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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120131078-2207-01]

RIN 0648-XA913

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Gulf of Maine Winter Flounder Catch Limit Revisions

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

ACTION: Emergency rule; request for comments.

SUMMARY: NMFS issues this final emergency rule under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This action implements new stock status determination criteria for Gulf of Maine (GOM) winter flounder and associated increases in GOM winter flounder catch limits based on the most recent and best available scientific information. This action increases fishing year (FY) 2011 GOM winter flounder catch levels, including Overfishing Levels (OFLs), Acceptable Biological Catches (ABCs), Annual Catch Limits (ACLs), ACL components, and sector Annual Catch Entitlements (ACEs). The ACL components include sub-ACLs for the common pool and sectors. This action is intended to provide additional fishing opportunities, consistent with the Northeast (NE) Multispecies Fishery Management Plan (FMP) and the Magnuson-Stevens Act.

DATES: Effective [insert date of filing for public inspection at the Office of the Federal Register], through April 30, 2012. Comments must be received by [insert date 30 days after date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background

This final emergency rule implements emergency measures, authorized by section 305(c) of the Magnuson-Stevens Act, to revise current GOM winter flounder catch limits immediately. On May 1, 2010, NMFS implemented catch limits developed by the New England Fishery Management Council (Council) under Framework Adjustment (FW) 44 (75 FR 18356; April 9, 2010) for all groundfish stocks, including GOM winter flounder, for FY 2010 through 2012. The catch levels specified by FW 44 included OFLs, ABCs, ACLs, and ACL components, including sub-ACLs for the common pool and sectors. On June 15, 2011, NMFS published (76 FR 34903) adjusted ACL subcomponents and adjusted sector ACEs for FY 2011 in order to reflect changes to the sector membership prior to the start the 2011 FY.

The FW 44 catch levels for all stocks, including GOM winter flounder, were based upon the most recent scientific information available at that time, i.e., the stock assessments conducted by the Groundfish Assessment Review Meeting (GARM III) in 2008. The GARM III rejected the GOM winter flounder assessment due to its high degree of uncertainty, but concluded that there was a strong probability that the GOM winter flounder stock was overfished. As a result,

the FY 2010-2012 catch levels in FW 44 were set at 75 percent of recent catches from 2006-2008; an annual ABC of 239 mt was set for FY 2010, 2011, and 2012.

A new peer reviewed benchmark stock assessment review (SARC 52) was completed for the winter flounder complex in June 2011, and the final summary report was completed in September 2011. The review committee accepted an assessment that provided an estimate of stock size and a proxy for F_{MSY} . The overfishing threshold was derived using F 40 percent (0.31) as a proxy for F_{MSY} , and 0.23 as the corresponding threshold exploitation rate. Based on this information, the estimate of fishing mortality in 2010 was 0.03 (13 percent of F_{MSY}). Reviewers were able to determine from the data that the stock is not undergoing overfishing, but could not make an estimate of target biomass and, therefore, could not determine whether the stock is in an overfished condition.

The Council developed updated groundfish specifications, including updates for GOM winter flounder, for FY 2012-2014 through FW 47 to the NE Multispecies FMP. Using information from the new GOM winter flounder assessment, at its September 2011 meeting, the Council's Scientific and Statistical Committee (SSC) recommended an annual ABC of 1,078 mt for FY 2012-2014, a substantially higher amount than the currently specified FY 2010-2012 ABC of 239 mt. This recommendation was approved by the Council in November 2011 as part of FW 47, which is targeted for implementation, if approved, for FY 2012 (May 1, 2012).

Through a letter sent November 21, 2011, the Council requested, based on the new assessment results, that the Secretary of Commerce (Secretary) use emergency authority to increase the FY 2011 GOM winter flounder commercial ACL for the remainder of the 2011 FY out of concern that the current FY 2011 ACL may be unnecessarily constraining on the

groundfish fishery. Recent catch information indicates that catches of this stock are higher than last year and may lead to lost opportunities for groundfish fishermen if the quota is reached before the end of the FY. Catch of GOM winter flounder as of January 7, 2012, indicated that nearly 56 percent of the FY 2011 commercial groundfish fishery sub-ACL has already been caught, with sectors having caught nearly 57 percent of their sub-ACL for this stock. During FY 2010, nearly 75 percent of the annual GOM winter flounder catch was harvested after November. This suggests that if those catch rates were to continue during FY 2011, the majority of the groundfish fishery would likely have to stop fishing in the GOM to avoid exceeding the sub-ACL for this stock by the end of FY 2011 (April 30, 2012), resulting in potentially substantial lost economic yield for the groundfish fishery.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) pursuant to section 305(c) of the Magnuson-Stevens Act specify three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone.

The new information from the GOM winter flounder benchmark stock assessment is considered to be a “recently discovered circumstance,” which, in the context of the current FMP and low GOM winter flounder catch limits specified for FY 2011, has been determined by NMFS to represent an emergency situation. This circumstance is the result of the recently conducted assessment of GOM winter flounder, and the subsequent recommendations by the SSC and the Council, which significantly revised the stock status and specifications for this stock for the fishery. Although the new assessment was completed in June 2011, it was not possible to have predicted its outcome; nor could the SSC’s recommended FY 2012-2014 ABC, or the Council’s subsequent approval of this recommendation, have been foreseen in time to follow normal procedures for implementing this type of action under the Magnuson-Stevens Act. These decisions were made following the normal procedures for updating fishery specifications under the MSA and the FMP and would not have been completed any earlier. Although the Council has the authority to develop a management action to modify the GOM winter flounder catch limits, as exemplified through the adoption of increased FY 2012 -2014 catch limits for this stock under FW 47, such an action could not be completed before the end of FY 2011. If the normal regulatory process is used to revise the GOM winter flounder catch limits, it would take substantially longer for the new limits to be implemented, and could result in triggering restrictive, and economically harmful management actions that otherwise may have been avoided. The FMP requires that fishing effort be reduced or stopped if catch of a single stock is projected to reach an ACL, and that accountability measures (AMs) be implemented if an ACL is exceeded, to payback an overage and to prevent the ACL from being exceeded again. Recent catch information indicates that catches of this stock are higher than last year and that, if these

catch rates were to continue for the remainder of FY 2011, the majority of the groundfish fishery would likely have to stop fishing in the GOM well before the end of the 2011 FY in order to avoid exceeding the sub-ACL for this stock. Thus, a delay in implementing the revised catch limits could potentially have resulted in lost economic opportunity due to an early end to the FY 2011 fishing season, not only for GOM winter flounder, but also for several other groundfish stocks that are caught together.

The emergency presents serious management problems because the low catch limits for GOM winter flounder could result in substantially reduced fishing effort and decreased catch and revenue due to the multispecies nature of the fishery. When the projected catch of the ACL for a single stock such as GOM winter flounder triggers a reduction or cessation of fishing effort (for common pool and sector vessels, respectively), catches of several other stocks that are caught concurrently with GOM winter flounder may also be reduced.

NMFS has determined that the current situation meets the criteria for emergency action. Because this is a Secretarial emergency action, not a Council action, the involvement of the SSC in the specification of ABC is not specifically required, although the emergency rule must still be consistent with the best scientific information available. In their letter, the Council suggested NMFS consider alternatives that would increase the commercial groundfish GOM winter flounder sub-ACL two to three fold. NMFS considered this request and developed a preferred alternative that essentially implements the SSC and Council's recommended FY 2012 ABC in FY 2011, but only releases a portion of this ABC to the commercial fishery for the remainder of the current FY. Rather than providing the full FY ACL to the fishery, the FY 2011 GOM winter flounder ACL and ACL sub-components are increased by an amount equivalent to the monthly

proportion of the FY 2012 ACL applied over what was the expected duration of this action (January – April 2012, or 4 months). Increasing the GOM winter flounder catch limits for the remainder of FY 2011, while not providing the full FY ACL, would enable the fishery to more effectively harvest available ACL for other stocks caught in conjunction with GOM winter flounder, but not to a degree that it would compromise efforts to rebuild other overfished stocks. Further, providing the full increase could also lower the leasing market price for this stock and potentially eliminate demand for this stock on the sector annual catch entitlement (ACE) leasing market. While this would benefit those seeking to acquire ACE for this stock, it could eliminate any benefits to those wishing to sell ACE of this stock to others. Each revised FY 2011 sub-ACL or sub-component was derived by adding 4 months of the appropriate FY 2012 sub-ACL/sub-component (as proposed in FW 47) to the FY 2011 catch (as of December 31, 2011) for that component: $\text{FY 2011 catch} + ((\text{FY 2012 sub-ACL}/12)*4$; see Table 1). For the remainder of the 2011 FY, this alternative effectively doubles the FW 44 FY 2011 commercial groundfish sub-ACL, thereby increasing the sector and common pool sub-ACLs, and increases the ACL sub-components allocated to the state waters fishery and “other” sub-component fisheries. Increasing the GOM winter flounder ACL eliminates the potential loss of economic opportunity for groundfish vessels by preventing an early closure of the fishery, and allowing vessels a better chance to catch their allocations of more abundant stocks by not constraining them under the FW 44 FY 2011 ACL.

Table 1. Derivation of Revised GOM Winter Flounder ACL Components for FY 2011

GOM Winter Flounder ACL Component	Proposed FW 47 FY 2012 Catch Level (mt) (Column A)	4 Months of FW 47 Catch Level (mt) (Column B)	Catch as of Dec. 31, 2011 (mt) (Column C)	Revised ACL Component (mt) (Column D = B + C)
State Waters sub-component	272	91	72	163
Other sub-component	54	18	14	32
Groundfish sub-ACL	715	238	91	329
Total ACL	1040	-	-	524*

*The total ACL is derived by adding up the sub-ACL and ACL sub-components, consistent with the method specified in FW 44, Appendix III.

The Secretary is taking emergency action to swiftly implement an increase in the GOM winter flounder ACL. If the normal regulatory process were to be used to revise the GOM winter flounder catch limits, it would not be able to be completed prior to the end of the 2011 FY (April 30, 2012), and so all potential benefits of this action would be lost and could not be recouped the following year. Thus, the immediate benefit of an emergency action outweighs the value that would be derived from the normal regulatory process.

The duration of this action is limited by the Magnuson-Stevens Act to 180 days. However, if the revised status determination criteria and revised specifications is made permanent by the approval of FW 47, which is targeted for implementation with the start of FY 2012 (May 1, 2012), then this temporary action is likely to be effective for the remainder of the 2011 FY (until April 30, 2012) as it is expected that FY 2012 specifications will be implemented before the start of FY 2012 (May 1, 2012).

Based upon the stock assessment results, NMFS is revising the stock status determination criteria for GOM winter flounder. The revised biomass target parameter (SSB_{MSY} or its proxy) is classified as “undefined,” and the maximum fishing mortality threshold is the F_{MSY} proxy F_{40}

percent MSP, or 0.31. To be consistent with the swept-area biomass approach used to model the status of this stock, F_{MSY} must be converted to an exploitation rate (threshold exploitation rate of 0.23).

Consistent with the revised stock status, NMFS is also revising the GOM winter flounder catch limits for FY 2011, including the OFL, ABC, ACL, and ACL components, including the FY 2011 sector ACEs and common pool sub-ACL. The revised GOM winter flounder catch limits are contained in Tables 2 and 3 below. NMFS conducted an analysis to determine new GOM winter flounder trip limits for common vessels for FY 2011, but was unable to identify an appropriate limit. NMFS examined historical fishing patterns, but little relationship could be found between GOM winter flounder possession limits and catch rates of GOM winter flounder in recent years. Also, possession limits did not appear to be a limiting factor in the catch of GOM winter flounder, based on this analysis. Furthermore, NMFS is concerned that a high GOM winter flounder trip limit for the remainder of FY 2011 may increase catch of GOM cod due to the multispecies nature of the fishery. Results from the most recent assessment of this stock (SARC 53) suggests that catch of GOM cod must be substantially reduced during FY 2012 to maintain consistency with conservation objectives of the FMP. In addition, the NMFS Northeast Regional Administrator has the authority under the current regulations to revise common pool trip limits at any time inseason to ensure that available sub-ACLs are caught and not exceeded. Therefore, NMFS is maintaining the current GOM winter flounder 250 lb/trip (113 kg)/trip) limit for common pool vessels. NMFS will continue to monitor landings of GOM winter flounder and will increase this trip limit, if necessary, to ensure the GOM winter flounder trip limit is not constraining on common pool vessels during the remainder of FY 2011.

Table 2. Revised GOM Winter Flounder OFL, ABC, ACL and ACL Components for FY 2011

GOM Winter Flounder Catch Limits	Current FW 44 Adjusted Catch Limits (mt)	Revised FY 2011 Catch Limits (mt)
OFL	570	1,458
ABC	239	1,078
Total ACL	231	524
State Waters sub-component	60	163
Other sub-component	12	32
Groundfish sub-ACL	159	329
Sector sub-ACL*	150	313
Common Pool sub-ACL*	8	16

*Final rule that updated sector membership (76 FR 34903; June 15, 2011)

Table 3. GOM Winter Flounder ACE by Sector (mt)

Sector	Current ACE (mt) FW 44 Adjustment	Revised ACE (mt)
Fixed Gear	3.49	7.26
Maine Permit Bank Sector	1.38	2.87
NCCS	1.43	2.98
NEFS 2	33.34	69.43
NEFS 3	17.37	36.16
NEFS 4	7.45	15.51
NEFS 5	0.51	1.06
NEFS 6	5.84	12.15
NEFS 7	1.38	2.87
NEFS 8	5.33	11.09
NEFS 9	3.85	8.02
NEFS 10	43.21	89.97
NEFS 11	3.20	6.66
NEFS 12	0.50	1.04
NEFS 13	1.98	4.12
PCGS	2.03	4.22
Sustainable Harvest Sector I	9.37	19.52
Sustainable Harvest Sector III	5.15	10.72
Tri-State	3.29	6.86
Total	150	313

All ACE values for sectors assume that each sector member has a valid permit for FY 2011.

NCCS: Northeast Coastal Communities Sector; NEFS: Northeast Fishery Sectors; PCGS: Port Clyde Community Groundfish Sector

An environmental assessment (EA) was prepared that analyzes the impact of the revised GOM winter flounder catch limits for the remainder of FY 2011, and compares the impact to the current catch limits specified for FY 2011 (i.e., the No Action Alternative). The revised level of GOM winter flounder catch is consistent with fishing at a sustainable level of mortality (F_{MSY}).

Both scientific and management uncertainty are accounted for in this catch level and the ACL and ACL components are only getting a prorated increase, as opposed to the full proposed FY 2012 ACL, so the risks of negative biological impacts have been minimized. Furthermore, if the catch limits specified here are exceeded, AMs will be triggered, further reducing the risk of overfishing and adverse impacts to the stock. The revision to the FY 2011 GOM winter flounder catch limits in this rule may result in the catch of substantially more GOM winter flounder than under the No Action Alternative. The larger catch limit for GOM winter flounder may result in greater fishing effort and greater catch of other stocks in addition to GOM winter flounder, as compared to the current GOM winter flounder catch limits, because it is not likely that GOM winter flounder will serve as a constraining stock. However, all stocks have catch limits and management measures designed to manage catches, so additional fishing effort that could result from a larger GOM winter flounder catch limit is not likely to negatively impact other stocks or result in catches exceeding catch limits for other stocks. Given the preliminary results of the recent GOM cod assessment, NMFS was concerned that an increase in the GOM winter flounder ACL could have an impact on GOM cod, since these two stocks co-occur. However, in light of the overall effort reductions in the fishery and the constraints on fishing effort in effect, including the GOM cod ACL and a prohibition on discarding by sector vessels, effects on GOM cod should not be significant.

The larger catch limit for GOM winter flounder may result in an increased interaction of groundfish gear with protected species, as a result of increased effort. However, the increased effort in the context of the overall fishery is not expected to result in negative impacts to protected species. Five distinct population segments (DPSs) of Atlantic sturgeon are currently

proposed to be listed under the ESA. Four DPSs are proposed to be listed as endangered (New York Bight, Chesapeake Bay, Carolina, and South Atlantic) and one DPS as threatened (Gulf of Maine). A final listing determination is expected in January 2012. Because analysis has shown that the NE multispecies fishery may interact with Atlantic sturgeon, if these DPSs are listed, a formal consultation will be reinitiated for the NE Multispecies FMP that will analyze the effects of any fishery interactions in a biological opinion (BO). NMFS will implement any appropriate measures outlined in the BO to mitigate harm to Atlantic sturgeon. It is difficult to predict the amount of fishing effort that will occur during the remainder of FY 2011 as a result of this action, due to the novelty of management changes in the fishery in recent years. Although effort may be expected to increase as a result of this action, the overall fishing effort in the fishery is expected to be lower than what has occurred in previous years as a result of overall mortality reductions implemented through Amendment 16 and FW 44 for GOM winter flounder and other stocks. Therefore, the net effect of the increase in the GOM winter flounder catch limits for the limited duration of this action, the remaining three months of FY 2011, will likely be negligible overall compared to operation of the fishery in recent years. These measures, therefore, are not likely to jeopardize the continued existence of Atlantic sturgeon between now and the time when a final listing determination will be made.

Due to the increased amount of GOM winter flounder catch allowed under this emergency action, the revised GOM winter flounder ACL represents an increase of potential revenue of \$1.2 million, assuming recent average prices for GOM winter flounder remain steady, and assuming that the full ACL for GOM winter flounder will be harvested. This estimate of GOM winter flounder revenue is likely high, given the level of GOM winter flounder landings in

recent years. Additional revenue may be generated from increased catch of other stocks due to the revised GOM winter flounder catch limits. The primary economic benefit of the revised ACL is expected to be associated with reducing the likelihood that an accountability measure would be triggered for the common pool and for sectors. The triggering of accountability measures would have reduced or precluded access to other stocks and the associated revenue.

Even with a total increase in the revised sector specifications of 163 mt of GOM winter flounder, the common pool and one of the sectors (NEFS XII) will still be left with less GOM winter flounder than their collective memberships landed during FY 2010. That is, even though the revised aggregate GOM winter flounder ACE is higher than the FY 2010 landings, the ACE for these sectors is still lower than the sector members' FY 2010 combined GOM winter flounder landings. However, the deficit for the one sector may be overcome by leasing ACE from other sectors that may have a surplus of GOM winter flounder ACE, that is, an ACE that is greater than their members' collective recent GOM winter flounder landings. With respect to the impact of the revised GOM winter flounder catch limit on individual members of sectors, there may be a similar deficit or surplus between an individual vessel's allocation from its sector and its own historical landings. However, these differences may also be offset through trading within a vessel's sector and with other sectors. The revised GOM winter flounder catch limits may reduce the ACE market price for leasing GOM winter flounder, by reducing the demand for GOM winter flounder on the ACE trading market. The magnitude of this decline is highly uncertain. However, NMFS is only allowing a limited increase in the GOM winter flounder specifications, in order to provide additional fishing opportunity to groundfish vessels without collapsing the lease price.

Classification

NMFS has determined that this rule is necessary to respond to an emergency situation and is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds it impracticable and contrary to the public interest to provide for prior notice and opportunity for the public to comment under the provisions of section 553(b)(B) of the Administrative Procedure Act. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment contrary to the public interest. This action would result in the benefit of the revenues associated with larger GOM winter flounder catch limits. This action could not allow for prior public comment because the scientific review process and determination could not have been completed any earlier due to the inherent time constraints associated with such process. This action was initiated as a result of recently discovered circumstances that warrant an increase in the FY 2011 GOM winter flounder catch limits. A new assessment for GOM winter flounder was completed in June 2011 that significantly revised the status of this stock. As a result of the new assessment, the SSC recommended, and the Council subsequently approved at its meeting on November 16, 2011, substantially higher specifications for this stock for FY 2012-2014. These decisions were made following the normal procedures for updating fishery specifications under the MSA and the FMP, and could not have been foreseen in time to follow normal procedures for implementing this type of action under the Magnuson-Stevens Act. Although the Council could have initiated a management action to modify the GOM winter flounder catch limits for the remainder of FY 2011 at the time they approved the SSC's recommendation, as they are doing with the FY 2012 -2014 catch limits for

this stock under FW 47, such an action could not have been completed before the end of FY 2011 (April 30, 2012), and could have resulted in triggering restrictive and economically harmful management actions that otherwise could have been avoided. As described in an earlier paragraph, GOM winter flounder catch rates in FY 2011 have been such that reduction or cessation of fishing effort may have been necessary before the end of the fishing year in order for the common pool or sectors to avoid exceeding an ACL. An early end to the fishing season could have meant lost economic opportunity for groundfish vessels in the form of ACL left unharvested for GOM winter flounder and other stocks caught with it. An emergency action can be developed and implemented by NMFS much more swiftly than development of a Council action, which is subject to procedural and other requirements not applicable to the Secretary. Thus, NMFS initiated this temporary rule, at the request of the Council, to revise the GOM winter flounder catch limits before the end of FY 2011. If this rulemaking was delayed to allow for notice and comment, the current quota for some sectors could be exceeded, which could result in triggering restrictive and economically harmful AMs that otherwise could have been avoided. A sector that exceeds an allocation must pay back that overage on a pound-for-pound basis in the following year. The time necessary to provide for prior notice and opportunity for public comment for this action could severely curtail fishing operations if the current ACL is reached and measures to reduce or end fishing effort are triggered prior to implementation of the increased catch limit. In the interest of receiving public input on this action, the revised assessment upon which this action was based is made available to the public, and this action requests public comments on that document and the provisions in this rule.

The Assistant Administrator for Fisheries, NOAA, finds good cause to waive the requirement for a 30-day delay in effectiveness under the provisions of section 553(d) of the Administrative Procedure Act. As stated above, this action would result in a benefit of additional revenues associated with larger GOM winter flounder catch limits, and more opportunity for groundfish vessels to harvest their allocations of other stocks caught concurrently. This rule relieves a restriction by increasing the catch limit for GOM winter flounder and, consequently, extends fishing opportunity for fishermen that would otherwise be constrained under the current catch limits, which are restrictive and based on outdated biological information. If this rulemaking was delayed to allow for a 30-day delay in effectiveness, the fishery would likely forego some amount of the increase in catch level, and resulting additional fishing opportunity, implemented by this rule, and could suffer an early end to the fishing season before the end of FY 2011 (April 30, 2012). If the common pool was projected to catch the current catch limit, while the effectiveness of the new catch limits in this action is delayed, the regulations would still require NMFS to take action to implement unnecessary restrictive measures in the GOM to ensure the common pool did not exceed its current catch limit. Similarly, sector vessels would still be required to end fishing effort in the GOM if they reached their allocations under the current GOM winter flounder catch limits. While these restrictions would be alleviated after this rule becomes effective, the lost economic opportunity of foregone catches of GOM winter flounder, and other valuable groundfish stocks caught concurrently in the GOM, that would result from a delay in the effectiveness of this action could not be recouped in the few short weeks before the end of FY 2011, or in the following fishing year. For these reasons, the AA finds good cause to implement this rule immediately.

This emergency rule is exempt from E.O. 12866 because it contains no implementing regulations.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

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

Dated: February 7, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator

for Regulatory Programs,

National Marine Fisheries Service.

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