Regulatory Impact Review (RIR) for a Temporary Rule Emergency Action to Change Sector Annual Catch Entitlement (ACE) Carryover Catch used in Fishing Year 2013 Accounting and Accountability Measure Triggers

1.0 Introduction

This action would change the way NMFS evaluates if FY 2012 sector carryover ACE used in FY 2013 triggers accountability measures. Specifically, if both the stock-level total ACL and the sector sub-ACL are exceeded, sectors will be required to 'payback', except for a de minimis amount of any carryover catch used in FY 2013. If these accountability measure criteria are met, individual sectors that used carryover in FY 2013 will have their FY 2014 ACE reduced pound-for-pound by the amount of carryover used above the de minimis level.

The District of Columbia U.S. District Court ruled on April 4, 2014, in Conservation Law Foundation v. Pritzker, et al. (Case No. 1:13-CV-0821-JEB) that the carryover system permitted in FW 50 violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The change in accounting and how accountability measures function for FY 2013 are necessary to satisfy the Court's vacatur of the provisions of FW 50 to the NE Multispecies FMP that outline ACE carryover for the fishing year. The Court remanded the issue of FY 2012 ACE carryover used in FY 2013 to NMFS for resolution. The changes to respond to the remand are being implemented by an emergency rule issued by NMFS under MSA section 305(c) authority.

2.0 Regulatory Impact Review (Executive Order (E.O.) 12866)

In compliance with E.O. 12866, NMFS requires the preparation of a Regulatory Impact Review (RIR) for all regulatory actions or for significant policy changes that are of public interest. E.O. 12866 was signed on September 30, 1993, and established guidelines for promulgating new regulations and reviewing existing regulations. The RIR is a required component of the process of preparing and reviewing FMPs or amendments and is intended to provide a review of the economic impacts associated with regulatory actions. The RIR serves as the basis for assessing whether or not any proposed regulation is a "significant regulatory action" under criteria specified by E.O. 12866.

The RIR must provide the following information: (1) A comprehensive review of the level and incidence of economic impacts associated with a proposed regulatory action or actions; (2) a review of the problems and policy objectives prompting the regulatory proposals; and (3) an evaluation of the major alternatives that could be used to meet these objectives. In addition, an RIR must ensure that the regulatory agency systematically and comprehensively consider all available alternatives such that the public welfare can be enhanced in the most efficient and cost effective manner.

3.0 Statement of the Problem and Need for Action

As previously stated, the District of Columbia U.S. District Court vacated the ACE carryover accounting and accountability measure evaluation for carried over FY 2012 catch used in FY 2013. The vacatur occurred on April 4, 2014, just 26 days before the end of the FY 2013 fishing year. The Court remanded to NMFS the issue of carryover accounting for FY 2013. The Court indicated it was unlikely that rulemaking could be conducted before the end of the fishing year. It also stated that NMFS must quickly inform the public of changes being made as a result of the decision.

The timing of the decision and the insufficient time to enact rulemaking before the end of the fishing year presented a substantial challenge: It would not be possible to repeal the FY 2012 carryover, consistent with the vacatur, and several sectors had already made use of some carryover catch at the time of the Court's decision. In addition, most sectors had expected to have available carryover for use in the final 3 weeks of the fishing year. Thus, there was a clear need to address the Court's remand in a timely fashion. NMFS' options, given the timing and use of carryover, were limited to after-the-fishing season changes to carryover catch accounting in determining if sector accountability measures should be triggered.

NMFS initially notified sector managers of the Court's decision on the day it was issued, April 4. An information bulletin was distributed to the industry and public on April 16 outlining details of the Court's decision and providing information on NMFS' initial plan to address the remand. This bulletin outlined applying the FW50 developed approach for FY 2014 and beyond as the FY 2013 remedy. Under this approach, sectors using carryover could be held accountable for FY 2012 carryover used if the total catch exceeded the total stock-level FY 2013 ACL.

A subsequent bulletin was issued on May 6 that expanded further on the initial information, outlining the two-tiered accountability evaluation outlined here. That is, sectors that used FY 2012 carryover in FY 2013 will be held accountable to pay back the carryover used, except for a de minimis amount, from their FY 2014 ACE if both the total ACL and sector sub-ACL are exceeded.

4.0 Objectives of the Action

The objective of the emergency action is satisfying the Court's remand regarding FY 2012 carryover catch used in FY 2013. The intent of the action is to modify the carryover system for FY 2013 to be consistent with the MSA, National Standard 1 guidelines, and the FMP. NMFS will ensure accountability for carryover use, if the two-tiered catch evaluation indicates catch has exceeded the applicable ACLs.

5.0 Description of the Affected Entities

This emergency action could affect any FY 2013 sector participant that made use of carried over ACE from FY 2012. There were 836 permits in 17 sectors in FY 2013 that were eligible to receive carryover (state permit banks to not receive carryover).

The following table outlines in metric tons the FY 2013 total ACL, sector sub-ACL, FY 2012 carryover, de minimis carryover, and sector catch to date, per stock, for each carryover-eligible stock in FY 2013.

Stock	Total ACL	Sector [a] sub-ACL	FY 2012 Carryover	FY 2012 *de minimis* [b]	Reconciled Sector Catch [c]
	A to H	A			
GB Cod	1,907	1,775	426	17	1,540.6
GOM cod	1,470	812	59	7	732.2
GB Haddock	27,936	26,111	2,539	245	2,977.2
GOM Haddock	274	185	58	2	169.2
GB Yellowtail Flounder	Not eligible for carryover				
SNE Yellowtail Flounder	665	488	55	5	282.1
CC/GOM Yellowtail Flounder	523	466	92	4	376.4
Plaice	1,482	1,395	282	12	1,391.6
Witch Flounder	751	599	126	5	638.9
GB Winter Flounder	3,641	3,506	327	35	1,722.0
GOM Winter Flounder	1,040	688	62	6	167.9
SNE/MA Winter Flounder	No carryover; stock not allocated in FY 2012				
Redfish	10,462	10,092	765	93	3,996.1
White Hake	3,974	3,822	293	34	2,039.8
Pollock	14,921	12,802	1,155	118	4,878.4

[a] *Sector sub-ACL = sum of all initial sector ACE*
[b] *The de minimis carryover amount is a subset of the total carryover available. It is calculated as 1 percent of the FY 2013 sector sub-ACL.*
[c] *Final FY 2013 sector catch information. Report run in June 16, 2014, for data reported through April 30, 2014.*

To date, none of the accountability trigger criteria have been met for any stock. Three stocks bear additional examination given the amount used by sectors in FY 2014: Gulf of Maine haddock, American plaice, and witch flounder. Final, reconciled sector-catch data are now available, so evaluation of the 2nd trigger, whether or not the sector sub-ACL has been exceeded, can be undertaken. The total ACL for Gulf of Maine haddock has been exceeded as a result of the combined recreational and commercial catch; however, the sector sub-ACL has not. The sector sub-ACL for American plaice has not been exceeded. The sub-ACL for witch flounder has been exceeded; however, final total FY 2013 catch information, inclusive of FY 2012 carryover use, will not be available until September 2014.

Based on the current information available, there may only be the potential for a witch flounder accountability measure payback as all other stocks have not exceeded the second trigger of exceeding the sector sub-ACL. For witch flounder, it remains to be seen if a repayment will be triggered when final total catch data are available later this year. NMFS will update this RIR as well as issue any additional information bulletins or rulemaking necessary to inform the public and sectors of accountability and its associated impacts, as needed, following release of the final catch information this fall.

6.0 Description of the Alternatives

As previously mentioned, the Court vacated carryover in FY 2013; however, because rulemaking could not be completed to repeal carryover before the end of the year consistent with the vacatur. Further, at the time of the Court's ruling, some sectors had already used FY 2012 carryover. NMFS believes the only available option to satisfy the Court and the MSA is to ensure accountability for carryover use if ACLs are exceeded.

The range of potential remedies for the Court remand is necessarily constrained by two overarching issues: First, measures must be consistent with the Court's findings. This means that any measures adopted by NMFS to address the remand must be consistent with the MSA, National Standard 1 guidelines, and the FMP. Second, given that the rulemaking will be effective after the fishing year has ended, alternatives may only modify the way in which FY 2012 carryover used in FY 2013 is accounted for in determining if accountability measures have been triggered.

NMFS initially issued information that sectors would be required to repay on a pound-for-pound basis any FY 2012 carryover used in FY 2013 if the total ACL had been exceeded. In this system carryover, when used, would be considered in determining if sectors had exceeded their available annual catch entitlement (ACE) and would attribute carryover catch toward the total ACL in determining accountability. After discussion with sector managers and the interested public, NMFS included a second criterion that must be met before requiring sectors to repay carryover used in FY 2013. That is that the sector catch must also have exceeded the sector sub-ACL in addition to the total catch having exceeded the total ACL. The agency also clarified that the de minimis amount would be applied, meaning that a nominal amount of carryover, if used, would not be subject to accountability payback provisions. This two-level evaluation ensures that, if carryover is used and contributes to ACL overages, accountability is maintained. It also provides some limited flexibility to sectors in that they are not held accountable if other fishery components cause the total ACL to be exceeded but sector catch has remained within the specific sector sub-ACL.

This final approach of evaluating catch relative to both total ACL and sector sub-ACL for the purpose of determining carryover accountability is the most flexible alternative available that will meet the requirements of the MSA and ensure consistency with the Court's instructions. Other alternatives, such as the one NMFS initially put forward, may unnecessarily hold sectors

accountable for using carryover when the total sector catch, inclusive of carryover used, does not exceed the sector sub-ACL.

7.0 Expected Economic Effects of the Alternatives

There are no expected economic impacts associated with the carryover remedy being put in place for FY 2012 carryover catch use in FY 2013. The majority of stocks will not have any accountability measure repayment triggered because the total catch does not meet the threshold criteria for requiring payback. For those stocks where a payback is or may be triggered, available information indicates that the reduction in FY 2014 ACE would not result in a different outcome of the economic impact analyses performed for FY 2014 as part of FW 51.

Sector comparison report and catch data available through May 30, 2014, indicate that the sector sub-ACL has been exceeded for witch flounder. No other stocks have met the second criteria for triggering the accountability measure, i.e., catch for the other groundfish stocks remains below sub-ACL. This includes American plaice. The catch information for plaice indicates sector catch is near the sub-ACL but has not exceeded it, meaning the payback trigger criteria are not met. Irrespective of where final total catch is after all data have been compiled, sectors would not have to repay any used carryover for stocks other than witch flounder. It remains to be seen if the total ACL will be exceeded for witch flounder. That information will not be available until September.

If the total witch flounder ACL is exceeded once final data are compiled in September, 6 individual sectors would pay back a total of approximately 85,000 lb of carryover used. The range of repayment is from 3,100 to 48,000 lb per sector. The Quota Change Model (QCM) used to predict both potential FY 2014 quota utilization and project revenues for those landings indicates that witch flounder is not expected to fully achieve the sector sub-ACL in FY 2014. The model projects the FY 2014 utilization of the 601 mt witch flounder ACL to be 98 percent. Sectors may repay up to 38.5 mt (85,000 lb) for the FY 2012 carryover used in FY 2013 that exceeded the available ACE and *de minimis* carryover amount. This is approximately 6 percent of the witch flounder ACL; therefore, if total catch for all fishery components is achieved, only 94 percent of the ACL can be utilized as a result of the repayment. This may mean that witch flounder would become a constraining stock, thereby limiting the ability of the fishery to catch other less limiting species. Given historical fishing patterns and biomass distribution, witch flounder is likely to be the binding constraint in the Gulf of Maine (GOM), if at all. The QCM projects 99 percent of GGOM cod will be used in FY 2014, meaning it is the most constraining stock in lieu of any witch flounder carryover payback. It is thus uncertain whether witch flounder or GOM cod will serve as the constraining stock in the GOM. If witch flounder did become the constraining stock, the revenue impact is measurable as the difference between the revenue that could have been generated when GOM cod is the constraining stock versus when witch flounder serves as the constraining stock. Preliminary calculations derived from the QCM indicate that the impact of a witch flounder fishery constraint on gross revenue may be expected to fall within a standard deviation of the mean QCM model value for gross revenues of $70.8 million, with one standard deviation equal to $1.8 million. Given the relative normality of the distribution of QCM outcomes, this suggests that the impact on the fishery from a witch flounder constraint would be undetectable under the methods used in Framework 51. Based on this, it is unlikely that the potential reduction to the FY 2014 witch flounder sector sub-ACL will have a

discernable economic or other impact. Even with the potential change to witch flounder utilization if the accountability measure is eventually triggered, it is not expected that the economic impact on sectors will differ from those analyzed in FW 51's EA.

Intuitively, sectors that may have their FY 2014 witch flounder ACE reduced by the accountability repayment may incur some economic impact through either lost landing revenues, lost lease or transfer revenues, or increased operational costs as the result of leasing in additional witch flounder ACE if it limits their respective operations. These potential losses cannot be reasonably predicted or quantified. Impacts are expected to be nominal given the small repayment that may be possible as a 'worst case scenario' based on current information. As a result, given the available information, the potential economic impact of a witch flounder carryover-related payback AM, if triggered, is expected to be minimal. Thus, any impact on fishing communities resulting from potential ACE reduction (i.e., payback) is expected to be nominal.

8.0 Determination of Significance under E.O. 12866

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be significant. A "significant regulatory action" is one that is likely to: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, safety, or state, local, or tribal Governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. A regulatory program is "economically significant" if it is likely to result in the effects described above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

NMFS has determined that, given the information presented above, none of the factors defining "significant regulatory action" are triggered by this emergency action; therefore, the action has been determined to be not significant for the purposes of E.O. 12866. This action should not adversely affect, in the long-term, competition, jobs, the environment, public health or safety, or state, local, or tribal government communities. Second, this action should not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. No other agency has indicated that it plans an action that will affect sectors and their use of carryover in FY 2013. Third, this action will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of their participants. And, fourth, the proposed action does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Based on the results of the RIR, this action is not significant under E.O. 12866.