



December 20, 2018

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U.S. Department of Commerce
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Dear Sirs:

We write to express our deep concern about the fundamental lack of accountability in the New England groundfish fishery and the deepening crisis it has engendered in the region. The absence of effective monitoring is having profound negative effects on the groundfish resource, on the quality of the stock assessment science and therefore the efficacy of management, and on the economic prospects of fishing communities. This is the oldest organized fishery in the United States and it has become deeply crippled under the watch of the New England Fishery Management Council, GARFO, and NOAA Fisheries. As the key leaders with ultimate management authority and statutory responsibility over this important resource and fishery, you have a duty to take immediate and effective steps to fix this problem.

At the national scale, NOAA Fisheries properly reports that it has “effectively ended overfishing and is rebuilding domestic fish stocks[.]”¹ Not in New England, however, where chronic mismanagement in the groundfish fishery continues unabated. Atlantic cod, various flounders, and other groundfish are still subject to overfishing and remain in a persistent overfished status – which

¹ https://naturalresources.house.gov/uploadedfiles/testimony_oliver.pdf.

has endured for almost 30 years in some cases – despite the legal requirement to prevent overfishing and rebuild fisheries in as short a time as possible. NOAA Fisheries and the Council have consistently failed to prevent overfishing on some of these stocks since “overfishing” metrics were first approved in 1989. If there isn’t a radical change in management direction, the prospect of these stocks ever rebuilding remains tenuous at best.

A committee of the best experts in the fisheries science community concluded that stocks will generally rebuild if effective management measures are in place maintaining catches at scientifically appropriate levels.² Their conclusion, of course, rested on the assumption that assessment scientists had access to accurate catch data to set the proper quotas in the first place. A separate analysis by the Natural Resources Defense Council produced three overall reasons why rebuilding plans fail to reduce fishing mortality: (1) ineffective input controls and lack of accountability measures, (2) mortality due to bycatch in other fisheries, and (3) inaccurate estimates of stock size leading to improperly high catch limits.³ All these drivers of management failures are present in the New England groundfish fishery and have a singular common denominator: the lack of effective at-sea monitoring in the fishery. This failure endures despite the millions in taxpayer funds that are dedicated to propping up the current monitoring system.

Lack of monitoring and overfishing are inextricably linked

Meaningful solutions must track the sources of any management problem. In order to achieve a healthy fishery, managers and scientists need accurate and reliable data to understand the level of catch in any given fishing year, inform stock assessments, set appropriate catch limits, and enforce the limits that are set. For years, however, the organizations you lead – organizations that have a mandatory duty to develop and enforce science-based catch limits – have enabled a management system and strategy that is crippled by inaccurate and unreliable catch data. And historic problems are growing more acute in New England. On the one hand, there are now widespread public accounts of unreported and misreported discards of Atlantic cod at sea verified by NOAA Fisheries and state fishery officials, who acknowledge receiving reports of “discards up to 2000-3000 pounds per trip” and “reports about observers not recording these discards.”⁴ And on the other, the world is now aware of the profound lack of oversight that enabled criminal enterprises like those of Carlos Rafael to thrive in this region for years.

² “[A]nalysis of rebuilding plans indicated that when fishing mortality was effectively reduced, only a few stocks did not show an increase in biomass.” NRC Committee on Evaluating the Effectiveness of Stock Rebuilding Plans of the 2008 Fishery Conservation and Management Reauthorization Act at 120 (NAS 2014).

³ NRDC Report *Bringing Back the Fish: An Evaluation of U.S. Fisheries Rebuilding Under the Magnuson-Stevens Fisheries Conservation and Management Act*, <https://www.nrdc.org/sites/default/files/rebuilding-fisheries-report.pdf>.

⁴ See https://s3.amazonaws.com/nefmc.org/180417_1_Intros-and-Reports.mp3, Recording of the April 2018 New England Council meeting, where discussion of widespread reports of high levels of illegal discarding begins at 22:00; the transcript of this discussion is attached. “This Spring, the number of individuals coming to us with reports about cod discarding is unusually high.... Reports we are receiving this spring are that there are discards up to 2000-3000 pounds per trip happening in this area. We are hearing reports from not just groundfish vessels but other non-groundfish vessels that they are catching dead cod in many of their tows. We are also hearing reports about observers not recording these discards.”

New England groundfish fishermen face intense economic pressure to discard low-quota stocks like cod without reporting them so that they can continue fishing for target stocks. When the Pacific groundfish trawl fishery – a similar multispecies fishery with historically high bycatch and seven severely constraining overfished species – made its transition to a catch share program in 2011, a 100 percent at-sea and dockside monitoring requirement ensured accountability and drove intense, rapid innovation in fishing methods and gear configurations to avoid bycatch.^{5,6} Today, most of the previously-overfished West Coast rockfish stocks, which once restricted the catch of other species, have largely recovered, many dramatically ahead of scientific predictions.⁷ The successful recovery of this multispecies fishery and the presence of 100 percent monitoring are not simply coincidences.

Under the watch of the Council, GARFO, and NOAA Fisheries, New England has taken the opposite course and predictably suffered the opposite results. “Target” monitoring coverage levels in New England (which include both ASM and NEFOP science observers) have been steadily declining since 2010 from already minimal levels, reaching their lowest levels – 14 percent – in fishing year 2016. Currently, in fishing year 2018, the monitoring coverage “target” remains low at just 15 percent but the actual coverage is even lower. Recent revelations from GARFO, the Council, and OLE indicate that discarding of legal-sized fish is not even being reported by observers on the trips they do take.⁸ Under these circumstances, there is no reliable information about what is happening with catches and discards at sea. We have yet to find a single person who has any confidence that the current monitoring program produces information that bears any resemblance to the real world of the fishery.

Some fishermen claim that the current ACLs for Gulf of Maine cod do not reflect the actual cod population, arguing that they are seeing more cod now than ever before and that “they can’t get away from cod.” And yet, the reported catches all manage to stay magically within the extremely low ACLs year after year. Even fishermen have become increasingly vocal about what is really happening at sea: massive illegal and unreported discarding of cod and other low quota stocks. At the April 2018 council meeting, during the discussion of increased illegal discarding, GARFO staff said, “Industry are expressing increased frustrations with how wasteful discarding is and the potential impact or future impact on the stock. Related to this, people are concerned that widespread discards puts bad data into the system and puts bad data into the science, and connected to that, industry are expressing frustrations that continued bad data into the system continues to give quotas that aren’t reflective of what they are seeing on the water and it’s not reflective to the fish available to the fishery right now.”⁹ There is no incentive for any of the fishermen to play by the rules in this fishery if they want to stay competitive.

Predictably, the status of key vulnerable stocks has grown worse and their assessment models have degraded as monitoring coverage levels have declined. The Gulf of Maine cod stock, which has been overfished since at least 1990 when Amendment 4 first quantified overfished

⁵<http://blogs.edf.org/edfish/2016/08/05/gear-workshop-highlights-innovators-in-west-coast-fishery/>.

⁶ See NOAA Fisheries, The West Coast Catch Shares Program: 2015 Update for the West Coast Catch Shares Program (November 2015), available at https://www.westcoast.fisheries.noaa.gov/publications/fishery_management/trawl_program/analytical_docs/final_2012-2013_summary_report.pdf.

⁷ <http://westcoasttrawlers.net/2017/12/12/west-coasts-pacific-ocean-perch-stocks-declared-rebuilt-will-lead-to-higher-groundfish-catches/>.

⁸ See Recording of the April 2018 New England Council meeting; transcript attached.

⁹ *Id.*

levels, is still overfished and subject to overfishing.¹⁰ In recent years, the stock has plummeted to historic lows and is persistently hovering at 5 percent of what scientists consider to be a healthy population level.¹¹ The stock has had a severely truncated size and age structure for some time without any management response and is not on track to meet its 2024 rebuilding timeline.¹² Georges Bank cod is in a similarly poor state, but scientists are unable to make quantitative estimates about the population because the model from the 2015 operational assessments could not be updated and could no longer be used for management advice,¹³ likely the result of poor data inputs to the models. The analytical assessment for witch flounder was rejected due to pervasive retrospective patterns, among other issues, and uncertain estimates of total catch was explicitly identified as a significant deficiency.

In addition to the straight-forward problems of program implementation, part of the problem with the New England groundfish monitoring program is the reliance on the coefficient of variability (CV) standard. CV aims for precision, not accuracy. As discards as a percentage of catch increase, combined with the presence of observer bias, the likelihood increases that the data produced by relying on the CV standard are precisely wrong. *See* Attachment 1 at 14-15. At a Groundfish Plan Development Team (PDT) meeting in June 2018, NOAA Fisheries itself conceded that “[the existence of bias] may call into question [the CV method’s] validity for determining monitoring coverage.”¹⁴ At the same meeting, NOAA Fisheries also provided an analysis that showed, in part, further evidence that “what observers are seeing for catch composition is different than on unobserved trips, so that there is bias in the discard estimates.”¹⁵ If observers are not even reporting the discards that are occurring on the trips they take, this bias is dramatically compounded.

When managers lack reliable information on the amount of catch, both directed and unintentional – as has been the case in the New England groundfish fishery – increased scientific and management uncertainty result, as does the potential for overfishing. There can be no serious question that the Council and NOAA Fisheries are failing to deal adequately with the significant uncertainties that have applied for years in the groundfish fishery and are now increasing. The National Standard 1 Guidelines explicitly call for adequate buffers between the overfishing level (OFL), acceptable biological catch (ABC), and annual catch limit (ACL) in order to ensure that uncertainty in either science or management does not result in overfishing.¹⁶ When the actual in-season monitoring coverage falls below the already inadequate coverage requirements, the guidelines call for the annual catch limit to be even further reduced to prevent overfishing.¹⁷ NOAA Fisheries, however, has not required any buffer changes as monitoring levels have declined and has increased the ACLs on some stocks even while overfishing persists.

¹⁰ https://www.nefsc.noaa.gov/publications/crd/crd1717/gulf_of_maine_cod.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ https://www.nefsc.noaa.gov/publications/crd/crd1717/georges_bank_cod.pdf.

¹⁴ https://s3.amazonaws.com/nefmc.org/6a_180601_Groundfish-Committee_meeting_summary_Final.pdf.

¹⁵ *Id.*

¹⁶ *See* 50 C.F.R. §§ 600.310 (f)(2)(ii) (“The ABC control rule must articulate how ABC will be set compared to the OFL based on the scientific knowledge about the stock or stock complex and taking into account scientific uncertainty.”); 600.310(f)(4)(i) (“ACL cannot exceed the ABC...ACLs in coordination with [accountability measures] must prevent overfishing (see MSA section 303(a)(15)). If an Annual Catch Target (ACT), or functional equivalent, is not used, management uncertainty should be accounted for in the ACL.”)

¹⁷ *See, e.g.,* 50 C.F.R. § 600.310(g)(2) (“For fisheries without inseason management control to prevent the ACL from being exceeded, AMs should utilize ACTs that are set below ACLs so that catches do not exceed the ACL.”).

While the SSC has attempted to account for scientific uncertainty in setting OFLs and ABCs, the management uncertainty buffers applied between the ABC and sub-ACLs are low to the point of being meaningless in these overfished and unhealthy fisheries. In New England, these buffers are based on four criteria: (1) enforceability and precision of management measures, (2) adequacy of catch monitoring, (3) latent effort, and (4) catch of groundfish in non-groundfish fisheries.¹⁸ There has been no adjustment upward to capture the observer bias that is now documented in the fishery.¹⁹ Nor is there any direct consideration of stock health for either uncertainty buffer in New England, whereas in the 100 percent monitored Pacific groundfish fishery, buffer levels do take stock health into account.

Implosion of the sector at-sea monitoring program

Given the region's dismal track record in preventing overfishing, it was shocking to learn several months ago that sectors operating in the groundfish fishery are significantly failing to meet even their current, albeit inadequate, at-sea monitoring requirements. GARFO's own analysis reveals realized coverage for a majority of sectors that represent most of the groundfish fleet is as low as 1.8 percent.²⁰ The current reality has become undeniable: the monitoring system in New England is so broken that vendors cannot provide monitoring services under the present circumstances, and NOAA Fisheries and the Council are now enabling sectors to avoid their regulatory monitoring obligations. This utter lack of accountability has produced a "management" approach that is based, at best, on professional guesswork, not data or science.

We would have expected the acknowledgment of management failure and contract violation that these sector monitoring letters represent to be accompanied by an immediate and consequential corrective response from NOAA Fisheries, GARFO, and the Council, requiring immediate steps to bring sectors into full compliance. However, the GARFO letters and agency statements at the December 2018 Council meeting seem to suggest that your view is that this is simply a routine matter of training more observers and working with the sectors to make sure that fishermen are following their own sector monitoring rules, effectively kicking the problem down the road without consequences yet again. NOAA Fisheries appears reluctant to hold noncompliant sectors accountable with penalties or other sanctions as long as the sectors claim to operate in "good faith" with GARFO to fix the situation. However, behind this façade of "business as usual" is the reality that the monitoring system in New England is utterly broken. There is an urgent need to develop a new monitoring system that provides the full accountability that the fishery requires for recovery and sustainable management.

Unacceptable progress on Amendment 23

The law requires – and the region's groundfish resources and those who depend on them deserve – replacing the current monitoring approach with one that produces accurate as well as precise estimates. Amendment 23 to the Northeast Multispecies Fishery Management Plan is the vehicle the Council and NOAA Fisheries have determined will be used to accomplish that

¹⁸ https://s3.amazonaws.com/nefmc.org/180220_Groundfish_FW57_Appendix_II_Calculation-of-ACLs_FINAL.pdf.

¹⁹ *Id.*

²⁰ See Letters to 15 sectors dated September 25, 2018, from Michael Pentony, Regional Administrator for NOAA Fisheries Greater Atlantic Regional Fisheries Office, included as Attachment 3 (GARFO Letters).

objective.²¹ And yet, as you all recognize, the Council is making little progress on the amendment. The pace and approach to developing Amendment 23, unfortunately, resembles the Council's earlier efforts to address the economic and social impacts of fleet consolidation and quota allocations in Amendment 18: slow progress with frequent deferrals of action steps and a consistent pattern of revisiting decisions. Amendment 18, as we repeatedly expressed to you at the time, ultimately produced a set of management strategies that fundamentally failed to address the consolidation problem that it was intended to fix.

If immediate steps are not taken, the same pattern will play out and Amendment 23 will meet the same fate as Amendment 18. Notwithstanding the imperative to increase accountability in the fishery, to better understand why so many groundfish stocks have performed so poorly for so many years despite fishermen "staying within quotas," and to improve data inputs to the stock assessment models that are performing so poorly as management tools, Amendment 23 will become yet another example of the Council and NOAA Fisheries delaying the process out of fear that the necessary corrective management actions will be controversial, complicated, or expensive.

Amendment 23 was introduced in **September 2016**. Now, **more than two years later**, the Council has yet to put alternatives on the table for consideration. The delays have been the result of a garden variety of bureaucratic issues that are well within your power as leaders to cut through. The most recent delay, which will postpone review of the Amendment 23 alternatives from the Council's January 2019 meeting to the April meeting, was caused by the "challenge" of scheduling a special meeting between the PDT, the Groundfish Advisory Panel, and the Groundfish Committee. Even the need for this special meeting, in part, illustrates the bureaucratic fog surrounding this amendment: Council staff openly questioned the purpose of the amendment at a Groundfish Committee meeting – two years into the process.

Unfortunately, this example is just one in a long string of delays that Amendment 23 has faced since the beginning, and for which there appears to be no end in sight. In a recent meeting with EDF, Council staff hinted that getting the Draft EIS ready in time for a September 2019 Council meeting would be extremely difficult, even assuming the alternatives make it to a Council vote by April. While ongoing efforts to synthesize and peer-review important analyses that will underpin the alternatives are important and take time, the meta-message from the Council's Executive Committee and NOAA Fisheries is that it is acceptable to continue to delay the process, allowing fishing without accountability for yet another season, if not more. Based on everything we as members of the public can see, your leadership on these key issues is lacking.

We can only hope at this point in time that it is not too late for the Council and NOAA Fisheries to ensure that prompt and effective actions are taken to meet the purpose and need of Amendment 23 as immediately as the dire circumstances of groundfish populations require, and that sector accountability is elevated as a critical agency priority before some of these stocks, especially Gulf of Maine cod, drop to such low levels that they can never recover.

As the Council and NOAA Fisheries will already miss the intended 2019 fishing year implementation date for Amendment 23, the agency should demand specific and enforceable

²¹ The Groundfish PDT has concluded that the CV standard will not likely achieve the purpose and need of Amendment 23: "Framework 48 stated that the minimum coverage level based on CV is only appropriate for sector monitoring purposes if there is no evidence that behavior on observed and unobserved trips is different. If there is evidence that behavior is different, then a higher coverage level may be required to ensure the accuracy of discard estimates." Draft Alternatives document of March 20, 2018.

deadlines for each stage of the Amendment 23 process, ensuring that it will be concluded in time to have a new monitoring system on the water for the 2020 fishing year.

In tackling this persistent problem with at-sea monitoring, NOAA Fisheries should not hide behind the current expensive, cumbersome, and inefficient system of human observers – even if the agency were able to fix the current problems causing the systemic breakdown of the ASM program. EDF and CLF, not to mention many other organizations, agencies, and individuals across the fishery, have worked diligently and successfully for years to pursue methods to improve reliability and coverage levels using electronic monitoring and reporting. This is not new territory. The Pacific multispecies groundfish fishery now has 100% at-sea monitoring and 100% dockside monitoring in place and it appears to be working well, and is in the process of a transition to EM coverage.

Simply implementing these new monitoring tools and techniques in combination with human collection and evaluation of data as needed will ensure that the reliable and accurate data needed to manage the groundfish fishery is available at a reasonable cost.²² What is of overriding importance now is achieving full accountability in the groundfish fishery so that it too may someday join the ranks of the nation's sustainably managed fisheries.

NOAA Fisheries must exercise its leadership and oversight duties to regain control of the New England groundfish fishery.

Preventing overfishing remains the most central, important, and unqualified mandate of the fishery law you are charged with implementing. If the statutory goals of producing optimum yields of New England's groundfish fisheries are ever to be achieved, the agency must ensure that:

- New England's groundfish stocks are not overfished;
- overfishing is prevented;
- there is demonstrable compliance with annual catch limits with no illegal discards and full accounting of regulatory discards;
- appropriate management and science buffers are set;
- necessary steps are taken to rebuild overfished stocks;
- the fishery is managed based on the best scientific information available; and
- sectors follow their own rules and contractual obligations.

It is black letter law that regulators must ensure that fishery management plans have at least a 50 percent chance of achieving a rebuilding plan's goals²³ using appropriate scientific and management buffers. The agency has further adapted and expanded that standard.²⁴ Nonetheless, that has not happened in the New England groundfish fishery. NOAA Fisheries has sanctioned and enabled the overfished condition of cod and yellowtail flounder since the early 1990s and seems unwilling to take the necessary corrective actions. Assessment after assessment, there has been an

²² Furthermore, given the new additional resources provided to NOAA Fisheries for supporting the costs of ASM, cost is not the issue. NOAA Fisheries has informed industry members that some \$4.6 million will be available for covering ASM industry costs in FY2019 alone. See <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-announces-reimbursement-sector-sea-monitoring-costs>. That is an exorbitant budget for the published number of observer days, and we encourage the agency to use some of the remaining funds to increase monitoring levels immediately, including accelerating the development of more durable and reliable means of collecting fishing data.

²³ See *NRDC v. Daley*, 209 F.3d 717, 753-754 (D.C. Cir. 2000),

²⁴ See 50 C.F.R. § 600.310(f)(4).

unbroken demonstration that the ACLs that you are setting and the buffers you are using are not preventing overfishing.

The combination of unrealistically low buffers between OFLs and ACLs, demonstrated biases in existing catch data, low monitoring rates, lack of discard monitoring, and, most recently, indications that even those low monitoring rates will not be achieved this year, remove any serious question about two things: 1) overfishing is still occurring on key groundfish stocks, and 2) meaningful measures to ensure accountability with ACLs at-sea are not in place or on the horizon. The result is a fishery that blatantly violates the MSA.

To meet statutory obligations and to offer any hope of rebuilding and ending overfishing of depleted groundfish stocks in New England, the Council and NOAA Fisheries must, at a minimum, access and employ accurate and precise data obtained through a reliable at-sea monitoring program. Statistically reliable data are also necessary to ensure full accountability and fundamental fairness so that all fishermen play by the same rules and catch limits are observed. NOAA Fisheries' chronic failure to demand the same standards in New England that have been demonstrated to achieve management success in other regions undercuts the integrity of the sector system here in New England and jeopardizes the economic and social prospects of the fishery, further eroding the public's trust in fisheries management.

We believe it is past time for everyone engaged with this fishery to face the facts: NOAA Fisheries and the Council have lost control of this fishery and are essentially managing the fishery in the dark. The management measures in place in this fishery are forcing even the most honorable fishing operations to violate the law if they are to survive in the fishery's current environment. There is no way to scientifically determine whether the fishery is in compliance with ACLs and no rational basis for arguing that it is.

In order to cure existing legal violations, NOAA Fisheries and the Council must establish and stick to an aggressive timeline for Amendment 23, using firm deadlines so that full accountability is in force in the fishery no later than the start of the 2020 fishing year. In the meantime, NOAA Fisheries must use the substantial taxpayer resources that have been dedicated to monitoring of this fishery and that are currently sitting idle to immediately increase coverage levels to comply at a minimum with the existing monitoring requirements by the start of the next fishing year on May 1, 2019. The current failure of observers to record discards must be corrected immediately. The Secretary must use his emergency authority, if necessary, in order to remedy the overfishing that is under way at this time.

We request a meeting with you in Washington to discuss this critical situation. We would hope this meeting could take place before the New England Fishery Management Council convenes on January 29, 2019. Please advise us at your earliest opportunity whether and when such a meeting could be scheduled.

Very truly yours,

Peter Shelley
Senior Counsel
Conservation Law Foundation

Matt Tinning
Associate Vice President, Oceans
Environmental Defense Fund

Attachments:

Transcript of discarding discussion at April 2018 New England Council meeting

EDF FR55 letter

GARFO September 25 letters

EDF AM23 letter

FY19 spend plan

CC:

Cisco Werner, Ph.D., NOAA Fisheries Director of Scientific Programs and Chief Science Advisor

Sam Rauch, Deputy Assistant Administrator for Regulatory Programs

Jon Hare, Ph.D., NOAA Fisheries Science and Research Director, Northeast Fisheries Science Center

Jason McNamee, Ph.D., Chair, New England Fishery Management Council Science and Statistical Committee