

Dated: June 24, 2014.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 140616507-4507-01]

RIN 0648-BE19

#### Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Unused Catch Carryover; Emergency Action

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

**ACTION:** Temporary rule; emergency action; request for comments.

**SUMMARY:** NMFS is changing the accounting system and accountability measures implemented last year for fishing year 2012 Northeast multispecies fishery sector annual catch entitlement carryover used during fishing year 2013. This change implements a stock level pound-for-pound payback accountability measure if a sector uses its 2012 carryover and both the sector sub-annual catch limit and the overall annual catch limit are exceeded. This rule is necessary to comply with an April 4, 2014, ruling by the U.S. District Court for the District of Columbia that invalidated and vacated the fishing year 2013 carryover measures.

**DATES:** Effective June 27, 2014, except for the amendment to § 648.87(b)(1)(i)(C)(2)(i) which is effective June 27, 2014, through December 24, 2014. Comments must be received on or before July 28, 2014.

**ADDRESSES:** You may submit comments, identified by NOAA-NMFS-2014-0070, by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0070](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0070), click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Paper, disk, or CD-ROM comments should be sent to John K.

Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on the Court remedy carryover emergency rule."

- *Fax:* (978) 281-9135, Attn: Michael Ruccio.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

A National Environmental Policy Act (NEPA) Supplemental Information Report (SIR), including a Regulatory Impact Review, has been prepared for this action. Copies of the SIR prepared for this action by NMFS are available from John K. Bullard, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. The SIR is accessible via the Internet at <http://www.nero.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Michael Ruccio, Fishery Policy Analyst, phone: 978-281-9104.

**SUPPLEMENTARY INFORMATION:** This rule to respond to a recent U.S. District Court decision in *Conservation Law Foundation v. Pritzker, et al.* (Case No. 1:13-CV-0821-JEB) provides information in a question in response format. The key questions are:

1. What action is being taken by this rule?
2. What are the events and background that led to this rule becoming necessary?
3. What is the justification for taking this action?
4. What are the next steps NMFS will take?

This section includes information on the fishing year (FY) 2013 remedy and information about carryover accounting for FY 2014 and beyond. Additional information on how this rule complies with applicable law is provided in the Classification section.

#### 1. What action is being taken by this rule?

As a result of the Court order and remand in *Conservation Law Foundation v. Pritzker, et al.*, we are

implementing regulations that hold sectors accountable for using carryover of annual catch entitlement (ACE) from FY 2012 in FY 2013. The Court invalidated the carryover measures implemented in association with Framework Adjustment 50 (FW 50) to the NE Multispecies Fishery Management Plan (FMP) because the measures failed to prevent total potential catches of certain stocks (ACEs plus carryovers) from exceeding their annual biological catches (ABCs). This action implements revised carryover measures for FY 2013 to comply with the Court's findings. The action does not delete the specific regulations invalidated by the Court at § 648.87(b)(1)(i)(C) because they were already removed, inadvertently, when FW 51 measures were implemented on May 1, 2014. This action requires an accountability measure for a sector that harvests its carryover catch from FY 2012 of a stock in FY 2013 if the cumulative sub-annual catch limit (ACL) for all sectors, and, the overall ACL of such stock is exceeded. The accountability measure is a pound-for-pound reduction (or "payback") of that sector's FY 2014 ACE for an applicable stock equal to the amount of the carryover used after deducting a *de minimis* amount.

The following stepwise evaluation process provides a detailed explanation of when and how the payback accountability measure would be triggered and assessed:

*Step 1:* Has the total fishery-level ACL for a stock been exceeded?

- No—There is no reduction in FY 2014 ACE for that stock required (i.e., no repayment required). Other components of the fishery underutilized their available catch limits for that stock sufficient to offset any carryover used.

- Yes—Proceed to step 2.

*Step 2:* Has the sector sub-ACL (i.e., sum total of all sector ACE) been exceeded?

- No—There is no reduction in FY 2014 ACE for that stock required (i.e., no repayment required). Even though the total fishery-level ACL was exceeded, sectors collectively did not exceed their sub-ACL for that stock. While some sectors may have used carryover for that stock, other sectors did not or underutilized available ACE for that stock by enough to offset the carryover used, resulting in total catch less than the sub-ACL.

- Yes—Proceed to step 3.

*Step 3:* After sectors' FY 2013 catch reconciliation with NMFS has occurred, determine which sectors used FY 2012 carryover ACE for a stock. For each of those sectors, determine the amount of

carryover used that must be deducted from that sector's FY 2014 ACE as follows:

- *Step 3a:* Subtract the *de minimis* carryover amount for that stock from the carryover amount used by the sector. The *de minimis* amount was recently determined to be 1 percent of the FY 2013 sector sub-ACL subdivided to the sectors according to their percent sector contribution per stock.

- *Step 3b:* Reduce the sector's FY 2014 ACE for that stock by the amount calculated in Step 3a. This is the equivalent to a pound-for-pound payback of FY 2012 carryover used minus the *de minimis* allowance.

## 2. What are the events and background that led to this rule becoming necessary?

We took action in May 2013 to clarify how unused multispecies sector ACE carried over from FY 2012 for use in FY 2013 would function. The clarification was made using Magnuson-Stevens Act section 305(d) authority and was put in place as part of the rulemaking for FW 50 to the FMP. The clarification described how carryover catch would be counted in evaluating if accountability measures were triggered because ACLs had been exceeded. In the FW 50 rulemaking, we also clarified how carryover accounting and accountability would function for FY 2014 and beyond. The FW 50 interim final rule published on May 3, 2013 (78 FR 26172), and the final rule published on August 29, 2013 (78 FR 53363).

Regulations implementing FW 50 measures stated that FY 2013 was the last year for which carried over catch, if used by sectors, would not be counted against ACLs to determine accountability, should overages occur. This had been the accounting practice since the establishment of the expanded sector program in 2010 (Amendment 16 to the FMP).

In developing FY 2013 measures, we recognized that the maximum carryover (10 percent of FY 2012 sector ACE), if used in conjunction with the much lower catch limits being put in place, could cause overages of the ACL, ABC and, for one stock, the overfishing limit (OFL). We explained these concerns in the FW 50 rulemaking. We put in place measures to maintain the previously described system in which carryover catch was not involved in the accountability measures evaluation. This was intended to be a transition year designed to help mitigate the negative impacts of much lower catch limits being implemented for FY 2013. Our general rationale in continuing this carryover approach for one more year

was to avoid potential negative impacts on safe at-sea operations at the end of the fishing year and on sectors involving carryover use, leases, or trades that would result from a sudden, late-season change in carryover accounting practices. We also took emergency action to reduce the amount of Gulf of Maine cod carryover so that OFL would not be exceeded if available carryover and the ACL were fully utilized.

Our clarifying action in FW 50 also specified new carryover accountability measures for FY 2014 and beyond. We put in place measures that specified carryover catch, except for a nominal ("*de minimis*") amount would be considered in determining accountability for catch limit overages under certain conditions. Specifically, carryover used would be subject to a pound-for-pound reduction in the next year's ACE for that stock when the total ACL is exceeded for a stock. A *de minimis* amount of used carried over catch would be exempt from reduction if the accountability measure was triggered. We exempted this small amount of carryover from the accountability measure so fishermen could plan for safe end-of-year fishing.

The FY 2013 carryover and other measures implemented by us in the FW 50 rules were challenged by the Conservation Law Foundation in U.S. District Court (District of Columbia).<sup>1</sup> On April 4, 2014, the U.S. District Court for the District of Columbia found that the FY 2013 carryover provisions violated the Magnuson-Stevens Act because the measures allowed for potential total catch levels (allocated sector ACEs plus 2012 carryover) to exceed the ABC. The Court vacated FY 2012 carryover provisions and remanded the issue to us to implement measures to prevent catches due to carryover from exceeding ABCs for each stock and to account for any overages of FY 2013 catch limits. The Court acknowledged that it was unlikely we could implement regulations to prevent catches from exceeding ABC before April 30, 2014, the end of FY 2013. The FY 2013 ABCs are available in the Framework Adjustment 50 interim final rule (May 3, 2013; 78 FR 26172). The Court noted that we could still implement measures to account and make-up for any overages of catch limits through a payback that would reduce 2014 sector allocations. The Court required us to notify the sectors and others as quickly as possible about the Court Order and our need to implement remedial measures to address the Order.

<sup>1</sup> *Conservation Law Foundation v. Pritzker, et al.* (Case No. 1:13-CV-0821-JEB)

The Court also expressed concern about minimizing disruption to the fishing industry in light of its ruling being issued with only weeks remaining in FY 2013.

We initially notified sector managers of the Court's decision on the day it was issued, April 4, 2014. An information bulletin was distributed to the industry and public on April 16, 2014, outlining details of the Court's decision and providing information on our initial plan to address the remand. This bulletin explained our intent to apply the FW 50 approach for FY 2014 and beyond as the FY 2013 carryover response. Under this approach, sectors using carryover could be held accountable for FY 2012 carryover used if the total catch exceeded the total stock-level FY 2013 ACL.

After substantial input from sectors, the New England Fishery Management Council, and others, a subsequent bulletin was issued on May 6, 2014, that modified the initial information. We outlined the modified approach for responding to the Court remand based on a two-tiered accountability evaluation that is being implemented by this rule. That is, sectors that used FY 2012 carryover ACE in FY 2013 for a particular groundfish stock will be held accountable to pay back the carryover used, except for a *de minimis* amount, from their FY 2014 ACE only if *both* the total ACL and sector sub-ACL are exceeded.

## 3. What is the justification for taking this action?

Section 305(c) of the Magnuson-Stevens Act authorizes NMFS, through delegation from the Secretary of Commerce, to take emergency action outside the Council process if the Secretary finds that an emergency involving a fishery exists. See, 16 U.S.C. 1855(c)(1) and (2). We previously issued guidance defining when "an emergency" involving a fishery exists. 62 FR 44421; August 21, 1997. This guidance defines an emergency as a situation that (1) arose from recent, unforeseen events, (2) presents a serious conservation problem in the fishery, and (3) can be addressed through interim emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and the deliberative consideration of the impacts on participants to the same extent as would be expected under the formal rulemaking process. This action satisfies these criteria.

The April 4, 2014, decision from the U.S. District Court for the District of Columbia was both recent and unforeseen. The decision and order

requires immediate action on our part to address what the Court found was a serious conservation problem. The FY 2013 carryover system provided a possibility that sectors could harvest fish in excess of the ABC.

The need to quickly provide regulatory information on the FY 2012 to FY 2013 carryover catch without the opportunity for prior public comment, as more fully discussed below in the CLASSIFICATION section, outweighs the value of the benefits that would be provided by standard Administrative Procedure Act notice-and-comment rulemaking. We have little discretion in complying with the Court's vacatur and remand. The Court decision stated that we violated the Magnuson-Stevens Act by allowing the carryover approach for FY 2013 as outlined in FW 50 because of the potential of harvesting fish stocks in excess of their ABCs. The scope of options that could be developed by us to address the remand were limited to accountability changes given the after-the-fact nature (i.e., rulemaking after the fishing year ended) and the need to ensure consistency with the FMP, National Standard 1 guidelines, and the Court's decision. The Court clearly articulated the need to expedite explanations of the impact to carryover resulting from the vacatur decision and for rulemaking to be completed in a timely manner for adequate accountability measures and to minimize disruptions to the fishing industry. Based on communications with sector managers and plaintiff Conservation Law Foundation following the April 16 bulletin, we revised the initial remand approach by providing some additional flexibility in the two-tiered approach (i.e., triggering accountability if both the total ACL and sector sub-ACL are exceeded). This approach maintains accountability at the ACL level, consistent with both the FMP and National Standard 1 guidelines. We believe that this approach also satisfies the Court's remand. Given the unforeseen circumstances, the limited scope of options available to address the remand, and the need to expeditiously implement regulations to address legal and conservation concerns, the use of Magnuson-Stevens Act section 305(c) rulemaking is necessary and justified.

We are also relying on the authority of section 305(d) of the Magnuson-Stevens Act to implement this action because that was the authority used to implement the 2013 carryover measures. It is appropriate to make these changes under the same authority. 16 U.S.C. 1855(d). Section 305(d) allows us to issue regulations to carry out a fishery

management plan in accordance with the Magnuson-Stevens Act. In this case, carryover accounting must be changed to respond to the Court's order finding the FY 2013 approach violated the Magnuson-Stevens Act.

#### 4. What are the next steps NMFS will take?

##### *Determining Whether the 2013 Carryover Accountability Measures Is Triggered*

Currently, catch information for FY 2013 is incomplete and it is not possible to fully determine if carryover-related accountability triggers have been or will be met in FY 2013. Final FY 2013 catch accounting for all fishery components, including information on state water and other fishery sub-component catch, will be available in September. In addition to modifications already implemented for the Weekly Sector ACE Comparison Reports that show catch, carryover, and the *de minimis* amount, per stock by sector, we will provide specific details if any accountability triggers are met, which would result in sectors having to pay back overages from FY 2014 ACE. We will enact the payback reduction of FY 2014 ACE, if necessary, through rulemaking. Further information on this process will be conveyed in Greater Atlantic Region Information Bulletins, as needed.

Based on catch information available through June 11, 2014, none of the ABCs for any of the stocks allocated to sectors have been exceeded due to recreational catch, except for Gulf of Maine haddock. The sector catch for most stocks remains below the sector sub-ACL meaning that the second criterion has not been met (i.e., exceeding sector sub-ACL) and no carryover-related accountability measure will be triggered even if the final total catch is above the total ACL. It is noteworthy that there are accountability measures that may still be enacted if the total catch does exceed ACL. Three stocks: Gulf of Maine haddock, American plaice, and witch flounder, all had varying levels of carryover use in FY 2013. Although the overall ACL for Gulf of Maine haddock has been exceeded, the sector sub-ACL has not. Thus, the carryover-repayment accountability measure is not triggered. American plaice total sector catch is also slightly below the sub-ACL even though some sectors made use of carryover. The sector sub-ACL for witch flounder has been exceeded but the overall ACL has not. Based on currently available information through June 11, 2014, the accountability triggers have not been met for any stock and no payback reduction of FY 2014 ACE for

a stock has been determined to be necessary. It is possible that 6 sectors may be required to repay approximately 60,000 lb (27,216 kg) of carryover used if the total ACL is determined to have been exceeded when final catch data are available later this fall. We intend to update this information frequently as additional data become available.

*Carryover Accounting for FY 2014 and Beyond.* The Court decision was clear that we could not permit the total potential catch (i.e., the total of the ACL plus available carryover) to exceed the ABC for any given stock. The current FY 2014 carryover system was developed before the decision does not take into account the court's findings.

We will be providing guidance to the Council on what may be necessary to address the inconsistency between current carryover provisions and the Court's decision. This guidance may include advice that the Council take action to modify the FMP so carryover is consistent with the Court's decision. In the meantime, we may have to take action to ensure that potential catch does not exceed ABC for any particular stock in FY 2014.

#### Classification

The Assistant Administrator Fisheries, NOAA, finds that it is impracticable, unnecessary, and contrary to the public interest to provide for prior notice and an opportunity for public comment. The opportunity for public comment, pursuant to authority set forth at 5 U.S.C. 553(b)(B), would be unnecessary, impracticable, and contrary to the public interest because NMFS has no discretion in implementing the measures of this rule. The changes implemented by this rule are necessary to respond immediately to a court-ordered remand. As such, the scope of options is very narrow and additional public comment is largely unnecessary given the lack of discretion available to develop alternative approaches that would satisfy the remand. Furthermore, the Court expressly stated that public notification and rulemaking should occur quickly as the remand was rendered with less than a month of the fishing year remaining. It would be unreasonable to delay rulemaking unnecessarily as sectors need to understand the implications of the Court decision and NMFS' approach to resolving the remand. For a limited time in the beginning of FY 2014, sectors have an opportunity to reconcile overages by trading or leasing ACE among themselves. It is important that sectors quickly understand how catch accounting is changed by this rule so they may pursue reconciliation options.

While this information was previously provided to sectors, it is necessary to finalize the regulations that put in place the process NMFS outlined to the Court, sectors, and the public. It is also important that NMFS provide information on how the remaining accounting process will occur, which is also provided in this rule. To the extent that flexibility in the measures could be provided, NMFS has done so. While formal public comment was not sought through rulemaking, NMFS did consider feedback on potential approaches to satisfy the remand, provided by the plaintiffs Conservation Law Foundation, sector managers, the Council, and the public.

Similarly, the need to implement these measures in a timely manner to respond to the Court constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to make this rule effective upon publication in the Federal Register. Given the need to respond to the Court remand and to inform the public of the measures NMFS intended to implement through this rule so that they may plan for the changes, the provisions of this rule have already been conveyed to the public. Additional delay in making this rule's measures effective would be contrary to the public interest. Additionally, the public has already been notified in advance of the rule's publication what measures would be put in place. This is highly unusual, but was necessary given the timing of the Court's decision relative to the end of the fishing year.

This rule has been determined to be not significant for purposes of Executive Order 12866.

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment. Accordingly, no Regulatory Flexibility Analysis is required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: June 23, 2014.

Eileen Sobeck,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.87, effective June 27, 2014, remove paragraph (b)(1)(i)(C), and add paragraphs (b)(1)(i)(C) heading, (b)(1)(i)(C)(1) introductory text, (b)(1)(i)(C)(1)(i) through (ii), and (b)(1)(i)(C)(2) to read as follows:

§ 648.87 Sector allocation.

- (b) \* \* \*
(1) \* \* \*
(i) \* \* \*

(C) Carryover. (1) With the exception of GB yellowtail flounder, a sector may carryover an amount of ACE equal to 10 percent of its original ACE for each stock that is unused at the end of one fishing year into the following fishing year.

(i) Eastern GB Stocks Carryover. Any unused ACE allocated for Eastern GB stocks in accordance with paragraph (b)(1)(i)(B) of this section will contribute to the 10 percent carryover allowance for each stock, as specified in this paragraph ((b)(1)(i)(C)(1)), but will not increase in individual sectors allocation of Eastern GB stocks during the following year.

(ii) This carryover ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

(2) Carryover accounting. (i) [Reserved]

(ii) Beginning in FY 2014, carryover of a particular stock attributed to a sector, other than the NMFS-specified de minimis amount, shall be counted against the sector's ACE for purposes of determining an overage subject to the AM in paragraph (b)(4)(iii) of this section if the overall stock-level ACL has been exceeded.

(iii) NMFS shall determine and announce the de minimis amount for FY 2014 and may modify each subsequent year. De minimis determinations shall be made consistent with the APA.

(iv) The Council may request, on an annual basis, for NMFS to reduce the amount of the available eligible carryover amount to ensure the total potential catch, the stock-level ACL plus the carryover amount, does not exceed the stock overfishing limit. Any such reduction of carryover amount shall be done consistent with the APA.

\* \* \* \* \*

■ 3. In § 648.87, effective June 27, 2014, through December 24, 2014, add paragraph (b)(1)(i)(C)(2)(i) to read as follows:

§ 648.87 Sector allocation.

- (b) \* \* \*
(1) \* \* \*
(i) \* \* \*
(C) \* \* \*
(2) \* \* \* (i) For FY 2013, carryover of

a particular stock from FY 2012 attributed to a sector, other than the NMFS-specified de minimis amount, shall be counted against the sector's ACE for purposes of determining an overage subject to the AM in paragraph (b)(4)(iii) of this section if both the overall stock-level ACL and sector sub-ACL for a particular stock have been exceeded.

\* \* \* \* \*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 131021878-4158-02]

RIN 0648-XD348

Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole for the Bering Sea and Aleutian Islands Trawl Limited Access Sector in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; modification of closure.

SUMMARY: NMFS is opening directed fishing for the Bering Sea and Aleutian Islands trawl limited access sector's yellowfin sole fishery in the Bering Sea and Aleutian Islands Management Area (BSAI). This action is necessary to fully use the 2014 total allowable catch (TAC) of yellowfin sole for the BSAI trawl limited access sector in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), June 25, 2014, through 2400 hrs, A.l.t., December 31, 2014. Comments must be received at the following address no later than 4:30 p.m., A.l.t., July 9, 2014.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2013-0152, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/