

## Correspondence

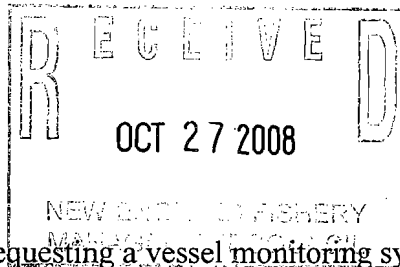


UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
NORTHEAST REGION  
One Blackburn Drive  
Gloucester, MA 01930-2298

#5a

OCT 22 2008

Jim Ford  
140 Willow Rd.  
East Kingston, NH 03827



Dear Mr. Ford:

Thank you for your recent email requesting a vessel monitoring system (VMS) declaration to allow vessels to come into port due to safety concerns, but to be charged extra days-at-sea to account for the amount of cod and yellowtail flounder caught.

Your request would require a modification to the existing cod running clock provision to allow a vessel to land groundfish beyond what is allowed by the current trip limits based upon the time the vessel actually fished. This was brought to the attention of the New England Fishery Management Council (Council) and its VMS/Enforcement Committee earlier this year. At its April 2008 meeting, the VMS/Enforcement Committee concluded that there were no technical limitations to implementing a VMS declaration as you request, but noted that previous enforcement concerns regarding the cod running clock provision still exist and may actually increase if the cod running clock provision is expanded. Despite these enforcement concerns, the VMS/Enforcement Committee stated that this was ultimately a policy decision and recommended that the Council should decide whether the cod running clock provision should be expanded. The Council remanded the issue to the Groundfish Oversight Committee. At its June 2008 meeting, the Groundfish Oversight Committee discussed the topic at length, but did not revise the cod running clock or VMS declarations to accommodate the issue you raised, citing earlier enforcement concerns and concerns that such changes could create incentives to target cod.

Thank you for bringing this issue to my attention. I take very seriously all safety concerns raised by the fishing industry. Please be aware that in situations such as those you describe, NMFS recommends that vessel operators contact the U.S. Coast Guard or NMFS enforcement and discuss their particular situation to ensure the safety of the vessel and crew.

Sincerely,

*Patricia A. Kurkul*  
for Patricia A. Kurkul  
Regional Administrator

cc: Paul Howard, New England Fishery Management Council



*cc: TN, CBK, Council (10/30)*



#56

New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116  
John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

October 30, 2008

Ms. Patricia Kurkul  
Regional Administrator  
NOAA/NMFS  
55 Great Republic Drive  
Gloucester, MA 01930

Dear Pat:

On October 8, 2008, the Council accepted the recommendations of the Transboundary Management Guidance Committee Total Allowable Catches (TACs) in the U.S./Canada area. The motion passed was:

“The Council recommends the following U.S./Canada area TACs for FY 2009:  
Eastern Georges Bank cod: 1,700 mt (527 mt U.S./1,173 mt Canada)  
Eastern Georges Bank haddock: 30,000 mt (11,100 mt U.S./18,900 mt Canada)  
Georges Bank yellowtail flounder: 2,100 mt (1,617 mt U.S./483 mt Canada).”

Consistent with Amendment 13 and 50 CFR 648.85(a), please implement these TACs for FY 2009. As always, please call me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Paul". The signature is stylized and cursive.

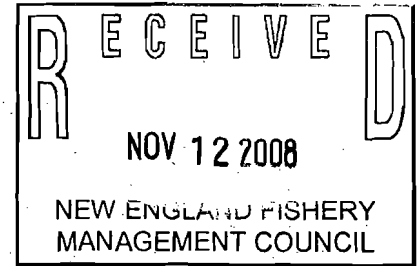
Paul J. Howard  
Executive Director





CAPE COD COMMERCIAL HOOK FISHERMEN'S ASSOCIATION, Inc.  
210-E Orleans Road  
North Chatham, MA 02650  
508-945-2432 • 508-945-0981 (fax)  
www.ccchfa.org • contact@ccchfa.org

#50



Pat Kurkul, Regional Administrator  
NOAA Fisheries Northeast Regional Office  
55 Great Republic Drive  
Gloucester, MA 01930

November 10, 2008

RE: Access to Multispecies Closed Areas by Midwater Trawl Vessels

Dear Pat,

As we did in August 2007, CCCHFA again respectfully requests inclusion of a prohibition on midwater trawling (single and pair) in all Groundfish Closed Areas in Amendment 16 to the Multispecies Fishery Management Plan. On behalf of the longliners represented by CCCHFA, I ask that you consider this in your capacity as a Council member.

But now the problem is even more urgent, and as such we are also appealing to you in your capacity as the RA. Herring vessels are now catching haddock inside Closed Area I, within sight of hook fishermen participating in the one successful Special Access Program in New England, and we ask that you please take action to stop this immediately. Fortunately you have the regulatory means to stop it. We ask that you take Emergency Action to rescind access by midwater trawl vessels to all groundfish closed areas.

Midwater trawl vessels began catching haddock inside Closed Area I in early October. We cannot assess how much they are catching because the monitoring infrastructure does not allow it, but if the scant data available were extrapolated suggest that upwards of 300,000 pounds of haddock may have been removed from Closed Area I by herring vessels in October.

Groundfishermen in our community and across New England are confused and angry.

They are confused about why they invested three years and over a million dollars in scientific experiments with 100% catch sampling in order to access these closed areas, while herring fishermen gained it on the basis of 13 tows that weren't analyzed relative to the closed areas.

They don't understand why selective dumping is allowed on observed trips. Amy Van Atten of the Northeast Observer Program presented analyses at the Herring Oversight Committee meeting on May 22<sup>nd</sup> of this year that showed 16% of tows on observed trips are dumped partially or completely, often specifically due to the presence of bycatch. Based on this, we have very little faith that the existing monitoring program can accurately or completely account for haddock catch by midwater trawl vessels.

*Protecting a Resource, a Tradition, and a Way of Life*

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cc: An, Council

They want to know why NMFS does not perform extrapolations on haddock bycatch in groundfish closed areas for midwater trawl vessels like it does for groundfish vessels participating in Special Access Programs. For groundfish vessels, these extrapolations are clear, public and transparent, leading to a high degree of accountability. Fishermen participating in the Closed Area I Hook Gear Haddock SAP justifiably find it unfair when they see midwater trawl vessels fishing in the same area without accountable oversight, especially on the very day they hear reports of thousands upon thousands of pounds of keeper haddock being stuffed into bait bags in the lobster fishery.

Framework 43, its everyday failings aside, did not and does not address haddock mortality in the closed areas. Groundfish closed areas should have the same monitoring and bycatch minimization standards for access by all gears capable of catching groundfish: bycatch caps, rigorous monitoring, and transparent real-time reporting.

Fortunately the regulations recognize this and grant you the authority to address this problem. Clearly the recent haddock bycatch events demonstrate violation of the 1% bycatch threshold for the closed areas, and as such we respectfully request that you immediately prohibit midwater trawling in our groundfish closed areas.

We also ask that you please work through the Council to initiate long-term reform of the regulations governing access to groundfish closed areas by herring vessels. We suggest that Amendment 16 should rescind their access permanently, and that the appropriate way to regain access is to conduct an experimental fishery under an Exempted Fishing Permit (EFP) with 100% observer coverage and 100% catch sampling (no dumping of unsampled catch). If an EFP indicates that long-term access is appropriate, the Council could then create a Special Access Program with hard caps on bycatch species and rigorous monitoring, including either 100% catch sampling or extrapolation to monitor the caps. The SAP should also prohibit dumping.

Thanks for your time and consideration.

Sincerely,



Paul Parker,  
Executive Director

Cc: Rip Cunningham, NEFMC Groundfish Committee Chairman  
Paul Howard, Executive Director, NEFMC

#5d

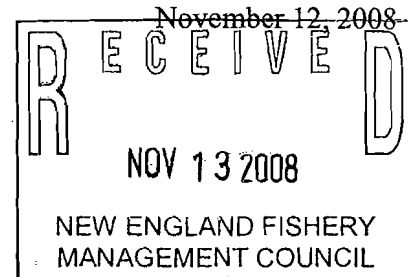


EARTHJUSTICE

 BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII  
 INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA  
 SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

*Via electronic mail and overnight delivery*

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 request that you take action as provided for under current law to address the recent midwater trawl bycatch of significant amounts of haddock in groundfish closed areas. The Magnuson-Stevens Act requires conservation and management measures that avoid or minimize bycatch, and specific regulations for northeastern fisheries provide you with authority to restrict or prohibit midwater trawling in groundfish closed areas when the bycatch of regulated multispecies exceed certain levels.

Preliminary information recently received from the Northeast Fishery Science Center Observer Program (NEFSCOP) indicates that in early October several midwater trawl trips, including midwater pair-trawl trips, were observed in Groundfish Closed Area 1. The location of such vessels inside groundfish closed areas along with the bycatch of significant amounts of haddock and other species has also been widely reported by New England fishermen.<sup>1</sup> All of the observed trips for which NEFSCOP data was provided (four out of four) had haddock bycatch. The NEFSCOP indicated that each of the other observed trips also had haddock bycatch, though the specific amounts had not yet been reported. The available information indicates that fifty percent of the observed tows contained haddock bycatch ranging from an estimated 431 pounds to 21,263 pounds (431, 809, 1,786, 4,264, and 21,363 pounds). The NEFSCOP indicated that it is currently analyzing the additional data. High levels of haddock bycatch from midwater trawling has also been corroborated independently by at least one other government source, the Maine Marine Patrol. They estimated that at least 1000 pounds of haddock was contained in a herring bait delivery of 35,000 pounds to Port Clyde, Maine on October 4, 2008.<sup>2</sup>

In view of this information the Herring Alliance requests that you promptly take the steps necessary to verify the preliminary data and information and take two specific actions pursuant to your regulatory authority. First, immediate action should be taken to restrict midwater trawl access to groundfish closed areas. Regulations provide that "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

<sup>1</sup> See e.g., Letter from Peter Taylor to John Pappalardo, Chairman, New England Fishery Management Council (Oct. 7, 2008).

<sup>2</sup> See "Haddock Bycatch Upsets Groundfishermen," *Working Waterfront*, (November, 2008).

1042 PEABODY ROAD, APPLETON, ME 04862

T: 978.846.0612 F: 207.785.2231 E: [rfleming@earthjustice.org](mailto:rfleming@earthjustice.org) W: [www.earthjustice.org](http://www.earthjustice.org)

cc: *fy Council*



Administrator may place restrictions and conditions in the letter of authorization for any or all individual fishing operations.” 50 C.F.R. 648.81(a)(2)(iii). The NEFSCOP preliminary data and other available information indicates that, at minimum, specific tows and trips by individual fishing operations in groundfish closed areas are resulting in greater than one percent of herring and mackerel harvested by weight. Therefore, in order to avoid and minimize bycatch of regulated multispecies in these critical areas, which were set aside specifically to assist in preventing overfishing and rebuilding groundfish, the Herring Alliance requests that you immediately place the following restrictions on the midwater trawl activities in closed areas: (1) prohibit pair-trawling; (2) require that midwater trawling only be allowed when there is an observer on board; (3) require that all midwater 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.

Second, the Herring Alliance requests that you consult with the New England Fishery Management Council (NEFMC) as part of the groundfish committee report at its November 19, 2008 meeting and permanently prohibit all midwater trawl activities in groundfish closed areas. The regulations referenced above also provide that if the bycatch of regulated multispecies in the fishery or by an individual fishing operation exceeds, or is likely to exceed, 1 percent of herring and mackerel harvested, “the Regional Administrator may . . . 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). As indicated above, the preliminary data available from the NEFSCOP indicates that the threshold for exercising such authority has been exceeded. Therefore, prohibiting midwater trawl activities in closed areas is warranted in order to avoid or minimize bycatch of regulated multispecies by midwater trawl ships and to protect these areas specifically set aside to help prevent overfishing and rebuild groundfish populations.

I would also like to take this opportunity to address certain related questions that have arisen regarding the scope of the haddock bycatch cap established in Framework 43. Specifically, midwater trawl industry representatives have suggested that the changes made in Framework 43 addressed all of the issues related to groundfish bycatch, and that so long as the observed and reported haddock bycatch remains below the haddock bycatch cap there is not a problem (at least from a regulatory perspective). This is incorrect.

Framework 43 did not address bycatch of groundfish in closed areas. Framework 43 established a midwater trawl exempted fishery because it was recognized as a result of recent enforcement actions and observed groundfish bycatch levels that midwater trawl gear could no longer be considered exempted gear. Framework 43 also established a cap for midwater trawl haddock bycatch that applies to all haddock observed or reported as bycatch throughout the entire regulated mesh area. See 50 C.F.R. 648.80(d) and 648.85. It was also the intent of the





EARTHJUSTICE

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Council that for the cap to work properly, 20 percent observer coverage should be provided. This level of observer coverage has never been achieved and the levels of haddock (and other) bycatch occurring in this fishery remains unknown .

On the other hand, as indicated above the regulatory provisions that allow midwater trawl ships to fish in closed areas are covered by separate regulations and contain a separate set of requirements for continued access to closed areas. *See* 50 C.F.R. 648.81(a)(2)(iii). In effect, these two sets of regulations simply create an overlay, similar to many aspects of the groundfish fishery, where there are provisions that apply region wide and additional provisions that apply specifically to closed areas.

Finally, as has been pointed out by the Midcoast Fishermen's Association in its Petition for Emergency and Permanent Rulemaking, and the related lawsuit currently in U.S. District Court, the closed area rules are out of date and need to be revisited. One fundamental flaw, highlighted herein, is that the rules were established based on a premise that is no longer true – that midwater trawl ships catch no (negligible amounts) groundfish. Nonetheless, even the current provisions authorize the Regional Administrator to take significant action to restrict this fishery when groundfish bycatch by even a single vessel is likely to exceed 1 percent of its catch. And the Regional Administrator may also suspend or prohibit midwater trawl access to closed areas after consultation with the NEFMC. We ask that you take the requested actions pursuant to this existing authority and, as appropriate, help lead the broader efforts as part of the ongoing herring and groundfish amendments to reform the herring fishery.

Thank you for your attention to this important matter.

Sincerely yours,

/s/

Roger Fleming  
Attorney

Cc    Mr. John Pappalardo, Chairman, NEFMC  
      Mr. Paul Howard, Executive Director, NEFMC  
      Mr. Rip Cunningham, Chairman, Groundfish Oversight Committee, NEFMC  
      Mr. Frank Blount, Chairman, Herring Oversight Committee, NEFMC  
      Dr. James Balsiger, Acting Assistant Administrator for Fisheries, NMFS  
      Mr. Samuel Rauch, Deputy Assistant Administrator for Regulatory Programs, NMFS  
      Mr. Gene Martin, Deputy General Counsel, NMFS  
      NEFMC

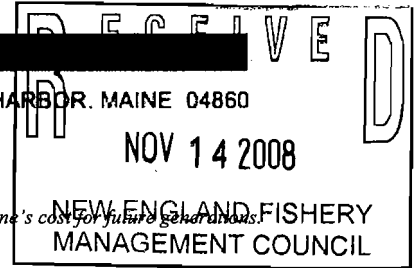


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MIDCOAST FISHERMEN'S ASSOCIATION

PO BOX 4 • TENANTS HARBOR, MAINE 04860



*The mission of the Midcoast Fishermen's Association:  
Identifies and fosters ways to restore our groundfish fishery and sustain fishing communities along Maine's coast for future generations.*

November 12, 2008

Patricia Kurkul  
Regional Administrator  
National Marine Fisheries Service  
1 Blackburn Drive  
Gloucester, MA 01930

John W. Pappalardo  
NEFMC Chairman  
New England Fishery Management Council  
50 Water St. Mill #2  
Newburyport, MA 01950

Re: Emergency Action for Midwater Trawlers in Groundfish Closed Areas

Dear Pat and John:

The Midcoast Fishermen's Association (MFA) is aware of recent data from the observer program documenting the bycatch of haddock by midwater trawlers from groundfish closed area 1. Members of the MFA saw confirmation of these incidents when bait trucks loaded from midwater trawler boats in Gloucester delivered haddock-filled bait to Port Clyde. I cannot convey how disheartening it is for groundfishermen who have struggled to rebuild haddock stocks only to see them slaughtered and sit in lobster bait boxes up and down the coast.

We beseech you to take emergency action to remove these midwater trawlers from groundfish closed areas immediately. It is fully within the Regional Administrator's authority to take action to prohibit midwater trawlers from groundfish closed areas when the levels of bycatch are this high. We also request that the council address this matter and put in place measures that will correct this egregious activity on a permanent basis.

Sincerely,

Glen Libby  
Chairman

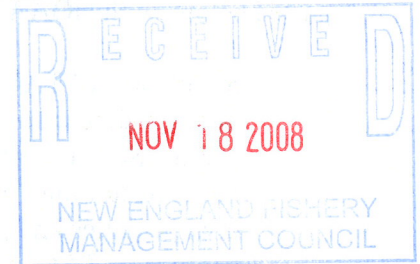
cc: NMFS and NEFMC

*tn, cbl, Council*



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

NOV 17 2008



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

Dear Paul:

At its October 30, 2008, meeting, the Groundfish Oversight Committee (Committee) adopted the following motion related to refining the applicability of joint and several liability for sector participants and sought input from NOAA General Counsel (GC):

That sectors may be held jointly liable for violations of sector operations plan requirements such as/for example: ACE overages, discards of legal fish, and misreporting of catch (landings or discards). The specific elements will be refined with input from NOAA GC, NERO, and industry.

In addition, the Committee adopted another motion that would eliminate reference to “any other applicable regulations” from the regulations at 50 CFR 648.87(b)(1)(x) and (b)(2)(x). This would essentially limit the applicability of joint and several liability to violations of the provisions of an approved sector operations plan and its accompanying letter of authorization. It is important to note that the regulations at § 648.87(b)(2)(x) were revised in 2005 to limit the applicability of joint and several liability to those provisions not specifically identified by sectors as administrative provisions in an approved operations plan to address similar concerns raised shortly after the implementation of Amendment 13.

Joint and several liability would only be used if warranted based upon the specific circumstances of the situation. While NOAA’s National Marine Fisheries Service recognizes that the prospect of joint and several liability could dissuade vessels from participating in sectors, there is also a need to ensure that prosecutorial discretion is not limited by the proposed revisions to existing regulations. Thus, it is important to balance incentives to enroll in sectors with flexibility in administering, enforcing, and prosecuting violations of sector provisions.

The following recommendations are provided to address the Committee’s motion and assist the New England Fishery Management Council in further developing provisions applicable to sector participants under Amendment 16 to the Northeast Multispecies Fishery Management Plan. NOAA GC recommends that each sector should be required to establish itself as a legally recognized independent entity, such as a corporation or a partnership, and provide the applicable documentation as part of its yearly operations plan submission. NOAA GC agrees that the text “and any other applicable federal regulations” could be deleted from the regulations at §§ 648.87(b)(1)(ix) and (b)(2)(x). In addition, § 648.87(b)(2)(iii) should be amended to require the

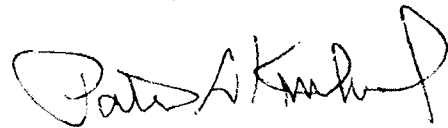


address of a designated representative or agent. Finally, the regulations at § 648.87(b)(1)(vii) are pasted below, with NOAA GC recommendations for revised text underlined.

Should a hard TAC allocated to a Sector be exceeded in a given fishing year, the Sector's allocation will be reduced by the overage in the following fishing year, and the Sector, each vessel, and vessel operator and/or vessel owner participating in the Sector may be charged, as a result of said overages, jointly and severally for civil penalties and permit sanctions pursuant to 15 CFR Part 904. If the Sector exceeds its TAC in more than 1 fishing year, the Sector's share may be permanently reduced, or the Sector's authorization to operate may be withdrawn.

Thank you for the opportunity to contribute to the discussion about this important issue. If you have further questions regarding the suggested language, please contact the Office of the Northeast Regional General Counsel at (978) 281-9211.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. Kurkul". The signature is fluid and cursive, with a large initial "P" and "K".

Patricia A. Kurkul  
Regional Administrator