



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
 NATIONAL MARINE FISHERIES SERVICE
 NORTHEAST REGION
 55 Great Republic Drive
 Gloucester, MA 01930-2276

JUL 19 2013

C.M. "Rip" Cunningham, Jr., Chairman
 New England Fishery Management Council
 50 Water Street
 Newburyport, MA 01950

Dear Rip:

On July 18, 2013, NOAA's National Marine Fisheries Service, on behalf of the Secretary of Commerce (Secretary), partially approved Amendment 5 to the Atlantic Herring Fishery Management Plan (Herring FMP).

A notice of availability (NOA) soliciting public comments on Amendment 5 was published on April 22, 2013, with a comment period ending June 21, 2013. A total of 115 comments were received and considered in making the decision to partially approve Amendment 5, as described below. One of the comment letters on the NOA provided copies of all the comments letters on the Amendment 5 draft environmental impact statement (EIS). The proposed rule to implement Amendment 5 was published on June 3, 2013, with a comment period ending July 18, 2013. To date, approximately 3,000 comments have been received during the public comment period for the proposed rule. A summary of the comments received, and NMFS's responses to those comments, will be published in the final rule.

Amendment 5 will improve the catch monitoring program for the herring fishery and address bycatch issues through responsible management. It contains many measures that will improve herring management and that can be administered by NMFS. We support improvements to fishery dependent data collections, be it through increasing reporting requirements or expanding the at-sea monitoring of the herring fishery. We also share the Council's concern for reducing bycatch.

However, a few measures in Amendment 5 lacked adequate rationale or development by the Council, and we had utility and legal concerns about the implementation of these measures. These measures are: A dealer reporting requirement; a cap that, if achieved, would require vessels discarding catch before it had been sampled by observers (known as slippage) to return to port; and a requirement for 100-percent observer coverage on Category A and B vessels, coupled with a limited industry contribution of \$325 per day toward observer costs.

We expressed our concerns about the implementation of these measures throughout the development of this amendment and, most recently, articulated them in our comment letter (dated June 5, 2012) on the draft EIS. The proposed rule for Amendment 5 also described our concerns about these measures' consistency with the Magnuson-Stevens Fishery Conservation



and Management Act and other applicable law. After review of public comment on the NOA, I partially approved measures in Amendment 5 on behalf of the Secretary.

Amendment 5 contains the following measures that improve herring management and that I approved:

- Modifying the herring transfer at-sea and offload definitions to better document the transfer of fish;
- Expanding possession limit restrictions to all vessels working cooperatively, consistent with pair trawl requirements;
- Eliminating the vessel monitoring system (VMS) power-down provision for limited access herring vessels, consistent with VMS provisions for other fisheries;
- Establishing an “At-Sea Herring Dealer” permit to better document the at-sea transfer and sale of herring;
- Establishing an “Areas 2/3 Open Access Permit” to reduce the potential for the regulatory discarding of herring in the Atlantic mackerel fishery;
- Allowing vessels to enroll as herring carriers with either a VMS declaration or letter of authorization to increase operational flexibility;
- Expanding pre-trip and pre-landing notification requirements, as well as adding a VMS gear declaration, to help facilitate monitoring;
- Expanding vessel requirements related to at-sea observer sampling to help ensure safe sampling and improve data quality;
- Prohibiting slippage, with exceptions for safety concerns, mechanical failure, and spiny dogfish preventing catch from being pumped aboard the vessel, and requiring a released catch affidavit to be completed for each slippage event;
- Establishing the ability to consider a river herring catch cap in a future framework;
- Establishing River Herring Monitoring/Avoidance Areas;
- Evaluating the joint Sustainable Fisheries Coalition/University of Massachusetts School for Marine Science and Technology/Massachusetts Department of Marine Fisheries bycatch avoidance program investigation of providing real-time, cost-effective information on river herring distribution and fishery encounters in River Herring Monitoring/Avoidance Areas;
- Expanding at-sea sampling requirements for all midwater trawl vessels fishing in groundfish closed areas; and
- Revising list of measures to be implemented via a framework action and/or specifications process to include measures established in Amendment 5.

The following sections detail our concerns about the other measures proposed by the Council in Amendment 5 and provide rationale for my disapproval of these measures.

Increased Observer Coverage Requirements

Amendment 5 contains a measure that would require 100-percent observer coverage on Category A and B vessels. The 100-percent observer requirement is coupled with a target maximum industry contribution of \$325 per day. The at-sea costs associated with an observer in the herring fishery are higher than \$325 per day. The Department of Commerce (DOC) Office of General Counsel has advised that cost-sharing violates the Anti-Deficiency Act. Based on DOC’s advice, there is no current legal mechanism to allow cost-sharing of at-sea costs between

NMFS and the industry. Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery. Requiring 100-percent observer coverage would amount to an unfunded mandate. Because Amendment 5 does not identify a funding source to cover all of the increased costs of observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, I disapproved the 100-percent observer coverage requirement.

The same measure that specifies 100-percent observer coverage coupled with a \$325 contribution by the industry also specifies that:

- The 100-percent coverage requirement would be re-evaluated by the Council 2 years after implementation;
- The 100-percent coverage requirement would be waived if no observers were available, but not waived for trips that enter the River Herring Monitoring/Avoidance Areas; and
- Existing observer service provider requirements would apply to the herring fishery and states would be authorized as observer service providers.

Because these additional measures appear inseparable from the 100-percent observer coverage requirement, I had to also disapprove these measures.

Amendment 5 allows for status quo observer coverage levels and funding for up to 1 year following the implementation of Amendment 5. A technical team, comprised of both Council and NMFS staff, is currently working on developing a legal mechanism to fund the at-sea costs associated with increased observer coverage. Even though I disapproved the 100-percent observer coverage requirement, the team will continue to work on finding a funding solution to pay for increased observer coverage in the herring fishery. If a funding solution can be developed, a measure requiring 100-percent observer coverage on Category A and B vessels could be implemented in a future action, perhaps within the 1-year interim period specified in Amendment 5, subject to NMFS's budget appropriations for its observer data collection responsibilities.

Measures to Minimize Slippage

Amendment 5 contains a measure that would require limited access vessels to bring all catch aboard the vessel and make it available for sampling by an observer. If catch is discarded before it has been made available to the observer, that catch is considered slippage.

Amendment 5 would allow catch to be slipped only if: (1) Bringing catch aboard compromises the safety of the vessel, (2) mechanical failure prevents the catch from being brought aboard, or (3) spiny dogfish prevents the catch from being pumped aboard. But if catch is slipped, the vessel operator would be required to complete a released catch affidavit detailing why catch was slipped and the estimated amount of slipped catch. Additionally, once there have been 10 slippage events in a herring management area by vessels using a particular gear type (including midwater trawl, bottom trawl, and purse seine) and carrying an observer, vessels that subsequently slip catch in that management area, using that particular gear type and carrying an observer, would be required to return to port.

We are concerned about the rationale for, and legality of, the slippage caps. The threshold for triggering a slippage cap (10 slippage events by area and gear type) does not have a strong supporting analysis in the EIS. Observer data indicate that the number of slippage events is variable across years. During 2008-2011, the number of slippage events per year ranged between 35 and 166. The annual average number of slippage events by gear type during 2008, 2009, and 2011 are as follows: 4 by bottom trawl; 36 by purse seine; and 34 by midwater trawl. Because the frequency of slippage was not consistently analyzed by gear type and management area, we believe it difficult to use the analysis in the EIS to support the selection of trigger for the slippage caps. Additionally, recent observer data (2008-2011) indicate that the estimated amount of slipped catch is relatively low (approximately 1.25 percent) compared to total catch.

Once a slippage cap has been met, vessels that slip catch, even if the reason for slipping was safety or mechanical failure, would be required to return to port. This aspect of the measure has the characteristic of a sanction, inconsistently applied. Vessels may continue fishing following slippage events 1 through 10, but must return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Additionally, this measure may result in a vessel operator having to choose between trip termination and bringing catch aboard despite a safety concern. For these reasons, we believe the slippage caps are inconsistent with the Administrative Procedure Act and National Standards 2 and 10, and had to be disapproved.

The requirements to bring all catch aboard and make it available for sampling by an observer and complete a released catch affidavit if catch is slipped appear separable from the slippage cap. Prohibiting slippage would improve the quality of observer catch data, especially data on bycatch species encountered in the herring fishery and the released catch affidavit would help provide insight into when and why slippage occurs. Therefore, I have approved the prohibition on slippage, except when safety, mechanical failure, or spiny dogfish catch would prevent the catch from being brought aboard the vessel, and the requirement that a released catch affidavit be completed for slipped catch.

Reporting Requirements for Dealers

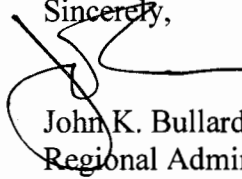
Amendment 5 contains a requirement that herring dealers must accurately weigh all fish and, if catch is not sorted by species, dealers would be required to document how they estimated relative species composition.

Dealers currently report the weight of fish, obtained by scale weights and/or volumetric estimates. Because this measure does not specify the methods dealers must use to determine weight and allows volumetric estimates, it is not expected to change dealer behavior and, therefore, is not expected to improve the accuracy of catch weights reported by dealers. Additionally, a qualitative description of how relative species composition is estimated cannot be incorporated into catch monitoring because we must use the weights reported by the dealers, regardless of the methods used to determine weights. Without standards for estimating species composition, we would be unable to evaluate the sufficiency of the information submitted. If this measure was a requirement, and dealers did not document how they estimated relative species composition, it would become a compliance issue and may affect future permit issuance.

For these reasons, we believe this measure does not comply with National Standard 7's requirement to minimize costs and avoid unnecessary duplication, and the Paperwork Reduction Act's requirement for the utility of the measure to outweigh the additional reporting and administrative burden on the dealers. Therefore, I have disapproved the dealer reporting requirement.

I appreciate the hard work that you and your staff put into developing Amendment 5. This amendment improves management of the herring fishery and I look forward to working with you and your staff on other ongoing improvements to management of the herring fishery. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be 'John K. Bullard', written over a circular stamp or mark.

John K. Bullard
Regional Administrator



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

Tom A. Nies, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

SEP 20 2013

Dr. Christopher M. Moore, Executive Director
Mid-Atlantic Fishery Management Council
800 North State Street
Dover, DE 19901

Dear Tom and Chris:

Since our July 30, 2013, letter to Tom, the agency working group on observer funding has been working to resolve the legal issues related to proposed observer cost sharing measures. We concluded that these issues required further discussion among NMFS, NOAA General Counsel, and Department of Commerce staff and that our lack of internal resolution of these issues prevented the joint observer funding plan development team and fishery management action team (Joint PDT/FMAT) from advancing their efforts. We now have a plan as to how to incorporate industry-funded observer coverage into fishery management plans (FMPs), which we will present at your upcoming September and October meetings; the plan is summarized below. Our plan would not specify fishery-by-fishery provisions for industry coverage programs, but would allow the Councils to use industry funding to increase observer coverage levels in their fisheries.

There are two components to the costs of observer coverage, and funding must be available for both components in order to achieve desired observer coverage levels. These components are:

- 1) Observer monitoring costs, which include the costs that would be incurred by an observer service provider, such as observer salary and travel; and
- 2) NMFS support and infrastructure costs, which include observer training, data processing, and infrastructure.

Under existing law, NMFS and industry cannot share responsibility for observer monitoring costs in the regulations. For example, we cannot cap the industry contribution and require NMFS to be responsible for the remainder of observer monitoring costs, such as the \$325 per day cap on industry contribution that was proposed in the recent Atlantic herring and Atlantic mackerel amendments. Also, any increases to observer coverage, even when industry is paying the full costs for the observers, will result in NMFS incurring additional support and infrastructure costs. Because NMFS's appropriations to cover support and infrastructure costs are limited and variable, the Councils cannot mandate specific levels of observer coverage that could impose financial obligations beyond what is appropriated.

The only way to increase observer coverage levels above levels set to cover legal mandates or the standardized bycatch reporting methodology (SBRM) is for industry to be responsible for 100 percent of observer monitoring costs, and for the Council to recommend coverage targets



rather than mandating specific coverage levels. We believe the best way to provide the Councils the tools to use industry funding of increased observer coverage is through an omnibus amendment for all New England and Mid-Atlantic fishery management plans (FMPs). As we have done with SBRM, we have asked our staffs to take the technical lead on developing this amendment if the Councils choose to proceed. The omnibus amendment would:

- 1) Define both NMFS and industry cost responsibilities for observer coverage consistent with the allocations noted above;
- 2) Create industry-funding requirements, similar to those currently in place in the Northeast multispecies and the Atlantic sea scallop FMPs, that can be referenced by any FMP that needs to implement industry funding requirements; and
- 3) Establish an annual process in which NMFS and both Councils would prioritize observer coverage levels above SBRM that will inform NMFS's decisions on the allocation of available NMFS support and infrastructure funds to achieve regional coverage goals, consistent with considering efficiency in the utilization of resources and minimizing costs as required by National Standards 5 and 7.

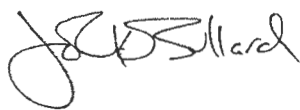
We intend to keep this action focused exclusively on the observer issue to avoid lengthy development that could result from the addition of other issues and management measures. Council input and meetings remain critical to ensure the public is involved, so we recommend leaving the Joint PDT/FMAT intact, with expanded membership to include experts from other FMPs.

We acknowledge that the observer monitoring costs can be a significant burden for industry. That is why we have identified a potential mechanism that may enable NMFS, when funding is available, to help offset some of industry's costs. This model was used to fund NE multispecies Sector dockside monitoring coverage in 2010 and 2011.

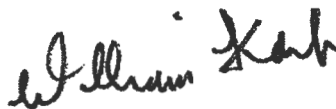
In order for these concepts to work, we need support from both Councils. This proposed approach would require both Councils to be willing to work together to prioritize regional monitoring goals. The Councils must remember that available funds limit the amount of observer coverage for all of our fisheries, regardless of the source of funding. The Councils must not prescribe specific observer coverage levels or specific industry contribution levels in future Council actions.

There are many details of this plan that still need to be resolved, but if both Councils agree with this approach, our staff will begin to develop alternatives for the omnibus amendment. Our goal is to present both Councils with an initial range of alternatives at their January and February 2014 meetings.

Sincerely,



John K. Bullard
Regional Administrator



William A. Karp, Ph.D.
Science and Research Director