

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CONSERVATION LAW FOUNDATION,  
et al.,  
Plaintiffs

CIVIL ACTION NO. 00-1134 (GK)

v.

DONALD L. EVANS, et al.,  
SECRETARY OF COMMERCE  
Defendants

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THIRD DECLARATION OF PATRICIA A. KURKUL

I, PATRICIA A. KURKUL, declare as follows:

1. I am the Northeast Regional Administrator of the National Marine Fisheries Service (NMFS), Gloucester, Massachusetts. In this capacity, I am responsible for the development of policy and the implementation of science and management programs for the living marine resources of the northeastern United States. I represent the Secretary of Commerce on the New England Fishery Management Council and in other regional activities. I supervise the 460 personnel in the Region who are charged with the implementation of fishery management plans.

2. I previously executed a declaration in this action on February 20, 2002, in support of Federal Defendant's Response to Plaintiffs' Request for Injunctive Relief and Statement with Respect to

Remedy, filed March 1, 2002. I also executed a declaration on March 11, 2002, correcting a misstatement regarding the anticipated date of publication of an interim final rule. The purpose of this declaration is to provide additional information on NMFS' plan to respond to the Court's December 28, 2001, Order and to bring the Northeast Multispecies Fishery Management Plan (FMP) into full compliance with the Sustainable Fisheries Act (SFA), the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) and all other applicable law as quickly as possible. It also responds to the Court's March 18, 2002, Order that NMFS provide to the Court the total allowable catches (TACs) for all species managed under Amendment 9 to the FMP, and the measures that would be used to achieve those TACs.

#### Assessment of the Interim Measures

3. NMFS has prepared a draft Environmental Assessment (EA), as required by the National Environmental Policy Act (NEPA), which analyzes the expected biological and socioeconomic impacts of a range of alternatives considered in the Secretarial interim action, which is the first of three sequential actions NMFS plans to take. The draft EA is under Agency review and is expected to be completed within 2 weeks. As stated in my declaration to the Court on March 1, 2002, the interim action will put in place restrictive measures to reduce fishing effort and fishing mortality on groundfish stocks in the Northeast and to reduce bycatch in the groundfish fishery. Through simultaneous, non-regulatory action, NMFS will also substantially increase at-sea observer coverage to better monitor and assess bycatch. Both the interim action and the increase in observer coverage will become effective on May 1, 2002, which is the start of the next fishing year.

4. The preferred alternative analyzed in the draft EA, which will be implemented through the Secretarial interim action, will reduce overfishing and fishing mortality rates (Fs) primarily through

restrictions on days-at-sea (DAS) use, revised seasonal closed areas, additional year-round closed areas, gear modifications, and more restrictive recreational fishing measures. The specific measures that will be implemented through interim action were described in my first declaration to the Court, filed March 1, 2002. The draft EA includes analyses of the expected environmental consequences of the measures contained in the preferred, non-preferred and status quo alternatives, from a NEPA perspective, as well as from the perspective of the required provisions of the Magnuson Act and other applicable law. These analyses quantify, to the extent possible, the anticipated reductions in fishing mortality on all regulated groundfish; the economic impacts on various vessel sizes, gear groups, gear/vessel groups, home port states, and port groups; the economic impacts of mesh size changes; the economic impacts of new recreational measures on both charter/party and private recreational anglers; the economic impacts on other sectors of the fishery; the impacts on habitat, including an Essential Fish Habitat Assessment; the direct, indirect, and cumulative economic impacts; impacts on small entities; long-term economic impacts; social impacts, including impacts on fishing communities (as required by National Standard 8); and an analysis of compliance with the Magnuson Act, all 10 national standards (including bycatch and safety at sea), the Coastal Zone Management Act, and the Paperwork Reduction Act. When impacts could not be quantified, qualitative assessments of the expected impacts were provided.

#### Impacts of the Interim Measures

5. Although the interim measures to be implemented on May 1, 2002, are intended to focus reductions in fishing mortality on Gulf of Maine (GOM) cod, because that is one of the most overfished stocks, the measures in the interim action will reduce fishing mortality on other stocks, as well. In almost all areas where the fishery operates, several stocks of groundfish occur together, along with other non-

groundfish species such as skates, spiny dogfish, and monkfish. Closures and gear restrictions that are targeted on cod will also reduce fishing effort on these other stocks. For many of the other species, the expected reductions in fishing mortality and landings are very substantial. This approach is consistent with the FMP, given the interrelated nature of the multispecies complex. The quantifiable reductions in Fs for regulated groundfish species that are expected to result from implementation of the interim measures are as follows:

**Estimated reductions, by percent, in commercial fishery mortality rates (May-October):**

<b>STOCK:</b>	<b>GOM</b>	<b>GB</b>	<b>SNE</b>	<b>CC</b>	<b>MA</b>	<b>Other</b>
Cod	62.5	31.8				
Haddock	N/A	31.6				
Winter flounder	N/A	13.0	24.1			
Yellowtail fl.		21.4	23.3	15.7	N/A	
Windowpane						N/A
Plaice						32.3
Witch flounder						30.4
Pollock						N/A
Redfish						34.2

White hake						30.6
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N/A refers to stocks for which F reductions cannot be calculated.

**GOM** is the Gulf of Maine stock.

**GB** is the Georges Bank stock

**SNE** is the Southern New England stock

**CC** is the Cape Cod stock

**MA** is the Mid-Atlantic stock.

The interim measures are also expected to result in substantial reductions in commercial catches, as follows:

**Estimated reductions, by percent, in commercial catch (May-October):**

<b>STOCK:</b>	<b>GOM</b>	<b>GB</b>	<b>SNE</b>	<b>CC</b>	<b>MA</b>	<b>Other</b>
Cod	53.3	27.3				
Haddock	43.6	25.3				
Winter flounder	41.7	11.0	19.4			
Yellowtail fl.		14.2	19.1	8.2	16.5	
Windowpane						73.5

Plaice						27.9
Witch flounder						25.3
Pollock						30.3
Redfish						28.5
White hake						22.0

**GOM** is the Gulf of Maine stock.

**GB** is the Georges Bank stock

**SNE** is the Southern New England stock

**CC** is the Cape Cod stock

**MA** is the Mid-Atlantic stock.

6. The measures contained in the interim action will not only reduce fishing mortality on many groundfish and non-groundfish species, but will reduce bycatch of these and other species, as well, as explained under paragraph 5 above. The increase in the codend mesh requirements for trawl vessels and the increase in gillnet mesh will allow for increased escapement of small fish of all species, thereby minimizing bycatch caused by discards of non-commercial species and undersized commercial species, and will contribute to increased spawning potential. The continuation of the Western Gulf of Maine (WGOM) Area Closure and the addition of new closed areas will protect all stocks from fishing mortality during those areas and times of closure. The closure of area blocks 124 and 125 in May is intended to remove fishing mortality from those areas during a period of the year when groundfish are concentrated there. As a result of that concentration, discards of cod above the trip limits are likely to occur; the closure will thus prevent fishing that would otherwise have resulted in high discards of cod.

Because total fishing effort will be reduced as a result of differential DAS counting and restrictions in temporal use of DAS, as well as reductions in the number of gillnets that can be fished, total bycatch in the fishery will also be reduced. The prohibition on recreational fishing in the WGOM Area Closure will prevent recreational fishing effort in that important area and will reduce fishing mortality on all fish in that area that are vulnerable to recreational fishing gear. NMFS will expand significantly its observer coverage in the Northeast multispecies fishery to monitor and collect information on bycatch, as well as other biological and fishery related information, which will provide the necessary information to develop more targeted bycatch reduction measures.

7. NMFS has analyzed the expected economic and social impacts of the interim action, as explained in paragraphs 3 and 4 above. Although NMFS designed the measures in the interim action to meet the biological objectives, to minimize the adverse economic and social impacts, and to spread the adverse impacts as fairly as possible, the impacts will still be substantial. The interim measures will result in a substantial loss in May-October fishing revenues for some vessels, particularly smaller vessels. Small trawl vessels will be most negatively impacted, with 25% of all those vessels losing nearly 30% of their gross fishing revenue during the May-October period when the interim measures will be in place. About 10% of small trawlers will lose more than 40% of their May-October fishing income. Hook vessels and large trawl vessels will generally experience the least losses in revenues, relative to other vessels in the fishery. The interim measures will impact coastal fishing communities throughout the Northeast, with the impacts greatest on vessels from New Hampshire--at least 50% of those vessels will lose more than 20% of their gross fishing income. Maine and Massachusetts vessels will be less affected, but will still experience adverse economic impacts. However, because of the larger number of vessels in Maine and Massachusetts compared to New Hampshire, the total impacts will be greater on

the states of Maine and Massachusetts than on New Hampshire. The ports/port groups most impacted will be Gloucester, MA; Provincetown, MA; upper mid-coast Maine; and Portsmouth, NH; though other Northeast ports will also experience adverse economic impacts. The changes in recreational measures under the interim action will negatively impact all sectors of that fishery, including charter/party anglers and businesses, and private recreational anglers. Dealers, wholesalers and processors of groundfish will also be negatively impacted by the interim measures, because less product will be available to them. This will likely increase the need for them to import fresh product from other parts of the country and from Canada. As a result, costs for processors will probably increase.

#### Vessel Monitoring Systems (VMS)

8. Plaintiffs assert that NMFS exaggerated the cost of VMS units, which the Plaintiffs believe should be required for all vessels in the fishery. That assertion is incorrect in that it appears to rely on NMFS' estimates of costs for VMS units for use in the highly migratory species (HMS) fisheries. The VMS units certified for use in the Northeast groundfish fishery under regulations at 50 CFR 648.9 are much more complex and costly than the units for the HMS fisheries because of the capabilities NMFS believes are necessary for the VMS units to meet the management requirements of this fishery. For example, the groundfish units must allow two-way messaging, must be tamper-proof, and must include hardware and application software (the Plaintiff's proposed remedy also calls for two-way communication capabilities). The units for use in the HMS fisheries do not provide two-way communication capabilities, except through addition of a separate computer, and do not provide the same level of security. The cost estimates for VMS coverage in the groundfish fishery provided by NMFS in its proposed remedy are correct. The most recent estimates of VMS units for use in the HMS fisheries indicates that they may cost up to \$4,000; to allow two-way communication requires the



additional purchase of a separate laptop computer, which is not included in that cost estimate. An additional problem with the Plaintiffs' proposal that all vessels be equipped with VMS is that the VMS units currently certified for use in the groundfish fishery are not feasible for use on the smaller vessels in the fishery (for example, because of their power requirements). This is one of the reasons why the units are currently voluntary and not mandatory in the groundfish fishery.

#### Continuation of WGOM Area Closure

9. Regardless of other measures that are implemented as of May 1, 2002, it is critically important that the WGOM Area Closure not be allowed to reopen, as the regulations would currently require. The GOM cod stock is presently concentrated in a relatively small area, as compared to its historical distribution, and is primarily distributed in the western GOM. The area encompassed by the WGOM Area Closure is an area with historically high cod landings. This closed area is thus extremely important to the protection of GOM cod, as well as other stocks of groundfish, as is acknowledged by the Plaintiffs and the intervenors in this case.

#### Response to the Court's March 18, 2002, Order

10. The 2002-2003 total TACs calculated for all species managed under Amendment 9 to the FMP, and the management TACs that would result from those total TACs, are presented in Exhibit 1. The figures in the "Total TAC" column are consistent with those presented in Declaration 2 of Dr. Steven A. Murawski (see Table 1, the column labeled "AVE 2002-2003 FISHING YR (mt)" of that declaration) and include Canadian catches, discards, and recreational and commercial catches, as applicable. The figures in the "Management TAC" column of Exhibit 1 of this declaration represent the amounts of fish that could actually be harvested by U.S. commercial and recreational fisheries. An explanation of how the TACs were derived appears in Declaration 2 of Dr. Steven A. Murawski.

11. Option 1, which appears in Exhibit 2, is based on achieving a zero fishing mortality rate for all stocks that would have a zero management TAC under Amendment 9. The result would be a total closure of GB, a significant portion of southern New England (SNE), and Long Island Sound (a portion of the Mid-Atlantic (MA) Area) to all gear that is capable of catching groundfish in any significant numbers, because that is the only way to prevent all fishing mortality on those stocks for which the management TAC would be zero under Amendment 9. Exhibit 4 shows the area that would be closed under Option 1. No commercial trawl, gillnet, dredge, or hook-and-line fisheries would be allowed in the GB/SNE closed area, year-round. The GOM would remain open to groundfishing, but with a temporal extension of the WGOM Area Closure and the addition of a new offshore closed area (area block 129), additional gear restrictions, only hook gear allowed in statistical area 514, and a prohibition on possession of Atlantic halibut and ocean pout. The GOM cod possession limit would be increased to 800 lb per day/8,000 lb per trip to respond to the higher TAC for GOM cod that results under Amendment 9. Possession of all yellowtail flounder stocks would also be prohibited throughout the management area. Permit stacking, which is allowing groundfish permit holders to accumulate and use other groundfish permits and their associated DAS, would be allowed, to help vessels acquire enough DAS to stay in business and to consolidate effort in the fishery. Effective DAS effort would also be capped for each vessel at the level of that vessel's highest DAS usage during the period 1996-1999. Mesh-size increases would be required for all trawl gear in the open areas, and the number and types of gillnets that could be used would be greatly restricted. Recreational fishing would still be allowed to operate under the status quo recreational measures throughout the GOM, GB, SNE and MA areas, except that no possession would be allowed for any species for which the management TAC is zero (i.e., GB cod; SNE, Cape Cod (CC), and MA yellowtail flounder; ocean pout; and Atlantic halibut).

12. Option 2 assumes that, rather than reducing fishing mortality to absolute zero for those stocks with a management TAC of zero under Amendment 9, management measures would reduce the fishing mortality on those stocks to as close to zero as possible. No directed fishery or retention of the zero-management-TAC species would be allowed, but other stocks that have management TACs available could be harvested at some controlled level, with additional measures to protect the weakest stocks. Under Option 2, vessels would receive a 50% reduction in the maximum number of DAS each vessel fished during 1996-1999. This would result in approximately a 35% reduction in the total number of DAS used by all vessels in 1999—a significant reduction in effective effort across the entire commercial fishery. As in Option 1, permit stacking would be allowed. The same measures as in Option 1 would apply in the GOM. Possession of GB cod; SNE, CC, and MA yellowtail flounder; ocean pout, and Atlantic halibut would be prohibited throughout the management area. The possession limit for GOM cod would be increased to 800 lb/day; 8,000 lb/trip to take into account the increase in TAC for GOM cod that would result under Amendment 9. As under Option 1, significant gear restrictions, both in terms of mesh size and number of nets, would be imposed, with some gears prohibited from certain areas because of the need to avoid fishing mortality on specific stocks (e.g., no flatfish gillnets would be allowed south of GB, to protect SNE and MA yellowtail flounder). Additional area closures would be employed to reduce mortality on particular stocks in those areas. Only hook gear would be allowed in statistical area 514, to protect CC yellowtail flounder. On GB, no hook gear or roundfish gillnet gear would be allowed (to protect GB cod). The closed areas that would be in effect under Option 2 are shown in Exhibit 5. Trawling on GB would be allowed only when the vessel is carrying an observer; the observer would be paid for by the vessel. If GB cod bycatch (no possession would be allowed) reached the bycatch trigger, the trawl fishery on GB would be closed.

As under Option 1, additional changes to the existing regulations, such as reducing the open access Handgear permit possession limits, would be used to further reduce effort in the fishery. The recreational measures would also be the same as under Option 1.

13. Under Amendment 9, 11 of the 19 stocks of groundfish require little or no management action, and some could even accommodate additional fishing pressure. Conversely, the management TACs for six of the stocks would be zero under Amendment 9. The severity of the measures required to achieve the zero management TACs for these species makes it unnecessary to implement “hard TACs” under Option 1 (i.e., all of the areas where the stocks most in need of management are found would be closed). Similarly, the severity of the management measures under Option 2 also make hard TACs unnecessary, though Option 2 does contain a hard TAC for GB cod bycatch in the trawl fishery. If that bycatch TAC is reached, GB would be closed to trawling for the remainder of the fishing year.

14. Although NMFS has not conducted a full analysis of the impacts of these options, the economic and social impacts of either option would clearly be very severe, if not irreparable. Option 1 would severely impact (essentially do away with) the Northeast groundfish fishery on GB and SNE in the near term, and would largely prohibit the monkfish, sea scallop, and spiny dogfish fisheries from operating in that area, as well. Option 2 would prohibit hook and roundfish gillnet gear from GB and allow some low level of trawl fishing, but with a bycatch trigger for GB cod that would likely close the fishery at sometime during the fishing year, unless fishermen can very effectively avoid catching GB cod. Under either option, fishing communities that rely on GB and SNE fisheries, and the infrastructure that supports those fisheries, would likely experience very negative impacts. Many small entities might either go out of business or would have to relocate. To the extent that participants in the industry could do so, many would be expected to shift effort into other fisheries for which they have permits or could acquire

permits for, or that are open access, and/or would shift fishing effort northward, to the GOM, or to south of GB. Jobs in the industry would be lost, at least in the near term. Fisheries that do not use gear capable of catching groundfish, such as purse seines, traps, and mid-water trawls, would be unaffected by the restrictions, but could experience increases in effort displaced from the groundfish, monkfish, scallop, and other fisheries that would be restricted under Option 1. The primary impact on the recreational fishery would be the prohibition on retention of GB cod.

15. Although NMFS has calculated the TACs that would result from implementation of Amendment 9 to the FMP and two sets of management measures that are expected to achieve those TACs, as ordered by the Court, the calculations are not based on the best available scientific information (see Declaration 2 of Dr. Steven A. Murawski, paragraph 14). In some cases, the TACs that were calculated based on Amendment 9 are much different from the TACs that would result from applying the best science available to us today. As such, I do not believe that the management options outlined above are the most advisable way to rebuild groundfish stocks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gloucester, Massachusetts, on this 1st day of April, 2002.

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Patricia A. Kurkul

Regional Administrator, Northeast Region, NMFS

**Exhibit 1. Total TACs and management TACs for groundfish species managed under Amendment 9. All figures are in metric tons.**

<b>Species</b>	<b>Stock</b>	<b>Total TAC</b>	<b>Management TAC (Comm. &amp; Rec.)</b>
<b>Atlantic Cod</b>	<b>GOM</b>	9,508	7,888
	<b>GB</b>	0	0
<b>Haddock</b>	<b>GB</b>	12,016	5,036
	<b>GOM</b>	3,390	3,390
<b>Yellowtail Flounder</b>	<b>GB</b>	15,050	8,112
	<b>SNE</b>	0	0
	<b>CC</b>	0	0

	<b>MA</b>	2	0
<b>American Plaice</b>	<b>GOM-GB</b>	3,318	2,700
<b>Witch Flounder</b>	<b>GOM-GB</b>	4,289	3,634
<b>Winter Flounder</b>	<b>GB</b>	3,158	2,458
	<b>SNE</b>	11,295	10,586
<b>Acadian Redfish</b>	<b>GOM-GB</b>	9,567	9,567
<b>White Hake</b>	<b>GOM-GB</b>	5,297	4,999
<b>Pollock</b>	<b>GOM-GB</b>	N/A	N/A
<b>Windowpane Flounder</b>	<b>Northern</b>	1,556	1,556
	<b>Southern</b>	175	175
<b>Ocean Pout</b>		7	0
<b>Atlantic Halibut</b>	<b>GOM-GB</b>	0	0





**Exhibit 2. Option 1 management measures to achieve Amendment 9 TACs.**

**COMMERCIAL MEASURES**

Retain the following measures:

- Existing year-round closures in GOM and SNE
- Existing harbor porpoise closures
- Existing minimum fish sizes

DAS

- Cap effective DAS based on highest DAS used by each vessel from 1996-1999
- Allow stacking of groundfish permits
- Prohibit frontloading of DAS
- Count all trips between 3 and 15 hours as 15 hours (all gear)

New GB/SNE Area Closure (year-round)

- Close statistical areas 521, 522, 525, 526, 537-539, 561, 562, and 611 to all gear capable of catching groundfish

New offshore GOM Area Closure (year round)

- Close area block 129

Possession limits

- Yellowtail flounder (all stocks)      0
- Ocean pout      0
- Atlantic halibut      0

-- GOM cod 800 lb/day, 8,000 lb/trip

Gear (required in all open areas, unless otherwise noted)

- Require 6-1/2" diamond, 7"square minimum mesh size in trawls (codend)
- Require 7" minimum mesh size in gillnets
- Restrict gillnet use to a maximum of 50 roundfish or 50 flatfish nets in GOM; 50 roundfish nets (no flatfish nets) south of GB
- Require hook gear to use circle hooks, with maximum of 1,000 hooks, no crucifiers
- Allow only hook gear to be used in statistical area 514

Other

- Abolish Large Mesh permits
- Change possession limits under open access Handgear permits to:
  - 300 lb/trip for cod and haddock, combined
  - No possession of GB cod; SNE, CC, and MA yellowtail flounder; ocean pout; or Atlantic halibut
  - Unlimited amounts of other groundfish species
- Eliminate spawning season/blocks out of the fishery
- Eliminate rolling closures

**RECREATIONAL MEASURES**

- Prohibit possession of GB cod, yellowtail flounder (CC, SNE, and MA stocks), ocean pout

or Atlantic halibut

-- Retain all other existing recreational measures

### **Exhibit 3. Option 2 management measures to achieve Amendment 9 TACs.**

#### **COMMERCIAL MEASURES**

Retain the following measures:

-- Existing year-round closures in GOM and SNE

-- Existing harbor porpoise closures

-- Existing minimum fish sizes

#### DAS

-- Reduce effective DAS by 50% over highest DAS actually used by each vessel from 1996-1999

-- Allow stacking of groundfish permits

-- Prohibit frontloading of DAS

-- Count all trips between 3 and 15 hours as 15 hours (all gear)

#### Possession limits

-- GB cod 0

-- SNE yellowtail flounder 0

-- CC yellowtail flounder 0

-- MA yellowtail flounder 0

- Ocean pout 0
- Atlantic halibut 0
- GOM cod 800 lb/day, 8,000 lb/trip

Gear (required in all open areas, unless otherwise noted)

- Require 6-1/2" diamond, 7"square minimum mesh size in trawls (codend)
- Require 7" minimum mesh size in gillnets
- Restrict gillnet use to a maximum of 50 roundfish or 50 flatfish nets in GOM; 50 flatfish nets (no roundfish nets) on GB; 50 roundfish nets (no flatfish nets) south of GB
- Require hook gear to use circle hooks, with maximum of 1,000 hooks, no crucifiers
- Allow only hook gear to be used in statistical area 514

New/redefined area closures

- Close area block 129 year-round
- Close area blocks 85 and 86 year round

Additional measures specific to GB

- Prohibit use of hook gear
- Allow trawl gear with observers only, to be paid for by industry; close GB to trawling when GB cod bycatch trigger is reached (700 mt)

Other

- Abolish Large Mesh permits
- Change possession limits under open access Handgear permit to:

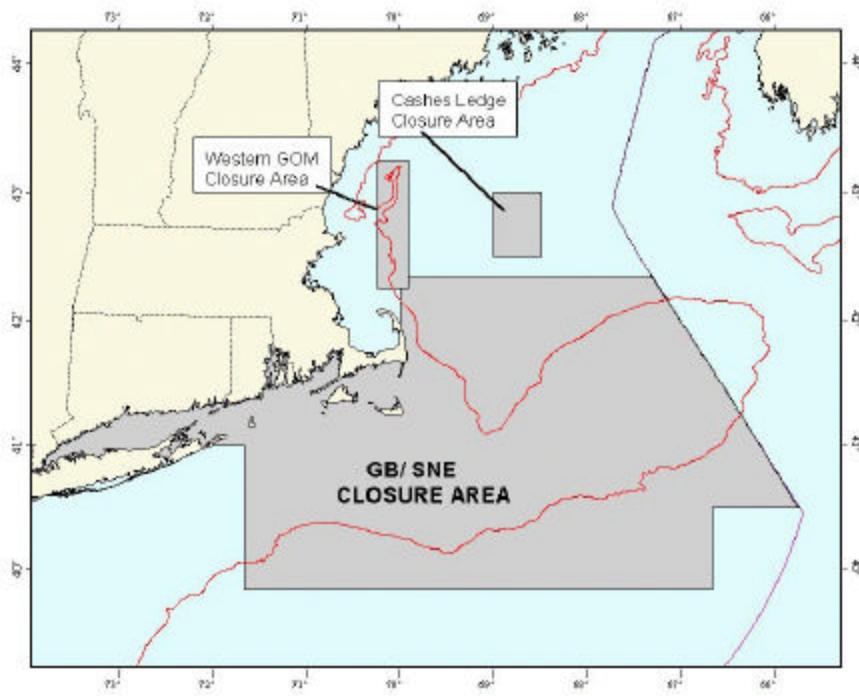
- 300 lb/trip for cod and haddock, combined
- No possession of GB cod; SNE, CC, and MA yellowtail flounder; ocean pout; or Atlantic halibut
- Unlimited amounts of other groundfish species

- Eliminate spawning season/blocks out of the fishery
- Eliminate rolling closures

#### **RECREATIONAL MEASURES**

- Prohibit possession of GB cod, yellowtail flounder (CC, SNE, and MA stocks), ocean pout or Atlantic halibut
- Retain all other existing recreational measures

**EXHIBIT 4 - Areas to be closed under Option 1**



**EXHIBIT 5 - Areas to be closed under Option 2**

