current regulation regime is vulnerable to stock area misreporting and limits the ability of enforcement to detect and document misreporting of stock areas.”³⁸ Unfortunately, overfished, low-quota stocks like GOM cod and GB cod are most vulnerable to illegal discarding³⁹ and misreporting,⁴⁰ and multiple analyses and comments from both industry and managers have documented these issues in relation to cod.⁴¹

While there was some discussion at the Council’s SSC meeting about how to consider the cod discard/bycatch data, the proposed rule does not address the topic. Ultimately, the agency cannot currently ensure sector accountability to Framework 59’s proposed catch limits for GOM cod and GB cod because the mechanism for doing so, i.e., the ASM program, has been deemed inadequate. The Regional Administrator acknowledged this at the Council’s June 3, 2020 Executive Committee meeting when he stated that the current ASM program is “no longer

³⁵ 75 Fed. Reg. 18,262 (April 9, 2010), 18,278. (The at-sea monitoring (“ASM”) program was established in the groundfish fishery “to verify area fished and catch (landings and discards), by species and gear type, for the purposes of monitoring sector ACE utilization.”)

³⁶ NEFMC. Draft *Amendment 23 to the Northeast Multispecies Fishery Management Plan, Appendix V* at 112. Available at: https://s3.amazonaws.com/nefmc.org/Amendment-23_Appendix-V_Groundfish-PDT-Monitoring-Analyses-and-SSC-Panel-Peer-Review-Report.pdf.

³⁷ *Id.* at 113.

³⁸ USCG First District Enforcement Staff. *Summary of Stock Area Analysis and Investigation of Misreporting in the Northeast Multispecies Fishery* at 21. Available at: <https://s3.amazonaws.com/nefmc.org/USCG-Groundfish-Misreporting-Investigation-and-Analysis.pdf>.

³⁹ NEFMC. Draft *Amendment 23 to the Northeast Multispecies Fishery Management Plan, Appendix V* at 110. (“In general, . . . cod stocks have [one of] the highest modeled discard incentives over time,” and “cod stocks had higher discard incentives in recent years (2015-2017).”)

⁴⁰ Palmer MC. 2017. *Vessel Trip Reports Catch-area Reporting Errors: Potential Impacts on the Monitoring and Management of the Northeast United States Groundfish Resource*. NEFSC Ref. Doc. 17-02. (“This quota-based system could have created incentives to intentionally misreport catch along these lines, particularly for stocks where quota was limited. This possibility of incentives would be particularly true for allocated groundfish species managed as multiple stocks (Atlantic cod [*Gadus morhua*], haddock [*Melanogrammus aeglefinus*], yellowtail flounder [*Limanda ferruginea*], and winter flounder [*Pseudopleuronectes americanus*]). For these four stocks, catches of lower quota stocks of the same species could be reported in another stock area where quota was less limiting by either inaccurately reporting the fishing area or catch location on the vessel trip report (VTR). Accurate reporting is critical to ensuring that fishery removals are managed appropriately and that fish stocks are not overharvested.”)

⁴¹ NEFMC. Draft *Amendment 23 to the Northeast Multispecies Fishery Management Plan, Appendix V* at 111; See Recording of the April 2018 Council Meeting, Introductions, Announcements, and Reports on Recent Activities at around 21:00. Available at: <https://s3.amazonaws.com/nefmc.org/1804171Intros-and-Reports.mp3>; USCG First District Enforcement Staff at 20.



supportable” for science and management purposes. Without meaningful and enforceable accountability measures, the catch limits proposed in Framework 59 cannot prevent overfishing.

D. Conclusion

Framework 59 presents another opportunity for NMFS to sustainably manage Atlantic cod. In order to set Atlantic cod on a path to recovery, NMFS must disapprove Framework 59’s proposed catch limits for GOM cod and GB cod and remand them to the Council with recommendations for catch limits that actually end overfishing.

Thank you for considering these comments.

Sincerely,

Allison Lorenc

Allison Lorenc
Policy Analyst
Conservation Law Foundation

Boenish R and Chen Y. 2020. “Re-evaluating Atlantic cod mortality including lobster bycatch: where could we be today?” *Canadian Journal of Fisheries and Aquatic Sciences* 77(6): 1049-1058. <https://doi.org/10.1139/cjfas-2019-0313>

ABSTRACT

Full accounting of fisheries mortality is one of the most tractable ways to improve stock assessments. However, it can be challenging to obtain in cases when missing catch comes from small-scale nontarget fisheries unrequired to report incidental catch. Atlantic cod (*Gadus morhua*) in the Gulf of Maine (GoM), USA, once served as a regionally important fishery, but has been serially depleted to <5% of historic spawning stock biomass. Recent management efforts to rebuild GoM cod have largely failed. We test the hypothesis that unaccounted bycatch of Atlantic cod in the Maine American lobster (*Homarus americanus*) fishery is a substantial missing piece in the GoM Atlantic cod assessment. We integrated multiple scenarios of hind-casted discards into the two accepted regional cod assessment models from 1982 to 2016. Incorporation of discards improved the assessment bias for both models (10%–15%), increased estimates of spawning stock biomass (4%), and decreased estimates of fishing mortality (9%). A novel evaluation of longitudinal model bias suggests that alternative modelling approaches or specifications may be warranted. We highlight the importance of accounting for all fishery-related mortality and the need for methods to deliver more comprehensive estimates from both target and nontarget fisheries.

June 17, 2020

Dr. John Quinn, Council Chairman
Mr. Tom Nies, Executive Director
New England Fishery Management Council
50 Water Street, Mill #2
Newburyport, MA 01950

Submitted via comments@nefmc.org

RE: Protections for Atlantic Cod

Dear Dr. Quinn and Mr. Nies:

Conservation Law Foundation (“CLF”) submits this letter for consideration at the New England Fishery Management Council’s (“Council”) June 2020 meeting. CLF remains focused on the sustainable management of Atlantic cod in New England, which includes advocating for conservation and management measures necessary and sufficient to end overfishing immediately and rebuild the stocks as required by the Magnuson-Stevens Act. As part of these efforts, CLF has closely followed the work of the Atlantic Cod Stock Structure Working Group (“Working Group”), and we offer the following comments and recommendations based on the Working Group’s report.

First, we commend the Working Group on the thoroughness with which it approached the interdisciplinary review. Its review of multiple data types provides extensive evidence of a mismatch between the current two stock management units (Georges Bank (“GB”) cod and Gulf of Maine (“GOM”) cod) and the true biological stock structure. This evidence led the Working Group to “reject the current management units as an accurate representation of cod stock structure within the region”¹ and propose five biological stocks for Atlantic cod: (1) Georges Bank, (2) Southern New England, (3) Western Gulf of Maine and Cape Cod (winter spawners), (4) Western Gulf of Maine (spring spawners), and (5) Eastern Gulf of Maine.² Of these proposed stocks, the supporting evidence for the Southern New England and Eastern Gulf of Maine stocks was deemed to be less certain, but evidentiary support was clear for the other three.³

¹ McBride RS and Kent Smedbol R. *An Interdisciplinary Review of Atlantic Cod (Gadus morhua) Stock Structure in the Western North Atlantic Ocean*. NOAA Technical Memorandum NMFS-NE-XXX at 233. (“Working Group Report”). Available at: https://s3.amazonaws.com/nefmc.org/Interdisciplinary-Review-of-Atlantic-Cod-Stock-Structure_200505_090723.pdf.

² *Id.* at 3.

³ See “Peer Review of the Atlantic Cod Stock Structure Working Group Report.” Presentation by Review Panel Chair Jake Kritzer at NEFMC Scientific & Statistical Committee, June 4, 2020. Available at: <https://s3.amazonaws.com/nefmc.org/Presentation-ACSSWG-Review-Panel-Report.pdf>.

CLF appreciates the time it will take the Council and additional follow-up working groups to fully analyze the report and determine the implications to both assessments and management. Still, in light of the dire state of Atlantic cod in New England—GOM cod and GB cod stocks remain overfished and subject to overfishing⁴ despite 16 years in rebuilding plans—action is needed now to curb persistent overfishing, prevent further decline, and rebuild the fishery. As the Working Group states in its report:

Declining populations of cod have occurred despite substantially reduced fishery catch and a series of management actions over decades. This has led to concerns that existing cod management units have not adequately captured cod’s biological stock structure, contributing to delays in rebuilding⁵

Failure to account for stock structure can also lead to extirpation of spawning components,⁶ such as what happened in coastal Maine waters⁷ and what must be prevented in coastal Massachusetts waters. Waiting until the 2023 research track assessment is concluded, reviewed, and moved into management action is too late to address these concerns.

Interim Measures Are Necessary to Protect Spawning Components

CLF urges the Council to fully consider the appropriate management changes needed in light of the new understanding of Atlantic cod stock structure and to implement the measures necessary to end overfishing and rebuild the fishery (and all biological stocks of Atlantic cod). Kerr et al. (2017) provide a framework for considering the range, and associated scope, of management responses to address misalignment of biological and management stocks.⁸ Status

⁴ NEFSC. *Operational Assessment of 14 Northeast Groundfish Stocks, Updated Through 2018*. Pre-publication copy last revised Jan. 7, 2020 at 26 and 38. Available at: <https://nefsc.noaa.gov/saw/2019-groundfish-docs/Prepublication-NE-Grndfish-1-7-2020.pdf> (“2019 Groundfish Operational Assessment”); Per NMFS policy, “where a known determination had previously been provided and a new assessment is rejected or the results are inconclusive, the [last] known status will continue to be the official stock status.” Letter from John K. Bullard to John F. Quinn, August 31, 2017, p. 2. Available at: https://s3.amazonaws.com/nefmc.org/A8_170831_Bullard-to-Quinn_Groundfish-Inadequate-Rebuilding-Progress.pdf.

⁵ Working Group Report at 6.

⁶ Working Group Report at 6-7.

⁷ Ames EP. 2004. “Atlantic cod stock structure in the Gulf of Maine.” *Fisheries* 29(1):10–28.

⁸ Kerr LA, Hintzen NT, Cadrin SX, Clausen LT, Dickey-Collas M, Goethel DR, Hatfield EMC, Kritzer JP, and Nash RDM. 2017. “Lessons learned from practical approaches to reconcile mismatches between biological population structure and stock units of marine fish,” *ICES Journal of Marine Science* 74(6): 1708-1722, doi:10.1093/icesjms/fsw188. (“(i) Status quo management—there is insufficient information to change the current management practices. (ii) ‘Weakest link’ management—there is some knowledge of spatial structure, but insufficient information exists to explicitly manage all spawning components. The assumed weakest spawning component is protected through management measures. (iii) Spatial and temporal closures—there is knowledge of spatial structure, but insufficient information exists to alter the scale of assessment. Spatial and temporal closures are used to protect spawning populations. (iv) Stock composition analysis—there is knowledge of stock mixing, but insufficient information exists to explicitly model connectivity within a stock assessment. Stock composition data

quo management is clearly failing New England cod, and minimally some enhanced degree of spawning component protections will be required. While considering the possibility of more complex forms of management, steps can be taken immediately to address the uncertainty introduced by the misalignment between the current management approach and the new understanding of true stock structure in the region, including (1) appropriately buffering for scientific uncertainty when specifying catch limits⁹ and (2) protecting known spawning grounds from fishing pressure to conserve spawning components. As elaborated below, sufficient information is available for enhanced spatial and temporal closures for the Western Gulf of Maine spawning components.

As the Council determines how best to reconcile the new scientific information on Atlantic cod stock structure with potential new management measures, **the Council should request that the Secretary take emergency action to protect all known spawning areas of Atlantic cod in the Western Gulf of Maine during the entirety of the spawning seasons.**

Emergency Action is Warranted

Three criteria must be satisfied to warrant emergency action. NMFS policy defines an emergency as:

a situation that: (1) [r]esults from recent, unforeseen events or recently discovered circumstances; and (2) [p]resents serious conservation or management problems in the fishery; and (3) [c]an be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.¹⁰

These criteria are satisfied in the GOM cod fishery. First, the Working Group's rejection of the current management regime for Atlantic cod, coupled with the most recent survey results for GOM cod reaching the lowest biomass index levels on record,¹¹ constitute unforeseen events.

are used to parse data (catches or samples) to the appropriate stock of origin before being input to the stock assessment or used in management. (v) Alteration of stock boundaries—sufficient information is available on population structure and unique harvest stocks exist, which allows updating and redrawing stock boundaries to improve the alignment of biological populations and management units.”).

⁹ The decision around quotas currently lies with National Marine Fisheries Service in its consideration of Framework Adjustment 59. Note that CLF has filed comments with the NMFS on the legality of the proposed catch limits for GOM cod and GB cod in the proposed rule for Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan.

¹⁰ See NMFS Policy Guidelines for the use of Emergency Rules, 62 Fed. Reg. 44,421 (Aug. 21, 1997).

¹¹ The 2019 federal fall trawl survey results show that biomass index fell to a new historic low, over 2.5 times lower than the previous low points in 1993 and 2012 and 65 times lower than the historic high. C. Perretti (NEFSC) pers. comm.; NEFSC. 2019. *Gulf of Maine Atlantic Cod 2019 Assessment Update Report Supplemental Tables* (Draft), at 24.

Second, the continued failure to end overfishing and rebuild GOM cod¹²—a stock that currently has only a zero to one percent chance of rebuilding on schedule during its second rebuilding period even in the absence of any fishing¹³—is without a doubt a “serious conservation or management problem[.]”¹⁴ Further, as previously noted, the Working Group indicates the patent misalignment of the current management approach with the true biological nature of the sub-populations could be inhibiting rebuilding. And third, given the Council’s current timeline is to preliminarily address the Working Group’s conclusions in time to inform the 2023 research track assessment for GOM cod, the immediate benefits of protecting vulnerable spawning components of an overfished stock through emergency interim measures outweigh the benefits of standard public procedure.

As CLF emphasized in its February 13, 2020 Petition for Rulemaking to End Overfishing and Rebuild Atlantic Cod, the Council’s Groundfish Plan Development Team (“PDT”) conducted a comprehensive analysis of cod spawning times and locations in the Western Gulf of Maine during the development of Framework Adjustment 53 in 2014. At that time, the PDT recommended seasonal closures that provided more extensive spawning protections for both the winter and spring spawning groups (Figure 1),¹⁵ but the Council chose not to adopt these measures. The PDT’s prior recommendation provides an immediate means to address limitations of the current two stock management approach and protect the “two genetically distinct sub-populations [in the Western Gulf of Maine] whose spawning grounds overlap in space, but not in season”¹⁶—now recognized as two separate biological stocks (Western Gulf of Maine and Cape Cod winter spawners and Western Gulf of Maine spring spawners).

¹² NEFSC. *Operational Assessment of 14 Northeast Groundfish Stocks, Updated Through 2018*. Pre-publication copy last revised Jan. 7, 2020 at 26 and 33.

¹³ Memorandum from Groundfish PDT to Scientific and Statistical Committee regarding “Candidate Groundfish OFLs and ABCs for fishing years 2020 to 2022” dated Oct. 10, 2019 & revised Oct. 15, 2019) at 7. Available at: https://s3.amazonaws.com/nefmc.org/A.8-GF-PDT-memo-to-SSC-re-FY2020-FY2022-Groundfish-OFLs-ABCs_20191001-REVISED.pdf.

¹⁴ 62 Fed. Reg. at 44,422.

¹⁵ Memorandum from Groundfish PDT to Groundfish Committee regarding “Development of Framework Adjustment 53 (FW 53) to the Multispecies (Groundfish) Fishery Management Plan” dated Nov. 5, 2014 at 12-13, 17. Available at: https://s3.amazonaws.com/nefmc.org/8_141105_GF-PDT-memo-to-GF-Committee-re-FW-53-FINAL-2-with-Appendicies.pdf.

¹⁶ Dean MJ, Elzey SP, Hoffman WS, Buchan NC, and Grabowski JF. 2019. “The relative importance of sub-populations to the Gulf of Maine stock of Atlantic cod.” *ICES Journal of Marine Science*, doi:10.1093/icesjms/fsz083.

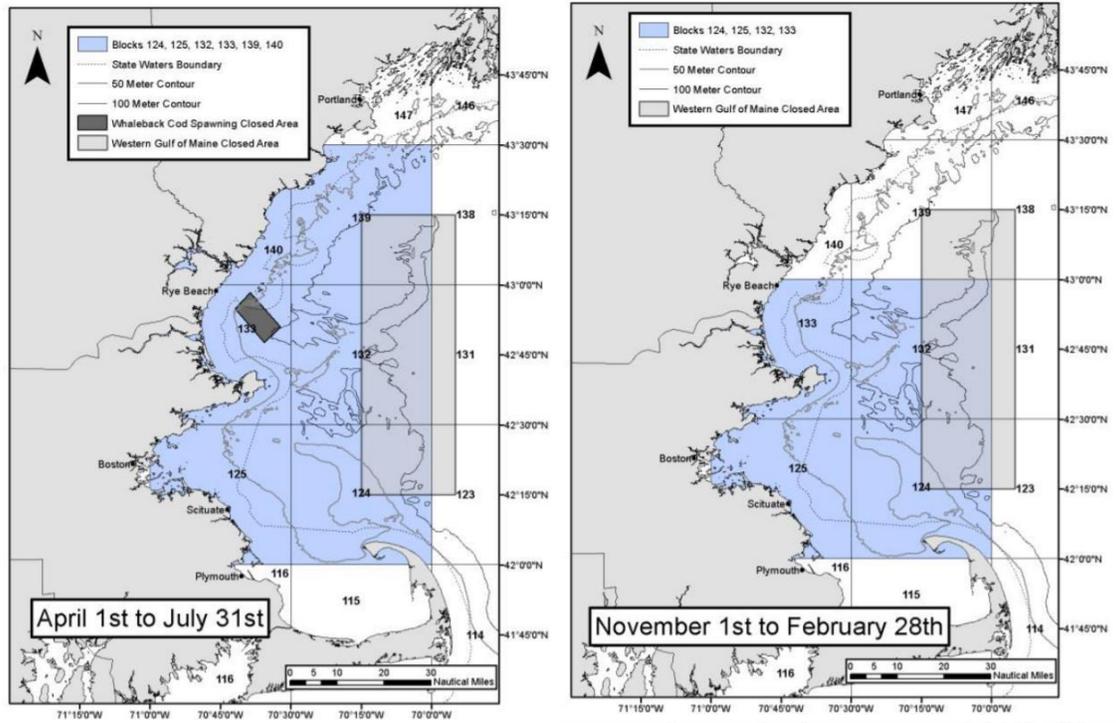


Figure 1: PDT recommendation for seasonal cod spawning closures in the Western Gulf of Maine (shaded in blue) compared to then-current (2014) closures.¹⁷

To prevent further serious conservation and management problems in the fishery, the Council should request at the June meeting that the Secretary immediately promulgate interim measures to implement the PDT’s recommendation for spawning protections in the Western Gulf of Maine. For the remaining biological stocks of cod proposed by the Working Group, the Council should request that NMFS and the Northeast Fishery Science Center prioritize a similarly comprehensive data review of all relevant data sources to determine the locations, in time and space, of spawning cod on Georges Bank and Southern New England.¹⁸

The law requires the Council to take all necessary actions to end overfishing and rebuild Atlantic cod using the best scientific information available.¹⁹ Appropriate consideration of stock structure is one of those actions. As Dean et. al. (2019) stated when referring to assessment models and the importance of accounting for sub-populations, misrepresenting “the aggregate

¹⁷ Memorandum from Groundfish Plan Development Team Development to Groundfish Committee regarding “Development of Framework Adjustment 53 (FW 53) to the Multispecies (Groundfish) Fishery Management Plan” dated Nov. 5, 2014, at 17.

¹⁸ While the Working Group also proposes the presence of a distinct Eastern Gulf of Maine stock, there is a known “lack of spawning fish in this area.” Working Group Report at 69.

¹⁹ 16 U.S.C. § 1853(a)(1); *Id.* § 1851(a)(2).



dynamics of the population will yield inaccurate catch advice and lead to misguided management, perpetuating, and amplifying the problem. In short: it matters where, when, and which cod are harvested from the population.”²⁰ On a more positive note, however, the Working Group report states:

The [Working Group] believes that improved recognition of population structure may help prevent further loss of spawning components; better guide adjustments of allowable catch to balance fishing mortality across populations; facilitate recovery of currently depleted stocks; and strengthen the resiliency of the populations that exist within fishing areas.²¹

In this context, the best scientific information available suggests that emergency interim measures while the Council wrestles with appropriate management advice are vital and necessary.

Thank you for considering these comments. We look forward to further engaging with the Council as this work moves forward.

Sincerely,

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²⁰ Dean et. at. 2019.

²¹ Working Group Report at 3.