

Analysis of Whether Fishing in State Waters by Vessels Without a Northeast Multispecies Permit is Consistent with the Northeast Multispecies Fishery Management Plan

EXECUTIVE SUMMARY

Section 110 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (Reauthorization Act) requires the Secretary of Commerce (Secretary) to determine whether fishing for regulated groundfish species in state waters by vessels without a Federal groundfish permit is not consistent with the Northeast (NE) Multispecies Fishery Management Plan (FMP). If such a determination is made, the Reauthorization Act requires the Secretary to cure such inconsistencies pursuant to Section 306(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Based on the language contained in Section 306(b) of the Magnuson-Stevens Act, this analysis defines “not consistent with the NE Multispecies FMP” to mean fishing activities that would substantially and adversely affect the carrying out of the NE Multispecies FMP. Two threshold criteria were used to evaluate whether groundfish landed by vessels fishing for regulated species in state waters without a Federal permit would not be consistent with the NE Multispecies FMP. First, to determine whether such activities would substantially affect the carrying out of the FMP, groundfish landings from each state were evaluated to examine whether vessels fishing in state waters without a Federal groundfish permit caught more than a *de minimis* amount of regulated species, defined as landing less than one percent of the yearly target total allowable catch (TAC) levels established for each species. Second, to determine whether such activities would adversely affect the carrying out of the FMP, total groundfish catch was then evaluated to examine whether state groundfish landings were sufficient to cause the entire groundfish fishery, including state and Federal commercial groundfish vessels and recreational vessels, to exceed yearly target TAC levels for any regulated species. Finally, a Federal regulatory action currently under development was evaluated to determine whether that action would reduce groundfish landings from state waters by vessels fishing in state waters and not subject to Federal regulations.

An examination of groundfish landings by vessels fishing for groundfish in state waters without a Federal groundfish permit found that vessels fishing for groundfish without a Federal groundfish permit in the waters of only one state (Massachusetts) landed more than a *de minimis* amount of regulated species during fishing year (FY) 2005, the year for which the most recent landings data are available. Thus, vessels fishing for groundfish without a Federal groundfish permit in states other than Massachusetts are not sufficient to substantially affect the carrying out of the NE Multispecies FMP. In addition, despite the fact that vessels fishing in Massachusetts state waters exceeded *de minimis* landings for four regulated species, none of the yearly target TACs for these species was exceeded during FY 2005. Further, total groundfish catch, including groundfish landed by vessels fishing for groundfish without a Federal groundfish permit in the waters of every state that lands groundfish, did not exceed yearly target TAC levels for any regulated species (a proxy for determining fishery performance relative to fishing mortality rate (F) targets) during FY 2005. Thus, groundfish landed by vessels fishing in state waters without

Federal groundfish permits do not adversely affect the carrying out of the FMP because they do not compromise the ability of the groundfish fishery to achieve the conservation objectives of the NE Multispecies FMP. As a result, this analysis concludes that vessels fishing for groundfish in state waters without a Federal groundfish permit are consistent with the NE Multispecies FMP because such operations do not substantively and adversely affect the carrying out of the FMP.

A Federal regulatory action currently under development further buttresses this conclusion by proposing to eliminate existing regulatory loopholes that have historically allowed federally permitted groundfish vessels to fish for groundfish within state waters under state regulations. Historically, some limited access NE multispecies vessel owners have delayed the renewal of their Federal limited access groundfish permits and moved their permits among different vessels in order to operate outside the purview of Federal groundfish regulations when fishing in state waters. This action would prohibit a vessel issued a Federal limited access permit from fishing in state waters until such time that they have successfully renewed their Federal limited access permits. Further, this action would only allow one vessel replacement during each FY, if implemented as proposed. If implemented as proposed, this action will close this loophole and reduce the amount of groundfish caught by such vessels within state waters by approximately 90,000 lb--the amount of groundfish landed by such vessels during FY 2005. While this action would not eliminate groundfish landings from state waters by vessels not holding Federal groundfish permits, it would offer further assurance that groundfish landings by vessels operating in state waters without a Federal groundfish permit would not undermine the conservation objectives of the FMP.

INTRODUCTION

In Section 110 of the Reauthorization Act passed by Congress in December 2006 and signed into law on January 12, 2007, Congress required the Secretary to determine, within 60 days after the date of enactment of the Reauthorization Act (*i.e.*, by March 13, 2007), “whether fishing in state waters without a New England multispecies groundfish fishery permit on regulated species within the multispecies complex is not consistent with the applicable Federal fishery management plan.” Further, if the Secretary determines that fishing for groundfish in state waters without a Federal permit is “not consistent with the plan, the Secretary shall, in consultation with the Council, and after notifying the affected State, develop and implement measures to cure the inconsistency pursuant to section 306(b).” In response to this statutory requirement, the National Marine Fisheries Service (NOAA Fisheries Service) prepared the following analysis to determine whether groundfish landings by vessels fishing without a Federal permit are consistent with the NE Multispecies FMP and to evaluate whether a Federal regulatory action that is currently under development that would limit the ability of federally permitted groundfish vessels to fish in state waters outside of the FMP would reduce the impact of state groundfish landings on the NE Multispecies FMP.

BACKGROUND

Federal Management of the Groundfish Fishery

Under the Magnuson-Stevens Act, the Secretary, in conjunction with the appropriate fishery management council, is charged with developing FMPs to regulate the harvest of fish species within the exclusive economic zone outside of the seaward boundary of each of the coastal states of the Northeast. The seaward boundary of the coastal states within the Northeast extends out to 3 miles from the shore. Therefore, authority for managing fishing operations within 3 miles of the coast (*i.e.*, within “state waters” outlined in the Congressional mandate) resides with each individual state, while the authority for managing fisheries conducted more than 3 miles from the coast resides with the Secretary. The NE multispecies fishery occurs predominantly in Federal waters and the NE Multispecies FMP is the primary management scheme used to ensure that New England groundfish species meet the conservation objectives of the Magnuson-Stevens Act.

The term “New England multispecies groundfish permit” used in the Congressional mandate is interpreted to mean a Federal permit issued pursuant to the regulations implemented by the NE Multispecies FMP, as developed by the New England Fishery Management Council (Council). The NE Multispecies FMP outlines the management measures for 12 groundfish species off the New England and Mid-Atlantic coasts. The FMP defines a subset of the 12 species managed under the FMP as “regulated species.” Regulated species contribute to the majority of the commercial and recreational catch under the FMP and include cod, haddock, yellowtail flounder, pollock, plaice, witch flounder, white hake, windowpane flounder, winter flounder, and redfish. Many of the 10 regulated species managed under the FMP are divided into specific geographic stocks, or groups of a particular species linked by particular shared characteristics. As a result, the FMP manages a total of 19 groundfish stocks of regulated species. Regulated species are

currently managed through effort controls in the form of limitations on the number of days that a vessel may fish for groundfish (*i.e.*, the days-at-sea (DAS) program), trip limits, gear requirements, and area and seasonal closures, among other provisions. All of these measures help ensure that the fishery achieves the conservation objectives established under the FMP.

The conservation objectives of the FMP are based upon the Magnuson-Stevens Act's requirement that all FMPs must prevent overfishing and rebuild overfished stocks. In order to do so, Amendment 13 to the FMP established rebuilding programs designed to reduce F on overfished stocks in order to rebuild stock biomass and achieve optimum yield from the fishery. To measure the progress of the fishery towards meeting these conservation objectives, the FMP has developed yearly target TAC amounts for each stock that indicate whether the fishery is operating in a manner that is consistent with the established rebuilding programs for each stock. If the fishery does not exceed these yearly target TACs, the fishery should be operating in a manner that is consistent with the rebuilding programs established by the FMP.

Relationship Between State and Federal Groundfish Regulations

A commercial fishing vessel may not fish for groundfish in Federal waters without a Federal groundfish permit. A vessel not issued a Federal groundfish permit may fish for groundfish in state waters under the applicable state fishing regulations. A vessel issued a Federal fishing permit may only fish in both Federal and state waters under the more restrictive regulations, including Federal regulations for groundfish, when fishing within state waters (see 50 CFR 648.3).

All groundfish caught in either state or Federal waters count toward assessing F on each groundfish stock. Because groundfish stocks are managed in terms of total F on each stock from all sources, fishing measures implemented under the NE Multispecies FMP are designed to ensure that total groundfish catch does not exceed yearly target TAC amounts calculated for each stock, a proxy for determining whether the fishery is achieving the conservation objectives of the FMP. As a result, if groundfish landings from state waters remain relatively constant, the fishery should achieve the conservation objectives established by the FMP. However, should state landings become a greater proportion of the overall groundfish landings, state groundfish landings may increase the F on a particular groundfish stock that cannot be directly controlled by the NE Multispecies FMP. If this were to occur, it may be necessary to implement more restrictive regulations in the Federal groundfish fishery to ensure that total groundfish catch does not exceed yearly target TAC amounts and that groundfish stocks continue to rebuild according to the Amendment 13 rebuilding programs. Therefore, it is important to consider the amount of groundfish landed by vessels fishing without a Federal groundfish permit in state waters to assess the impact of the fishing by such vessels on the Federal groundfish regulations.

INTERPRETATION AND APPLICATION OF THE TERMS USED IN THIS ANALYSIS

To determine whether fishing for regulated species in state waters without a Federal groundfish permit is not consistent with the NE Multispecies FMP, this analysis interprets the key term "not

consistent with the NE Multispecies FMP” in light of the apparent intent of Section 110 of the Reauthorization Act. Section 110 specifies that, if the Secretary finds that fishing for groundfish in state waters without a Federal groundfish permit is not consistent with the applicable FMP, the Secretary “shall develop and implement measures to cure the inconsistency pursuant to section 306(b) (of the Magnuson-Sevens Act).” Under Section 306(b)(1)(B) of the Magnuson-Stevens Act, the Secretary is authorized to regulate a predominantly Federal fishery in state waters only when the state has taken action, or omitted to take action, the results of which will substantially and adversely affect the carrying out of such fishery management plan. Because any “cure” for an inconsistency as mandated by Section 110 of the Reauthorization Act ultimately can only be authorized if the results of such inconsistency will “substantially and adversely affect” the carrying out of the applicable FMP, the interpretation of the term “not consistent with the NE Multispecies FMP” should be based on language found at Section 306(b)(1)(B) of the Magnuson-Stevens Act. Accordingly, this analysis concludes that fishing in a state’s waters for regulated species without a NE multispecies permit is not consistent with the NE Multispecies FMP only if such fishing will substantially and adversely affect the carrying out such FMP.

In applying this interpretation, two threshold criteria are used. First, fishing activities that will “substantially” affect the carrying out of the FMP are interpreted as those activities that result in more than a “*de minimis*” amount of groundfish landings from state waters, defined as landing more than one percent of the yearly target TAC of each regulated species. The “*de minimis*” standard is derived from the Atlantic States Marine Fisheries Commission’s (ASMFC) interpretation of the term. The ASMFC allows states with minimal participation in a particular fishery to be granted “*de minimis*” status and be exempt from certain requirements outlined in a FMP. The ASMFC defines “*de minimis* status” as those states whose actions “would be expected to contribute insignificantly to a coastwide conservation program required by a Fishery Management Plan or amendment” (ASMFC 2003). The latest review of the ASMFC’s Winter Flounder FMP defines *de minimis* status as those states whose state landings constitute less than one percent of the coastwide commercial or recreational landings for the preceding 3 years (ASMFC 2005). For this analysis, “*de minimis*” means landings of a particular regulated species that equal less than one percent of the yearly target TAC for each regulated species. *De minimis* landings by state only permitted vessels provide *prima facie* evidence that a state’s fishing activities do not “substantially” affect the carrying out of the NE Multispecies FMP. If landings of regulated species by vessels fishing for groundfish in state waters without a Federal groundfish permit are below the *de minimis* amount for each species, even absent any state regulations, there would be insufficient mortality from such landings to undermine achieving the goals and objectives of the FMP and, therefore, substantially affect the carrying out of the FMP.

Second, even if a state’s landings of regulated species exceeded *de minimis* levels for each species, such states’ fishing activities would not be considered to “adversely” affect the carrying out of the NE Multispecies FMP if total groundfish catch (including landings and discards from state and Federal commercial vessels and catch from recreational vessels) exceeds the yearly target TAC for any regulated species, thereby undermining the conservation objectives of the NE Multispecies FMP. If landings of regulated species by vessels fishing for groundfish in state waters without a Federal groundfish permit are more than the *de minimis* amount for a particular

species, but the total groundfish catch resulting from state and Federal commercial groundfish landings, commercial discards, and recreational groundfish catch is less than the yearly target TAC amounts for each species, then there is *prima facie* evidence that fishing activities in that state's waters are not sufficient to adversely affect the carrying out of the FMP because they do not prevent the fishery from achieving the conservation objectives of the FMP.

Thus, fishing for regulated species in state waters without a Federal groundfish permit would be consistent with the NE Multispecies FMP if such operations do not result in more than a *de minimis* amount of groundfish catch and/or would not cause the total groundfish catch, including commercial discards and groundfish catch from Federal commercial and recreational groundfish vessels, to exceed the yearly target TAC levels for each species.

ANALYSIS

Data Used

Prior to FY 2004, individual target TACs were specified for stocks of cod, haddock, and yellowtail flounder only, while an aggregate target TAC was specified for the remaining seven regulated species. In addition, Federal groundfish regulations were substantially revised with the May 1, 2004, implementation of Amendment 13 to the NE Multispecies FMP, including the establishment of revised rebuilding programs for regulated species. Further, because only preliminary Federal commercial landings data are available through August 2006, these data cannot be compared to the yearly target TACs established under the NE Multispecies FMP. Thus, the only groundfish landings data that can be used to compare groundfish landings to the yearly target TACs for each species managed under the FMP in this analysis are data from FYs 2004 and 2005. However, to provide the most accurate assessment of recent fishing activity in state waters, only FY 2005 data were used for this analysis because these data represent the most recent data available.

The states of Maine, New Hampshire, and Connecticut submit landings data on a calendar year basis. As a result, only partial landings data for these states are available for FY 2005 (*i.e.*, landings data are available from May 2005 through December 2005 only). Although landings data for these states are incomplete, because these data represent over 66 percent of the yearly catch for the fishing year and that preliminary information indicates that these states landed very little groundfish between January and April 2006, it was determined that these landings data are sufficient for the purposes of this analysis¹ and are the most recent data available in the groundfish fishery that also reflect the most recently implemented management measures.²

¹ There are several other limitations to the data used to prepare this analysis. First, landings data are not collected in sufficient detail to develop precise estimates of the extent of groundfish landings outside of the FMP. This is because landings data from dealer records identify the amount of each species landed, but do not identify where that fish was harvested. As a result, it is not possible to accurately identify the amount of each stock landed by vessels without a Federal groundfish permit for this analysis. Therefore, landings data discussed in this analysis are presented at the species level, not at the stock level. Second, dealer landings data assume that groundfish were harvested within the waters of the same state as the dealer location. This may not be completely representative of vessel operations, particularly for dealers located in ports adjacent to the waters of another state. Third, landings

Groundfish Landings by Vessels Operating Without a Federal Groundfish Permit

To evaluate the scope of groundfish landings by vessels operating without a Federal groundfish permit, it is necessary to consider groundfish landings under two scenarios: Vessels operating without being issued a Federal groundfish permit (*i.e.*, state groundfish vessels), and vessels that have been issued a Federal groundfish permit during a particular fishing year (*i.e.*, between May 1 and April 30), but that have landed groundfish, presumably caught in state waters, either before renewing their Federal limited access groundfish permit or being issued a Federal open access groundfish permit for a particular fishing year, or after transferring their Federal limited access groundfish permit onto another vessel or canceling their Federal open access groundfish permit. Groundfish landings under either scenario are assumed to be landed outside of the control of the FMP and are, therefore, subject to state regulations.

Table 1 indicates groundfish landings by state groundfish vessels during FY 2005. Table 2 indicates groundfish landings by Federal vessels that have landed groundfish either before being issued/renewing their Federal groundfish permit, or after canceling/transferring their Federal groundfish permit to another vessel during FY 2005. Finally, Table 3 calculates the total amount of groundfish landed by all vessels fishing outside of the NE Multispecies FMP (*i.e.*, groundfish landings under both scenarios described above) during FY 2005.

FINDINGS

As discussed above, two threshold criteria were used to determine whether fishing for groundfish in state waters by vessels without a Federal groundfish permit is not consistent with the NE Multispecies FMP. These criteria include evaluating whether vessels fishing for regulated species in state waters without a Federal groundfish permit landed more than a *de minimis* amount of groundfish and evaluating whether such landings, combined with Federal commercial landings and discards along with recreational catch, resulted in the fishery exceeding the yearly target TAC amounts for any regulated species.

data from particular states may be limited due to data entry difficulties, differences in the reporting requirements for each state, and differences in data collection timing and format. Fourth, the landings data for each state represent landings by vessels without a valid Federal vessel permit number selling to dealers without a valid Federal dealer permit. There is the possibility that these data over- or under-estimated state groundfish landings by vessels fishing without a Federal groundfish permit, because some landings would not have appeared in the query used to generate the data used for this analysis.

² FY 2004 data were examined to determine if groundfish landings changed substantially between FYs 2004 and 2005. These data reveal that overall groundfish landings by vessels fishing for groundfish without a Federal groundfish permit have decreased substantially between FYs 2004 and 2005.

Groundfish Landings from Each State Compared to *De Minimis* Groundfish Levels

Table 4 compares state groundfish landings with *de minimis* levels for each regulated species based on the FY 2005 target TACs.³ This table indicates that the groundfish landings of only one state (Massachusetts) exceeded the *de minimis* level of landings as compared to the FY 2005 target TACs, and only for four species (cod, yellowtail flounder, American plaice, and windowpane flounder) during FY 2005. Because these data reveal that only the groundfish landings of vessels operating in the state waters of Massachusetts exceeded the *de minimis* level of landings for any groundfish species during FY 2005, groundfish landings by all other states do not substantially affect the carrying out of the NE Multispecies FMP.

Groundfish Landings from Each State Compared to Yearly Target TACs for Each Species

To further evaluate whether state groundfish landings adversely affect the carrying out of the NE Multispecies FMP, it is necessary to examine state groundfish landings in relation to the yearly target TACs for each species. Table 5 identifies the portion of the yearly target TAC of each species caught by state groundfish vessels during FY 2005. Total groundfish catch is defined as the total amount of groundfish caught by state and Federal commercial fishing vessels, along with estimates of discards and recreational catch for specific species. Discards and recreational catch estimates were based upon data obtained in the latest groundfish stock assessment (Groundfish Assessment and Review Meeting (GARM) 2005 – see Mayo and Terceiro 2005) and are the same values used in analyses conducted for Framework Adjustment (FW) 42 (NEFMC 2006) (see Appendix 1 for a description of the methods used in the FW 42 analysis). These estimates are necessary because the yearly target TACs for specific species include recreational catch and/or commercial discards.

As highlighted above, Massachusetts was the only state whose groundfish landings exceeded *de minimis* levels for any regulated species, exceeding *de minimis* levels for cod, yellowtail flounder, American plaice, and windowpane flounder. The data in Table 5 indicate that groundfish landings caught by state commercial vessels in Massachusetts waters constitute between 1 – 12 percent of the yearly target TACs for these species. However, despite this, none of the yearly target TACs for these species was exceeded during FY 2005. Thus, while Massachusetts landings of cod, yellowtail flounder, American plaice, and windowpane flounder exceeded *de minimis* levels during FY 2005, they did not contribute to the fishery exceeding the yearly target TACs established for each of these regulated species.

The yearly target TACs identified in Table 5 include all stock components for each regulated species, as noted above. However, because vessels without a Federal groundfish permit cannot fish for Georges Bank (GB) stocks of yellowtail flounder or winter flounder due to the fact that these stocks are located outside of state jurisdiction and entirely within Federal waters, this analysis also considered the catch of these species as compared to the yearly target TACs minus the GB stock components for yellowtail flounder and winter flounder. This evaluation is

³ Because landings data are not reported by stock, aggregate *de minimis* amounts for the yearly target TAC of each species were prepared for this analysis instead.

presented in Table 6 and reveals that even when the GB stock components are removed, the total catch of yellowtail flounder and winter flounder still remained below the yearly target TACs for these species. Although this analysis did not explicitly separate state landings into individual stock components for the reasons specified above, a preliminary evaluation of groundfish landings for each stock of regulated species was presented for FY 2005 in Table 7. This evaluation indicates that the total catch of groundfish, including landings and discards from Federal and state commercial vessels and recreational vessels, remained less than the yearly target TAC for each stock of regulated species.

An examination of landings by vessels fishing without a Federal groundfish permit in Massachusetts state waters indicates that groundfish landings decreased substantially between FYs 2004 and 2005. While the cause of such decreases in groundfish landings is not entirely clear, it is likely that at least a portion of these decreases can be attributable to the recent implementation of more restrictive state groundfish regulations. Some of these regulations were intentionally implemented on a temporary or emergency basis and, since that time, portions of these regulations have been implemented indefinitely. However, concern remains that some of these regulations could be modified or expire if not reinstated. As a result, should such regulations be modified, the state groundfish regulations could once again become less restrictive than Federal groundfish regulations and could result in increased groundfish landings by vessels operating within state waters. Because groundfish landings by vessels operating within Massachusetts state waters are substantially greater than any other state, NOAA Fisheries Service will continue to monitor state groundfish landings to ensure that such landings do not cause the fishery to exceed the yearly target TACs of any stock of regulated species.

Because the yearly target TACs for each species are used as a proxy to determine whether the fishery is achieving the conservation objectives of the FMP, the most recent data available suggest that groundfish catch by vessels fishing for regulated species in state waters, including Massachusetts, without a Federal groundfish permit has not caused the fishery to exceed the yearly target TACs for any regulated species. Therefore, such fishing activities do not undermine the rebuilding programs established by the NE Multispecies FMP and do not adversely affect the carrying out of the FMP.⁴

Ongoing Efforts to Minimize the Impact of Vessels Fishing Outside of the FMP

Based upon discussions with the Council and the Massachusetts Division of Marine Fisheries, the Secretary is currently developing a management action that would further ensure that state

⁴ Because target TACs are not considered to be precise estimates of F for a particular calendar year, these findings do not necessarily indicate that the fishery is achieving the conservation objectives of the FMP. However, the fact that landings of overfished groundfish stocks, in particular, are generally decreasing in most states and are all within the target TAC levels in FY 2005 are good indications that the fishery is on the right track toward achieving the conservation objectives of the FMP. Thus, assuming that similar overall trends in groundfish catch are observed in 2006 and beyond, there is little concern that groundfish landings from vessels operating outside of the FMP will necessitate further restrictions on Federal groundfish vessels to maintain the Amendment 13 rebuilding programs for overfished stocks and that total groundfish catch will remain below the yearly target TACs for each regulated species.

fishing activities are consistent with the NE Multispecies FMP by eliminating potential loopholes in Federal fishing regulations that have historically allowed federally permitted groundfish vessels to fish for groundfish within state waters under state regulations by delaying the renewal of their Federal groundfish permits and by transferring their permits onto different vessels. This action would prohibit a vessel issued a Federal limited access permit from fishing in state waters until such time that it has successfully renewed its Federal limited access permit. Further, this action would only allow one vessel replacement during each FY, if implemented as proposed. The state of Massachusetts has implemented similar measures to address such loopholes by prohibiting the issuance of a Massachusetts groundfish fishing endorsement to vessels that have been issued a Federal NE multispecies permit.

Groundfish landings by vessels issued a limited access NE multispecies permit and fishing outside of the NE Multispecies FMP by taking advantage of such loopholes are summarized in Tables 8 and 9.⁵ In FY 2004, groundfish landings by vessels operating in this manner totaled nearly 363,000 lb, but decreased to just over 90,000 lb during FY 2005. This represents a reduction of over 272,000 of groundfish (all species), including a reduction of just over 212,000 lb for vessels operating in Massachusetts alone. If this action is implemented as proposed, it is expected that groundfish landings could potentially be reduced by as much as 90,000 lb (the amount of groundfish landed by vessels fishing in state waters either before renewing their limited access groundfish permits or after transferring their limited access groundfish permits to another vessel during FY 2005), assuming the decreasing trend observed between FYs 2004 and 2005 continues. While this action would not completely eliminate groundfish landings by vessels fishing in state waters without a Federal groundfish permit, the action would reduce the potential that groundfish landings by vessels operating outside of the FMP will undermine the conservation objectives of the FMP.

CONCLUSIONS

The findings presented in this analysis indicate that only one state (Massachusetts) caught more than a *de minimis* amount of any regulated species during FY 2005, the most recent FY for which sufficient data are available for this analysis. Further, even though vessels fishing for groundfish in Massachusetts state waters caught more than a minimal amount of several regulated species, such landings were not sufficient to cause the fishery as a whole, including groundfish landings and discards from state and Federal commercial vessels, as well as catch from recreational vessels, to exceed the yearly target TAC for any regulated species. As a result, groundfish landings by vessels fishing for regulated species without a Federal groundfish permit in the waters of any state do not substantially and adversely affect the carrying out of the NE Multispecies FMP. Further, a management action currently being developed by the NOAA Fisheries Service is likely to further reduce the impact of groundfish landings from vessels operating outside of the FMP by eliminating a regulatory loophole that has previously allowed

⁵ Because a vessel can be issued a Federal open access groundfish permit at any time during the fishing year, this action would not be able to reduce groundfish landings by vessels operating under a Federal open access groundfish permit and would only reduce groundfish landings by vessels transferring or delaying the renewal of their Federal limited access groundfish permits.

federally-permitted groundfish vessels to land groundfish from state waters before the vessel renewed its Federal limited access groundfish permit or after the vessel transferred its Federal limited access groundfish permit to another vessel. Therefore, this analysis concludes that vessels fishing for regulated species in state waters without a Federal groundfish are consistent with the NE Multispecies FMP because such operations do not substantively and adversely affect the carrying out of the FMP.

Because each state's fishing activities meet both of the two thresholds established for determining consistency with the NE Multispecies FMP, it was not necessary to do a comparison of each state's fishing regulations with Federal fishing regulations to determine whether the Secretary needs to "cure" any inconsistencies with the NE Multispecies FMP. However, an evaluation of each state's fishing regulations was prepared to provide context to this analysis. Shown in Appendix 2, this evaluation reveals that most state regulations are either consistent with, or more restrictive than, equivalent Federal regulations, but notes that no state has a comprehensive effort control program analogous to the DAS program established by the NE Multispecies FMP.

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Appendix 1



New England Fishery Management Council

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Frank Blount, *Chairman* | Paul J. Howard, *Executive Director*

MEMORANDUM

DATE: June 6, 2005
TO: Council Members
FROM: Groundfish Plan Development Team
SUBJECT: **Preliminary Landing Statistics**

1. Groundfish stock assessments will be completed in August, 2005, and reported to the Council at the September, 2005 Council meeting. Since there will only be a short time to react to this information before the final vote on the biennial adjustment in November, the Council expressed an interest in reviewing preliminary landings information so that potential problem stocks could be identified before the assessments. NMFS has published preliminary landing statistics for the period January 2004 through January 2005. The following pages summarize this information for both calendar and fishing year 2004. Catch estimates are compared to Amendment 13 target TACs after making assumptions on commercial discards and recreational harvest.
2. Caution should be used in drawing conclusions about fishing mortality from these data. The catch weight information shown does not consider age composition, fishery selectivity, trends in relative abundance, and other factors that affect mortality estimates. Some groundfish stock assessments have shown retrospective patterns in the past. Target TACs generated from assessments with a retrospective pattern may be a poor estimate of the catch that will produce the desired fishing mortality. Definitive conclusions on fishing mortality rates will be provided by assessments in August.
3. Calendar year landings are summarized in Table 1. Since assessments are based on calendar year data, this table provides a preliminary indication of whether fishing mortality rates in CY 2004 will meet Amendment 13 targets (note these catches do not accurately reflect the overall impacts of Amendment 13 since those regulations were implemented May 1). This table includes estimates of commercial discards and recreational harvest for those stocks where these components are included in the target TAC; the method used to develop these estimates is described in enclosure (1). The rudimentary estimation procedure used for developing these estimates introduces uncertainty into these analyses.
4. Based on the comparison between catches and target TACs shown in Table 1, Amendment 13 fishing mortality targets may have been exceeded in CY 2004 for GB cod, GOM cod, GB

yellowtail flounder, and CC/GOM yellowtail flounder. Catches for other stocks are lower than the target TACs, suggesting that Amendment 13 mortality targets may have been met in CY 2004.

5. Since Amendment 13 was implemented in May, calendar year catches do not provide a good indication of the amendment's impacts. An estimate of fishing year 2004 catches is shown in Table 2. Since landings data are only available for May 2004 through January 2005, the data include an estimate of catches in February 2005 – April 2005 that is explained in the enclosure. This table includes rough estimates of commercial discards and recreational harvest for those stocks where these components are included in the target TAC; the method used to develop these estimates is included in enclosure (1). The rudimentary estimation procedure used for developing these estimates introduces uncertainty into these analyses and does not account for changes in recreational harvest or discards that may result from regulatory changes.

6. Based on the comparison between estimated fishing year catches and FY 2004 target TACs shown in Table 2, target TACs may be exceeded for GOM cod, GB yellowtail flounder, and GB winter flounder in FY 2004.

Calculation of Preliminary Catches for CY/FY 2004

Calendar Year

1. Commercial landings are taken from the monthly preliminary landings estimates published by NMFS NERO at <http://www.nero.noaa.gov/ro/fso/mul.htm>.

2. For those stocks where commercial discards are included in the TAC, discards were estimated as follows:

(a) The ratio of commercial discards/commercial landings from the most recent assessment (GARM, SAW 36, or SAW 37) was multiplied by the preliminary commercial landings;

(b) For GOM cod, a second estimate was based on 62.5% of the previous ratio, reflecting the possibility that regulatory discards may have been reduced by the increased trip limit (500 lbs/800 lbs=0.625).

3. For those stocks where recreational harvest is included in the TAC, recreational harvest was estimated as follows:

(a) The ratio of recreational harvest/commercial landings from the most recent assessment (GARM, SAW 36, or SAW 37) was multiplied by the preliminary commercial landings;

(b) A second estimate is shown for GOM cod. For the second estimate, the number of cod harvested (A+B1) in 2001 was divided by the number of cod harvested (A+B1) in 2004. This ratio was multiplied by 2600 mt, the estimate of 2001 recreational harvest in the GARM.

4. Estimates are not shown for ocean pout and halibut.

Fishing Year

1. Preliminary commercial landings statistics were used for the period May 2004 through January 2005.

2. For each stock, the catch for May through January was divided by the total fishing year catch for each fishing year from FY 1999 through FY 2003. This ratio was averaged over the period, and the result divided into the preliminary landings for May 2004 through January 2004 to estimate FY 2004 commercial landings.

3. Discards and recreational catch were estimated as above, with the exception that the total catch of GB yellowtail flounder is as reported on the NMFS NERO web page.

4. Estimates are not shown for ocean pout, halibut, and windowpane flounders.

| | Discards as % of Comm. Landings | Rec Harvest as % of Comm. Landings | CY 2004 Preliminary Landings | Discard Estimate | Recreational Harvest Estimate | Total Estimated Catch | FY 2004 TAC | Catch/TAC | FY 2005 TAC |
|-------------------|--|--|------------------------------------|---------------------|-------------------------------------|-----------------------------|-------------------|-------------|-------------------|
| GB Cod | | | 3,503 | 0 | 0 | 3,503 | 2,949 | 119% | 4,830 |
| GOM Cod (1) | 34% | 59% | 3,718 | 1,263 | 2,189 | 7,170 | 4,850 | 148% | 6,372 |
| GOM Cod (2) | 21% | see text | 3,718 | 789 | 1,300 | 5,807 | 4,850 | 120% | 6,372 |
| GB Haddock | | | 7,194 | 0 | 0 | 7,194 | 14,955 | 48% | 12,282* |
| GOM Haddock | | | 957 | 0 | 0 | 957 | 4,831 | 20% | 4,735 |
| GBYTF | 13% | | 6,197 | 815 | 0 | 7,012 | 6,100 | 115% | 4,260 |
| SNE/MA YTF | 0% | | 165 | 0 | 0 | 165 | 707 | 23% | 1,982 |
| CC/GOM YTF | 19% | | 791 | 150 | 0 | 941 | 881 | 107% | 1,233 |
| Plaice | 12% | | 2,425 | 281 | 0 | 2,706 | 3,695 | 73% | 3,625 |
| Witch Flounder | 23% | | 2,879 | 671 | 0 | 3,550 | 5,174 | 69% | 6,992 |
| GB Winter | | | 2,300 | 0 | 0 | 2,300 | 3,000 | 77% | 3,000 |
| GOM Winter | 3% | 8% | 558 | 15 | 44 | 617 | 3,286 | 19% | 2,634 |
| SNE/MA Winter | 2% | 13% | 1,246 | 23 | 160 | 1,429 | 2,860 | 50% | 3,550 |
| Redfish | | | 860 | 0 | 0 | 860 | 1,632 | 53% | 1,725 |
| White Hake | | | 3,413 | 0 | 0 | 3,413 | 3,839 | 89% | 3,822 |
| Pollock | | | 4,989 | 0 | 0 | 4,989 | 10,584 | 47% | 10,584 |
| N Window | | | 58 | 0 | 0 | 58 | 534 | 11% | 534 |
| S Window | | | 96 | 0 | 0 | 96 | 285 | 34% | 273 |

Table 1 – Preliminary estimate of CY 2004 regulated groundfish catch

Note: FY 2005 GB haddock and GB cod TACs are based on Amendment 13 target TAC minus CA TAC in 2005.

| Stock | Discards as % of Comm. Landings | Rec Harvest as % of Comm Landings | Comm. Landings | Landings, % of total (FY 99-03 avg.) | Estimated Total Landings | Estimated Discards | Estimated Rec. Harvest | Estimated Total Catch | FY 2004 TAC | Estimated Catch/ TAC | FY 2005 TAC |
|----------------|---------------------------------|-----------------------------------|----------------|--------------------------------------|--------------------------|--------------------|------------------------|-----------------------|-------------|----------------------|-------------|
| | | | May-Jan | May-Jan | | | | | | | |
| GB Cod | | | 1,753 | 65% | 2,697 | 0 | 0 | 2,697 | 2,949 | 91% | 4,830 |
| GOM Cod (1) | 34% | 59% | 3,289 | 80% | 4,111 | 1,396 | 2,421 | 7,928 | 4,850 | 163% | 6,372 |
| GOM Cod (2) | 21% | see text | 3,289 | 80% | 4,111 | 873 | 1,300 | 6,284 | 4,850 | 126% | 6,372 |
| GB Haddock | | | 4,619 | 61% | 7,572 | 0 | 0 | 7,572 | 14,955 | 51% | 12,282* |
| GOM Haddock | | | 660 | 71% | 930 | 0 | 0 | 930 | 4,831 | 19% | 4,735 |
| GBYTF | 13% | | 5,224 | 64% | | | | 6,250 | 6,100 | 102% | 4,260 |
| SNE/MA YTF | 0% | | 118 | 65% | 182 | 0 | 0 | 182 | 707 | 26% | 1,982 |
| CC/GOM YTF | 19% | | 507 | 84% | 604 | 114 | 0 | 718 | 881 | 81% | 1,233 |
| Plaice | 12% | | 1,400 | 82% | 1,707 | 198 | 0 | 1,905 | 3,695 | 52% | 3,625 |
| Witch Flounder | 23% | | 2,157 | 73% | 2,955 | 689 | 0 | 3,643 | 5,174 | 70% | 6,992 |
| GB Winter | | | 2,711 | 85% | 3,189 | 0 | 0 | 3,189 | 3,000 | 106% | 3,000 |
| GOM Winter | 3% | 8% | 412 | 78% | 528 | 14 | 42 | 584 | 3,286 | 18% | 2,634 |
| SNE/MA Winter | 2% | 13% | 1,091 | 88% | 1,240 | 23 | 159 | 1,422 | 2,860 | 50% | 3,550 |
| Redfish | | | 281 | 78% | 360 | 0 | 0 | 360 | 1,632 | 22% | 1,725 |
| White Hake | | | 2,471 | 77% | 3,209 | 0 | 0 | 3,209 | 3,839 | 84% | 3,822 |
| Pollock | | | 3,917 | 74% | 5,293 | 0 | 0 | 5,293 | 10,584 | 50% | 10,584 |

Table 2 – Preliminary estimate of FY 2004 regulated groundfish catch

Note: FY 2005 GB haddock and GB cod TACs are based on Amendment 13 target TAC minus CA TAC in 2005.

Appendix 2

Consistency of State Groundfish Regulations with Federal Groundfish Regulations

The fishing regulations of each coastal state from Maine to North Carolina published on the state's resource management agency's website were compared to the fishing regulations implemented by the NE Multispecies FMP. Staff from specific state agencies were consulted to ensure that the most recent regulations were being compared to Federal groundfish regulations. Because many of the Federal regulations are not relevant to fishing operations within inshore state waters (e.g., offshore habitat closure areas, special management programs, etc.), this analysis focused on identifying particular state fishing regulations that authorize a vessel to fish in state waters, as well as those specific to fishing for groundfish, and comparing them to the pertinent Federal regulation, if available, rather than comparing each Federal groundfish regulation to state fishing regulations.

Three criteria were used to evaluate the consistency of state fishing regulations with those implemented by the NE Multispecies FMP. These criteria are defined as follows:

- Less restrictive than Federal regulations (e.g., a larger trip limit than Federal regulations)
- Consistent with Federal regulations (e.g., the same trip limit as the Federal regulations)
- More restrictive than Federal regulations (e.g., a smaller trip limit than Federal regulations)

Tables 1 – 12 summarize the findings of this comparison for each type of regulation identified. Each table lists a brief description of the relevant state regulation identified, the pertinent Federal regulation, if available, and a determination whether the regulations of each state is consistent with available Federal groundfish regulations based upon the three criteria listed above.

Without considering the overall effort-control program (*i.e.*, the DAS program) implemented under the NE Multispecies FMP and discussed further below, most states have implemented groundfish regulations that were either consistent with, or more restrictive than, the current Federal groundfish regulations. In fact, those states with the greatest participation in the groundfish fishery based upon landings information have implemented more regulations that are consistent with Federal groundfish regulations than states with less participation in the groundfish fishery. For example, Massachusetts is the state with the most groundfish landings from state waters and has implemented regulations that, with the few exceptions noted below, are consistent with Federal groundfish regulations. In contrast, Delaware does not have an extensive groundfish fishery within its waters and has not implemented many regulations that are consistent with Federal groundfish regulations (see Tables 2 and 3 for a clear example of how states with a greater participation in the groundfish fishery have implemented regulations that are consistent with the Federal groundfish size limits). One explanation for this observation is that groundfish stocks are very rarely encountered in states located south of New York and are not available in enough abundance to support a directed fishery, thereby minimizing the need to establish groundfish-specific fishing regulations. This is clearly illustrated in Tables 21 and 22 which indicate minimal groundfish landings in FYs 2004 and 2005 for the states of New Jersey, Delaware, Maryland, Virginia, and North Carolina.

The following state regulations were determined to be inconsistent with Federal groundfish regulations for the reasons listed in parenthesis:

- **Maine:**
 - Commercial possession limit for halibut: 4 fish/day, up to 50 fish/season (Federal regulations limit commercial possession of halibut to 1 fish per trip)
 - Recreational possession limit for pollock: 6 fish under 19” per day (Federal regulations do not allow the possession of any pollock under 19”)
- **New Hampshire:**
 - Recreational size limit for pollock: No size limit (Federal regulations impose a 19” size limit for pollock)
 - Commercial and recreational size limit for witch flounder and halibut: None specified (Federal regulations impose a 14” and 36” size limit for witch flounder and halibut, respectively)
- **Massachusetts:**
 - Recreational possession limit for cod: 2 fish/person, or 75 lb/private vessel between November – March (Federal regulations prohibit the possession of Gulf of Maine (GOM) cod from recreational vessels between November – March)
 - Recreational size limit for pollock: No size limit (Federal regulations impose a 19” size limit for pollock)
- **Rhode Island:**
 - Commercial possession limit for yellowtail flounder: Unlimited (Federal regulations limit commercial possession of yellowtail flounder off Rhode Island to 250 lb/DAS, up to 1,000 lb/trip)
 - Commercial and recreational size limit for cod: 19” and 20”, respectively (Federal regulations impose a commercial and recreational size limit for cod of 22” in the Southern New England (SNE) Regulated Mesh Area (RMA))
- **Connecticut:**
 - Commercial mesh size for gillnets: 3-5” (Federal regulations require vessels to use gillnets with 6.5” mesh in the SNE RMA)
- **New York:**
 - Commercial possession limit for cod: Unlimited (Federal regulations limit commercial possession of cod to 1,000 lb/DAS, up to 10,000 lb/trip in the SNE/Mid-Atlantic (MA) RMA)
 - Commercial possession limit for yellowtail flounder: Unlimited (Federal regulations limit commercial possession of yellowtail flounder to 250 lb/DAS, up to 1,000 lb/trip in the SNE/MA RMA)
 - Recreational possession limit for cod: Unlimited (Federal regulations limit recreational possession of cod off New York to 10 fish/person on every trip)
- **New Jersey:**
 - Recreational possession limit for cod: Unlimited (Federal regulations limit recreational possession of cod off New Jersey to 10 fish/person on every trip)

- Commercial and recreational size limit for cod: 21” (Federal regulations impose a commercial and recreational size limit for cod caught of 22” in the MA RMA)
- Commercial mesh size for gillnets: <2.75” when fishing under a mesh exemption and 5” in Raritan and Sandy Hook Bays (Federal regulations require vessels to use gillnets with 6.5” mesh in the MA RMA)

It is important to note that the primary means of controlling fishing effort in the Federal groundfish fishery is through restrictions on DAS, in conjunction with species size and trip limits, gear restrictions, and area closures. While many states rely on species size and trip limits, gear restrictions, and area closures, none of the states have a comprehensive effort control similar to the Federal DAS program. Therefore, despite implementing many other regulations that are consistent with the FMP, none of the states are completely consistent with the regulations implemented by the NE Multispecies FMP due to the lack of a comprehensive effort control system such as DAS.