

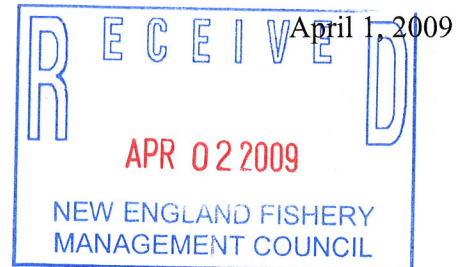


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Via electronic mail

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



Dear Mr. Howard:

I am writing on behalf of the Herring Alliance regarding the New England Fishery Management Council's scheduled discussion on April 8, 2009 of the recent data on groundfish bycatch by herring vessels in groundfish closed areas. I have enclosed a copy of a December 5, 2008 letter to Regional Administrator Kurkul demonstrating that under existing regulations the RA has broad authority to exclude midwater trawl vessels from fishing in groundfish closed areas when groundfish bycatch in closed areas reaches the levels recently reported by the National Marine Fisheries Service.

Midwater trawlers should be held to the same standard as groundfishermen and all other fishermen in New England seeking access to groundfish closed areas. Fishermen using bottom trawls ("Ruhle Trawl"), demersal longlines, and scallop dredges were all denied access to groundfish closed areas until they established through rigorous Exempted Fishery Permits (EFP) that their fishing activities would not undermine measures established to conserve and manage the groundfish fishery. In contrast, midwater trawl vessels received unfettered access to groundfish closed areas as a result of only 7 herring tows and 6 mackerel tows.¹ Even these tows were conducted under observer protocols that allowed fish to be dumped unobserved and it appears that some or all may not have even occurred inside actual groundfish closed areas.²

Further, the herring midwater trawl industry's claim that their "fisheries capture negligible amounts of regulated multispecies due to the spatial separation of pelagic and demersal species in the water column,"³ have been proven false. While this claim was the basis for allowing midwater trawl access to closed areas, evidence from the Northeast Fisheries Observer Program (NEFOP) shows that these vessels fish on the bottom where there is no spatial separation between groundfish and herring,⁴ and that significant amounts of groundfish are in

¹ See Framework 18: Northeast Multispecies FMP, 11-12 (July 23, 1997)

² See *id* at 9-11.

³ See 63 Fed. Reg. 7727, 7728 (February 17, 1998).

⁴ See e.g., A. van Atten, Operations Coordinator, Northeast Fisheries Observer Program. Presentation to Herring Oversight Committee of New England Fisheries Management Council, (May 22, 2008) (www.nefmc.org/herring/index.html) (showing that fishing occurs primarily during the daylight hours); see



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fact caught by herring midwater trawl vessels in groundfish closed areas.⁵ As discussed in the enclosed letter, the RA has the authority, after consulting with the council, to prohibit any or all midwater trawl activities in closed areas if she determines that the bycatch of groundfish “exceeds, or is likely to exceed,” 1 percent of herring harvested by any individual fishing vessel.⁶ While the existing data documents that the threshold for action has been exceeded at the trip level on at least two occasions and the tow level on at least occasions, when taking into consideration the limitations of the existing observer program there is a clear basis for action under the “likely to exceed” test. A clear example of those limitations may be found in the data presented by the NEFOP in November 2008, which show that no observers were deployed into Closed Area I in the second week of October, despite the detection of significant bycatch in the first week of that month and the fact that herring removals from the area doubled.

The Herring Alliance urges the Council to take action on April 8 that will provide the RA with the clear direction she needs to immediately exclude midwater trawl vessels from closed areas. The Council should also continue its work as part of herring Amendment 4 to develop criteria that would guide any future access through exempted fishing permits. Taking these actions would provide equal treatment for midwater trawl vessels when compared with other fishermen in New England that seek access to groundfish closed areas.

Thank you for your attention to this important matter.

Sincerely yours,

/s/ Roger Fleming
Roger Fleming
Attorney

Cc NEFMC
 Mr. Gene Martin, Deputy General Counsel, NMFS

Memorandum from Lori Steele, Herring Plan Development Team Chairman, Atlantic Herring Stock/Fishery Update 17-18 (September 7, 2007)(summarizing NMFS observer program data showing the bycatch of metal debris).

⁵ Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery (March, 2009).

⁶ 50 C.F.R. §648.81(a)(2)(iii)(emphasis added).

1042 PEABODY ROAD, APPLETON, ME 04862
T: 978.846.0612 F: 207.785.2231 E: rfleming@earthjustice.org W: www.earthjustice.org



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December 5, 2008

Via electronic mail

Pat Kurkul, Regional Administrator
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

Dear Ms. Kurkul:

I am writing on behalf of the Herring Alliance to follow-up on our November 12 letter regarding the recent herring midwater trawl fleet's bycatch of haddock in groundfish Closed Area 1, and the related actions taken by the New England Fishery Management Council (NEFMC) at its November meeting. At the NEFMC meeting concerns were raised about the meaning of some aspects of the relevant closed area regulation. *See* 50 C.F.R. §648.81(a)(2)(iii). This letter provides our views on how this regulation should be interpreted given the information available to us.

The Alliance's letter requested that you consult with the NEFMC during its meeting consistent with the closed area regulations and take action to restrict or permanently prohibit all midwater trawl activities in groundfish closed areas. As a result of the NEFMC's discussion, the Council approved a motion requesting that NMFS evaluate whether the requirements for midwater trawl vessel access to the closed areas are being met and if they are not the NEFMC recommended that access be prohibited. A later motion made Council review of the criteria for future access to groundfish closed areas a priority for a 2009 herring management action.

The closed area regulation states as follows:

“fishing with pelagic midwater trawl gear, consistent with §648.80(d), provided that the Regional Administrator shall review information pertaining to the bycatch of regulated NE multispecies and, if the Regional Administrator determines, on the basis of sea sampling data or other credible information for this fishery, that the bycatch of regulated multispecies exceeds, or is likely to exceed, 1 percent of herring and mackerel harvested, by weight, in the fishery or by any individual fishing operation, the Regional Administrator may place restrictions and conditions in the letter of authorization for any or all individual fishing operations or, after consulting with the Council, suspend or prohibit any or all midwater trawl activities in the closed areas.”

50 C.F.R. §648.81(a)(2)(iii). The questions about the precise meaning of this regulation centers on the term “fishing operation,” which does not appear to be defined in regulation. Specifically, whether data clearly indicating that an individual vessel has exceeded the 1 percent threshold on



a single trip can trigger action that would restrict or exclude one or all midwater trawl vessels from groundfish closed areas.

First, the Federal Register announcing the final rule providing access to closed areas makes clear that the term “fishing operation” applies to individual vessels. The term fishing operation was used interchangeably with the term “individual vessel” in order to indicate that the new rule applied to midwater trawlers fishing in different fisheries and for different species. The term fishing operation is explained on page 7728 in the preamble to the final rule, appearing at the conclusion of a paragraph in which reference is made to individual fishing vessels three times. *See* 63 Fed. Reg. 7727, 7728 (February 17, 1998). This paragraph explains that the rule was in response to the midwater trawl industry’s request for access to closed areas by vessels operating in joint ventures or the directed domestic fishery in order to maximize the harvesting and/or processing capacity of herring and mackerel vessels. *See id.* It is clear from the use of the term fishing operation in this paragraph that it was used as a way to encompass all of the individual vessels participating in joint ventures and the directed domestic fishery, and in turn that the authority provided to the RA to restrict or exclude any or all vessels could be triggered by the actions of an *individual vessel*. The intent of the regulation was to address the impacts of closed areas on individual vessels, and the criteria for access contained in the regulation in turn can be applied to individual vessels. If the actions of an individual vessel could not be used as a trigger for action by the RA, but rather were to be accumulated with the actions of other vessels or the entire fleet, then the policy goal of eliminating the incentives to catch groundfish would be defeated.¹

For similar reasons, it is consistent with the regulation to base the determination of whether a fishing operation has exceeded the 1 percent threshold for RA action on a single trip by a midwater trawl vessel. The closed area access rule itself, along with the preamble to the rule and the Framework 18 document, do not specifically address this issue. As you are aware, there is an Amendment under way at the NEFMC intended to address monitoring of the midwater trawl fishery. Some of the identified problems with the current monitoring program include an overall insufficient level of observer coverage necessary to provide precise and accurate bycatch assessments, and problems with the existing protocols that allow significant portions of the catch by vessels containing observers to go unobserved due to actions such as presorting, pumping to unobserved vessels, and dumping (e.g., “slippage”). *See e.g.*, A. van Atten, Operations Coordinator, Northeast Fisheries Observer Program. Presentation to Herring Oversight Committee of New England Fisheries Management Council, (May 22, 2008) (www.nefmc.org/herring/index.html); T. Rudolph, Cape Cod Commercial Hook Fishermen’s Association. Shore Based Monitoring in the Atlantic Herring Fishery: Translation of Successful U.S. Models to New England including Context of Shore-Based Tools within Comprehensive Catch Monitoring Programs, Presentation to Herring Oversight Committee of NEFMC, 2 (Sept. 30/Oct. 1, 2008) (www.nefmc.org/herring/index.html). These problems could be less significant in the closed area context if the underlying premise for access

¹ *See* Framework 18: Northeast Multispecies FMP, 1 (July 23, 1997) (Indicating that the regulation was intended in part to eliminate incentives for individual midwater trawl vessels to target groundfish).



to groundfish closed areas – that midwater trawl vessels have only “negligible” amounts of groundfish bycatch – were true. *See* 63 Fed. Reg. at 7728. However, we now know this is not true. Thus, given the uncertainties in the data being collected and the policy goal contained in the rule to prevent the bycatch of groundfish, and the terms of the regulation itself, it is consistent with the closed area access rule for the RA to make the determination that the 1 percent threshold has been exceeded based on a single haul or trip.

Finally, I would also like to draw your attention with that part of the regulation that refers to “fishing with pelagic midwater trawl gear, consistent with 50 C.F.R. § 648.80(d).” When access to closed areas was provided to herring and mackerel and midwater trawl vessels, part of the justification provided by the industry was that such “fisheries capture negligible amounts of regulated multispecies due to the spatial separation of pelagic and demersal species in the water column.” 63 Fed. Reg. at 7728. It is constantly brought to the attention of the Herring Alliance that herring midwater trawl vessels fish on or near the bottom, regularly making contact with the bottom, in violation of the definition of midwater trawl gear. *See* 50 C.F.R. §658.2. Moreover, it is clear that when “midwater” gear is being fished on or near the bottom it is being fished at a level in the water column where demersal species are found. Thus the rationale used to support the closed area access rule based on the premise that the fishery would avoid catching groundfish by taking advantage of the spatial separation of pelagic and demersal species is no longer valid. We encourage you to consider the available data and information related to where in the water column “midwater trawl” gear is actually being fished, such as observer record, data on the time of day midwater trawling is occurring, and data collected from vessel electronics, when determining whether the requirements for midwater trawl access to closed areas is being met, or whether these vessels are otherwise operating in compliance with the fishery’s applicable regulations.

This letter is not intended to try to summarize for you all of the data and information available regarding the amount of groundfish bycatch occurring in closed areas by midwater trawl vessels. As indicated in our November 12th letter, however, the Northeast Fishery Observer Program (NEFOP) has identified at least one very large haul of groundfish in October 2008 containing over 20,000 pounds and many additional tows where smaller, but significant, amounts of groundfish bycatch were also observed. The NEFOP information publicly available also indicates that observer coverage dropped after the October bycatch problem was first identified and that at least several hauls went unobserved even when an observer was present. It is our view that under the circumstances, this information alone provides ample authority for a determination by you that it is likely that the 1 percent threshold has been exceeded.

The regulations provide you with broad authority to take action in response to the recent groundfish bycatch evidence. In our November 12 letter we outlined several restrictions that might help address the situation ranging from prohibiting pair-trawling to time outs in the fishery when groundfish bycatch is detected.² We agree, however, with the view taken by the Council,

² Specifically, the November 12 letter suggested the following immediate restrictions: (1) prohibit pair-trawling; (2) require that midwater trawling only be allowed when there is an observer on board; (3) require that all midwater



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after lengthy and careful deliberation, that prohibiting all midwater trawling is appropriate. This would allow the Council to determine as part of a future action under what conditions, if any, access should again be allowed.

Thank you for your attention to this important matter.

Sincerely yours,

/s/
Roger Fleming
Attorney

Cc Mr. Gene Martin, Deputy General Counsel, NMFS
 Mr. John Pappalardo, Chairman, NEFMC

trawl gear be fished no closer than 20 feet of the bottom, and require that the depth of the gear be reported and verified using information from midwater trawl ships' onboard electronics; (4) prohibit the use of chafing gear, all contact with the bottom, and institute inspections of doors and/or other gear for evidence of bottom contact; (5) require that all catch be brought on board and sampled by observers (no at-sea dumping of unobserved catch), and; (6) that in the event haddock or other groundfish bycatch is detected in an amount greater than 100 pounds of multispecies per tow that all midwater trawling in such closed area be suspended for 24 to 48 hours.

1042 PEABODY ROAD, APPLETON, ME 04862
T: 978.846.0612 F: 207.785.2231 E: rfleming@earthjustice.org W: www.earthjustice.org