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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 648 and 697

[Docket No. 130319263-3823-02]

RIN 0648- BD09

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Final Rule to Allow Northeast Multispecies Sector Vessels Access to Year-Round Closed Areas

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

ACTION: Interim final rule.

SUMMARY: This rule allows fishing access for Northeast multispecies sectors to two portions of the Southern New England Nantucket Lightship Closed Area for the remainder of the 2013 fishing year under specified conditions. Although NMFS considered and proposed exemption requests that would allow sector vessels access to portions of Georges Bank Closed Areas I and II, NMFS is not granting access to those areas at this time. The intent of this rule is to allow sector vessels increased opportunities to harvest non-groundfish stocks such as monkfish, dogfish, and skates while minimizing impacts to overfished groundfish stock such as Georges Bank cod and yellowtail flounder.

DATES: Effective [Insert date 15 days after date of publication in the FEDERAL REGISTER], through April 30, 2014. Comments on the interim monitoring coverage measure must be received by [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: A copy of the accompanying environmental assessment is available from the NMFS Northeast Regional Office: John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: <http://www.regulations.gov>.

You may submit comments on this document, identified by NOAA-NMFS-2013-0084, 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-2013-0084](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0084), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Fax: (978) 281-9135, Attn: William Whitmore.
- 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 Closed Area Interim Final Rule.”

Instructions: All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. No comments will be posted for public viewing until after the comment period has closed. 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.

Once submitted to NMFS, copies of addenda to fishing year 2013 sector operations plans detailing industry-funded monitoring plans, and the environmental assessment (EA), will be available from the NMFS NE Regional Office at the mailing address above.

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, phone (978) 281-9182, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

Amendment 16 to the Northeast Multispecies Fisheries Management Plan (groundfish plan) allows sectors to request regulatory exemptions in their annual sector operations plans. We review and approve or disapprove sector exemptions on an annual basis. Exemption requests are only approved after we determine that the exemption is consistent with the groundfish plan's goals and objectives. For additional information on sector exemptions, the process for approving sector exemptions, and a description of current sector exemptions, please see the final rule for fishing year 2013 sector operations plans (78 FR 25591, May 2, 2013).

On May 3, 2013, NMFS partially approved Framework Adjustment 48 to the groundfish plan, which includes a provision that allows sectors to request access to year-round mortality closure areas. For additional information on Framework 48, see 78 FR 26118; May 3, 2013. Anticipating that Framework 48 would be approved, sectors included exemption requests from year-round closure areas in their initial fishing year 2013 operations plan submissions in the fall of 2012. This interim final rule partially approves these exemption requests.

As explained in the proposed rule (78 FR 41772; July 11, 2013), recent analyses of these closed areas were undertaken by the New England Fishery Management Council's (Council) Closed Area Technical Team (CATT). Much of the work done by the CATT was incorporated

into the environmental assessment that accompanies this action. In a separate action, the Council is also in the process of preparing Essential Fish Habitat (EFH) Omnibus Amendment 2 (referred to as the Omnibus Habitat Amendment) to several fishery management plans, including the groundfish plan. It is anticipated that the Omnibus Habitat Amendment will be completed by May 2014, and potentially implemented by the end of 2014.

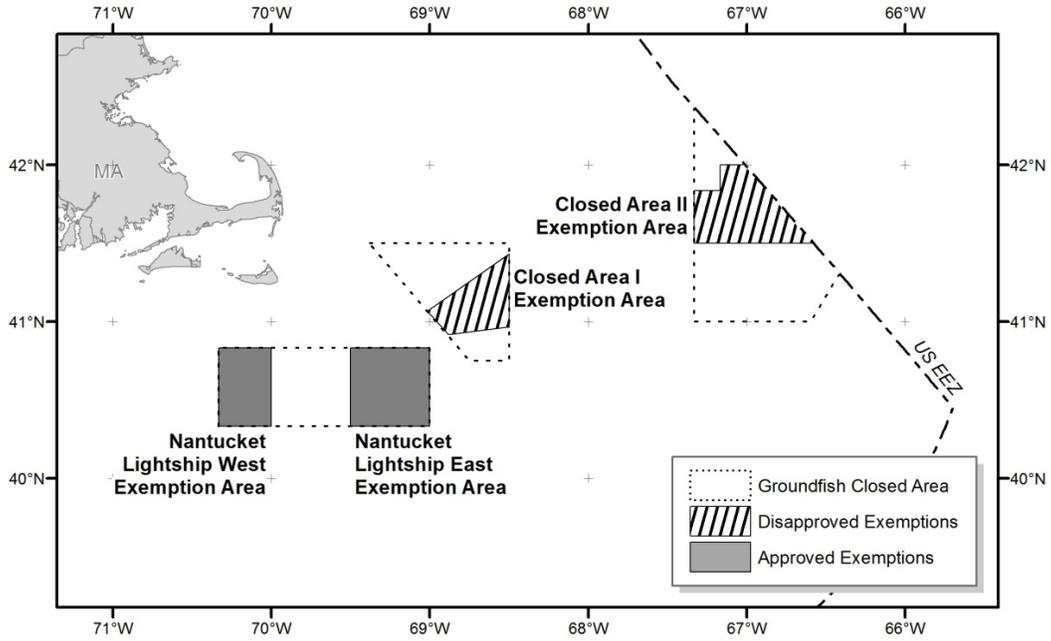
While the measures approved in this rule are only for the 2013 fishing year, the current closed areas could be modified sometime during the 2014 fishing year as a result of the Omnibus Habitat Amendment. The Omnibus Habitat Amendment is considering allowing access to the areas being opened in this action within the context of balancing the protections and opportunities provided by a broad array of potential essential fish habitat management areas. The balance will seek to minimize impacts to essential fish habitat to the extent practicable. This action involves access to portions of these specific closed areas, without balancing the potential protections or opportunities provided by other areas. The broader focus of the Omnibus Habitat Amendment may result in providing more or less restrictive access to the portions of the closed areas considered in this action. Additional information on the Omnibus Habitat Amendment, including a map and descriptions of the proposed closed area modifications, can be found on the Council's website at <http://nefmc.org/habitat/index.html>.

We considered exemption requests from portions of the Nantucket Lightship Closed Area and Closed Areas I and II in a separate action from the final rule for fishing year 2013 sector operations plans for several reasons. First, proposing these exemption requests in a separate action gave us additional time to develop a more detailed and complete environmental analysis. Second, it provided a better opportunity to address specific concerns with the potential impact of actual sector proposals. Third, the public could provide additional comments to those already

expressed in response to Framework 48. Fourth, because access to these closed areas was considered through sector exemptions, the NMFS Regional Administrator could include additional stipulations and constraints on specific exemptions to facilitate the monitoring and enforcement of sector operations or as mitigation measures to address specific potential impacts. The three proposed exemptions included additional constraints to mitigate impacts on groundfish stocks and protected resources to ensure that any approved exemptions are consistent with the goals and objectives of the groundfish plan.

Our consideration of these sector exemptions balanced factors specific to the protections of, and fishing opportunities for, fish stocks within small portions of these closed areas. The proposed exemptions were intended to provide economic opportunities to sector vessels to mitigate the impact of sharp reductions in catch limits. After considering over 81,100 comments submitted by the public, and after further review of the environmental assessment, we have elected not to grant sectors restricted access to Georges Bank Closed Areas I and II in fishing year 2013. This rule, however, does grant sector vessels access to portions of the Southern New England Nantucket Lightship Closed Area for the remainder of this fishing year. Further, we will use at least the standard federally funded sector at-sea monitoring and observer coverage level (22 percent of trips for the 2013 fishing year) for trips into the Eastern and Western Exemption Areas of Nantucket Lightship Closed Area (Figure A). Because this coverage level differs from what was initially proposed, we are soliciting additional comment on this issue. It is hoped that allowing carefully designed access to the Nantucket Lightship Closed Area will allow vessels to increase their catch of healthy non-groundfish stocks (such as monkfish, dogfish, and skates), while minimizing impacts to recovering groundfish stocks and protected resources.

Figure A – Approved and Disapproved Sector Exemptions for Closed Area Access for Fishing Year 2013



## Disapproval of Exemption Requests to Fish in Portions of Closed Areas I and II

Although we proposed to allow access to fish in portions of Closed Areas I and II in the proposed rule, we are not approving sector exemption requests that would allow sector vessels to fish in those areas. Comments submitted by the fishing industry indicated that they would be unable to participate in the exemption if they were required to pay for a monitor on every trip. We are also concerned about the current status of Georges Bank cod and yellowtail flounder stocks, which are found in Closed Areas I and II. Furthermore, the vast majority of comments submitted by members of the public and environmental organizations are opposed to reopening the closed areas.

Our proposal to allow access to these areas was based on a balance of potential economic opportunity and efficiency with cost-effective monitoring and fish stock protections. We have concluded that the utility of opening these areas is outweighed by the potential adverse impacts to overfished fish stocks and because comments from industry state that it is too costly for them to participate in these exemptions. Because of the combination of the industry's lack of participation in these exemptions and our concern about the status of these overfished stocks, we are disapproving these requests.

We continue to believe it is critical that every trip into Closed Area I and II have an at-sea monitor or observer on board the vessel to monitor total catch from these areas. These areas were originally closed to protect struggling fish stocks. Specifically, Closed Areas I and II were closed to protect Georges Bank cod and haddock, which spawn in these areas. Because we know Georges Bank cod and yellowtail flounder, which are both severely depleted, reside in these areas, we believe it is appropriate to require additional monitoring coverage, especially since there are very few historical catch data from these areas. We are also concerned that observing

only 22 percent of the trips into the areas could be insufficient for us to promptly address changes in the discard rates for groundfish stocks. Monitoring every trip would allow us to respond more quickly, should there be an unanticipated impact to the area, such as increased harvests of juveniles, large adult spawners, or impacts on protected species. Additionally, if a large amount of haddock, cod, or yellowtail flounder is found in a re-opened area, then vessels may unintentionally catch more fish than they have an allocation for, because catch limits are relatively low for these stocks. Avoiding exceeding one's allocation could provide a strong incentive for illegal discarding. Requiring a monitor to be on each vessel fishing in a closed area would mitigate this concern. Also, if there is a large amount of haddock in the area, a vessel may be tempted to misreport or illegally discard limiting stocks of Georges Bank cod and yellowtail flounder so that it can continue to harvest haddock. These concerns are not unique to closure areas. Because the closure areas provide additional protection to depleted groundfish stocks, we believe it is vitally important to get good catch information from these areas. Further, this level of monitoring would provide greater chances to observe interactions with protected species, if they occur, as well as an ancillary benefit of gaining additional fishery dependent data from the trips into these areas.

We proposed that sector vessels pay for at-sea monitors on these trips because we do not have money to pay for these additional trips. Unfortunately, comments submitted by members of the fishing industry, fishing industry interest groups, and sector managers argued that no fishing vessel would utilize the exemption if it were required to pay for an at-sea monitor. Industry claims that the additional expenses offset any potential increase in profit, making the exemption useless.

We are seriously concerned about the sustainability of the Georges Bank cod and yellowtail flounder stocks. Both of these stocks, which are overfished and subject to overfishing, are found in Closed Areas I and II, with yellowtail flounder found predominantly in Closed Area II. Despite proposals to require selective gears and seasonality restrictions, without 100-percent coverage of these trips, we cannot approve access to Closed Areas I and II. There is no utility in providing access, however, if industry does not participate.

Lastly, we are hearing from fishermen that they are having a difficult time catching Georges Bank haddock. As of September 11, 2013, we are over one third of the way into the fishing year and sector vessels have harvested only 2.7 percent of the Georges Bank haddock east quota, and 2.5 percent of the Georges Bank west haddock quota. These drastically low catch amounts suggest that the closed areas alone are not the only limiting factor influencing fishermen's Georges Bank haddock catch. Fishermen were requesting that we open Closed Areas I and II so they could increase their haddock catch – these low catch amounts, along with comments from some fishermen, suggest that opening Closed Areas I and II would not lead to a significant increase in haddock catch.

Sector exemptions should provide fishermen with greater flexibility to enhance their efficiency and, ultimately, improve their profits, all while maintaining the goals and objectives of the groundfish plan. We proposed allowing sectors restricted access into Closed Areas I and II, believing that if there were a substantial chance of enhancing efficiency, the increased revenue associated with increases in catch would easily offset the costs associated with funding an at-sea monitor. The proposal sought to provide the industry an opportunity for increasing catch and mitigating the impact of lower catch limits, while balancing efficiency in utilizing fishery resources, minimizing costs, and minimizing bycatch to the extent practicable consistent with

Magnuson-Stevens Fishery Conservation and Management Act National Standards. Comments submitted by industry indicate that the proposed exemptions for these areas would not meet those goals because industry perceived that the economic benefits of the potential catch from these areas would not outweigh the costs of monitoring and stated they would not participate. Because of this, and because we want to continue working to rebuild overfished groundfish stocks, we are not approving these exemptions at this time.

NMFS is interested in gathering data from Closed Areas I and II so that it may conduct analyses to determine whether fishing can be allowed at a level of observer coverage less than 100 percent. Sector vessels interested in assisting NMFS in obtaining additional fisheries-dependent data from year-round closed areas may submit a request to NMFS for an exempted fishing permit. Exempted fishing permits authorize a federally permitted fishing vessel (or vessels) to conduct fishing activities that would otherwise be prohibited – in this instance, to fish in a year-round closed area under conditions that would not harm stocks. Exempted fishing permit requests would be expeditiously reviewed and authorized based on their merit. Permits would not be approved if it is determined that the exempted activities could undermine measures that were established to conserve and manage fisheries or reduce interactions with protected species.

NMFS will also reassess whether groundfish sector vessels might be able to access these closed areas if they are assigned a random observer or at-sea monitor. However, NMFS must ensure that new information or analysis from this reassessment shows that such trips would not compromise the legally required monitoring coverage levels for other groundfish trips across the entire fishery, or the underlying analytical principles that support catch and discard

monitoring. NMFS will complete this reanalysis in time to determine whether this is a viable option for sector exemptions for the next fishing year, which begins May 1, 2014.

#### Approval of an Exemption Request Allowing Sector Vessels into Portions of Nantucket Lightship Closed Area

This rule allows sector vessels access to the Eastern and Western Exemption Areas within the Nantucket Lightship Closed Area for the duration of fishing year 2013, as outlined in this preamble. Trawl vessels are restricted to using selective trawl gear, including the separator trawl, the Ruhle trawl, the mini-Ruhle trawl, rope trawl, and any other gear authorized by the Council in a management action. Flounder nets are prohibited in this area. Hook vessels are permitted. Gillnet vessels are restricted to fishing 10-inch (25.4-cm) diamond mesh or larger. Gillnet vessels are required to use pingers when fishing in the Western Exemption Area from December 1 – May 31, because this area lies within the existing Southern New England Management Area of the Harbor Porpoise Take Reduction Plan.

Requiring selective gear in the Nantucket Lightship Closed Area allows vessels to target monkfish, dogfish, and skates while minimizing flounder bycatch. Although Southern New England/Mid-Atlantic yellowtail flounder is considered rebuilt, the requirement to use selective gear addresses concerns that vessels could harvest a large portion of yellowtail flounder allocation from this area, which is considered home to an important source population for yellowtail flounder. Catches of monkfish, dogfish, and skates could help mitigate the low fishing year 2013 allocations for several groundfish stocks.

After further review of the environmental assessment and after considering comments submitted by the public, we are reducing the necessary at-sea monitoring coverage level to the standard 22 percent. We will fund the at-sea monitors and observers and if any additional at-sea

monitoring or Federal observer funding becomes available, we will consider increasing the coverage rate for trips into this area.

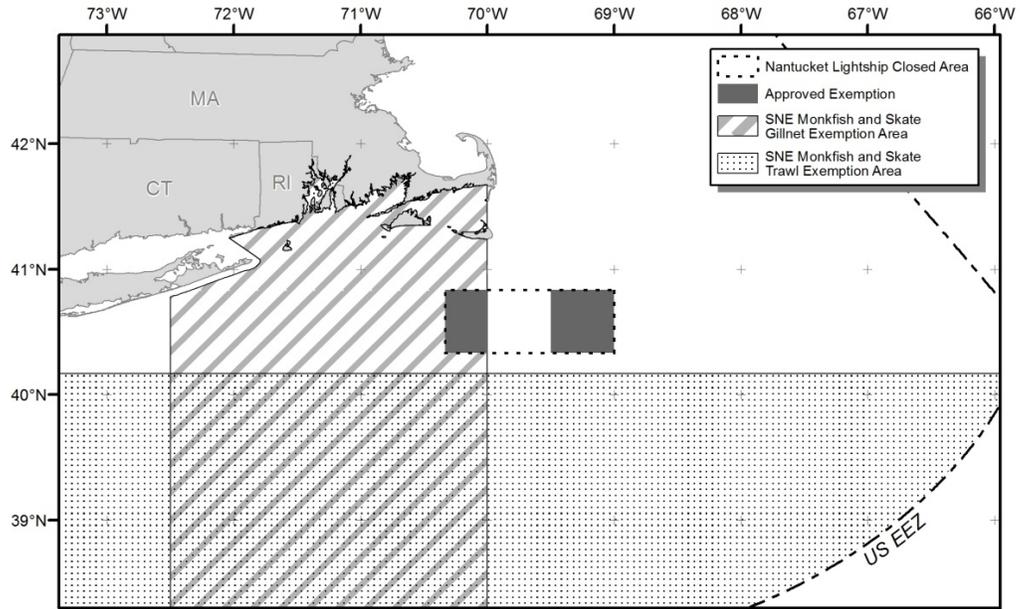
We have several reasons for modifying the at-sea monitoring coverage level in the Nantucket Lightship Closed Area. First, this exemption is designed to allow vessels to target non-groundfish stocks while reducing groundfish catch, and therefore groundfish discard rates. Second, there are not significant numbers of Georges Bank cod in the Nantucket Lightship Closed Area, and there are no Georges Bank yellowtail flounder in the area. Requiring selective gear in these areas reduces the likelihood that groundfish, including Southern New England/Mid-Atlantic yellowtail flounder, will be caught.

Second, the Western Exemption Area is surrounded by the Southern New England Monkfish, Skate, and Dogfish Exemption Area, where vessels fishing with extra-large mesh gillnets are already exempted from at-sea monitoring entirely (See Figure B). Gillnet vessels fishing under this exemption in the Western Exemption Area would be fishing in a similar area and with similar mesh size as those in the surrounding exempted fishery, but would have monitoring coverage. Vessels fishing just south of the areas are also exempt from monitoring coverage when fishing large mesh. Discard rates on trips in these two Exemption Areas are low, and we expect similar discard rates for this gear used in the Eastern and Western Exemption Areas. So while we have reduced the monitoring coverage requirement from 100 percent to 22 percent, this 22 percent is still a higher level of coverage than for most trips in the immediate surrounding areas. For more information on these exempted fisheries see §§ 648.80(b)(6) and (b)(7).

This action becomes effective 15 days after the date of publication in the Federal Register. This delay is to allow vessels fishing fixed gear, such as lobster pots, to remove their

gear from the eastern and western exemption areas, if they wish to do so, to avoid potential gear conflicts.

Figure B – Exempted Fisheries Surrounding the Nantucket Lightship Closed Area



If there is an increase in fishing effort as a result of allowing sector vessels into portions of the Nantucket Lightship Closed Area, and it is determined that the increased effort is reducing our ability to provide the necessary at-sea monitoring coverage to monitor other sector trips, we will discontinue the exemption. The Regional Administrator also reserves the authority to discontinue the exemption if it is determined that the exemption jeopardizes management measures, objectives, or rebuilding efforts.

A sector vessel intending to fish in the Eastern or Western Exemption Areas will be required to call the Northeast Fishery Observer Program at least 48 hr prior to departure. A separate number and call-in system is being developed and will be detailed in a bulletin to permit holders. Each vessel is also required to declare its intent through its Vessel Monitoring System prior to departing the dock. Unlike previously proposed, because we are using the same at-sea monitoring coverage rate as other sector trips, catch from these trips will be used for determining a sector's discard rate. We continue to work on additional implementation issues and will explain any additional reporting requirements (changes to trip start or end hail requirements, for example) to each sector that requests to utilize this exemption.

Because this level of monitoring coverage was not discussed in the proposed rule or the accompanying draft environmental assessment, we are specifically requesting public comment on the modification to reduce the monitoring coverage level (both at-sea monitors and observers) from 100 percent to some level that is at least 22 percent but less than 100 percent.

We have determined that this action is consistent with the goals and objective of Amendment 16 to the groundfish plan (for a complete list of the Amendment 16 goals and objectives, see page 67 of the Amendment 16 environmental impact statement). This rule allows sector vessels additional opportunities to increase their catch while constrained by an annual

catch limit (Objectives 1 and 3). By restricting vessels to specific areas and gears, this rule minimizes vessel bycatch. Habitat impacts from fishing are minimized to the extent practicable because the areas were determined to have low vulnerability (Objectives 9 and 10). The exemptions granted to sector vessels through this rule increase the opportunity to meet optimum yield of several healthy fish stocks while constraining fishing mortality. Any increase in profits will benefit fishermen and fishing communities, while the gear restrictions will continue to allow overfished stocks to rebuild.

#### Comments and Responses

We received 90,263 comments in response to the proposed rule consisting of five petitions and numerous letters from individuals, organizations, and government entities. Three of the petitions including 74,943 signatures that were initially submitted in response to Framework 48, were resubmitted for this action. The remaining two petitions included 6,187 provided additional comments in response to this action. NMFS also received a petition that included another 9,082 additional comments, however this petition was submitted well after the comment period expired. The petitions, and therefore the majority of comments, were submitted by environmental organizations. The individual comments consisted of letters received from the Council, U.S. Coast Guard, Maine Department of Marine Resources, seven environmental organizations, six fishing industry groups, and dozens of individuals. Some of the comments did not address the proposed measures and are not included here. Many comments are similar, if not identical, to those that were submitted for Framework 48. In those instances, we reference the Framework 48 response.

#### Closed Areas Provide Benefits

Comment 1: Several of the petitions submitted, as well as comments from many environmental groups and individuals, said that the closed areas should not be opened because they provide important protection for critical life stages and spawning activities of severely depressed stocks, such as cod.

Response: Closed Areas I and II were approved as year-round closures in 1994 to protect Georges Bank haddock and cod. The Nantucket Lightship Closed Area was approved as a year-round closed area that same year to reduce mortality on Southern New England/Mid-Atlantic yellowtail flounder. While Georges Bank haddock and Southern New England/Mid-Atlantic yellowtail flounder have rebuilt, both the Georges Bank cod and yellowtail flounder stocks are in decline and are struggling to rebuild. We felt that we could provide increased access to the rebuilt Georges Bank haddock in Closed Areas I and II if we required vessels to use selective gear to reduce catch of Georges Bank cod and yellowtail flounder. We also proposed seasonal prohibitions in Closed Areas I and II to protect spawning Georges Bank cod. These provisions were an attempt to prevent a potential mortality increase on stocks that are critically depressed. These gear and season restrictions were in addition to the quota that already constrains mortality.

We also proposed 100-percent monitoring coverage so that we could have a very clear picture of catch and discards. We believed that this level of coverage would allow us to monitor the use and impacts of the exemption in near-real time and potentially close the area earlier if necessary, should the information warrant it. However, comments submitted by members of the fishing industry stated that they are unable to pay for this level of coverage and would not access these areas under this monitoring requirement. Given the importance of having a high level of coverage in these areas, the fact that we are unable to fund this level of coverage, and the

industry's comments that the cost of coverage required for access is too high compared to the potential benefit from access to these areas, we are disapproving access to Closed Areas I and II.

The status of many key groundfish stocks is poor. Recent status reports from the Transboundary Resource Assessment Committee (TRAC), which conducts an annual stock assessment of Georges Bank cod, haddock, and yellowtail flounder, have several troubling findings. For example, the combined Canadian and U.S. catches of Georges Bank yellowtail flounder in 2012 were 722 mt. The report explains that this is the first time since 1940 that catch has been less than 1,000 mt. Further, recruitment of the three most recent yellowtail flounder cohorts is estimated to be the lowest in the time series. The TRAC also explained that the average weight at length of Georges Bank cod, used to reflect condition, has been stable in the past, but has started to decline in recent years. Lower weights at age in the population in recent years and poor recruitment have contributed to the lack of rebuilding, and the TRAC is recommending a reduction in allocation for the 2014 fishing year.

We believe that the proposed rule included restrictions that would limit fishing impacts on these stocks, and properly monitor fishing trips under this exemption. However, in light of our concern about the continually declining status of Georges Bank cod and yellowtail flounder, we believe that it is not appropriate to increase fishing activity in Closed Areas I and II at this time.

On the other hand, Georges Bank cod are rarely in the Nantucket Lightship Closed Area, and Southern New England/Mid-Atlantic yellowtail flounder has recently been declared to be rebuilt. Vessels fishing in this area will not be targeting cod, haddock, or yellowtail flounder. Acknowledging concerns that a source population for Southern New England/Mid-Atlantic yellowtail flounder exists in that area, we included selective gear requirements with the

exemption. For example, in addition to prohibiting the use of flounder nets in these areas, gillnet vessels will be fishing with net mesh sizes consistent with the requirements of nearby Exempted Fisheries that experience little to no groundfish bycatch. These selective gear requirements are in addition to each sector also being restricted by an allocation. We believe that we can monitor this fishery with the standard coverage rate. For these reasons, we believe that the Nantucket Lightship Closed Area differs from Closed Areas I and II, which is why we are approving restricted access to and lower monitoring coverage for this area so sector vessels can target monkfish, skate, and dogfish.

Comment 2: Four individuals, the Environmental Defense Fund, the Penobscot East Resource Center, and the Maine Coast Fishermen's Association suggested that closed areas are helping to provide needed refuge to overfished stocks and are helping struggling stocks rebuild.

Response: The results of analyses conducted by the Council's Closed Area Technical Team (CATT) are mixed when it comes to measuring the effectiveness of closed areas.

The data indicate that Closed Area II likely contributed to the recovery of Georges Bank haddock. Some data indicate that Closed Area II is providing refuge to stocks of Georges Bank cod and yellowtail flounder. It appears that a significant portion of the Georges Bank yellowtail flounder population can be found in Closed Area II. Larger cod are found in the Western Gulf of Maine Closed Area, as well as the northern portion of Closed Area II. These stocks have not rebuilt despite these closed areas. The peer-reviewed literature reviewed by the CATT had different findings regarding a correlation between closed areas and stock health.

Our proposed rule attempted to provide a balanced approach to reopening the areas by allowing very restricted access. While we are not allowing vessels into Closed Areas I or II, we are allowing vessels into the Nantucket Lightship Closed Area. More importantly, we are not

deeming any of these areas as effective or ineffective. Further, this action is for fishing year 2013 only. A full review of essential fish habitats and year-round closures will be undertaken in the Habitat Omnibus Amendment, in which the most effective closed areas will be identified and implemented.

Comment 3: Several of the petitions, as well as comments from five individuals, argued that closed areas should not be opened because they protect vital benthic habitat and conserve essential fish habitat.

Response: While we agree that closing areas to bottom trawling does provide increased protection for essential fish habitats, the areas we proposed to reopen do not have benthic habitats that are considered vulnerable to fishing. An essential fish habitat assessment was conducted for this action, and we determined that the proposed action would only have a minimal (or low negative) impact on essential fish habitat for federally managed species in the Northeast Region. As explained in the environmental assessment, benthic habitats in two of the areas (the Eastern Exemption Area within the Nantucket Lightship Closed Area, and Closed Area I) are periodically exposed to scallop dredging, and the overall vulnerability of bottom habitats in all four areas is low. More vulnerable hard-bottom areas in Closed Area II on eastern Georges Bank where there has been no bottom trawling or dredging since these areas were closed in 1994 would have only been exposed to fishing for 2 months. Habitats in the western Nantucket Lightship Closed Area Western Exemption Area are predominantly mud and sand, so any impacts of trawling there would be minimal.

Furthermore, we did not propose to open any of the year-round essential fish habitat closed areas any of the areas proposed to be closed in Omnibus Habitat Amendment 2.

Comment 4: Environmental Defense Fund and the Maine Coast Fishermen’s Association suggested that closed areas provide managers with a buffer against uncertainty.

Response: We agree. A management buffer is helpful during times of such unknowns as retrospective patterns in stock assessments and the effect of climate changes. Based on fishing industry comments that the industry-funded monitoring requirements are unacceptable, we concluded that the benefit of this buffer is greater than the potential increase in catch and revenue from opening Closed Areas I and II. However, because the stocks in Nantucket Lightship Closed Area are healthier, and stocks of monkfish, dogfish, and skates are underharvested, we believe we can allow vessels into those areas with the standard federally funded monitoring coverage.

Comment 5: One individual suggested that we conduct additional scientific research, specifically a before-after-control impact analysis, prior to allowing vessels into the closed areas.

Response: Gathering additional data would be beneficial; however, we have very limited funding available. Research vessels do trawl in closed areas, but we have limited data from closed areas due to a very small number of tows. Again, this research effort is limited due to fiscal and time constraints. Further, in an effort to provide mitigation now for vessels struggling to overcome reduced allocations for fishing year 2013, we are attempting to provide increased access as soon as possible. It is highly unlikely that enough data could be gathered to properly conduct a before-after-control impact analysis prior to opening the area in fishing year 2013 – potentially even before the Omnibus Habitat Amendment.

Comment 6: The Conservation Law Foundation, Earthjustice, and one individual commented that opening year-round closed areas to provide financial mitigation to offset decreased revenue that results from declining groundfish allocations is inappropriate. Several

other commenters, including members of the fishing industry, environmental organizations, the Council, and Maine Division of Marine Resources, stated that the action as proposed would not provide any economic relief. Some commented that the short-term benefits would not outweigh the long-term financial loss associated with delayed rebuilding efforts. Others suggested that, because the data show no indication that there are larger amounts of fish in the closed areas, there would not be increased revenue from accessing the closed areas.

Response: In general, we agree with these comments. Our consideration of these exemptions involved a balancing of providing the industry an additional opportunity to achieve optimum yield to mitigate adverse effects of lower allocations with protecting vulnerable stocks and sufficiently monitoring fishing in these areas. If it were clear that vessels could significantly increase their catch per unit effort in a sustainable manner when accessing the closed areas (as we proposed), we would be more inclined to grant access, should industry participants be willing to pay for observer coverage. This does not seem to be the case for Closed Areas I and II. Because the universal comment submitted by both industry and environmental groups was that the proposed exemptions for Closed Areas I and II would likely not provide the amount of economic relief necessary to offset required monitoring costs, as this rule was intended to do, we are not opening Closed Areas I and II.

Because the stocks in Nantucket Lightship Closed Area are healthier than stocks in Closed Areas I and II and because we have included the selective gear requirements, we can provide access to Nantucket Lightship Closed Area with federally funded coverage at the standard coverage rate of 22 percent. Therefore, this option could allow industry more fishing opportunities with no additional expenses.

Comment 7: One individual and the Blue Ocean Institute commented that opening the year-round closed areas would result in increased mortality.

Response: We disagree with this assumption. Quotas are set using the best available science to limit fishing mortality overall so that overfishing does not result. Each sector is restricted to its allocation, which is a portion of a total quota. Fishing mortality in each of these closed areas would be further constrained by gear or season restrictions. Moreover, as proposed, every trip inside Closed Areas 1 and 2 would have been monitored and all catch (landings plus discards) would have counted against each sector's allocation. Further, having an at-sea monitor on board every trip would have reduced the possibility of some vessels illegally discarding catch. For each area, if a sector reaches its allocation of even a single stock, it would be prohibited from fishing in that stock area. Therefore, we believe that opening these areas as proposed would not result in increased mortality.

Comment 8: The Conservation Law Foundation suggested that requiring 100-percent at-sea monitoring coverage within a closed area and only 22-percent coverage outside of a closed area would increase illegal discarding on unobserved trips outside of closed areas. The Conservation Law Foundation explained that the catch inside the closed areas would “be fully identified by observers and will result in significant reductions in the cod and yellowtail flounder that will be available to sector vessels outside the closed areas. Because the later trips will be observed at a much lower rate and the quotas for cod and yellowtail are so low, this access program almost creates an incentive for sector vessels to misreport cod and yellowtail bycatch and discards on observed trips outside the closed areas...”

Response: We disagree that these exemptions would provide an incentive to discard catch on unobserved trips outside of the closed areas that would result in substantially higher

discards on unobserved trips. We have determined that the current level of observer coverage provides sufficiently reliable catch estimates to monitor sector allocations and ensure accountability of catch limits. This level of coverage currently applies outside of the closed areas and is sufficient to provide the basis for discard rates in those areas. Furthermore, because we are not allowing sectors access to Closed Areas I and II through this action, and we are removing the 100-percent coverage requirement for the Nantucket Lightship Closed Area, this concern is no longer valid.

#### Process and Policies

Comment 9: Several of the environmental groups argued that this action undermines the development of Omnibus Habitat Amendment 2. The commenters explained that this action makes a decision on a closed area prior to the completion of the Omnibus Amendment. For example, the areas this action considered opening represent the “status quo” areas in the Omnibus Amendment. These comments contend that, if we were to open these areas to fishing, they would be damaged prior to potentially being selected as the preferred alternative for the Omnibus Habitat Amendment.

Response: Both NMFS and the Council agreed to consider opening these areas because they are not considered to be vulnerable habitat, and this rule is only for a duration of fishing year 2013. The Council did not allow sectors to request exemptions from any areas that were newly proposed essential fish habitat management area alternatives in the Omnibus Habitat Amendment. As explained above, the proposed portions of Eastern Exemption Area within the Nantucket Lightship Closed Area and Closed Area I are already subject to fishing pressure. The Western Exemption Area and Closed Area II that we considered temporarily opening are not considered to be vulnerable to fishing. While these areas are included as the “status quo” under

the Omnibus Habitat Amendment, research done by the Habitat Plan Development Team indicates that there could be better areas set-aside for habitat protection than the areas included in this rule. The Omnibus Habitat Amendment is considering numerous potential management areas in combination to minimize adverse effects on essential fish habitat to the extent practicable. This action is specific to providing suitable opportunities to mitigate sharp reductions in catch limits while still preventing overfishing and protecting vulnerable stocks. In other words, we believe that the Omnibus Habitat Amendment will provide ample opportunities to further enhance habitat protection, and these exemptions will not adversely impact that Amendment.

Comment 10: Several environmental organizations said that an environmental impact statement (EIS) is necessary because the impacts associated with this action would be significant.

Response: Framework 48 permits sectors to request exemptions from portions of the Western Gulf of Maine Closed Area, Closed Area I, Closed Area II, the Nantucket Lightship Closed Area, and Cashes Ledge Closed Area. We determined that the original exemption requests submitted by the sectors could have resulted in significant impacts. However, the Regional Administrator has the authority to modify sector exemption requests, which we did in this instance (see Comment 19 below). The exemptions proposed in this action were limited to areas of low vulnerability and are effective only in fishing year 2013. They included additional gear and season restrictions to further reduce potential impacts. Because of the additional restrictions, we determined that there would not be any significant impact and that an environmental assessment was sufficient for this action.

Comment 11: Earthjustice and the Conservation Law Foundation argued that including the groundfish closed areas in a Notice of Intent for the Omnibus Habitat Amendment directly

linked the groundfish closed areas with essential fish habitat and that not taking a holistic approach represents a shift in NOAA/NMFS policy.

Response: The groundfish closed areas considered in this action were initially established to “provide protection to depleted cod and haddock stocks.” Other commenters, and the Council, have argued that these areas were established as “mortality closure areas.” There are obvious habitat benefits with closing an area to fishing, so it is understandable how the two can be linked. Simply put, not fishing in an area can provide an opportunity to improve the habitat.

Despite the fact that some argue that the proposed areas represent “de facto” habitat closed areas, and that discussing the two in the same Notice of Intent links them, they are in fact, two separate closures that are managed differently. Mobile bottom tending gear (bottom trawls and dredges) are prohibited from fishing in a habitat closed area. However, vessels can use bottom trawls and dredges in some groundfish year-round closed areas, for instance, through groundfish special access programs and scallop access areas. Because of this, we supported the ability for sectors to request exemptions from portions of groundfish closed areas that are not managed as essential fish habitat closed areas, and we are allowing vessels to fish in portions of the Nantucket Lightship Closed Area.

Comment 12: Earthjustice and the Conservation Law Foundation commented that this action (opening closed areas) cannot be undertaken as a framework adjustment to the groundfish plan and that an amendment is necessary.

Response: This comment was also submitted as a comment to Framework 48 allowing sectors to request a regulatory exemption that would allow them to fish in portions of the

groundfish year-round closed areas. The response to this comment can also be found in the final rule for Framework 48 (78 FR 26148, May 3, 2013).

The regulations at § 648.90(c)(1)(i) state that changes to closed areas, management boundaries, essential fish habitat, sector administrative provisions, and sector specifications can be made in a framework. We believe that this action is consistent with the goals and objectives of the groundfish plan. For these reasons, we do not believe that an amendment is necessary.

Comment 13: The Conservation Law Foundation contends that this action illegally segments the required National Environmental Policy Act (NEPA) analyses from the Council's ongoing Omnibus Habitat Amendment.

Response: We responded to this comment in the final rule for Framework 48 (78 FR 26146, May 3, 2013). In our response we explained that we are not avoiding the development of an EIS because an EIS is being drafted for the Omnibus Habitat Amendment.

Comment 14: Several environmental groups claim that this action is inconsistent with the Magnuson-Stevens Act, NEPA, the Endangered Species Act, and the Marine Mammal Protection Act. They also commented that a Finding of No Significance (FONSI) cannot be approved for an environmental assessment without a proper Endangered Species Act (ESA) Section 7 consultation.

Response: NMFS followed the requirements of the Magnuson-Stevens Act and NEPA and believe that this action is consistent with the Magnuson-Stevens Act National Standards and the goals and objectives of the groundfish plan. The approved exemption balances providing an additional opportunity to achieve optimum yield to mitigate reductions in catch limits while preventing overfishing and protecting vulnerable stocks. We conducted an environmental

assessment, including a review of impacts on essential fish habitat and endangered species and determined that there are no significant impacts.

While an ESA Section 7 consultation continues to be developed for the groundfish plan, we have determined that allowing these fisheries and associated research to continue during the reinitiation period will not violate ESA sections 7(a)(2) and 7(d), meaning this action will not jeopardize the ESA-listed species in the action area. Northeast Regional Office staff analyzed these exemption requests through an environmental assessment, reviewed the assessment, and concluded that there would be no significant impacts.

Comment 15: Earthjustice and the Conservation Law Foundation commented that this rule represents a policy shift from Amendments 11 and 13 to the groundfish plan, where we explained that essential fish habitat is necessary to help groundfish stocks rebuild.

Response: We agree that it is necessary to minimize adverse impacts of fishing on essential fish habitat to the extent practicable. We do not believe that this rule represents a policy shift, however. It meets the goals and objectives of the groundfish plan and is consistent with Magnuson-Stevens Act National Standards. It balances allowing vessels an additional opportunity to achieve optimum yield to mitigate the adverse effects of reduced catch limits while preventing overfishing and protecting vulnerable fish stocks and habitat. The proposed areas are not vulnerable habitats and are already exposed to fishing pressure (see comments 3 and 9 above). The exemption attempts to minimize costs and improve efficient use of resources while taking into account the variations and contingencies in fisheries by allowing vessels to target healthy stocks while avoiding more vulnerable stocks and adjusting monitoring levels where practicable. We also included additional gear and seasonality restrictions that further help minimize bycatch to the extent practicable.

Specifically, based on public comment and our continuing goal of rebuilding fish stocks, we are not opening Closed Areas I and II. We are opening the portions of the Nantucket Lightship Closed Area because the area is not critical to stocks that are overfished or undergoing overfishing, such as Georges Bank cod or yellowtail flounder. Further, we have included additional restrictions with this exemption that will limit groundfish harvests while allowing vessels to target monkfish, skates, and dogfish.

#### Protected Species Interactions

Comment 16: One petition, the Center for Biological Diversity, the Humane Society, Whale and Dolphin Conservation, the Conservation Law Foundation, and one individual commented that they are concerned about an increase in protected species interactions in the proposed areas. One individual also commented that gillnets should be prohibited from fishing in any of the proposed areas.

Response: Analyses in the EIS for the Large Whale Take Reduction Plan indicate that the impacts on large whales and harbor porpoises from gillnets in these areas is substantially less than pot gear. In other words, there are significantly more vertical lines from pot gear than gillnets and, as a result, most impacts result from pot gear, not gillnet gear. For more information, see Chapter 3 of the Large Whale Take Reduction Plan EIS can be found at [http://www.nero.noaa.gov/protected/whaletrp/eis2013/deis/chapter-3-regulatory\\_alternatives.pdf](http://www.nero.noaa.gov/protected/whaletrp/eis2013/deis/chapter-3-regulatory_alternatives.pdf).

To reduce potential impacts on harbor porpoises, we are requiring pingers in the Western Exemption Area of the Nantucket Lightship Closed Area as required by the Harbor Porpoise Take Reduction Plan.

Importantly, it is likely that vessels will only fish in this area if they can increase their catch per unit effort of whatever fish they are targeting. In other words, it is illogical for vessels

to continually fish in an area where they catch less fish. We expect either this area will not be more productive and will not be utilized, or it will be utilized with greater catch per unit effort, which would reduce the overall effort and therefore reduce the potential for interactions between protected species and fishing gear.

Comment 17: The Center for Biological Diversity, the Humane Society, and Whale and Dolphin Conservation argued that the Harbor Porpoise and Atlantic Large Whale Take Reduction Plans were constructed assuming that these areas would be closed.

Response: The original Harbor Porpoise Take Reduction Plan was based on the Gulf of Maine rolling closures, designed to protect spawning Gulf of Maine cod. The Western Gulf of Maine and Cashes Ledge year-round closed areas were added shortly afterwards (63 FR 66464, December 2, 1998). One of the reasons we cited for not including the Western Gulf of Maine and Cashes Ledge closed areas in the proposed rule was because of our concern about harbor porpoise interactions.

Importantly, overall fishing effort has been decreasing as a result of the drastic reductions in allocations. There were 447 takes during fishing year 2011 compared to the established potential biological removal level of 706. Furthermore, if there is an unanticipated increase in observed interactions with protected species as a result of allowing vessels to fish in the Nantucket Lightship Closed Area, the Regional Administrator reserves the authority to revoke the exemption. In addition, both the Harbor Porpoise and Large Whale Take Reduction Plans include accountability measures that would be enacted if the potential biological removal level is exceeded.

Lastly, as previously stated, this action complies with and follows the requirements of the Harbor Porpoise Take Reduction Plan, including the use of pingers in the Western Exemption

Area. One peer-reviewed study that was published in the journal Nature (1997, Vol 388, page 525) found that harbor porpoise takes were reduced by 92 percent when pingers were used.

For these reasons, in addition to those included in the environmental assessment for this action, we do not believe that opening portions of the Nantucket Lightship Closed Area will have a significant impact on harbor porpoise or large whales.

#### Industry-Funded At-Sea Monitoring

Comment 18: Several fishing industry groups, including the Associated Fisheries of Maine, the Cape Cod Commercial Fishermen's Alliance, and the Northeast Seafood Coalition, along with the Council, Maine Division of Marine Resources, and several individuals, argued that the fishing industry needs financial assistance and that requiring industry to fund an at-sea monitor on 100 percent of the trips into closed area is financially unfeasible and negates the benefits of the proposed action.

Response: We proposed 100-percent at sea monitoring coverage for several reasons. As explained earlier in the preamble, these areas were originally closed to protect struggling fish stocks. Specifically, Closed Areas I and II were closed to protect Georges Bank cod and haddock. Because we know Georges Bank cod and yellowtail flounder, which are both severely depleted, reside in these areas, we believe it would be appropriate to require additional monitoring coverage if they were opened, so that we could thoroughly account for catch and discards. There is very little historical catch data from these areas, and we are concerned that observing only 22 percent of the trips into the area could be insufficient to identify changes in the discard rates for groundfish stocks. Monitoring every trip would allow us to respond more quickly, should there be an unanticipated impact to the area, such as increased harvests of juveniles, large adult spawners, or impacts on protected species. If a large amount of haddock,

cod, or yellowtail flounder were found in a re-opened area, then vessels could accidentally catch more fish than they have an allocation for, which could create an incentive for illegal discarding in an area for which we do not have established discard rates. Also, if there were a large amount of haddock in the area, a vessel could be tempted to misreport or illegally discard limiting stocks of Georges Bank cod and yellowtail flounder so that it could continue to harvest haddock. For these reasons, we believe that the proposed 100-percent at-sea monitoring coverage would be necessary if Closed Areas I and II were reopened.

We disagree with assertions that we are not providing mitigation to the fishing industry. We do not have enough Federal funds to cover this level of monitoring in these areas because we are already paying for 100 percent of the coverage on standard sector fishing trips. Arguably, we could fund trips into this area if we reduced our funding of other trips – but we do not believe this is a viable solution to provide coverage across the entire sector fishery. Amendment 16 stated that sectors would be required to fund all their monitoring coverage by fishing year 2012, yet we have provided funding for fishing years 2012, 2013, and are working to provide assistance for at least a portion of monitoring costs in fishing year 2014.

After reconsidering our initial proposal, we believe that we can allow vessels into portions of Nantucket Lightship Closed Areas with standard levels of monitoring coverage. Because we do not anticipate an increase in effort resulting from this decision, we believe that we can fund these trips.

Comment 19: Associated Fisheries of Maine, Maine Division of Marine Resources, the Council, and several individuals contend that NMFS inappropriately altered the Council's intent for Framework 48 by requiring 100-percent industry-funded at-sea monitoring without Council comment. Associated Fisheries of Maine, the Northeast Seafood Coalition, and several

individuals also argued that NMFS should not alter the action as proposed by the Council and requested by the sectors.

Response: The regulations provide the Regional Administrator with the authority to consider, approve/disapprove, and modify exemption requests proposed by sectors (§ 648.87(c)(1-2)). We are required to ensure that exemptions are consistent with the Magnuson-Stevens Act National Standards and the groundfish plan's goals and objectives. We modified the request after careful consideration of the many factors required to ensure that compliance. Further, we modified the sector requests to avoid significant environmental impacts and to allow sectors to fish under the exemption during the current fishing year.

The proposed rule for fishing year 2013 sector operations plans (78 FR 16220; March 14, 2013, see page 16236) explained that we would require 100-percent industry-funded at-sea monitoring for several exemptions, including access to year-round closed areas. The comment period for the sector operations plans proposed rule was from March 14, 2013, until March 29, 2013. The Framework 48 final rule explained that it was unlikely that we would open the Western Gulf of Maine or Cashes Ledge Year-Round Closed Areas (78 FR 26118; May 3, 2013, see page 26145). Also, the Framework 48 final rule and the final rule for fishing year 2013 sector operations plans responded to comments opposed to industry-funded at-sea monitoring (78 FR 26118; May 3, 2013, see page 26145 and 78 FR 25591; May 2, 2013, see page 25610). Despite these comments and responses, the issue was not discussed at either the June 12, 2013, Groundfish Committee meeting or the June Council meeting the following week. We believe that the Council had adequate opportunities to comment on this issue.

We must consider efficiency in the utilization of fishery resources and minimize costs to the extent practicable when we consider exemptions. For example, if opening these closed areas

were to provide sector vessels with economic benefits, the economic benefits should at least outweigh the costs of the appropriate level of at-sea monitoring deemed necessary to properly account for catch. If the financial benefits do not outweigh the costs of carrying a monitor, we believe that there is likely not enough financial incentive (enough fish) to outweigh the potential resource risks. This conclusion is supported by our analyses, as well as analyses by the Council's Closed Area Technical Team and industry comments.

To be clear, we have modified sector exemptions in the past and will likely modify them in the future if we believe it could be beneficial to the sectors. We do not necessarily know the impact of an exemption request until we analyze it. We need to review the requests within an environmental assessment. If an exemption request could have a significant impact, it requires an EIS. Because an EIS requires a substantial amount of time to develop, it is not possible to develop an EIS in time to approve a sector exemption during the fishing year. Furthermore, any action that requires an EIS should likely be discussed and approved by the Council.

It should be noted that approved exemptions are completely voluntary. Exemption requests are not regulations that are required to be approved or implemented. We view exemptions as opportunities to provide additional flexibility that can be utilized by a sector vessel as they wish, as long as the exemption meets the goals and objectives of the groundfish plan. Despite frequent opposition by industry to our modifications of exemption requests, we propose revised exemptions as an effort to aid sectors by offering an approvable option instead of simply denying a request. As explained earlier, the proposed rule was our attempt at finding a sustainable solution to a controversial issue.

Comment 20: The Council contends that catch history is not needed to accurately estimate discard rates because Standardized Bycatch Reporting Methodologies (SBRM) exist.

The Council suggests that nothing in the SBRM guidelines link the accuracy of discard estimates to past catch history. The Council contends that SBRM does not indicate that 100-percent observer coverage is necessary in order to accurately monitor protected species interactions. Lastly, the Council argues that there is no evidence that the Agency considered a coverage level that is higher than in open areas but less than 100 percent.

Response: Because these areas have been closed, there is a lack of historical fishing data within the closed areas (referred to here as “catch history”). We are concerned that observing only 22 percent of the trips into the area could be insufficient to identify changes in the discard rates for groundfish stocks. Monitoring every trip allows us to respond more quickly, should there be an unanticipated impact to the area, such as increased harvests of juveniles, large adult spawners, or protected species. The SBRM is not used alone to determine the at-sea monitoring levels necessary to monitor proposed management measures. It is a methodology designed to specify at-sea observer coverage levels that will allow discards to be estimated for the groundfish stocks as a group, with a specified level of precision. Text from the executive summary of the 2011 SBRM 3-year Review Report explains that “SBRM is not intended to be the definitive document on the estimation methods nor is it a compendium of discard rates and total discards. Instead, the SBRM is intended to support the application of multiple bycatch estimation methods that can be used in specific stock assessments. The SBRM provides a general structure for defining fisheries into homogeneous groups and allocating observer coverage based on prior information and the expected improvement in overall performance of the program. The general structure helps identify gaps in existing coverage, similarities among groups that allow for realistic imputation, and the tradeoffs associated with coverage levels for different species.”

While SBRM may not indicate that 100-percent coverage is necessary to properly monitor protected species interactions, 100-percent coverage was proposed not only for protected species interactions, but also to monitor catch (including discards) in an area where we have very little fishery data.

We did consider a coverage level that was higher than that in an open area but less than 100 percent but decided, as stated in comment 18, that 100-percent monitoring would be necessary for this exemption. For additional information on why we proposed 100-percent industry-funded at-sea monitoring, see the proposed rule for fishing year 2013 sector operations plans (78 FR 16220; page 16236). Also, it appears from the comments submitted on behalf of industry members that industry is unwilling to pay for any level of at-sea monitoring, making the argument for an intermediate level of coverage moot.

Recognizing the concern of the Council though, we have modified our original proposal to allow vessels to fish in portions of the Nantucket Lightship Closed Area with at least the standard monitoring coverage rate.

Comment 21: The Cape Cod Commercial Fishermen's Alliance suggested that we should have additional funding for at-sea monitoring this year due to a reduction in effort.

Response: We do not have additional funding this year. Only 6 months before the fishing year started, we were unsure if we would be able to even cover half of the trips that needed to be monitored. However, we were able to find additional money, and because of additional money that could be carried over from the previous year, we are hopeful we can fund observer coverage at the specified level for fishing year 2013.

We are going to fund the monitoring of trips into the Eastern and Western Exemption Areas in Nantucket Lightship Closed Area. If any additional at-sea monitoring or Northeast

Fisheries Observer Program funding remains, we will increase our coverage as possible. We do not have adequate funding to pay for trips into Closed Areas I and II at the full coverage rate we believe is necessary.

Comment 22: The Council argued the Atlantic Herring management plan allows herring mid-water trawl vessels to fish in the groundfish closed areas only when an observer, funded by NMFS, is on board, and that a similar approach should be permitted in the groundfish fishery.

Response: We implemented a similar approach to industry-funded at-sea monitoring coverage with a fishing year 2012 exemption that allowed vessels to target redfish with smaller mesh (78 FR 14226; March 5, 2013). However, we were uncomfortable with this approach and later explained in the proposed rule for fishing year 2013 sector operations plans why we would not propose this method in the future (78 FR 16220; March 14, 2013, see page 16236).

Essentially, we believe that a vessel that could fish in the closed areas would do so whenever it was randomly selected for an observer or at sea monitor. If every vessel did this, it could skew our observer coverage, affect our discard and catch estimates, and possibly prevent us from achieving the required at-sea monitoring coverage levels in other stock areas.

Further, the at-sea monitoring coverage requirements for the herring fishery are very different. Unlike the groundfish fishery, there is no regulatory requirement for at-sea monitoring coverage to achieve a specified level of precision.

Comment 23: The Cape Cod Commercial Fishermen's Alliance, The Maine Coast Fishermen's Association, Penobscot East Resource Center, and the Environmental Defense Fund supported our requirement for 100-percent at-sea monitoring coverage. These groups felt that a high level of monitoring is necessary to provide more real-time data. The Penobscot East

Resource Center also commented that discarding in these areas is at a higher level than other areas.

Response: We proposed 100-percent monitoring because we believe it is necessary to properly monitor catch under these circumstances. A higher coverage rate allows us to better monitor vessels utilizing the exemption and therefore better manage the fishery, meaning we could stop the exemption if there were any unanticipated negative impacts. After further review, we are opening portions of the Nantucket Lightship Closed Area with the standard coverage level because we have less concern about overfished groundfish stocks in that area.

Comment 24: Environmental Defense Fund and the Cape Cod Commercial Fishermen's Alliance suggested that we make the at-sea monitoring information recorded from these areas available to the public following the end of the fishing year.

Response: To explain the fishing year 2013 at-sea monitoring requirements for the fishery, we published a document titled, "Summary of analyses conducted to determine at-sea monitoring requirements for multispecies sectors, fishing year 2013." This report is available online at [http://www.nero.noaa.gov/ro/fso/reports/Sectors/ASM/FY2013\\_Multispecies\\_Sector\\_ASM\\_Requirements\\_Summary.pdf](http://www.nero.noaa.gov/ro/fso/reports/Sectors/ASM/FY2013_Multispecies_Sector_ASM_Requirements_Summary.pdf). One of the appendices to that report presents data for each sector, by stock and gear, in a manner consistent with the data confidentiality requirements of Section 402(b) of the Magnuson-Stevens Act. This final rule establishes a sector exemption for specified gears within the Nantucket Lightship Closed Area requiring only the standard at-sea monitoring coverage level. As a result, the data for sector vessels that make trips into the exemption area will be pooled with the data for other trips made by vessels in each sector when the stock area and gear are the same. The information from the 2013 fishing year will be included in the

summary we will publish in 2014 to support the determination of the at-sea monitoring requirements for the FY 2015 fishery.

#### General Opposition to the Rule as Proposed

Comment 25: The Associated Fisheries of Maine, Northeast Sector Support Network, Northeast Seafood Coalition, and several industry members suggested that we should open Cashes Ledge and the Western Gulf of Maine year-round closed areas.

Response: We did not propose allowing access to these areas because we cannot ensure at this time that access to these areas would be consistent with the groundfish plans goals and objectives and the Magnuson-Stevens Act National Standards. These areas provide refuge to overfished stocks of Gulf of Maine cod and haddock, both which are overfished and subject to overfishing. In addition, harbor porpoise are commonly found in the Western Gulf of Maine. The Council may consider opening up these portions after developing an EIS for the Omnibus Habitat Amendment, but we do not feel that it is appropriate to open these areas at this time.

Comment 26: The Northeast Seafood Coalition and the Northeast Sector Support Network contend that effort controls are no longer necessary now that sectors have an allocation that limits their effort. As a result, closed areas and the accompanying restrictions that are proposed in this rule are not necessary to manage the fishery.

Response: We strongly disagree that managing effort, or input controls, including the use of closed areas and gear restrictions, are no longer necessary. Since Amendment 16 to the groundfish plan established annual catch limits and accountability measures and expanded the scope of sectors, not one sector has exceeded its allocation – this is important in a quota-managed fishery. Yet several key groundfish stocks, including Gulf of Maine cod, Gulf of Maine haddock, Georges Bank cod, and Georges Bank yellowtail flounder, are in worse

condition than they were in fishing year 2010 when Amendment 16 was implemented. Despite our attempts at utilizing the best available science to develop annual quotas, and despite each sector adhering to its allocation each fishing year, many of our stocks continue to struggle to rebuild for a variety of reasons, including poor recruitment and possibly climate change. Simply put, quotas alone cannot manage this fishery.

Because of this, we do believe that additional measures, such as protection for juvenile and spawning fish, as well as essential fish habitats, are vital to helping the stocks rebuild. Furthermore, it is counter-productive to increase fishing pressure on stocks that are overfished and undergoing overfishing.

Comment 27: The Northeast Seafood Coalition and the Northeast Sector Support Network are opposed to the seasonality restrictions that were included in the proposed rule. The Cape Cod Commercial Fishermen's Alliance argued that gillnets should be permitted in Closed Area I and that hook gear should not be subject to the same restrictions as lobster and trawl gear.

Response: The seasonality restrictions were included to protect spawning stocks of Georges Bank cod, which is overfished and undergoing overfishing. As explained on our response to Comment 26, we believe effort controls such as seasonality restrictions are necessary to protect stocks that are in poor condition.

The Cape Cod Commercial Fishermen's Alliance comment focused on the fact that Closed Area I is not in a designated whale protection zone, harbor porpoise are not in the area, and pinger compliance could reduce any concern of increased interactions with protected species. We were prohibiting gillnets in the Closed Area I exemption area to protect Georges Bank cod because gillnets have relatively high bycatch rates; we were not prohibiting them in the area because of protected species interactions.

Lastly, the comment suggesting that hook gear should not be subject to the same restrictions as lobster and trawl gear as defined by the Addendum XX to the Atlantic States Marine Fisheries Commission Lobster Management Plan is moot since we are no longer opening Closed Area II as proposed.

Comment 28: The Northeast Seafood Coalition and Northeast Sector Support Network commented that the mortality closure areas, which is what the Council included in Framework 48 as areas that sectors could request exemptions from, have never been identified as habitat closed areas either in the past or proposed as alternatives in the Omnibus Habitat Amendment. Further, they say that they are commonly known and understood to be mortality closures only.

Response: As explained in the response to comment section in the Framework 48 final rule (78 FR 26118; May 3, 2013; see pages 26147-26148), the record clearly shows that the areas in question were created with several considerations in mind, including protection for spawning stocks and improvement of benthic habitats. It is not irrational to link mortality closure areas with habitat closure areas because there has been no groundfish fishing in many of the mortality areas, specifically the portions we proposed to open in this rule, for almost 20 years. It seems reasonable to argue that an area that was once closed to reduce mortality has been closed so long that it has improved habitat.

However, as explained in our response to Comment 11, we are not denying access to Closed Areas I and II because of habitat concerns. In fact, we proposed to open the areas because we believe that the habitat in these areas is either already subject to fishing pressure or not vulnerable to fishing. We are not allowing access into these two areas because industry has stated that they are unable to pay for the monitoring coverage we see necessary, given our concern about the health of such groundfish as Georges Bank cod and yellowtail flounder.

## Comments in General Support of the Proposed Action

Comment 29: The Penobscot East Resource Center commented that allowing vessels offshore into Closed Areas I and II could increase inshore fishing opportunities for smaller dayboats.

Response: We expect this would be the case, at least to some degree, if the areas were opened. However, there is no guarantee that allowing vessels to fish offshore in Closed Areas I and II would reduce their inshore fishing effort. For example, even though a vessel may shift some of its fishing effort into Closed Area II to increase its catch of Georges Bank haddock, that vessel still has an allocation of Gulf of Maine winter flounder, American plaice, Cape Cod/Gulf of Maine yellowtail flounder, and other stocks that they could possibly catch inshore. As a result, approving the proposed opening of offshore areas would not necessarily reduce the inshore fishing effort of large vessels.

Comment 30: The Maine Coastal Fishermen's Association supported the accountability measures as proposed.

Response: We modified the exemptions because we believe that access to closed areas needs to be done in a responsible manner that is well monitored and protects struggling fish stocks. It is also important to consider the efficiency of fishery resources so that the utility of opening an area outweighs the potential costs, and to the extent practicable, reduce adverse economic impacts on communities and minimize costs. Because the vast majority of the comments submitted argued that the areas should not be opened, and industry is unwilling to pay for additional monitoring that we deem necessary to monitor stocks of concern, we are not opening Closed Areas I and II.

Comment 31: Environmental Defense Fund and the Penobscot East Resource Center suggested developing trigger thresholds that would result in closing the areas if certain catch levels are obtained.

Response: While we agree with this concept, we are not opening Closed Areas I or II at this time, therefore thresholds are not needed for those areas. We will monitor catches of groundfish, as well as catches of monkfish, dogfish, and skates in the Nantucket Lightship Closed Area, and will revoke the exemption if opening the area results in any unanticipated negative impacts. We will also revoke the exemption if it is determined that we have insufficient funding to meet our monitoring costs by allowing access to this area under standard observer coverage.

Comment 32: The Environmental Defense Fund supported opening the Nantucket Lightship Closed Area as long as a Great South Channel closure is included in the Omnibus Habitat Amendment.

Response: While we support the idea of a variety of habitat closure areas in a variety of locations, we cannot predict a future Council decision. There are several alternatives in the Council's Omnibus Habitat Amendment for the Great South Channel area, and we continue to support a comprehensive approach to habitat protection.

We proposed opening the Nantucket Lightship Closed Area because we do not believe that it provides extensive habitat benefits and the benefits to the groundfish fishery of re-opening that area outweigh the potential impacts on fishery stocks. The Omnibus Habitat Amendment, if approved, is intended to minimize the adverse effects of fishing on EFH, to the extent practicable.

Comment 33: The Atlantic Offshore Lobstermen's Association and one industry member suggested that NMFS needs to anticipate potential gear conflicts and work with industry to resolve the conflicts rather than forcing industry to take on the burden itself.

Response: We understand the concerns expressed by lobstermen and will take a more active role in the future. Further, we commend the lobster and groundfish industries for working together to develop a compromise. Because we did not approve the exemption that would allow sector vessels into a portion of Closed Area II, the lobster agreement made between the Atlantic Offshore Lobstermen's Association and several sectors is no longer necessary for fishing year 2013. If sectors request the exemption for fishing year 2014, and if it is approved, the agreement would come into play and the regulatory language that was included in the proposed rule would be proposed again.

Regulations adding increased restrictions on offshore lobster vessels were included in the proposed rule, but because the exemption is not being approved, the regulations are not included in this final rule. If the exemption is requested in the future, similar regulations would be proposed and would be implemented if the exemption were approved.

#### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Northeast Multispecies Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be 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.

Under 5 U.S.C. 553(d)(1), the Assistant Administrator for Fisheries finds good cause to waive the 30-day delayed effectiveness of this action. Waiving the 30-day delay in the effective date balances the needs of different user groups who fish in the Eastern and Western Exemption Areas. This action reduces regulatory restrictions by allowing sector vessels access to areas previously closed to fishing. Failure to waive the 30-day delayed effectiveness would result in missed opportunities for sector vessels to increase profits by increasing their catch of healthy fish stocks that are underharvested. However, NMFS is allowing for 15 days before implementing this rule so that vessels fishing fixed gear, such as lobster pots, in the Eastern and Western Exemption Areas can remove their gear from the areas should they wish to do so. This shorter delay should provide sufficient time for vessels to remove gear and avoid potential gear conflicts while also providing sector vessels quick access to these fishing grounds. Implementing this plan quickly meets Objectives 1 and 3 of the groundfish plan by allowing sector vessels additional fishing opportunities. Selective gears used in these areas reduces bycatch, and minimizes habitat impacts (Objectives 9 and 10).

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires agencies to assess the economic impacts of their proposed regulations on small entities. The objective of the Regulatory Flexibility Act is to consider the impacts of a rulemaking on small entities, and the capacity of those affected by regulations to bear the direct and indirect costs of regulation. Size standards have been established for all for-profit economic activities or industries in the North American Industry Classification System. On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries

effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from \$4.0 to \$19.0 million, Shellfish Fishing from \$4.0 to \$5.0 million, and Other Marine Fishing from \$4.0 to \$7.0 million.

Taking this change and public comment into consideration, NMFS has identified no additional significant alternatives that accomplish statutory objectives and minimize any significant economic impacts of the proposed rule on small entities. Because sector exemptions are voluntary and would likely only be utilized when economically beneficial to sector vessels, we do not see any difference between impacts to larger vessels or companies versus smaller. We also do not see any significant economic impacts in general. Further, the new size standards do not affect the decision to prepare a Final Regulatory Flexibility Analysis as opposed to a certification for this action. Because there are so few companies that were listed as large entities prior to the rule change, increasing the size standards would only further reduce the number of larger entities. In this instance we believe that preparing a Final Regulatory Flexibility Analysis was a more transparent, conservative, responsible approach that required additional analyses that provided the agency and the public with more information.

Pursuant to the Regulatory Flexibility Act, and prior to Small Business Administration's June 20 final rule, an initial regulatory flexibility analysis was developed for this action using Small Business Administration's former size standards. NMFS has reviewed the analyses prepared for this action in light of the new size standards. The new standards could result in a few more entities being considered small.

The Small Business Act defines affiliation as: Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with

common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated (13 CFR 121.103(f)).

A Final Regulatory Flexibility Analysis was prepared for this action, as required by section 604 of the Regulatory Flexibility Act. The Final Regulatory Flexibility Analysis includes the SUMMARY and Comments and Responses section in this rule, the analyses contained in the accompanying environmental assessment (including the Regulatory Impact Review and Regulatory Flexibility Analysis, and the Initial Regulatory Flexibility Analyses summary in the proposed rule). The Final Regulatory Flexibility Analysis describes the economic impact of this action on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to the proposed and final rule in Sections 1.0, 2.0, and 3.0 of the EA prepared for this action, and is not repeated here. A summary of the analysis follows. A copy of this analysis is available from NMFS (see ADDRESSES).

#### Description of the Reasons Why Action by Agency is Being Considered

The flexibility afforded to sectors includes exemptions from certain specified regulations as well as the ability to request additional exemptions. Sector members no longer have groundfish catch limited by days-at-sea allocations and are instead limited by their allocations. In this manner, the economic incentive changes from a vessel maximizing its effective catch of all species on a day-at-sea to maximizing the value of its allocation, which places a premium on timing landings to market conditions, as well as changes in the selectivity and composition of species landed on fishing trips. Further description of the purpose and need for this action is contained in Section 2.0 of the EA.

## The Objectives and Legal Basis for the Proposed Action

This action grants sectors a regulatory exemption allowing sector vessels restricted access to fish in portions of Nantucket Lightship Closed Area. The legal basis for the proposed action is the NE Multispecies FMP and promulgating regulations at § 648.87. Regulations adding increased restrictions on offshore lobster vessels were included in the proposed rule, but because the exemption is not being approved, the regulations are not included in this final rule.

## Estimate of the Number of Small Entities

As explained above, the SBA size standard for commercial fin-fishing entities (North American Industry Classification System code 114111) is \$19 million in annual sales and \$5 million in annual sales for shellfish fishing entities. To determine an entity's size, we consider a vessel's affiliations. We have recently worked to identify ownership affiliations and incorporated those data into this analysis. Although work to more accurately identify ownership affiliations is ongoing, for the purposes of this analysis, ownership entities are defined as an association of fishing permits held by common ownership personnel as listed on permit application documentation. Only permits with identical ownership personnel are categorized as an ownership entity.

Using the Small Business Administration's size standard prior to its revision, NMFS determined that the maximum number of entities affected by this action is expected to be approximately 303. A total of 301 groundfish ownership entities are considered small entities, based on the Small Business Administration's prior size standard. It is likely that all 303 of the groundfish vessels ownership entities would be considered small entities following the Small Business Administration's revision. The economic impact resulting from this action on these small groundfish entities is positive, since the action provides additional operational flexibility to

vessels participating in NE multispecies sectors for FY 2013. In addition, this action further mitigates negative impacts from the implementation of Amendment 16, Frameworks 44 and 45, which have placed additional restrictions on the NE multispecies fleet, as well as Frameworks 48 and 50.

#### Reporting, Recordkeeping, and Other Compliance Requirements

This rule contains no collection-of-information requirement subject to the Paperwork Reduction Act. This action provides additional flexibility to sector vessels in fishing year 2013 by allowing them to fish in areas that were previously closed. Sector vessels are required to declare their intent to fish in these areas prior to departure. Exemptions implemented through this action will be documented in a letter of authorization issued to each vessel participating in an approved sector.

#### Duplication, Overlap or Conflict with other Federal Rules

The final rule is authorized by the regulations implementing the NE Multispecies FMP. It does not duplicate, overlap, or conflict with other Federal rules.

#### Alternatives which Minimize any Significant Economic Impact of Proposed Action on Small Entities

NMFS considered two alternatives for this action, the No Action Alternative and the Preferred Alternative. Under the No Action Alternative, sector vessels would not be able to fish in year-round closed areas unless fishing within an existing, approved Special Access Program. The No Action Alternative is the disapproval of the exemption and addendum to any sector's operations plan. The No Action Alternative would result in sector vessels operating under the operations plans as approved for the start of the 2013 FY on May 1, 2013. Approving the No Action Alternative could contribute to continued under harvesting of Georges Bank haddock and

would eliminate the potential for groundfish fishermen to increase their profits by limiting access to other stocks such as monkfish, dogfish, and skates.

The Preferred Alternative (the proposed action) would allow sector vessels to fish in portions of the Nantucket Lightship Closed Area, Closed Area I, and/or Closed Area II. The Preferred Alternative is expected to create a positive economic impact for the participating ownership entities that include sector vessels because it would mitigate the impacts from restrictive management measures implemented under the groundfish plan within certain groundfish closed areas. Few quantitative data on the precise economic impacts to individual ownership entities are available. The 2011 Final Report on the Performance of the Northeast Multispecies (NE multispecies) Fishery (May 2010 – April 2011) (copies are available from NMFS, see ADDRESSES) documents that all measures of gross nominal revenue per trip and per day absent in 2011 were higher for the average sector vessel than in 2010, and lower for the average common pool vessel than in 2010, except for average revenue per day on a groundfish trip for vessels under 30 ft (9.14 m) in length and for vessels 75 ft (22.86 m) and above. However, the report stipulates that this comparison is not useful for evaluating the relative performance of DAS and sector-based management because of fundamental differences between these groups of vessels, which were not accounted for in the analyses. Accordingly, quantitative analysis of the impacts of sector operations plans is still limited. NMFS anticipates that by switching from effort controls of the common pool regime to operating under a sector allocation, sector members will have a greater opportunity to remain economically viable while adjusting to changing economic and fishing conditions. Thus, the preferred action provides benefits to sector members that they would not have under the No Action Alternative.

Economic Impacts on Small Entities Resulting from Proposed Action

The environmental impact statement for Amendment 16 compares economic impacts of sector vessels with common pool vessels and analyzes costs and benefits of the universal exemptions. The final rules for the approval of sector operations plans and contracts for fishing years 2010-2013 (75 FR 18113, April 9, 2010; 75 FR 80720, December 23, 2010; 76 FR 23076, April 25, 2011; 77 FR 26129, May 2, 2012; 78 FR 25591, May 2, 2013) and their accompanying EAs discussed the economic impacts of the exemptions requested by sectors in those years.

The EA prepared for this rule evaluates the impacts of each closed area alternative individually relative to the No Action Alternative (i.e., no sectors are approved), and the alternatives may be approved or disapproved individually or as a group. The impacts associated with the implementation of each of the exemptions proposed in this rule are analyzed as if each exemption would be implemented for all sectors. The EA analyses include all sectors because all sectors can request the exemption. Sectors can also add approved exemptions to the operations plans at any point during the fishing year. Further, attempting to limit the analyses to a specific number of sectors would be incorrect because any sector(s) could lease in all the remaining allocation and fish for that allocation under the exemption. Therefore, it is important to analyze the impacts as if the entire allocation could be harvested under the exemption. However, each exemption will only be implemented for the sector(s) that requested that exemption.

Approval of this rule would provide greater operational flexibility and increased fishing opportunities to sector vessels. Increased “operational flexibility” generally has positive impacts on human communities as sectors and their associated exemptions grant fishermen some measure of increased operational flexibility. By removing the limitations on vessel effort (amount of gear used, number of days declared out of fishery, trip limits and area closures), sectors help create a more simplified regulatory environment. This simplified regulatory environment grants fishers

greater control over how, when, and where they fish, without working under increasingly complex fishing regulations with higher risk of inadvertently violating one of the many regulations. The increased control granted by the sectors and their associated exemptions may also allow fishermen to maximize the ex-vessel price of landings by timing them based on market prices and conditions. Generally, increased operational flexibility can result in reduced costs and/or increased revenues. All exemptions contained in the proposed fishing year 2013 sector operations plans are expected to generate positive social and economic effects for sector members and ports. In general, profits can be increased by increasing revenues or decreasing costs. Similarly, profits decrease when revenues decline or costs rise. The intent of this action is to allow fishermen to increase their revenues by increasing their catch, which would increase their revenue. Also, fishermen may potentially increase their catch per unit effort, which would also decrease their costs.

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

Dated: December 11, 2013

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Alan D. Risenhoover,  
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performing the functions and duties of the  
Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.

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