



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

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RIN 0648-BB89

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Interim Action

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; interim measures; request for comments.

SUMMARY: This temporary rule implements interim Gulf of Maine (GOM) Atlantic cod (cod) management measures for the 2012 fishing year. This action is necessary to: Establish GOM cod Annual Catch Limits (ACLs); implement recreational management measures that will constrain catch to the recreational sub-ACL; and reduce overfishing occurring on GOM cod in anticipation of further action to end overfishing in fishing year 2013.

DATES: Effective May 1, 2012, until September 30, 2012; comments must be received by [insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by “NOAA-NMFS-2012-0045,” by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2012-0045 in

the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.

- Mail: Submit written comments to Daniel Morris, Acting Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930.
- Fax (978) 281-9135.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the supplemental environmental assessment (EA) prepared for this action by NMFS are available from Daniel Morris, Acting Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. The supplemental EA is accessible via the Internet at <http://www.nero.noaa.gov>. A copy of the most recent stock assessment for GOM cod is also accessible via the Internet at <http://www.nefsc.noaa.gov/groundfish>.

FOR FURTHER INFORMATION CONTACT: Michael Ruccio, Fishery Policy Analyst, phone: 978-281-9104.

SUPPLEMENTARY INFORMATION:

## Plain Language Executive Summary

A recent assessment of the amount of cod found in the GOM was finalized in January 2012. The results are substantially different from those from a similar examination conducted in 2008. The new assessment concludes that GOM cod are “overfished,” meaning there is a lower amount of fish than necessary to sustain the population over the long term. It also concludes that GOM cod are subject to “overfishing,” meaning fishing activities are removing too many fish from the sea to sustain the population. The required population and fishing-related removal levels are set for GOM cod under a fishery management plan developed by the New England Fishery Management Council (Council) in collaboration with NMFS. This plan is designed to satisfy requirements of the primary law governing U.S. fisheries--the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The new assessment indicates that increasing GOM cod to the rebuilding stock size target is not possible by 2014, even if no cod are harvested by fisheries between now and then. Based on the information in the new assessment, NMFS has determined that the GOM cod rebuilding program is not making adequate progress toward building the stock to the required size. NMFS has notified the Council of this finding. Based on this notification and in accordance with Magnuson-Stevens Act requirements, the Council must revisit the GOM cod rebuilding plan and revise it within the next two years so that the recovery effort is back on track. NMFS also advised the Council that there is some limited flexibility the agency may use to reduce, rather than end, overfishing on GOM cod for up to one year. The Council had originally intended to use the new assessment information and recommend measures for fishing year 2012 (May 1, 2012-April 30, 2013). However, the Council elected not to do so, based on concerns about the new assessment. Instead, the Council has asked NMFS to implement interim measures for the

fishing year, under its authorization to do so provided by section 305(c) of the Magnuson-Stevens Act.

In response to the Council's request, NMFS has decided that it is necessary and appropriate to implement this interim action to address overfishing of GOM cod using NMFS' authority in the Magnuson-Stevens Act (see Justification for Interim Action section later in this preamble for additional detail). In anticipation of implementing an interim rule, NMFS held several meetings with the Council, stakeholders, and interested parties. The objective of these meetings was to help identify fishing measures for the 2012 fishing year that will reduce overfishing. The measures implemented by this interim rule reduce GOM cod catch levels available to fishermen by approximately 17 percent from 2010 catch levels and 22 percent from 2011 catch levels, reduce the rate of fishing mortality by approximately 23 percent from the 2010 rate and approximately 4 percent from the 2011 rate, and therefore are consistent with Magnuson-Stevens Act requirements. These measures are based, in part, on the input from the meetings and are intended to reduce the magnitude of negative economic impact to fishery participants, fishery-dependent businesses, and coastal communities in New England in comparison to taking a more strict action to achieve reductions from 2010 catch levels by 84 percent and from 2011 catch levels by 85 percent that would be necessary to end overfishing.

This action implements catch levels and recreational management measures designed to reduce rather than end overfishing on the GOM cod stock in fishing year 2012. The Council intends to revisit the stock's rebuilding plan over the next two years and to develop measures to end overfishing on GOM cod starting in fishing year 2013 (May 1, 2013-April 30, 2014).

This interim rule implements a total GOM cod total annual catch limit (ACL) of 6,700 mt and divides this catch limit among the fishery as follows: Sectors, 3,618 mt, with an additional

471 mt as carryover; Common Pool, 81 mt; Recreational, 2,215 mt; State Waters, 253 mt; and Other Sub-component, 62 mt. This rule also implements a 19-inch (48.26-cm) minimum fish size for recreationally caught GOM cod and a recreational possession limit of 9 fish per angler. This rule is effective for 180 days.

NMFS is requesting comment on these interim measures in anticipation of extending the measures this fall to ensure measures are in place for the entire 2012 fishing year. Further, in response to public input, additional analysis is planned during 2012 to re-examine some components of the recent stock assessment. NMFS cannot predict how this additional analysis may influence what is known about the size and condition of the GOM cod population. It is possible that changes to measures may be necessary to respond to comments or new information when catch and management measures are extended this fall.

Additional detail is provided in the remainder of the preamble to this rule.

## Background

The Northeast (NE) Multispecies Fishery Management Plan (FMP) specifies management measures for 16 fish species that occur in Federal waters off the New England and Mid-Atlantic coasts. Cod, along with haddock, yellowtail flounder, pollock, American plaice, witch flounder, white hake, windowpane flounder, Atlantic halibut, winter flounder, redfish, and Atlantic wolffish are referred to as “regulated species,” in that they are subject to large mesh size requirements through the FMP. These regulated species are jointly managed by the Council and NMFS. Several of the regulated species are further subdivided into 19 separate stocks. These stocks, along with ocean pout, form the groundfish fishery complex managed under the FMP. There are two recognized stocks of cod in the U.S. portion of the North Atlantic: GOM and George’s Bank.

## Rebuilding Program and Stock Assessment Information

Amendment 13 to the FMP, developed by the Council and implemented by NMFS, established a program designed to rebuild the GOM cod stock from low population levels. This program, implemented in 2004 (69 FR 22906; April 27, 2004), was designed to rebuild the GOM cod stock in 10 years, by May 1, 2014.

Comprehensive assessments of the GOM cod stock were conducted in 2005, 2008, and most recently in December 2011 (published in January 2012). The 2008 assessment, conducted by NMFS' Northeast Fisheries Science Center (NEFSC) in collaboration with state agency scientists, academia, and industry-hired consultants, and externally peer-reviewed by the Center for Independent Experts, indicated that the GOM cod stock was likely to rebuild by 2014, consistent with the rebuilding plan.

The new assessment, conducted through a similar collaborative and peer-review process, provided a new and significantly revised scientific understanding of the status of GOM cod. The most recent assessment indicates that rebuilding the stock to the biomass target of 61,218 mt would not be possible by 2014 even in the absence of all fishing mortality. Additionally, this assessment indicates that the stock is subject to continued overfishing and is overfished. Because the most recent assessment provides a substantially changed perspective for the status of GOM cod, the inability to adequately rebuild the stock is the fault of neither the Council nor fishery participants.

Additional detail on all the GOM stock assessments, including the most recent assessment results, are available on the NEFSC stock assessment-related website (<http://www.nefsc.noaa.gov/nefsc/saw/>) and are not further summarized here.

## Implications of New Assessment Information

Based on the new assessment, the fishing mortality rate (F) on GOM cod in 2010 was 1.14. Based on the Council's Plan Development Team (PDT) analysis, the current projection indicates F for 2011 is 0.92. The overfishing threshold calculated by the assessment is an F of 0.2; thus to end overfishing, the F rate would need to be reduced by at least 82 percent from the 2010 rate and 78 percent from the 2011 rate to be at or below the overfishing threshold.

The mechanism for reducing F is to reduce catch. To achieve the level of reduction in F to end overfishing immediately (i.e.,  $F = 0.2$  or less), the assessment calculated that total catch limit for fishing year 2012 would need to be 1,313 mt, and stock biomass would increase to 11,463 mt in 2013. Further, the Council established in Amendment 13 that it would set an F rate at 75 percent of the overfishing threshold of 0.2 for an F of 0.15. This 0.15 F rate would result in a catch limit of 1,001 mt in fishing year 2012, and stock biomass would increase to 11,838 mt in 2013. Reductions in catch limits of this magnitude would end overfishing; however, this would have significant negative economic impacts to fishery participants, fishing-related industries in New England, and coastal communities in the region.

#### Council Process for Fishing Year 2012 Measures

The Council was aware that the new assessment for GOM cod was being conducted in December 2011, and that final results from the assessment would be available in early 2012. Typically, the Council takes final action on recommendations for the subsequent fishing year in November of the preceding year (i.e., November 2011 for 2012 measures). Because the timing of the GOM cod assessment complicated the normal process used, the Council had included a range of potential catch levels in its analysis of Framework Adjustment 47 to the FMP (FW47). The Council took final action on FW47 in November 2011. The Council intended to have its PDT and Scientific and Statistical Committee (SSC) review the assessment results in early 2012

to provide advice for a GOM cod Acceptable Biological Catch (ABC) for fishing year 2012.

Subsequently, the Council expected to finalize GOM cod catch recommendations to NMFS for inclusion in the FW47 rulemaking.

However, as the preliminary GOM cod assessment results became available, the Council grew concerned about the assessment as well as the potentially low catch levels that appeared to be required for the 2012 fishing year. It was at this point that NMFS began a detailed examination of potential options for the fishing year and concurrently began meeting with the Council and stakeholders.

#### Flexibility to Reduce but not Immediately End Overfishing

When the assessment results were finalized in late January 2012, NMFS notified the Council, as required by section 304(e)(7) of the Magnuson-Stevens Act, that the GOM cod rebuilding program is not making adequate progress toward rebuilding the stock based on the new and significantly revised scientific understanding of the stock's status. Based on this determination and subsequent notification to the Council, NMFS has determined the Secretary of Commerce (Secretary) may take interim action for up to one year under section 304 (e)(6) of the Magnuson-Stevens Act to reduce rather than end overfishing on GOM cod while the Council revisits the rebuilding program. Measures to reduce rather than end overfishing must, at a minimum, maintain the current GOM cod stock size and preferably, should result in an increase in the stock size. Further, the reduction in overfishing must be appreciable.

In addition, to invoke the flexibility of section 304(e)(6) of the Magnuson-Stevens Act for fishing year 2012, the Council must be in the process of revising the GOM cod rebuilding program for completion within 2 years for implementation no later than May 1, 2014. The

Council has stated its intent to address the rebuilding needs and NMFS anticipates collaborating with the Council on the development of stock-rebuilding measures over the months to come.

The Secretary may implement emergency or interim measures for only up to 1 year under the emergency action authority provided by section 305(c) of the Magnuson-Stevens Act. The Council is expected to develop measures to end overfishing beginning with the 2013 fishing year, which starts May 1, 2013.

#### Council Recommendation for Fishing Year 2012

Upon receiving the preliminary GOM cod assessment results in early 2012, the Council asked the SSC not to recommend an ABC in part due to concerns about the assessment. Subsequently, the Council did not recommend ABC or ACLs in FW 47 for GOM cod. Instead, the Council, relying on the notification and flexibility measures previously described, voted to request of NMFS that it implement an interim action to reduce rather than end overfishing for fishing year 2012. In making this request, the Council recommended that NMFS implement interim GOM cod catch and recreational fishery management measures for the 2012 fishing year. The Council recommended three specific items to NMFS for consideration in developing and implementing interim measures:

- Setting a total GOM cod ACL in a 6,700 to 7,500 mt range;
- Modifying the recreational management measures with particular emphasis on reductions in the possession/bag limit and minimum fish size to reduce discards; and,
- Re-opening several existing closed areas: Nantucket Lightship Closed Area year round, Closed Area I from 1 May 1-February 15, Closed Area II south of 41°50'

May 1 through February to selective fishing gear, and a portion of the both the Western GOM Closed Area and Cashes Ledge Closed Area year round.

#### Interim 2012 Fishing Measures

After considering the Council recommendations and public input from outreach meetings, NMFS implements, through this interim action, the following measures for the commercial and recreational GOM cod fisheries for fishing year 2012. These measures, based on a total GOM cod ACL of 6,700 mt, are expected to reduce overfishing. The assessment found an F of 1.14 for 2010 and PDT-conducted analysis has projected an F of 0.92 for 2011. The 6,700 mt catch limit established for this rule is expected to produce an F of 0.879, or a reduction in F of 23 percent from 2010 and 4 percent from 2011. Fishing under these measures in fishing year 2012 is expected to increase spawning stock biomass by 19 percent, from 8,618 mt in 2012, to 10,235 mt in 2013.

As noted above, if overfishing were ended in 2012 based on an F rate of 0.2, the ACL would be 1,313 mt, and the 2013 stock biomass would increase to 11,463 mt. If the fishery were closed in fishing year 2012, the 2013 stock biomass would increase to 13,073. Under the Council's recommended upper bound ACL of 7,500 mt for fishing year 2012, the 2013 stock biomass would increase to 9,564 mt, but the F rate would increase to 1.031 (i.e., overfishing would not be reduced).

There are several compelling reasons why NMFS is implementing an ACL of 6,700 mt as opposed to a higher or lower limit. Fishing at this level is likely to reduce overfishing to an appreciable degree while allowing meaningful mitigation of negative impacts for fishing year 2012 resulting from the reduced ACL while the Council develops revisions to the GOM cod rebuilding program. Fishing at 6,700 mt in fishing year 2012 is projected to allow growth in the

GOM cod biomass and should not significantly influence the fishing year 2013 catch level. The magnitude of reduction needed for fishing year 2013 is so substantial that it is unlikely that the 2013 ACL will be greater than 3,000 mt. This would be true even if the fishing year 2012 ACL were set at a much lower level.

The 6,700 mt ACL is consistent with National Standard 8, which requires fishing measures to minimize adverse economic impacts on fishing communities while remaining consistent with conservation requirements. Adopting a measure effectively eliminating the GOM cod harvest for 2012 could permanently remove the smaller fishing operations from the fishery, without a significant corresponding benefit (e.g., in terms of increasing stock biomass). Setting the ACL at this level is further justified as an equitable measure as it recognizes that the need for more severe reductions of GOM cod fishing mortality is not the result of a failure of the FMP or the fishing industry in complying with FMP measures, but rather it is the result of a sudden change in the understanding of the GOM cod stock status. In light of this sudden change in the assessment, this fishing level is particularly needed to help mitigate the negative economic impacts in the transition year before more restrictive measures having more substantial adverse impacts are necessary for the 2013 fishing year.

Rationale for the agency's decision not to adopt some recommendations is also provided within each following sub-section.

#### Annual Catch Limits (ACLs)

This action implements a total GOM cod ACL of 6,700 mt for fishing year 2012. Normally, the sub-ACL allocations are derived from the ABC; however, for the interim action no ABC has been set by the Council. To determine sub-ACLs, NMFS calculated a proxy for ABC from the ACL of 6,700 mt. This results in a proxy ABC value of 7,066 mt. Under the Council's

procedures for setting ACLs, the ACL is set 5 percent lower for commercial fisheries and 7 percent lower for the recreational fishery to offset management uncertainty. However, instead of using the FMP-established distribution percentages for calculating the sub-ACLs from ABC, this action modifies the distribution percentages by reducing State Waters and Other Sub-component catch levels, and shifting tonnage from those sub-components to the commercial fishery. The revised sub-sector ACLs are shown in Table 1.

Table 1. GOM cod fishing year 2012 sub-ACLs, in metric tons (mt).

Total ACL	Interim Sub-ACLs (mt)					
	Commercial Fishery			Recreational	State Waters	Other Sub-component
	Total	Sectors	Common Pool			
6,700	4,170	4,089 potential total 3,618 sub-ACL (471 as carryover)	81	2,215	253	62

Consistent with the FMP, the recreational fishery sub-ACL was calculated first. The remaining tonnage was apportioned across the four commercial fishery sub-components: Sectors, Common Pool, State Waters, and the Other Sub-component.

The adjustment in commercial catch levels was done to help ensure that sector carryover, if maximized to 10 percent from fishing year 2011 and fully utilized in fishing year 2012, would not cause fishing to increase above the projected fishing year 2011 level. Neither the State Waters nor Other Sub-component categories were fully utilized in fishing year 2010, nor are they projected to be fully harvested in fishing year 2011. NMFS has moved tonnage from these two categories to the Commercial (Sector and Common Pool) sub-ACLs to provide a buffer for sector carryover from fishing year 2011. The catch from state waters was approximately 250 mt, and catch attributed to the other sub-component category was approximately 60 mt in fishing year 2010. It is expected that these sub-sectors will harvest around that same amount in fishing

year 2011. NMFS has reduced the catch components for the two categories from 468 to 253 mt (State Waters) and 234 to 62 mt (Other Sub-component) and reapportioned the 387 mt derived from these fisheries to the Total Commercial ACL. The Commercial ACL is then subdivided to the sub-ACLs for the sector and the common pool fisheries.

#### Incidental Catch Total Allowable Catches (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 and the Regular B Days-At-Sea (DAS) Program), in order to limit the catch of these stocks in these programs. The Incidental Catch TAC for each stock is based on the Common Pool sub-ACL and is distributed to each special management program using a predetermined formula specified in the implementing regulations for the FMP. Any catch on a trip that ends on a Category B DAS (either Regular or Reserve B DAS) is attributed to the Incidental Catch TAC for the pertinent stock. Catch on a trip that starts under a Category B DAS and then flips to a Category A DAS is attributed to the Common Pool sub-ACL.

The incidental catch TAC for GOM cod is 1 percent of the common pool sub-ACL. For fishing year 2012, the incidental catch TAC is 0.81 mt, and 100 percent of this incidental catch TAC is allocated to the Regular B DAS Program.

#### Common Pool Trimester TACs

Beginning in fishing year 2012, Common Pool trimester TACs outlined in Amendment 16 become effective. The Common Pool sub-ACL for each stock will be divided into trimester TACs at the start of the fishing year. The percentage of each sub-ACL allocated to each

trimester was determined in Amendment 16. The regulations require that once 90 percent of an applicable trimester TAC is caught, the area where 90 percent of the catch for the pertinent stock occurred will be closed. The area closure will apply to all common pool vessels fishing with gear capable of catching the pertinent stock. Any overages or underages of the trimester TAC in Trimester 1 or Trimester 2 will be applied to the next trimester (e.g., any remaining portion of the Trimester 1 TAC will be added to the Trimester 2 TAC). Any overage of the total sub-ACL will be deducted from the following fishing year's Common Pool sub-ACL for that stock. Uncaught portions of the Trimester 3 TAC will not be carried over into the following fishing year.

Table 2 contains the fishing year 2012 trimester TACs for GOM cod.

Table 2. Fishing Year 2012 GOM Cod Common Pool Trimester TACs

Percentage of sub-ACL Allocated to Each Trimester			2012 Trimester TACs (mt)		
Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3
27	36	37	22	29	30

The fishing year 2012 sector rosters will not be finalized until May 1, 2012. Therefore, the allocation of the Commercial ACL between the Common Pool and Sector sub-ACLs for GOM cod may change due to changes in the sector rosters. An updated Sector sub-ACL, Common Pool sub-ACL, incidental catch TAC, and trimester TACs for GOM cod will be published in a subsequent adjustment rule, if necessary, based on the final fishing year 2012 sector rosters as of May 1, 2012.

#### Sector Carryover

NMFS weighed several options for addressing GOM cod sector carryover. NMFS considered providing less than the 10-percent carryover, as well as options that would have

allowed carryover to occur above and beyond the total fishery ACL. However, the only viable options to ensure that the potential fishing year 2012 catch would not increase overfishing in light of the new assessment were scenarios that kept all potential catch, both sub-ACLs and carryover, within the total fishery ACL of 6,700 mt. Allowing catch to exceed 6,700 mt could cause overfishing to occur at levels equal to or higher than the overfishing level in fishing year 2011. Thus, the potential fishing year 2011 sector carryover of 471 mt is being allowed in conjunction with the Sector sub-ACL of 3,618 mt. The sub-ACL of 3,618 mt will be used to calculate Sector Annual Catch Entitlement (ACE). Overall, this is an 83-mt reduction from the Sector sub-ACL of 3,701 mt discussed publically at the February 10, 2012, GOM Cod Working Group meeting in Portsmouth, NH. If the sector sub-ACL and full 10-percent carryover are caught in fishing year 2012, the total sector catch will be 4,089 mt. By constraining potential carryover catch within the total fishery ACL, overfishing will be reduced in fishing year 2012 from 2011 levels. If all recreational and commercial fishery components, including a potential sector harvest of 4,089 mt (i.e., sub-ACL plus 10-percent carryover) catch their full allocations, the total catch will be 6,700 mt under this apportionment scheme.

Consistent with the existing regulations, accountability measures (AMs) for the State Waters and Other Sub-component sub-ACLs are implemented only if the total ACL (i.e., 6,700 mt) is exceeded and the State Waters and/or the Other Sub-component sub-ACLs are also exceeded. If the State Waters and/or Other Sub-component sub-ACLs are exceeded and the total ACL is not, no AMs are implemented.

#### Recreational Fishery Management Measures

As indicated in Table 1, the recreational sub-ACL for fishing year 2012 is 2,215 mt. NMFS is reducing the recreational GOM cod minimum fish size from 24 to 19 inches (60.96 to

48.26 cm) and is reducing the per-angler possession limit from 10 to 9 fish. Preliminary analysis indicates that these measures will sufficiently reduce recreational catch to ensure that the revised recreational sub-ACL of 2,215 mt will not be exceeded in fishing year 2012. NMFS engaged the Council's Recreational Advisory Panel (RAP) and recreational fishery stakeholders during development of these measures in a public meeting held February 10, 2012, in Portsmouth, NH. These measures were supported for use by the Council's RAP. Most stakeholders present at the meeting also supported these measures for fishing year 2012.

It may seem counterintuitive that reducing the minimum fish size will reduce total catch. The most recent stock assessment assumes that all recreational discarded cod die—a discard mortality assumption of 100 percent. The reduction in minimum fish size is expected to increase overall effort by a minor amount; however, analysis indicates that anglers will likely have higher success in catching legal-sized fish more quickly, so that there will theoretically be fewer discarded fish within trips. There is also a lower average fish weight with the lower minimum fish size that has some effect in reducing the total recreational landings amount.

Anglers are reminded that the per-person limit is a possession limit. The act of “high-grading,” or discarding previously captured smaller fish for larger fish is strongly discouraged, as it would undermine the management program.

#### Potential Changes to Recreational Measures in 6 Months

The interim measures implemented by this rule were developed through a new analytical model. The theory of its operation is as previously outlined and is sound. However, the model, its underlying assumptions, and output have not yet been subject to the type of rigorous review typically used before providing advice for management. To be clear, this model is new, untested, and not yet peer-reviewed. There exists some uncertainty about the effectiveness of the

measures produced, particularly if anglers “high grade” to keep larger cod. The previously used approach for deriving recreational management measures did not consider discard mortality of 100 percent. NMFS has determined that using this new model in the limited, short-term context of this interim rule is appropriate given the caveats discussed in this preamble.

Prior to the expiration of this temporary rule, NMFS intends to rigorously review the new model and will work to have some level of external review of the model, the underlying assumptions, and the output generated during the period between issuing these interim measures and the renewal of interim measures after 180 days. Recreational measures will be revisited once the model has been peer-reviewed to ensure that the measures are effective in meeting the catch reductions necessary for the 2012 fishing year (i.e., to constrain catch within the recreational sub-ACL).

In addition, it is possible that NMFS will re-evaluate or otherwise re-visit the 100-percent discard mortality assumption utilized in the most recent assessment during the course of the 2012 fishing year. The discard mortality assumption used in the assessment is also used to monitor catch in the fishery. If the assumed discard mortality of recreationally caught fish were to change from 100 percent to a lower value, the effectiveness of a reduced minimum fish size could be less.

Based on these ongoing examinations, it is possible that NMFS may need to include changes to recreational management measures when these interim measures are extended after 180 days in October 2012. There are two possible outcomes:

- The modeling approach is valid and appropriate and the discard mortality assumption is unchanged.

In this scenario, it is unlikely that any changes to the interim recreational measures implemented by this rule would be necessary.

- The model-generated advice is found to be inappropriate to achieve the required reduction and/or the discard mortality assumption is changed to a level less than 100 percent.

Under this scenario, it is likely that additional, more restrictive measures would be necessary for the second half of the fishing year--essentially for April 16-30, 2013, due to the GOM recreational cod closure currently in place from November 1-April 15. This is the more problematic scenario, as fishing will have already occurred for 6 months and more restrictive measures would be implemented mid-year. NMFS anticipates working closely with the Council's RAP and the recreational fishing industry in developing any mid-year changes to reduce catch, should such measures become necessary. Such measures would likely include at least some closure of the fishery in April 2013, and/or increases to minimum fish size, and/or reduction in possession limits. There is also the potential for changes in our understanding of GOM cod status. See the 6-month renewal of interim measures section for additional detail.

#### Closed Areas

NMFS is not taking action at this time to re-open those closed areas as requested by the Council. NMFS finds that there are several compelling reasons for not modifying these closed areas through this interim or other emergency action. While the agency did receive some input supporting the Council's request, the majority of comments received through correspondence and at the February 10, 2012, GOM Cod Working Group meeting requested that NMFS leave in place the existing closed areas.

The process for evaluating the biological impacts to fish stocks, particularly GOM cod, as well as the habitat protection requirements outlined in the Magnuson-Stevens Act, involves complex analyses. Such analyses could not be completed in a thorough, deliberative, and transparent manner in the time period NMFS had to develop and implement the interim measures contained in this rule.

The Council continues to develop a comprehensive omnibus amendment process to address the Essential Fish Habitat requirements of the Magnuson-Stevens Act. This process is undertaking analysis that contemplates modification of many of the closed areas. This process is tentatively scheduled to be completed in 2013. In addition, the PDT continues to discuss and analyze stock-level impacts of re-opening closed areas. It is appropriate to examine potential changes to the closed areas through these deliberative Council processes to ensure that analysis to support any changes is both robust and conducted in a transparent manner.

#### 6-month Renewal of Interim Measures

NMFS' interim authority is available for up to 180 days in an initial action and may be extended up to an additional 186 days by a subsequent rule. This system provides for a full year of interim measures, when necessary. NMFS will renew interim measures in October 2012 to ensure coverage of the entire 2012 fishing year. We are accepting comment on these initial interim measures for consideration on the extension to be issued this fall.

It is expected that additional information regarding calendar and fishing year 2011 catch will become available between now and the 6-month renewal of this action. In addition, several concurrent processes are underway to more closely examine components of the most recent GOM stock assessment. These include the assumed discard mortality rate, analysis of industry catch-per-unit-effort data, further development and potential incorporation of Marine

Recreational Information Program data, and potentially other components of the assessment. Additional recreational analysis may be conducted pending review of the modeling approach used to develop measures for this rule. It is possible that any one or several of these ongoing efforts may provide additional information on the status of GOM cod and/or the appropriateness of the measures being implemented by this initial set of interim measures. NMFS will work closely with the Council, public, and interested parties to openly discuss potential catch-level or management measure changes necessary for the second half of fishing year 2012.

It is not possible to predict whether changes, either more liberal or more constraining, may become necessary to reduce overfishing and/or to ensure ACLs are not likely to be exceeded; however, as previously stated, the current situation for GOM cod is highly unusual. We remain committed to providing as much information as possible as quickly as practical so that business and fishing-related operations can be planned.

#### Justification for Interim Action

The Magnuson-Stevens Act authorizes the Secretary to act if (1) the Secretary finds that an emergency involving a fishery exists; or (2) the Secretary finds that interim measures are needed to reduce overfishing in any fishery; or (3) if the Council finds one of those factors exists and requests that the Secretary act. See section 305 of the Magnuson-Stevens Act. Where such circumstances exist, the Secretary may promulgate emergency rules or interim measures “to address the emergency or overfishing”. 16 USC 1855(c)(1) and (2). The Secretary has delegated this authority to NMFS. Further, NMFS has issued guidance defining when “an emergency” involving a fishery exists. 62 FR 44421; August 21, 1997. This guidance defines an emergency as a situation that (1) arose from recent, unforeseen events, (2) presents a serious conservation problem in the fishery, and (3) can be addressed through interim emergency

regulations for which the immediate benefits outweigh the value of advance notice, public comment, and the deliberative consideration of the impacts on participants to the same extent as would be expected under the formal rulemaking process. Under the statute and guidance, the rationale for issuing these emergency and interim regulations is as follows:

The new GOM cod stock assessment indicates that the stock is overfished, is subject to overfishing, and is not making adequate progress toward the rebuilding objective. Neither NMFS nor the Council could have foreseen the GOM cod stock assessment's recent findings, because the previous stock assessment suggested that GOM cod was recovering according to the schedule set out in a prior rebuilding plan. The most recent stock assessment represents a significant and unforeseen change in scientific understanding of the GOM cod stock, and the final stock assessment did not become available to NMFS and the Council until late January 2012.

Both NMFS and the Council agree with the stock assessment's findings. Thus, both NMFS and the Council have determined that overfishing is occurring on GOM cod. Further, based on this information, the Council has found that interim measures are needed to reduce overfishing in the GOM cod fishery, and has requested that NMFS issue emergency regulations designed to reduce overfishing of GOM cod. Accordingly, under the Magnuson-Stevens Act, NMFS, acting by delegation for the Secretary under the previously outlined provisions, is issuing emergency interim measures designed to address the emergency situation concerning the overfishing of GOM cod.

Classification

The Acting Administrator, Northeast Region, NMFS, determined that this interim rule is necessary for the conservation and management of the GOM cod fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

Pursuant to 5 U.S.C. 553(b)(B) and 553(d)(3), the Assistant Administrator finds good cause to waive prior notice and an opportunity for public comment on this action along with the 30-day delay in effectiveness, as notice and comment and delayed effectiveness are impracticable and contrary to the public interest. There has been insufficient time to conduct notice-and-comment rulemaking for this action, which is necessary due to recent, unforeseen events; namely, the most recent GOM cod stock analysis indicates that despite the management measures in place, GOM cod is currently overfished and undergoing overfishing. This analysis, which came out in January 2012, has complicated the timing and process for setting catch levels and management measures that normally occurs. As a result of these changes, NMFS has had to quickly conduct substantial and complex analyses to develop rulemaking to ensure that measures to reduce overfishing would be in place by the start of the fishing year on May 1, 2012. These timing complications were unavoidable. The immediate benefits of the interim measures, implemented by this rule, the mitigation of substantial negative economic impacts to fishery participants, associated businesses, and coastal communities that depend on GOM cod-related revenues, outweigh the value of formal advance notice and public comment.

Though notice-and-comment rulemaking is not being conducted, substantial outreach discussions have occurred with the Council, public, and interested parties to explore what measures should be included in this interim action. NMFS has shared a great deal of information with these groups, and has received input on the interim measures from a wide range of stakeholders and interested parties. NMFS requests comment on these interim measures in

anticipation of extending the measures this fall to ensure management measures are in place for the entire fishing year.

The normal process for establishing ACLs for GOM cod was substantially impacted for the 2012 fishing year. In a typical process, the Council receives new scientific information by October and decisions on ACLs and any necessary management measures changes would be voted on by the Council in November. By late December/early January of the following year, the Council's recommendations are forwarded to NMFS for rulemaking. The Council would typically forward with its recommendation the comprehensive analyses necessary to satisfy all applicable laws, including the National Environmental Policy Act (NEPA). Notice-and-comment rulemaking would be conducted by NMFS through the spring months and measures would be implemented for the May 1 start of the fishing year.

For the cycle leading into fishing year 2012, the Council and public knew that a new stock assessment for GOM cod would be conducted in December 2011. The Council acknowledged that the assessment could differ from previous management advice and result in a wide range of catch recommendations; thus, it recommended a range of ACLs and other measures for NMFS' consideration in FW47 for implementation beginning on May 1, 2012. The Council had intended to receive the new assessment results in January 2012, evaluate this new information quickly, and finalize its catch and management measures recommendations to NMFS for the 2012 fishing year at its February 1, 2012, meeting. This schedule would allow the Council to utilize the most recent stock assessment information in its recommendation to NMFS.

As stated in the preamble of this rule, the new assessment markedly changed the understanding of the GOM cod stock. It is overfished and subject to overfishing, the rebuilding plan is not making adequate progress, and the stock biomass is at a much lower level than

previously believed. The magnitude of change in our understanding of the GOM cod stock was unforeseen. The previous assessment, conducted in 2008, indicated that the GOM cod stock was growing and expected to be rebuilt by 2014. The new assessment directly contradicts those findings and indicates rebuilding will not be achieved by 2014.

The GOM cod catch levels that would result from using the new assessment information, if applied by the Council to end overfishing, would result in very low catch levels for the 2012 fishing year. In light of the substantially changed stock information, the magnitude of negative economic impacts associated with very low catch levels, and a number of assessment-related topics the Council would like to explore further, the Council elected not to formally recommend a specific catch level to NMFS for the 2012 GOM cod fishery. Instead, in understanding that NMFS could utilize limited authority to reduce, but not end, overfishing, in the interim while the Council revisits the GOM cod rebuilding program design, the Council recommended a range of catch and requested NMFS implement interim measures for the 2012 fishing year based on these recommendations. This specific request to the Secretary to act under section 305(c) of the Magnuson-Stevens Act is consistent with NMFS policy guidelines for the use of emergency rules issued August 21, 1997 (62 FR 44421), as it is a request from the Council to address an emergency situation. Had the Council not taken such action, it would have been compelled to recommend very low catch levels for the 2012 fishing year that in turn would have substantial negative economic impacts to the fishery participants and coastal communities in New England that rely on fishing-related revenues. The emergency, in the context of the Council's request, is for NMFS to apply the interim rulemaking provisions of section 305(c) to avoid the significant negative economic impacts to fishery participants and communities that would result from ending overfishing at the beginning of fishing year 2012 (i.e., May 1, 2012).

NMFS received the Council's recommended catch range of 6,700 to 7,500 mt at the February 1, 2012 meeting. NMFS began analyzing this range along with recreational measures for consistency with the requirement to reduce overfishing, and to determine which catch levels would be appropriate within this range. In conjunction with the Council, NMFS held a GOM Cod Working Group meeting on February 10, 2012, in Portsmouth, NH. This group was chaired by the Acting Assistant Administrator for Fisheries. At this meeting, NMFS indicated that fishing at a level higher than 6,700 mt would likely not reduce overfishing on the GOM cod stock. NMFS discussed potential sub-ACLs that would result from fishing at 6,700 mt for the year as well as providing potential changes to the recreational management measures for discussion, should this catch level eventually be implemented. Though no formal recommendations were sought or provided, a great deal of public input was received during this meeting and through correspondence after the meeting. This input was very helpful for NMFS as the interim measures were further developed.

The typical analytical process that is used to inform development of catch and recreational measures spans from late August through late December. Because of the introduction of new and substantially changed GOM cod stock information, these analyses had to be conducted by NMFS within a few weeks' time to ensure that rulemaking-related analyses and development could be conducted and concluded in sufficient time for the start of the fishing year (May 1). Though the work and discussion were conducted as quickly as possible, it was not possible to do so in a manner that provided sufficient time for notice-and-comment rulemaking. NMFS is relying on the collaborative development process for the measures within this interim rule to have provided a meaningful opportunity to engage with the affected public prior to issuing interim measures. Although this rule is becoming effective on May 1, based on the

emergency precipitating it, NMFS is allowing the public an opportunity to comment on the measure for 60 days after the rule becomes published. NMFS will address public comments, including any necessary changes, before these interim measures are renewed in 6 months (October 2012).

Similarly, NMFS finds good cause under 5 U.S.C. 553(d)(3) to waive the full 30-day delay in effectiveness for this rule, and to have it become effective on May 1, 2012. That date is the beginning of the fishing year for GOM cod. If this rule does not become effective on May 1, 2012, then the previous ACL and AMs would remain in effect, with the result that overfishing would not be reduced. These measures would increase overfishing on the GOM cod stock and, as such, are inconsistent with the Magnuson-Stevens Act, the stated intent of the GOM cod rebuilding program, and the FMP. Moreover, failing to have the rule effective on May 1, 2012, may lead to confusion in the fishing community as to what regulations govern the harvest of GOM cod. Thus, the 30-day delay is impracticable and contrary to the public interest, and NMFS waives the requirement and makes this rule effective on May 1, 2012.

NMFS has consulted with the Office of Information and Regulatory Affairs (OIRA) and due to the circumstances described above this action is exempt from review under Executive Order 12866.

Under section 608 of the Regulatory Flexibility Act, an agency may waive the requirement to perform a regulatory flexibility analysis for a rule where the agency finds that the “rule is being promulgated in response to an emergency that makes compliance or timely compliance with [the regulatory flexibility analysis requirements] impracticable.” 5 U.S.C. 608. As discussed in the preamble to this interim rule, and as elaborated in this classification section, NMFS takes this action to address an emergency situation in the GOM cod fishery. Undertaking

a regulatory flexibility analysis would delay this action and put the GOM cod and any small businesses that depend on it at further risk. Because the nature of this emergency requires immediate action, NMFS finds that compliance with the Regulatory Flexibility Act is impracticable. Thus, the requirements of the Regulatory Flexibility Act are hereby waived.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 29, 2012

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Alan D. Risenhoover,  
Acting Deputy Assistant Administrator  
For Regulatory Programs,  
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.

2. In § 648.89,

a. Amend paragraph (b)(1) introductory text by removing the reference “paragraph (b)(3)” and adding “paragraph (b)(5) in its place”;

b. Suspend paragraphs (b)(3), (c)(1)(i), and (c)(2)(i); and

c. Add new paragraphs (b)(5), (c)(1)(vi), and (c)(2)(vi) to read as follows:

§ 648.89 Recreational and charter/party vessel restrictions.

(b)\* \* \*

(5) GOM cod. Private recreational vessels and charter party vessels described in paragraph (b)(1) of this section may not possess cod smaller than 19 inches (48.26 cm) in total length when fishing in the GOM Regulated Mesh Area specified under § 648.80(a)(1).

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(vi) Unless further restricted by the Seasonal GOM Cod Possession Prohibition specified under paragraph (c)(1)(v) of this section, each person on a private recreational vessel may possess no more than 9 cod per day in, or harvested from, the EEZ.

\* \* \* \* \*

(2) \* \* \*

(vi) Unless further restricted by the Seasonal GOM Cod Possession Prohibition specified in paragraph (c)(2)(v) of this section, each person on a charter/party vessel may possess no more than 9 cod per day.

\* \* \* \* \*

[FR Doc. 2012-7972 Filed 04/02/2012 at 8:45 am; Publication Date: 04/03/2012]