

for implementing the 1997 8-hour ozone NAAQS for several of the limited portions of the rule vacated by the U.S. Circuit Court of Appeals for the District of Columbia. The proposal addresses the classification system for the subset of initial 8-hour ozone nonattainment areas that the implementation rule originally covered under CAA title I, part D, subpart 1. The proposal also addresses how 1-hour ozone contingency measures that apply for failure to attain or make reasonable progress toward attainment of the 1-hour standard should apply under the anti-backsliding provisions of the implementation rule. In addition, the proposal removes language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment NSR and CAA section 185 penalty fees under the 1-hour standard.

**Public Hearing:** The proposal for which EPA is holding the public hearing was published in the **Federal Register** on January 16, 2009, (74 FR 2936) and is available at: <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/> and also in the docket identified below. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposal. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. Written comments on the proposed rule must be postmarked by April 1, 2009, which is the extended closing date for the comment period.

Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via e-mail or CD) or in hard copy form.

The hearing schedule, including lists of speakers, will be posted on EPA's Web site <http://www.epa.gov/ttn/naaqs/o3imp8hr/>. Verbatim transcripts of the hearing and written statements will be included in the docket for the rulemaking.

### How Can I Get Copies of This Document and Other Related Information?

The EPA has established a docket for the proposed rule "Proposed Rule to Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Revision on Subpart 1 Area Reclassification and Anti-Backsliding Provisions Under Former 1-Hour Ozone Standard; Proposed Deletion of Obsolete 1-Hour Ozone Standard Provision" under Docket ID No. EPA-HQ-OAR-2007-0956 (available at <http://www.regulations.gov>).

As stated previously, the proposed rule was published in the **Federal Register** on January 16, 2009 (74 FR 2936) and is available at <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/> and in the above-cited docket.

Dated: February 5, 2009.

**Mary E. Henigin,**

*Acting Director, Office of Air Quality Planning and Standards.*

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**BILLING CODE 6560-50-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Part 414

[CMS-1561-NC]

RIN 0938-AP59

### Medicare Program; Changes to the Competitive Acquisition of Certain Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) by Certain Provisions of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA)

#### Correction

In proposed rule document E9-2839 beginning on page 6557 in the issue of Tuesday, February 10, 2009, make the following correction:

On page 6557, in the third column, in the **DATES** heading, "February 13, 2009" should read "February 12, 2009".

[FR Doc. Z9-2839 Filed 2-10-09; 4:15 pm]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 090123054-9058-01]

RIN 0648-XM12

### Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2009 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:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule provides interested parties an opportunity to comment on the proposed sector operations plan and supplemental environmental assessment (EA) prior to final approval or disapproval of the sector operations plan and allocation of a Georges Bank (GB) cod total allowable catch (TAC) to the GB Cod Fixed Gear Sector (Fixed Gear Sector) for fishing year (FY) 2009.

Framework Adjustment (FW) 42 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) implemented the Fixed Gear Sector and authorized allocation of up to 20 percent of the annual GB cod TAC to the Fixed Gear Sector. Pursuant to that authorization, a representative of the Fixed Gear Sector has submitted an operations plan and sector agreement (contract), and requested an allocation of GB cod to the Fixed Gear Sector for FY 2009.

**DATES:** Written comments must be received on or before February 27, 2009.

**ADDRESSES:** You may submit comments, identified by 0648-XM12, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>,
- Fax: (978) 281-9135, Attn: Mark Grant,
- Mail: 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not

submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Sector Agreement and the EA are available from the NE Regional Office at the mailing address specified above.

**FOR FURTHER INFORMATION CONTACT:**

Mark Grant, Sector Policy Analyst, phone (978) 281-9145, fax (978) 281-9135, e-mail [Mark.Grant@NOAA.gov](mailto:Mark.Grant@NOAA.gov).

**SUPPLEMENTARY INFORMATION:** NMFS announces that the Administrator, NE Region, NMFS (Regional Administrator), has made a preliminary determination that the 2009 Fixed Gear Sector Operations Plan and Agreement, which contains the sector contract and operations plan, is consistent with the goals of the FMP, and other applicable law and is in compliance with the regulations governing the development and operation of a sector, as specified under 50 CFR 648.87, as they existed prior to the court order described in this proposed rule. The final rule implementing Amendment 13 (69 FR 22906, April 27, 2004) specified a process for the formation of sectors within the NE multispecies fishery and the allocation of TAC for specific groundfish species (or days-at-sea (DAS)), implemented restrictions that apply to all sectors, established the GB Cod Hook Sector Area (Sector Area), and specified a formula for the allocation of GB cod TAC to the sectors.

FW 42 (October 23, 2006; 71 FR 62156) to the NE Multispecies FMP implemented the Fixed Gear Sector. On January 26, 2009, the U.S. District Court of Massachusetts (Court) issued an order in *Commonwealth of Massachusetts by its Division of Marine Fisheries and State of New Hampshire by its Department of Fish and Game, Division of Marine Fisheries v. Carlos M. Gutierrez, et al.*, temporarily suspending FW 42. On February 2, 2009, NMFS filed a motion to alter or amend the Court's order. NMFS may not be able to finally approve the Fixed Gear Sector's proposed sector operations plan for FY 2009 while FW 42 is suspended. Accordingly, NMFS publishes this proposed rule with the condition that a final rule approving or disapproving the proposed sector operations may be contingent upon the removal of the suspension of FW 42. NMFS is taking this action at this time so that a final

approval or disapproval of the proposed sector operations could be made in advance of the start of FY 2009 on May 1 should the suspension of FW 42 be lifted. This action must be taken at this time to allow sufficient time for publication of this proposed rule, a public comment period, and publication of a final rule no less than 30 days prior to the rule taking effect, consistent with the requirements of the Administrative Procedure Act, as specified at 5 U.S.C. 553.

The principal regulations applying to the Fixed Gear Sector specify that: (1) All vessels with a valid limited access NE multispecies DAS permit are eligible to participate in the Fixed Gear Sector; (2) membership in the Fixed Gear Sector is voluntary, but each member is required to remain in the Fixed Gear Sector for the entire fishing year and cannot fish in the NE multispecies DAS program outside the sector during the fishing year, unless certain conditions are met; (3) vessels fishing in the Fixed Gear Sector are 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; and (4) participating vessels are required to comply with all pertinent Federal fishing regulations, unless specifically exempted by a Letter of Authorization issued by the Regional Administrator, and the provisions of an approved operations plan.

While FW 42 implemented the Fixed Gear Sector, in order for GB cod to be allocated to the Fixed Gear Sector and for the Fixed Gear Sector to be authorized to fish, the Fixed Gear Sector must submit an operations plan and sector contract to the Regional Administrator annually for approval. The operations plan and sector contract must contain certain elements, including a contract signed by all Fixed Gear Sector participants and a plan containing the management rules that the Fixed Gear Sector participants agree to abide by in order to avoid exceeding the allocated TAC. An additional analysis of the impacts of the Fixed Gear Sector's proposed operations may also be required in order to comply with the National Environmental Policy Act. Further, the public must be provided an opportunity to comment on the proposed operations plan and sector contract. The regulations require that, upon completion of the public comment period, the Regional Administrator will make a determination regarding approval of the operations plan and sector contract. If approved by the Regional Administrator, participating vessels would be authorized to fish

under the terms of the operations plan and sector contract.

The Fixed Gear Sector was authorized to fish in FY 2006, FY 2007, and FY 2008, and, based upon the GB cod landings history of its members, was allocated <1.0, 10.7, and 13.99 percent, respectively, of the annual GB cod TAC.

On September 30, 2008, the Fixed Gear Sector submitted its FY 2009 operations plan and sector agreement to NMFS. A draft environmental assessment (EA) was submitted on November 14, 2008. The proposed 2009 Fixed Gear Sector Operations Plan and Agreement contains the same elements and proposed exemptions as the 2008 Fixed Gear Sector Operations Plan and Agreement. The Fixed Gear Sector would be overseen by a Board of Directors and a Sector Manager. The Fixed Gear Sector Agreement specifies, in accordance with Amendment 13, that the Fixed Gear Sector's GB cod TAC would be based upon the number of Fixed Gear Sector members and their historic landings of GB cod. The GB cod TAC is a "hard" TAC, meaning that, once the TAC is reached, Fixed Gear Sector vessels could 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). Should the hard TAC be exceeded, the Fixed Gear Sector's allocation would be reduced by the amount of the overharvest in the following year.

The 2009 operations plan proposes exemptions from the following restrictions of the FMP: The GB cod trip limit; the GB Seasonal Closure Area (when fishing with hook gear); the 3,600-hook limit for longline gear in the GB Regulated Mesh Area (RMA); and the 2,000-hook limit for longline gear in the Gulf of Maine (GOM) and Southern New England (SNE) RMAs. Justification for the proposed exemptions and analysis of the potential impacts of the operations plan are contained in the EA. A Regulatory Impact Review/Initial Regulatory Flexibility Analysis (IRFA) is summarized in the Classification section of this proposed rule.

Twenty-three prospective Fixed Gear Sector members signed the 2009 Fixed Gear Sector Contract. The GB cod TAC calculation is based upon the historic GB cod landings of the participating 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. Based upon the 23 prospective members (and their associated GB cod landings history), the Fixed Gear Sector's share of the overall U.S. portion of the GB cod TAC would be 11.64 percent, or 899,869 lb (408 mt) (11.64 percent times the U.S portion of the fishery-wide GB cod target TAC of 7,729,408 lb (3,506 mt)). If prospective members of the Fixed Gear Sector are deemed ineligible to, or decide not to, participate in the Fixed Gear Sector after the publication of this proposed rule and prior to a final decision by the Regional Administrator, it is possible that the total number of participants in the Fixed Gear Sector and the TAC for the Fixed Gear Sector may be reduced from the numbers above, but no additional members may join the Fixed Gear Sector for FY 2009.

The sector contract contains procedures for the enforcement of the operations plan, a schedule of penalties, and provides the authority to the Fixed Gear Sector Manager to issue stop fishing orders to members of the Fixed Gear Sector. Participating vessels would be required to call the Sector Manager prior to leaving port on a fishing trip. All legal-sized cod caught would be retained, landed and counted against the Fixed Gear Sector's GB cod TAC. For each fishing trip, participating vessels would be required to fish under the NE multispecies DAS program regulations to account for any incidental groundfish species that they may catch while fishing for GB cod. Participating vessels would be required to land fish only in designated landing ports and would be required to provide the Fixed Gear Sector Manager with a copy of the vessel trip report (VTR) within 48 hr of offloading. Dealers purchasing fish from participating vessels would be required to provide the Fixed Gear Sector Manager with a copy of the dealer report on a weekly basis. On a monthly basis, the Fixed Gear Sector Manager would transmit to NMFS aggregate catch data from dealer slips and aggregate discard data from the VTRs. After 90 percent of the Fixed Gear Sector's allocation has been harvested, the Fixed Gear Sector Manager would be required to provide NMFS with aggregate reports on a weekly basis. A total of 1/12 of the Fixed Gear Sector's GB cod TAC would be allocated to each month of the fishing year. GB cod quota that is not landed during a given month would be rolled over into the following month. If landings exceed the monthly quota, the excess would be deducted from subsequent monthly quotas to ensure the Fixed Gear Sector does not exceed its GB cod TAC. The harvest rules

would not preclude a vessel from fishing under the charter/party or recreational regulations, provided the vessel fishes under the applicable charter/party and recreational rules on separate trips.

Participating vessels would not be allowed to fish with or have on board gear other than jigs, non-automated demersal longline, handgear, or sink gillnets. Participating Fixed Gear Sector vessels could use an unlimited number of hooks in the Sector Area and would be exempt from the GB Seasonal Closure Area when using hook gear. All of these exemptions were approved for FY 2006 and FY 2007.

The EA prepared for the Fixed Gear Sector's operations concludes that the biological impacts of the Fixed Gear Sector will be positive because the hard TAC and the use of DAS would provide two means of restricting both the landings and effort of the Fixed Gear Sector. Implementation may have a positive impact on essential fish habitat and bycatch if the Fixed Gear Sector's quota is caught prior to the end of the fishing year by reducing the amount of time that gear would be in the water. The analysis of economic impacts of the Fixed Gear Sector concludes that the members would realize higher economic returns if the Fixed Gear Sector is implemented. The EA asserts that fishing in accordance with the sector contract rules enables more efficient harvesting of GB cod than would be possible if the participating vessels were fishing in accordance with the common pool (non-sector) rules. The social benefits of the Fixed Gear Sector would accrue to sector members, as well as the Chatham, MA, and Harwichport, MA, communities, which are more dependent upon groundfish revenues as a percentage of fishery-derived landings than many other communities. The EA concludes that the self-governing nature of the Fixed Gear Sector and the member's opportunity to develop rules governing the way in which they harvest their GB cod TAC enables stewardship of the cod resource by the Fixed Gear Sector. The cumulative impacts of the Fixed Gear Sector are expected to be positive due to a positive biological impact, potential positive impact on habitat, and a positive social and economic impact. In contrast, the cumulative impact of the no action alternative is estimated to be neutral, with negative social and economic impacts.

Should the Regional Administrator approve the sector contract as proposed, a Letter of Authorization would be issued to each member of the Fixed Gear Sector exempting them, conditional

upon their compliance with the sector contract, from the GB cod possession restrictions, the 3,600-hook limit in the GB RMA, the 2,000-hook limit in the GOM and SNE RMAs, and the GB Seasonal Closure Area (when using hook gear), as specified in §§ 658.86(b)(2), 648.80(a)(4)(v), 648.80(a)(3)(v), 648.80(b)(2)(v), and 648.81(g), respectively.

#### Classification

Pursuant to section 304 (b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This action is exempt from review under Executive Order (E.O.) 12866.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. The IRFA consists of this section, the preamble and the EA prepared for this action. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this proposed rule and in sections 1.0, 2.0, and 3.0 of the EA prepared for this action. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

The Small Business Administration size standard for small commercial fishing entities is \$4 million in average annual receipts, and the size standard for small charter/party operators is \$6.5 million in average annual receipts. All permitted and participating vessels in the groundfish fishery, including prospective Fixed Gear Sector members, are considered to be small entities because gross sales by any one entity (vessel) do not exceed this threshold, and, therefore there is no disproportionate impact between large and small entities. 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. All permitted and participating vessels in the groundfish fishery, including prospective Fixed Gear Sector members, are considered to be small entities because gross sales by any one entity (vessel) do not exceed this threshold. The number of prospective participants in the Fixed Gear Sector is 23, substantially less than

the total number of active vessels in the groundfish fishery. Only these 23 vessels would be subject to the regulatory exemptions and operational restrictions proposed for the Fixed Gear Sector for FY 2009.

#### *Economic Impacts of the Proposed Action*

The proposed alternative would allocate a GB cod TAC of 408 mt to the Fixed Gear Sector. Once the GB cod TAC is harvested, participating vessels would not be allowed to fish under a NE multispecies DAS, possess or land GB cod, or other regulated species managed under the NE multispecies FMP, or use gear capable of catching groundfish (unless fishing under recreational or charter/party regulations). Vessels intending to fish in the Fixed Gear Sector during FY 2009 may only fish with hook gear or sink gillnets. Under the proposed operations plan, members would be exempt from several restrictions of the FMP described in the preamble to this proposed rule and in the EA.

The Fixed Gear Sector fishermen and the Chatham, MA, and Harwichport, MA, communities are dependent upon GB cod and other groundfish. The Amendment 13 restrictions that reduced the GB cod trip limit had a disproportionate affect on these fishermen. According to Amendment 13, Chatham's overall community dependence on NE multispecies as a percentage of total fisheries revenues from federally permitted vessels averaged about 71-percent and it was likely that at least some of the active groundfish vessels in Chatham and Harwichport were even more than 71 percent dependent on the NE multispecies fishery.

Cod, skate wings, and monkfish comprised the largest proportion of Fixed Gear Sector landings (40.70 percent, 23.62 percent, and 9.78 percent respectively, in FY 2007). During FY 2007, members of the Fixed Gear Sector made 632 trips, landed 721,315 lb (327,183 kg) of cod, 418,679 lb (189,910 kg) of skate wings, 173,270 lb (78,594 kg) of whole monkfish, and 20,209 lb (9,167 kg) of monkfish tails, and generated approximately \$ 1,348,859; \$ 230,273; \$ 344,807; and \$ 62,648 in revenue from those species, respectively (assuming dockside prices of \$ 1.87, \$ 0.55, \$ 1.99, and \$ 3.10 per lb [\$ 4.11, \$ 1.21, \$ 4.38 and \$ 6.82 per kg], respectively). Fixed Gear Sector members also landed various other species, which increased their revenue. In general, the operation of the Fixed

Gear Sector would continue to mitigate the negative economic impacts that result from the current suite of regulations that apply to the groundfish fishery (most recently FW 42). The Fixed Gear Sector, by fishing under rules that are designed to meet their needs (as well as the conservation requirements of the FMP), is afforded a larger degree of flexibility and efficiency, which result in economic gains. For example, Fixed Gear Sector members are able to plan their fishing activity and income in advance with more certainty due to the fact that there is a cod TAC, which is apportioned to each month of the year. They are able to maximize their efficiency (revenue per trip) due to the exemption from trip limits and limits on the number of hooks fished. Two hundred seventy-three of the Fixed Gear Sector's 632 trips (43 percent) in FY 2007 landed more than the daily GB cod trip limit (1,000 lb/day; 454 kg/day) in place for the common pool vessels (non-sector vessels). This resulted in an additional 349,705 lb (158,624 kg) (46 percent of the Fixed Gear Sector's FY 2007 cod landings) being landed, rather than discarded. For some vessel owners in the Fixed Gear Sector, participation in the Fixed Gear Sector enables their businesses to remain economically viable.

No other alternatives in addition to the No Action and the proposed action were considered. The RFA requires each IRFA to include a description of significant alternatives that accomplish the objectives of applicable statutes (in this case, sector provisions) and minimize any significant economic impact to small entities. The objective of sector management, as originally developed and implemented under Amendment 13 to the FMP, is to provide opportunities for like-minded vessel operators to govern themselves so that they can operate in a more effective and efficient manner. The Fixed Gear Sector developed the proposed operations plan after consultation with prospective members. Prospective members then signed a binding sector contract to abide by the measures specified in the proposed operations plan. As described above, the proposed operations plan minimizes economic impacts to participating vessels by allowing them to operate more efficiently. Accordingly, the proposed operations plan reflects the management measures preferred by vessels participating in the Fixed Gear Sector during FY 2009 and represents all of the significant alternatives that accomplish

the objectives of sector provisions and minimize economic impacts to small entities, as required by the RFA. Therefore, in conjunction with the NEPA requirement to consider a reasonable range of alternatives, no other alternatives were considered as part of this proposed action.

#### *Economic Impacts of Alternative to the Proposed Action*

Under the No Action alternative, the 2009 Fixed Gear Sector operations plan is disapproved and no modified operations plan is submitted. While the Fixed Gear Sector would remain implemented under the FMP, under the No Action Alternative, the Fixed Gear Sector would not be authorized to fish, would not be allocated a GB cod TAC, and all vessels would remain in the common pool and fish under the regulations implemented in Amendment 13 and subsequent FW to the FMP.

Because cod usually represents a high proportion of total fishing income for Cape Cod-based fixed gear vessels, revenues for such vessel owners are very sensitive to regulations that impact how and when they can fish for cod, such as trip limits and restrictions on the number of hooks fished. Under the common pool rules implemented by FW 42 (e.g., differential DAS counting) and Amendment 13 (restrictive daily trip limits for cod), it is likely that Fixed Gear Sector vessels would experience revenue losses in comparison to the proposed action. It is more likely under the No Action alternative that disruption to the Chatham/Harwichport communities would occur.

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

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

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on proposed sector operations plans and TAC allocations.

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

Dated: February 6, 2009.

**Samuel D. Rauch,**

*Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.*

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