DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 648

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RIN 0648–AQ87

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Amendment 1

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is implementing approved measures contained in Amendment 1 to the Atlantic Herring Fishery Management Plan (FMP), developed by the New England Fishery Management Council (Council). Amendment 1 establishes a limited access program. Amendment 1 also includes the following measures: An open access incidental catch permit; a change in the management area boundaries; establishment of a purse seine/fixed gear-only area; establishment of a maximum sustainable yield (MSY) proxy; an approach to determining the distribution of area-specific Total Allowable Catches (TACs); a multi-year specifications process; a research quota set-aside for herring-related research; a set-aside for fixed gear fisheries; a change in the midwater trawl gear definition; and additional measures that could be implemented through the framework adjustment process. Also, NMFS informs thepublic of the approval by the Office of Management and Budget (OMB) of the collection-of-information requirements contained in this final rule and publishes the OMB control numbers for these collections.

DATES: Effective June 1, 2007, except for §§ 648.200–648.203, and §§ 648.206–648.207, which are effective April 11, 2007.

ADDRESSES: Copies of supporting documents used by the Council, including the Final Supplemental Environmental Impact Statement (FSEIS) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org*. NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of the preamble of this final rule. Copies of the FRFA, Record of Decision (ROD), and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298, and are also available via the internet at *http://www.nero.nmfs.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to David Rostker at OMB by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285, or to the Federal e-rulemaking portal *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, (978) 281–9259, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

This final rule implements the approved measures of Amendment 1, which was partially approved by NMFS on behalf of the Secretary of Commerce (Secretary) on December 6, 2006. A proposed rule for Amendment 1 was published in the **Federal Register** on September 27, 2006 (71 FR 56446), with comments accepted through November 13, 2006. The details of the development of Amendment 1 were contained in the preamble of the proposed rule and are not repeated here. In the proposed rule, NMFS requested comment on all proposed measures, but specifically highlighted three issues about which it had concern. The three highlighted issues were: (1) the proposed revision of existing provisions in § 648.13 relating to the transfer of fish at sea in order to enforce the possession restrictions proposed in Amendment 1; (2) whether it was necessary to maintain the reserve option as part of the specification process; and (3) whether a vessel that sank, was destroyed, or was sold, and then replaced, should be able to meet the permit requirement for a limited access incidental catch permit if it had been issued a Federal permit to fish for *Loligo* or *Illex* squid, mackerel, butterfish, and/or whiting (a limited access Northeast multispecies permit also serves as a whiting permit), during the 2005 fishing year as of November 10, 2005, and had landed at least 33,000 lb (15 mt) of herring in any calendar year between January 1, 1988, and December 31, 2003. A discussion of these issues, including NMFS consideration of public comments on the issues, follows:

1. Possession Limits for Transfers at Sea

NMFS did not receive any comments on this issue and, since it simply clarifies the applicability of the possession limits for permitted herring vessels, regardless of the disposition of the catch, this final rule includes regulatory language to ensure that such possession limits are maintained and enforced. NMFS did receive comment on other aspects of the proposed regulations governing transfer of fish at sea, and has made revisions to this final rule as a result. These revisions are discussed under changes from the proposed rule and in the response to comment 25 in this preamble.

2. Maintenance of the Reserve

NMFS recieved seven comments on this issue, including one from the Council, all in support of maintaining the reserve provision to ensure that the Council and NMFS have maximum flexibility to respond to changing circumstances in the fishery that arise during the course of the fishing year. In deference to these arguments, and, in particular, to the Council's wishes, this final rule maintains the reserve option as part of the specification process.

3. Vessels that Sank, were Destroyed, or Sold

The Council submitted a comment in support of the provision that would clarify that vessels that sank, were destroyed, or were sold, and then replaced, would be subject to the same permit history criteria as vessels that apply directly for a limited access incidental catch permit. Therefore, to meet the permit history criteria for a limited access incidental catch permit, a vessel that is replacing a vessel that sank, was destroyed, or sold, must have been issued a Federal permit to fish for Atlantic herring, *Loligo* or *Illex* squid, mackerel, butterfish, and/or whiting (a limited access Northeast multispecies permit also serves as a whiting permit), between November 10, 2003, and November 9, 2005.

For purposes of TAC monitoring, Amendment 1's revision to the management area boundaries required NMFS to consider how to attribute landings to the appropriate herring management area. This final rule changes the management boundaries for three of the areas (1B, 2, and 3), with portions of Area 1B and Area 2 redesignated into Area 3. The reporting requirements for herring vessels require vessel owners/operators to report their

landings via interactive voice reporting (IVR) and vessel trip reports (VTR) based on the area boundaries in effect at the time of their fishing trip. Therefore, the catch reports for some fishing trips conducted prior to April 11, 2007 would be attributed to Areas 1B or 2 when they should be attributed to Area 3. The Council did not consider this possibility in Amendment 1, but NMFS has determined that it will use the data available from the fishery (Vessel Monitoring System (VMS), IVR, and VTR) to reallocate, to the extent possible, the area-specific landings that took place prior to the implementation of Amendment 1 to the areas as implemented by this final rule.

Disapproved Measures

After reviewing Amendment 1, its supporting analyses, and public comments received on the amendment, NMFS, on behalf of the Secretary, disapproved one measure in Amendment 1, based on NMFS's determination that the measure was inconsistent with two of the National Standards of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The disapproved measure concerned the harvest of herring by fixed gear fishermen in Downeast Maine (east of Cutler-the Downeast Maine Fixed Gear Fishery). Amendment 1 proposed to allow the harvest of herring by fixed gear fishermen in Downeast Maine to be exempt from the TACs that govern the fishery. The specifications process would have presumed that catch from this Downeast fishery and the New Brunswick weir fishery would not exceed 20,000 mt. During the fishing season, catch from the Downeast Maine fixed gear fishery would not have been counted against the TAC for Area 1A, and the fixed gear fishery would have been allowed to continue to operate after the Area 1A TAC was reached.

NMFS disapproved this measure because it was, prima facie, inconsistent with National Standard 1 of the Magnuson-Stevens Act. The measure would essentially allow a portion of the fishery to remain completely unregulated, without corresponding conservation benefits. If herring landings from the fixed-gear fishery in this area were to increase dramatically, NMFS would have no means of regulating that catch to ensure the integrity of the TACs established for the fishery. NMFS also found that the measure was inconsistent with National Standard 3, as it would fail to manage the stock throughout its range.

Approved Measures

NMFS approved the remainder of the measures in Amendment 1, although not all approved measures require regulatory text in this final rule. A summary of the approved measures follows. This final rule also includes some non-substantive revisions to the existing text of the herring regulations that were included in the proposed rule but that were not part of Amendment 1; these revisions remove obsolete language, clarify the intent of the Council, and generally improve the organization and clarity of the regulations. NMFS has made several additional changes to clarify the administrative requirements associated with the Amendment 1 measures. These are described under Changes from the Proposed Rule in this preamble.

1. Exemption from Vessel Permit Requirements

The following vessels may fish for, catch, possess, transport, or land Atlantic herring in or from the Exclusive Economic Zone without a Federal permit: A skiff or other similar craft used exclusively to deploy the net in a purse seine operation conducted by a vessel that is permitted to fish for Atlantic herring; and a vessel that possesses herring solely for its own use as bait, providing the vessel does not use or have on board purse seine, midwater trawl, pelagic gillnet, sink gillnet, or bottom trawl gear on any trip on which herring is fished for, possessed, or landed, and does not transfer, sell, trade, or barter such herring.

2. Limited Access Vessel Permits

This final rule implements two new categories of limited access permits that authorize vessels to fish for herring without being limited by a possession limit: (1) An All Areas Limited Access Herring Permit, which authorizes vessels to fish in all herring management areas; and (2) an Areas 2 and 3 Limited Access Herring Permit, which authorizes vessels to fish only in herring management areas 2 and 3. A vessel is eligible for either an All Areas Limited Access Herring Permit or an Areas 2 and 3 Limited Access Herring Permit if it meets both the permit history criteria and the landings requirements specified in this final rule. Vessels that qualify for such permits are not restricted by a possession or trip limit for herring, though they are subject to the other regulations established through this final rule. If 95 percent of an area TAC is reached in a management area, the directed fishery for herring will be closed, and All Areas Limited Access Herring permit holders and Areas 2 and 3 Limited Access Herring permit holders will be limited to 2,000 lb (907.2 kg) of herring per trip, with a limit of one landing per calendar day when fishing in the area.

A vessel is eligible for either an All Areas Limited Access Herring Permit or an Areas 2 and 3 Limited Access Herring Permit it if meets the requisite history and landings criteria. First, the vessel must meet one of the two following permit history criteria: The vessel must have been issued a Federal herring permit (Category 1 or 2) that was valid as of November 10, 2005; or the vessel is replacing a vessel that was issued a Federal herring permit (Category 1 or 2) between November 10, 2003, and November 9, 2005. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or, if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel at the time it sank or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer and the owner/seller documenting that the vessel owner/seller retained the herring permit history and all herring landings history. This written agreement must be consistent with the permit splitting provisions outlined in Section 4 of this preamble.

The vessel must also meet certain landings requirements, depending on the type of permit beings sought. The landings requirements to qualify for the All Areas Limited Access Herring Permit require the vessel and/or any vessel it replaced to have landed at least 500 mt of herring in any one calendar year between January 1, 1993, and December 31, 2003, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS (dealers of Atlantic herring were required to obtain a dealer permit and to comply with reporting requirements as of January 10, 2001). The landings requirements to qualify for an Areas 2 and 3 Limited Access Herring Permit require the vessel and/or any vessel it replaced to have landed at least 250 mt of herring in any one calendar year between January 1, 1993, and December 31, 2003, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS (dealers of Atlantic herring were required to obtain a dealer permit and to comply with reporting

requirements as of January 10, 2001). In those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and border transfers (BT), a vessel owner can submit other documentation that verifies such transactions and proves that the herring thus transferred should be added to the vessel's landings history.

A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has not been replaced, must see Section 4 of this preamble for information about the requirement to obtain a confirmation of permit history (CPH).

3. Limited Access Incidental Catch Herring Permit

This final rule implements a Limited Access Incidental Catch Herring Permit to accommodate vessels that have an incidental catch of herring while fishing in other small-mesh, high-volume fisheries for species including Atlantic mackerel, *Loligo* squid, and whiting. A vessel must meet both the permit history criteria and the eligibility requirements specified in this rule.

A vessel is eligible for and may be issued a limited access Incidental Catch Herring Permit if it meets the requisite permit history and landings requirements. First, the vessel must must have been issued a Federal permit to fish for Atlantic herring, *Loligo* or *Illex* squid, mackerel, butterfish, and/or whiting (a limited access Northeast multispecies permit also serves as a whiting permit), during the 2005 fishing year as of November 10, 2005; or the vessel is replacing a vessel that was issued a Federal permit to fish for Atlantic herring,*Loligo* or *Illex* squid, mackerel, butterfish, and/or whiting (a limited access Northeast multispecies permit also serves as a whiting permit) between November 10, 2003, and November 9, 2005. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or, if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel at the time it sank or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer and the owner/seller documenting that the vessel owner/seller retained the herring permit history and all herring landings history. This written agreement must be consistent with the permit splitting provisions outlined in Section 4 of this preamble.

To qualify for a limited access incidental catch herring permit, the vessel and/or any vessel it replaced must also document that it landed at least 33,000 lb (15 mt) of herring in any calendar year between January 1, 1988, and December 31, 2003, as verified by dealer reports submitted to or documented through valid dealer receipts, if dealer reports were not required by NMFS (dealers of Atlantic herring were required to obtain a dealer permit and to comply with reporting requirements as of January 10, 2001). In those cases where a vessel has sold herring but there are no dealer receipts, e.g., transfers of bait at sea and BT, a vessel owner can submit other documentation that captures such transactions and proves that the herring thus transferred should be added to the vessel's landings history. A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has not been replaced, must see Section 4 of this preamble for information about the requirement to obtain a CPH.

Vessels with limited access incidental catch permits are restricted by a possession limit of 55,000 lb (25 mt) of herring and limited to one landing of herring per calendar day. If 95 percent of an area TAC is reached in a management area, the directed fishery for herring will be closed, and limited access incidental catch permit holders will be limited to 2,000 lb (907.2 kg) of herring per trip, with a limit of one landing per calendar day, when fishing in the area.

A vessel may be issued multiple herring permits. For instance, a vessel could qualify for the Areas 2 and 3 Limited Access Herring Permit, but not the All Areas Limited Access Herring Permit. Such a vessel could also qualify for a Limited Access Incidental Catch Permit. In this case, the vessel could not possess herring in excess of the Limited Access Incidental Catch Herring Permit possession limit of 55,000 lb (25 mt) if it fishes any part of a trip in Area 1, regardless of whether it catches herring from Areas 2 or 3. However, the vessel could catch and land herring in excess of 55,000 lb (25 mt) in or from Areas 2 and 3, provided it stowed its gear while transiting Area 1.

4. Limited Access Vessel Permit Provisions

This final rule establishes measures to govern future transactions related to limited access vessels, such as purchases, sales, or reconstruction. These measures apply to all limited access vessels.

Initial Eligibility

Initial eligibility for a herring limited access permit must be established during the first year after the permit is required. A vessel owner is required to submit an application for a herring limited access permit or CPH by May 31, 2008.

CPH

A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has sunk, been destroyed, or transferred to another person, can apply for and receive a CPH if the herring fishing and permit history of such vessel has been retained lawfully by the applicant. To be eligible to obtain a CPH, the applicant has to show that the qualifying vessel meets the eligibility requirements for the limited access herring permit in question, and that all other permit restrictions are satisfied (e.g., permit splitting). Issuance of a valid CPH preserves the eligibility of the applicant to apply for a limited access permit for a replacement vessel based on the qualifying vessel's fishing and permit history at a subsequent time. A CPH has to be applied for by the due date in order for the applicant to preserve the limited access eligibility of the qualifying vessel. Vessel owners who are issued a CPH can obtain a vessel permit for a replacement vessel based upon the previous vessel's history utilizing the CPH, consistent with the vessel size upgrade restrictions.

The owner of a qualifying vessel that has sunk, been destroyed, or been transferred to another person without the Atlantic herring fishing history, but not yet replaced, must submit an application for a CPH by May 31, 2008.

Landings History

Unless NMFS data already demonstrate that a vessel made landings of herring that satisfy the eligibility criteria for a limited access permit, applicants must submit valid dealer receipts that verify landings. The owners of pair trawl vessels may divide the catch history between the two vessels in the pair through third party verification and supplemental information, such as VTR or dealer reporting. The two owners must apply for a limited access permit jointly and must submit proof that they have agreed to the division of their landings. In those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and BTs, a vessel owner can submit other documentation that captures such transactions and proves that the herring

thus transferred should be added to the vessel's landings history.

Extension of Qualification Period

A vessel owner who can prove that a vessel was under construction, reconstruction, or was under written contract for purchase as of December 31, 2003, and landed the amount of fish required by the limited access program as of December 31, 2004, can apply for and obtain a limited access permit as long as the vessel meets the permit eligibility criteria. This measure provides such vessel owners with a 1-year extension of the qualification period for the landings portion of the eligibility criteria.

Permit Transfers

An Atlantic herring limited access permit and fishery history is presumed to transfer with a vessel at the time it is bought, sold, or otherwise transferred from one owner to another, unless it is retained through a written agreement signed by both parties in the vessel sale or transfer.

Permit Splitting

Limited access herring permits are governed by the permit splitting provision currently in effect for other limited access fisheries in the region. Therefore, a limited access permit may not be issued to a vessel if the vessel's permit or fishing history has been used to qualify another vessel for a limited access permit. This means all limited access permits, including herring limited access permits, must be transferred as a package when a vessel is replaced or sold. As specified in Amendment 1, the permit-splitting provision applies to the transfer/sale of herring fishing history prior to the implementation of this final rule. Thus, vessel owners who sold vessels with limited access permits and retained the herring history with the intention of qualifying a different vessel for the herring limited access program are not eligible for a limited access permit, unless the limited access permits on the sold vessel are permanently relinquished by the owner.

Qualification Restriction

Consistent with previous limited access programs, no more than one vessel may qualify, at any one time, for a limited access permit or CPH based on that or another vessel's fishing and permit history. If more than one vessel owner claims eligibility for a limited access permit or CPH, based on one vessel's fishing and permit history, the Administrator, Northeast Region, NMFS (Regional Administrator) will determine who is entitled to qualify for the permit or CPH.

Appeal of Permit Denial

There is an appeals process for applicants who are initially denied a limited access Atlantic herring permit. Such applicants can appeal in writing to the Regional Administrator within 30 days of the denial. Any such appeal may only be based on the grounds that the information used by the Regional Administrator to evaluate the application was incorrect.

The appeals process provides an opportunity for a hearing before a hearing officer designated by the Regional Administrator. The owner of a vessel denied a limited access herring permit may fish for herring, pending the outcome of an appeal, provided that the denial has been appealed, the appeal is pending, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category. The Regional Administrator will issue such a letter for the pendency of any appeal. If the appeal is ultimately denied, the Regional Administrator will send a notice of final denial to the vessel owner, and the authorizing letter becomes invalid 5 days after receipt of the notice of denial, but no later than 10 days from the date of the letter of denial.

Vessel Upgrades

A vessel can be upgraded in size, whether through refitting or replacement, and be eligible to retain or renew a limited access herring permit, only if the upgrade complies with the following limitations. The vessel's horsepower (HP) can be increased only once, whether through refitting or replacement. Such an increase cannot exceed 20 percent of the HP of the vessel's baseline specifications, as applicable. The vessel's length, gross registered tonnage (GRT), and net tonnage (NT) can be increased only once, whether through refitting or replacement. Any increase in any of these three specifications of vessel size cannot exceed 10 percent of the vessel's baseline specifications, as applicable. If any of these three specifications is increased, any increase in the other two must be performed at the same time. This type of upgrade can be done separately from an engine HP upgrade.

This final rule makes no changes to the existing specification of maximum length, size, and HP for vessels engaged in the Atlantic herring fishery (165 ft (50.2 m), 750 GRT (680.3 mt), and 3,000 HP), or existing regulations that exempt U.S. at-sea processing (USAP) vessels from these size limits.

Establishing Vessel Baselines

A limited access vessel's baseline refers to those specifications (length overall, GRT, NT, and HP) from which any future vessel size change is measured. The vessel baseline specifications for an Atlantic herring vessel issued a limited access permit are the specifications of the vessel that is initially issued a limited access permit, as of the date that the vessel owner initially applied for such a permit for that vessel. If a vessel owner is initially issued a CPH instead of a permit, the vessel that provided the CPH eligibility establishes the size baseline against which future vessel size limitations will be evaluated.

Vessel Replacements

The term vessel replacement refers to replacing an existing limited access vessel with another vessel. In addition to addressing increases in vessel size and HP, this final rule requires that the same entity must own both the limited access vessel (or fishing history) that is being replaced, and the replacement vessel.

Voluntary Relinquishment of Eligibility

A vessel owner may voluntarily exit a limited access fishery by permanently relinquishing a vessel's limited access fishing eligibility. In some circumstances, this may allow vessel owners to choose between different permits with different restrictions without being bound by the more restrictive requirement (e.g., lobster permit holders may choose to relinquish their other NE Region limited access permits to avoid being subject to the reporting requirements associated with those other permits). If a vessel's limited access permit history for the herring fishery is voluntarily relinquished to the Regional Administrator, no limited access permit for that fishery can ever be reissued or renewed based on that vessel's history.

Permit Renewals and CPH

Once a vessel has qualified for and been issued a limited access herring permit, a vessel owner must maintain the limited access permit status by renewing the permits on an annual basis or applying for issuance of a CPH. A CPH may be issued to a person who does not currently own a particular fishing vessel, but who has legally retained the fishing and limited access permit history of the vessel for the purpose of transferring it to a replacement vessel at a future date. The CPH provides a benefit to a vessel owner by securing limited access eligibility through a registration system

when the individual does not currently own a vessel.

A vessel's limited access permit history will be cancelled due to the failure to renew, in which case no limited access permit can ever be reissued or renewed based on that vessel's history or to any other vessel relying on that vessel's history.

All limited access permits must be issued on an annual basis by the last day of the permit year for which the permit is required, unless a CPH has been issued. Atlantic herring permits are issued annually for the period May 1–April 30; this is referred to as the permit year. A complete application for a limited access herring permit must be received no later than 30 days before the last day of each permit year: that is, no later than March 31.

5. Open Access Vessel Permit and Possession Limit

Any vessel is eligible to be issued an open access incidental catch permit authorizing the possession and landing of up to 6,600 lb (3 mt) of herring per trip, with a limit of one landing per calendar day. When the TAC in a management area is projected to be reached and the limited access fishery closes, the possession limit for these vessels will be reduced to 2,000 lb (907.2 kg) per trip, with a limit of one landing per calendar day, when fishing in the area. Open access vessels that land more than 2,000 lb (907.2 kg) of herring in any week are required to report their catches on a weekly basis through the IVR reporting program described in Section 6 of this preamble.

To transport herring caught by another fishing vessel, an Atlantic herring carrier vessel must be issued an Atlantic herring permit, not have any gear on board capable of catching or processing herring, and have on board a letter of authorization (LOA) from the Regional Administrator. Carrier vessels are not required to qualify for a limited access permit to possess/transport herring, but must be issued either an open access or a limited access herring permit. While operating as a carrier vessel under an LOA, a carrier vessel is not limited by the possession limits associated with the herring permit issued to the vessel because the vessel is functioning solely as a carrier, with no gear on board capable of catching herring.

6. Reporting Requirements

All limited access herring permit holders are required to report herring catches weekly through the IVR call-in system, and to file a negative report if there are no catches in a specific week. All open access herring vessels that land more than 2,000 lb (907.2 kg) of herring in any week must also report their landings through IVR. All vessels issued a limited access herring permit (with the exception of fixed gear (weirs and stop seines) fishermen) must also install and maintain operable VMS units, and comply with all VMS notification and reporting requirements. Such vessels may power down the VMS unit when in port, but must re-power the VMS unit and enter an appropriate trip designation prior to leaving port. All VTR requirements for permitted herring vessels in the existing regulations remain in effect.

7. Adjustments to Management Area Boundaries

Herring management measures, including TACs, are specified for four management areas (Areas 1A, 1B, 2, and 3). The area boundaries have been revised consistent with recommendations from the Transboundary Resource Assessment Committee (TRAC), a group comprised of both U.S. and Canadian scientists. The boundary between Areas 1B and 3 is revised through this final rule to assure that fish caught in Franklin Swell are attributed to the Georges Bank (GB) spawning component of the stock. The Area 2 and 3 boundary is moved west from 69°00′ W. long. to 70°00′ W. long. through this final rule to better relate catch to the TRAC conclusion that there are two spawning components of the stock: The Gulf of Maine (GOM) and GB/Nantucket Shoals components.

8. Maximum Sustainable Yield

In February 2003, during the development of Amendment 1, the TRAC met to try to come to consensus regarding the status of the stock and the most appropriate values for biological reference points. The two herring assessments presented at the TRAC meeting produced different results, and no overall consensus was reached regarding which assessment is more accurate. Consequently, no specific biological reference points were provided by the joint peer review group. In the face of this scientific uncertainty, the Council decided that it was appropriate to set a relatively conservative proxy for MSY in Amendment 1, until a stock assessment can be completed that specifies an analytical MSY value. Based on input from the Council's Scientific and Statistical Committee (SSC), the proxy reference points specified in the overfishing definition for Atlantic herring were as follows: MSY = 220,000 mt; B_{MSY} (B_{Target}) = 1,100,000 mt; and $B_{threshold}$ = 550,000 mt. The reference points in the FMP were: MSY = 317,000 mt; B_{MSY} (B_{Target}) = 1,100,000 mt; and $B_{threshold}$ = 550,000 mt (the $B_{threshold}$ established in the FMP is ½ B_{MSY}). The Amendment 1 document explained that the proposed proxy reference points would be revised if a new, peer-reviewed stock assessment recommends different reference points. In May 2006, the TRAC reconvened and completed another herring assessment. The TRAC recommended the following reference points: MSY = 194,000 mt, and B_{msy} = 629,000 mt. Based on this and the FMP's guidance, B_{Target} is 629,000 mt, and $B_{threshold}$ is 314,500 mt (½ B_{MSY}). These values are now the new reference points for the Atlantic herring fishery.

9. Specification of Management Measures Including TACs

The Amendment 1 management program establishes a 3-year specification process. If the Council determines that the specifications should be adjusted during the 3-year time period, it may recommend an adjustment through the specification process for one or both of the interim years. No action is required by the Council to maintain the same specifications for all 3 fishing years.

10. TAC Set-Asides to Support Herring-Related Research

Amendment 1 authorizes the Council, in consultation with the Atlantic States Marine Fisheries Commission (Commission), to recommend setting aside 0–3 percent of the TAC from any management area(s) as a research set aside (RSA) to support herring-related research. The RSA can be used to support herring-related research in any management area(s), consistent with the research priorities identified by the Council. Projects funded under an RSA allocation have to enhance understanding of the fishery resource and/or contribute to the body of information upon which management decisions are made.

The Council recommends the specific percentages for the RSA and the management area(s) to which it is applied during the fishery specification process. If there is no RSA allocated, the directed herring fishery will close in each management area when it is projected that 95 percent of the area TAC would be caught. The remaining 5 percent of the TAC will be set aside for catch under a 2,000–lb (907.2–kg) trip limit. If the RSA is specified for a management area, it comes out of the allocation for the directed fishery. For example, if there is a 3 percent set-aside of the Area 1A TAC to support research,

then the Area 1A directed fishery would close when 92 percent of the overall Area TAC was projected to be reached.

The RSA will be administered through a process similar to that specified by the Mid-Atlantic Fishery Management Council in several of its fishery management plans. That mechanism includes the following elements: Individual research projects may apply for the use of more than one herring RSA allocation; researchers may request to harvest the RSA separately from the research trip or as part of the research trip; and research compensation trips need not be conducted by the same vessel, but all trips must be conducted in the management area from which the RSA is allocated.

Multi-year projects can be funded, since the RSA process is intended to be consistent with the 3-year specification process. The RSA must be utilized in the same fishing year in which it is allocated (i.e., RSA and compensation trips cannot be rolled over into future years). However, the money generated from the RSA may be rolled over into, or used to fund research in future years, consistent with the multi-year proposal.

Specification of RSA amounts (percentages) for the upcoming fishing years will be incorporated into the Council's fishery specification package every 3 years, and submitted to NMFS with additional analysis required, as part of the specification package. For each proposal cycle, NMFS must publish a Request for Proposals (RFP) that specifies research priorities identified by the Council and application procedures for funding through the RSA. Since specifications will be set for 3 fishing years, the proposal cycle will also cover 3 fishing years, unless the Council identifies new/different research priorities during the interim years and decides to publish a second RFP.

Research proposals, whenever possible, will be reviewed and approved prior to the publication of final specifications for the upcoming fishing years. In the event that the approved proposals do not make use of any or all of the set-asides, NMFS is authorized to release the unutilized portion of the RSA back to its respective management area(s) when the final specifications are published. If there is unutilized RSA available, NMFS, at the request of the Council, could publish another RFP for either the second or third years of the three-year specifications. In such case, NMFS shall release the unutilized portion of the RSA back to its respective management area(s) for the first year of the specifications and any other year that yields unutilized RSA after an additional RFP is published. The Council also may decide not to publish another RFP, in which case NMFS shall release the unutilized portion of the RSA back to its respective management area(s) for all 3 fishing years covered by the specifications.

11. Purse Seine/Fixed Gear Only Area

This action prohibits the use of midwater trawling vessels from fishing for Atlantic herring in Area 1A from June 1 September 30 of each year. There are no restrictions on the use of midwater trawl gear in Area 1A from October 1 May 31.

12. Measures to Address Fixed Gear Fisheries

One measure in the proposed rule would have set aside 500 mt of the Area 1A TAC for the fixed gear fisheries in Area 1A (weirs and stop seines) that occur west of Cutler, Maine. In its comments, the Council pointed out that it had not meant to establish this set aside at the 500 mt level, but rather to allow the set aside to be set at any value up to 500 mt. As a result of this comment, NMFS has modified the final rule to clarify that this set aside is up to 500 mt, and not invariably 500 mt. This set-aside is available for harvest using fixed gear west of Cutler in Area 1A until November 1 each year. If the set-aside is not utilized by the fixed gear fisheries west of Cutler in Area 1A by November 1, then it becomes part of the overall allocation for Area 1A. If 95 percent of the Area 1A TAC has already been reached by November 1 (and the directed fishery in Area 1A is therefore closed), the reallocation of the set-aside would not result in re-opening the directed fishery, but would be available for landings under the 2,000–lb (907.2–kg) possession limit.

This measure requires weekly monitoring of fixed gear catches in Area 1A. To ensure that this set-aside is effectively monitored and enforced, fixed gear (weirs and stop seines) fishermen in Area 1A are required to report their herring catches through the IVR reporting system. Because fixed gear fishermen fish exclusively in state waters and are not required to obtain a Federal limited access permit, this IVR reporting requirement has been implemented in state waters by the Commission in Amendment 2 to the Interstate FMP for Atlantic Herring.

13. Measures to Address Bycatch

Measures to address bycatch in the herring fishery were developed in conjunction with Amendment 1, but submitted separately as Framework 43 to the NE Multispecies FMP. Framework 43 was approved and implemented through a final rule that was effective August 15, 2006 (71 FR 46871). Framework 43's regulatory requirements apply to Category 1 herring vessels. Amendment 1 establishes new vessel permit designations. The proposed rule for Amendment 1 stated that the regulatory requirements in Framework 43 would be applicable to all vessels issued limited access permits. The Council comment noted that NMFS should revise the final regulation because it was inconsistent with Amendment 1, which specifies that the measures established by Framework 43 will apply only to vessels issued an All Areas Limited Access Herring Permit or the Areas 2 and 3 Limited Access Herring Permit, not limited access incidental catch permits. NMFS reviewed Amendment 1 and Framework 43 and has revised this final rule accordingly, because it is explicit in the Amendment and the Framework that the measures should apply only to All Areas Limited Access Herring and the Areas 2 and 3 Limited Access fishing permits. This means vessels issued limited access incidental catch permits are prohibited from possessing any NE multispecies.

14. Regulatory Definition of Midwater Trawl Gear

This action modifies the regulatory definition of midwater trawl gear to reflect the recommendations made by the Council's Enforcement Committee to improve the enforceability of the definition and clarify the public's understanding of how the gear should be fished. The restrictions included in the new definition better ensure that the gear cannot be fished on the ocean bottom.

15. Framework Measures

This action expands the framework adjustment process in the FMP by adding the following measures to the list of measures that could be implemented through a framework adjustment to the FMP in the future: In-season adjustments to TACs; measures to address bycatch and bycatch monitoring; and TAC set-aside amounts, provisions, and adjustments.

Comments and Responses

General Comments on Amendment 1

Comment 1: A total of 988 commenters expressed general support for Amendment 1. One commenter opposed the entire amendment.

Response: NMFS has approved the Amendment, with the exception of the

measure concerning the harvest of herring by fixed gear fishermen in Downeast Maine (east of Cutler-the Downeast Maine Fixed Gear Fishery).

Comments on the PS/FG Only Area

Comment 2: A total of 970 commenters supported the measure that would establish a seasonal (June-September) purse seine/fixed gear (PS/FG) only area. These commenters included U.S. Congressman Tom Allen; Bumble Bee/Stinson Seafoods; the Coalition for the Atlantic Herring Fishery's Orderly, Informed, and Responsible Long-Term Development (CHOIR); Conservation Law Foundation (CLF); Environment Maine; the Lobster Conservancy; the Maine Department of Marine Resource (MEDMR); the National Coalition for Marine Conservation; the National Environmental Trust; the Northeast Hook Fisherman's Association; Oceana; the Ocean Conservancy; the Stellwagen Bank Charter Boat Association; and 957 individuals.

These commenters provided the following reasons for supporting the measure: (1) Midwater trawlers have a negative impact on sustainability of the herring resource because they cause localized depletion of herring in the areas where they fish, while such localized depletion is not caused by other herring gears, such as purse seines and weirs; (2) herring are a keystone species in the GOM, and maintaining a healthy inshore herring stock is critically important to lobster fisherman who use herring for bait, and to a wide range of predators that rely on herring as forage, including groundfish, tuna, seabirds, striped bass, and whales; (3) the measure will minimize bycatch of marine mammals and groundfish, which are put at risk due to bycatch by midwater trawls; (4) the measure is an appropriate precautionary measure; and (5) the social and economic impacts of the PS/FG area are more than offset by the biological benefits that will accrue, and the trawlers that are kept out of this area will still have the option of redirecting their efforts to Areas 1B, 2, and 3, which would support one the FMP's goal of encouraging the development of the offshore herring fishery.

Fifty-three commenters argued that the PS/FG only area should be disapproved, including the American Pelagic Association, the Associated Fisheries of Maine (AFM), Cape Seafoods, Inc.; Cold Spring Fish &Supply Company; Garden State Seafood Association (GSSA); Lunds Fisheries, Inc.; Norpel; and 46 individuals. The reasons cited by these commenters for their opposition are that the PS/FG only area violates several of the Magnuson-Stevens Act national standards and other legal requirements, including: (1) National Standard 2 and the Administrative Procedure Act (APA) because the rationale for the proposal does not have an adequate scientific basis; (2) National Standard 4 and the APA because it is an unfair and inequitable allocation of fishing privileges and the Amendment 1 analyses do not demonstrate a rational connection between that allocation and the actual furtherance of optimum yield (OY) or any legitimate goal of the FMP; (3) National Standard 4 because it discriminates between residents of different states; (4) National Standard 7 because the measure fails to, where practicable, minimize costs by imposing costs of a new gear amounting to several hundred thousands of dollars; (5) National Standard 8 and Magnuson-Stevens Act section 303(b)(6), because the Council has not adequately analyzed or given due weight to the present participation of midwater trawls in the fishery, the historical fishing practices and dependence on the fishery, the economics involved, and the impact upon fishing communities adversely affected by this discriminatory provision; and (6) National Standard 9, which requires that conservation and management measures shall, to the extent practicable, minimize bycatch and bycatch mortality. Commenters also claimed that, although Amendment 1 argues that the measure will prevent overfishing, it presents no reasoned argument for that conclusion. Excluding midwater trawlers, the commenters continue, will not reduce the number of herring caught; rather, it will simply mean purse seiners will catch more, and midwater trawlers less. Finally, some commenters claimed that although Amendment 1 argues that it will protect discrete spawning components, it presents no facts or logical connection to support this and, furthermore, it presents no evidence of localized depletion, a term that is not even defined.

Response: The Magnuson-Stevens Act gives considerable latitude to the Councils to develop management measures if, in the judgment of the Council, they conserve and manage a fishery resource. While the comments in opposition to this measure note several legal and statutory requirements that the commenters believe would be violated by the proposed measure, NMFS does not agree with their assertions.

NMFS determined that the measure does not violate National Standard 2 or the APA. National Standard 2 does not limit the Council or NMFS to taking action only in those cases where scientific data support a measure, but rather requires the use of the best scientific information available concerning the issue under review. This action is justified under the APA because it is based on rational decision making and not arbitrary and capricious. With respect to the PS/FG, the Council did take into account the best available scientific information on localized depletion, and adequately weighed that information, along with other factors, in supporting this measure in the Amendment and its supporting analyses. NMFS agrees with the Council that, in the face of scientific uncertainty or in the absence of hard data, as is the case in this situation, the Council can choose to be precautionary and implement measures intended to address or avoid a resource problem. Given the importance of herring as a forage species and its role in the GOM ecosystem, NMFS concludes that it is appropriate to enact this measure now to maintain the health of this resource in the inshore area, as well as the resources that depend on herring as prey, and the businesses that are sustained by a healthy GOM ecosystem. Such weighing and balancing of factors clearly satisfies the APA's requirement that a federal action not be arbitrary and capricious.

This measure does not violate National Standard 4. While National Standard 4 does not allow NMFS to approve measures that were specifically designed to discriminate between the residents of different states, it does not limit NMFS's ability to approve measures that have a different impact on fishermen from different states. The proposed PS/FG measure is not designed to differentiate between fishers based on their state of residence. The measure was designed to regulate the use of a specific gear type in herring Management Area 1A. The fact that vessels fishing from ports in states that are closer to Area 1A may be more impacted than vessels in states that are more distant is an unavoidable geographic fact, not discrimination. In addition, impacted fishers may continue to fish within the area during the PS/FG only season if they use a gear other than midwater trawl gear.

Amendment 1 notes that the PS/FG only measure contributes, ''directly and indirectly,'' to several FMP objectives, including Objective #1 (prevent overfishing) and Objective #5 (full utilization of OY). A more specific linkage to these particular FMP objectives is not provided in the amendment. The measure contributes to

the overall management program, however, thus NMFS concludes it is appropriate to characterize the measure as indirectly supporting the objectives of preventing overfishing and achieving OY. NMFS notes that the achievement of OY does not depend solely on the attainment of the TAC in Area 1A. In fact, in most years, the Area 1A TAC has been fully attained. Achieving OY would require that the TACs allocated to Area 2 and Area 3 be attained, which is unrelated to the PS/FG only measure.

Amendment 1 also notes that the PS/FG only measure contributes, ''directly and indirectly,'' to FMP Objective #2 (prevent overfishing of discrete spawning components), and that the measure is intended to prevent the inshore stock component from becoming depleted or overfished. NMFS agrees with the commenters who note that there is no formal definition of the term ''localized depletion.'' However, such a definition is not required in order for the Council to design a measure to conserve and manage the stock in Area 1A. The Council has now established a seasonal gear restriction in the area to address concerns about the impact of midwater trawling on schools of herring. This gear restriction is an expansion of the area management program that has been in effect for the fishery for a number of years.

Some commenters similarly noted their view that the proposed provision would violate the Magnuson-Stevens Act provision at 303(b), which specifies conditions for the allocation of fishing privileges. However, this measure does not make an allocation of fishing privileges, because any fisher who is eligible for the required herring permit may fish under the specified gear restrictions.

This measure does not violate National Standard 7. The key phrase in this standard is ''where practicable.'' This standard does not require that conservation and management measures minimize costs whenever costs are involved. The PS/FG measure is projected to entail costs to those vessel owners who can no longer fish in the area during the seasonal restriction and who choose to either re-rig so that they can fish in the PS/FG or fish in other areas. These costs were fully considered by the Council and balanced against the potential benefits of the PS/FG area, and in the Council's estimation, with which NMFS concurs, those costs are justified. Furthermore, to the extent that fishermen excluded from the PS/FG have the option to either fish in other areas or re-rig to become purse seiners, the economic impacts of the PS/FG can be partially ameliorated as compared to being completely banned seasonally from this area.

National Standard 8 requires that fishing measures take into account a range of factors, including the importance of fishery resource to ensure the sustained participation of fishing communities and, to the extent practicable, minimize the economic impact on such communities. National Standard 8 does not dictate what measures shall be adopted once those factors are considered. Amendment 1 provides a huge amount of information on the potential impacts of the PS/FG on virtually every stakeholder, including the fishing communities that rely on herring. Those data were fully considered and evaluated by the Council in deciding to support this measure. Similar to the discussion of National Standard 7, above, one of the key phrases in Standard 8 is ''to the extent practicable.'' While various fishing communities are projected to have costs to bear as a result of the implementation of PS/FG, those costs were balanced and minimized in development of the measure to the extent that fishermen excluded from the PS/FG have the options to either fish in other areas or re-rig to become purse seiners, thereby ameliorating the economic impacts of being completely banned seasonally from this area. As noted previously, the requirements at Section 303 (b) of the Magnuson-Stevens Act are specific to the allocation of fishing privileges, not the gear restriction established by the PS/FG measure. Any fisher who is eligible for the required herring permit may fish under the specified gear restrictions.

This measure does not violate National Standard 9. While the Council notes in Amendment 1 that there may be some indirect benefits to recovering groundfish stocks in Area 1A based on data suggesting differences in bycatch rates, species composition of bycatch, and bycatch mortality between purse seines and midwater trawls, the measure is not specifically designed to address bycatch. The commenters did not explain why they believe that the indirect benefits cited would violate the requirement to address bycatch.

Comment 3: One commenter urged NMFS to develop a formal definition of a purse seine vessel. The commenter expressed concern that some midwater trawl vessels that might re-rig to use purse seine gear have holds that are much larger than traditional purse seine vessels. The commenter expressed concern that larger vessels could fish too hard in Area 1A, and requested a definition that would ''limit the ultra-efficiency'' of trawlers that re-rig.

Response: The restriction on the use of midwater trawl gear is not based on vessel size or capacity; it is a gear restriction. The Council specifically notes its intention that midwater trawl owners have the option of re-rigging to use the preferred purse seine gear in Area 1A when midwater trawl gear is prohibited. NMFS has no authority to establish a definition that would substantially modify the Council's intent.

Comments on Limited Access Program

Comment 4: Nine commenters, including CLF, the Ocean Conservancy and seven individuals, argued against approving the limited access program presented in Amendment 1 because it fails to address the issue of overcapacity. These commenters argued, among other things, that the Council should not have allowed vessels to qualify for limited access permits on the basis of landings made after the control date of September 16, 1999. They believe that the Council should reconsider the alternatives that relied on the 1999 control date, and are, therefore, presumably arguing for disapproval of the limited access program in Amendment 1. On the other hand, 22 commenters supported the limited access program for Area 1A in general, but did not support the eligibility criteria, arguing that they would significantly increase effort in this area. Bumble Bee/Stinson Seafoods commented in support of the implementation of the All Areas Limited Access Permit in Amendment 1. Six vessel owners commented in favor of the implementation of the limited access program for Areas 2 and 3.

Response: Control dates are set to alert the fishing community to the possibility, not the certainty, that vessels that enter the fishery after that date might be treated differently than vessels that were in the fishery prior to that date, in the event that a limited access program is implemented. However, a Council is under no obligation to use the control date in establishing criteria for a limited access program. If a Council decides to develop a limited access program, the program must comply with the requirements of the Magnuson-Stevens Act outlined in section 303(b)(6). These requirements include the need to take into account the present and historical participation. With regard to herring, the Council was aware that new vessels had entered the herring fishery since the September 1999 control date and were fishing for herring in various management areas. One of the goals and objectives of

Amendment 1 is to, ''provide, to the extent practicable, controlled opportunities for fishermen and vessels in other Mid-Atlantic and New England fisheries.'' Due to the nature of this fishery and recent developments in shoreside processing, the Council determined that active participants up through 2003 with significant landings should be accommodated in at least some management areas. NMFS concludes that the Council selected eligibility criteria consistent with the requirements of the Magnuson-Stevens Act.

In a similar vein, a Council is under no obligation to select the most restrictive eligibility criteria. The Council properly considered a range of factors in determining the eligibility criteria, and, in particular, the dates during which landings would be used to qualify for limited access permits, paying special attention to the need to balance historic and current participation. Although the Council could have chosen eligibility criteria that would have greatly reduced the number of qualifying vessels and hence the potential effort in Area 1A, the eligibility criteria that the Council chose are reasonable and defensible.

Comment 5: Forty-six commenters, including AFM; APA; Cape Seafoods, Inc.; Cold Spring Fish & Supply Company; GSSA; Lunds Fisheries, Inc.; Montauk Inlet Seafood, Inc.; Norpel, and 38 individuals argued that NMFS should disapprove the establishment of the limited access program for Areas 2 and 3. The reasons cited for this position include the following: (1) The TACs allocated to these areas have never been fully utilized, and landings have actually decreased in recent years, therefore establishing limited access in these areas would violate National Standard 1, which requires measures to, ''prevent overfishing while achieving on a continuing basis, the optimum yield from each fishery;'' (2) limiting access to these areas now will impede the achievement of OY; (3) the capacity analysis in Amendment 1 is flawed because it did not analyze recent and anticipated future growth in capacity or fishing effort in Areas 2 and 3, it over-estimated harvesting capacity, and it does not take into account net capacity growth that may have taken place in the past few years; (4) the amendment simply assumes rather than proves that, absent the imposition of limited access, there would be significant growth in capacity in Areas 2 and 3; (5) it will unfairly eliminate a large percentage of the fleet from access to significant amounts of herring; and (6) the possibility of overcapitalization, in the absence of any serious threat of overfishing or other near-term conservation impact, is not a sufficient basis for the imposition of a limited access system, with all its attendant adverse effects upon competition and free market activity.

Response: Many of the concerns noted by these commenters are the result of the fact that they inappropriately equate historic landings with fleet capacity. The fact that the open access herring fleet has not taken the TACs in Areas 2 and 3 is not a reflection of the capacity of the vessels. Indeed, during the Council debate about annual specifications, members of the herring industry strenuously argued that the existing fleet has the capacity to take the entire OY (including all the TACs for the various areas), thereby precluding any foreign fishing allocation. Many of the same industry members now argue that, because they have not in fact taken the TACs in Areas 2 and 3, those areas should remain open access in order to land OY. However, the capacity to take the TACs in Areas 2 and 3 already exists, as demonstrated in the capacity analysis for the No Action alternative. The reason that the fleet has not done so to date has more to do with the availability of fish and external market factors that it has to do with capacity. In Section 6.1 of Amendment 1, the Council adequately lays out its rationale for limited access and the Council notes that it seeks to avoid the problems experienced in other fisheries as a result of excess capacity. The Council also notes that it seeks to develop a limited access program to address the existing capacity problems in Area 1A and avoid such problems in other areas.

The Magnuson-Stevens Act requires the Council to consider past and present participation when establishing a limited access program, and the Amendment 1 eligibility criteria are predicted to result in a fleet that has the capacity to harvest expected TACs. The analysis of potential harvesting capacity in this Council document is based on the best available information and provides some perspective on what the potential catch of the limited access fleet may be under the Amendment 1 eligibility criteria. The range of potential catch under each of the limited access criteria provided in the analysis was not intended to be an absolute estimate or a direct measure of capacity, but rather a tool for the Council to use to evaluate the potential for the fleet to catch the total TAC for the fishery. It was used during the Council deliberations to compare the limited access alternatives under consideration. The range of potential catch estimates in the analysis represents a minimum estimate, as it only incorporates observed fishing effort for active vessels (2002–2004) that would 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 and additional qualified vessels that may come forward during the review of Amendment 1 eligibility, are not included in the analysis, so the potential catch of the entire limited access fleet is expected to be higher than the range provided in this analysis. The capacity analysis for the proposed action concluded that the potential catch would range from 161,030 to 198,710 mt, exceeding the 2006 total TAC for the fishery of 150,000 mt. Keeping in mind that this is likely an underestimate of the capacity that will actually result from the implementation of this action, it is clear that the fleet of vessels found eligible for permits under Amendment 1 will have more than enough capacity to take the TAC, not only in Area 1A, but also in Areas 1B, 2, and 3. As to the issue of whether there would be significant growth in capacity in Areas 2 and 3, absent the imposition of limited access, that is not relevant. As already stated above, the capacity already exists in the fleet to take all the TACs and to achieve OY.

The limited access program contained in this action will not unfairly eliminate a large percentage of the fleet from access to significant amounts of herring. Although there is no doubt that certain herring boats will be limited in the amount of herring that they can catch or possibly excluded from the limited access fishery, the vast majority of the historically active and significant participants in the fishery should be able to qualify for one or more limited access permits, and continue to participate in the fishery. Indeed, the eligibility criteria chosen by the Council were specifically intended to enable a wide range of past and present participants in the fishery to qualify for one or more limited access permits. As the Amendment noted, the majority of vessels that are likely not to qualify under this action have not participated 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 and

3. As stated above, by taking action now, and implementing limited access in Areas 2 and 3, the Council hopes to avoid the problem of overcapacity.

NMFS believes that this limited access program complies with National Standards 1 and 4, as well as with the APA, because the decision to make Areas 2 and 3 limited access is clearly based on a reasoned evaluation of the data and the potential capacity of the fleet.

Comment 6: Twenty-eight commenters, including AFM; American Pelagic Association; Bumble Bee/ Stinson Seafoods; Cape Seafoods, Inc.; Cold Spring Fish & Supply Company; GSSA; MEDMR; Montauk Inlet Seafood, Inc.; Lunds Fisheries, Inc.; Norpel; and 18 individuals suggested that NMFS should modify the limited access program for Areas 2 and 3 if it does not disapprove it. All of them suggested a longer time period for determining limited access eligibility, with specific suggestions to extend the start of the qualification period back to 1988, and/ or forward to 2005 or the date that limited access is implemented. MEDMR advocated for an eligibility criteria for Areas 2 and 3 that would qualify all current fishery participants for the permit, though it did not suggest how such participants would be defined. Twenty-one commenters proposed a phased in ''controlled access'' program.

Response: The Magnuson-Stevens Act authorizes NMFS to approve or disapprove measures proposed by the Council in an FMP or an amendment; there is no authority to modify those measures in a substantive way after being submitted for approval. During the development of Amendment 1, the Council evaluated numerous proposals for limited access eligibility criteria and ultimately adopted those approved in the amendment. Amendment 1's rationale for the limited access program for Areas 2 and 3 is sufficiently justified and NMFS finds no grounds for disapproving the provision, which it finds to be consistent with the Magnson-Stevens Act and other applicable laws.

Comment 7: A number of commenters suggested modifications to the limited access incidental catch permit. These include 21 individuals who recommended a higher possession limit, and 17 who suggested that all vessels issued an Atlantic mackerel permit should be eligible for this herring permit. One commenter believes that the program violates National Standard 9 because it could require vessels targeting mackerel to discard herring if they catch more than the possession limit authorized under their herring permit.

Response: As noted above, NMFS can only approve or disapprove measures in Amendment 1; it cannot modify those measures. In Amendment 1, the Council sufficiently evaluated the likely levels of incidental herring catch in fisheries targeting other species. The possession limits specified in Amendment 1 are intended to provide reasonable levels of incidental catch without creating an incentive for targeting herring. Amendment 1 notes, in Section 5.2.2, that if there are future interactions, particularly in the squid-mackerel fisheries, the Council may take additional action to address those interactions. In light of the findings in Amendment 1 on this subject, NMFS finds no basis for disapproving the limited access incidental catch measures.

Comment 8: Three individuals commented that NMFS should make it possible for fishermen to be able to sell and purchase herring permits without jeopardizing the fishermen's other limited access permits.

Response: As noted previously, NMFS can only approve or disapprove measures in Amendment 1. It cannot modify those measures in a substantive way. NMFS notes, however, that it has never recognized the sale of open access or limited access permits. The regulations for limited access fisheries govern the transfer of limited access permits when a vessel is sold. Furthermore, the Council specifically addressed the issue of how the sale and retention of herring permits and histories would be handled under Amendment 1. See the response to Comment 9 for additional discussion of the provision governing such sales.

Comment 9: Twenty-two commenters including American Pelagic Association; Cape Seafoods, Inc.; Cold Spring Fish & Supply Company; GSSA; Lunds Fisheries, Inc.; Norpel; and 16 individuals argued that the permit-splitting provision in Amendment 1 should be disapproved. They believe that the Amendment 1 regulations should allow a vessel owner who sold a vessel with limited access permits, but who retained the Atlantic herring fishing history, to use the retained history to qualify the onwer's vessel for a limited access herring permit. They argue that the measure in Amendment 1 would retroactively prohibit business transactions that were legitimate at the time they were conducted, and that it is not consistent with the consistency amendment that was implemented in 1999 to standardize the limited access programs for the region's fisheries. They also argue that the measure violates the requirement of the APA for reasoned and non-arbitrary decisionmaking because there is no analysis of the impacts of the measure in the Amendment, and that it would violate the National Standard 4 requirement for the allocation of fisheries privileges to be made in a fair and equitable manner.

Several of the commenters who oppose the permit-splitting provision argue that it will increase, rather than decrease, the capacity of the herring fleet, and outline a specific scenario to support their view that the permit-splitting provision in Amendment 1 would create two herring limited access permits where there only should have been one. Six individuals supported the permit-splitting provision as proposed.

Response: NMFS concludes that Amendment 1 adequately considered and justified this measure and NMFS, therefore, finds no reason to disapprove the provision. At the Atlantic Herring Advisory Panel meeting on October 19, 2005, a number of questions were asked about the manner in which the herring limited access permitting provisions would be implemented. NMFS staff provided information to the Council about the vessel eligibility determinations made in previous limited access programs, and specifically noted that NMFS had been getting inquiries from industry members about buying and selling herring ''landings histories.'' It was pointed out to the Council that previous programs had not recognized this type of activity. For the next several months, the Council discussed various limited access permit issues and adopted provisions that were consistent with previous limited access programs.

Among the provisions adopted by the Council on May 3, 2006, was one referred to as the permit-splitting provision that specified that, ''no more than one vessel may qualify, at any one time, for a limited access permit based on that or another vessel's fishing and permit history.'' NMFS reviewed the language in response to inquiries from constituents, and asked the Council to clarify its intention concerning the measure. NMFS noted that, if implemented as written, vessel owners who had sold a vessel that had been issued one or more limited access permits, but retained only the herring fishing history, would not be able to use the herring history to qualify another vessel for a herring limited access permit. NMFS notified the owners of vessels issued herring permits that the discussion would take place the following week at the Council meeting on April 4, 2006. At that time, the Council clarified that it would maintain the measure as written.

While this clarification to the implementation of Amendment 1 happened in the final stages of the development process, it is not being applied retroactively to previously recognized actions. The actions the commenters took prior to the establishment of the herring limited access program were private transactions between individuals. The fact that regulations in effect at the time did not bar those transactions does not mean that the Council or NMFS recognized them as valid. The commenters' suggestion that the impacts of the measure on vessel owners could have been analyzed implies that they were recorded in a database that could be used in analysis. However, there is no way for the Council or NMFS to identify the existence of these private arrangements.

It is unclear how the commenters conclude that this provision violates National Standard 4. Certainly some vessel owners will be impacted, while others will not, but that, in and of itself, is not the same as an inequitable assignment of fishing privileges. It appears that some vessel owners who took speculative actions in anticipation of limited access going into effect for the herring fishery will find that their strategies did not work, but that does not constitute a violation of National Standard 4.

The commenters who have expressed concern that the permit-splitting provision could increase fleet capacity base their concern on a very specific set of circumstances. NMFS argues that there could be cases where two separate owners could qualify vessels for limited access permits based on fishing conducted using the same hull by each of the owners at different points in the eligibility periods. This would require the original owner to have retained the fishing history and any limited access permits, and to own a vessel that meets the permit requirement. This scenario would require the purchaser of the vessel to have independently accumulated sufficient herring landings to meet the eligibility criteria and to have been issued a herring permit at the required time. While this scenario could potentially occur, it is likely to be very limited in scope, and would not violate any requirement of the Magnuson-Stevens Act or other applicable laws.

Comment 10: One commenter argued that the Amendment discriminates against historic participants in the Downeast Maine herring fishery. The commenter states that herring were not available to the fishermen in this area during the selected qualification years of 1988 and 2003, for the limited access incidental permit. Therefore, the fishermen of that area will only be able to qualify for open access permits. The commenter argues that Downeast fishermen who invested in herring after the control date of 1999 face large losses because they were not able to find herring within the time constraints required to qualify for limited access permits.

Response: The Magnuson-Steven Act requires the Council to consider historic and recent participation in a fishery when it establishes a limited access program. The Council conferred some level of limited access eligibility on participants who made specified levels of landings over a 15-year period. By design, eligibility will not be conferred on vessels that made no herring landings. NMFS has approved the program because it complies with the Magnuson-Stevens Act and other applicable laws and has considered present and historic participation in the fishery.

Comments on Open Access Permit Program

Comment 11: Nineteen commenters, including Cape Seafoods, Inc.; Cold Spring Fish & Supply Company; GSSA; Lunds Fisheries, Inc.; Norpel; and 14 individuals, argued that the herring possession allowance for vessels issued the open access incidental catch permit established by Amendment 1 should be increased from 3 mt to either 5 mt or 25 mt. Many commenters argued that the increase would provide consistency pursuant to National Standards 5, 6, and 9 by ensuring access to the mackerel resource while reducing the potential for regulatory discards.

Response: NMFS can only approve or disapprove measures in Amendment 1; it cannot modify those measures. The Council specifically analyzed in Amendment 1 the level of incidental herring caught by vessels that land Atlantic mackerel, and addressed the issue by establishing the open access and limited access incidental catch permits. The basis for the Council's specification of a 3 mt possession limit, therefore, is well-documented and reasonable, and there is nothing in the Council's specification of a 3–mt possession limit for vessels issued open access incidental catch permits that violates the national standards cited by the commenters. NMFS finds no basis for disapproving the measure.

Comments on Other Measures

Comment 12: One commenter expressed concern that the suite of measures adopted in Amendment 1 represented a ''mix-and-match'' of the measures taken to public hearing by the Council. The commenter noted that the Draft Environmental Impact Statement (DEIS) stated that measures would not be mixed and matched, and that the Council violated this promise. The commenter claimed that the proposed action was not fully analyzed and the public did not have an opportunity to reflect on the impacts of that action.

Response: While the DEIS did discuss analyzing the various alternatives as packages, the Council was under no legal obligation to strictly maintain the alternatives without any modification. In fact, to do so could have been inconsistent with the Council's consideration of the comments received during the public hearings. All of the elements in Amendment 1 fall within the range of packaged alternatives analyzed in the Amendment, and the final impacts were presented to the public for review and comment in the formal submission of Amendment 1. NMFS found that Amendment 1 complies with the requirements of the Magnuson-Stevens Act and other laws.

Comment 13: Ten commenters, including CLF, Oceana, and eight individuals, opposed the 3-year specification setting process, arguing that only yearly specifications will allow the Council to effectively adjust to changing conditions in the fishery.

Response: 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 regulation of the fishery. Extending the specification process from 1 to 3 years could give businesses a longer-term planning horizon and create a more stable environment for business planning. Concerns about the importance of reviewing this fishery on an annual basis are addressed in Amendment 1 through the requirement for the Herring PDT to annually review the status of the stock relative to the overfishing definition and the provision that authorizes the Council to adjust the specifications during the interim years. Thus, the provision will permit the Council to adjust the specifications, if necessary, in response to changes in the condition of the stock or the fishery.

Comment 14: Seventeen commenters including GSSA, AFM, and 15 individuals, argued that the proposed definition of midwater trawl gear should be disapproved because it does not define the term ''chafing gear.'' They note that chafing gear is critical in order to haul gear up stern ramps without sustaining damage to the gear. These commenters recommended that the Council and NMFS convene a working

group to more fully develop the definition, and especially define chafing gear. The Council also submitted a comment requesting that NMFS clarify the definition in the final rule, but made no suggestion for clarification. CLF supported the proposed midwater trawl definition, but urged NMFS to strengthen this provision in the future to ensure that midwater trawl gear is not fished on the bottom.

Response: The Council's definition of midwater trawl gear says in part, that ''the gear may not include discs, bobbins or roller on its footrope or chafing gear as part of the net.'' Industry members raised the gear damage concern to the Council during the development of Amendment 1 but the Council ultimately adopted the definition. NMFS notes that restrictions on the use of chafing gear appear in the regulations for many fisheries in the NE region, including squid, mackerel, butterfish, NE multispecies, summer flounder, black sea bass, and scup, without further definition. NMFS is unaware of any resultant problem with respect to industry compliance or enforcement. NMFS has approved the definition, but notes that the commenters may wish to bring up the issue with the Council, and to offer further refinement of the definition in a future regulatory action.

Comment 15: MDEMR and two individuals opposed the disapproval of the Downeast Maine (east of Cutler-the Downeast Maine Fixed Gear Fishery) exemption from the TACs that govern the fishery. MEDMR disagreed with NMFS's assertion, as stated in the proposed rule for Amendment 1, that this measure would violate National Standard 1, and that NMFS would have no means of regulating the catch to ensure the integrity of the TAC. MEDMR pointed out that its regulations require all herring landings to be reported, and therefore believed the fishery would be regulated. MEDMR also disagreed with NMFS's determination, also stated in the proposed rule for Amendment 1, that this provision would be inconsistent with National Standard 3, the requirement to manage an individual stock unit throughout its range. MEDMR stated that there is increasing evidence that the fish in the area belong to the NW Nova Scotian stock and consequently the requirement to manage an individual stock unit throughout its range may not be applicable. Two herring fishermen commented that disapproving this provision was not fair to those fishermen who operate in the Downeast Maine Fixed Gear Fishery, and would have a dramatic and negative impact on them.

Response: Although MEDMR can monitor the landings of the Downeast Maine Fixed Gear Fishery, NMFS would not have the legal authority to regulate that catch. The provision, as written, means that the Downeast Maine Fixed Gear Fishery would be exempt from the TAC controls; therefore, NMFS would have no authority to close down that fishery and maintain the integrity of the TAC. The measure would essentially allow a portion of the fishery to remain completely unregulated by Federal authority without corresponding conservation benefits. In addition, while in the future the definition of the Atlantic herring stock may change, the best available science specifies that herring is a unit stock. As stated in the proposed rule for Amendment 1, NMFS found the measure to be inconsistent with National Standards 1 and 3 of the Magnuson-Stevens Act, and it was disapproved on December 6, 2006.

Comment 16: CLF and the Ocean Conservancy argued that caution should be used in applying the existing methodology to establishing MSY, because the methodology used in the TRAC process might prove risky in light of the retrospective pattern of the assessment and new and emerging information on ecological relationships, which might alter the way in which various factors are taken into account.

Response: The establishment of MSY is based on the best available science. The TRAC process is continually working to improve the methods it uses to estimate MSY, and will continue to take into account emerging information about the fishery and its interrelations within the ecosystem. Indeed, the most recent TRAC, which was completed after Amendment 1 was finalized, revised MSY downwards. Instead of the proxy value of 220,000 mt, the MSY for the herring stock is now 194,000 mt. NMFS notes that the retrospective pattern in the assessment can be taken into account when recommending Atlantic herring specifications.

Comment 17: Six individuals opposed the establishment of an RSA, arguing that the herring industry has provided financial and in-kind support for such research without the administrative burden and associated cost. Twenty-one commenters support the RSA to support herring research.

Response: NMFS acknowledges the industry's voluntary efforts to participate in and contribute to scientific research and hopes that these efforts continue in the future. There is no basis suggested for disapproving the measure that establishes the RSA. NMFS notes that, each time the Council recommends fishery specifications, it has the option of setting the RSA at zero. None of the TAC would necessarily be set-aside if there is concern about utilization of the resource in a particular area. Moreover, any portion of the RSA that is not allocated for research will be reallocated to the fishery at the beginning of the fishing year.

Comment 18: Six individuals opposed the 500–mt set aside for fixed gear fisherman in Area 1A, because there are no management measures in Federal or state FMPs that preclude this sector from full participation in the fishery, and because of the administrative burdens that such a provision would impose.

Response: The Council developed this measure to ensure access to the herring resource for the fixed gear fishery in Area 1A. Herring is only available to fixed gear fishermen using weirs and stop seines in the inshore GOM if the fish move inshore. Some fixed gear fishermen requested a specific allocation, arguing that the fishery in Area 1A would otherwise harvest the TAC before fish can reach the inshore areas. While there may be other factors related to the decline of the fixed gear fisheries, it is within the authority of the Council to make such an allocation. NMFS notes that its administrative burden will be relatively small. If the set-aside is not utilized by November 1, it would become part of the overall Area 1A allocation. Monitoring measures established through the Commission's Amendment 2 to the Interstate Fishery Management Plan (ISFMP) for Atlantic herring will require the State of Maine to provide the data necessary to monitor the fishery. There may be administrative burden associated with the State program, but that is outside of NMFS's authority.

Comment 19: The Council requested that NMFS clarify that the language regarding the 500–mt set aside should authorize ''up to 500 mt'' to be set aside, as opposed to requiring that 500 mt be set aside. The Council noted that the exclusion of the words ''up to'' in Amendment 1 was an oversight resulting in a very stringent management measure that provides no flexibility to the Council.

Response: NMFS has clarified the regulations, consistent with the Council's intent.

Comment 20: Bumble Bee/Stinson Seafoods supported the revision of the permitting requirements that would require at-sea processing vessels to obtain dealer permits rather than vessel permits.

Response: NMFS is implementing the provision through this final rule.

Comment 21: The Council and six individuals supported the retention of the TAC reserve option in the specifications.

Response: NMFS has left the option for the specifications to include TAC reserves.

Comment 22: The Council urged NMFS to revise the final regulations to clarify thatthe measures specified in Framework 43 regarding the retention of haddock and other regulated species will apply only to vessels issued limited access directed fishing permits, not limited access incidental catch permits.

Response: NMFS reviewed Amendment 1 and Framework 43, and has revised the final rule as requested by the Council because it is explicit in the Amendment and the Framework that the measures should apply only to limited access directed fishing permits the All Areas Limited Access Herring Permit, and the Areas 2 and 3 Limited Access Herring Permit. NMFS notes that this means vessels issued limited access incidental catch permits are prohibited from possessing any NE multispecies.

Comment 23: The Council argued that it did not intend for carrier vessels to be required to possess either a limited access or an open access herring permit. The Council supports the requirement for carrier vessels to obtain a letter of authorization and suggested that a separate permit be issued for carrier vessels, similar to the permit that authorizes carriers to receive up to the BT specification.

Response: The Council specified in Amendment 1 that the herring management measures existing prior to Amendment 1 would remain in effect unless specifically revised in Amendment 1. The provision that requires a carrier vessel to have a herring permit has been in effect since 2000. While Amendment 1 specified that carrier vessels would not be required to be issued a limited access permit, the Amendment did not contemplate the removal of the permit requirement entirely. Therefore, NMFS is maintaining the requirement for U.S. carrier vessels to be issued either an open-access or a limited access herring permit as a required aspect of program administration and as an enforcement tool. The permit is needed to identify the vessel owner, should there be any violation of regulatory requirements, and withholding a permit is one of the most effective enforcement tools. As mentioned in the preamble to this rule, even though carrier vessels will be required to have either an open access or a limited access permit, they will not be required to abide by the possession limits associated with those permits while operating as a carrier vessel. The Magnuson-Stevens Act, as amended by Public Law104–297 sec. 105(e), provides specific authority for NMFS to issue permits to up to 14 Canadian vessels to transport U.S.-caught herring to Canada solely for sardine processing. The amount that can be transferred is specified in the annual specifications as BT. However, the provision is unrelated to the authorization of U.S. carrier vessels.

Comment 24: One commenter suggested that herring carrier vessels should not be prohibited from possessing species other than Atlantic herring. The commenter noted that Framework 43 authorized herring vessels to possess NE multispecies up to specified limits. The commenter suggested that, because carriers receive herring pumped directly onboard from fishing vessels, carrier vessels must be authorized to possess NE multispecies up to the same specified limits.

Response: While this comment would more appropriately have been raised during the public comment period for Framework 43, NMFS recognizes that the Council developed Amendment 1 and Framework 43 jointly, so the issues are directly related in the mind of the public. NMFS finds that the commenter has raised a valid point about an inconsistency in the regulations that would present the industry with a compliance problem and NMFS with an enforcement problem. Thus, NMFS has clarified that the possession allowances applicable to herring fishing vessels are also applicable to herring carrier vessels that receive herring from these vessels.

Comment 25: One commenter requested modifications to the proposed regulations governing the transfer of fish at sea. The commenter suggested that several of the restrictions should be modified because they are inconsistent with fishery operations, particularly in the purse seine fishery. The commenter explained that purse seine operations may catch more herring than estimated when they encircle the fish they are targeting. The amount of herring captured may be more than either the vessel's market demands, or more than the vessel has the capacity to carry. As a result, to alleviate waste and discarding, it has been industry practice for purse seine vessels to share their catch with other fishing vessels, as well as carrier vessels. The proposed rule would restrict this activity in two ways. First, it would prohibit transfers of herring at sea unless the transfer is made to a vessel for personal use as bait, to an at-sea processing vessel, or to a vessel operating exclusively as a carrier vessel under a LOA. Second, the proposed regulations would prohibit a vessel with fishing gear on board from operating as a carrier vessel.

The commenter requests that NMFS revise the final rule to allow the transfer of fish among fishing vessels, provided each vessel involved in such a transfer has been issued a limited access herring permit. Vessels would be required to comply with the herring possession limits associated with their vessel permit. In addition, the commenter stated that NMFS should revise the final rule so that the vessel receiving such a transfer could utilize the fish in any manner, not just for personal use as bait. The commenter noted that the Council intended to limit transfers for bait use only when herring is transferred to a vessel that is not issued a herring permit. The commenter argued that it is illogical to limit the transfer of fish to U.S.-permitted vessels to bait use only, and notes that carrier vessels, in particular, deliver fish that is used for commercial purposes other than bait. The commenter noted that reporting requirements would apply to all such herring, so that the landings would be counted toward the area TACs.

In addition, the commenter requests that NMFS revise the final rule to allow any vessel issued a limited access herring permit to operate as a herring carrier vessel, without being subject to the LOA requirements. The commenter argues that NMFS proposed new measures that would restrict carrier vessels. The commenter believes that industry practice requires limited access vessels to be able to receive transfers at sea without the limitations specified by the LOA, particularly the requirement that the vessel operate exclusively as a herring carrier vessel while issued the LOA, and the requirement for the LOA to be issued for a minimum period of 7 days. The commenter thinks the LOA should be required only for vessels that are not issued a limited access herring permit since, in the commenter's view, the objective is to identify vessels allowed to possess herring and insure that all catch is reported.

Response: In the preamble to the proposed rule, NMFS specifically requested comments on the proposed regulations governing the transfer of fish at sea. NMFS noted that it was proposing a revision of the existing regulatory text because Amendment 1 was establishing several types of vessel permits, each of which authorized the possession of different amounts of herring. The revision was intended to maintain the integrity of the herring possession limits, and required a vessel

transferring herring to comply with the possession restrictions associated with its permit type. The commenter agrees with this aspect of the NMFS revision.

However, the other issues raised by the commenter resulted in a review of the proposed revision that revealed that NMFS omitted from the proposed rule a provision of the existing regulations that should have been maintained. The Council specified in Amendment 1 that the herring management measures existing prior to Amendment 1 would remain in effect unless specifically revised in Amendment 1. Because the transfer at sea provisions were not revised by the Council in Amendment 1, the proposed rule for the transfer of fish at sea should have maintained regulatory text that authorized vessels to transfer fish at sea without restriction on its future use, provided each vessel was issued a valid Atlantic herring permit. Restoring this improperly deleted text will authorize the type of activity identified by the commenter, in which several vessels take on board herring caught in a purse seine deployed by another vessel. It will also authorize the transfer to carrier vessels and U.S. at-sea processing vessels without restriction on the future use of the herring. As noted by the commenter, consistent with the establishment of the limited access program, the final rule specifies that no vessel may possess on board more herring at any time than authorized by the vessel permit it is issued. As noted by the commenter, it is critical that all herring landings be properly reported, so NMFS has also clarified that each vessel must report the herring it lands through the IVR and VTR.

As noted above, unless herring management measures were specifically revised by Amendment 1, the Council specified that existing provisions would be maintained. The existing regulations clearly define herring carrier vessels as vessels issued herring permits, that are prohibited from having gear on board capable of catching herring, and that are issued a LOA. The LOA has a minimum enrollment and specific vessel reporting instructions that are important for NMFS data collection. Therefore, NMFS believes that making any revision to this regulations governing herring carrier vessels would be inconsistent with Amendment 1. NMFS notes that the restoration of the improperly deleted text in the proposed rule may eliminate the need for such a revision. In fact, the carrier vessel LOA would provide an additional opportunity for a vessel issued a limited access herring permit that limits its possession of herring to work with a purse seine vessel for a period of time solely as a carrier vessel. Because such a vessel would have no gear on board, there would be no need to limit the amount of herring it could carry, because it could not have caught the herring.

Comment 26: One commenter requested a revision to the definition of ''processing,'' with respect to the Atlantic herring fishery. The existing definition includes the term ''salting'' as a method of herring processing. However, the commenter believes this would limit the ability of vessels without refrigerated seawater holds to operate as herring carriers, and suggests a revision to allow such vessels to use salt. The commenter notes that there is no ice available to vessels east of Portland, ME, so salt is the best option for such vessels.

Response: NMFS notes that this definition was established in the original FMP, and was not revised in Amendment 1. Therefore, it would not be appropriate to make this modification in this final rule. The commenter may raise the issue to the Council for possible future action.

Comment 27: The Council requested that NMFS clarify the inconsistencies between State and Federal regulations pertaining to the Downeast Maine Fixed Gear Fishery for herring, given that the Commission has already implemented this measure, while NMFS has disapproved it. The Council asked how NMFS will address the inconsistency and how fixed gear catches will be treated with respect to monitoring the Area 1A TAC.

Response: NMFS will rely on data provided by the states, as required by Amendment 2 to the ISFMP for Atlantic Herring, to monitor the landings of the fixed gear sector. These landings will be counted toward the Area 1A TAC.

Comment 28: The Council agrees with the suggestion, made by NMFS in the proposed rule, that vessels that sank, were destroyed, or sold, and then replaced, should be treated the same as vessels that apply directly for a limited access incidental catch permit when it comes to meeting the current permit requirement. Therefore, to meet the current permit requirement for a limited access incidental catch permit, a vessel that is replacing a vessel that sank, was destroyed, or sold must have been issued a Federal permit to fish for Atlantic herring, *Loligo* or *Illex* squid, mackerel, butterfish, and/or whiting (a limited access Northeast multispecies permit also serves as a whiting permit), between November 10, 2003, and November 9, 2005.

Response: This final rule includes this provision.

Changes from the Proposed Rule

NMFS has made several changes to the proposed rule as a result of public comment. Other changes are technical or administrative in nature and clarify or otherwise enhance the administration and/or enforcement of the fishery management program. These changes are listed below in the order that they appear in the classification section and the regulations.

In the section on the collection-of-information requirements for the Paperwork Reduction Act (PRA), the numbers for those requirements have been clarified.

In § 648.2, the definition of Atlantic herring carrier has been clarified to indicate which vessels it applies to.

In § 648.2, the definition of Fixed gear has been added, and, for the purposes of the Atlantic herring fishery it means weirs or stop seines.

In § 648.4, paragraph (a)(10)(ii) is revised to indicate that, even though carrier vessels are required to have a herring permit, they are exempt from the possession limits associated with such permits when operating as a carrier vessel. The paragraph is also revised to clarify that the LOA exempts such a vessel from the VMS and IVR vessel reporting requirements as specified in § 648.7, as well as subpart K. The paragraph is also revised to clarify that a carrier vessel may posses NE multispecies in catches transferred by vessels issued either an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, consistent with the applicable possession limits for such vessels.

In § 648.4, paragraph (a)(10)(iii) is revised to clarify that vessels that exceed the size or HP restrictions are eligible to be issued an at-sea processing permit specified under § 648.6(a)(2)(ii) as opposed to § 648.6(a)(2).

In § 648.4, paragraphs (a)(10)(iv)(B)(*2*)(*i*) and (a)(10)(iv)(B)(*3*)(*i*) are revised to clarify that the subject vessels must have landed, rather than landed and sold, the required amount of herring to qualify for either the All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit. These paragraphs are also revised to clarify that, in those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and BTs, the vessel owner can submit other documentation that captures such transactions and proves that the herring thus transferred should be added to their landings history.

In § 648.4, paragraph (a)(10)(iv)(C)(*1*)(*ii*) is revised to clarify

that a vessel can qualify for an Incidental Catch Limited Access Herring Permit, and CPH, if the vessel is replacing a vessel that was issued a Federal permit for NE multispecies, Atlantic mackerel, Atlantic herring, *Loligo* or *Illex* squid, or butterfish that was issued between November 10, 2003, and November 9, 2005, assuming the vessel meets all the other qualification criteria.

In § 648.4, paragraph (a)(10)(iv)(C)(*2*) is revised to clarify that the subject vessels must have landed, rather than landed and sold, the required amount of herring to qualify for the Incidental Catch Limited Access Herring Permit. This paragraph is also revised to clarify that, in those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and BTs, the vessel owner can submit other documentation that documents such transactions and proves that the herring thus transferred should be added to their landings history.

In § 648.4, paragraphs (a)(10)(iv)(B)(*2*) and (*3*), and in (a)(10)(iv)(C)(*2*) are revised to clarify that landings history must be verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. In the proposed rule, the term records was used instead of reports, when reports is the appropriate term and the one that is used in existing recordkeeping and reporting regulations. The phrase, ''if dealer reports were not required by NMFS,'' was added to clarify what kinds of records are acceptable for verifying landings to qualify for limited access permits.

In § 648.4, paragraph (a)(10)(iv)(D) is revised to clarify that the initial application for all limited access permits established under § 648.4(a)(10)(iv) must submitted by May 31, 2008. This paragraph is also revised to clarify that all limited access permits established under § 648.4(a)(10)(iv) must be renewed on an annual basis, by April 30, the last day of the year for which the permit is issued, unless a CPH has been issued as specified in paragraph § 648.4(a)(10)(iv)(L). Application for such permits must be received no later than March 31, which is 30 days before the last day of the permit year. Failure to renew a limited access permit in any fishing year bars the renewal of the permit in subsequent years.

In § 648.4, paragraph (a)(10)(iv)(N) is amended to clarify what is meant by permit splitting. Specifically, permit-splitting means that the same fishing history cannot being used to qualify more than one vessel for a limited access permit, but a single hull can create more than one distinct fishing history, which could be used to qualify for a limited access permit.

In § 648.4, paragraph (a)(10)(iv)(O)(*3*) is amended to clarify that when the Regional Administrator sends a notice of final denial of a permit application to a vessel owner, the LOA becomes ''invalid 5 days after receipt of the notice of denial, but no later than 10 days from the date of the letter of denial.''

In § 648.6, paragraph (a)(2) is revised to clarify that for transfers-at-sea of mackerel and herring, the at-sea processor receiving the mackerel or the herring is subject to the dealer reporting requirements at § 648.7 (a).

In § 648.7, paragraph (b)(2)(i)(D) is revised to clarify the reporting requirements for vessels transferring herring at sea.

In § 648.13, paragraph (f) is revised to clarify that the cross-reference for the at-sea herring processing permit is § 648.6(a)(2)(ii) as opposed to § 648.6(a)(2), and to clarify that all vessels transferring herring must be issued a LOA.

In § 648.13, language in paragraphs (f)(1)(ii)(B), (f)(2)(ii), and (f)(5) is revised to clarify that possession limits are specified for vessels during area closures as 2,000 lb (907.2 kg) of herring per trip or calendar day.

In § 648.13, language in paragraphs (f)(4) is revised to clarify under what conditions a vessel could no longer tranship herring to a Canadian transshipment vessel.

In § 648.13, paragraph (f)(6) is added to clarify that transfers of herring are allowed if both the transferring and receiving vessels have been issued valid Atlantic herring permits and/or other applicable authorization, such as a LOA from the Regional Administrator, to transfer or receive herring, and that the transferring vessels cannot transfer more herring and the receiving vessel cannot receive more herring than they are authorized to possess by virtue of their herring permit.

In § 648.14, paragraphs (a)(166)-(169) are revised to clarify that these prohibitions apply to vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, not to all limited access vessels.

In § 648.15, paragraph (d)(1) is revised to clarify that federally permitted herring dealers and processors, including at-sea processors, that cull or separate out from the herring catch all fish other than herring in the course of normal operations, must separate out and retain all haddock offloaded from vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit. The proposed language had inadvertently retained the reference to Category 1 herring vessels. In the same section, paragraph (e) is revised to clarify that only vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit are required to retain haddock.

In § 648.15, paragraph (e) is revised to clarify that vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may not discard any haddock that has been brought on the deck or pumped into the hold. This prohibition on discarding does not apply to limited access incidental catch vessels.

In § 648.80, paragraphs (d)(2)(ii), (d)(4)-(6), and (e)(3)-(6) are revised to clarify: (1) that vessels permitted to fish for herring can be issued LOAs for the midwater trawl exempted fishery and the purse seine exempted fishery at the same time; (2) that only vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit are required to notify the observer program 72 hr prior to taking a trip and notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to crossing the VMS demarcation line on their return trip to port, or, for vessels that have not fished seaward of the VMS demarcation line, at least 6 hr prior to landing; and (3) that only vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit are required to retain haddock that has been brought on the deck or pumped into the hold.

In § 648.83, paragraph (b)(4); § 648.85, paragraph (d); and § 648.86, paragraphs (a)(3) and (k) are revised to clarify that the NE multispecies restrictions cited therein apply only to vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit.

In § 648.86, paragraph (k) is revised to clarify that the possession and landing limit for other regulated NE multispecies is 100 lb (45.3 kg) combined, and not for each species.

In § 648.200, paragraph (f)(1) is revised to specifically identify the coordinates of what was formerly referred to as ''the eastern shore of Monomoy island.''

In § 648.201, paragraph (g) is revised to clarify that the set-aside can be set at any value up to 500 mt.

Subpart K is revised to replace all references to ''research quota'' with the term ''research set-aside (RSA).''

In § 648.207, paragraphs (f) and (g) were switched and the reallocation process for RSAs was clarified.

Classification

The Administrator, Northeast Region, NMFS, determined that the amendment implemented by this rule is necessary for the conservation and management of the Atlantic herring fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Council prepared a FSEIS for this amendment. The FSEIS was filed with the Environmental Protection Agency on September 29, 2006 (71 FR 57504). A notice of availability was published on September 6, 2006 (71 FR 52521). In partially approving Amendment 1 on December 6, 2006, NMFS issued a ROD identifying the selected alternative. A copy of the ROD is available from NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of the analyses is available from NMFS (see **ADDRESSES**).

A description of the reasons for this action, the objectives of this action, and the legal basis for the final rule is found in Amendment 1 and the preamble to the proposed rule and this final rules.

Statement of Need for this Action

The purpose of this action is to improve the management of the Atlantic herring fishery by establishing limited access in the fishery; to implement management measures to address growing concerns about the localized depletion of the inshore GOM stock and the importance of herring as a forage species; and to incorporate new stock assessment information as appropriate.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

NMFS received 1,068 public comments on Amendment 1 and its proposed rule. None of the comments received were specific to the IRFA. However, several of the comments referred to the economic impacts on small entities (vessels) of the management measures presented in the proposed rule to implement Amendment 1. Those comments are noted below and can be read in the comments/response section of this preamble.

Comment 2 notes concerns raised by the public concerning the PS/FG only area. Among them were concerns about the costs to vessels of several hundred thousands of dollars if vessels replace their existing midwater trawl gear with purse seine gear, and concern that Amendment 1 did not sufficiently analyze the economics of the measure. The comment did not result in any changes to the proposed measure, for the reasons outlined in response to the comment.

Comments 5, 6, 7, and 9 all expressed concern about the negative impacts of the limited access program on the owners of vessels that did not qualify for a limited access permit for various reasons. Several commentors focused on the impacts resulting from the establishment of limited access for vessels that fish in Areas 2 and 3 and argued that such a program is not needed for management because the annual TACs set for those areas have not been attained. These commenters argued that there is no need to negatively impact any vessel owners as a result. Several commenters expressed concern that some mackerel boats would not qualify for a limited access incidental catch permit, thereby limiting their opportunity to target mackerel and avoid discarding of herring. Several commenters expressed concern about the provision that prohibits permit splitting because of their concern it would have negative impacts on individuals who had purchased or sold herring fishing histories in the past. None of these comments resulted in any changes to the proposed measure, for reasons outlined in the responses to the comments.

Comment 10 noted a concern expressed by an individual from Downeast Maine that the limited access eligibility criteria preclude fishermen from the area from qualifying for limited access because they have not caught herring in recent years. The commenter believes that they will face large financial losses as a result. The comment did not result in any changes to the proposed measure, for reasons outlined in the response to the comment.

Comment 25 raised concerns about the language drafted by NMFS in the proposed rule to govern the transfer of fish at sea. The commenter explained that, as proposed, the language would prevent the herring industry from operating in the manner that had previously been authorized under the FMP. NMFS reviewed the commenter's concerns and revised this final rule to address most of the concerns noted. The revisions are explained in detail in the response to the comment.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

During the 2004 fishing year, 86 vessels landed herring, 40 of which averaged more than 2,000 lb (907.2 kg) of herring per trip. The Small Business Administration's size standard for small commercial fishing entities is $4 million in gross sales. There are no large entities, as defined in section 601 of the Regulatory Flexibility Act (RFA), participating in this fishery. Therefore, there are no disproportionate economic impacts between large and small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action implements some new reporting and recordkeeping requirements and revises some existing requirements. The limited access program will require vessel owners to submit limited access vessel permit application materials in order to determine whether or not their vessel is eligible for a limited access permit. The owner of a vessel that is initially denied a limited access permit may appeal that denial, and an appeal will have to be filed in writing. The existing VMS requirements for the herring fishery are revised to reflect the establishment of new vessel permit types. Similarly, the existing IVR catch reporting requirements are revised to reflect the establishment of new vessel permit types. Finally, individuals seeking to fund research with RSA will have to prepare and submit application materials. Additional information regarding the projected reporting or recordkeeping costs associated with this action was made available for review in NMFS's PRA submission to OMB on August 31, 2006, and is summarized in the discussion of the Small Entity Compliance Guide below.

Other Compliance Requirements

There will be compliance costs associated with the PS/FG area for the owners of vessels that currently use midwater trawl gear. Some vessel owners may decide that it is essential to their fishing operation to continue to operate within Area 1A during the June-September period, and in such cases

these vessels must be re-rigged to use purse seine gear. The costs of re-rigging are estimated in Amendment 1 to range from $300,000 to $500,000, per vessel.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The Amendment 1 measures that are most likely to directly impact fishery-related businesses and communities are the limited access program, the PS/FG area, the open access incidental catch permit, and the vessel size upgrade restrictions. In all of these instances, the measures adopted in this final rule minimize, to the extent possible, the economic impact on small entities, as compared to all the other, significant alternatives. However, in each case, there are non-selected alternatives that would have had lesser impacts than the adopted measures. The reasons that these alternatives were not substituted for this action by NMFS are discussed below.

Limited Access Program

The FSEIS estimates the numbers of vessels that would qualify for limited access permits under the different alternatives. There were six alternatives in addition to the proposed action and Alternative 1 (No Action). The alternatives distinguish between limited access directed fishery permits, which have no associated possession restrictions, and limited access incidental catch permits, which would have associated limits on the amount of herring that could be possessed. A combination of dealer and logbook data were used to estimate how many vessels would qualify under each of the proposed limited access alternatives. The FSEIS developed estimates for all the alternatives of the number of qualifying vessels, as well as the number of active vessels that would qualify. Active vessels were defined as those vessels that averaged more than 1 mt of herring per trip from 2002–2004. The analysis of active qualifiers was conducted presuming that these vessels would be most likely to participate in the fishery after the establishment of a limited access program. The FSEIS noted that the estimates of qualifying vessels are minimum estimates, as vessel owners may produce additional records demonstrating eligibility during the application process.

Under this action, 31 vessels (28 active) would qualify for limited access fishery permits to fish in all management areas, and 3 additional vessels (1 active) would qualify for limited access directed fishery permits to fish in Areas 2 and 3 only, resulting in 34 vessels qualified for directed fishery permits not subject to possession limits. Another 56 vessels would qualify for limited access incidental catch permits with a 25–mt possession limit, resulting in a total of 90 vessels qualifying for various types of limited access permits.

Under Alternative 2, 36 vessels (31 active) would qualify for limited access fishery permits to fish in all management areas, and 10 additional vessels (4 active) would qualify for limited access fishery permits to fish in Areas 2 and 3 only, resulting in 46 (35 active) vessels qualified for fishery permits not subject to possession limits. Another 37 vessels (1 active) would qualify for limited access incidental catch permits.

Under Alternative 3, 57 vessels (38 active) would qualify for limited access fishery permits to fish in all management areas. No additional vessels would qualify for the limited access directed fishery permit to fish in Areas 2 and 3 only. Another 3 vessels (none active) would qualify for the limited access incidental catch permit (possession limit of 55,000 lb or 25 mt).

Under Alternative 4, 38 vessels (31 active) would qualify for limited access fishery permits to fish in all management areas, and 7 additional vessels (2 active) would qualify for limited access fishery permits to fish in Areas 2 and 3 only (after the trigger was reached). Another 14 vessels (4 active) would qualify for limited access incidental catch permits.

Under Alternative 5, 29 vessels (25 active) would qualify for limited access fishery permits to fish in all management areas, and 13 (6 active) additional vessels would qualify for limited access directed fishery permits to fish in Areas 2 and 3 only. Another 38 vessels (11 active) would qualify for limited access incidental catch permits.

Under Alternative 6, 32 vessels (21 active) would qualify for limited access fishery permits to fish in all management areas, and 13 additional vessels (12 active) would qualify for limited access fishery permits to fish in Areas 2 and 3 only. Another 39 vessels (12 active) would qualify for limited access incidental catch permits (possession limit of 55,000 lb or 25 mt).

Under Alternative 7, 23 vessels (18 active) would qualify for limited access fishery permits to fish in all management areas, and 22 additional vessels (15 active) would qualify for limited access fishery permits to fish in Areas 2 and 3 only. Another 37 vessels (13 active) would qualify for limited access incidental catch permits (possession limit of 33,000 lb or 15 mt).

The FSEIS analyzed active qualifiers and used two measures to estimate how much herring those qualifiers might land in the future under the various management alternatives. The first measure multiplies a vessel's highest number of DAS per year observed from 2002 through 2004 by their average metric tons landed per DAS over the same time period. The sum of the products is reported to provide a first level estimation of what the group of vessels that qualify under a given alternative is likely to land. The second measure is similar to the first except that DAS are multiplied by the highest yearly average metric tons per day-at-sea observed over the 2002 to 2004 time period. The sum of these vessel-level products represents a second-level estimation of potential catch by alternative. This second measure provides an estimate of potential landings under the assumption that vessels produce at their highest average catch rates and at their highest level of effort observed in recent years. These two potential catch measures are used to evaluate future profits under the various alternatives.

One way to compare the economic impacts of this action and the non-selected alternatives is to see how all the alternatives might affect landings, because landings potentially relate to profits, depending on the TACs that are established. For 28 active vessels that qualify for all areas under this action, the potential catch of the limited access fleet ranges from 161,030 to 198,710 mt. The additional active vessel that qualifies for Area 2 and 3 increases the potential catch slightly, though the specific amount of the increase cannot be provided in this document due to data confidentiality restrictions.

This action ranks in the middle of the alternatives relative to the potential catch in Area 1A. Four alternatives (no action and Alternatives 2, 3, and 4) would result in higher potential catch, and three alternatives (Alternatives 5, 6, and 7) would result in lower potential catch from the area. When the catch from all of the management areas is evaluated, there are six alternatives (no action, and Alternatives 2, 3, 4, 6, and 7) that result in potential catch higher than this action. The highest potential

catch is associated with the no-action alternative, at 170,087 to 209,368 mt. Alternative 5 has a lower potential catch than the chosen alternative.

Thus, based on this capacity analysis, there are six alternatives that would have likely minimized the economic impact on small entities, compared to this action, because they would have allowed for higher potential catches, and higher catches would result in higher revenues for the fishery as a whole. Although the action implemented by this rule will not minimize such economic impacts, it was selected because it was deemed to do the best job of meeting the goals of the FMP and pertinent legal requirements. This action strikes a balance between past and present participation in the fishery, and the need to limit capacity in the fishery. The analysis of the future herring landings under the various limited access alternatives was done to make relative comparisons, and omitted the constraint on landings that would be posed by future TAC controls. As noted in the preamble, Amendment 1 establishes MSY at 194,000 mt so future landings could not exceed that level under any alternative selected.

In terms of number of vessels, this action qualifies the fewest vessels into the limited access fishery (34 vessels). This result differs for the all areas limited access permit versus the areas 2 and 3 limited access permit. Four alternatives would qualify more vessels than this action to fish in any of the management areas, while two would qualify fewer vessels. The fact that this action is the most restrictive in terms of the total number of vessels that qualify for these limited access fisheries is due to the nature of the Area 2 and 3 qualification criteria. The Area 2 and 3 criteria are the most restrictive of the alternatives considered due to the selection of 1993 as a start date for the qualification period (versus 1988). Only three additional vessels would qualify for limited access fishery permits in Areas 2 and 3.

The majority of vessels that would not qualify for a limited access permit under this 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, including those targeting Atlantic mackerel and squid. The limited access incidental catch permit is likely to 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 limited access fishery permit in Areas 2 and 3. This action is the least restrictive alternative for the limited access incidental catch permit that was considered in this amendment.

While there were alternatives evaluated in Amendment 1 that would have qualified more vessels than this action, the Magnuson-Stevens Act provides the Council with the latitude to design a limited access program in a variety of ways, provided it complies with specific requirements outlined in the law. NMFS has no authority to modify a limited access program that is found to comply with these requirements, and NMFS has determined that the program in Amendment 1 complies with the requirements.

Purse Seine/Fixed Gear Only

The impact of this measure was evaluated by considering how many of the vessels that would qualify for the limited access fishery permit to fish in all management areas utilize midwater trawl gear. The analysis showed that a total of 22 vessels used midwater trawl gear (6 used single trawls and 16 used pair trawls) and would be affected by the measure that would establish Area 1A from June through September as a PS/FG area. Amendment 1 noted that landings data show that 4 of the midwater trawl vessels and 13 of the pair trawl vessels actively fished in Area 1A during the June through September period. To compensate for potential losses from not being able to fish in the PS/FG area, the excluded vessels could fish in other management areas or be re-rigged to utilize purse seine gear in Area 1A during the time of the restriction. The costs of re-rigging are estimated in Amendment 1 to range from $300,000 to $500,000 per vessel.

Four of the alternatives, in addition to this action, included a measure to establish a PS/FG area. Under Alternatives 3, 4, and 6, vessels using single and paired midwater trawls would have been prohibited from fishing for Atlantic herring in Area 1A east of 69°W. long. from June 1 - September 30 of each fishing year. Under this action and Alternative 7, the PS/FG only area would be for all of Area 1A, from June 1 - September 30 of each fishing year.

In terms of numbers of vessels, Alternative 3 would result in the greatest number of vessels excluded from the respective gear restricted area. However, while this action and Alternative 7 impact fewer vessels, the impacts of the PS/FG measure are the highest in these alternatives because the gear restricted area is much larger for these alternatives (all of Area 1A versus 1A east of 69° W. long). This means that a greater share of the midwater trawl vessels' landings from Area 1A could be lost. This impact is especially important during the summer months, when demand for herring to be used as lobster bait is at its peak.

Of all the alternatives, the gear restriction in this action would likely result in the greatest economic loss when the impacts are considered independent of the other measures because more midwater trawl vessels qualify for limited access directed fishery permits in Area 1 under this action than under Alternative 7. Consequently, more vessels may incur losses due to the gear restricted area. However, when compared to Alternative 7 and considered in the context of the limited access program, the overall impacts of this measure are mitigated to some extent. There are midwater trawl vessels that qualify for limited access under this action that would be negatively impacted by the gear restriction. However, under Alternative 7 they would have been restricted entirely from Area 1A because they would not qualify under the limited access program, resulting in a comparatively greater negative impact. These vessels are less impacted by this 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 when they would not have qualified at all for the directed fishery in Area 1 under other alternatives (Alternative 7, for example).

During 2002 through 2004, the affected midwater trawl vessels landed an average of 12 million lb of herring (5,472 mt, worth about $892,000), and the pair trawl vessels landed 47 million lb of herring (21,298 mt, worth about $3,472,000) per season (June through September) from Area 1A. These landings represent 68 percent and 60 percent of the total Area 1A landings by these single and paired midwater trawl vessels, respectively. The midwater trawl vessel landings ranged from 586,429 lb to 7.4 million lb (266 to 3,372 mt), and the pair trawl vessel landings ranged from 190,416 lb to 7.2 million lb (90 to 3,263 mt). To compensate for potential losses, midwater trawl vessels 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.

Although, relative to the PS/FG only area, all of the other alternatives would have minimized impacts on small entities, this action is being implemented rather than disapproved because NMFS has found the measure to comply with the requirements of the

Magnuson-Stevens Act and other applicable laws.

Open Access Incidental Catch Permit

Amendment 1 considered an alternative to the open access incidental catch permit that would have authorized such vessels to possess 11,000 lb (5 mt) of herring per trip. This alternative would have provided a small added economic benefit to those vessels that received such a permit by allowing a higher possession of herring than the 6,600 lb (3 mt) established by this action. The measure being enacted was selected as the best way to minimize bycatch and provide limited opportunities for vessels targeting other species to land small amounts of herring, without providing an incentive for vessels to target herring.

Vessel Upgrade Restrictions

This action restricts future size increases for limited access vessels. Such a vessel's HP can be increased only once, whether through refitting or replacement. This increase cannot exceed 20 percent of the HP of the vessel's baseline specifications, as applicable. The vessel's length, GRT, and NT can be increased only once, whether through refitting or replacement. Any increase in any of these three specifications of vessel size cannot exceed 10 percent of the vessel's baseline specifications, as applicable. These are the same limitations enacted previously for other limited access fisheries in the NE region. Amendment 1 included two alternatives to this action. The first, no action, would have allowed herring vessels to increase in size up to 165 ft (50.3 m) in length overall, 750 GRT (680.4 mt), and 3,000 HP. Alternative 3 would have allowed a vessel to increase its HP once, provided the increase would not have exceeded 50 percent of the HP of the vessel's baseline HP. Alternative 3 would also have allowed the vessel's length, GRT, and NT to have been increased once, provided none of the size attributes increased by more than 25 percent of the vessel's baseline specifications.

The proposed upgrade restrictions are more restrictive concerning the size of future vessels than the two alternatives mentioned above. Because the restriction affects future action, it will not impact all vessel owners. Some vessel owners may be impacted, particularly those that had immediate plans to upgrade from their initial limited access vessel. However, the restrictions are intended to maintain the capacity of the limited access fleet near its initial level, while providing a reasonable opportunity to replace limited access vessels.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all holders of permits in the New England and Mid-Atlantic regions. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator (see **ADDRESSES**).

This final rule contains one new collection-of-information requirement and 5 modified collection-of-information requirements subject to the PRA, all of which have been approved by the Office of Management and Budget (OMB) under control numbers 0648–0202, 0348–0040, 0348–0043, 0348–0044, 0348–0046. The one new collection-of-information requirement is incorporated into OMB #0648–0202, while the 5 modified collection-of-information requirements are included in OMB #s 0648–0202, 0348–0040, 0348–0043, 0348–0044, 0348–0046.

The public reporting burden for the collection-of-information requirements includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information requirements. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395.7285.

The new reporting requirements and the estimated time for a response are as follows:

1. Time required of vessel owners to: (a) prepare application materials, 80 hr (0.58 hr per response)(three year average); (b) prepare CPH application materials, 5 hr (0.5 hr per response); (c) appeal permit denials, 20 hr (2.0 hrs per response); and (d) apply for vessel replacement/upgrade, 60 hr (3.0 hrs per response) (OMB #0648–0202);

2. VMS requirement for vessels fishing under limited access permits OMB #0648–0202, 709 hr (6.50 hr reporting annually per respondent, installation having already occurred);

3. IVR reporting requirements for weir fishermen west of Cutler, ME fishing under the limited access permits, OMB #0648–0202, 8 hr (0.8 hr annually per respondent); and

4. Application materials for the RSA program OMB # 0348–0040, 0348–0043, 0348–0044, and 0348–0046, 80 hr (4 hr per response).

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 1, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons stated in the preamble, 15 CFR part 902, and 50 CFR part 648 are amended as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under 50 CFR is amended by adding in the left column under 50 CFR, in numerical order, an entry for § 648.207, and in the right column, in corresponding position, the control numbers -0348–0043, 0348–0044, 0348–0040, and 0348–0046, to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (All numbers begin with 0648–)
* * * * *	
50 CFR	

CFR part or section where the information collection requirement is located	Current OMB control number (All numbers begin with 0648–)
* * * * *	
648.207	–0348–0043, 0348–0044, 0348–0040, and 0348–0046.
* * * * *	

50 CFR Chapter VI

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 3. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 4. In § 648.2, the definition of ''Category 1 herring vessel'' is removed, the definitions of ''Atlantic herring carrier'' and ''Midwater trawl'' are revised, and the definition of ''Fixed gear'' and ''Limited access herring vessel'' are added to read as follows:

§ 648.2 Definitions.

* * * * *

Atlantic herring carrier means a fishing vessel that may receive and transport herring caught by another fishing vessel, provided the vessel has been issued a herring permit, does not have any gear on board capable of catching or processing herring, and has on board a letter of authorization from the Regional Administrator to transport herring caught by another fishing vessel.

* * * * *

Fixed gear, for the purposes of the Atlantic herring fishery, means weirs or stop seines.

* * * * *

Limited access herring vessel means a vessel that has been issued a valid permit for any type of limited access herring vessel permit described in § 648.4.

* * * * *

Midwater trawl gear means trawl gear that 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. The gear may not include discs, bobbins, or rollers on its footrope, or chafing gear as part of the net.

* * * * *

■ 5. In § 648.4, paragraphs (a)(10) and (c)(2)(vi) are revised to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(10) *Atlantic herring vessels*–(i) Except as provided herein, any vessel of the United States must have been issued and have on board a valid Atlantic herring permit to fish for, possess, or land Atlantic herring in or from the EEZ. This requirement does not apply to the following:

(A) A vessel that possesses herring solely for its use as bait, providing the vessel does not use or have on board purse seine, mid-water trawl, pelagic gillnet, sink gillnet, or bottom trawl gear on any trip in which herring is fished for, possessed, or landed, and does not transfer, sell, trade, or barter such herring;

(B) A skiff or other similar craft used exclusively to deploy the net in a purse seine operation during a fishing trip of a vessel that is duly permitted under this part; or

(C) At-sea processors that do not harvest fish, provided that at-sea processor vessels are issued the at-sea processor permit specified under § 648.6(a)(2).

(ii) *Atlantic herring carrier.* An Atlantic herring carrier must have been issued and have on board a herring permit and a letter of authorization to receive and transport Atlantic herring caught by another permitted fishing vessel. The letter of authorization exempts such a vessel from the VMS and IVR vessel reporting requirements as specified in § 648.7 and subpart K of this part, except as otherwise required by this part. An Atlantic herring carrier vessel must request and obtain a letter of authorization from the Regional Administrator, and must report all herring carried from each vessel on a given trip in its Fishing Vessel Trip Report. The Fishing Vessel Trip Report must include the vessel name. Carrier vessels under a letter of authorization may not conduct fishing activities except for purposes of transport or possess any fishing gear on board the vessel; must be used exclusively as an Atlantic herring carrier vessel; and must carry observers if required by NMFS. There is a minimum enrollment period of 7 calendar days. While operating under a valid LOA, such vessels are exempt from any herring possession limits associated with the herring vessel permit categories. Herring carrier vessels under an LOA may not possess, transfer, or land any species except for Atlantic herring, except that they may possess Northeast multispecies transferred by vessels issued either an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, consistent with the applicable possession limits for such vessels.

(iii) *Vessel size limitation.* A vessel of the United States is eligible for and may be issued an Atlantic herring permit to fish for, possess, or land Atlantic herring in or from the EEZ, except for any vessel that is ≥165 ft (50.3 m) in length overall (LOA), or > 750 GRT (680.4 mt), or the vessel's total main propulsion machinery is > 3,000 horsepower. Vessels that exceed the size or horsepower restrictions are eligible to be issued an at-sea processing permit specified under § 648.6(a)(2)(ii).

(iv) *Limited access herring permits.* (A) A vessel of the United States that fishes for, possesses, or lands more than 6,600 lb (3 mt) of herring, except vessels that fish exclusively in state waters for herring, must have been issued and carry on board one of the limited access herring permits described in paragraphs (a)(10)(iv)(A)(*1*)–(*3*) of this section, including both vessels engaged in pair trawl operations.

(*1*) *All Areas Limited Access Herring Permit.* A vessel may fish for, possess, and land unlimited amounts of herring from all herring areas, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(*2*) *Areas 2 and 3 Limited Access Herring Permit.* A vessel may fish for, possess, and land unlimited amounts of herring from herring Areas 2 and 3, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(*3*) *Limited Access Incidental Catch Herring Permit.* (*i*) A vessel that does not qualify for either of the permits specified in paragraphs (a)(10)(iv)(A)(*1*) and (*2*) of this section may fish for, possess, and land up to 55,000 lb (25 mt) of herring from any herring area, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(*ii*) A vessel that does not qualify for an All Areas Limited Access Herring Permit specified in paragraph (a)(10)(iv)(A)(*1*) of this section, but qualifies for the Areas 2 and 3 Limited Access Herring Permit specified in paragraph (a)(10)(iv)(A)(*2*) of this section, may fish for, possess, and land up to 55,000 lb (25 mt) of herring from Area 1, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(B) *Eligibility for All Areas and Areas 2 and 3 Limited Access Herring Permits, and Confirmation of Permit History (CPH).* A vessel is eligible for and may be issued either an All Areas or Areas 2 and 3 Limited Access Herring Permit if it meets the permit history criteria in paragraph (a)(10)(iv)(B)(*1*) of this section and the relevant landing requirements in paragraphs (a)(10)(iv)(B)(*2*) and (*3*) of this section.

(*1*) *Permit history criteria for All Areas and Areas 2 and 3 Permits.* (*i*) The vessel must have been issued a Federal herring permit (Category 1 or 2) that was valid as of November 10, 2005; or

(*ii*) The vessel is replacing a vessel that was issued a Federal herring permit (Category 1 or 2) between November 10, 2003, and November 9, 2005. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or, if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel being replaced at the time it sunk or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer of the vessel being replaced and the owner/seller of the vessel, documenting that the vessel owner/seller retained the herring permit and all herring landings history.

(*2*) *Landings criteria for the All Areas Limited Access Herring Permit*–(*i*) The vessel must have landed at least 500 mt of herring in any one calendar year between January 1, 1993, and December 31, 2003, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. In those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and border transfers, the vessel owner can submit other documentation that documents such transactions and proves that the herring thus transferred should be added to their landings history. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(10)(iv)(B)(*2*)(*iii*) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(10)(iv)(B)(*1*)(*ii*) of this section and the permit splitting prohibitions in paragraph (a)(10)(iv)(N) of this section.

(*ii*) *Extension of eligibility period for landings criteria for vessels under construction, reconstruction, or purchase contract.* An applicant who submits written evidence that a vessel was under construction, reconstruction, or was under written contract for purchase as of December 31, 2003, may extend the period for determining landings specified in paragraph (a)(10)(iv)(B)(*2*)(*i*) of this section through December 31, 2004.

(*iii*) Landings criteria for vessels using landings from pair trawl operations. To qualify for a limited access permit using landings from pair trawl operations, the owners of the vessels engaged in that operation must agree on how to divide such landings between the two vessels and apply for the permit jointly, as verified by dealer reports submitted to NMFS or valid dealer receipts, if dealer reports were not required by NMFS.

(*3*) *Landings criteria for the Areas 2 and 3 Limited Access Herring Permit.* (*i*) The vessel must have landed at least 250 mt of herring in any one calendar year between January 1, 1993, and December 31, 2003, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. In those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and border transfers, the vessel owner can submit other documentation that documents such transactions and proves that the herring thus transferred should be added to their landings history. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(10)(iv)(B)(*2*)(*iii*) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(10)(iv)(B)(*1*)(*ii*) of this section and the permit splitting prohibitions in paragraph (a)(10)(iv)(N) of this section.

(*ii*) *Extension of eligibility period for landings criteria for vessels under construction, reconstruction or purchase contract.* An applicant who submits written evidence that a vessel was under construction, reconstruction, or was under written contract for purchase as of December 31, 2003, may extend the period for determining landings specified in paragraph (a)(10)(iv)(B)(*3*)(*i*) of this section through December 31, 2004.

(*iii*) *Landings criteria for vessels using landings from pair trawl operations.* See paragraph (a)(10)(iv)(B)(*2*)(*iii*) of this section.

(*4*) *CPH.* A person who does not currently own a fishing vessel, but owned a vessel that satisfies the permit eligibility requirements in paragraph (a)(10)(iv)(B) of this section that has sunk, been destroyed, or transferred to another person, but that has not been replaced, may apply for and receive a CPH that allows for a replacement vessel to obtain the relevant limited access herring permit if the fishing and permit history of such vessel has been retained lawfully by the applicant as specified in paragraph (a)(10)(iv)(B)(*1*)(*ii*) of this section and consistent with (a)(10)(iv)(N) of this section.

(C) *Eligibility for Incidental Catch Limited Access Herring Permit, and CPH.* A vessel is eligible for and may be issued an Incidental Limited Access Herring Permit if it meets the permit history criteria specified in paragraph (a)(10)(iv)(C)(*1*) of this section and the landings criteria in paragraph (a)(10)(iv)(C)(*2*) of this section.

(*1*) *Permit history criteria.* (*i*) The vessel must have been issued a Federal permit for Northeast multispecies, Atlantic mackerel, Atlantic herring, *Loligo* or *Illex* squid, or butterfish that was valid as of November 10, 2005; or

(*ii*) The vessel is replacing a vessel that was issued a Federal permit for Northeast multispecies, Atlantic mackerel, Atlantic herring, *Loligo* or *Illex* squid, or butterfish that was issued between November 10, 2003, and November 9, 2005. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or, if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel being replaced at the time it sunk or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer of the vessel being replaced and the owner/seller of the vessel, documenting that the vessel owner/seller retained the herring permit and all herring landings history.

(*2*) *Landings criteria for Incidental Catch Limited Access Herring Permit.* (*i*) The vessel must have landed at least 15 mt of herring in any calendar year between January 1, 1988, and December 31, 2003, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. In those cases where a vessel has sold herring but there are no required dealer receipts, e.g., transfers of bait at sea and border transfers, the vessel owner can submit other documentation that documents such transactions and proves that the herring thus transferred should be added to the vessel's landings history. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(10)(iv)(B)(*2*)(*iii*) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(10)(iv)(B)(*1*)(*ii*) of this section and the permit splitting prohibitions in paragraph (a)(10)(iv)(N) of this section.

(*ii*) *Extension of eligibility period for landings criteria for vessels under*

construction, reconstruction or purchase contract. An applicant who submits written evidence that a vessel was under construction, reconstruction, or was under written contract for purchase as of December 31, 2003, may extend the period for determining landings specified in paragraph (a)(10)(iv)(C)(*2*)(*i*) of this section through December 31, 2004.

(*3*) *CPH*. A person who does not currently own a fishing vessel, but owned a vessel that satisfies the permit eligibility requirements in paragraph (a)(10)(iv)(C) of this section that has sunk, been destroyed, or transferred to another person, but that has not been replaced, may apply for and receive a CPH that allows for a replacement vessel to obtain the relevant limited access herring permit if the fishing and permit history of such vessel has been retained lawfully by the applicant as specified in paragraph (a)(10)(iv)(B)(*1*)(*ii*) of this section and consistent with (a)(10)(iv)(N) of this section.

(D) *Application/renewal restrictions*. (*1*) No one may apply for an initial limited access Atlantic herring permit or a CPH under paragraph (a)(10)(iv)(L) of this section after May 31, 2008, or after the abandonment or voluntary relinquishment of permit history as specified in paragraph (a)(10)(iv)(M) of this section.

(*2*) An applicant who submits written proof that an eligible vessel was sold, with the seller retaining the herring history through a written agreement signed by both parties to the sale or transfer, may not utilize such history if the vessel's history was used to qualify another vessel for another limited access permit.

(*3*) All limited access permits established under this section must be issued on an annual basis by April 30, the last day of the year for which the permit is issued, unless a CPH has been issued as specified in paragraph (a)(10)(iv)(L) of this section. Application for such permits must be received no later than March 31, which is 30 days before the last day of the permit year. Failure to renew a limited access permit in any fishing year bars the renewal of the permit in subsequent years.

(E) *Qualification restriction*. See paragraph (a)(1)(i)(C) of this section.

(F) *Change in ownership*. See paragraph (a)(1)(i)(D) of this section.

(G) *Replacement vessels*. See paragraph (a)(1)(i)(E) of this section.

(H) *Upgraded vessel*. See paragraph (a)(1)(i)(F) of this section.

(I) *Consolidation restriction*. See paragraph (a)(1)(i)(G) of this section.

(J) *Vessel baseline specifications*. See paragraph (a)(1)(i)(H) of this section. If a herring CPH is initially issued, the vessel that provided the CPH eligibility establishes the size baseline against which future vessel size limitations shall be evaluated.

(K) *Limited access permit restrictions*. [Reserved]

(L) *Confirmation of Permit History*. See paragraph (a)(1)(i)(J) of this section.

(M) *Abandonment or voluntary relinquishment of permits*. See paragraph (a)(1)(i)(K) of this section.

(N) *Restriction on permit splitting*. See paragraph (a)(1)(i)(L) of this section. Notwithstanding paragraph (a)(1)(i)(L), vessel owners applying for a limited access herring permit who sold vessels with limited access permits and retained the herring history before applying for the initial limited access herring permit may not use the herring history to qualify a vessel for the initial limited access herring permit, if the issuance of such permit would violate the restrictions on permit splitting. Furthermore, notwithstanding paragraph (a)(1)(i)(L), for the purposes of the Atlantic herring fishery, herrings landings history generated by separate owners of a single vessel at different times may be used the qualify more than one vessel, provided that each owner applying for a limited access permit, demonstrates that he/she created distinct fishing histories, and that such histories have been retained.

(O) *Appeal of denial of permit*–(*1*) *Eligibility*. Any applicant eligible to apply for a limited access herring permit who is denied such permit may appeal the denial to the Regional Administrator within 30 days of the notice of denial. Any such appeal may only be based on the grounds that the information used by the Regional Administrator was based on incorrect data. The appeal must be in writing, and must state the specific grounds for the appeal.

(*2*) *Appeal review*. The Regional Administrator shall appoint a designee who shall make the initial decision on the appeal. The appellant may request a review of the initial decision by the Regional Administrator by so requesting in writing within 30 days of the notice of the initial decision. If the appellant does not request a review of the initial decision within 30 days, the initial decision is the final administrative action of the Department of Commerce. Such review will be conducted by a hearing officer appointed by the Regional Administrator. The hearing officer shall make findings and a recommendation to the Regional Administrator, which shall be advisory only. Upon receiving the findings and the recommendation, the Regional Administrator shall issue a final decision on the appeal. The Regional Administrator's decision is the final administrative action of the Department of Commerce.

(*3*) *Status of vessels pending appeal*. A vessel denied a limited access herring permit may fish under the limited access herring permit, provided that the denial has been appealed, the appeal is pending, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category. The Regional Administrator shall issue such a letter for the pendency of any appeal. The letter of authorization must be carried on board the vessel. If the appeal is finally denied, the Regional Administrator shall send a notice of final denial to the vessel owner; the authorizing letter becomes invalid 5 days after receipt of the notice of denial, but no later than 10 days from the date of the letter of denial.

(v) *Open access herring permit*. A vessel that has not been issued a limited access Atlantic herring permit may obtain an open access incidental Atlantic herring permit to possess up to 6,600 lb (3 mt) of herring per trip, and is limited to one landing per calendar day.

* * * * *

(c) * * *

(2) * * *

(vi) Prior to issuance of a limited access Atlantic herring permit, a VMS unit provided by a NMFS-approved vendor must be installed and NMFS must receive a notice from the vendor that the VMS is activated.

* * * * *

■ 6. In § 648.6, paragraph (a)(2) is revised to read as follows:

§ 648.6 Dealer/processor permits.

(a) * * *

(2) *At-sea processors*–(i) *At-sea mackerel processors*. Notwithstanding the provisions of § 648.4(a)(5), any vessel of the United States must have been issued and carry on board a valid at-sea processor permit issued under this section to receive over the side, possess, and process Atlantic mackerel harvested in or from the EEZ by a lawfully permitted vessel of the United States.

(ii) *Atlantic herring at-sea processing permit*. A vessel of the United States, including a vessel that is > 165 ft (50.3 m) length overall, or > 750 GRT (680.4 mt), is eligible to obtain an Atlantic herring at-sea processing permit to receive and process Atlantic herring subject to the U.S. at-sea processing

(USAP) allocation published by the Regional Administrator pursuant to § 648.200. Such a vessel may not receive and process Atlantic herring caught in or from the EEZ unless the vessel has been issued and has on board an Atlantic herring at-sea processing permit.

(iii) *Reporting requirements.* An at-sea processor receiving Atlantic mackerel or Atlantic herring is subject to dealer reporting requirements specified in § 648.7(a).

* * * * *

■ 7. In § 648.7, paragraph (b)(2)(i) is revised to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(2) * * *

(i) *Atlantic herring owners or operators.* The owner or operator of a vessel issued a permit to fish for Atlantic herring must report catches (retained and discarded) of herring each week to an IVR system, as specified in paragraphs (b)(2)(i)(A) and (B) of this section. The report shall include at least the following information, and any other information required by the Regional Administrator: Vessel identification, week in which species are caught, pounds retained, pounds discarded, management areas fished, and pounds of herring caught in each management area for the week. The IVR reporting week begins on Sunday at 0001 hrs (12:01 AM) local time and ends Saturday at 2400 hrs (12 midnight). Weekly Atlantic herring catch reports must be submitted via the IVR system by midnight, Eastern Time, each Tuesday for the previous week. Reports are required even if herring caught during the week has not yet been landed. This report does not exempt the owner or operator from other applicable reporting requirements of this section.

(A) The owner or operator of any vessel issued a limited access herring permit must submit an Atlantic herring catch report via the IVR system each week, regardless of how much herring is caught (including weeks when no herring is caught), unless exempted from this requirement by the Regional Administrator.

(B) An owner or operator of any vessel issued an open access permit for Atlantic herring that catches ≥ 2,000 lb (907.2 kg) of Atlantic herring on any trip in a week must submit an Atlantic herring catch report via the IVR system for that week as required by the Regional Administrator.

(C) Atlantic herring IVR reports are not required from Atlantic herring carrier vessels.

(D) *Reporting requirements for vessels transferring herring at sea.* A vessel that transfers herring at sea must comply with these requirements in addition to those specified at § 648.13(f).

(*1*) A vessel that transfers herring at sea to a vessel that receives it for personal use at bait must report all transfers on the Fishing Vessel Trip Report.

(*2*) A vessel that transfers herring at sea to an authorized carrier vessel must report all transfers weekly via the IVR system and must report all transfers on the Fishing Vessel Trip Report. Each time the vessel offloads to the carrier vessel is defined as a trip for the purposes of reporting requirements and possession allowances.

(*3*) A vessel that transfers herring at sea to an at-sea processor must report all transfers weekly via the IVR system and must report all transfers on the Fishing Vessel Trip Report. Each time the vessel offloads to the at-sea processing vessel is defined as a trip for the purposes of the reporting requirements and possession allowances. For each trip, the vessel must submit a Fishing Vessel Trip Report and the at-sea processing vessel must submit the detailed dealer report specified in paragraph (a)(1) of this section.

(*4*) A transfer between two vessels issued valid Atlantic herring permits requires each vessel to submit a Fishing Vessel Trip Report, filled out as required by the LOA to transfer herring at sea, and a weekly IVR report for the amount of herring each vessel lands.

* * * * *

■ 8. In § 648.9, paragraph (c)(2)(i)(C) is revised to read as follows:

§ 648.9 VMS requirements.

(c) * * *

(2) * * *

(i) * * *

(C) The vessel has been issued a limited access herring permit, and is in port, unless required by other permit requirements for other fisheries to transmit the vessel's location at all times. Such vessels must activate the VMS unit and enter the appropriate activity code prior to leaving port.

* * * * *

■ 9. In § 648.13, paragraph (f) is revised to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(f) *Atlantic herring.* With the exception of transfers made to an at-sea processing vessel issued the required permit under § 648.6(a)(2)(ii), any person or vessel, including any vessel issued an Atlantic herring permit, is prohibited from transferring, receiving, or attempting to transfer or receive any Atlantic herring taken from the EEZ, except as authorized in this paragraph (f), and in compliance with reporting requirements at § 648.7 (b)(2)(i)(D).

(1) *Personal use as bait.* (i) The operator of a vessel that is not issued an Atlantic herring permit may purchase and/or receive Atlantic herring at sea for personal use as bait, provided the vessel receiving the transfer does not have purse seine, midwater trawl, pelagic gillnet, sink gillnet, or bottom trawl gear on board;

(ii) A vessel issued an Atlantic herring permit may transfer herring at sea to another vessel for personal use as bait:

(A) Provided the transferring vessel is issued a letter of authorization to transfer fish. The operator of the transferring vessel must show the letter of authorization to a representative of the vessel receiving fish or any authorized officer upon request; and

(B) Provided that the transfer of herring at sea to another vessel for personal use as bait does not exceed the possession limit specified for the transferring vessel in § 648.204, except that no more than 2,000 lb (907.2 kg) of herring may be caught or transferred per trip or per calendar day if the vessel is in, or the fish were harvested from, a management area closed to fishing as specified in § 648.201.

(2) *Atlantic herring carrier vessels.* (i) A vessel issued an Atlantic herring permit may operate as a herring carrier vessel and receive herring provided it is issued a carrier vessel letter of authorization and complies with the terms of that authorization, as specified in § 648.4(a)(10)(ii).

(ii) A vessel issued an Atlantic herring permit may transfer herring at sea to an Atlantic herring carrier up to the applicable possession limits specified in § 648.204, provided it is issued a letter of authorization for the transfer of herring and that no more than 2,000 lb (907.2 kg) of herring may be caught or transferred at sea per trip or per calendar day if the vessel is in, or the fish were harvested from, an area closed to directed fishing as specified in § 648.201.

(3) If a herring management area has been closed to fishing as specified in § 648.201, a vessel may not transfer Atlantic herring harvested from or in the area to an IWP or Joint Venture vessel.

(4) If the amount of herring transshipped to a Canadian transshipment vessel would cause the amount of the border transfer specified

pursuant to § 648.200 to be exceeded, a vessel may not transfer Atlantic herring to a Canadian transshipment vessel permitted in accordance with Public Law 104–297.

(5) *Transfer to at-sea processors.* A vessel issued an Atlantic herring permit may transfer herring to a vessel issued an at-sea processing permit specified in § 648.6(a)(2)(ii), up to the applicable possession limit specified in § 648.204, except that no more than 2,000 lb (907.2 kg) of herring may be caught or transferred at sea per trip or per calendar day if the vessel is in, or the fish were harvested from, a management area closed to directed fishing as specified in § 648.201.

(6) *Transfers between herring vessels.* A vessel issued a valid Atlantic herring permit may transfer and receive herring at sea, provided such vessel has been issued a letter of authorization from the Regional Administrator to transfer or receive herring at sea. Such vessel may not transfer, receive, or possess at sea, or land per trip herring in excess of the applicable possession limits specified in § 648.204, except that no more than 2,000 lb (907.2 kg) of herring may be caught, transferred, received, or possessed at sea, or landed per trip or per calendar day if the vessel is in, or the fish were harvested from, a management area closed to directed fishing as specified in § 648.201.

* * * * *

■ 10. In § 648.14, paragraph (bb)(8) is removed and reserved; paragraphs (a)(166)–(169), (bb) (7), (bb)(10)–(12), (bb)(14)–(18), (bb)(20), and (bb)(24)–(26) are revised; and paragraphs (bb)(19), and (bb)(21)–(23) are added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(166) Sell, purchase, receive, trade, barter, or transfer haddock or other regulated multispecies, or attempt to sell, purchase, receive, trade, barter, or transfer haddock or other regulated multispecies (cod, witch flounder, plaice, yellowtail flounder, pollock, winter flounder, windowpane flounder, redfish, and white hake) for, or intended for, human consumption landed by a vessel that has an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit as defined in § 648.2.

(167) Fail to comply with requirements for herring processors/dealers that handle individual fish to separate out and retain all haddock offloaded from a vessel that has an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit limited access herring vessel, as defined in § 648.2, and to retain such catch for at least 12 hr, with the vessel that landed the haddock clearly identified by name.

(168) Sell, purchase, receive, trade, barter, or transfer, or attempt to sell, purchase, receive, trade, barter, or transfer to another person any haddock or other regulated multispecies (cod, witch flounder, plaice, yellowtail flounder, pollock, winter flounder, windowpane flounder, redfish, and white hake) separated out from a herring catch offloaded from a vessel that has an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit as defined in § 648.2.

(169) While operating an at-sea herring processor, fail to comply with requirements for herring processors/dealers that handle individual fish to separate out and retain all haddock offloaded from a vessel that has an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, as defined in § 648.2, and to retain such catch for at least 12 hr after landing, with the vessel that offloaded the haddock clearly identified by name.

* * * * *

(bb) * * *

(7) Possess, transfer, receive, or sell, or attempt to transfer, receive, or sell > 2,000 lb (907.2 kg) of Atlantic herring per trip, or land, or attempt to land > 2,000 lb (907.2 kg) of Atlantic herring per day in or from a management area closed pursuant to § 648.201(a), if the vessel has been issued a valid Atlantic herring permit.

(8) [Reserved]

* * * * *

(10) Transit an area of the EEZ that is subject to a closure or other restraints on fishing to fishing for Atlantic herring pursuant to § 648.201(a) with > 2,000 lb (907.2 kg) of herring on board, unless all fishing gear is stowed as specified by § 648.23(b).

(11) Catch, take, or harvest Atlantic herring in or from the EEZ with a U.S. vessel that exceeds the size limits specified in § 648.4(a)(10)(iii).

(12) Process Atlantic herring caught in or from the EEZ in excess of the specification of USAP with a U.S. vessel that exceeds the size limits specified in § 648.4(a)(10)(iii).

* * * * *

(14) Catch, take, or harvest Atlantic herring in or from the EEZ for roe in excess of any allowed limit that may be established pursuant to § 648.206(b)(24).

(15) Catch, take, or harvest Atlantic herring in or from the EEZ, unless equipped with an operable VMS unit if the vessel is a limited access herring vessel as defined in § 648.2.

(16) Receive Atlantic herring in or from the EEZ solely for transport, unless issued a letter of authorization from the Regional Administrator.

(17) Fail to comply with any of the requirements of a letter of authorization from the Regional Administrator.

(18) If the vessel is a limited access herring vessel and is fishing for herring, fail to notify the NMFS Office of Law Enforcement of the time and date of landing via VMS at least 6 hr prior to landing or crossing the VMS demarcation line on its return trip to port.

(19) If the vessel is a limited access herring vessel and is fishing for herring in the GOM/GB Exemption Area specified in § 648.80(a)(17), fail to notify NMFS at least 72 hr prior to departing on a trip for the purposes of observer deployment.

(20) Possess, land, transfer, receive, sell, purchase, trade, or barter, or attempt to transfer, receive, purchase, trade, or barter, or sell more than 2,000 lb (907 kg) of Atlantic herring per trip taken from the GOM/GB Herring Exemption Area defined in § 648.86(a)(3)(ii)(A)(*1*) following the effective date of the determination that the haddock cap has been reached pursuant to § 648.86(a)(3), unless all of the herring possessed or landed by a vessel was caught outside of that area.

(21) If fishing with midwater trawl or a purse seine gear, fail to comply with the requirements of § 648.80(d) and (e).

(22) If a limited access herring vessel, discard haddock at sea that has been brought on deck or pumped into the hold.

(23) Transit the GOM/GB Herring Exemption Area when that area is limited to the 2,000–lb (907.2–kg) limit specified in § 648.86(a)(3)(ii)(A)(*1*) with more than 2,000 lb (907.2 kg) of herring, unless all the herring on board was caught outside of that area and all fishing gear is stowed and not available for immediate use as required by § 648.23(b).

(24) Fish for herring in Area 1A between June 1 and September 30 with any gear other than purse seines or fixed gear.

(25) Transit Area 1A between June 1 and September 30 with more than 2,000 lb (907.2 kg) of herring on board with mid-water trawl gear not properly stowed as per § 648.23(b).

(26) Possess or land more herring than is allowed for by the vessel's Atlantic herring permit.

* * * * *

■ 11. In § 648.15, paragraphs (d)(1) and (e) are revised to read as follows:

§ 648.15 Facilitation of enforcement.

* * * * *

(d) * * *

(1) Federally permitted herring dealers and processors, including at-sea processors, that cull or separate out from the herring catch all fish other than herring in the course of normal operations, must separate out and retain all haddock offloaded from vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit. Such haddock may not be sold, purchased, received, traded, bartered, or transferred, and must be retained, after they have been separated, for at least 12 hr for dealers and processors on land, and for 12 hr after landing by at-sea processors. The dealer or processor, including at-sea processors, must clearly indicate the vessel that landed the retained haddock or transferred the retained haddock to an at-sea processor. Law enforcement officials must be given access to inspect the haddock.

* * * * *

(e) *Retention of haddock by limited access herring vessels.* Vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may not discard any haddock that has been brought on the deck or pumped into the hold.

■ 12. In § 648.80, paragraphs (d)(2)(ii), (d)(4)–(6) and (e)(3)–(6) are revised to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(d) * * *

(2) * * *

(ii) The vessel is issued a letter of authorization for a minimum of 7 days. The vessel can be issued LOAs for the midwater trawl exempted fishery and the purse seine exempted fishery at the same time.

* * * * *

(4) The vessel does not fish for, possess or land NE multispecies, except that vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may possess and land haddock or other regulated species consistent with the incidental catch allowance and bycatch caps specified in § 648.86(a)(3). Such haddock or other regulated NE multispecies may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for, or intended for, human consumption. Haddock or other regulated NE multispecies that are separated out from the herring catch pursuant to § 648.15(d) may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for any purpose. Vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may not discard haddock that has been brought on the deck or pumped into the hold;

(5) To fish for herring under this exemption, vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; and the date, time, and port of departure, at least 72 hr prior to beginning any trip into these areas for the purposes of observer deployment; and

(6) All vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, which are on a declared herring trip must notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to crossing the VMS demarcation line on their return trip to port, or, for vessels that have not fished seaward of the VMS demarcation line, at least 6 hr prior to landing. The Regional Administrator may adjust the prior notification minimum time through publication of a notice in the **Federal Register** consistent with the Administrative Procedure Act.

(e) * * *

(3) The vessel is issued a letter of authorization for a minimum of 7 days, and cancels it only as instructed by the Regional Administrator. The vessel can be issued LOAs for the midwater trawl exempted fishery and the purse seine exempted fishery at the same time; and

(4) The vessel does not fish for, possess, or land NE multispecies, except that vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, as defined in § 648.2, may possess and land haddock or other regulated species consistent with the incidental catch allowance and bycatch caps specified in § 648.86(a)(3). Such haddock or other regulated multispecies may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for, or intended for, human consumption. Haddock or other regulated species that are separated out from the herring catch pursuant to § 648.15(d) may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for any purpose. Vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may not discard haddock that has been brought on the deck or pumped into the hold;

(5) To fish for herring under this exemption, vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; and the date, time, and port of departure, at least 72 hr prior to beginning any trip into these areas for the purposes of observer deployment; and

(6) All vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit must notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to crossing the VMS demarcation line on their return trip to port, or, for vessels that have not fished seaward of the VMS demarcation line, at least 6 hr prior to landing. The Regional Administrator may adjust the prior notification minimum time through publication of a notice in the **Federal Register** consistent with the Administrative Procedure Act.

* * * * *

■ 13. In § 648.83, paragraph (b)(4) is revised to read as follows:

§ 648.83 Multispecies minimum fish sizes.

* * * * *

(b) * * *

(4) Vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may possess and land haddock and other regulated species that are smaller than the minimum size specified under § 648.83, consistent with the bycatch caps specified in §§ 648.86(a)(3) and 648.86(k). Such fish may not be sold for human consumption.

* * * * *

■ 14. In § 648.85, paragraph (d) is revised to read as follows:

§ 648.85 Special management programs.

* * * * *

(d) *Incidental catch allowance for some limited access herring vessels.* The incidental catch allowance for vessels that have an All Areas Limited Access

Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit is defined as 0.2 percent of the combined target TAC for Gulf of Maine haddock and Georges Bank haddock (U.S. landings only) specified according to § 648.90(a) for a particular multispecies fishing year.

■ 15. In § 648.86, paragraphs (a)(3), and (k) are revised to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(a) * * *

(3)(i) *Incidental catch allowance for some limited access herring vessels.* Vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may possess and land haddock on all trips that do not use a NE multispecies DAS, subject to the requirements specified in § 648.80(d) and (e).

(ii) *Haddock incidental catch cap.* (A)(*1*) When the Regional Administrator has determined that the incidental catch allowance in § 648.85(d) has been caught, all vessels issued an Atlantic herring permit or fishing in the Federal portion of the GOM/GB Herring Exemption Area, defined in this paragraph (a)(3)(ii)(A)(*1*), are prohibited from fishing for, possessing, or landing herring in excess of 2,000 lb (907.2 kg) per trip in or from the GOM/GB Herring Exemption Area, unless all herring possessed and landed by the vessel were caught outside the GOM/GB Herring Exemption Area and the vessel complies with the gear stowage provisions specified in § 648.23(b) while transiting the Exemption Area. Upon this determination, the haddock possession limit is reduced to 0 lb (0 kg) for all vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit, regardless of where they were fishing. In making this determination, the Regional Administrator shall use haddock landings observed by NMFS-approved observers and law enforcement officials, and reports of haddock catch submitted by vessels and dealers pursuant to the reporting requirements of this part. The GOM/GB Herring Exemption Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

GB/GOM HERRING EXEMPTION AREA

Point	N. lat.	W. long.
1	41° 33.05′	70° 00′
2	41° 20′	70° 00′
3	41° 20′	69° 50′
4	41° 10′	69° 50′
5	41° 10′	69° 30′
6	41° 00′	69° 30′
7	41° 00′	68° 50′
8	39° 50′	68° 50′
9	39° 50′	66 °40′
10	40 °30′	66° 40′
11	40 °30′	64 °44.34′
12	41 °50′	66 °51.94′
13	41 °50′	67 °40′
14	44 °00′	67 °40′
15	44 °00′	67 °50′
16	44 °10′	67 °50′
17	44 °27′	67 °59.18′
18	ME, NH, MA Coastlines	
19	41 °33.05′	70° 00′

(*2*) The haddock incidental catch cap specified is for the NE multispecies fishing year (May 1 April 30), which differs from the herring fishing year (January 1 December 31). If the haddock catch cap is attained by the limited access herring fishery, the 2,000–lb (907.2–kg) limit on herring possession and landings in the GOM/GB Herring Exemption Area will be in effect until the end of the NE multispecies fishing year. For example, the 2006 haddock catch cap would be specified for the period May 1, 2006 April 30, 2007, and the 2007 haddock catch cap would be specified for the period May 1, 2007 April 30, 2008. If the catch of haddock by limited access herring vessels reached the 2006 catch cap at any time prior to the end of the NE multispecies fishing year (April 30, 2007), the 2,000–lb (907.2–kg) limit on possession or landing herring in the GOM/GB Herring Exemption Area would extend through April 30, 2007, at which time the 2007 catch cap would go into effect.

(B) [Reserved]

* * * * *

(k) *Other regulated NE multispecies possession restrictions for limited access herring vessels.* All vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may possess and land up to 100 lb (45 kg), combined, of other regulated NE multispecies on all trips that do not use a multispecies DAS, subject to the requirements specified in § 648.80(d) and (e). Such fish may not be sold for human consumption.

■ 16. Subpart K is revised to read as follows:

Subpart K Management Measures for the Atlantic Herring Fishery

Sec.

Subpart K–Management Measures for the Atlantic Herring Fishery

§ 648.200 Specifications.

(a) The Atlantic Herring Plan Development Team (PDT) shall meet at least every 3 years, but no later than July of the year before new specifications are implemented, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for a period of 3 years for consideration by the New England Fishery Management Council's Atlantic Herring Oversight Committee: Optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), reserve (if any), and the amount to be set aside for the RSA (from 0 to 3 percent of the TAC from any management area). The PDT and PRT shall also recommend the total allowable catch (TAC) for each management area and sub-area, including seasonal quotas as specified at § 648.201(f). Recommended specifications shall be presented to the New England Fishery Management Council (Council).

(1) The PDT shall meet with the Commission's PRT to review the status of the stock and the fishery and prepare a Stock Assessment and Fishery Evaluation (SAFE) report at least every 3 years. The Herring PDT will meet at least once during interim years to review the status of the stock relative to the overfishing definition if information is available to do so. When conducting a 3-year review and preparing a SAFE Report, the PDT/PRT will recommend to the Council/Commission any necessary adjustments to the specifications for the upcoming 3 years.

(2) If the Council determines, based on information provided by the PDT/PRT or other stock-related information, that the specifications should be adjusted during the 3-year time period, it can do so through the same process

outlined in this section during one or both of the interim years.

(b) *Guidelines.* As the basis for its recommendations under paragraph (a) of this section, the PDT shall review available data pertaining to: Commercial and recreational catch data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. The specifications recommended pursuant to paragraph (a) of this section must be consistent with the following:

(1) OY must be equal to or less than the allowable biological catch (ABC), as adjusted by subtracting an estimate of the expected Canadian New Brunswick fixed gear and GB herring catch.

(2) OY must not exceed MSY, unless an OY that exceeds MSY in a specific year is consistent with a control rule that ensures the achievement of MSY and OY on a continuing basis.

(3) Factors to be considered in assigning an amount, if any, to the reserve shall include:

(i) Uncertainty and variability in the estimates of stock size and ABC;

(ii) Uncertainty in the estimates of Canadian harvest from the coastal stock complex;

(iii) The requirement to insure the availability of herring to provide controlled opportunities for vessels in other fisheries in the Mid-Atlantic and New England;

(iv) Excess U.S. harvesting capacity available to enter the herring fishery;

(v) Total world export potential by herring producer countries;

(vi) Total world import demand by herring consuming countries;

(vii) U.S. export potential based on expected U.S. harvests, expected U.S. consumption, relative prices, exchange rates, and foreign trade barriers;

(viii) Increased/decreased revenues to U.S. harvesters (with/without joint ventures);

(ix) Increased/decreased revenues to U.S. processors and exporters; and

(x) Increased/decreased U.S. processing productivity.

(4) Adjustments to TALFF, if any, shall be made based on updated information relating to status of stocks, estimated and actual performance of domestic and foreign fleets, and other relevant factors.

(c) The Atlantic Herring Oversight Committee shall review the recommendations of the PDT and shall consult with the Commission's Herring Section. Based on these recommendations and any public comment received, the Herring Oversight Committee shall recommend to the Council appropriate specifications for a 3-year period. The Council shall review these recommendations and, after considering public comment, shall recommend appropriate 3-year specifications to NMFS. NMFS shall review the recommendations, consider any comments received from the Commission, and publish notification in the **Federal Register** proposing 3-year specifications. If the proposed specifications differ from those recommended by the Council, the reasons for any differences shall be clearly stated and the revised specifications must satisfy the criteria set forth in paragraph (b) of this section.

(d) NMFS shall make a final determination concerning the specifications for Atlantic herring. Notification of the final specifications and responses to public comments shall be published in the **Federal Register**. If the final specification amounts differ from those recommended by the Council, the reason(s) for the difference(s) must be clearly stated and the revised specifications must be consistent with the criteria set forth in paragraph (b) of this section. The previous year's specifications shall remain effective until they are revised through the specification process.

(e) *In-season adjustments.* (1) The specifications and TACs established pursuant to this section may be adjusted by NMFS, after consulting with the Council, during the fishing year by publishing notification in the **Federal Register** stating the reasons for such action and providing an opportunity for prior public comment. Any adjustments must be consistent with the Atlantic Herring FMP objectives and other FMP provisions.

(2) If a total allowable catch reserve (TAC reserve) is specified for an area, NMFS may make any or all of that TAC reserve available to fishers after consulting with the Council. NMFS shall propose any release of the TAC reserve in the **Federal Register** and provide an opportunity for public comment. After considering any comments received, any release of the TAC reserve shall be announced through notification in the **Federal Register**.

(f) *Management areas.* The specifications process establishes TACs and other management measures for the three management areas, which may have different management measures. Management Area 1 is subdivided into inshore and offshore sub-areas. The management areas are defined as follows:

(1) *Management Area 1 (Gulf of Maine)*: All U.S. waters of the Gulf of Maine (GOM) north of a line extending from a point at 70°00′ W. long. and 41°39′ N. to 42°53′14″ N. lat., 67° 44′35″ W. long., thence northerly along the Hague Line to the U.S.-Canadian border, to include state and Federal waters adjacent to the States of Maine, New Hampshire, and Massachusetts. Management Area 1 is divided into Area 1A (inshore) and Area 1B (offshore). The line dividing these areas is described by the following coordinates:

Point	N. lat.	W. long.
1	41°58′	70° 00′
2	42°38′	70° 00′
3	42°53′	69° 40′
4	43°12′	69° 00′
5	43°40′	68° 00′
6	43°58′	67° 22′(the U.S.–Canada Maritime Boundary)

(2) *Management Area 2 (South Coastal Area)*: All waters west of 70° 00′ W . long., south of 41°39′ N. lat., to include state and Federal waters adjacent to the States of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, and North Carolina.

(3) *Management Area 3 (Georges Bank)*: All U.S. waters east of 70°00′ W. long. and southeast of the line that runs from a point at 70°00′ W. long. and 41°39′ N. lat., northeasterly to the Hague Line at 42°53′14″ N. lat., 67°44′35″ W. long.

§ 648.201 Closures and TAC controls.

(a) If NMFS determines that catch will reach 95 percent of the annual TAC allocated to a management area before the end of the fishing year, or 95 percent of the Area 1A TAC allocated to the first seasonal period as set forth in paragraph (f) of this section, NMFS shall prohibit vessels, beginning the date the catch is projected to reach 95 percent of the TAC, from fishing for, possessing, catching, transferring, or landing >2,000 lb (907.2 kg) of Atlantic herring per trip and/or >2,000 lb (907.2 kg) of Atlantic herring per day in such area pursuant to paragraph (e) of this section, except as provided in paragraphs (c) and (d) of this section. These limits shall be enforced based on a calendar day, without regard to the length of the trip.

(b) The percent of the TAC that triggers imposition of the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section may be adjusted

through the specification process described in § 648.200. Any lowering of the percent of the TAC that triggers the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section must be accomplished through the framework adjustment or amendment processes.

(c) A vessel may transit an area that is limited to the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section with > 2,000 lb (907.2 kg) of herring on board, provided such herring were caught in an area or areas not subject to the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section, and that all fishing gear is stowed and not available for immediate use as required by § 648.23(b), and provided the vessel is issued a vessel permit appropriate to the amount of herring on board and the area where the herring was harvested.

(d) A vessel may land in an area that is limited to the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section with > 2,000 lb (907.2 kg) of herring on board, provided such herring were caught in an area or areas not subject to the 2,000–lb (907.2–kg) limit specified in paragraph (a) of this section, and that all fishing gear is stowed and not available for immediate use as required by § 648.23(b), and provided the vessel is issued a vessel permit appropriate to the amount of herring on board and the area where the herring was harvested.

(e) NMFS shall implement fishing restrictions as specified in paragraph (a) of this section by publication of a notification in the **Federal Register**, without further opportunity for public comment.

(f) The TAC for Management Area 1A is divided into two seasonal periods. The first season extends from January 1 through May 31, and the second season extends from June 1 through December 31. Seasonal TACs for Area 1A, including the specification of the seasonal periods, shall be set through the annual specification process described in § 648.200.

(g) Up to 500 mt of the Area 1A TAC shall be allocated for the fixed gear fisheries in Area 1A (weirs and stop seines) that occur west of 44° 36.2 N. Lat. and 67° 16.8 W. long (Cutler, Maine). This set-aside shall be available for harvest by fixed gear within the specified area until November 1 of each fishing year. Any portion of this allocation that has not been utilized by November 1 shall be restored to the TAC allocation for Area 1A.

§ 648.202 Season and area restrictions.

(a) Purse Seine/Fixed Gear Only Area. Vessels fishing for Atlantic herring may not use, deploy, or fish with midwater trawl gear in Area 1A from June 1 September 30 of each fishing year. A limited access herring vessel with midwater trawl gear on board may transit Area 1A from June 1–September 30, provided such midwater trawl gear is stowed pursuant to § 648.23(b). Vessels may use any authorized gear type to harvest herring in Area 1A from October 1 – May 31.

(b) [Reserved]

§ 648.203 Gear restrictions.

(a) Midwater trawl gear may only be used by a vessel issued a valid herring permit in the GOM/GB Exemption Area as defined in § 648.80(a)(17), and in the Nantucket Lightship Area as described in § 648.81(c)(1), provided it complies with the midwater trawl gear exemption requirements specified under the NE multispecies regulations at § 648.80(d), including issuance of a Letter of Authorization.

(b) Purse seine gear may only be used by a vessel issued a valid herring permit in the GOM/GB Exemption Area as defined in § 648.80(a)(17), provided it complies with the purse seine exemption requirements specified under the NE multispecies requirements at § 648.80(e), including issuance of a Letter of Authorization.

§ 648.204 Possession restrictions.

(a) A vessel must be issued a valid limited access herring permit to fish for, possess, or land more than 6,600 lb (3 mt) of Atlantic herring from or in the EEZ from any herring management area, provided that the area has not been closed due to the attainment of 95 percent of the TAC allocated to the area, as specified in § 648.201.

(1) A vessel issued an All Areas Limited Access Herring Permit is authorized to fish for, possess, or land Atlantic herring with no possession restriction from any of the herring management areas defined in § 648.200(f), provided that the area has not been closed due to the attainment of 95 percent of the TAC allocated to the area, as specified in § 648.201.

(2) A vessel issued only an Areas 2 and 3 Limited Access Herring Permit is authorized to fish for, possess, or land Atlantic herring with no possession restriction only from Area 2 or Area 3 as defined in § 648.200(f), provided that the area has not been closed due to the attainment of 95 percent of the TAC allocated to the area, as specified in § 648.201. Such a vessel may fish in Area 1 only if issued an open access herring permit or a Limited Access Incidental Catch Herring Permit, and only as authorized by the respective permit.

(3) A vessel issued a Limited Access Incidental Catch Herring Permit is authorized to fish for, possess, or land up to 55,000 lb (25 mt) of Atlantic herring in any calendar day, from any management area defined in § 648.200(f), provided that the area has not been closed due to the attainment of 95 percent of the TAC allocated to the area.

(4) A vessel issued an open access herring permit may not fish for, possess, or land more than 6,600 lb (3 mt) of Atlantic herring from any herring management area per trip and/or per calendar day, provided that the area has not been closed due to the attainment of 95 percent of the TAC allocated to the area, as specified in § 648.201.

(5) A vessel issued a herring permit may possess herring roe provided that the carcasses of the herring from which it came are not discarded at sea.

(b) Both vessels involved in a pair trawl operation must be issued valid herring permits to fish for, possess, or land Atlantic herring harvested from any management area. Both vessels must be issued the herring permit appropriate for the amount of herring jointly possessed by both of the vessels participating in the pair trawl operation.

§ 648.205 VMS requirements.

The owner or operator of any limited access herring vessel with the exception of fixed gear fishermen must install and operate a VMS unit consistent with the requirements of § 648.9. The VMS unit must be installed on board, and must be operable before the vessel may begin fishing. Atlantic herring carrier vessels are not required to have VMS. At least 1 hr prior to leaving port, the owner or authorized representative of a herring vessel that is required to use VMS as specified in this section must notify the Regional Administrator by entering the appropriate VMS code that the vessel will be participating in the herring fishery. VMS codes and instructions are available from the Regional Administrator upon request.

§ 648.206 Framework provisions.

(a) *Framework adjustment process.* In response to the triennial review, or at any other time, the Council may initiate action to add or adjust management measures if it finds that action is necessary to meet or be consistent with the goals and objectives of the Atlantic Herring FMP, or to address gear conflicts as defined under § 600.10 of this chapter.

(1) *Adjustment process.* After a management action has been initiated,

the Council shall develop and analyze appropriate management measures over the span of at least two Council meetings. The Council may delegate authority to the Herring Oversight Committee to conduct an initial review of the options being considered. The Oversight Committee shall review the options and relevant information, consider public comment, and make a recommendation to the Council.

(2) After the first framework meeting, the Council may refer the issue back to the Herring Oversight Committee for further consideration, make adjustments to the measures that were proposed, or approve of the measures and begin developing the necessary documents to support the framework adjustments. If the Council approves the proposed framework adjustments, the Council shall identify, at this meeting, a preferred alternative and/or identify the possible alternatives.

(3) A framework document shall be prepared that discusses and shows the impacts of the alternatives. It shall be available to the public prior to the second or final framework meeting.

(4) After developing management actions and receiving public testimony, the Council shall make a recommendation to NMFS. The Council's recommendation must include supporting rationale and, if changes to the management measures are recommended, an analysis of impacts and a recommendation to NMFS on whether to issue the management measures as a final rule. If the Council recommends that the management measures should be issued as a final rule, the Council must consider at least the following factors and provide support and analysis for each factor considered:

(i) Whether the availability of data on which the recommended management measures are based allows for adequate time to publish a proposed rule, and whether regulations have to be in place for an entire harvest/fishing season.

(ii) Whether there has been adequate notice and opportunity for participation by the public and members of the affected industry in the development of the Council's recommended management measures.

(iii) Whether there is an immediate need to protect the resource or to impose management measures to resolve gear conflicts.

(iv) Whether there will be a continuing evaluation of management measures adopted following their implementation as a final rule.

(5) If the Council's recommendation to NMFS includes adjustments or additions to management measures, after reviewing the Council's recommendation and supporting information NMFS may:

(i) Concur with the Council's recommended management measures and determine that the recommended management measures should be published as a final rule in the **Federal Register** based on the factors specified in paragraphs (c)(4)(i)-(iv) of this section.

(ii) Concur with the Council's recommendation and determine that the recommended management measures should be first published as a proposed rule in the **Federal Register**. After additional public comment, if NMFS concurs with the Council's recommendation, the measures shall be issued as a final rule in the **Federal Register**.

(iii) If NMFS does not concur, the Council shall be notified in writing of the reasons for the non-concurrence.

(b) Possible framework adjustment measures. Measures that may be changed or implemented through framework action include:

(1) Management area boundaries or additional management areas;

(2) Size, timing, or location of new or existing spawning area closures;

(3) Closed areas other than spawning closures;

(4) Restrictions in the amount of fishing time;

(5) A days-at-sea system;

(6) Adjustments to specifications;

(7) Adjustments to the Canadian catch deducted when determining specifications;

(8) Distribution of the TAC;

(9) Gear restrictions (such as mesh size, etc.) or requirements (such as bycatch-reduction devices, etc.);

(10) Vessel size or horsepower restrictions;

(11) Closed seasons;

(12) Minimum fish size;

(13) Trip limits;

(14) Seasonal, area, or industry sector quotas;

(15) Measures to describe and identify essential fish habitat (EFH), fishing gear management measures to protect EFH, and designation of habitat areas of particular concern within EFH;

(16) Measures to facilitate aquaculture, such as minimum fish sizes, gear restrictions, minimum mesh sizes, possession limits, tagging requirements, monitoring requirements, reporting requirements, permit restrictions, area closures, establishment of special management areas or zones, and any other measures included in the FMP;

(17) Changes to the overfishing definition;

(18) Vessel monitoring system requirements;

(19) Limits or restrictions on the harvest of herring for specific uses;

(20) Quota monitoring tools, such as vessel, operator, or dealer reporting requirements;

(21) Permit and vessel upgrading restrictions;

(22) Implementation of measures to reduce gear conflicts, such as mandatory monitoring of a radio channel by fishing vessels, gear location reporting by fixed gear fishermen, mandatory plotting of gear by mobile fishermen, standards of operation when conflict occurs, fixed gear marking or setting practices; gear restrictions for certain areas, vessel monitoring systems, restrictions on the maximum number of fishing vessels, and special permitting conditions;

(23) Limited entry or controlled access system;

(24) Specification of the amount of herring to be used for roe

(25) In-season adjustments to TACs;

(26) Measures to address bycatch and bycatch monitoring;

(27) Requirements for a herring processor survey;

(28) TAC set-aside amounts, provisions, adjustments; and

(29) Any other measure currently included in the FMP.

(c) *Emergency action*. Nothing in this section is meant to derogate from the authority of the Secretary to take emergency action under section 305(e) of the Magnuson-Stevens Act.

§ 648.207 Herring Research Set-Aside (RSA).

(a) NMFS shall publish a Request for Proposals (RFP) in the **Federal Register**, consistent with procedures and requirements established by NMFS, to solicit proposals from industry for the upcoming 3 fishing years, based on research priorities identified by the Council.

(b) Proposals submitted in response to the RFP must include the following information, as well as any other specific information required within the RFP: A project summary that includes the project goals and objectives, the relationship of the proposed research to herring research priorities and/or management needs, project design, participants other than the applicant, funding needs, breakdown of costs, and the vessel(s) for which authorization is requested to conduct research activities.

(c) NMFS shall convene a review panel, including technical experts, to review proposals submitted in response to the RFP. Each panel member shall recommend which research proposals should be authorized to utilize RSA,

based on the selection criteria described in the RFP.

(d) NMFS shall consider each panel member's recommendation, provide final approval of the projects and the Regional Administrator may, when appropriate, exempt selected vessel(s) from regulations specified in each of the respective FMPs through written notification to the project proponent.

(e) The grant awards approved under the RFPs shall be for the upcoming 3 fishing years, unless the Council identifies new/different research priorities during the interim years and decides to publish a second RFP. Proposals to fund research that would start prior to, or that would end after the fishing year, are not eligible for consideration. The RSA must be utilized in the same fishing year in which it was distributed (i.e., RSA and compensation trips cannot be rolled over into future years). However, the money generated from the RSA may be rolled over into, or used to fund research in future years, consistent with the multi-year proposal.

(f) Whenever possible, research proposals shall be reviewed and approved prior to the publication of final quota specifications for the upcoming fishing years. In the event that the approved proposals do not make use of any or all of the set-asides, the unutilized portion of the set-aside shall be reallocated back to its respective management area(s) when the final specifications are published. If there is unutilized set-aside available, NMFS, at the request of the Council, could publish another RFP for either the second or third years of the 3-year specifications. In this case, NMFS shall release the unutilized portion of the RSA back to its respective management area(s) for the first year of the specifications and any other year that yields unutilized set-aside after an additional RFP is published. The Council also may decide not to publish another RFP, in which case NMFS may release the unutilized portion of the set-aside back to its respective management area(s) for all 3 fishing years covered by the specifications.

(g) If a proposal is approved, but a final award is not made by NMFS, or if NMFS determines that the allocated RSA cannot be utilized by a project, NMFS shall reallocate the unallocated or unused amount of the RSA to the respective TAC by publication of a notice in the **Federal Register** in compliance with the Administrative Procedure Act, provided that the RSA can be available for harvest before the end of the fishing year for which the RSA is specified.

(h) Any RSA reallocated under paragraphs (f) and (g) of this section may not be used solely as compensation for research.

(i) Researchers may apply for the use of more than one herring RAS allocation for individual research projects, and may request that the set-aside be collected separately from the research trip or as part of the research trip. The research compensation trips do not necessarily have to be conducted by the same vessel, but must be conducted in the management area from which the set-aside was derived.

(j) No more than 50 percent of the allocated set-aside may be taken before the research begins. If a research project is terminated for any reason prior to completion, any funds collected from the catch sold to pay for research expenses must be refunded to U.S. Treasury.

(k) NMFS shall provide authorization of the research activities to specific vessels by letter of acknowledgement, letter of authorization, or Exempted Fishing Permit issued by the Regional Administrator, which must be kept on board the vessel.

(l) Upon completion of herring research projects approved under this part, researchers must provide the Council and NMFS with a report of research findings, which must include: A detailed description of methods of data collection and analysis; a discussion of results and any relevant conclusions presented in a format that is understandable to a non-technical audience; and a detailed final accounting of all funds used to conduct the herring research.

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