

## **11.0 RELATIONSHIP TO OTHER APPLICABLE LAW**

### **11.1 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**

#### **11.1.1 Introduction and FSEIS Table of Contents**

NEPA requires preparation of an Environmental Impact Statement (EIS) for major Federal actions that significantly affect the quality of the environment. The Council published a Notice of Intent (NOI) to prepare this Amendment and the EIS in the *Federal Register* on April 14, 2003, which was followed by four scoping meetings in Rockland ME, Danvers MA, Mansfield MA, and Atlantic City NJ. The Council prepared a scoping document that outlined some of the major issues and types of management measures that the Council might consider during the development of Amendment 1. The Council invited discussion on the scoping document and any other issues of concern at the scoping meetings as well as suggestions for appropriate management measures to consider during the development of this amendment.

To prepare the Final Amendment/FSEIS, the Council held numerous meetings of its Herring Oversight Committee, Herring Advisory Panel, and Herring Plan Development Team. All of these meetings, as well as several related Council meetings, were open to the public. A list of public meetings held during the development of Amendment 1 is provided in Section 12.0 of this document (p. 683).

The proposed management measures in this integrated amendment/FSEIS document were the subject of public hearings during 2005. Seven management alternatives were considered by the Council and analyzed in the Amendment 1 DSEIS, which was available for public review and comment during Fall 2005. The Council took public comment into consideration when selecting the final management measures for Amendment 1 in late 2005 and early 2006. The Council approved the final management action and voted to submit Amendment 1 to NMFS at its January 31-February 2, 2006 meeting in Portland ME.

The following Table of Contents for this FSEIS is provided to aid reviewers in referencing the appropriate corresponding sections of this integrated amendment/FSEIS document.

## FSEIS Table of Contents

<b>FSEIS SECTION</b>	<b>FMP SECTION</b>	<b>PAGE</b>
Cover Sheet	FSEIS	i
Executive Summary	Executive Summary	Executive Summary
Background and Purpose	2.0	2
Purpose and Need for Action	2.3	7
Goals and Objectives	3.0	12
Scoping Process	FSEIS	645
Areas of Controversy/Issues to be Resolved	FSEIS	648
Proposed Management Action	4.0	14
Alternatives to the Proposed Action	5.0	35
Measures Considered but Rejected	5.2	56
Rationale for the Proposed Action	6.0	85
Description of the Affected Environment	7.0	106
Biological Environment		
Atlantic Herring	7.1	108
Protected Resources	7.2	179
Physical Environment and EFH	7.3	208
Human Environment		
Fishing Businesses	7.4.1	261
Coastal Communities	7.4.2	380
Other Fisheries	7.5	451
Environmental Impacts	8.0	461
Impacts on Atlantic Herring	8.1	463
Impacts on Protected Resources	8.2	491
Impacts on Physical Environment and EFH	8.3	499
Impacts on Fishery-Related Businesses and Communities	8.4	508
Impacts on Other Fisheries	8.5	569
Enforcement Analysis	8.6	578
Cumulative Effects	8.7	580
Initial Regulatory Flexibility Analysis (IRFA)	11.8.1	673
Determination of Significance	FSEIS	652
List of Preparers	FSEIS	653
DSEIS Circulation List	FSEIS	654
DSEIS Public Comments and Response	FSEIS	655
List of Public Meetings	12.0	683
Index	15.0	710

### **11.1.2 Scoping Process**

During the scoping period for Amendment 1, four scoping meetings were conducted, and numerous written comments were received. This section summarizes the issues raised during the scoping period for Amendment 1, through both the scoping meetings and written comments. The Herring Committee, Advisory Panel, and Plan Development Team considered all of the scoping comments during the development of the range of alternatives for consideration in Amendment 1 as well as the final selection of management measures proposed in this document.

Twenty five written letters were received during the scoping period for the herring amendment, some signed by multiple individuals. Thirteen identical “comment cards” were received, each expressing support for a limited access program in all management areas that utilizes the September 1999 control date for herring. Twenty seven more of these comment cards were received after the scoping period ended on June 2, 2003.

In general, the scoping comments identified numerous issues for consideration in this amendment, and perspectives on each of the issues varied widely. The major issues that were identified and discussed during scoping are generally summarized below. This summary is not intended to reflect every scoping comment that was received. The letters and scoping meeting summaries should be referenced to gain a better perspective on individual comments, ideas, and suggestions.

#### **1. Limited Access**

- Many commenters expressed support for a fishery-wide limited access program that would apply to all herring management areas. Almost all of those who commented from the State of Maine support the development of a limited access program for the entire herring fishery.
- Many commenters who support limited access also support using the September 1999 control date as part of the qualification criteria, while others do not. Some commenters felt that anyone who can demonstrate participation in the herring fishery should qualify for a limited access permit.
- Some people who believe that the herring fishery is underutilized suggested that a control date and limited access are unnecessary.
- Those who do not support a fishery-wide limited access program expressed support for a controlled access program similar to the controlled access programs considered in the original Herring FMP, especially for Areas 2 and 3. Very few commenters expressed support for allowing the herring fishery to remain an entirely open-access fishery.
- Several comments emphasized the need to consider the historical fixed gear fishery in Downeast Maine when developing a limited access program for the herring fishery. Fixed gear fishermen are concerned that they may be eliminated from the fishery through a limited access program because their landings of herring have been very low in recent years.
- Some people suggested that there should be different qualifying criteria for directed herring boats and incidental catch boats. They felt that boats that traditionally caught small amounts of herring should be allowed to continue to do so.
- Several fishermen from the Mid-Atlantic expressed concern that although they have fished for herring in the past, they may be excluded from the fishery under a limited access program because: 1) they have not fished in all management areas and/or they have fished exclusively in one area, and 2) they have targeted mackerel more recently because it is more profitable. These individuals emphasized the importance of considering the relationship between the herring and mackerel fisheries when developing a limited access program for the herring fishery.

## **2. Forage Issues**

- Many commenters emphasized the importance of herring as a forage species in this region and urged the Council to ensure that adequate forage is left in the ocean for other fish and marine mammal species. Some suggested that an attempt be made in this amendment to identify trophic interactions and link herring with other managed species in the Northeast Region.
- Recreational fishermen commented on the importance of maintaining an adequate forage base for important recreational species in the region.
- A related issue raised by several commenters is concern about localized depletions of herring, particularly by midwater trawlers. Tuna and recreational fishermen expressed concern that localized schools of herring may be scattered or depleted from important fishing areas before the predator fish (like tuna) enter the areas to feed, consequently reducing fishing opportunities for the predator fish.
- Several people stressed the importance of understanding the predator-prey relationships.

## **3. Bycatch and Observer Coverage**

- Several commenters expressed concern about the current lack of accurate bycatch data in the herring fishery. All of these commenters support requirements for increased observer coverage in the fishery. Many suggestions were provided for possible requirements.
- Most people who expressed specific concerns about bycatch in the herring fishery mis-interpreted the application of the 5% bycatch standard, believing that this standard applies to the herring fishery and allows herring vessels to take groundfish up to 5% of their total catch.
- Some commenters suggested a higher level of observer coverage on herring vessels that access groundfish closed areas. Most suggested that observers be required on 100% of herring trips in groundfish closed areas.
- Some members of the herring industry felt that bycatch in this fishery has been proven to be minimal, thus making requirements for additional observer coverage unnecessary.

## **4. US/Canada Stock Assessment Issues**

- Everyone who commented about the recent discrepancies between the US and Canadian assessments of herring acknowledged the need to resolve these issues as well as the importance of coordinating management of this resource with Canada.
- Some commenters felt that there should not be any increase in the number of participants in the herring fishery or any increases in the amount of herring landed until the differences between the two stock assessments are resolved.

## **5. Management Area Boundaries**

- A suggestion was made that a more flexible system should be adopted to replace specific management area boundaries. This system would open and close fishing areas as-needed, based on real-time information about the distribution of herring.
- A few commenters expressed opposition to any changes in the management area boundaries.
- Reconsideration of spawning area restrictions were also suggested by some individuals.
- A few commenters expressed concern that moving the management area boundaries could increase fishing effort on the inshore components of the resource, especially if the Area 1A/1B boundary is eliminated.

## **6. Gear Issues**

- Concerns were expressed about the impact of midwater (single and pair) trawling on the herring resource and other fishery resources in the region.
- Purse seiners, among others, expressed support for a purse-seine only area in the Gulf of Maine to reduce gear conflicts and ensure purse seine vessels access to the resource. Conversely, some individuals expressed opposition to the establishment of a seine-only area.
- At least one commenter raised concerns about the potential impacts of some herring gears on habitat. There is uncertainty about the nature and extent of bottom contact when fishing with midwater trawl gear.

## **7. Fixed Gear Fisheries for Herring**

- Several commenters emphasized the importance of considering the historical fixed gear fishery for herring, particularly the fishery in Downeast Maine, when developing a limited access program.
- Fixed gear fishermen who commented during the scoping period suggested that the Council consider incorporating the Downeast Maine fixed gear fishery into the 20,000 mt catch that is assumed to come from the New Brunswick weir fishery.
- Fixed gear fishermen requested that VMS requirements for herring vessels be clarified in this amendment to reflect an exemption for fixed gear.
- One individual noted that there are also fixed gear fisheries that catch herring around Cape Cod and The Islands, in addition to some fixed gear activity off Rhode Island.

## **8. Quota-Based Limited Access/Quota Allocation Programs**

- One individual felt that while IFQs are a good way to manage a fishery, developing an IFQ program for the herring fishery in this amendment would complicate and delay the amendment.
- Most commenters expressed opposition to establishing a quota-based limited access program in the herring fishery at this time.

## **9. Days-Based Management Approaches**

- Some individuals suggested that days out of the fishery continue to be managed through the ASMFC process and industry “gentlemen’s agreements” rather than through the federal FMP.
- As an alternative to specific days out of the fishery, layover days between trips was suggested for consideration.
- Several commenters expressed concern about the differential impacts of days out and layover days in the fishery. These individuals felt that larger vessels are disadvantaged by these measures because of increased operating expenses in this high-volume fishery.

## **10. Other Comments/Suggestions**

- Several commenters suggested that the regulatory definition of a midwater trawl should be revisited and clarified to better reflect how the gear should be fished.
- A few commenters expressed the need to reduce the intensity of midwater trawling during the tuna-fishing season, especially on the tuna fishing grounds.
- Some individuals noted that considering a change to the start of the herring fishing year may be worth considering in this amendment, but it does not appear to be a significant issue.
- Comments regarding vessel upgrade restrictions varied. While some commenters supported consideration of such restrictions in this amendment, most industry members expressed opposition,

citing safety concerns and noting the need to have larger vessels to fish offshore in this high-volume fishery.

- Many people expressed the need for more accurate scientific information about the herring resource and the herring fishery.

### **11.1.3 Areas of Controversy and Issues to Be Resolved**

NOAA Administrative Order 216-6 defines “controversial” as referring to a substantial dispute which may concern the nature, size, or environmental effects, but not the propriety, of a Proposed Action. In this context, the Council recognizes the following areas of controversy and issues to be resolved relative to the action proposed in this amendment.

#### ***Stock Assessment/Resource Condition***

The biological status of the Atlantic herring stock complex as well as its individual spawning components remains an uncertain and controversial issue throughout the completion of this amendment. The measures proposed in this amendment are based on the best available information from the most recent TRAC stock assessment during the Spring of 2003 (see Appendix I, Volume II for the TRAC Assessment Report). However, there was considerable uncertainty about herring biomass and the appropriate value for MSY, and no specific consensus was reached at this TRAC meeting regarding these issues.

Both a U.S.-led assessment (forward projection analysis, (FPA)) and a Canadian-led assessment (virtual population analysis, VPA ) of the herring resource were presented and reviewed at the TRAC Meeting in St. Andrew’s, New Brunswick from February 10-14, 2003. The two assessments produced different results (see Appendix I in Volume II for more information), and no overall consensus was reached regarding which assessment was correct. While the ADAPT assessment did not provide biological reference points and/or other information that is useful from a management perspective, the TRAC review group did not support the reference points that resulted from the FPA assessment either. This left the Council with no scientifically-accepted value of MSY and/or stock biomass on which to base the measures proposed in this amendment.

During the review of TRAC assessment results on June 19, 2003, the Council’s Scientific and Statistical Committee (SSC) agreed that some level of recovery has occurred in the herring stock complex, but that it might not be at the level suggested by the FPA assessment (see June 19, 2003 SSC Recommendations in Appendix II). The consensus of the SSC was also that herring biomass was probably not as low as suggested by the VPA.

The Council has responded to the uncertainty associated with the stock assessment for herring by proposing to establish a proxy for MSY until another stock assessment is conducted by the TRAC. The Council believes that this approach is precautionary enough to ensure the health of the resource while still allowing for expansion of the fishery beyond current levels, which the Herring PDT also believes is appropriate. Any declines in the resource, although not likely, would be detected rather quickly through changes in the surveys and could be reversed in a short time frame. Moreover, the analysis suggests that the impacts of total removals under an MSY of 220,000 mt are not expected to be significant enough to compromise the health of the resource as a whole.

The next TRAC stock assessment for the Atlantic herring complex is scheduled to occur in Spring 2006. If the TRAC reaches consensus regarding an appropriate value for MSY, the value proposed in this amendment will be updated to reflect the most recent scientific consensus, and TAC adjustments, if necessary, will be made accordingly during the Council’s fishery specification process. All biological issues related to the specification of MSY will be explored during the upcoming TRAC assessment. The

MSY language proposed in this amendment provides flexibility such that if a scientifically-accepted value of MSY results from a future stock assessment, the MSY proxy proposed in this amendment will be automatically updated to reflect the new, accepted estimate.

### ***Localized Depletion/Midwater Trawl Gear Effects***

Uncertainty related to herring stock status and the 2003 TRAC Assessment increased controversy associated with perceptions about the health of the inshore Gulf of Maine component of the resource and concerns about the localized depletion of herring in this area. A significant amount of concern about the health of the inshore stock component was expressed by many interested parties during the development of this amendment. The Council received testimony from environmental organizations, recreational fishermen, tuna fishermen, groundfish fishermen, whale watchers, eco-tourism companies, lobster fishermen, and even some herring fishermen suggesting that the inshore component of the resource is dwindling and that this is having a negative impact on all elements of the Gulf of Maine ecosystem. Concerns relate primarily to the importance of herring as a forage species and the impact that midwater trawl fishing effort may be having on localized schools of herring in nearshore areas, which serve as important prey for other fish, marine mammals, and seabirds.

The Council's Scientific and Statistical Committee also expressed concern about the health of the inshore component of the resource when it reviewed the TRAC 2003 assessment in June 2003 (see Appendix II, Volume II):

- No severe declines in the stock complex should be expected by maintaining current levels of catches over the short-term; however, the current concentration of harvest in the inshore Gulf of Maine is of concern and may be excessive.
- The aerial effects of the catch distribution and risks to individual stock components may overwhelm any potential risks to the resource as a whole. It is critical that the risk associated with overfishing a specific stock component be minimized.
- While there is little risk associated with maintaining current catch levels over the short-term, monitoring the movement of larger year classes through the fishery will be important to ensure sustainable catches over the long-term.

The Council is addressing this controversial issue to the extent possible in this amendment by proposing a seasonal purse seine/fixed gear-only area in the inshore Gulf of Maine from June – September of each fishing year. Given the importance of herring in the Gulf of Maine ecosystem, overwhelming concerns expressed about the health of the inshore stock, and the general lack of detailed biological data specific to the inshore stock, the Council has concluded that a precautionary approach to managing the herring fishery in the inshore Gulf of Maine is warranted. The Council's precautionary approach is embedded in the proposed purse seine/fixed gear-only area, which would restrict concentrated midwater trawl (single and pair) effort in the inshore Gulf of Maine during the summer months, some of which incorporate important spawning months for this stock.

Related concerns were expressed during the development of this amendment about the impact that midwater trawl gear has on the herring resource. Midwater trawl and pair trawl gear is very efficient, and there is ongoing debate about the impact that this kind of concentrated fishing effort may have on localized schools of herring. It is recognized that there are diurnal differences in fishing practices between the two primary gear types in the herring fishery— purse seines fish primarily during the night, while midwater trawl vessels are capable of fishing during the day and night. The differential impact of these gear types on localized schools of herring requires further investigation.

No specific data that link midwater trawling to localized depletion and overall declines in herring abundance are available, but the proposed purse seine/fixed gear area is intended, in part, to reduce catch rates that result from concentrations of significant fishing power in the inshore areas during the summer months. (Fishing power relative to midwater trawls versus purse seines is discussed further below.) It also may reduce overall fishing effort on herring in the inshore Gulf of Maine since it is restricting the primary gear type that catches herring during the peak months of the fishing season, which also happen to be spawning months for this stock component (late summer). While the need for this measure as well as the nature and extent of its associated impacts (biological and economic) remain controversial at the time of this writing, the Council believes that this is a necessary, precautionary step to ensure long-term protection of herring in the Gulf of Maine ecosystem, despite specific scientific data that demonstrates a biological need.

Addressing the areas of controversy and unresolved issues will require better biological and fishery-related information and a more complete understanding of the interactions between herring and other species in the Northeast Region ecosystem. In this amendment, the Council has identified an extensive list of data and research needs specific to the herring resource and the herring fishery (see Section 9.0 of this document for more information). Establishing a purse seine/fixed gear-only area may provide a mechanism to improve scientific information related to fisheries interactions with herring. This area could be a research area to further explore factors related to herring distribution, localized depletion, ecological influences, habitat issues, predator/prey interactions, and other issues that may affect the abundance and distribution of Atlantic herring in the inshore GOM. There may be an opportunity to observe the differences in catch rates and fish availability/distribution inside and outside of the area; research differences between purse seines, fixed gear, and midwater trawls; and observe short-term/long-term changes in the ecosystem within the area where midwater trawling is restricted.

### ***Bycatch***

The nature and extent of bycatch of all species, including Atlantic herring, in the Atlantic herring fishery remains an area of significant controversy. Bycatch data are not adequate at this time to generate estimates across the fishery by area or gear type, and the uncertainty about the actual bycatch that may be occurring in the fishery generated a significant amount of debate during the development of this amendment. The Council recognizes the need to collect more and better bycatch information on the herring fishery and has expressed this in the Data and Research Needs associated with this amendment (see Section 9.0). In response to concerns about bycatch and the lack of adequate bycatch monitoring measures in the fishery, the Council considered a range of alternatives in the Amendment 1 DSEIS to implement a more structured program for observer coverage and implement specific measures to address bycatch (see Amendment 1 DSEIS).

With growing concern and controversy about the bycatch of multispecies, particularly haddock, in the herring fishery, the Council took action to implement the bycatch measures proposed in this amendment more quickly. At its final meeting for Amendment 1 to the Herring FMP (January 31-February 2, 2006), the New England Fishery Management Council separated the measures to address bycatch in the herring fishery from Amendment 1 to the Herring FMP and agreed to submit these measures separately as Framework 43 to the Northeast Multispecies FMP (February 2006). Framework 43 was submitted prior to the completion of Amendment 1 so that the bycatch measures proposed for the herring fishery could be implemented as expeditiously as possible, prior to the summer 2006 fishery.

Framework 43 includes management measures to address the bycatch of regulated multispecies, primarily haddock, in the Atlantic herring fishery. These management measures were included and analyzed in the Draft EIS and public hearing document for Amendment 1, which also represented a framework adjustment to the Groundfish FMP. The Council chose to separate this action and submit it prior to

Amendment 1 so that these measures can be implemented more expeditiously, hopefully prior to the summer 2006 fishery. As a result, specific measures to address bycatch are not included in this amendment; the haddock catch cap was included in Framework 43, and NMFS is developing an omnibus amendment to Northeast Region FMPs to address Standardized Bycatch Reporting Methodology (SBRM). However, this document does provide background information about the current SBRM for the herring fishery, and it includes language that adds several management measures to address bycatch to the list of measures that can be implemented in the future through a framework adjustment to the Herring FMP or through the fishery specification process, whichever is most expeditious (see Section 4.12).

Amendment 1 follows-up on the action proposed in Framework 43 by including language to establish the “catch cap” approach as one potential mechanism to address bycatch of groundfish and other species in the Atlantic herring fishery over the long-term. Establishing and modifying catch caps, including the cap proposed in Framework 43, are identified in Amendment 1 as measures that can be implemented through a framework adjustment to the Herring FMP or through the herring fishery specification process (with concurrent adjustments to regulations in other fisheries, as appropriate), whichever is most expeditious. Measures that could be implemented through a framework adjustment or the herring fishery specification process to address bycatch in the herring fishery also include seasonal and temporal closures in high bycatch areas and catch/bycatch caps. See Section 4.12 of this document as well as the Framework 43 document for additional information.

The current Standardized Bycatch Reporting Methodology (SBRM) for the Atlantic herring fishery is described in Section 7.4.1.5.2 of this document. As controversy and debate regarding observer coverage in the herring (and other) fishery continue, the National Marine Fisheries Service is developing an omnibus amendment to Northeast Region FMPs to address SBRM requirements and this provision of the M-S Act in all federally-managed fisheries. This amendment will serve to ensure that all FMPs of the Northeast Region, for both the New England and Mid-Atlantic Councils, are in compliance with the SBRM requirements of the Magnuson-Stevens Act, taking into account the Agency’s mandates under the Endangered Species Act and the Marine Mammal Protection Act. The purpose of the SBRM amendment is to: (1) explain the methods and processes by which bycatch is currently monitored and assessed for Northeast Region fisheries; (2) determine whether these methods and processes need to be modified and/or supplemented; (3) establish standards of precision for bycatch estimation for all Northeast Region fisheries; and, thereby, (4) document the SBRMs established for all fisheries managed through the FMPs of the Northeast Region.

The scope of the NMFS SBRM amendment is limited to those fisheries that are prosecuted in the Federal waters of the Northeast Region and managed through an FMP developed by either the Mid-Atlantic or the New England Council. This amendment will not address fisheries managed through an FMP developed by any other regional fishery management council, the Highly Migratory Species branch of NOAA Fisheries Service, the Atlantic States Marine Fisheries Commission (ASMFC) (except those joint FMPs established by both the ASMFC and either the Mid-Atlantic or New England Council), or under the aegis of the Atlantic Coastal Fishery Cooperative Management Act (ACFCMA) (including American lobster and northern shrimp). The SBRM for the Atlantic herring fishery, which is managed by the NEFMC and the ASMFC, will be addressed by NMFS in this amendment.

As previously noted, the SBRM amendment will further address this area of controversy and will include a comprehensive examination, description, and analysis of the methods by which bycatch is monitored and assessed in the fisheries of the northeastern U.S.. It also will Establish standards for determining adequacy of SBRMs and include discussion and consideration of precision and accuracy aspects of SBRMs. Consideration of the adequacy of existing methods of bycatch monitoring for the Northeast Region fisheries, and recommendations for additional and/or alternative methods, will be addressed in the SBRM amendment if necessary and appropriate.

#### **11.1.4 Determination of Significance**

National Oceanic and Atmospheric Administration Administrative Order 216-6 (NAO 216-6) (May 20, 1999) contains criteria for determining the significance of the impacts of a Proposed Action. In addition, the Council on Environmental Quality regulations at 40 CFR. 1508.27 state that the significance of an action should be analyzed both in terms of “context” and “intensity.” Each criterion listed below is relevant in making a determination of significance relative to the Proposed Action and has been considered individually, as well as in combination with the others. The significance of this action is analyzed based on the NAO 216-6 criteria and CEQ’s context and intensity criteria. These include:

1. Can the Proposed Action reasonably be expected to jeopardize the sustainability of any target species that may be affected by the action?
2. Can the Proposed Action reasonably be expected to jeopardize the sustainability of any non-target species?
3. Can the Proposed Action reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in FMPs?
4. Can the Proposed Action be reasonably expected to have a substantial adverse impact on public health or safety?
5. Can the Proposed Action reasonably be expected to adversely affect endangered or threatened species, marine mammals, or critical habitat of these species?
6. Can the Proposed Action be expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc.)?
7. Are significant social or economic impacts interrelated with natural or physical environmental effects?
8. Are the effects on the quality of the human environment likely to be highly controversial?
9. Can the Proposed Action reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers or ecologically critical areas?
10. Are the effects on the human environment likely to be highly uncertain or involve unique or unknown risks?
11. Is the Proposed Action related to other actions with individually insignificant, but cumulatively significant impacts?
12. Is the Proposed Action likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources?
13. Can the Proposed Action reasonably be expected to result in the introduction or spread of a non-indigenous species?
14. Is the Proposed Action likely to establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration?
15. Can the Proposed Action reasonably be expected to threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment?
16. Can the Proposed Action reasonably be expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species?

The Council has reviewed the above criteria relative to the action proposed in Amendment 1 to the Atlantic Herring FMP. Based on these criteria, the Council has determined that the Proposed Action represents a significant action and has prepared an EIS in accordance with the National Environmental Policy Act. The Final EIS for the action proposed in this amendment is included in this integrated document.

### **11.1.5 List of Preparers**

This document was prepared by members of the New England Fishery Management Council staff and Herring Plan Development Team, with input from the Herring Advisory Panel and ASMFC staff.

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The following agencies were consulted during the development of this amendment, either through direct communication/correspondence and/or participation on the Herring Committee or PDT:

- NOAA Fisheries, National Marine Fisheries Service, Northeast Regional Office, Gloucester MA
- Northeast Fisheries Science Center, Woods Hole MA
- Atlantic States Marine Fisheries Commission and Atlantic Herring Section
- Mid-Atlantic Fishery Management Council

### **11.1.6 DSEIS Circulation List**

Initially, the Council distributes the Draft Amendment 1 document and DSEIS to individuals who contributed to the development of this document, including Herring PDT and AP members. These individuals are listed in the previous section of this document.

As part of the review process for consistency with applicable laws such as the CZMA and the ESA, the Council distributes the Draft FMP/EIS to the following individuals:

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Mr. Daniel Furlong, Mid-Atlantic Fishery Management Council  
Captain Vincent O'Shea, Atlantic States Marine Fisheries Commission

In addition, the Council prepares a notice to its “Interested Party” list for Atlantic herring that announces the availability of the DSEIS and public hearing document and announces the schedule for public hearings. A Notice of Availability of the DSEIS is also published in the *Federal Register*. At that time, anyone on the “Interested Party” list or any other member of the public may call the Council office and request a copy of the DSEIS for their review. There are approximately 336 individuals on the “Interested Party” mailing list for Atlantic herring. The Council also made the Amendment 1 DSEIS available for downloading through its website.

A similar process will be used by the Council for distribution and circulation of the final Amendment 1 and FSEIS document.

### **11.1.7 DSEIS Public Comments and Response**

Public comments on the Amendment 1 document and its Draft Supplemental Environmental Impact Statement (DSEIS) were accepted by the Council during a formal comment period, September 9 – October 24, 2005. Oral comments were also accepted at any of the Amendment 1 public hearings, which occurred during October 2005 in Portland ME, Rockland ME, Perry ME, Fairhaven MA, Gloucester MA, and Cape May NJ. Written comments were accepted during this time at the Council office through mail, email, and/or facsimile. The Herring Committee held a meeting on November 10, 2005, and the Council held a meeting on November 15, 2005 to review the public comments and select final management measures for inclusion in Amendment 1 to the Herring FMP.

This section summarizes the public comments and provides the Council’s general response to these comments.

#### **Comments on Proposed Management Alternatives (Limited Access Program and Purse Seine/Fixed gear-Only Area)**

- 1. Several herring purse seine fishermen expressed support for Alternative 7 and urged the Council to take action to reduce the impact that midwater trawl vessels are having on the inshore fishery.** These individuals cited bycatch, increased efficiency, and gear conflicts as problems they have incurred with midwater trawl vessels in the inshore Gulf of Maine. They suggested that the purse seine fishery is a “cleaner” fishery and that there will be adequate harvesting capacity in Area 1A during the summer months if this area is restricted to purse seines and fixed gear only. Many of them also suggested that a 60,000 mt TAC caught by purse seine vessels represents less mortality than the same amount of fish caught by midwater trawl vessels.

**Response:** Although specific data are lacking to confirm many of the above claims, the Council recognizes the growing concern among various interests regarding the impact of midwater trawling on the herring resource. Midwater trawl fishing effort can be highly concentrated at times, particularly in the inshore Gulf of Maine. Moreover, the status of the inshore component of the stock is not entirely clear, and the Council intends to take precautionary action in this amendment to ensure its continued protection. The Council is proposing a limited access program for all herring management areas as well as a seasonal purse seine/fixed gear-only area in the inshore Gulf of Maine to address these concerns. It is likely that these measures, particularly the gear restricted area, will help to reduce gear conflicts (purse seines, midwater trawls, etc.) in the inshore Gulf of Maine during the summer months. Moreover, there may be an opportunity to observe the differences in catch rates and fish availability/distribution inside and outside of the restricted area; research differences between purse seines, fixed gear, and midwater trawls; and observe short-term/long-term changes in the ecosystem within the area where midwater trawling is prohibited. The Council intends for this purse seine/fixed gear-only area to provide a mechanism for new

research and collection of information regarding differences between gear types engaged in the herring fishery.

- 2. All tuna fishermen, recreational fishermen, whale watch businesses, and seabird-related interests who commented on the Amendment 1 DSEIS expressed strong support for Alternative 7, especially the proposed seasonal purse seine/fixed gear-only area.** They felt that Alternative 7 is the only alternative proposed in Amendment 1 that adequately addressed the objectives of the plan and met the requirements of the M-S Act. The commenters suggested that the proposed buffer zone in the inshore Gulf of Maine is critically important and necessary to prevent localized resource depletion and to provide adequate forage for recovering groundfish stocks, large pelagics like bluefin tuna, and several species of marine mammals and sharks. They commented that Alternative 7 should protect schools of herring from being dispersed or completely caught by midwater trawl vessels and should help to preserve the feeding grounds for groundfish, whales, tuna, and all of the other species that are important to the Gulf of Maine ecosystem, while also addressing capacity issues in the directed herring fishery.

*Response:* The Council has addressed these comments in this amendment by proposing a seasonal purse seine/fixed gear-only area in the inshore Gulf of Maine (Section 4.4). This measure was included in Alternative 7 in the DSEIS, and the Council is proposing to implement it in conjunction with a limited access program for all management areas. The primary reason that the Council supports this measure is because there is significant and growing concern about the status of the inshore component of the herring resource and the potential impacts of midwater trawl fishing effort, which can be highly concentrated at times, in the inshore Gulf of Maine. Given the importance of herring as a forage species and its role in the Gulf of Maine ecosystem, the Council believes that steps should be taken now to maintain the health of this resource in the inshore area. The importance of herring to the ecosystem and the potential significant consequences associated with allowing the inshore component to become depleted or even overfished argue for a proactive approach to managing herring fishing effort in Area 1A. Area 1A also is the most important area for the herring fishery, so efforts to protect the resource and maintain a robust stock in this area should benefit the herring fishery over the long-term as well.

- 3. Representatives from several environmental organizations as well as their members expressed strong support for Alternative 7 and urged the Council to adopt this alternative in consideration of the impacts of the herring fishery on the greater Gulf of Maine/Georges Bank ecosystem and the importance of herring as a forage species.** These commenters specifically supported Council action to address problems associated with (1) expanding capacity in the herring fishery; (2) localized depletion of the inshore herring spawning component; and (3) wasteful bycatch of non-target species in the herring fishery. Alternative 7 was viewed by these commenters as the proposal that would offer the greatest benefits to the widest range of stakeholders affected by the herring amendment.

*Response:* The Council essentially adopted Alternative 7 with a modified limited access program that provides opportunities in the fishery for more recent entrants. The Council believes that the Proposed Action includes a suite of management measures that will offer the greatest benefits to the widest range of stakeholders affected by the herring amendment. Herring fishery participants are important stakeholders in the process, and the Council selected limited access criteria that best address the needs of this recently-expanding industry while controlling overall harvesting capacity in the fishery. The proposed purse seine/fixed gear-only area was included in Alternative 7 in the DSEIS and is recommended by the Council as a precautionary measure to minimize the risk of depleting the inshore component of the stock. See response to Comment #2 above for more information.

4. **The majority of those who commented in favor of the limited access program included in Alternative 7 supported utilizing the 1999 control date for participation in Area 1.** They felt that the control date in combination with a restrictive limited access program for Area 1 are necessary to address long-term fishing capacity issues, reduce pressure for quota in nearshore areas, reduce the race to fish for herring in the Gulf of Maine, and establish long-term economic viability for the low-value Atlantic herring fishery.

**Response:** The Council modified the limited access program included in Alternative 7 to allow for recent participants in the fishery to qualify. Due to the nature of this fishery and recent developments in shoreside processing, the Council believes that active participants (post-1999 control date, active between 1999 and 2003) with significant current investments should be accommodated at some level in this limited access fishery. Recency represents an important criterion in designing any limited access plan under the Magnuson-Stevens Act National Standards. A limited access plan which eliminates “new” entrants into the fishery on the basis of the control date of 1999 would disenfranchise and harm participants with demonstrated and significant current participation and investment in the fishery. The proposed limited access program restricts the number of vessels that can participate in the directed fishery in Area 1 (1A+1B) to 31 and should address long-term capacity issues in the fishery. The proposed limited access program and purse seine/fixed gear-only area, in combination with the split season in Area 1A (Framework 1) and the ASMFC effort controls (days out) and spawning restrictions should further reduce pressure for quota in the inshore Gulf of Maine.

5. **Several representatives from the herring industry commented in strong opposition of Alternative 7. Among them were representatives of the East Coast Pelagic Association, who support Alternative 5.** Opposition to Alternative 7 was based largely on the notion that the limited access program qualifies vessels with no recent history in the fishery and further excludes vessels with plans in place as of the 1999 control date. In addition, the purse seine/fixed gear area proposed in Alternative 7 was opposed by these industry members because they felt that the DSEIS provides no scientific justification for the seasonal midwater trawl exclusion in Area 1A. The commenters were concerned about the economic impacts of Alternative 7 and the potential for this alternative to reduce the supply of lobster bait during the summer months. The herring industry representatives also emphasized that 80-90% of the participants in the directed herring fishery oppose Alternative 7 for the reasons identified above.

**Response:** The Council acknowledged the industry’s concern about the economic impacts of Alternative 7 by modifying the proposed limited access program to provide continued access for recent entrants into the fishery. This amendment does, however, also propose a seasonal purse seine/fixed gear-only area despite the lack of specific scientific data to demonstrate that this measure is needed to protect the inshore component of the resource. There are many other reasons why the Council supports this measure, as discussed in detail in Section 6.5 of this document. While management measures must be based on the best scientific information available, a resource problem and/or a specific biological need are not the only reasons why the Council can propose management measures. In the face of scientific uncertainty or in the absence of data, as is the case in this situation, the Council can choose to be precautionary and implement measures intended to avoid a resource problem. The long-term benefits, in this case, may outweigh the short-term costs. The proposed limited access program provides access to Area 1 for a much larger number of herring vessels and should mitigate the potential impacts on the supply of lobster bait during the summer months, despite the proposed purse seine/fixed gear-only area. A total of 31 vessels qualify for limited access directed fishery permits to fish in Area 1 under the Proposed Action. There are more vessels that will have the opportunity to re-rig and purse seine in Area 1A during the summer months if there is adequate financial incentive to do so.

- 6. Some herring industry representatives expressed opposition to a limited access program that would eliminate current participants in the fishery and urged the Council to adopt an inclusive limited access program, especially in Areas 2 and 3 where the TAC is not yet fully utilized. Many of these individuals (American Pelagic Association and NORPEL) expressed support for Alternative 2.** They feel that there appears to be room for significant growth in the fishery and supported a more inclusive approach like the one embedded in Alternative 2. They expressed concern about the capacity analysis included in the DSEIS and felt that the fishery may actually achieve under-capacity if Alternative 7 is implemented. They encouraged the Council to dissect the capacity analysis and carefully consider which vessels would really be left to prosecute the fishery if Alternative 7 is implemented. They urged the Council to focus on developing a limited access program that includes all current participants as well as recent historical participants, but not vessels that have not participated in the fishery for more than ten years.

*Response:* The Council addressed these comments to the extent practicable by adopting a limited access program that is more inclusive of recent participants in the fishery than the one initially proposed in Alternative 7. The Council is aware that new vessels have entered the herring fishery since the September 1999 control date and are pursuing the available TAC for herring in various management areas. One of the Goals and Objectives for Amendment 1 is to “provide, to the extent practicable, controlled opportunities for fishermen and vessels in other Mid-Atlantic and New England fisheries.” More liberal criteria to qualify for the directed fishery for herring (in addition to the proposed limited access incidental catch permit) may help to achieve this objective within the constraints of long-term resource protection. The proposed qualification criteria for a limited access directed fishery permit to fish in Area 1 was, in fact, originally included in Alternative 2.

The analysis of potential harvesting capacity in this document (Section 8.4.4) provides some perspective on what the potential catch of the limited access fleet may be under the Proposed Action and other management alternatives. The range of potential catch under each of the limited access programs provided in the analysis is not intended to be an absolute estimate or a direct measure of capacity, but rather a basis for considering the potential for the fleet to catch the total TAC for the fishery and for comparing alternatives to each other and to the no action alternative. Moreover, the range of potential catch resulting from this analysis represents a minimum estimate, as it only incorporates observed fishing effort for active vessels (2002-2004) that qualify for a limited access directed fishery permit; qualifying vessels that did not participate in the herring fishery from 2002-2004 as well as limited access incidental catch permit holders are not included in the analysis, so the potential catch of the entire limited access fleet is likely to be higher than the range provided in this analysis.

- 7. Several commenters, including American Pelagic Association, NORPEL, and the Associated Fisheries of Maine, expressed support for a moratorium on permits in Areas 1B, 2, and 3, instead of a more restrictive limited access program.** They feel that there is still room for growth and expansion of the herring fishery and that the limited access program should not restrict or eliminate new participants in the fishery in areas where the TACs remain under-utilized.

*Response:* In general, there is a need to prevent overcapitalization in the herring fishery to the extent possible, as well as minimizing the potential for derby fishing in all management areas. While impacts of maintaining an open-access fishery are most likely in Area 1 at this time, other areas will become increasingly subject to the same outcome. The Council’s action in this amendment takes a pro-active step to address problems associated with excess capacity in the herring fishery before they become significant in the other management areas. Rationalizing the herring fishery and preventing excess harvesting capacity should pave the way for sustainable long-term development of this fishery in all areas. The Council sees no need to delay the development of a limited access program for all management areas in the herring fishery. Due to the nature of this fishery and recent developments in shoreside processing, the Council believes that active participants (post-1999 control date, active between 1999 and 2003) with

significant current investments should be accommodated to some extent in the limited access fishery. The proposed limited access program addresses the concerns of these interest groups in part by allowing vessels to qualify for the limited access fishery with landings through the 2003 fishing year.

- 8. Some herring fishermen expressed opposition to the establishment of any purse seine/fixed gear-only area based on inadequate information.** They noted that there is no scientific information to suggest that there is any differential impact on the herring resource from purse seine or midwater trawl gear. One commenter mentioned that the herring stock on the other side of the Atlantic Ocean was completely decimated by purse seine gear and that this can happen in the Gulf of Maine as well. The industry members who expressed opposition to this measure generally felt that maintaining a mix of different gear types in the fishery is the healthiest and most sustainable long-term approach.

*Response:* There are many other reasons why the Council supports this measure, as discussed in detail in Section 6.5 of this document. While management measures must be based on the best scientific information available, a resource problem and/or a specific biological need are not the only reasons why the Council can propose management measures. In the face of scientific uncertainty or in the absence of data, as is the case in this situation, the Council can choose to be precautionary and implement measures intended to avoid a resource problem. Moreover, there may be an opportunity to observe the differences in catch rates and fish availability/distribution inside and outside of the restricted area; research differences between purse seines, fixed gear, and midwater trawls; and observe short-term/long-term changes in the ecosystem within the area where midwater trawling is prohibited. The Council intends for this purse seine/fixed gear-only area to provide a mechanism for new research and collection of information regarding differences between gear types engaged in the herring fishery.

- 9. Several commenters who expressed support for Alternative 7 felt that this alternative, although the most restrictive in the DSEIS, was not conservative enough and that more action should be taken to restrict midwater trawling for herring, especially in the inshore Gulf of Maine.** A few individuals expressed support for a year-round ban on midwater trawling in Area 1A (including the Maine Lobstermen's Association).

*Response:* The measures proposed in this amendment are intended to balance the needs of the herring industry with growing concerns about the inshore Gulf of Maine stock component and the impacts of midwater trawling on the fishery. In addition, the measures must comply with all provisions of the M-S Act, including the National Standards to achieve OY in the fishery on a continuing basis and to provide for the sustained participation of fishing communities. Alternative 7 was the most restrictive alternative considered in the Amendment 1 DSEIS, and the Council selected elements of this alternative for inclusion in the Proposed Action. The Proposed Action includes the most restrictive purse seine/fixed gear-only area that was considered during the development of this amendment. The Council modified the limited access program in Alternative 7, however, because a limited access plan which eliminates new entrants into the fishery on the basis of the control date of 1999 would disenfranchise and harm participants with demonstrated and significant current participation and investment in the fishery. It is quite likely that some participants in the fishery will be significantly impacted by the measures proposed in this amendment. The Council believes that the long-term benefits of this amendment will outweigh the short-term costs. Nevertheless, it is necessary for the Council to mitigate the impacts of this amendment on fishery-related businesses and communities by providing adequate access to the resource and the ability to maintain shoreside infrastructure.

**10. Some herring industry members commented that they do not support any of the proposed management alternatives as they were presented in the DSEIS.** They urged the Council to reconsider the limited access alternatives and develop a limited access program for the herring fishery that is more inclusive of current participants. They expressed opposition to using the 1999 control date in this fishery and concern about excluding vessels that may have entered the fishery after 2003, the proposed end date for the qualification criteria.

**Response:** The Council addressed these comments to by adopting a limited access program that is more inclusive of current participants in the fishery than the one initially proposed in Alternative 7. The Council is aware that new vessels have entered the herring fishery since the September 1999 control date and are pursuing the available TAC for herring in various management areas. One of the Goals and Objectives for Amendment 1 is to “provide, to the extent practicable, controlled opportunities for fishermen and vessels in other Mid-Atlantic and New England fisheries.” More liberal criteria to qualify for the directed fishery for herring (in addition to the proposed limited access incidental catch permit) may help to achieve this objective within the constraints of long-term resource protection.

The Council began developing the limited access alternatives for this amendment in early 2003, and the proposed qualification criteria extend through December 31, 2003, inclusive of any vessels that were considered “current” or even new to the fishery at that time. The development of this amendment was widely publicized and included a substantial number of public meetings (see Section 12.0). The Council solicited proposals and suggestions from the public and the industry throughout 2003 and 2004, as various alternatives and limited access criteria were discussed at Committee and AP meetings.

**11. Associated Fisheries of Maine expressed opposition to a limited access incidental catch permit with a possession limit and instead recommended consideration of an overall incidental catch target TAC.** The group was concerned that establishing this permit would allow some vessels in other fisheries to retain herring they catch incidentally, while other vessels in the same fishery may be required to discard all herring they catch. The AFM suggested consideration of an overall target TAC for incidental catch in all non-directed fisheries and an open access incidental catch permit for vessels wishing to utilize this TAC.

**Response:** The limited access incidental catch permit is intended to accommodate incidental catch of herring in other small-mesh, high-volume fisheries for vessels that do not qualify for a limited access directed herring permit. The most notable example is the mackerel fishery. Other examples include the loligo squid fishery and the whiting fishery. The intent of establishing a limited access incidental catch permit is to accommodate vessels that do not target herring, but do land herring in measurable quantities as incidental catch in other fisheries. The Council does not want to exclude incidental catch vessels from this fishery and therefore increase the potential for regulatory discarding in non-directed fisheries.

There may be fisheries in which some vessels will have a limited access incidental catch permit (25 mt) and others will have an open access 3 mt herring permit. This scenario is most likely to occur in fisheries like whiting and squid, particularly in localized fisheries where there is a diversity of vessels (Small Mesh Areas 1 and 2, for example). The proposed criteria for the limited access incidental catch permit qualify 56 vessels based on only 15 mt of herring landings in any year from 1988-2003. While there is potential for vessels to be fishing under different herring incidental catch limits in the same fishery, it should not be a significant problem, given how many vessels qualify for the limited access incidental catch permit. Moreover, each vessel’s incidental catch limit should be indicated on the permit to aide enforcement.

The Council did not consider an overall incidental catch target TAC during the development of this amendment and therefore cannot implement it in this action. However incidental catch caps and other measures to address bycatch will be included on the list of measures that can be implemented through a framework adjustment to the Herring FMP or the fishery specification process, whichever is most

expeditious (see Section 4.12). The Council can monitor incidental catch in other fisheries and may address the problem suggested by the commenters in the future, as necessary.

### **Comments on Proposed MSY Proxy**

**12. The majority of comments received regarding the proposed specification of maximum sustainable yield (MSY) were in favor of MSY Measure 2, which would establish a proxy for MSY of 220,000 mt.** Commenters felt that this proxy represents a proactive and precautionary approach, versus the no action alternative, and recognizes the uncertainty related to the most recent TRAC stock assessment for herring and the discrepancy between the U.S. and Canadian assessments.

*Response:* The Council agrees and is recommending a precautionary MSY proxy of 220,000 mt in this amendment. This represents a significant reduction from the current MSY value of 317,000 mt, and the Council supports this measure despite the lack of scientific agreement about the appropriate value for MSY at this time. The Council believes that this approach is precautionary enough to ensure the health of the resource while still allowing for expansion of the fishery beyond current levels, which the Herring PDT also believes is appropriate. Any declines in the resource, although not likely, would be detected rather quickly through changes in the surveys and could be reversed in a short time frame. Moreover, the analysis suggests that the impacts of total removals under an MSY of 220,000 mt are not expected to be significant enough to compromise the health of the resource as a whole.

The Council expects that the MSY value for the herring stock complex will be addressed further in the upcoming TRAC Assessment for herring during the Spring of 2006. If the next stock assessment for Atlantic herring produces one scientifically-accepted estimate of MSY, then the MSY value specified in the Atlantic Herring FMP (and its associated reference points) would automatically change to be consistent with the newly-accepted MSY value.

### **Comments on Proposed TAC Set-Asides**

**13. The majority of herring fishery participants and other individuals who commented expressed support for the proposed set-asides for research. Researchers themselves also expressed support for this measure.** One individual suggested that the research set-aside should be included in the current 5% set-aside for incidental catch after the directed herring fishery closes in an area, rather than be in addition to this set-aside. The Gulf of Maine Research Institute submitted detailed comments regarding the elements of a research set-aside program for herring.

*Response:* The Council agrees and is proposing a research set-aside process for the herring fishery in this amendment, to be addressed in the future through the specification process. Because of the perception by some that herring is an underutilized species as well as the low market value of the product, it is often difficult to obtain funding for herring research. However, there is a critical need to better understand important biological and life-history parameters for the Atlantic herring resource as the area-specific and fishery-wide exploitation rates increase. A TAC set-aside for research in the herring fishery is intended to help to eliminate the constant pursuit of soft money to fund industry-based research programs (i.e. herring tagging and inshore hydroacoustic survey). The Council considered the specific comments provided by interested parties on the details of this set-aside program when developing the Proposed Action.

**14. The East Coast Pelagic Association expressed support for the no action alternative relative to set-asides for research.** The ECPA members noted that they have consistently supported research to provide a better understanding of the herring resource and supplied direct and indirect funding for various cooperative research projects, and they will continue to do so in the future. The organization felt that it is unnecessary to develop additional mechanisms for funding research on the herring fishery, especially given the numerous set-asides that are proposed in Amendment 1 and the potential for these set-asides to collectively take a large proportion of an area TAC from the directed fishery.

The ECPA did however, support administration measure 1, outlined in the DSEIS, if research set-asides are established in Amendment 1.

**Response:** The Council applauds the industry's efforts to participate in and contribute to scientific research and hopes that these efforts continue in the future. The proposed research set-aside is intended to advance these efforts by providing an additional funding opportunity. The RSA process also can be used to identify the most important research needs and develop information to improve management, all of which should benefit both the industry and the resource in the long-term.

The proposed research set-aside represents a relatively small proportion of the total TAC in any management area. The Council maintains the ability to establish a set-aside from 0-3% in any area, so none of the TAC could be set-aside if there is concern about utilization of the resource in a particular area. Moreover, the portion of the set-aside that is not allocated for research will be returned to the fishery at the beginning of the fishing year.

**15. Many individuals in the herring and mackerel fisheries, as well as the Mid-Atlantic Fishery Management Council, expressed concern about the proposed set-aside for the mackerel fishery and felt that this measure should be further developed and addressed through a future action instead of Amendment 1.** In general, most of the industry and public expressed support for a mackerel set-aside but urged the Council to consider this measure in more detail before implementing it. Commenters suggested that the overlap between the herring and mackerel fisheries and any set-aside of herring requires further discussion with the Mid-Atlantic Council's Mackerel Committee and its Advisory Panel to ensure that vessels maintain the ability to fish in Area 2 for mackerel during the season, especially if the Area 2 TAC for herring is reached.

**Response:** The Council agrees and voted to reject the mackerel set-aside measures from further consideration in this amendment at its January 31-February 2, 2006 meeting. Unfortunately, the details of this provision could not be adequately developed in a timely manner for inclusion in the final Amendment 1 document. The Council chose to eliminate this measure from further consideration at this time for this reason and because there is currently no need for a set-aside to address incidental catch in the mackerel fishery (the herring TACs in Areas 2 and 3 are not yet fully utilized). The Council intends to address this issue as the need arises in a future action related to the Atlantic Herring FMP.

#### **Comments on Measures to Address Fishery Specification Process**

**16. Some individuals expressed support for no action regarding adjustments to the timing of the fishery specification process. The East Coast Pelagic Association also expressed support for the no action alternative.** They felt that given the concern about the importance of herring as a forage species, scientific uncertainty, and other related biological and stock assessment issues, the fishery should continue to be reviewed and adjusted on an annual basis rather than every two or three years. ECPA noted that if the Council is convinced of the uncertainty about herring stock status, specifications should continue for the fishery on an annual basis.

**Response:** Amendment 1 proposes to change the specification process for the Atlantic herring fishery from an annual process to a three-year process. The intent of this measure is to streamline the regulatory process, reduce the amount of work and resources required to set specifications, and enhance stability in the regulations for this fishery. This measure still allows the Council to adjust the specifications at the end of one year through the same process if information suggests that a change is necessary. Concerns about the importance of reviewing this fishery on an annual basis are addressed in the Proposed Action by both the requirement for the Herring PDT to annually review the status of the stock relative to the overfishing definition and the flexibility for the Council to adjust the specifications during the interim years.

Extending the specification process from one to three years could give businesses a longer-term vision and create a more stable environment for business planning. Since the measure does permit the Council to adjust the specifications in the interim years, major problems or sudden changes in conditions of the stocks or human environment could potentially be accommodated.

**17. There was general support from those who commented, on the proposed changes to the specification process that would allow for different approaches to determine the distribution of the area-specific TACs.** The East Coast Pelagic Association expressed support for this measure and noted that it is consistent with the recent specification-setting process for 2005 and 2006. One environmental organization expressed support for this measure in order to discourage arbitrary setting of the TACs. It encouraged the Council to utilize all available scientific information when setting area TACs for the herring fishery.

**Response:** The Council agrees, and the Proposed Action reflects this sentiment. This measure maximizes flexibility for the Herring PDT and the Council and allows the Council to fully utilize the best scientific information available at the time when specifications for the herring fishery are developed. This measure should improve consistency with National Standard 2 (Best Available Science) and also supports Objective #7 in Amendment 1 (as well as several other objectives related to the long-term health of the herring resource): *to promote research and improve the collection of information in order to better understand herring population dynamics, biology and ecology, and to improve assessment procedures and cooperation with Canada, and to move to real time management of herring.* Consideration of other analytical approaches should allow the PDT to better react to real-time stock and fishery conditions and ultimately develop more comprehensive and thoughtful approaches to determining the herring fishery specifications.

#### **Comments on Proposed Adjustments to Management Area Boundaries**

**18. The majority of participants in the herring fishery who commented on this issue expressed support for Area Measure 2, which would redefine Area 3 based on the TRAC Assessment recommendations.** They noted that this measure appears to utilize the best available scientific information regarding the distribution of the various spawning components in the herring stock complex.

**Response:** The Council agrees and is proposing Area Measure 2 in this amendment. This measure will re-define Area 3 (and consequently Areas 1B and 2) to better reflect the distribution of the offshore component of the resource. It is based on the best available scientific information, as reflected in the recommendations from the 200 TRAC assessment (Appendix I, Volume II). This measure helps to better ensure that herring caught in Area 3 are from the offshore component, increasing confidence in the ability of the area-specific TACs to prevent overfishing of any discrete spawning component. This also directly supports Objective #2 in Amendment 1 (Section 3.2), *prevent the overfishing of discrete spawning components of Atlantic herring.*

**19. Representatives from the tuna fishery commented in opposition of Area Measure 2, which would redefine Area 3 based on the TRAC Assessment recommendations.** They were concerned that shifting the boundary of Area 1B north and west, as proposed, places important tuna fishing grounds within Area 3 where a larger harvest of herring is allowed. They commented that the proposed change would likely result in an increase in herring catches from nearshore areas with negative impacts to the giant bluefin and recreational tuna fisheries in this area.

**Response:** The changes to the herring management areas are intended to improve conservation and management of the herring resource, which, in turn, will have positive impacts on other related fisheries and resources that depend on herring. The proposed area adjustments are based on the best available scientific information about the distribution of the herring stock components. Area 3 is an offshore area

that can support a substantial amount of herring fishing effort across a large geographic area. The TAC in this area has yet to be fully utilized, and the Herring PDT has encouraged effort in this fishery to shift to Area 3 as much as possible to reduce pressure on the inshore component of the resource, which has been identified by tuna and other fishermen as an extremely important feeding area for many species that prey on herring.

The Council has taken many steps in this amendment to address concerns about localized depletion and the importance of herring as a forage species for tuna, marine mammals, and other species. It is important for the Council to balance these concerns with the needs of the herring industry. In all of its management actions, the Council is required to develop measures that are designed to achieve OY for the fishery, are based on the best available scientific information, and provide sustained access to the extent practicable for fishery-related businesses and communities. The proposed changes to the management area boundaries are consistent with these requirements.

**20. One environmental organization expressed support for Area Measure 3 as a way to enlarge Area 1 and therefore increase protection for the inshore component of the stock in the Gulf of Maine.**

*Response:* The outcome presumed in the above comment was not the intent of Area Measure 3. The language in the Amendment 1 DSEIS indicated that if Area Measure 3 is adopted, the restrictions in the inshore Gulf of Maine would apply to what is currently delineated as Area 1A. The offshore Gulf of Maine, encompassed by Area 1B, is known to be an area of inshore/offshore stock mixing, not necessarily a critical area for protecting the inshore component of the resource. However, the Council did recognize that vessels would likely increase their fishing effort closer to shore if Area Measure 3 was adopted, which could necessitate further restrictions or reductions in the TAC to protect the inshore stock. The potential to shift effort inshore under Area Measure 3 was one of the primary reasons that this measure was not ultimately selected by the Council for inclusion in Amendment 1.

**21. The Massachusetts Lobstermen's Association expressed opposition to Area Measure 3, which would eliminate the Area 1A/1B boundary and create one large area in the Gulf of Maine.** The organization felt that the division in the Gulf of Maine has worked to reduce the impacts of the fishery in the inshore Gulf of Maine and that any restrictions in Area 1A should apply to all of Area 1 if Area Measure 3 is implemented in this amendment.

*Response:* The Council agrees and has maintained Area 1A and 1B so that management attention can be focused on the inshore GOM component of the resource, as necessary. While all of the 1A restrictions were not proposed to apply to all of Area 1 under Area Measure 3, it is possible that additional restrictions would result from Area Measure 3 (for example, a reduced Area 1 TAC) to account for the likelihood that vessels would fish as close to shore as possible, depending on fish availability. In the long-term, this measure could have more negative impacts on the fishery than the Proposed Action.

**Comments on Proposed Open-Access Incidental Catch Permit**

**22. A few individuals expressed support for an open access incidental catch permit for herring, to allow vessels that do not qualify for any limited access permits to retain small amounts of herring they may catch incidentally while targeting other species.**

*Response:* The Council agrees and is proposing an open access incidental catch permit to address several objectives in this amendment as well as National Standard 9 (bycatch). The Council proposes a 3 mt possession limit (one landing per calendar day) for vessels that obtain an open-access incidental catch permit to minimize the potential for directed herring fisheries to develop, while still providing controlled opportunities for vessels in other fisheries to catch small amounts of herring and minimize their bycatch.

**23. The East Coast Pelagic Association expressed support for Open Access Measure 2, which would allow for an open access permit and 1 mt possession limit.** The organization stated that this amount of herring is appropriate for a bycatch retention amount for other fisheries or for personal use as bait without encouraging directed fishing for herring.

*Response:* The Council is proposing a 3 mt incidental catch permit to ensure that incidental catch is adequately addressed in most fisheries. While some fisheries have maintained incidental catch levels well below 1 mt, there may be instances where catch is higher, and there are other fisheries that will likely encounter herring in higher amounts. Allowing 3 mt to be landed should minimize bycatch without providing an incentive to target herring.

#### **Comments on Proposed VMS Requirements and Vessel Upgrade Restrictions**

**24. Two participants in the herring fishery commented in opposition to any vessel upgrade restrictions.** They felt that the current size and horsepower restrictions in the Herring FMP are adequate, and with the addition of a limited access program, vessel upgrade restrictions would be unfair, especially for smaller vessels that need to maintain access to the fishery. They cited potential safety concerns associated with the vessel upgrade restrictions, as smaller vessels may try to fish in unsafe conditions. One industry member also noted that carriers can be used in the herring fishery, which will offset any capacity reduction associated with upgrade restrictions.

*Response:* Vessel upgrade restrictions are proposed specifically to address the overall Goal of this amendment (manage the fishery at long-term sustainable levels consistent with the M-S Act) as well as Objectives #1 (prevent overfishing), #4 (orderly development of the fishery in inshore and offshore areas), #5 (OY), #6 (prevent excess capacity in harvesting sector), and #8 (controlled opportunities for vessels in other fisheries) identified in Section 3.0 of this document. To address issues related to overcapacity, vessel upgrade restrictions are needed to improve the long-term management of the fishery. The Council wants to minimize the potential for any vessel in the fleet to be upgraded such that derby fishing would be substantially increased in any given area of the fishery. Derby fishing compromises vessel safety at sea, as vessels may fish in unsafe weather conditions to catch the TAC as quickly as possible. This is one consequence of overcapacity that the Council intends to avoid.

Carriers are used in the herring fishery to facilitate the transport of product to processors and markets. In a limited access fishery, with a purse seine/fixed gear area in 1A during the summer months, carriers may be especially important to minimize disruptions in bait supply. The Council does not intend to affect the use of carriers in the inshore GOM, as they may help to mitigate some of the impacts of the restrictions proposed in this amendment. Carriers are not used in offshore areas, which can support substantial fishing effort, nor do they contribute directly to the harvesting capacity of the fleet that qualifies for the limited access directed fishery.

**25. One environmental organization commented in favor of the proposed VMS requirements** as one mechanism to continue to improve fisheries data collection.

*Response:* The Council agrees and is proposing VMS requirements for all limited access permit holders (directed fishery and incidental catch) as part of Amendment 1.

**26. The East Coast Pelagic Association expressed support for Upgrade Measure 3.** The organization proposed this measure as a balanced alternative that addresses capacity concerns with restrictions that still provide flexibility to increase safety in an offshore environment for vessels with substantial weight on board.

*Response:* The Council believes that the proposed upgrade restrictions provide adequate flexibility to herring vessels, encourage responsible and safe fishing practices, and minimize confusion associated with different restrictions across fisheries in which these vessels participate. There are several arguments for

establishing the same restrictions for any Atlantic herring limited access program as are already in place for most of the region's limited access fisheries. Having one suite of restrictions that applies to all limited access fisheries reduces the confusion about the limited access program requirements. Vessel owners have a variety of reasons for modifying existing vessels, or for seeking new vessels. Keeping the requirements for the transfer of limited access permits consistent across the fisheries makes it easier for owners to consider alternatives when they are contemplating a change to their vessel. In addition, significant administrative procedures have been established by the Northeast Region to track the ownership of limited access vessel permits, and ensure that the integrity of the limited access program is maintained. The administrative burden for both vessel owners and the agency will be lower if the Atlantic herring limited access program can utilize the existing procedures. Finally, consistency with past limited access programs can be supported by an equity argument.

### **Comments on Measures to Address Fixed Gear Fisheries**

**27. Representatives from the herring fixed gear fisheries commented in favor of the measures to address fixed gear fisheries proposed in Amendment 1 and suggested that both Fixed Gear Measures 2 and 3 be implemented in Amendment 1.** They emphasized the historical importance of the fixed gear fishery and the geographic limitations of the gear. They felt that the Downeast ME fixed gear fishery should be treated the same as the Canadian fishery occurring within 20 miles east of Cutler and that the catch from this fishery should be deducted from the 20,000 mt catch assumed to come from the New Brunswick weir fishery. Commenters urged the Council not to regulate the fixed gear fishery for herring out of existence.

**Response:** The Council acknowledges the historical importance of the fixed gear fishery for herring and is proposing that both Fixed Gear Measures 2 and 3 be implemented in this amendment. The ASMFC is implementing a requirement for fixed gear fishermen to report catch through the IVR call-in system (ASMFC Amendment 2 to the Interstate FMP for Herring, 2006); this reporting requirement will help to ensure that the fixed gear measures proposed in this amendment can be adequately monitored. Catch information from the fixed gear fishery can be made available to the Herring PDT when considering fishery specifications, including the catch from the NB weir fishery and the proposed fixed gear set-aside. This measure addresses National Standard 8, which requires management measures to *take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.*

### **Comments on Measures to Address Bycatch**

**28. Several commenters expressed support for Bycatch Measure 3, which would establish a catch cap for haddock caught incidentally in the directed herring fishery.** They felt that hard catch caps provide strong incentive to avoid bycatch and hoped that the catch cap approach for haddock could be expanded in the future to address other species caught as bycatch in this fishery. Several of these commenters also expressed support for Monitoring Option 1 for the catch cap, which would extrapolate from observer data to monitor the catch cap across the entire fishery.

**Response:** Measures to address bycatch were separated from Amendment 1 and submitted in February 2006 as Framework 43 to the Multispecies FMP. These measures include a catch cap and monitoring program for haddock bycatch in the herring fishery. The Framework 43 document should be referenced for more information regarding this issue.

**29. Many individuals commented on the need to increase observer coverage in the herring fishery and obtain better information about the bycatch of all species in this fishery.** Several commenters expressed support for Observer Option 3, which would require NMFS to establish an observer program for the herring fishery that would be adequate to characterize catch and bycatch in the fishery across all gear types and management areas. A few individuals suggested that there should be 100% observer coverage in the directed herring fishery.

**Response:** The National Marine Fisheries Service is developing an omnibus amendment to Northeast Region FMPs to address Standardized Bycatch Reporting Methodology (SBRM) in all federally-managed fisheries. This amendment will serve to ensure that all FMPs of the Northeast Region, for both the New England and Mid-Atlantic Councils, are in compliance with the SBRM requirements of the Magnuson-Stevens Act, taking into account the Agency's mandates under the Endangered Species Act and the Marine Mammal Protection Act. The purpose of this amendment is to: (1) explain the methods and processes by which bycatch is currently monitored and assessed for Northeast Region fisheries; (2) determine whether these methods and processes need to be modified and/or supplemented; (3) establish standards of precision for bycatch estimation for all Northeast Region fisheries; and, thereby, (4) document the SBRMs established for all fisheries managed through the FMPs of the Northeast Region.

The scope of the SBRM amendment is limited to those fisheries that are prosecuted in the Federal waters of the Northeast Region and managed through an FMP developed by either the Mid-Atlantic or the New England Council. This amendment will not address fisheries managed through an FMP developed by any other regional fishery management council, the Highly Migratory Species branch of NOAA Fisheries Service, the Atlantic States Marine Fisheries Commission (ASMFC) (except those joint FMPs established by both the ASMFC and either the Mid-Atlantic or New England Council), or under the aegis of the Atlantic Coastal Fishery Cooperative Management Act (ACFCMA) (including American lobster and northern shrimp). The SBRM for the Atlantic herring fishery, which is managed by the NEFMC and the ASMFC, will be addressed by NMFS in this amendment.

As previously noted, this amendment will include a comprehensive examination, description, and analysis of the methods by which bycatch is monitored and assessed in the fisheries of the northeastern U.S.. It also will Establish standards for determining adequacy of SBRMs and include discussion and consideration of precision and accuracy aspects of SBRMs. Consideration of the adequacy of existing methods of bycatch monitoring for the Northeast Region fisheries, and recommendations for additional and/or alternative methods, will be addressed in the SBRM amendment if necessary and appropriate.

The timeline for the SBRM amendment is aggressive, with a scheduled completion target during the 2006 calendar year. Based on the current schedule of meetings for the Councils, the Mid-Atlantic Council would need to approve the amendment at its August 2006 meeting, and the New England Council would approve the amendment at its September 2006 meeting. Given this schedule, public hearings may occur by July 2006, with the Councils reviewing a draft amendment in June.

The Council's current SBRM for the herring fishery, as well as all available information relative to bycatch in the fishery, is presented in Section 7.4.1.5 of this document.

**30. Several people expressed concern about the potential bycatch of river herring or alewife in the Atlantic herring fishery and urged the Council to take action to address this issue.**

**Response:** The Council acknowledges this issue and understands the importance of minimizing bycatch of all non-target species. The current SBRM for the herring fishery, as well as all available information relative to bycatch in the fishery, is presented in Section 7.4.1.5 of this document. While some river herring was observed as bycatch in the Atlantic herring fishery, available data do not indicate that river herring bycatch is a significant problem at this time. The Council intends to monitor this issue and collect better bycatch information through all management measures. Measures to address bycatch of all species

in the herring fishery are proposed to be added to the list of measures that can be implemented through a framework adjustment to the Herring FMP or the fishery specification process, whichever is most expeditious. This should allow for faster response to bycatch issues as they arise, improving real-time management. In addition, the SBRM amendment, currently under development by NMFS, may further address bycatch in the herring fishery.

### **Comments on Measures to Modify Regulatory Definition of Midwater Trawl Gear**

**31. Some representatives from environmental organizations as well as other individuals expressed support for Definition Measure 2,** which would re-define midwater trawl gear based on the Council's 1999 Enforcement Committee recommendations. Those who supported this measure felt that it would help to ensure that the gear is truly fished off the ocean bottom.

*Response:* The Council agrees and is proposing to implement Definition Measure 2 in this amendment. The intent of changing the regulatory definition of midwater trawl gear is to improve the enforceability of the definition and clarify perceptions about how the gear is intended to be fished. The restrictions included in the proposed definition of midwater trawl gear would better ensure that the gear cannot be fished on the ocean bottom (no discs, bobbins, or rollers on the footrope of the gear and no chaffing gear as part of the net). This measure will improve enforcement because it will provide specific references that enforcement agents can use to ensure that the gear is being fished properly (as opposed to the current definition, which simply states that the gear is designed to fish for, is capable of fishing for, or is being used to fish for pelagic species, no portion of which is designed to be or is operated in contact with the bottom at any time).

**32. Some herring industry members expressed concern about the proposed changes to the midwater trawl gear definition because any change would affect all fisheries using this gear.**

Those who opposed this measure noted that it will impact all fisheries using midwater trawl gear, as there is no specific regulatory definition for herring midwater trawl gear.

*Response:* It is true that the proposed changes will affect all fisheries using midwater trawl gear. However, they are intended to ensure that the gear is fished properly, that is, in the water column and not on the ocean bottom. This should be the objective for all pelagic gear definitions. The majority of pelagic fishermen in the Northeast Region are involved in either the herring or mackerel fisheries, or both. The MA Council, which manages the Atlantic mackerel fishery, was aware of the proposed gear changes and participated in the development of this amendment through the Council's Herring Committee and AP.

**33. The East Coast Pelagic Association expressed support for Definition Measure 4, which was submitted by ECPA as part of its proposal for Amendment 1.** ECPA representatives noted that chaffing gear and discs, although not used by most vessels in the Gulf of Maine herring fishery, are used in Mid-Atlantic fisheries and the mackerel fishery. Some vessels do not use hydraulic pumps to bring their fish on board and use chaffing gear to protect their nets when hauling them up a stern ramp. The ECPA noted that the intent of Definition Measure 4 is clearly not to encourage vessels to use midwater trawl gear on the ocean bottom, as the definition still states that vessels cannot rig their nets in a way that would provide an opportunity to fish on the bottom.

*Response:* The Council considered the ECPA proposal in Amendment 1 and chose the Proposed Action because it better reflects how midwater trawl gear should be rigged to fish in the water column. The majority of pelagic fishermen in the Northeast Region are involved in either the herring or mackerel fisheries, or both. The MA Council, which manages the Atlantic mackerel fishery, was aware of the proposed gear changes and participated in the development of this amendment through the Council's Herring Committee and AP.

**34. Some individuals expressed opposition to Definition Measure 4 because it would allow for chafing gear on the midwater trawl net.** They felt that chafing gear is not needed on a midwater net if it is being fished properly and not in contact with the ocean bottom.

*Response:* The Council agrees and is proposing Definition Measure 2 in this amendment.

#### Comments on Proposed Sector Allocation Process

**35. Comments on the sector allocation process proposed in Amendment 1 were mixed.** Some individuals supported inclusion of this process in Amendment 1 to provide more flexibility to vessels in the fishery once the limited access program is implemented. One environmental organization noted that a sector allocation process can help moderate the exploitation of the resource and avoid a race for the TAC and could benefit ocean predators by making forage more available year-round in areas where herring provide a critical source of food.

**Other individuals who commented on this issue, particularly some herring industry members, suggested that the Council should first implement the limited access program in Amendment 1 and address the sector allocation process in the future,** after further consideration and additional discussion with the fishery participants.

*Response:* Inclusion of the sector allocation process in Amendment 1 was ultimately rejected by the Council at the January 2006 meeting. The Council was uncomfortable with some of the details of the process and the uncertainties associated with the long-term impacts, particularly in Area 1A where the potential exists for a small number of vessels to monopolize the quota. There was significant concern about the impacts of sector allocations on smaller vessels that have historically depended on 1A fish and qualify for a limited access permit in this amendment. The Council determined that the most appropriate course of action for this fishery is to implement a limited access program in all management areas and address quota allocations in the future through a separate action. At the January 2006 meeting when this measure was eliminated from further consideration in Amendment 1, the Council expressed interest in revisiting this in a future action related to the Atlantic Herring FMP.

**36. Bumblebee Seafoods and the East Coast Pelagic Association generally expressed support for the proposed sector allocation process and submitted specific suggestions regarding the details of a sector allocation process for the herring fishery.**

*Response:* Although the Council chose not to establish a sector allocation process for the herring fishery in this amendment, it may consider this measure in a future action (most likely an amendment) to the Herring FMP. At the final meeting for Amendment 1, many Council members expressed interest in developing an amendment for a sector allocation process as soon as possible once Amendment 1 is completed and the limited access program is implemented. When the Council resumes discussion of this measure, the recommendations and comments provided by the industry groups and other members of the public will be reconsidered.

## **11.2 MARINE MAMMAL PROTECTION ACT (MMPA)**

The NEFMC has reviewed the impacts of the Proposed Action on marine mammals and has concluded that the measures proposed are consistent with the provisions of the MMPA. Although they are likely to affect species inhabiting the herring management unit, the measures will not alter the effectiveness of existing MMPA measures, such as take reduction plans, or other actions to protect those species.

The Proposed Action includes a limited access program that controls capitalization of the fleet, including growth of the midwater trawl sector, and a seasonal purse seine/fixed gear only area that should, at a minimum, not increase interactions with protected species beyond the status quo, and may have indirect positive benefits by imposing more controls on the fishery. Similarly, because most of the independent measures improve the management program through administrative and monitoring mechanisms, they are unlikely to affect protected species in any direct or measurable way beyond the status quo.

For further information on the potential impacts of the fishery and the proposed management action on marine mammals, see the Protected Species sections of this document (Section 7.2 and 8.2).

## **11.3 ENDANGERED SPECIES ACT (ESA)**

Section 7 of the Endangered Species Act requires federal agencies conducting, authorizing or funding activities that affect threatened or endangered species to ensure those effects do not jeopardize the continued existence of listed species. The NEFMC has concluded, at this writing, that the proposed amendment and the prosecution of the herring fishery is not likely to jeopardize any ESA-listed species or alter or modify any critical habitat, based on the discussion of impacts in this document and on the assessment of impacts in the existing Biological Opinion prepared by NMFS.

The Council does acknowledge that endangered and threatened species may be affected by the measures proposed, but impacts should be minimal when compared to the prosecution of the fishery prior to implementation of the FMP. The NEFMC is now seeking the concurrence of the National Marine Fisheries Service with respect to this action, adding measures that would enhance the effectiveness of the Council's management efforts.

For further information on the potential impacts of the fishery and the proposed management action on listed species, see the Protected Resources sections in this document (Section 7.2 and 8.2).

## **11.4 ADMINISTRATIVE PROCEDURE ACT (APA)**

The Council is not requesting relief from the requirements of the APA for notice and comment rulemaking.

## **11.5 PAPERWORK REDUCTION ACT (PRA)**

The purpose of the PRA is to control and, to the extent possible, minimize the paperwork burden for individuals, small businesses, nonprofit institutions, and other persons resulting from the collection of information by or for the Federal Government. The authority to manage information and recordkeeping requirements is vested with the Director of the Office of Management and Budget (OMB). This authority encompasses establishment of guidelines and policies, approval of information collection requests, and reduction of paperwork burdens and duplications.

The collection of information requirements associated with the measures proposed in this amendment were addressed through a separate analysis conducted by NMFS. The PRA package prepared in support of this action, including the required forms and supporting statements, was submitted by the NMFS Northeast Regional Office under separate cover.

## **11.6 COASTAL ZONE MANAGEMENT ACT (CZMA)**

The Council determined that the management measures proposed in this amendment are consistent with the approved coastal management programs of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina.

This determination was submitted for review by the responsible state agencies under §307 of the Coastal Zone Management Act.

## **11.7 DATA QUALITY ACT**

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554, also known as the Data Quality Act or Information Quality Act) directed the Office of Management and Budget (OMB) to issue government-wide guidelines that “provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies.” OMB directed each federal agency to issue its own guidelines, establish administrative mechanisms allowing affected persons to seek and obtain correction of information that does not comply with the OMB guidelines, and report periodically to OMB on the number and nature of complaints. The NOAA Section 515 Information Quality Guidelines require a series of actions for each new information product subject to the Data Quality Act. Information must meet standards of utility, integrity and objectivity. This section provides information required to address these requirements.

### **11.7.1 Utility**

Utility means that disseminated information is useful to its intended users. “Useful” means that the content of the information is helpful, beneficial, or serviceable to its intended users, or that the information supports the usefulness of other disseminated information by making it more accessible or easier to read, see, understand, obtain or use. The intended users of the information contained in this document are participants in the Atlantic herring fishery as well as other interested parties and members of the general public. The information contained in this amendment and FSEIS may be useful to owners of vessels holding Federal Atlantic herring permits as well as herring dealers and processors, since this document serves to notify these individuals of any potential changes to management measures for these fisheries. This information will enable these individuals to adjust their fishing practices and make appropriate business decisions based on the new management measures and corresponding regulations.

The information being provided in this amendment concerning the status of the herring fishery is based on information contained in the Draft EIS for Amendment 1 to the Atlantic Herring FMP and other recent documents. The information is updated through the 2004 fishing years throughout the document, and preliminary 2005 data are provided if available. Information presented in this document is intended to support the proposed management action, which has been developed through a multi-stage process involving all interested members of the public. Consequently, the information pertaining to management measures contained in this document has been improved based on comments from the public, fishing industry, members of the Council, and NOAA Fisheries.

The media being used in the dissemination of the information contained in this document will be contained in a *Federal Register* notice announcing the Proposed and Final Rules for this action. This information will be made available through printed publication and on the Internet website for the Northeast Regional Office (NERO) of NOAA Fisheries. In addition, the final Amendment 1 document and FSEIS will be available on the Council's website ([www.nefmc.org](http://www.nefmc.org)) in standard PDF format. Copies will be available for anyone in the public on CD ROM and paper from the Council's office.

### **11.7.2 Integrity**

Integrity refers to security – the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification. Prior to dissemination, NOAA information, independent of the intended mechanism for distribution, is safeguarded from improper access, modification, or destruction, to a degree commensurate with the risk and magnitude of harm that could result from the loss, misuse, or unauthorized access to or modification of such information.

All electronic information disseminated by NOAA adheres to the standards set out in Appendix III, "Security of Automated Information Resources," OMB Circular A-130; the Computer Security Act; and the Government Information Security Reform Act. If information is confidential, it is safeguarded pursuant to the Privacy Act and Titles 13, 15, and 22 of the U.S. Code (confidentiality of census, business and financial information).

### **11.7.3 Objectivity**

Objective information is presented in an accurate, clear, complete, and unbiased manner, and in proper context. The substance of the information is accurate, reliable, and unbiased; in the scientific, financial, or statistical context, original and supporting data are generated and the analytical results are developed using sound, commonly-accepted scientific and research methods. "Accurate" means that information is within an acceptable degree of imprecision or error appropriate to the particular kind of information at issue and otherwise meets commonly accepted scientific, financial, and statistical standards.

This document uses information of known quality from sources acceptable to the relevant scientific and technical communities. Several sources of data were used in the development of this document, including the analysis of potential impacts. These data sources include, but are not limited to: landings data from vessel trip reports, landings data from interactive voice response reports, information from resource trawl and hydroacoustic surveys, sea sampling (observer) data, data from the dealer weighout purchase reports, descriptive information provided (on a voluntary basis) by processors and dealers of Atlantic herring, and ex-vessel price information. Although there are some limitations to the data used in the analysis of impacts of management measures and in the description of the affected environment, these data are considered to be the best available. Information about bycatch is based on reports collected by the NEFSC Sea Sampling (Observer) Branch and incorporated into the NOAA Fisheries observer database. The observer data are collected using an approved, scientifically-valid sampling process.

In preparing this amendment document, the Council(s) must comply with the requirements of the Magnuson-Stevens Act, Regulatory Flexibility Act, Administrative Procedures Act, Paperwork Reduction Act, Coastal Zone Management Act, Endangered Species Act, Marine Mammal Protection Act, Data Quality Act, and Executive Orders 12612 (Federalism), 12630 (Property Rights), 12898 (Environmental Justice), 12866 (Regulatory Planning), and 13158 (Marine Protected Areas). The policy choices (i.e., management measures) proposed in this amendment are supported by the best available scientific information. The Council's rationale for the Proposed Action (Section 6.0) further addresses this issue.

Qualitative discussion is provided in cases where quantitative information was unavailable, utilizing appropriate references as necessary.

The review process for any action under an FMP involves the Northeast Regional Office (NERO) of NOAA Fisheries, the Northeast Fisheries Science Center (Center), and NOAA Fisheries Headquarters (Headquarters). The Council review process involves public meetings at which affected stakeholders have the opportunity to provide comments on the proposed changes to the FMP. Reviews by staff at NERO are conducted by those with expertise in fisheries management and policy, habitat conservation, protected species, and compliance with the applicable law. The Center's technical review is conducted by senior-level scientists with specialties in population dynamics, stock assessment methodology, fishery resources, population biology, and the social sciences.

Final approval of this amendment and clearance of the Proposed and Final Rules is conducted by staff at NOAA Fisheries Headquarters, the Department of Commerce, and the U.S. Office of Management and Budget. This review process is standard for any action under an FMP, and provides input from individuals having various expertise who may not have been directly involved in the development of the Proposed Action. Thus, the review process for any FMP modification, including those proposed in this amendment, is performed by technically-qualified individuals to ensure the action is valid, complete, unbiased, objective, and relevant.

## **11.8 E.O. 12866 AND REGULATORY FLEXIBILITY ACT (RFA)**

### **11.8.1 Regulatory Impact Review (RIR) and Initial Regulatory Flexibility Analysis (IRFA)**

This section provides the analysis and conclusions to address the requirements of Executive Order 12866 and the Regulatory Flexibility Act (RFA). Since many of the requirements of these mandates duplicate those required under the Magnuson-Stevens Act and NEPA, this section contains references to other sections of this document. The following sections provide the basis for concluding that the Proposed Action is not significant under E.O. 12866 and will not have a significant economic impact on a substantial number of small entities under the RFA.

### **11.8.2 Description of Management Objectives**

The goals and objectives of the management plan for the Atlantic herring resource are stated in Section 3.0 of this amendment document. The Proposed Action is consistent with these goals and objectives.

### **11.8.3 Description of the Fishery**

Section 4.0 of the Herring FMP contains a detailed description of the Atlantic herring fishery. Following development of the FMP, Stock Assessment and Fishery Evaluation (SAFE) Reports have been prepared for each fishing year from 1998-2003. The May 5, 2004 Herring PDT/TC Report serves as the SAFE Report for the 2003 fishing year, and much of the updated information from this report was presented in Section 4.0 of the 2005/2006 fishery specifications document.

This integrated amendment/EIS document updates all available fishery information through the 2004 fishing year and provides preliminary 2005 information if available. The description of the herring fishery is contained in the Affected Human Environment section of this document (Section 7.4) and should be referenced for additional information.

#### **11.8.4 Statement of the Problem**

The statement of the problem(s) that this amendment addresses can be found in the Purpose and Need for Action section of this document (Section 2.3) and should be referenced for additional information.

#### **11.8.5 Description of the Proposed Action and Alternatives**

A complete description of the management action proposed in this amendment is provided in Section 4.0 of this document. In addition, the no action alternative, other non-preferred alternatives, and the measures that the Council considered but rejected during the development of Amendment 1 are described in Section 5.0 of this document.

#### **11.8.6 Economic Analysis**

The economic impacts of the Proposed Management Action and other alternatives considered during the development of this amendment are discussed in Section 8.4 of this document. A summary of economic impacts is also provided in the Executive Summary at the beginning of this document.

#### **11.8.7 Determination of Significance Under E.O. 12866**

NMFS Guidelines provide criteria to be used to evaluate whether a Proposed Action is significant. A significant regulatory action means any regulatory action that is likely to result in a rule that may:

1. *Have an annual effect on the economy of \$100 million or more, or adversely effect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.*

The Proposed Action will not have an effect on the economy in excess of \$100 million (see Section 8.4 for additional information).

2. *Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.*

The Proposed Action will not create a serious inconsistency with 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 the Atlantic herring fishery in the EEZ.

3. *Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.*

The Proposed Action will not materially alter the budgetary impact of entitlements, grants, user fees or loan programs, or the rights and obligations of their participants.

4. *Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.*

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.

### **11.8.8 Initial Regulatory Flexibility Analysis (IRFA)**

The objective of the RFA is to require consideration of the capacity of those affected by regulations to bear the direct and indirect costs of regulation. If an action would have a significant impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) must be prepared to identify the need for action, alternatives, potential costs and benefits of the action, the distribution of these impacts, and a determination of net benefits. The RFA requires the Federal rulemaker to examine the impacts of proposed and existing rules on small businesses, small organizations, and small Governmental jurisdictions.

The Small Business Administration has defined all fish-harvesting or hatchery businesses that are independently owned and operated, not dominant in their field of operation, and with annual receipts (gross revenues) not in excess of \$4,000,000 as small businesses.

If an action is determined to affect a substantial number of small entities, the analysis must include:

1. A description and estimate of the number of small entities and total number of entities in a particular affected sector, and a total number of small entities affected: and
2. Analysis of economic impact on small entities, including the direct and indirect compliance costs of completing paperwork or recordkeeping requirements, effect on the competitive position of small entities, effect on the small entity's cash flow and liquidity, and ability of small entities to remain in the market.

Determination of significance is based on two criteria: Disproportionality and profitability. Disproportionality means small firms are placed at a significant competitive disadvantage relative to large firms. Profitability means that firms' profits are significantly reduced. Because different classes of entities are not an issue here (all of the affected parties can be defined as small entities), there are no entities that are disproportionately affected. The criterion of profitability has been considered in this case.

The following sections contain analyses of the effect of the Proposed Action on small entities. Under Section 603(b) of the RFA, each initial regulatory flexibility analysis is required to address:

1. Reasons why the agency is considering the action,
2. The objectives and legal basis for the proposed rule,
3. The kind and number of small entities to which the proposed rule will apply,
4. The projected reporting, record-keeping and other compliance requirements of the proposed rule, and
5. All Federal rules that may duplicate, overlap or conflict with the proposed rule.

#### **11.8.8.1 Reasons for Considering the Action**

The reasons for considering the management action proposed in Amendment 1 are discussed in the Purpose and Need for Action section of this document (Section 2.3) and should be referenced for additional information.

### 11.8.8.2 Objectives and Legal Basis for the Action

The goals and objectives of the management plan for the Atlantic herring resource are stated in Section 3.0 of this amendment document. The Proposed Action is consistent with these goals and objectives and has been developed in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, National Environmental Policy Act, and all other applicable laws, which are addressed in various sections of this document (see Table of Contents).

### 11.8.8.3 Description and Number of Small Entities to Which this Rule Applies

All of the potentially-affected businesses are considered small entities under the standards described in NOAA Fisheries guidelines because they have gross receipts that do not exceed \$4 million annually and employ fewer individuals than the denoted thresholds. In general, about 30-35 vessels catch 99% of all herring landed in any given fishing year. During the 2003 fishing year, there were 154 vessels that landed herring, 38 of which averaged more than 2,000 pounds of herring per trip.

A complete description of the number of small entities to which this rule applies is provided in Section 7.4.1.3 of this document. Summary information about vessels catching herring is provided below, but the above sections of this document should be referenced for more information.

**Table 175 Number of Vessels by Principal Herring Gear for 2002 – 2004**

	<b>2002</b>	<b>2003</b>	<b>2004</b>
<b>Bottom Trawl</b>	67	56	56
<b>Midwater Pair Trawl</b>	13	16	13
<b>Midwater Trawl</b>	15	10	9
<b>Purse Seine</b>	7	6	4
<b>Other</b>	45	52	43
<b>Total</b>	<b>147</b>	<b>140</b>	<b>125</b>

In the 2004 fishing year, there were 40 vessels, defined as directed herring vessels, which sold 93,673 metric tons of herring. This is five (5) more vessels than in 2002. However, most of this is attributed to an increase in the bottom trawl sector. There was a decline of two (2) vessels since 2002 in the single midwater trawl fleet and the purse seine fleet dropped from seven (7) to four (4). Thirteen vessels pair trawled in 2002 and 2004 and 16 in 2003.

Since Area 1A is the management area in which the TAC is most likely to be reached, it is important to summarize the activity of vessels targeting herring in Area 1A. Table 43 and Table 45 in this document provide information for the vessels that averaged more than 1 mt per trip in Area 1A in 2002 through 2004; these tables should be referenced for more detailed information. Those vessels landed 91,893 mt of herring from Area 1A.

#### **11.8.8.4 Reporting and Recordkeeping Requirements**

The Proposed Action introduces one new reporting, recordkeeping, or other compliance requirement. Owners of vessels who plan to apply for any limited access herring permit, and owners of vessels that sank or were destroyed and can meet the current permit eligibility requirement for a limited access permit, will be required to submit to NMFS application materials that support their request to receive a limited access permit.

#### **11.8.8.5 Duplication, Overlap, or Conflict with Other Federal Rules**

The Proposed Action does not duplicate, overlap or conflict with any other Federal rules.

#### **11.8.8.6 Economic Impacts on Small Entities Resulting From the Proposed Action**

The management measures included in the Proposed Action that are most likely to directly impact fishery-related businesses and communities are the proposed limited access program and the purse seine/fixed gear-only area. The Proposed Action is estimated to qualify 31 vessels for limited access directed fishery permits to fish in all management areas, three additional vessels for limited access directed fishery permits in Areas 2/3 only, and 56 vessels for limited access incidental catch permits with a 25 mt possession limit. **The estimated total number of limited access vessels under the Proposed Action is 90, with 34 unique vessels qualifying for the directed herring fishery.**

Under the Proposed Action, there are 56 vessels that qualify for limited access incidental catch permits that do not qualify for the limited access directed fishery permits. Seventeen of these vessels were recently active in the Atlantic herring fishery. Vessels with limited access incidental catch permits can retain up to 25 metric tons of herring per calendar day until 95% of the TAC is reached and the management area closes, at which time they would be limited to an incidental catch of 2,000 pounds per trip. This is the least restrictive alternative for the limited access incidental catch permit that was considered in this amendment. It provides opportunities in the fishery for historical vessels that would not have otherwise qualified (due to lack of adequate landings since 1993).

The majority of vessels that do not qualify under the Proposed Action have not been active in the herring fishery in recent years, and in some cases, for many years. Some have switched to other fisheries like mackerel and squid. The limited access incidental catch permit will likely accommodate the catch of herring on these vessels and allow them to continue normal operations in other fisheries. This should help to mitigate the impacts of not qualifying for a directed fishery permit in Areas 2/3.

There are 16 midwater pair trawl and six single midwater trawl vessels that qualify for Area 1 but would not be able to fish in the purse seine/fixed gear area proposed in the Proposed Action (all of Area 1A) from June through September. Of the 16 affected pair trawl vessels, 9 have their primary landing port in Massachusetts, four in Maine, and three are from other states in the Northeast. Of the six affected single midwater trawl vessels, two have their primary landing port in Maine, three in Rhode Island, and one in Mid-Atlantic States. Recent landings data show that four of the midwater trawl vessels and 13 of the pair trawl vessels are actively fishing in Area 1A during the June through September period.

During 2002 through 2004, the affected midwater trawl vessels landed an average of 5,472 metric tons (worth about \$892,000), and the pair trawl vessels landed 21,298 metric tons of herring (worth about \$3,472,000) per season (June through September) from Area 1A. These landings represent 68% and 60% of the total Area 1A landings by these single and paired midwater trawl vessels, respectively. The midwater trawl vessel landings ranged from 266 to 3,372 metric tons, and the pair trawl vessel landings ranged from 90 to 3,263 metric tons. To compensate for potential losses, they will have the choice to either seek alternative fishing grounds or fisheries and/or to re-rig to purse seine in Area 1A during the time of the restriction. All of the above choices are associated with financial costs.

Pair trawl vessels that qualify for limited access directed fishery permits under the Proposed Action are 69% dependent on herring. Qualifying midwater trawl vessels are 38% dependent, and qualifying purse seine vessels are 100% dependent on herring. Dependence on herring for single midwater trawl vessels ranges from 38% to 45% for most alternatives considered in the Amendment 1 DSEIS. Bottom trawl vessels are the least dependent on herring. Under the Proposed Action, there are four pair trawl vessels that would not qualify for a directed limited access herring permits. These vessels have, on average, annual revenue from herring of \$91,730 (from an average of 25 days of herring fishing) which represents about 35% of their total revenue from all species.

Based only on the potential catch measures of the 28 active vessels that qualify for all areas, the potential catch measures range from **161,030 to 198,710 metric tons** (relative to current total TAC for the fishery of 150,000 mt). This provides some perspective on what the potential harvesting capacity of the limited access directed fishery fleet may be under the Proposed Action. The range of potential catch of the limited access directed fleet represents a 5% decrease from the status quo. The additional potential catch measures for the one active vessel that qualifies for Areas 2/3 only increases the potential catch measures slightly (cannot report due to confidentiality issues). The Proposed Action ranks in the middle of the alternatives considered in Amendment 1 relative to the potential catch measures (see Section 8.4.4 for a description of the potential catch measures).

Table 176 summarizes the impacts of the Proposed Action on fishery-related businesses and communities. The table focuses on the impacts of the limited access program and the purse seine/fixed gear-only area, the two management measures that are likely to result in the greatest impact on affected participants in the fishery.

**Table 176 Summary of Impacts of Proposed Action on Fishery-Related Businesses and Communities**

<b>Measures with Greatest Impacts</b>	Limited Access Program and Permits Purse Seine/Fixed Gear-Only Area
<b>LIMITED ACCESS DIRECTED FISHERY QUALIFIERS</b>	
<b>Area 1 (All Areas)</b>	31
<b>Areas 2/3 Only</b>	3
<b>TOTAL DIRECTED FISHERY QUALIFIERS = 34</b>	
<b>Limited Access Incidental Catch Qualifiers</b>	56
<b>TOTAL NUMBER OF LIMITED ACCESS VESSELS = 90</b>	
<b>Potential Catch Measure 1 for Area 1 Qualifiers</b> (Active Directed Fishery Qualifiers Only)	161,030 mt
<b>Potential Catch Measure 2 for Area 1 Qualifiers</b> (Active Directed Fishery Qualifiers Only)	198,710 mt
<b>POTENTIAL CATCH = 5% REDUCTION FROM NO ACTION</b>	
<b>Active Non-Qualifiers for Directed Fishery</b>	2 purse seine 9 midwater trawl (2 qualify for incidental catch) 4 pair trawl (1 qualifies for incidental catch)
<b>Average Revenues from Herring for Active Non-Qualifiers</b>	Purse Seine = cannot report Midwater Trawl = \$21,420 Pair Trawl = \$91,730
<b>Qualifying Vessels Impacted by Purse Seine/Fixed Gear Area</b>	16 Pair Trawl 6 Midwater Trawl
<b>Percentage of Total Area 1A Catch During Purse Seine/Fixed Gear Closure for Impacted Vessels</b>	60% Pair Trawl 68% Midwater Trawl

The Council considered the economic impacts of the action proposed in Amendment 1 and the costs associated with the proposed management measures. To the extent possible, the Council selected a suite of measures intended to minimize the economic impacts on the herring industry while ensuring that the needs of the resource and fishery continue to be met over the long-term. The Proposed Action is intended to minimize costs and avoid unnecessary duplication, to the extent possible, while capping fishing capacity and promoting sustainable, long-term management of the Atlantic herring fishery. Any costs incurred as a result of the Proposed Action are considered to be necessary in order to achieve the goals and objectives of this management program.

Relative to the other measures and alternatives under consideration, the Proposed Action minimizes or mitigates economic impacts on small entities in a number of ways:

- The Proposed Action qualifies 34 vessels into the limited access directed fishery, 31 of which will have access to all management areas, including Area 1. Four alternatives that were considered in the Amendment 1 DSEIS qualified more vessels for Area 1, and two alternatives qualified fewer vessels. Alternative 7, which was the preferred alternative in the DSEIS, only qualifies 23 vessels and excluded recent (post-1999 control date) vessels from the Area 1 fishery, which was expected to have significant impacts. The Council selected the proposed limited access criteria instead to minimize the impacts of the Area 1 limited access program while still managing harvesting capacity in the fishery and minimizing the race to fish.
- The Proposed Action ranks in the middle of the alternatives considered in Amendment 1 relative to the potential catch measures (see Section 8.4.4 for a description of the catch measures). That is, three alternatives (Alternatives 2, 3, and 4) have higher potential catch measures and three alternatives (Alternatives 5, 6, and 7) have lower potential catch measures. When all areas are considered together, there are four alternatives (Alternatives 3, 4, 6, and 7) that have potential catch measures higher than the Proposed Action. Two alternatives (Alternatives 2 and 5) have lower potential catch measures. The range of potential catch of the limited access directed fleet represents a 5% decrease from the status quo. The additional potential catch measures for the one active vessel that qualifies for Areas 2/3 only increases the potential catch measures slightly (cannot report due to confidentiality issues). Relative to the status quo and other alternatives considered in this amendment, the Proposed Action appears to control harvesting capacity at levels while minimizing the economic impact on vessels that participate heavily in the herring fishery.
- The proposed criteria for the limited access incidental catch permit (15 mt 1988-2003) is the least restrictive alternative for the limited access incidental catch permit that was considered in this amendment. It provides opportunities in the fishery for historical vessels that would not have otherwise qualified (due to lack of adequate landings since 1993). The limited access incidental catch permit will likely accommodate the catch of herring on these vessels and allow them to continue normal operations in other fisheries. This should help to minimize the impacts of not qualifying for a limited access directed fishery permit in Areas 2/3.
- Relative to the alternatives that do not include as restrictive a purse seine/fixed gear-only area, the purse seine/fixed gear-only area proposed in this amendment is likely to result in negative impacts on affected midwater trawl and pair trawl vessels. However, the costs associated with this measure are viewed to be necessary to ensure long-term benefits to the resource and the fishery by taking a proactive and precautionary approach to managing the fishery in the inshore Gulf of Maine and minimizing the risk for localized resource depletion. When compared to Alternative 7 and considered in the context of the limited access program, the overall impacts of the proposed purse seine/fixed gear measure are mitigated to some extent. The midwater trawl vessels that qualify under the Proposed Action but do not under Alternative 7 may be negatively impacted by the gear restriction, but under Alternative 7, they would be restricted entirely from Area 1A due to the limited access

program, resulting in a comparatively greater negative impact. These vessels are less impacted by the Proposed Action even though it appears that the impacts from the gear restricted area are greater. This is because they can fish in Area 1 from October to May under the Proposed Action when they may not have qualified at all for the directed fishery in Area 1 under other alternatives (Alternative 7, for example).

- Vessel upgrade restrictions are proposed to be the same for the herring fishery as all other limited access fisheries in the Northeast Region. The consistency associated with this restriction should minimize the negative impacts on affected entities, as many vessels already possess limited access permits for other Northeast Region fisheries and are already subject to the upgrade restrictions in those fisheries. This measure also minimizes confusion and uncertainty that can often be associated with conflicting or multiple regulations.
- The proposed open access incidental catch permit provides an opportunity for vessels that do not qualify for any of the limited access herring permits to keep up to 3 mt of herring they may catch incidentally in other fisheries. This permit is available to all vessels fishing in the EEZ. The possession limit of 3 mt was selected to minimize the negative impacts associated with discarding without providing an incentive to target herring. Relative to the status quo (2,000 pounds), this measure allows more herring to be landed incidentally and may benefit some of the vessels that obtain the open access permit.

### **11.9 E.O. 13132 (FEDERALISM)**

The Executive Order on Federalism established nine fundamental federalism principles to which Executive agencies must adhere in formulating and implementing policies having federalism implications. The E.O. also lists a series of policy making criteria to which agencies must adhere when formulating and implementing policies that have federalism implications. However, no federalism issues or implications have been identified relative to the Proposed Action.

The Proposed Action does not contain policies with federalism implications sufficient to warrant preparation of an assessment under E.O. 13132. The affected States have been closely involved in the development of the proposed management measures through their involvement in the Regional Fishery Management Council process (i.e., all affected states are represented as voting members on at least one Council) as well as the ASMFC process. The proposed measures were developed with the full participation and cooperation of the State representatives of the New England Council. No comments were received from any State officials relative to any federalism implications of the proposed management measures.

### **11.10 E.O. 12898 (ENVIRONMENTAL JUSTICE)**

Executive Order (E.O.) 12898 requires that, “to the greatest extent practicable and permitted by law... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions...”

Currently, there is no indication that Amendment 1 to the Herring FMP will have disproportionately high effects on low-income or minority populations. Few minority and income poor populations participate in this fishery (partly as a result of the demise of the cannery operations in the region). Those who do participate would likely be found in the processing sector (the one remaining cannery and the southern New England freezer plants, as these operations offer limited opportunities for a low-skilled labor force,

see Section 7.4.1.4 of this document for a description of these processing facilities and additional information about employment). Significant minority populations reside in Southern New England and have historically participated in this sector.

Plant and cannery workers are usually only paid when they receive fish. Therefore, regulations that lead to interruptions in fish supply to these operations could negatively impact employees. However, under Amendment 1, the TACs are generally expected to continue to be taken to supply processing plants and canneries in addition to lobster bait. Overall, the processing plants and sardine cannery in Prospect Harbor should not be affected by these measures. Although the Prospect Harbor cannery does not have a significant minority workforce, cannery workers are almost all women, and alternative employment opportunities in the area are limited, making this group vulnerable to changes in supply. See Section 7.4.2.10 of this document as well as Appendix XI in Volume II for additional information about Prospect Harbor and its demographics.

While overall impacts are not expected to be significant, it is difficult to predict if and how supply may change on a seasonal basis for some of these plants, especially the cannery, which is very dependent on fresh product. The purse seine/fixed gear only area may promote the supply of food-quality herring for this plant and may prevent disruption in supply, but there are currently about four active purse seine vessels in Area 1A. Impacts on supply to the cannery and other processing facility will be minimized during the summer months if some midwater trawl vessels re-rig to purse seine gear in order to access Area 1A fish during the gear restriction period.

### **11.11 E.O. 13158 (MARINE PROTECTED AREAS)**

The Executive Order on Marine Protected Areas requires each federal agency whose actions affect the natural or cultural resources that are protected by an MPA to identify such actions, and, to the extent permitted by law and to the extent practicable, avoid harm to the natural and cultural resources that are protected by an MPA. The E.O. defines a Marine Protected Area as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”

The Departments of Commerce and the Interior are jointly developing a list of MPAs that meet the definition of MPA for the purposes of this E.O. As of the date of submission of the DSEIS for this amendment, the list of MPA sites has not been developed by the departments. However, it is likely that when the list is available the Stellwagen Bank National Marine Sanctuary, the Council's network of Habitat Closed Areas and the Council's year-round groundfish closed areas, at a minimum, will meet criteria for an MPA and will likely be listed.

The E.O. promotes the development of MPAs by enhancing or expanding the protection of existing MPAs and establishing or recommending new MPAs. However, Amendment 1 to the Atlantic Herring FMP does not propose to modify or expand any of the existing year-round closed areas (or MPAs) as it may not be appropriate to manage a pelagic, migratory species with the use of closed areas.