



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
Silver Spring, Maryland 20910  
THE DIRECTOR

April 7, 2022

Mr. Peter Shelley  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110

Dear Mr. Shelley:

We have considered the Conservation Law Foundation's (CLF) February 13, 2020, petition<sup>1</sup> for rulemaking ("the petition") requesting that NOAA's National Marine Fisheries Service (NMFS) develop and implement fishery management measures for Atlantic cod under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). I am denying the petition because the New England Fishery Management Council is responsible for developing necessary management measures for the Northeast Multispecies Fishery Management Plan (FMP), and it has not failed to timely develop or submit management measures necessary to manage the multispecies fishery. Further, the Council has addressed, or is in the process of addressing, many of the concerns and proposed measures raised in the petition. For example, the Council adopted monitoring measures under Amendment 23 to the Northeast Multispecies FMP, is developing a new rebuilding plan for Gulf of Maine cod, developed recreational restrictions for Georges Bank cod for fishing year 2022, and is considering the management implications of the most recent scientific information on cod stock structure, among other considerations. The Council is currently considering additional cod management measures that address issues or suggestions you raise in the CLF petition. I provide a detailed explanation of my denial below.

The Magnuson-Stevens Act authorizes the Secretary of Commerce to implement fishery measures in place of the Council in limited circumstances. The Secretary is authorized to put in place emergency or interim measures to address exigent circumstances or to prevent or reduce overfishing. NMFS policy highlights the importance of Council action in the first instance and imposes conditions on when emergency actions may be used. Otherwise, the Magnuson-Stevens Act authorizes the Secretary to amend fishery management plans only if a Council fails to timely develop and submit necessary amendments for fisheries requiring conservation and management. The Council has timely addressed issues arising in this fishery based on the best scientific information available at the time.

As explained in our June 10, 2020, letter to the Council, we recommended that the Council process most appropriately would address the issues raised in the petition. The letter sought Council input and noted that, at its core, the Magnuson-Stevens Act authorizes regional fishery management councils to develop fishery management measures. On November 24, 2020, the Council responded to our letter, disputing many of the contentions in the CLF petition and the two supplements and rejecting assertions that it failed to adopt measures necessary to protect cod. The Council concluded that the petition did not have merit and declined to initiate new

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<sup>1</sup> The original petition was supplemented on June 24, 2020, and again on September 16, 2020.

actions at that time to consider CLF's recommended measures. The Council's review provided specific rebuttal to claims throughout the petition, which we reviewed and considered in both our decision to announce the petition for public comment and in this decision to deny the petition.

On August 18, 2021, we published a notice announcing that we received your petition (86 FR 46226, RTID 0648-XA720) and sought public comment on the petition. The comment period closed on October 4, 2021. We received 20 unique comments on the petition, with 1,251 form letter comments submitted by your supporters. About one-half of the unique comments supported the petition and the information and analysis supporting it. Comments in support of the petition were mainly based on the argument that the Council has failed to take action to rebuild cod over a very long period of time. The commenters argue that NMFS must take immediate action, outside of the Council process, to implement measures that are necessary and adequate to rebuild cod. The remainder of the unique comments opposed the petition. Some presented a different and more optimistic view of the condition of the cod resource than was presented in the petition, and most rejected the need for the measures and process the petition recommended. We considered all of the comments in our decision on the petition. You can review the comments at this link:

<https://www.regulations.gov/document/NOAA-NMFS-2021-0039-0001>

The petition and comments we received supporting it did not demonstrate that the Council failed to timely develop and submit required management measures. We have not disapproved relevant measures recommended by the Council, and the Secretary does not have the authority to otherwise develop management measures for the groundfish fishery outside of the Council process. Similarly, the petition did not present a case that unforeseen problems with the cod resource and groundfish fishery require NMFS to take emergency or interim action to prevent overfishing and other grave and immediate impacts without going through the Council process. Instead, the petition considers in hindsight the effectiveness of measures developed by the Council and approved by NMFS and contends that those measures failed to adequately manage the cod fishery, which required conservation and management. Notably, the Magnuson-Stevens Act does not give NMFS the authority to develop and implement management measures outside of the Council process when measures implemented have not achieved the intended results. This is true even when years of actions have not been as successful as designed, or have failed. The responsibility lies with the Council to develop effective management measures that will have more success than prior measures.

The following are my specific responses to the arguments presented in the petition:

**The petition states that NMFS has consistently approved management measures that failed to address low recruitment, neglected to account for model errors and uncertainty when setting catch advice, approved uncertainty buffers that do not account for this uncertainty, and approved the use of an inadequate acceptable biological catch (ABC) control rule. The petition asserts that the rebuilding plans that have been implemented for cod do not identify and protect critical cod spawning areas or adequately conserve habitat for juvenile cod.**

The petition looks back at approved management measures and argues that, in hindsight, they were ineffective at achieving the intended impact. NMFS reviewed and approved measures that were determined to be consistent with the Magnuson-Stevens Act and other applicable laws at the time of each action. The Council developed and NMFS approved and implemented each management measure expected to successfully end overfishing, rebuild stocks, or sufficiently protect cod and other groundfish habitat. The measures and projections were based on the best available science available at the time they were implemented. The Council's Omnibus Essential Fish Habitat Amendment 2 implemented by NMFS in 2018 (83 FR 15240, April 9, 2018) included measures aimed at protecting cod and juvenile cod habitat. Cod protection areas under the Northeast Multispecies FMP also serve to protect spawning areas and reduce the impacts of fishing on cod spawning. We agree that, in retrospect, measures implemented for the groundfish fishery at times have not been as effective as projected. This is not a legal basis for NMFS to assume control of developing fishery management measures.

**The petition claims that NMFS has failed to conduct adequate rebuilding progress reviews for both the Gulf of Maine and Georges Bank cod stocks as required under the Magnuson-Stevens Act, or as required by the supplemental rebuilding program review process implemented in Framework Adjustment 51 to the FMP.**

The Council is timely responding to NMFS' determinations on rebuilding. To date, available scientific information and the status of the Georges Bank cod rebuilding plan did not support an inadequate rebuilding progress determination. We are continuing to monitor Georges Bank cod rebuilding. At the time of your petition, we had not sent the Council a letter about inadequate rebuilding progress for Gulf of Maine cod. However, our review of groundfish stocks and consideration of inadequate rebuilding determination was ongoing, and we were preparing our decisions and letter to the Council when you submitted the petition. On August 13, 2021, we notified the Council that Gulf of Maine cod is not making adequate rebuilding progress and that the Council is required to prepare and implement a revised rebuilding plan for the stock within two years of the letter. In response to the inadequate rebuilding progress determination for Gulf of Maine cod, the Council has committed to revising its rebuilding plan through development of Framework 65 to the FMP. Work on that framework will begin in April and conclude in December 2022. Also in that action, the Council will be developing catch limits and management measures for Georges Bank cod after recommending a 70-percent reduction in Georges Bank cod annual catch level for 2022. The Council's timeline for developing Framework 65 will allow NMFS to consider and implement any approved revised measures in early 2023, consistent with the Magnuson-Stevens Act requirement to implement the revised rebuilding plan and management measures within two years of our notification.

**The petition states that NMFS has failed to recognize or account for the findings of a National Research Council (NRC) Rebuilding Committee, which identified several reasons why stocks may not rebuild as expected under their respective rebuilding plans.**

There is no requirement for the Council or NMFS to adopt the findings of the NRC, but we certainly would support consideration of ideas to help guide the development of measures the Council is undertaking in 2022. Nevertheless, whether or not the Council or NMFS recognized

or accounted for the findings of the NRC is not a basis for NMFS taking over the management of the groundfish fishery.

**The petition states that in NMFS's denial of a 2015 petition for rulemaking on Gulf of Maine cod, NMFS committed to prevent overfishing, rebuild the stock, and adjust management measures as needed in response to the findings of a 2015 assessment. CLF asserts that these commitments were not upheld, and that NMFS did not properly balance biological and socioeconomic impacts in its rationale to deny the 2015 petition.**

NMFS's engagement with the Council and the Council's development of management measures after the denial of the 2015 petition represents our and the Council's efforts to manage the groundfish fishery, end overfishing, and rebuild cod and other stocks. The actions were consistent with our legal mandates to manage fisheries, promote rebuilding, and achieve optimum yield in sustainable fisheries, including balancing biological and socioeconomic impacts of those measures. CLF's contention fails to demonstrate that the Council failed to develop and submit management actions to achieve these legal requirements in a reasonable time.

**The petition states that inadequate at-sea monitoring coverage in the sector fishery has failed to provide sufficiently accurate and precise data to prevent and end overfishing or rebuild the cod stocks. Inadequate monitoring coverage targets, coupled with low quotas, have created incentives for the fishing industry to illegally discard and misreport cod catch. Analyses in the development of Amendment 23 to the Northeast Multispecies FMP indicate that there is an observer effect in the Northeast multispecies fishery, meaning observed trips are not representative of unobserved trips. Without accurate and precise catch data, managers cannot appropriately apply the accountability measures that are designed to prevent overfishing.**

The Council was actively working on Amendment 23 when you submitted your petition, and Amendment 23 now includes 100-percent observer coverage among other related monitoring measures. The Council adopted Amendment 23 in September 2020 and submitted it for NMFS review. NMFS recently published a notice of availability for Amendment 23 (87 FR 2399, January 14, 2022) and a proposed rule (87 FR 11014, February 28, 2022). If approved, Amendment 23 is intended to address the monitoring issues you raise in your petition. Again, the petition fails to demonstrate that the Council failed to timely develop or submit management actions to address the noted problem.

**The petition states that past management actions have failed to address truncated cod stock age structures, which may contribute to reduced recruitment and decreased resilience to stressors. CLF asserts that managing cod as two stocks (Gulf of Maine and Georges Bank) fails to account for sub-populations, and that recent research by the Atlantic Cod Stock Working Group suggests that at least three sub-populations exist. Differences in the characteristics of these sub-populations, such as differences in spawning seasonality, are important for stock recovery.**

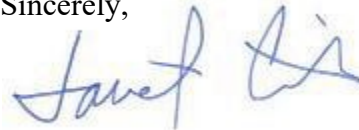
Approved actions have attempted to address the biological conditions of the cod stocks as identified in the stock assessments and projections based on those assessments. The Council has also done substantial work over the last year to understand the new cod stock structure. Scientific development of new cod stock structure has understandably taken time. Once developed and presented to the Council, the Council has timely turned to considering action in 2022 to begin to address the change through management measures. The Council is invested in plans to consider how new cod stock structure information may affect development of conservation and management measures and this consideration is its first management step in that process. Again, the petition fails to demonstrate that the Council failed to develop or submit management measures to address the necessary conservation and management of cod in a reasonable time.

**The petition argues that stock assessments and management measures for Atlantic cod must account for impacts to the stock due to climate change, especially since temperature and other environmental conditions have been shown to impact cod biology.**

We agree that the impacts of climate change are very important to consider in the assessment of cod (and other fish species) stocks and in developing management measures. However, this is not a basis for NMFS to take over management of the groundfish fishery. Cod stocks are the subject of the Spring 2023 research track assessment, and it will look at a variety of issues including environmental impacts on habitat and population dynamics. The Council will certainly take the conclusions of the assessment into consideration as it develops future management measures for the groundfish fishery to prevent overfishing of cod and rebuild the stocks.

In conclusion, I am acutely aware of and concerned about the condition of the Northeast cod stocks and how they have not responded as expected to reductions in fishing mortality and other protective measures. NMFS and the Council must work together with stakeholders to develop effective management measures for cod. I greatly appreciate CLF's and the other members of the public's interest and commitment to effective management of the groundfish fishery. We look forward to constructive input and helpful recommendations within the Council process to help effectively manage cod.

Sincerely,



Janet L. Coit  
Assistant Administrator for Fisheries

Cc: Tom Nies, Executive Director  
New England Fishery Management Council  
Eric Reid, Chairman  
New England Fishery Management Council  
Michael Pentony, Regional Administrator  
NMFS Greater Atlantic Region