

(c) *Primary Constituent Elements.* The primary constituent elements essential for conservation of the Southern Resident killer whale are:

- (1) Water quality to support growth and development;
- (2) Prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth; and (3) Passage conditions to allow for migration, resting, and foraging.

(d) *Sites owned or controlled by the Department of Defense.* Critical habitat does not include the following areas owned or controlled by the Department of Defense, or designated for its use, in the State of Washington, including shoreline, nearshore areas around structures such as docks and piers, and marine areas:

- (1) Naval Undersea Warfare Center, Keyport;
- (2) Naval Ordnance Center, Port Hadlock (Indian Island);
- (3) Naval Fuel Depot, Manchester;
- (4) Naval Air Station, Whidbey Island;
- (5) Naval Station, Everett;
- (6) Naval Hospital Bremerton;
- (7) Fort Lewis (Army);
- (8) Pier 23 (Army);
- (9) Puget Sound Naval Ship Yard;
- (10) Strait of Juan de Fuca naval air-to-surface weapon range, restricted area;
- (11) Strait of Juan de Fuca and Whidbey Island naval restricted areas;
- (12) Admiralty Inlet naval restricted area;
- (13) Port Gardner Naval Base restricted area;
- (14) Port Orchard Passage naval restricted area;
- (15) Sinclair Inlet naval restricted area;
- (16) Carr Inlet naval restricted area;
- (17) Port Townsend/Indian Island/Walan Point naval restricted area; and
- (18) Crescent Harbor Explosive Ordnance Units Training Area.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 060808213-6300-02; I.D. 073106C]

RIN 0648-AU56

#### Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2006 Georges Bank Cod Fixed Gear Sector Operations Plan and Agreement and Allocation of Georges Bank Cod Total Allowable Catch

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

**ACTION:** Final rule.

**SUMMARY:** NMFS announces partial approval of an Operations Plan and Sector Contract titled "GB Cod Fixed Gear Sector Operations Plan and Agreement" (together referred to as the Sector Operations Plan), and the associated allocation of Georges Bank (GB) cod, consistent with regulations implementing Amendment 13, as modified by Framework Adjustment (FW) 42 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) for fishing year (FY) 2006. The intent of this action is to allow regulated harvest of NE multispecies by the GB Cod Fixed Gear Sector (Fixed Gear Sector), consistent with the objectives of the FMP.

**DATES:** Effective November 22, 2006, through April 30, 2007.

**ADDRESSES:** Copies of the Sector Operations Plan and the Environmental Assessment (EA) are available upon request from the NE Regional Office at the following mailing address: George H. Darcy, Assistant Regional Administrator for Sustainable Fisheries, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. These documents may also be requested by calling (978) 281-9315.

**FOR FURTHER INFORMATION CONTACT:** Mark Grant, Fishery Management Specialist, phone (978) 281-9145, fax (978) 281-9135, e-mail [Mark.Grant@NOAA.gov](mailto:Mark.Grant@NOAA.gov).

**SUPPLEMENTARY INFORMATION:** The final rule implementing Amendment 13 to the FMP (69 FR 22906, April 27, 2004) specified a process for the formation of sectors within the NE multispecies fishery and the allocation of total allowable catch (TAC) or days-at-sea

(DAS) for specific NE multispecies, implemented restrictions that apply to all sectors, and authorized the first sector of the FMP (the GB Cod Hook Gear Sector). The final rule implementing FW 42 (71 FR 62156, October 23, 2006) creates the Fixed Gear Sector, the second approved sector of the FMP. Creation of the Fixed Gear Sector authorizes the Regional Administrator to allocate a GB cod TAC to the Fixed Gear Sector and exempt members from FMP restrictions on an annual basis.

In accordance with the regulations that specify the process of sector approval, and in anticipation of approval of the Fixed Gear Sector, the Fixed Gear Sector submitted an initial version of the Sector Operations Plan and EA to NMFS on February 1, 2006. A final version was submitted on September 18, 2006. According to these documents, the Fixed Gear Sector will be overseen by a Board of Directors and a Sector Manager. Consistent with Amendment 13, the cod TAC for the Fixed Gear Sector is based upon the number of participants and their historic landings of GB cod. In addition, participating vessels will be required to fish under their Amendment 13 DAS allocations to account for any incidental groundfish species that they may catch while fishing for GB cod. The GB cod TAC is a "hard" TAC, meaning that, once the TAC is reached, Fixed Gear Sector vessels may not fish under a DAS, possess or land GB cod or other regulated species managed under the FMP (regulated species), or use gear capable of catching groundfish (unless fishing under charter/party or recreational regulations) for the remainder of the fishing year.

Each Fixed Gear Sector member will be required to fish with jigs, demersal longline, handgear or gillnets; remain in the Fixed Gear Sector for the entire fishing year; and be confined to fishing in the Sector Area, which is that portion of the GB cod stock area north of 39° 00' N. lat. and east of 71° 40' W. long. Fixed Gear Sector members will be required to comply with all pertinent Federal fishing regulations, unless specifically exempted by a Letter of Authorization (LOA), and with the provisions of the approved Operations Plan. Fixed Gear Sector members will be exempted from the GB cod possession limits, the requirements of the GOM cod trip limit exemption program, and the GB Seasonal Closure Area (when fishing with hook gear).

On August 22, 2006, a proposed rule was published in the **Federal Register** (71 FR 48903) that requested comments on the Operations Plan and EA. The

proposed rule announced that the Operations Plan proposed a geographic area for the Fixed Gear Sector that was different from the Sector Area proposed in FW 42 and specifically solicited comments on the larger area proposed in the Operations Plan. The comment period closed on September 21, 2006.

Two Fixed Gear Sector members have signed the 2006 Sector Contract. The GB cod TAC calculation is based upon the historic cod landings of the participating Fixed Gear Sector vessels, using all gear. The allocation percentage is calculated by dividing the sum of total landings of GB cod by Fixed Gear Sector members for FY 1996 through 2001, by the sum of the total accumulated landings of GB cod harvested by all NE multispecies vessels for the same time period (2,240,110 lb (1,016.1 mt) / 113,278,842 lb (51,382.4 mt)). The resulting number is 1.98 percent. Based upon the two prospective Fixed Gear Sector members, the Fixed Gear Sector TAC of GB cod will be 121 mt (1.98 percent of the U.S. portion of the fishery-wide GB cod target TAC of 6,132 mt).

#### Disapproved Measure

The proposed rule for FW 42 specified the same geographic area for the Fixed Gear Sector (i.e., the Sector Area) as the area that was implemented in the Amendment 13 final rule for the GB Cod Hook Gear Sector. Conversely, the Fixed Gear Sector's Operations Plan, Sector Agreement, and EA proposed a geographic area for the Fixed Gear Sector that was substantially different from this Sector Area. The geographic area proposed in the Operations Plan and Sector Agreement included the Sector Area, but extended it south to 35° 00' N. lat. and west to the coast. The Operation's Plan for the Fixed Gear Sector states that Fixed Gear Sector participants should be allowed to fish in an area larger than the GB Cod Hook Gear Sector area in order to pursue an offshore gillnet fishery for monkfish. Because the goal of the Fixed Gear Sector is similar to the GB Cod Hook Gear Sector, i.e., to target cod and other NE multispecies, the rationale to expand the Sector Area for participants in the Fixed Gear Sector for the purpose of targeting monkfish is not consistent with the objectives of the FMP and is, therefore, not justified in this action. Furthermore, expansion of this area must be implemented through the existing FMP framework adjustment process.

#### Comments and Responses

Thirty-three comments were received on this action. In addition, 36 comments

sent in response to the proposed rule for FW 42, and which directly addressed the Operations Plan, were also considered for this action. Combined, 58 separate entities commented on the Operations Plan (some entities submitted separate comments to both proposed rules). Only comments received before the deadline were considered.

Comment letters were received from Associated Fisheries of Maine, the Maine Department of Marine Resources; the Cape Cod Commercial Hook Fishermen's Association; the GB Cod Hook Sector; the Fixed Gear Sector; the Portland Fish Exchange; the Boards of Selectmen of Orleans, Harwich, Brewster, Chatham, and Yarmouth, MA; Representative William Delahunt; Massachusetts State Senator Robert O'Leary; the Downeast Initiative; the Conservation Law Foundation; AJ Marine Hydraulic Equipment; Environmental Defense; the National Environmental Trust; one recreational fisherman; three industry members not associated with a sector; and 36 industry members associated with the two sectors.

*Comment 1:* One commenter did not specifically address either the Operations Plan or EA, but opposed any expansion of commercial fishing and asserted that a portion of GB should be reserved for recreational fishermen.

*Response:* Amendment 13 to the FMP established the process by which a group of individuals may form a sector. One of the requirements of this procedure is that all of the participating vessels are limited access NE multispecies permit holders. Reserving a portion of GB or any associated fish species as a sector is not a viable option under current regulations, nor is there any other mechanism by which a portion of the NE multispecies fishery or associated fishing area can be reserved for recreational fishers, since recreational fishers do not have a limited access NE Multispecies permit specific for their fishery.

*Comment 2:* Fifty-one commenters supported the Fixed Gear Sector and approval of the Operations Plan. Generally, the commenters supported the idea of a sector because they felt it could help to reduce fishing waste, involve communities in management, and allow for greater responsibility and accountability in the fishing industry.

*Response:* NMFS agrees and has approved the Fixed Gear Sector's Operations Plan.

*Comment 3:* Two commenters specified that the Fixed Gear Sector should be allowed access only to the GB Cod Hook Gear Sector Area, and two

commenters believed that the expanded geographic area proposed in the Sector Operations Plan should be vetted by the Council prior to approval. Twenty-five comments were received on the proposed rule for FW 42, requesting that NMFS modify the Sector Area to reflect the larger area proposed by the Sector's Operations Plan to facilitate pursuit of an offshore monkfish fishery. A further 19 comments supported the expanded Sector Area proposed in the Operations Plan to direct effort away from the Gulf of Maine. Eight of the 19 comments specified that the expanded Sector Area proposed would allow the Fixed Gear Sector to maintain a traditional winter fishery focused on offshore monkfish while accounting for GB cod bycatch.

*Response:* Because the goal of the Fixed Gear Sector is similar to the GB Cod Hook Gear Sector, i.e., to target cod and other NE multispecies, the rationale to expand the Sector Area for participants in the Fixed Gear Sector for the purpose of targeting monkfish is not consistent with the objectives of the FMP, and is, therefore, not justified. Furthermore, changing the geographic area of a sector needs to be considered by the New England Fishery Management Council (Council) and must be implemented through rulemaking under the framework adjustment process in the FMP. For these reasons, NMFS has disapproved expansion of the Sector Area for the Fixed Gear Sector.

*Comment 4:* Six commenters believe that the Fixed Gear Sector should be required to have TACs for all species. One noted that input controls could have been proposed in lieu of TACs for all species. Two commenters also expressed concern that the Fixed Gear Sector will reduce the effectiveness of the net cap on pollock and monkfish. Two commenters expressed concern that the Fixed Gear Sector could cause redirected effort and impact other portions of the industry.

*Response:* The assertion that a sector should be governed by a TAC for each species has previously been considered in the context of the GB Cod Hook Gear Sector. Because the Fixed Gear Sector would continue to be bound by both species-specific possession limits and DAS effort controls, TACs are unnecessary for each species. A TAC is issued for GB cod in lieu of possession limits. The comment suggesting that input controls could have been proposed in lieu of TACs is without merit because the Fixed Gear Sector has proposed input controls in the form of DAS and gear restrictions. Similarly, concerns regarding pollock and monkfish caps, and the potential for

redirected effort are unfounded because the Fixed Gear Sector will continue to be bound by DAS and possession limits for all other species. Additionally, the Fixed Gear Sector may not fish under a DAS, possess or land GB cod or other regulated species managed under the FMP, or use gear capable of catching groundfish (unless fishing under recreational or charter/party regulations) once the Sector's cod TAC is reached.

*Comment 5:* One commenter believes that the TAC monitoring protocol proposed in the Sector's Operations Plan is insufficient to ensure timely monitoring of monthly quotas and suggested that daily Vessel Monitoring System (VMS) reporting, standard for other parts of the industry, would be more effective than Vessel Trip Reports (VTRs) submitted monthly to NMFS.

*Response:* The TAC monitoring system proposed by the Fixed Gear Sector is modeled after the system used by the GB Cod Hook Gear Sector. During 3 years of operations this system has been successful at managing both the cod TAC and monthly quota. Further, the Sector Manager is empowered to require an observer be present at offloading of all catch to enhance monitoring.

LOAs will be issued to members of the Fixed Gear Sector exempting them, conditional upon their compliance with the Sector Operations Plan, from the requirements of the GOM cod trip limit exemption program, the GB Seasonal Closure Area (when fishing with hook gear), and the GB cod possession limit restrictions, as specified in §§ 648.86(b)(4), 648.81(g), and 648.86(b)(1) and (2), respectively.

#### Classification

NMFS has determined that this final rule is consistent with the FMP and is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C 553(d)(3) to waive the 30-day delay in effectiveness. Formation of the Fixed Gear Sector is authorized by the final rule implementing FW 42, in accordance with procedures and requirements implemented by Amendment 13, and became effective on November 22, 2006 (71 FR 62156). Creation of the Fixed Gear Sector allows the Regional Administrator to allocate a GB cod TAC to the Fixed Gear Sector and exempt Fixed Gear Sector members from FMP restrictions on an annual basis. Therefore, this action could not be taken prior to the effective date of FW 42, November 22, 2006. FW 42 was

scheduled to take effect on May 1, 2006, the beginning of the 2006 fishing year; however, final adoption of FW 42 by the Council was delayed for several months, which substantially hindered the ability of NMFS to implement the rule in the expected time frame. Under the Sector allocation provisions specified in 648.87(b)(1)(xii), vessels that fish under the DAS program outside the Sector allocation in a given fishing year may not participate in a Sector during the same fishing year. Thus, the two vessels that have agreed to participate in the Fixed Gear Sector have been prohibited from fishing in the groundfish DAS program since May 1, 2006, pending the creation of the Fixed Gear Sector. Each of the vessels that have agreed to participate in the Fixed Gear Sector possesses only two limited access permits: Lobster and groundfish. The lobster fishery, for which these vessels are permitted, is seasonal, with catches slowing during late fall and remaining low through the winter. Thus, while both of these vessels have been able to fish in the lobster fishery since May 1, 2006, the seasonality of that fishery means that they are more dependent on groundfish for their livelihood at this time of year.

Both vessels that have signed on to the Fixed Gear Sector are considered small vessels (<50 ft), which are more adversely impacted by weather conditions than other vessels. In addition, since these vessels are rigged for lobster and hook gear, they are what is referred to as "open" vessels (i.e., no shelter is available during fishing operations) and are exposed to the elements during fishing operations. In addition, the homeport of one vessel, Chatham, is notoriously dangerous to access, particularly during inclement weather. If they cannot begin to fish immediately, then they may effectively be deprived of the majority of the rest of the fishing season because of the likelihood of a great number of days of inclement weather. At this point in the fishing year, there remain a limited number of groundfish days which will have weather in which these two vessels can safely travel to the Sector area on Georges Bank, and since they have already missed the bulk of the season, any further delay would deprive them of a meaningful chance to pursue their livelihood.

This final rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866. This final rule does not contain policies with federalism or "takings" implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. There are

no Federal rules that duplicate, overlap, or conflict with this final rule.

An EA has been prepared for this final rule in compliance with the National Environmental Policy Act (NEPA). In addition, an EA was prepared for FW 42 to the FMP, which references the Fixed Gear Sector. Copies of both of these EAs may be obtained from the Regional Administrator (see **ADDRESSES**).

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), prepared this Final Regulatory Flexibility Analysis (FRFA) in support of the 2006 GB Fixed Gear Sector Operations Plan and allocation of GB cod TAC. The FRFA incorporates the economic impacts summarized in the Initial Regulatory Flexibility Analysis (IRFA) included in the proposed rule and the corresponding analysis in the EA prepared for this action. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, along with the objectives of, and the legal basis for, this rule are contained in the preamble to the proposed rule and are not repeated here.

*Summary of the Issues Raised by Public Comments in Response to the IRFA. A summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made from the Proposed Rule as a Result of Such Comments*

No comments pertaining to the IRFA or the economic impacts of the rule were received during the comment period for this action.

*Description of and Estimate of the Number of Small Entities to Which the Final Rule Would Apply*

All vessels issued a limited access NE multispecies permit and allocated DAS are eligible to participate in the Fixed Gear Sector. Although the nearly 1,000 vessels issued a limited access NE multispecies permit and allocated DAS are eligible to participate in this Sector, it is expected that a substantially smaller number of vessels will actually participate in the Fixed Gear Sector. Due to delays in the review and approval of FW 42, to date, only two vessels have signed the 2006 Sector Contract. However, it is expected that approximately 23 vessels will participate in a proposed Fixed Gear Sector during FY 2007, based upon preliminary estimates.

The Small Business Administration (SBA) size standard for small commercial fishing entities is \$4 million in gross sales, and the size standard for small charter/party operators is \$6.5

million. Available data for FY 2004 gross sales show that the maximum gross sales for any single commercial fishing vessel was \$1.8 million, and the maximum gross sales for any affected party/charter vessel was \$1.0 million. While an entity may own multiple vessels, available data make it difficult to determine which vessels may be controlled by a single entity. For this reason, each vessel is treated as a single entity for purposes of size determination and impact assessment. This means that all commercial and charter/party fishing entities would fall under the SBA size standard for small entities and, therefore, there is no differential impact between large and small entities.

*Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule*

This rule contains no collection-of-information requirements subject to the Paperwork Reduction Act.

*Description of Steps the Agency Has Taken to Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes*

Two alternatives were considered regarding the 2006 Fixed Gear Sector Operations Plan and allocation of GB cod TAC: The no-action alternative and the proposed alternative. Under the no-action alternative, all Fixed Gear Sector vessels would remain in the common pool of vessels and be subject to all of the regulations implemented by Amendment 13 and subsequent adjustments to the FMP, and would not be allocated any portion of the GB cod target TAC. The proposed alternative implemented by this action, enables vessels to fish under the restrictions of the Operations Plan summarized above and allocates a portion of the GB cod target TAC to Fixed Gear Sector vessels.

Because cod usually represents a high proportion of total fishing income for gillnet and hookgear vessels, revenues for such vessel owners are very sensitive to changes in cod trip limits. As a result, the reduced number of available DAS and restrictive trip limits implemented by recent management actions such as FW 42 would result in revenue losses for Fixed Gear Sector vessels under the no-action alternative. In contrast, the 2006 Sector Operations Plan includes a number of provisions that would allow Fixed Gear Sector vessels to remain economically viable, minimize vessel expenses, and maximize consistent revenue streams throughout the fishing year compared to the no-action alternative, without compromising conservation objectives of the FMP.

Such provisions include the establishment of a hard TAC for GB cod landed by Fixed Gear Sector vessels, the even distribution of the allocated GB cod TAC throughout the fishing year, the ability to pool available DAS among Fixed Gear Sector vessels, and exemption from the GB Seasonal Closure Area for hook gear vessels. By facilitating the continued supply of groundfish, the preferred alternative allows Fixed Gear Sector vessels to maximize revenues from available fishing opportunities and, therefore, minimizes adverse economic impacts on small entities compared to the no-action alternative.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: November 22, 2006.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 060608158-6158-01; I.D. 051806E]

RIN 0648-AU47

#### Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Emergency Rule

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

**ACTION:** Temporary rule; emergency action extended.

**SUMMARY:** This rule continues management measures implemented by a June 16, 2006, emergency interim final rule that were set to expire on December 13, 2006. In the June 16, 2006, emergency action, NMFS implemented an observer service provider program for the Atlantic sea scallop (scallop) fishery including criteria for becoming an approved observer service provider, observer certification criteria, decertification criteria, and observer deployment logistics. Through the emergency rule, NMFS re-activated the industry-funded observer program implemented under the Atlantic Sea Scallop Fishery Management Plan (FMP) through a scallop total allowable catch (TAC) and days-at-sea (DAS) set-aside program that helps vessel owners

defray the cost of carrying observers. Under the emergency action, scallop vessel owners, operators, or vessel managers are required to procure certified fishery observers for specified scallop fishing trips from an approved observer service provider. The emergency rule maintains the existing requirements for scallop vessel owners to pay for observers whether or not scallop TAC or DAS set-aside is available. This extension of the emergency rule ensures that observers can continue to be deployed in the scallop fishery throughout the year.

**DATES:** The amendments in this rule to paragraphs (g), (h), and (i), are effective November 29, 2006, through June 11, 2007. The emergency rule published June 16, 2006 (71 FR 34842), is extended from December 13, 2006, through June 11, 2007.

**ADDRESSES:** Written comments regarding the burden-hour estimate or other aspects of the collection-of-information requirement contained in this rule should be submitted to the Regional Administrator at the address above and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:** Peter W. Christopher, Fishery Policy Analyst, 978-281-9288; fax 978-281-9135.

**SUPPLEMENTARY INFORMATION:** On June 16, 2006, an emergency rule implemented an observer service provider certification program that enabled NOAA Fisheries Service to reactivate the Scallop FMP's observer set-aside program. The emergency rule was necessary to resolve an issue with the observer program that rendered the Scallop FMP's observer set-aside program inoperable. Further, the Northeast Fisheries Science Center's (NEFSC's) FY 2006 level of funding for the observer program provided for only minimal coverage in the scallop fishery, and that is not expected to change in FY 2007. Additional background relative to the need for the action is included in the June 16, 2006, emergency rule, and is not repeated here.

The emergency rule established a program that allows observer service providers to be certified by NOAA Fisheries Service to deploy observers on scallop vessels. Certified observer service providers are required to meet specified criteria in order to remain certified under the emergency rule. In addition, vessel owners are required to procure observers from an approved observer service provider and must pay for the observer. To help defray the