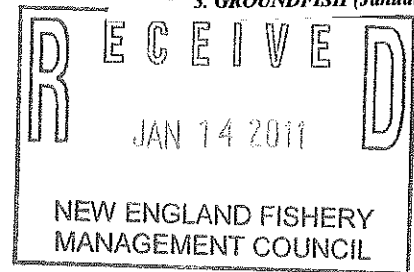


Additional Correspondence



January 14, 2011

Rip Cunningham
Chair, Groundfish Committee
New England Fisheries Management Council



RE: New Amendment to Address Fleet Diversity and Accumulation Limits

BOARD OF TRUSTEES

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Massachusetts Lobstermen's Association

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Boyce Thorne Miller
Science & Policy Coordinator

Brett Tolley
Community Organizer

Sean Sullivan
Marketing, Development and Outreach Associate

Dear Mr. Cunningham,

As the NEFMC considers a new Amendment to the Groundfish FMP regarding Fleet Diversity and Accumulation Limits, we urge Council members to adopt mechanisms to:

- Ensure that diversity of the region's fishing fleet is well matched to and sustains the ecological diversity of the region's marine ecosystem.
- Allow affordable access for new entrants into the fishery, reward owner-operators, and provide incentives for lower impact fishing methods.
- Sustain the diversity of the fishing fleet and prevent excessive consolidation and accumulation of fishing power into the hands of a few entities.
- Define economic efficiency to include measurable triple bottom line contributions of the fleet: community, economy and ecology.

The Groundfish Committee and Council are obligated to design New England's Groundfish Catch Share system in a way that achieves Amendment 16 Goals and Objectives as yet unmet:

- Goal 2 (A16): Achieve economic efficiency, biological conservation, and diversity within the fishery.
- Goal 4 (A16): Minimize, to the extent practicable, adverse impacts on fishing communities and shoreside infrastructure.
- Objective 7 (A16): To the extent possible, maintain a diverse groundfish fishery, including different gear types, vessel sizes, geographic locations, and levels of participation.

cc: In, ah, etc.

If designed right, the new Amendment to the Groundfish FMP will help achieve the stated goals and objectives of Amendment 16. We believe the direction moving forward must include:

- a clear understanding of the problem;
- a clear vision for what fleet diversity should look like in New England;
- a comprehensive review of all the tools available to address the problem; and
- a careful selection of tools best suited for achieving the fleet diversity envisioned for the New England groundfish fishery.

Problem Statement

As it stands in Amendment 16 and the current Groundfish FMP there are no protections to ensure fleet diversity, to prevent excessive consolidation, or to ensure that the aforementioned A16 goals and objectives are met.

Without protections set in place, excessive fleet consolidation will further erode New England fishing communities and ultimately undermine conservation and ecological requirements established by the Magnuson Stevens Act. Specific protections are needed to: ensure that the fleet remains diverse, under the control of active fishing communities, sustains entire ecosystems and, by extension, provides for a sustainable food system.¹

Unfortunately, in the New England groundfish fishery we are already seeing signs that we are headed toward excessive consolidation and its consequences. The cost of leasing quota and buying permits is skyrocketing. Quota and permits are migrating from smaller-scale to larger-scale more industrial operations. The number of owner/operator fishermen is decreasing while the number of absentee owner leasing is increasing. Community infrastructure is at risk of collapse. We have seen this happen with farms and in other fisheries around the world; we should not let it happen with fisheries here in New England.

Fleet Diversity

In Amendment 16 to the Multispecies FMP, Objective 7 offers a logical starting point to discuss what is meant by fleet diversity. Objective 7 reads, "To the extent possible, maintain a diverse groundfish fishery, including different gear types, vessel sizes, geographic locations, and levels of participation."

In addition, the Council Staff white paper titled "Fleet Diversity, Allocation, and Excessive Shares in the Northeast Multispecies Fishery" refers to two New England studies related to Fleet Diversity: the NAMA sponsored Fleet Visioning Project and the Social Sciences Branch (SSB) of the Northeast Fisheries Science Center's *Report on*

¹ For a more detailed analysis of the connection between Fleet Diversity and Ecological Objectives please see "Addressing the Ecological Implications of Consolidation and Quota Accumulation Under Amendment 16" submitted by NAMA to the Council September 2010.

Catch Share Performance Measures. The Fleet Visioning Project provides a clear picture for what the New England community deems to be fleet diversity and the SSB report provides clear fleet diversity indicators and performance measures.

The Fleet Vision Project (FVP), which was presented before the Interspecies Committee in April 2010, involved a 2-year process and over 250 stakeholders from throughout New England to arrive at a consensus-built common vision for the New England Groundfish fleet. The FVP defines a diverse fleet as “a geographically distributed commercial and recreational fleet that includes all gear types and boat sizes.” The report also states:

“Clearly, the community values and understands the need for many different boat sizes and gear types that provide diverse products to markets. The community strongly dislikes the possibility of a fleet that is consolidated either by ownership or geography, and participants in this project advocate many jobs and coastal community welfare over economic efficiency.”

In the second report, The SSB developed Catch Share performance measures for managers and stakeholders to gauge the success or failure of New England catch share programs. One of the performance measures most relevant to fleet diversity is ‘distributional outcomes’. The factors that will be considered under this metric include whether there has been a concentration of quota ownership, how employment opportunities have changed, and whether certain groups, communities, or regions are excluded. Example indicators may be industrial concentration indices, revenue by community/region/fishery/vessel type (e.g., small owner-operated vessels), and annual crew days.² The indicators provided by the SSB may serve to guide Council members in establishing a system of measuring success in achieving its stated Goals and Objectives related to fleet diversity.

Heading Towards a More Diverse Fleet

The road to achieve fleet diversity is marked by many obstacles. One challenge is the concern over the flexibility needed in the new Catch Share system to make fishing businesses viable. ‘Social engineering’ of the fleet post Catch Shares potentially poses a threat to businesses and their ability to adapt.

Another challenge to achieving a diverse fleet is deciding how to choose the baseline dates and/or other criteria that reflect the optimal mix of the fleet. This task is highly problematic because any pre-conceived notion for X number of vessels, with X number of gear types, from X number of ports does not factor in current biological, economic, and social realities that have drastically changed over the years.

² Kitts, D and P Pinto da Silva. “Identifying Social and Economic Performance Measures and Research Objectives for Catch Share Programs”. Presentation to the New England Fishery Management Council (January 26, 2010).

A question to consider would be: How do we allow fishermen the flexibility to adapt to a changing biological, economical, and regulatory environment, while at the same time controlling consolidation so that it does not disenfranchise important components of our fisheries, such as rural port infrastructure, owner/operators, and smaller-scale businesses?

An alternative way forward is to focus on the conditions that foster a diverse fleet. What are the conditions that allow the most vulnerable elements of a diverse fleet to be sustained? We recommend that Council members examine the ecological, economic, social and regulatory conditions and scales of fishing and management that will foster a diverse fleet with a diverse ecosystem. Examples of criteria to consider may include: affordability and access to the fishery for new entrants; size, distribution and diversity of in-shore fish stocks; market prices; market diversification; and community infrastructure.

Tools to Achieve Fleet Diversity

The Council has mainly considered one possible tool to address Fleet Diversity: accumulation limits. While accumulation limits, if designed right, may help achieve A16 Goals and Objectives, there is nothing to indicate this tool alone can achieve the desired outcomes. Research shows that, in order to achieve the conditions that permanently foster a diverse fishery, a suite of interlinked measures are necessary.³ Tools should fit into a comprehensive management plan that supports rather than eliminates diversity of the fleet, fisheries, and fish.

Based on a review of Catch Share/ITQ plans and evaluations from around the United States and the world we believe the Council should include, among other possible options, the following ways to ensure fleet diversity and prevent excessive consolidation⁴:

1. Quota set-asides that invest in fishing communities and allow affordable access for new entrants.
2. Transferability policies that foster an affordable fishery
3. Owner-Operator incentives
4. Accumulation limits

We strongly urge the Council to conduct a comprehensive review of all the available options and tools.

Conclusion

We urge Council members to make sure work on this amendment continues moving

^{3,4} See "Addressing the Ecological Implications of Consolidation and Quota Accumulation Under Amendment 16" submitted by NAMA to the Council September 2010.

forward in order to produce a working Catch Share model that has mechanisms that can achieve its stated goals and objectives. Such a model would not only yield more effective goal-oriented management of groundfish, but would be very useful in designing management in other New England fisheries and for ultimately coalescing management of different species under ecosystem-based plans. For example, public hearings are taking place to consider a new catch share system for New England's monkfish fishery.

We recognize the tremendous amount of time and effort that Council members and Council staff have already contributed in the analysis of Fleet Diversity and Accumulation Limits and we look forward to working with the Council as you move forward in this process.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Tolley", written over a faint, dotted-line signature guide.

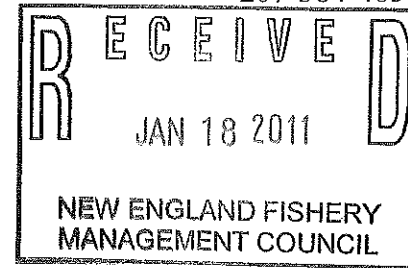
Brett Tolley
Community Organizer
Northwest Atlantic Marine Alliance

ASSOCIATED FISHERIES OF MAINE

PO Box 287, South Berwick, ME 03908

207-384-4854

January 18, 2011



Mr. Rip Cunningham, Chair
Groundfish Committee
New England Fishery Management Council
50 Water Street
Newburyport, MA 10950

Dear Rip:

I write, on behalf of Associated Fisheries of Maine (AFM), to provide comment on the draft scoping document for an amendment to establish accumulation caps and address fleet diversity.

We believe that the objectives, as stated in the document, are not clearly defined.

Objective 1 is "*to consider the establishment of individual accumulation caps for the groundfish fishery*". An accumulation cap is a tool that may achieve a social objective, but is not an objective in itself. If the Council believes that accumulation of groundfish fishing privileges should be limited, the document should state the social objective to be achieved by such limitation.

The document states that the Council is concerned that "*low catch limits, in conjunction with expanded sector management, will lead to excessive consolidation*", but unfortunately the document does not define "excessive consolidation".

AFM shares the Council's "*concerns related to maintaining the historical makeup of the fleet, as well as an interest in keeping active and thriving fishing ports throughout New England*". However, we do not understand, nor does the document describe, how "*limits on the amount of allocations that individuals or groups may control*" will address those concerns.

The document also suggests that certain management measures "*such as new entrant set-asides, owner-onboard requirements, and community quotas*" will "*promote diversity*" but does not describe how those measures would achieve that objective.

Capacity reduction in groundfish has been a recognized need for several years beginning with Amendment 5 (moratorium on permits) and continuing through Amendments 13 and 16. Amendment 13 included a number of programs intended to promote capacity reduction and consolidation - a new allocation of DAS that removed unused days from

cc: An, ak, jm

the baseline, DAS leasing, DAS transfer¹, and sector management, and Amendment 13 describes the potential benefits of consolidation².

Amendment 16 continued to promote consolidation by authorizing the stacking of groundfish and scallop permits, by removing the DAS transfer tax³, and continued to recognize that sector implementation would result in consolidation.

Given the history of the Council's recognition of a need for consolidation in the groundfish fishery, it remains unclear why the Council is suggesting that "excessive consolidation" must be prevented, without providing a definition of excessive consolidation, and without providing documentation that excessive consolidation is indeed occurring.

The purpose of this letter is to encourage the Committee and Council to provide a clear statement of the problem that this Amendment proposes to address.

Sincerely,

M. Raymond

Maggie Raymond
Associated Fisheries of Maine

¹ Amendment 13, Executive Summary, Measures to Control Capacity: Each of the capacity proposals is designed to provide greater economic opportunity and flexibility in all fisheries while **maintaining the character of the existing fleet**, and to achieve **some long-term reduction in the number of vessels permitted to fish in the Northeast fisheries** (emphasis added).

² Amendment 13, , 3.4.16.1 Sector Allocation: One of the major benefits of self selecting sectors is that they provide incentives to self-govern, therefore, reducing the need for Council mandated measures. **They also provide a mechanism for capacity reduction through consolidation.** 3.4.16.1.1 Formation of a Sector, The motivation to form or join a sector could be for several reasons: a desire of its members **to consolidate operations in fewer vessels (reducing the cost of operations and possibly facilitating the profitable exit of some individual vessel owners from the fishery (emphasis added).**

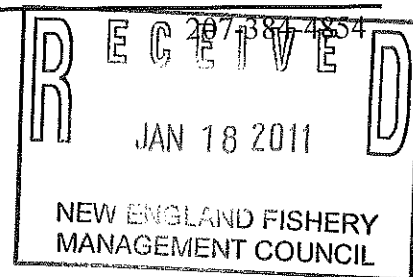
³ Amendment 16, page 683, To date, relatively few vessels have participated in the DAS transfer program even though the conservation tax on transfers was reduced in Framework 40B while other provisions of the DAS transfer program were further modified in Framework 42 to make the transfer program more attractive. **Neither of these actions has been successful in promoting the desired effect of increased consolidation in the groundfish fishery** (emphasis added).

ASSOCIATED FISHERIES OF MAINE

PO Box 287, South Berwick, ME 03908

January 18, 2011

Mr. Rip Cunningham, Chair
Groundfish Committee
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950



Dear Rip:

I write, on behalf of Associated Fisheries of Maine (AFM), to convey concerns about the draft Amendment 17.

AFM disagrees with the National Marine Fisheries Service (NMFS) assertion that the impacts of this Amendment are “wholly administrative in nature, and the only entities directly affected are the state fishery management agencies operating NOAA-funded permit banks. Therefore, a detailed description of the environmental components including the biological resources, physical environment, and socio-economic structure that could be affected by the alternatives under consideration is not necessary.”

Obviously, the NMFS intends for these permit banks to achieve specific social and/or economic objectives, otherwise they would not have stipulated that the States may make the fishing opportunities available only to certain fishing communities and vessel classes. Therefore, the specific objective or objectives of the agreement between the NMFS and the States should be defined and then analyzed in Amendment 17 to document that those objectives will be met. Additionally, AFM asserts that the stipulations of the agreement between NMFS and the States will have negative socio-economic impacts on individuals and/or communities that do not qualify for these privileges, and those impacts too should be documented.

AFM urges the Committee and the Council to insist that the NMFS complete the NEPA and RFA analyses for Amendment 17 that are required by law.

Sincerely,

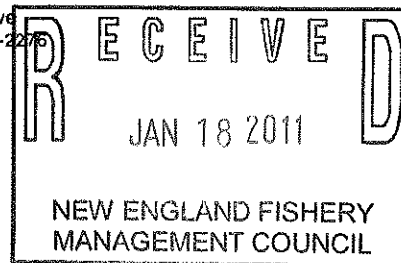
M. Raymond

Maggie Raymond



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

JAN 18 2011



Paul J. Howard
Executive Director
New England Fishery Management Council
80 Water Street
Newburyport, MA 01950

Dear Paul:

This letter responds to your December 16, 2010, letter regarding the Council's request that the National Marine Fisheries Service (NMFS) waive the Northeast Multispecies Amendment 16 administrative requirement that sector Annual Catch Entitlement (ACE) transfers be completed within 2 weeks of the end of the fishing year (May 14), given the concern that additional time may be needed to reconcile final sector ACE balances with NMFS's databases.

Based on preliminary Regional Office discussions, we agree that final reconciliation of NMFS and sector catch information will not be realized in time for sectors to balance their books by May 14 and, therefore, additional time will be necessary for sectors to transfer ACE. Given that this also affects the timeline for processing of ACE transfers by NMFS, NMFS is proposing in the Framework Adjustment 45 proposed rule that the phrase "unless otherwise instructed by NMFS" be added to references to the deadlines for end of year ACE transfers and processing in the regulatory text at 50 CFR 648.87(b)(1)(iii)(C) and (viii).

We will communicate with you and groundfish sectors on this issue as we get closer to the end of the fishing year to provide a more realistic deadline for FY 2010 ACE transfers. Once reconciliation is complete we will notify you and sectors as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. Kurkul".

for Patricia A. Kurkul
Regional Administrator

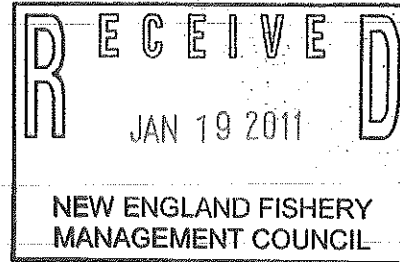




CITY OF NEW BEDFORD

SCOTT W. LANG, MAYOR

December 17, 2010



Mr. Doug Grout
Chair, Herring Oversight Committee
New Hampshire Fish and Game Department
225 Main Street
Durham, NH 03824

Dear Chairman Grout and Members of the Herring Oversight Committee,

Thank you for speaking with me Friday afternoon. From our conversation, I understand that the Oversight Committee meeting planned for Monday, December 20, will focus on management measures to address river herring bycatch. However, considering the urgency of addressing the haddock bycatch cap, I request that you address the issues presented in this letter in your discussions.

It is difficult to fathom how Georges Bank haddock could be a choke species. Artificially low haddock bycatch caps threaten to shut down the herring fleet, which has caught only 80% of their haddock allocation.

In 2003 an unprecedented haddock year-class recruited on Georges Bank and was subsequently encountered by midwater herring trawlers. The juvenile haddock behaved and looked similar to the sea herring and were sold as lobster bait. When the Maine DMR sampled the catches, the haddock was found. This led the New England Fishery Management Council to establish a haddock catch cap in the sea herring fishery. Known as FW 43, the cap was established based on the recommendation of the Science Center's groundfish biologist, who suggested a 2% cap would not jeopardize the haddock stock. However, during Council deliberations, Dave Simpson (CT) said that given the low herring fishery observer coverage at the time (< 5%), the bycatch cap should be lower. Simpson proposed 0.2%. There was no scientific basis for 0.2%. Now that at-sea observer coverage on the midwater trawl fishery has been increased with approximately 100% coverage of the Georges Bank herring fishery, there is no biological reason not to revisit the haddock cap and raise it.

Increasing the herring cap to 2% of the haddock quota would have a negligible effect on other fisheries. Specifically the multispecies fleet has caught less than 10% of the haddock quota for the past several years. Even if the midwater trawl fishery were to reach the 2% quota-cap, the overall catch of haddock would remain significantly below the overfishing level.

rec'd @ 1/19/11 Groundfish Ctr.

Sacrificing the ability of the herring fishery to achieve optimal yield based on a bycatch-cap that is, for all intensive purposes, insignificant is counter to the tenets of the Magnuson-Stevens Act. We would appreciate your support for increasing the haddock bycatch-cap from 0.2% to 2.0%. Given the chronic underfishing of the haddock stock and the potential economic harm a herring shut down would cause, an increase in the haddock cap is justified for the herring industry.

This adjustment of the cap will have a positive effect on jobs and the economy in Massachusetts.

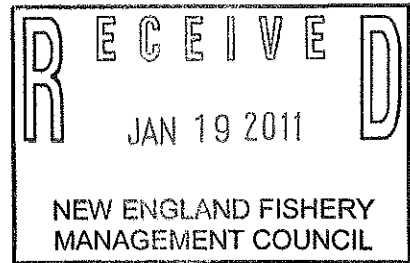
I sincerely appreciate your consideration of this request

Best regards for the holiday season.



Scott W. Lang
Mayor

cc: Mark Gibson
Rodney Avila
Frank Blount
Jim Fair
Mike Leary
Glen Libby
John Pappalardo
David Pierce
Terry Stockwell
Mary Beth Tooley



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

December 27, 2010

The Honorable Gary Locke
Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

RE: Rep. Frank Request for Emergency Action to Increase the Haddock Bycatch Cap

Dear Secretary Locke:

I am writing on behalf of the Herring Alliance¹ to ask that you deny the request by Representative Frank, made on behalf of the NORPEL Corporation, for an emergency action to increase the haddock bycatch cap for the Atlantic herring mid-water trawl fishery.² The requested action does not meet the standards for emergency action under the Magnuson-Stevens Conservation and Management Act ("Magnuson-Stevens Act") and NMFS guidelines, and relies upon an inaccurate understanding of the cap and other facts related to this fishery.

Moreover, new NFMS data received in recent days shows that the midwater trawl industry is in fact catching groundfish at alarming rates inside groundfish closed areas, including inside the groundfish HAPC located within Groundfish Closed Area 2 on Eastern Georges Bank.³ This area is regarded as so important to groundfish recovery and so sensitive that even proposals for groundfish tagging research by hook fishermen have been denied in the past.⁴ The new data show that it is not simply isolated hauls or trips that are causing midwater trawl gear bycatch problems because even if examined at the fleetwide level for the entire fishing season to date, midwater trawl operations exceed the existing regulatory threshold authorizing the NMFS Regional Administrator to ban midwater trawlers from fishing inside groundfish closed areas.⁵

Rather than granting Mr. Frank's emergency request, which would only increase bycatch in violation of the Magnuson-Stevens Act, the Secretary and NMFS should implement alternative approaches designed to reduce bycatch and protect sensitive groundfish areas. Such measures should exclude midwater trawlers from fishing inside groundfish closed areas and implement an effective regulation requiring midwater trawl vessels to fish in the middle of the water column, instead of on the bottom where groundfish interactions are inevitable.

¹ The Herring Alliance includes 34 member organizations and represents nearly 2 million individual members. See membership at: www.herringalliance.org/alliance-members.

² Letter from U.S. Representative Frank to Commerce Secretary Locke (November 30, 2010).

³ Northeast Fisheries Observer Program, Observed Trips That Fished in Closed Areas 1 & 2 - 2010 (Dec 22, 2010).

⁴ Personal communication with Cape Cod Commercial Hook Fishermen's Association (Dec 22, 2010).

⁵ 50 C.F.R. §648.81(a)(2)(iii). The data also show that the threshold is has been exceeded at the trip level on several occasions inside Closed Area 1.

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rec'd 1/19/11 GF OS ck. mtg.

Emergency Action to Increase Haddock Bycatch Cap Would Violate the Magnuson-Stevens Act

Representative Frank's request seeks to change via an emergency regulation the lawful promulgated 2006 rule that established the haddock bycatch cap in New England's groundfish fishery management plan ("Framework 43").⁶ The haddock bycatch cap was developed by the New England Fishery Management Council with the participation of Atlantic herring midwater trawl fishermen, groundfishermen, other stakeholders, and local, state and federal regulators. Its purpose was to comply with the Magnuson-Stevens Act's mandates to minimize groundfish bycatch in the herring fishery, while continuing efforts to end overfishing and rebuild New England's depleted groundfish populations.⁷ This action was reviewed and approved by your office.⁸

The Magnuson-Stevens Act does not authorize waiving its conservation requirements via an emergency rule under these circumstances. Any emergency regulation that changes any existing fishery management plan is treated as an amendment to that plan and as such must meet the Act's national standards, including National Standard 9's mandate to minimize bycatch.⁹ National Standard 8, addressing economic considerations, provides that adverse economic impacts on fishing communities shall be minimized "to the extent practicable" and "consistent with the conservation requirements of this [Act] (including the prevention of overfishing and rebuilding of overfished stocks)."¹⁰

Emergency regulations must comply with these statutory requirements. Any emergency action that *increases* the existing haddock bycatch cap would, by definition, almost certainly violate the Magnuson-Stevens Act's National Standard 9 requirement to minimize bycatch. It could also violate National Standard 1 and the Act's related requirements to

⁶ See Framework Adjustment 43, Final Rule, 71 Fed. Reg. 157,46871 (Aug. 15, 2006); see 50 C.F.R. 648.85; 648.86(a)(3)(iii) ("Framework 43").

⁷ See, e.g., Framework Adjustment 43 to the Northeast Multispecies Fishery Management Plan, New England Fishery Management Council at 3, 36-39.

⁸ See Framework 43 Final Rule, 71 Fed. Reg. at 46871, 75.

⁹ 16 U.S.C. § 1855(c)(3) ("Any emergency regulation or interim measure which changes any existing fishery management plan or amendment shall be treated as an amendment to such plan for the period in which such regulation is in effect."); 62 Fed. Reg. 44421, 44421 (Aug. 21, 1997) ("In order to approve an emergency rule, the Secretary must have an administrative record justifying emergency regulatory action and demonstrating its compliance with the [Magnuson-Stevens Act's] national standards" for fishery conservation and management at 16 U.S.C. § 1851(a)). See also *Traveler Diana Marie v. Brown*, 918 F.Supp. 921, 928 (E.D.N.C. 1995) ("It is clear that the National Standards are to be adhered to even when the Secretary takes emergency action."), *aff'd* 91 F.3d 134 (4th Cir. 1996) (per curiam). A recent memorandum from the Congressional Research Service, Memorandum from Adam Vann, Congressional Research Service, to Hon. Barney Frank (Sept. 13, 2010), is not to the contrary. That memorandum stands only for the unexceptional proposition that in cases of economic emergency, such as where a fishery cannot open without valid regulations in place, see *Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Calif. 1993), *aff'd*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996), the emergency provisions of the MSA provide a mechanism for the Secretary to act. The memorandum does not conclude that the content of emergency rules can violate the other provisions of the MSA.

¹⁰ 16 U.S.C. § 1851(a)(8)

prevent overfishing and rebuild overfished stocks as increasing amounts of juvenile haddock, cod, and other groundfish are caught and killed in the small mesh used by these vessels.

There is No Emergency

Guidance from the National Marine Fisheries Service provides that the emergency provisions of the Magnuson-Stevens Act can only be invoked in limited circumstances not present here. Although the midwater trawl industry has approached the haddock bycatch cap in 2010 for the first time, it hardly constitutes an emergency as contemplated by the Magnuson-Stevens Act and Agency guidelines. Under these guidelines, the Secretary can only invoke emergency authority to address conditions resulting from "recent, unforeseen events or recently discovered circumstances."¹¹

The haddock bycatch cap has been in place since 2006. It resulted from an extensive public process that involved the regulated industry, other fishermen, fisheries managers, scientists, and other interested members of the public. When the cap was established, it was clear that it was specifically *not* designed to fluctuate with observer coverage levels. "While the Council may have initially considered the percent observer coverage as the basis for the 0.2-percent cap, it ultimately specified it as an absolute value."¹² In fact, in the years following the cap's implementation when observer coverage levels have regularly been below the anticipated observer coverage levels, the cap was never adjusted downward. While this year observer coverage rates so far appear to be somewhat above the originally anticipated 20 percent level, they are no where "at or near 100%" for the fishery.

Further, contrary to the assertions made in the emergency request, the cap has not been reached and therefore is not "restricting access" to any fishing grounds. Neither are any fishing areas "set to close at the end of December." The most recent data through December 18, 2010 indicates that nearly 20 percent of the available cap quota remains available.¹³ Weekly landing data on the cumulative cap total is has been made available to the industry throughout the fishing year, and this information is posted on the NMFS Northeast Regional Office's website.¹⁴ As indicated in the materials attached to Mr. Frank's request, for nearly three months the industry has been slowly ramping up its efforts seeking an increase in the cap, and this matter was discussed at the November 2010 meeting of the New England Fishery Management Council. The Council did not find that an emergency exists, but did initiate a framework action to examine groundfish bycatch issues associated with the cap.¹⁵

Thus, Norpel and Mr. Frank have been aware of the cap and how it works since 2006. Norpel and the rest of the industry participated in the creation of the cap and have been made

¹¹ 62 Fed. Reg. at 44422.

¹² See Framework 43 Final Rule, 71 Fed. Reg. at 46873.

¹³ See http://www.nero.noaa.gov/ro/fso/reports/reports_frame.htm (last visited Dec 27, 2010).

¹⁴ *Id.*

¹⁵ See <http://www.nefmc.org/actions/motions/motions-nov10.pdf> (motion "to create Framework Adjustment 47 to address issues associated with the haddock bycatch cap in the sea herring fishery for implementation in 2011").

aware of the accumulating haddock bycatch on a weekly basis throughout the fishing year. And this matter has been discussed for several months, considered and rejected by managers at the Council, and instead an action has been initiated to examine the issue in a manner consistent with the Act and its implementing regulations. There is no colorable claim that an emergency exists that needs to be addressed by the Secretary's office.

Alternative Actions are Warranted

The haddock bycatch cap is working as intended -- as a backstop to [what should be] meaningful efforts by the midwater trawl industry to avoid and minimize bycatch. For its part, NMFS has monitored the accumulated bycatch of haddock and informed the industry of its monitoring results. As a result, the industry has recently taken steps to avoid reaching the cap, and in turn has decreased its rate of bycatch by avoiding fishing in the areas where bycatch was occurring at the fastest rates.¹⁶ Unfortunately, longer term voluntary efforts by this industry to avoid or minimize groundfish bycatch in the past have not succeeded, despite promises by the industry to the contrary.¹⁷

An increase in the bycatch cap as proposed by Mr. Frank and Norpel would only increase bycatch in violation of the Magnuson-Stevens Act and place the most sensitive areas of the ocean -- including the only HAPC currently recognized in New England -- at greater risk. Instead, the Secretary and NMFS should implement alternative approaches designed to reduce bycatch and protect sensitive groundfish areas, including measures to exclude midwater trawlers from fishing inside such closed areas (including the groundfish HAPC) and to implement an effective regulation requiring midwater trawl vessels to fish their gear in the middle of the water column.

The Regional Administrator already has the authority to exclude midwater trawlers from groundfish closed areas under the circumstances and should do so immediately.¹⁸ Closed areas are by definition areas where groundfish abundance is likely to be high and areas where groundfish spawn, thus are critical to the future sustainability of the fishery. It is logical that efforts to minimize bycatch should begin by avoiding areas where groundfish are most abundant. In addition, recent observer program data from the Northeast Fisheries Science Center shows that midwater trawlers fish at the bottom of the water column where groundfish interactions are inevitable, instead of in the middle of the water column, as promised, where the spatial separation of the gear from groundfish would greatly reduce groundfish bycatch.¹⁹ The

¹⁶ See Patricia A. Kurkul, Regional Administrator, Permit Holder Letter (October 27, 2010).

¹⁷ See Final Amendment 1 to the Atlantic Herring Fishery Management Plan (with FSEIS and IRFA), Section 7.A.1.5.9, *Industry Initiatives -- Voluntary Bycatch Reporting/Avoidance Program in 2003*, pp 371-3 (elaboration of an industry program to avoid groundfish bycatch proposed by the East Coast Pelagic Association, similar to a voluntary program currently "proposed" by the industry to avoid river herring bycatch in the context of Draft Amendment 5 to the Atlantic Herring Fishery Management Plan).

¹⁸ 50 C.F.R. §648.81(a)(2)(iii).

¹⁹ The current definition of mid-water trawl gear does not include an effective provision actually causing the gear to be fished in the "middle" of the water column. Instead it only vaguely refers to the design of the gear stating "*Midwater trawl gear means trawl gear that is designed to fish for, is capable of fishing for, or is being used to*

Atlantic herring fishery is directed at a pelagic species and the gear was originally intended to be fished in the middle of the water column where these species are most often found. Regulatory action must be taken to ensure midwater trawl gear is fished in the middle of the water column in order to avoid unnecessary interactions with groundfish species.

* * *

Under the circumstances discussed here, NMFS policy is clear that the limited authority to take emergency action under the Magnuson-Stevens Act does not permit the Secretary to overturn its haddock bycatch cap rule implemented to minimize the bycatch of haddock and other groundfish; a vital part of efforts to end overfishing of these stocks and rebuild their populations. In short, the Act does not give the Secretary the authority to promulgate an emergency regulation that would override the Council process, reverse a recent secretarial decision, and violate the conservation provisions of the act. On behalf of the Herring Alliance, I urge you to leave in place the haddock bycatch cap as currently designed and take other meaningful actions designed to reduce groundfish bycatch and protect areas "closed" in order to protect groundfish.

Thank you for your attention to this important matter.

Sincerely yours,



Roger Fleming
Attorney

Cc Dr. Jane Lubchenco, Administrator, NOAA
M. Eric Schwabb, Assistant Administrator, NMFS
Ms. Patricia Kurkul, Regional Administrator, NMFS
Mr. Gene Martin, Deputy General Counsel, NMFS
Mr. John Pappalardo, Chairman, NEFMC

fish for pelagic species, no portion of which is designed to be or is operated in contact with the bottom at any time. The gear may not include discs, hobbins, or rollers on its footrope, or chafing gear as part of the net." 50 C.F.R. § 648.2.

