DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket 100203070–4003–02]

RIN 0648–AY47

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Amendment 5

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

ACTION: Final rule.

SUMMARY: This rule implements approved measures in Amendment 5 to the Atlantic Herring Fishery Management Plan (FMP). Amendment 5 was developed by the New England Fishery Management Council (Council) to: Improve the collection of real-time, accurate catch information; enhance the monitoring and sampling of catch at-sea; and address bycatch issues through responsible management. The approved measures include: Revising fishery management program provisions (permitting provisions, vessel notification requirements, measures to address herring carrier vessels, regulatory definitions, and requirements for vessel monitoring systems); expanding vessel requirements to maximize observers' ability to sample catch at-sea; minimizing the discarding of unsampled catch (commonly known as slippage); addressing the incidental catch and bycatch of river herring; and revising the criteria for midwater trawl vessels' access to Northeast multispecies (groundfish) closed areas. NMFS disapproved three measures in Amendment 5. These measures included: A dealer reporting requirement; a cap that, if achieved, would require vessels discarding catch before it had been sampled by observers (known as slippage) to return to port; and a requirement for 100-percent observer coverage on Category A and B vessels, coupled with an industry contribution of $325 per day toward observer costs. NMFS disapproved these three measures because it believes they are inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other applicable law. Therefore, these three measures are not implemented in this action.

DATES: Effective March 17, 2014.

ADDRESSES: Copies of supporting documents used by the Council, including the Final Environmental Impact Statement (FEIS) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. The FEIS/RIR/IRFA is also accessible 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 final rule may be submitted to NMFS, Northeast Regional Office and by email to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

Information on the Federal Vessel Monitoring System (VMS) reimbursement program is available from the Pacific States Marine Fisheries Commission, 205 SE. Spokane Street, Suite 100, Portland, OR 97202 (Web site: *http://www.psmfc.org/,* telephone number: 503–595–3100, fax number: 503–595– 3232).

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, phone 978- 281–9272, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

On May 8, 2008 (73 FR 26082), the Council published a notice of intent (NOI) to prepare an EIS for Amendment 4 to the Atlantic Herring FMP to consider measures to: Improve long-term monitoring of catch (landings and bycatch) in the herring fishery, implement annual catch limits (ACLs) and accountability measures (AMs) consistent with the MSA, and develop a sector allocation process or other limited access privilege program for the herring fishery. The Council subsequently conducted scoping meetings during May and June of 2008 to discuss and take comments on alternatives to these measures. After considering the complexity of the issues under consideration in Amendment 4, the Council voted on June 23, 2009, to split the action into two amendments to ensure the MSA requirements for complying with provisions for ACLs and AMs would be met by 2011. The ACL and AM components moved forward in Amendment 4, all other measures formerly considered in Amendment 4 were to be considered in Amendment 5. A supplementary NOI was published on December 28, 2009, (74 FR 68577) announcing the split between the amendments, and that impacts associated with alternatives considered in Amendment 5 would be analyzed in an EIS. At that time, measures considered under Amendment 5 included: A catch-monitoring program; measures to address river herring bycatch; midwater trawl access to groundfish closed areas; and measures to address interactions with the Atlantic mackerel (mackerel) fishery.

Following further development of Amendment 5, the Council conducted MSA public hearings in March 2012, National Environmental Policy Act (NEPA) public hearings at the beginning of June 2012, and, following the public comment period on the draft EIS (DEIS) that ended on June 4, 2012, the Council adopted Amendment 5 on June 20, 2012. The Council submitted Amendment 5 to NMFS for review on September 10, 2012. Following a series of revisions, the Council submitted a revised version of Amendment 5 to NMFS on March 25, 2013. A Notice of Availability (NOA) for Amendment 5, as submitted by the Council for review by the Secretary of Commerce (Secretary), was published on April 22, 2013 (78 FR 23733), with a comment period ending June 21, 2013. A proposed rule for Amendment 5 was published on June 3, 2013 (78 FR 33020), with a comment period ending July 18, 2013. On July 18, 2013, NMFS partially approved Amendment 5 on behalf of the Secretary. NMFS sent a letter to the Council on July 19, 2013, informing it of the partial approval of Amendment 5.

The Council has spent several years developing this amendment, and it contains many measures that would improve herring management and that can be administered by NMFS. NMFS supports improvements to fishery dependent data collections, either through increasing reporting requirements or expanding the at-sea monitoring of the herring fishery. NMFS also shares the Council's concern for reducing bycatch and unnecessary discarding. However, three measures in Amendment 5 lacked adequate rationale or development by the Council, and NMFS had utility and legal concerns with the implementation of these measures. These measures include: A dealer reporting requirement; a cap that, if achieved, would require vessels discarding catch before it had been sampled by observers (known as slippage) to return to port; and a requirement for 100-percent observer coverage on Category A (All Areas Limited Access Herring Permit) and B (Areas 2/3 Limited Access Herring Permit) vessels, coupled with an industry contribution of a target maximum of $325 per day toward observer costs. NMFS expressed

potential concerns with these measures throughout the development of this amendment, but these measures have strong support from some stakeholders. The proposed rule for Amendment 5 described potential concerns about these measures' consistency with the MSA and other applicable law. After review of public comment, NMFS determined these three measures must be disapproved because they were inconsistent with the MSA and other applicable law. On September 20, 2013, NMFS sent a letter to the Council with recommendations on how these measures could be revised to address NMFS's concerns. If the Council chooses to revise these measures, NMFS will work with the Council to design effective measures to help improve management of the herring fishery. Revised measures could be addressed in upcoming Council actions. Whether that action would be an amendment or framework would depend on the scope of the revised measure.

Approved Measures

This final rule implements approved management measures that:

- Modify the herring transfer at-sea and offload definitions to better document the transfer of fish;
- Expand possession limit restrictions to all vessels working cooperatively, consistent with pair trawl requirements;
- Eliminate the vessel monitoring system (VMS) power-down provision for limited access herring vessels, consistent with VMS provisions for other fisheries;
- Establish an ''At-Sea Herring Dealer'' permit to better document the at-sea transfer and sale of herring;
- Establish an ''Areas 2/3 Open Access Permit'' to reduce the potential for the regulatory discarding of herring in the mackerel fishery;
- Allow vessels to enroll as herring carriers with either a VMS declaration or letter of authorization to increase operational flexibility;
- Expand pre-trip and pre-landing notification requirements, as well as adding a VMS gear declaration, to all limited access herring vessels and vessels issued an Areas 2/3 Open Access Permit to help facilitate monitoring;
- Establish an advance notice requirement for the observer pre-trip notification at 48 hr;
- Expand vessel requirements related to at-sea observer sampling to help ensure safe sampling and improve data quality;
- Establish measures to minimize the discarding of catch before it has been made available to observers for sampling (known as slippage);
- Establish a framework provision for a river herring catch cap, such that a river herring catch cap may be implemented in a future framework;
- Allow the existing river herring bycatch avoidance program to investigate providing real-time, cost-effective information on river herring distribution and fishery encounters in River Herring Monitoring/Avoidance Areas; and
- Expand at-sea sampling of midwater trawl vessels fishing in groundfish closed areas.

1. Adjustments to the Fishery Management Program

Amendment 5 revises several existing fishery management provisions, such as regulatory definitions, reporting requirements, and VMS requirements, and establishes new provisions, such as additional herring permits and increased operational flexibility for herring carriers, to better administer the herring fishery.

Definitions

Amendment 5 revises the regulatory definitions of transfer at-sea and offload to clarify these activities for the herring fishery. This action defines a herring transfer at-sea as a transfer of fish from one herring vessel (including fish from the hold, deck, codend, or purse seine) to another vessel, with the exception of fish moved between vessels engaged in pair trawling. This action also defines a herring offload as removing fish from a herring vessel to be sold to a dealer. Both transfers at-sea and offloading are frequent activities in the herring fishery, and the differences between these activities are not always well understood. These definition revisions attempt to more clearly differentiate between activities that trigger reporting requirements. By clarifying these activities for the herring fishery, fishery participants are more likely to report these activities consistently, thereby improving reporting compliance, helping ensure data accuracy and completeness, and lessening the likelihood of double counting herring catch.

Herring Carriers

Amendment 5 revises operating provisions for herring carrier vessels by establishing an At-Sea Herring Dealer permit for herring carriers that sell fish, allowing vessels to declare herring carrier trips via VMS, and exempting herring carriers from vessel trip report (VTR) requirements. Currently, herring carriers may receive and transport herring caught by another fishing vessel, provided the herring carrier has been issued a herring permit, does not have any gear on board capable of catching or processing herring, and has been issued a letter of authorization (LOA) from the NMFS Regional Administrator (RA). The herring carrier LOA exempts the herring carrier from possession limits and catch reporting requirements associated with the vessel's herring permit. To allow time for the processing, issuance, and, if necessary, cancellation of the LOAs, the herring carrier LOAs have a minimum 7-day enrollment period. During the LOA enrollment period, vessels may only act as herring carriers and they may not fish for any species, or transport species other than herring and certain groundfish species, including haddock and up to 100 lb (45 kg) of other regulated groundfish species (as specified at § 648.86(a)(3) and (k)).

This action allows vessels to choose between enrolling as a herring carrier with an LOA or declaring a herring carrier trip via VMS. If a vessel chooses to declare a herring carrier trip via VMS, it would be allowed to receive and transport herring caught by another fishing vessel provided the herring carrier has been issued a herring permit, does not have any gear on board capable of catching or processing fish, and only transports herring or groundfish, including haddock and up to 100 lb (45 kg) of other regulated groundfish species (as specified at § 648.86(a)(3) and (k)). Consistent with other Northeast Region VMS requirements, once a vessel declares a herring carrier trip via VMS, it is bound to the VMS operating requirements, specified at § 648.10, for the remainder of the fishing year. By declaring a herring carrier trip via VMS, a vessel would not be bound by the 7-day enrollment period of the LOA. A vessel declaring a herring carrier trip via VMS may only act as a herring carrier and may not fish for any species or transport species other than herring or groundfish. This measure would increase operational flexibility by allowing vessels to schedule herring carrier trips on a trip-by-trip basis. Vessels that do not possess a VMS or choose not to declare a herring trip via VMS may still act as carriers by obtaining a herring carrier LOA from the NMFS RA and operating in accordance with the LOA requirements.

Herring carriers typically receive herring from harvesting vessels and transport those herring to Federal dealers. The harvesting vessel reports those herring as catch, and dealers report those herring as a purchase. NMFS verifies the amount of herring

caught by comparing the amount reported by the harvesting vessel against the amount reported by the dealer. If the herring transported by a herring carrier is not purchased by a Federal dealer, then NMFS does not have any dealer reports to compare to the vessel reports. This action establishes an At-Sea Atlantic Herring Dealer Permit that would be required for herring carriers that sell herring, rather than deliver those fish on behalf of a harvesting vessel to a dealer for purchase. This permit requires compliance with Federal dealer reporting requirements. Vessels that have been issued both an At-Sea Atlantic Herring Dealer Permit and a Federal fishing permit would be required to fulfill the reporting requirements of both permits, as appropriate. NMFS expects the reporting requirements for the At-Sea Atlantic Herring Dealer Permit to minimize instances where catch is reported by harvesting vessels but which NMFS cannot match to dealer reports; thereby improving catch monitoring in the herring fishery.

Amendment 5 exempts herring carriers from the VTR requirements associated with their vessel permits while the vessel is operating in accordance with the herring carrier permit requirements. NMFS requires vessels issued herring permits to submit weekly VTRs to NMFS. However, dealers have incorrectly attributed catch to herring carrier vessels, rather than correctly attributing catch to the appropriate harvesting vessel, by reporting the herring carrier's VTR serial number rather than the VTR serial number of the harvesting vessel. To help prevent catch being attributed to the wrong vessel and to minimize data mismatches between vessel and dealer reports, this action exempts herring carriers from the VTR requirement associated with their herring permit when they are enrolled as a herring carrier with an LOA or by declaring a herring carrier trip via VMS. Dealers would still be responsible for correctly reporting the VTR serial number of the vessel that harvested the herring.

Open Access Herring Permits

Amendment 5 establishes a new open access herring permit for vessels engaged in the mackerel fishery and re-names the current open access herring permit. The permit formerly known as the Open Access Herring Permit (Category D) allows a vessel to possess up to 6,600 lb (3 mt) of herring per trip, limited to one landing per calendar day, in or from any of the herring management areas. All the provisions and requirements of this open access herring permit remain the same, but this action renames this permit as the All Areas Open Access Herring Permit (Category D), and creates a new open access permit for mackerel fishery participants fishing in herring management Areas 2 and 3 called the Areas 2/3 Open Access Permit (Category E).

The new Areas 2/3 Open Access Herring Permit (Category E) allows vessels to possess up to 20,000 lb (9 mt) of herring per trip, limited to one landing per calendar day, in or from herring management Areas 2 and 3. Vessels that have not been issued a limited access herring permit, but that have been issued a limited access mackerel permit, are eligible for the Areas 2/3 Open Access Herring Permit. Vessels may hold both open access herring permits at the same time.

In its letter to NMFS deeming the proposed regulations for Amendment 5, the Council requested that NMFS clarify the reporting and monitoring requirements associated with the new Category E permit. Amendment 5 states that Category E permits would be subject to the same notification and reporting requirements as Category C (Incidental Catch Limited Access Herring Permit) vessels. Therefore, this action establishes notification and reporting requirements for the Category E permit that are consistent with the requirements for Category C vessels, including the requirement to possess and maintain a VMS, VMS activity declaration and pre-landing requirements, and catch reporting requirements (i.e., submission of daily VMS catch reports and weekly VTRs). Reimbursement for VMS units is available on a first come, first serve, basis until the funds are depleted. More information on the VMS reimbursement program is available from the Pacific States Marine Fisheries Commission (see **ADDRESSES**) and from the NMFS VMS Support Center, which can be reached at 888–219–9228.

Amendment 5 does not state that Category E permits would be subject to the same catch monitoring requirements as Category C vessels, including the proposed vessel requirements to help improve at-sea sampling and measures to minimize the discarding of catch before it has been made available to observers for sampling. When describing or analyzing catch monitoring requirements, Amendment 5 does not describe extending catch monitoring requirements for Category C vessels to Category E vessels, nor does it analyze the impacts of catch monitoring requirements on Category E vessels. Because the Category C catch monitoring requirements were not discussed or analyzed in relation to Category E vessels, this action did not propose, and thus does not extend, those catch monitoring requirements to Category E vessels.

There is significant overlap between the mackerel and herring fisheries. Mackerel and herring co-occur, particularly during January through April, which is a time that vessels often participate in both fisheries. Not all vessels participating in the mackerel fishery qualify for a limited access herring permit because they either did not have adequate herring landings or they are new participants in the mackerel fishery. Currently, vessels issued an open access herring permit and participating in the mackerel fishery are required to discard any herring in excess of the open access permit's 6,600-lb (3-mt) possession limit. The creation of the new Areas 2/3 Open Access Herring Permit is intended to minimize the potential for regulatory discarding of herring by limited access mackerel vessels that did not qualify for a limited access herring permit, consistent with MSA National Standard 9's requirement to minimize bycatch to the extent practicable.

Trip Notification and VMS Requirements

Amendment 5 expands and modifies trip notification and VMS requirements for vessels with herring permits to assist with observer deployment and provide enforcement with advance notice of trip information to facilitate enforcement monitoring of landings. Currently, vessels with Category A or B permits, as well as any vessels fishing with midwater trawl gear in Areas 1A, 1B, and/or 3, are required to contact NMFS at least 72 hr in advance of a fishing trip to request an observer. This action expands this pre-trip observer notification requirement such that vessels with limited access herring permits; vessels with open access Category D permits fishing with midwater trawl gear in Areas 1A, 1B, and/or 3; vessels with open access Category E permits; and herring carrier vessels are required to contact NMFS at least 48 hr in advance of a fishing trip to request an observer. This measure would assist NMFS's scheduling and deployment of observers across the herring fleet, with minimal additional burden on the industry, helping ensure that observer coverage targets for the herring fishery are met. NMFS intends for the change from a 72-hr notification requirement to a 48-hr notification requirement to allow vessels more flexibility in their trip planning and

scheduling. The list of information that must be provided to NMFS as part of this pre-trip observer notification remains the same as before this change and is described in the regulations. Vessels with herring permits currently contact NMFS via phone; the phone number to contact NMFS will be provided in the small entity compliance guide. If a vessel is required to notify NMFS to request an observer before its fishing trip, but it does not notify NMFS before beginning the fishing trip, that vessel is prohibited from possessing, harvesting, or landing herring on that trip. If a fishing trip is cancelled, a vessel representative must notify NMFS of the cancelled trip, even if the vessel is not selected to carry an observer. All waivers or selection notices for observer coverage will be issued by NMFS to the vessel via VMS so the vessels have an on-board verification of either the observer selection or waiver. However, a vessel issued a Category A or B permit on a declared herring trip; or a vessel issued any herring permit fishing with midwater trawl gear in Herring Management Areas 1A, 1B, and/or 3; is still subject to the more restrictive 72-hr notification associated with the groundfish midwater trawl or purse seine gear exempted fisheries specified at § 648.80(d)–(e).

Vessels with limited access herring permits are currently subject to a VMS activity declaration. Amendment 5 expands that VMS activity declaration requirement and adds a gear code declaration. Therefore, under Amendment 5, vessels with limited access herring permits, Category E permits, and vessels declaring herring carrier trips via VMS must notify NMFS via VMS of their intent to participate in the herring fishery prior to leaving port on each trip by entering the appropriate activity and gear codes in order to harvest, possess, or land herring on that trip.

Currently, vessels with Category A or B permits; and vessels with Category C permits fishing with midwater trawl gear in Areas 1A, 1B, and/or 3; are subject to a pre-landing VMS notification requirement. This action expands this pre-landing VMS notification requirement so that vessels with limited access herring permits, Category E permits, and vessels declaring herring carrier trips via VMS must notify NMFS Office of Law Enforcement via VMS of the time and place of offloading at least 6 hr prior to landing or, if fishing ends less than 6 hr before landing, as soon as the vessel stops catching fish.

Limited access herring vessels are currently able to turn off (i.e., power down) their VMS when in port, if they do not hold other permits requiring continuous VMS reporting. Vessels authorized to power down their VMS in port must submit a VMS activity declaration prior to leaving port. This action prohibits vessels with herring permits from powering down their VMS when in port, unless specifically authorized by NMFS. If a vessel will be out of the water for more than 72 hr, a vessel owner must request a letter of exemption (LOE) from NMFS to power down its VMS. The application for a ''VMS Power Down Exemption Request'' is available on the NMFS Northeast Regional Office Web site (see **ADDRESSES**). Herring vessels are prohibited from powering down their VMS until they have received an LOE from NMFS. Additionally, a vessel owner can sign a herring vessel out of the VMS program for a minimum of 30 days by requesting and obtaining an LOE from NMFS. When a VMS unit is powered down, consistent with an LOE, that vessel is prohibited from leaving the dock until the VMS unit is powered back up and a VMS activity declaration is sent. This action prohibits herring vessels from powering down VMS units in port to improve the enforcement of herring regulations and help make herring VMS regulations consistent with VMS regulations in other Northeast fisheries.

Possession Limits

All herring vessels engaged in pair trawling must be issued herring permits, and their harvest is limited by the most restrictive possession limit associated with those permits. Amendment 5 expands this restriction by requiring that each vessel working cooperatively in the herring fishery; including vessels pair trawling, purse seining, and transferring herring at-sea; must be issued a herring permit and is subject to the most restrictive possession limit associated with the permits issued to those vessels working cooperatively. This measure establishes consistent requirements for vessels working cooperatively in the herring fishery and is intended to improve enforcement of herring possession limits for multi-vessel operations.

2. Adjustments to At-Sea Catch Monitoring

Two of the primary goals of Amendment 5 are to improve catch monitoring in the herring fishery and minimize bycatch and bycatch mortality to the extent practicable. Amendment 5 revises vessel requirements to assist observers sampling at-sea and establishes new measures to minimize the discarding of catch before it has been sampled by an observer.

Northeast fishery regulations specify requirements for vessels carrying NMFS-approved observers, such as providing observers with food and accommodations equivalent to those made available to the crew; allowing observers to access the vessel's bridge, decks, and spaces used to process fish; and allowing observers access to vessel communication and navigations systems. This action expands these requirements, such that vessels issued limited access permits and carrying NMFS-approved observers must provide observers with the following: (1) A safe sampling station adjacent to the fish deck, and a safe method to obtain and store samples; (2) reasonable assistance to allow observers to complete their duties; (3) advance notice when pumping will start and end and when sampling of the catch may begin; and (4) visual access to net/codend or purse seine and any of its contents after pumping has ended, including bringing the codend and its contents aboard if possible. Additionally, this action requires vessels issued limited access permits working cooperatively in the herring fishery to provide NMFS-approved observers with the estimated weight of each species brought on board or released on each tow. NMFS expects these measures to help improve at-sea catch monitoring in the herring fishery by enhancing the observer's ability to collect quality data in a safe and efficient manner.

This action, with limited exceptions, requires limited access vessels to bring all catch aboard the vessel and make it available for sampling by an observer. The Council recommended this measure to improve the quality of at-sea monitoring data by reducing the discarding of unsampled catch. If catch is discarded before it has been made available to the observer, that catch is defined as slippage. Fish that cannot be pumped and remain in the net at the end of pumping operations are considered operational discards and not slippage. Discards that occur after catch has been brought on board and sorted are also not considered slippage. Vessels may make test tows without pumping catch on board, provided that all catch from test tows is available to the observer when the following tow is brought aboard. Some stakeholders believe that slippage is a serious problem in the herring fishery because releasing catch before an observer can estimate its species composition undermines accurate catch accounting.

This action allows catch to be slipped if: (1) Bringing catch aboard

compromises safety; (2) mechanical failure prevents the catch from being brought aboard; or (3) spiny dogfish clog the pump and prevent the catch from being pumped aboard. If catch is slipped, the vessel operator is required to complete a released catch affidavit within 48 hr of the end of the fishing trip. The released catch affidavit must detail: (1) Why catch was slipped, (2) an estimate of the quantity and species composition of the slipped catch, and (3) the time and location of the slipped catch.

In 2010, the Northeast Fisheries Observer Program (NEFOP) revised the training curriculum for observers deployed on herring vessels to focus on effectively sampling in high-volume fisheries. NEFOP also developed a discard log to collect detailed information on discards in the herring fishery, including slippage, such as why catch was discarded, the estimated amount of discarded catch, and the estimated composition of discarded catch. Recent slippage data collected by observers indicate that information about these events, and the amount and composition of fish that are slipped, has improved; and the number of slippage events by limited access herring vessels has declined. Given NEFOP's recent training changes and its addition of a discard log, NMFS believes that observer data on slipped catch, rather than released catch affidavits, provide the best information to account for discards. However, there is still a compliance benefit to requiring a released catch affidavit because it will provide enforcement with a sworn statement regarding the operator's decisions and may help NMFS understand why slippage occurs.

NMFS expects that prohibiting slippage when vessels are carrying an observer will help reduce slippage events in the herring fishery, and thus improve the quality of observer catch data, especially data on bycatch species encountered in the herring fishery. NMFS also expects the released catch affidavit to help provide insight into when and why slippage occurs. Additionally, NMFS expects that the slippage prohibition will help minimize bycatch, and bycatch mortality, to the extent practicable in the herring fishery.

3. Measures To Address River Herring Interactions

Amendment 5 establishes several measures to address the catch of river herring in the herring fishery to minimize bycatch and bycatch mortality to the extent practicable. River herring (the collective term for alewife and blueback herring) are anadromous species that may co-occur seasonally with herring and are sometimes harvested as a non-target species in the herring fishery. When river herring are encountered in the herring fishery, they are either discarded at sea (bycatch) or, because they closely resemble herring, they are retained and sold as part of the herring catch (incidental catch). In contrast to bycatch, there is no MSA requirement to reduce incidental catch. Often, the term ''incidental catch'' is used interchangeably with ''bycatch.'' It is important to recognize this distinction between bycatch and incidental catch in the Atlantic herring fishery when considering whether bycatch in this fishery is being reduced to the extent practicable. While measures in Amendment 5 are not expressly designed to address the catch of shad (American and hickory) in the herring fishery, measures to reduce the catch of river herring are expected to also reduce the catch of shad because of the overlapping distributions of river herring and shad.

River herring are managed by the Atlantic States Marine Fisheries Commission (ASMFC) and the individual Atlantic Coast states. According to the most recent ASMFC river herring stock assessment (May 2012), river herring populations have declined from historic levels and many factors will need to be addressed to allow their recovery, including fishing (in both state and Federal waters), river passageways, water quality, predation, and climate change. In an effort to aid in the recovery of depleted or declining stocks, the ASMFC, in cooperation with individual states, prohibited state waters commercial and recreational fisheries that did not have approved sustainable fisheries management plans, effective January 1, 2012. NMFS considers river herring to be a species of concern, but recently (78 FR 48944, August 12, 2013) determined that listing river herring, as either threatened or endangered, under the Endangered Species Act is not warranted at this time. NMFS is establishing a technical working group and will continue to work closely with the ASMFC and others to develop a long-term, dynamic conservation plan for river herring from Canada to Florida. The working group will evaluate the impact of ongoing restoration and conservation efforts, as well as new fisheries management measures, which should benefit the species. It will also review new information produced from ongoing research, including genetic analyses, ocean migration pattern research, and climate change impact studies, to assess whether recent reports, showing higher river herring counts in the last 2 years, represent sustained trends. NMFS intends to revisit its river herring status determination within the next 5 years.

This action establishes River Herring Monitoring/Avoidance Areas for the herring fishery, which are areas established for two-month intervals to monitor river herring catch and encourage river herring avoidance. The coordinates for these areas are described in the regulations at § 648.200(f)(4), and are based on NEFOP data from between 2005 and 2009 as to where river herring catch (greater than 40 lb (18 kg)) occurred in the herring fishery. NMFS expects the slippage prohibition and released catch affidavit requirement to improve NMFS's understanding of river herring encounters in the herring fishery, especially in the River Herring Monitoring/Avoidance Areas. As the Council and NMFS learn more about river herring catch in the herring fishery, vessels fishing in the River Herring Monitoring/Avoidance Areas may be subject to additional regulations to further reduce river herring catch in the herring fishery. While the magnitude of the effect of river herring catch and bycatch on river herring populations is unknown, minimizing river herring catch and bycatch to the extent practicable is a goal of Amendment 5.

Amendment 5 establishes a mechanism to develop, evaluate, and consider regulatory requirements for a river herring bycatch avoidance strategy in the herring fishery. A river herring bycatch avoidance strategy will be developed and evaluated by the Council, in cooperation with participants in the herring fishery—specifically the Sustainable Fisheries Coalition (SFC); the Massachusetts Division of Marine Fisheries (MADMF); and the University of Massachusetts Dartmouth School of Marine Science and Technology (SMAST). This measure is based on the existing river herring bycatch avoidance program involving the SFC, MADMF, and SMAST. This existing program is voluntary and seeks to reduce river herring and shad bycatch by working within current fisheries management programs, without the need for additional regulatory requirements. The river herring bycatch avoidance program includes portside sampling, real-time communication with the SFC on river herring distribution and encounters in the herring fishery, and data collection to evaluate whether oceanographic features may predict high rates of river herring encounters.

Phase I of the river herring bycatch avoidance strategy is: (1) Monitoring and sampling of herring catch from the River Herring Monitoring/Avoidance Areas; (2) providing for adjustments to the River Herring Monitoring/Avoidance Area and river herring bycatch avoidance strategies through a future framework adjustment to the Herring FMP; and (3) Council staff collaboration with SFC, MA DMF, and SMAST to support the ongoing project evaluating river herring bycatch avoidance strategies.

Upon completion of the existing SFC/MA DMF/SMAST river herring bycatch avoidance project, Phase II of this measure will begin. Phase II involves the Council's review and evaluation of the results from the river herring bycatch avoidance project, and a public meeting to consider a framework adjustment to the Herring FMP to establish river herring bycatch avoidance measures. Measures that may be considered as part of the framework adjustment include: (1) Adjustments to the River Herring Monitoring/Avoidance Areas; (2) mechanisms to track herring fleet activity, report bycatch events, and notify the herring fleet of encounters with river herring; (3) the utility of test tows to determine the extent of river herring bycatch in a particular area; (4) the threshold for river herring bycatch that would trigger the need for vessels to be alerted to move out of the Area; and (5) the distance and/or time that vessels would be required to move from the Areas.

Amendment 5 also establishes the ability to consider implementing a river herring catch cap for the herring fishery in a future framework adjustment to the Herring FMP. Amendment 1 to the Herring FMP identified catch caps as management measures that could be implemented via a framework or the specifications process, with a focus on a haddock catch cap for the herring fishery. Amendment 5 contains a specific alternative that considers implementing a river herring catch cap through a framework or the specifications process. On the basis of the explicit consideration of a river herring catch cap, and the accompanying analysis in Amendment 5, NMFS has advised the Council that it would be more appropriate to consider a river herring catch cap in a framework subsequent to the implementation of Amendment 5.

Amendment 5 contains preliminary analysis of a river herring catch cap, but additional development of a range of alternatives (e.g., amount of cap, seasonality of cap, consequences of harvesting cap) and the environmental impacts (e.g., biological, economic) of a river herring catch cap is necessary prior to implementation. Therefore, it is more appropriate to consider implementing a river herring catch cap through a framework, rather than through the specifications. The Council may begin development of the river herring catch cap framework immediately, but the framework cannot be implemented prior to the implementation of Amendment 5.

During the development of Amendment 5, the ASMFC began work on a new stock assessment for river herring. It was hoped that the new assessment would help inform the analysis to determine a reasonable range of alternatives for a river herring catch cap. The ASMFC's river herring assessment was completed in May 2012, and the Council took final action on Amendment 5 in June of 2012. Therefore, there was not enough time to review the assessment, and if appropriate, incorporate its results in the development of a river herring catch cap in Amendment 5. However, as noted below, the Council was later able to consider this assessment when developing a river herring catch cap.

The Mid-Atlantic Fishery Management Council is also considering establishing a river herring catch cap for its mackerel fishery. Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish FMP will allow the Mid-Atlantic Council to consider river herring and shad catch caps for the mackerel fishery. Due to the mixed nature of the herring and mackerel fisheries, especially during January through April, the potential for the greatest river herring catch reduction would come from the implementation of a joint river herring catch cap for both the herring and mackerel fisheries. On May 23, 2013, the New England and the Mid-Atlantic Councils' technical teams for the herring and mackerel fisheries met to begin development of river herring catch caps. The Mid-Atlantic Council met on June 12, 2013, and recommended establishing a river herring/shad catch cap of 236 mt for the mackerel fishery in 2014.

At its June 2013 meeting, the Council discussed the development of river herring catch caps in Framework 3 to the Herring FMP. The Council considered establishing catch caps by area and gear, as well as establishing catch caps for both river herring and shad. While Amendment 5 did not explicitly consider catch caps for shad, because river herring and shad are closely related species, and the nature of their encounters with the herring fishery are similar, Framework 3 will evaluate the technical merits of developing a shad catch cap for the herring fishery. At its September 2013 meeting, the Council took final action on Framework 3 and recommended establishing river herring and shad catch caps for midwater and bottom trawl gear in the herring fishery. Framework 3, if approved, is expected to be implemented in the spring or summer of 2014. Based on the ASMFC's recent river herring assessment, data do not appear to be robust enough to determine a biologically based river herring catch cap and/or to evaluate the potential effects on river herring populations of such a catch cap on a coast-wide scale. Still, the Council supports establishing a river herring catch cap as soon as possible to encourage avoidance of river herring and shad to minimize bycatch and bycatch mortality.

One of the primary goals of Amendment 5 is to address bycatch issues through responsible management, consistent with the MSA National Standard 9 requirement to minimize bycatch and mortality of unavoidable bycatch to the extent practicable. Monitoring and avoidance are critical steps to a better understanding of the nature and extent of bycatch in this fishery in order to sufficiently analyze and, if necessary, address bycatch issues. The Council considered other measures to address river herring bycatch in Amendment 5, including closed areas. Because the seasonal and inter-annual distribution of river herring is highly variable in time and space, the Council determined that the most effective measures in Amendment 5 to address river herring bycatch would be those that increase at-sea sampling, bycatch accounting, and promote cooperative efforts with the industry to minimize bycatch to the extent practicable.

4. Measures To Address Midwater Trawl Access to Groundfish Closed Areas

Amendment 5 expands the existing requirements for midwater trawl vessels fishing in Groundfish Closed Area I to all herring vessels fishing with midwater trawl gear in the Groundfish Closed Areas. These Closed Areas include: Closed Area I, Closed Area II, Nantucket Lightship Closed Area, Cashes Ledge Closure Area, and Western Gulf of Maine Closure Area. The coordinates for these areas are defined at § 648.81(a)–(e). This action requires vessels with a herring permit fishing with midwater trawl gear in the Closed Areas to carry a NMFS-approved observer and bring all catch aboard the vessel and make it available for sampling by an observer. Herring

vessels not carrying a NMFS-approved observer may not fish for, possess, or land fish in or from the Closed Areas. Vessels may make test tows without pumping catch on board, provided that all catch from test tows is available to the observer when the next tow is brought aboard. This action allows catch to be released before it was pumped aboard the vessel if: (1) Pumping the catch aboard could compromise safety, (2) mechanical failure prevents the catch from being pumped aboard, or (3) spiny dogfish have clogged the pump and prevent the catch from being pumped aboard. But if catch is released for any of the reasons stated above, the vessel operator is required to immediately exit the Closed Area. The vessel may continue to fish, but it may not fish in any Closed Area for the remainder of that trip. Additionally, vessels that release catch before it has been sampled by an observer must complete a midwater trawl released catch affidavit within 48 hr of the end of the fishing trip. The released catch affidavit details: (1) Why catch was released, (2) an estimate of the weight of fish caught and released, and (3) the time and location of the released catch.

Given NEFOP's recent training changes and its addition of a discard log, NMFS believes that observer data on slipped catch, rather than released catch affidavits, provide the best information to account for discards. However, there is still a compliance benefit to requiring a released catch affidavit because it would provide enforcement with a sworn statement regarding the operator's decisions and may help to understand why slippage occurs.

Under current practice, as well as under the proposed revisions to the standardized bycatch reporting methodology (SBRM) that are being developed, the Northeast Fisheries Science Center (NEFSC) would allocate all existing and specifically identified observer funding to support SBRM observer coverage. Therefore, herring vessels would be assigned observers based on SBRM coverage, including trips by midwater trawl vessels into the Closed Areas. All trips by midwater trawl vessels into the Closed Areas would have observer coverage, thereby increasing observer coverage in the Closed Areas. But until there is additional funding available, the number of trips midwater trawl vessels can make into the Closed Areas would be limited by SBRM funding. Additional observer coverage specifically for midwater trawl trips into the Closed Areas would be possible after SBRM monitoring is fully funded or if funds are specifically appropriated for such trips.

If a midwater trawl vessel cannot fish in the Closed Areas on a particular trip because an observer is not assigned to that trip, any negative economic impact to that vessel is expected to be minimal. Analyses in the FEIS indicate that less than 10-percent of herring fishing effort occurs in the Closed Areas and less than 13-percent of the annual herring revenue comes from trips into the Closed Areas. Midwater trawl vessels will still have access to the Closed Areas during SBRM covered trips, even if there are less SBRM covered trips than in years past. Additionally, midwater trawl vessels can fish outside the Closed Areas without an observer.

Analyses in the Amendment 5 FEIS suggest that midwater trawl vessels are not catching significant amounts of groundfish either inside or outside the Closed Areas. Additionally, the majority of groundfish catch by midwater trawl vessels is haddock, and the catch of haddock by midwater trawl vessels is already managed through a haddock catch cap for the herring fishery. However, the Council believes it is important to determine the extent and nature of bycatch in the herring fishery. This measure still allows the herring midwater trawl fishery to operate in the Closed Areas, but it ensures that opportunities for catch retention and sampling are maximized.

5. Adjustments to List of Measures Modified Through Framework Adjustments or Specifications

Amendment 5 specifies the ability to modify management measures revised or established by Amendment 5 through a framework adjustment to the Herring FMP or the specifications process.

The measures that could be modified through a framework include: (1) Changes to vessel trip notification and declaration requirements, (2) adjustments to measures to address slippage, (3) River Herring Monitoring/Avoidance Areas, (4) provisions for the river herring bycatch avoidance program, (5) changes to criteria/provisions for access to the Groundfish Closed Areas, and (6) river herring catch caps.

The list of measures that could be modified through the specifications process include: (1) Possession limits; (2) River Herring Monitoring/Avoidance Areas; and (3) river herring catch caps.

Disapproved Measures

The following sections detail why NMFS disapproved three measures that were proposed as part of Amendment 5. NMFS disapproved these three measures because it found the measures to be inconsistent with the MSA and other applicable law. The proposed rule for Amendment 5 described NMFS's concerns with these measures' consistency with the MSA and other applicable law. After review of public comment, NMFS, on behalf of the Secretary, disapproved these measures; therefore, this final rule excludes implementing regulations for these measures.

1. Increased Observer Coverage Requirements

As described previously, the NEFSC determines observer coverage levels in the herring fishery based on the SBRM. Observer coverage in the herring fishery is currently fully funded by NMFS. Amendment 5 proposed increasing observer coverage in the herring fishery by requiring 100-percent observer coverage on Category A and B vessels. Many stakeholders believe this measure is necessary to accurately determine the extent of bycatch and incidental catch in the herring fishery. The Council recommended this measure to gather more information on the herring fishery so that it may better evaluate and, if necessary, implement additional measures to address issues involving catch and discards. The 100-percent observer requirement is coupled with a target maximum industry contribution of $325 per day. There are two types of costs associated with observer coverage: (1) Observer monitoring costs, such as observer salary and travel costs, and (2) NMFS support and infrastructure costs, such as observer training and data processing. The monitoring costs associated with an observer in the herring fishery are higher than $325 per day. Cost-sharing of monitoring costs between NMFS and the industry would violate the Antideficiency Act. Therefore, there is no current legal mechanism to allow cost-sharing of monitoring costs between NMFS and the industry.

Throughout the development of Amendment 5, NMFS advised the Council that Amendment 5 must identify a funding source for increased observer coverage because NMFS's annual appropriations for observer coverage are not guaranteed. Some commenters claim that the $325 per day industry contribution was not a limit, but a target, and that the Council intended the industry to pay whatever was necessary to ensure 100-percent observer coverage. NMFS disagrees, and does not believe the amendment specifies that the industry would pay all the monitoring costs associated with 100-percent observer coverage, nor does

it analyze the economic impacts of the industry paying all the monitoring costs. The FEIS for Amendment 5 analyzed alternatives with the industry paying $325 per day or $1,200 per day (estimated sum of observer monitoring costs and NMFS support and infrastructure costs), but it did not analyze a range of alternatives that would approximate total monitoring costs. Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery. Requiring NMFS to pay for 100-percent observer coverage would amount to an unfunded mandate. Because Amendment 5 did not identify a funding source to cover the costs of increased observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, NMFS had to disapprove the 100-percent observer coverage requirement. With the disapproval of this measure, this action maintains the existing SBRM observer coverage levels and Federal observer funding for the herring fishery.

Recognizing funding challenges, Amendment 5 specified status quo observer coverage levels and funding for up to 1 year following the implementation of Amendment 5, with the 100-percent observer coverage and partial industry funding requirement to become effective 1 year after the implementation of Amendment 5. During that year, the Council and NMFS, in cooperation with the industry, were to attempt to develop a way to fund 100-percent observer coverage.

During 2013, a working group was formed to identify a workable, legal mechanism to allow for industry-funded observer coverage in the herring fishery; the group includes staff from the New England and Mid-Atlantic Councils and NMFS. To further explore the legal issues surrounding industry-funded observer coverage, NMFS formed a working group of Northeast Regional Office, NEFSC, General Counsel, and Headquarters staff. The NMFS working group identified an administrative mechanism to allow for industry funding of observer monitoring costs in Northeast Region fisheries, as well as a potential way to help offset funding costs that would be borne by the industry, subject to available funding. This administrative mechanism would be an option to fund observer coverage targets that are higher than SBRM coverage levels. The mechanism to allow for industry-funded observer coverage is a potential tool for all Northeast Region FMPs, but it would need to be added to each FMP through an omnibus amendment to make it an available tool, should the Council want to use it. Additionally, this omnibus amendment could establish the observer coverage targets for Category A and B herring vessels.

In a September 20, 2013, letter to the Council, NMFS offered to be the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in New England and Mid-Atlantic FMPs. At its September 2013 meeting, the Council considered NMFS's offer and encouraged NMFS to begin development of the omnibus amendment. At this time, NMFS expects to present a preliminary range of alternatives for the omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Additionally, other Amendment 5 measures implemented in this action help improve monitoring in the herring fishery. These measures include the requirement for vessels to contact NMFS at least 48 hr in advance of a fishing trip to facilitate the placement of observers, observer sample station and reasonable assistance requirements to improve an observer's ability collect quality data in a safe and efficient manner, and the slippage prohibition and the sampling requirements for midwater trawl vessels fishing in groundfish closed areas to minimize the discarding of unsampled catch.

The same measure that would have required 100-percent observer coverage, coupled with a $325 contribution by the industry, would have also required that: (1) The 100-percent coverage requirement be re-evaluated by the Council 2 years after implementation; (2) the 100-percent coverage requirement be waived if no observers were available, but not waived for trips that enter the River Herring Monitoring/Avoidance Areas; (3) observer service provider requirements for the Atlantic sea scallop fishery apply to observer service providers for the herring fishery; and (4) states be authorized as observer service providers. NMFS believes these additional measures are inseparable from the 100-percent observer coverage requirement; therefore, NMFS had to disapprove these measures too. With the disapproval of these measures, the existing waiver and observer service provider requirements remain in effect.

2. Measures To Minimize Slippage

Amendment 5 proposed establishing slippage caps for the herring fishery. Once there have been 10 slippage events in a herring management area by vessels using a particular gear type (including midwater trawl, bottom trawl, and purse seine) and carrying an observer, vessels that subsequently slip catch in that management area, using that particular gear type and carrying an observer, would be required to immediately return to port. NMFS would track slippage events and notify the fleet once a slippage cap had been reached. Slippage events due to spiny dogfish preventing the catch from being pumped aboard the vessel would not count against the slippage caps, but slippage events due to safety concerns or mechanical failure would count against the slippage caps. The Council recommended these slippage caps to discourage the inappropriate use of the slippage exceptions, and to allow for some slippage, without being unduly burdensome on the fleet.

Throughout the development of Amendment 5 NMFS identified potential concerns with the rationale supporting, and legality of, the slippage caps. The need for, and threshold for triggering a slippage cap (10 slippage events by area and gear type) does not appear to have a strong biological or operational basis. Recent observer data (2008–2011) indicate that the estimated amount of slipped catch is relatively low compared to total catch (approximately 1.25 percent). Observer data also indicate that the number of slippage events is variable across years. During 2008–2011, the number of slippage events per year ranged between 35 and 166. The average number of slippage events by gear type during 2008, 2009, and 2011 were as follows: 4 by bottom trawl; 36 by purse seine; and 34 by midwater trawl. The data did not consistently differentiate the slippage events by area.

Under the proposed measure, once a slippage cap for a particular gear type in a herring management area has been met, vessels that slip catch, even if the reason for slipping was safety or mechanical failure, would be required to return to port. Vessels could continue fishing following slippage events 1 through 10, but must return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10, could continue fishing after the 11th slippage event, provided they do not slip catch again. NMFS believes this aspect of the proposed measure is inequitable. Additionally, this measure could have resulted in a vessel operator having to choose between trip termination and bringing catch aboard despite a safety concern. For these reasons, NMFS believes this measure is inconsistent with the MSA National Standards 2 and 10 and disapproved it.

The measures to minimize slippage are based on the sampling requirements for midwater trawl vessels fishing in Groundfish Closed Area I. However, there are important differences between these measures. Under the Closed Area I requirements, if midwater trawl vessels slip catch, they are allowed to continue fishing, but they must leave Closed Area I for the remainder of that trip. The requirement to leave Closed Area I is less punitive than the proposed requirement to return to port. Therefore, if the safety of bringing catch aboard is a concern, leaving Closed Area I and continuing to fish would likely be an easier decision for a vessel operator to make than the decision to terminate the trip and return to port. Additionally, because the consequences of slipping catch apply uniformly to all vessels under the Closed Area I requirements, inequitable application among the fleet is not an issue for the Closed Area I requirements, like NMFS believes it is for the proposed slippage caps.

If the Council wants to revise the slippage cap in a future action, the revisions would need to address issues concerning safety, the biological/administrative justification for the cap's trigger, and equity. The slippage cap could be revised to be more similar to the sampling requirements in Groundfish Closed Area I, such that all vessels that slip catch have a consequence. This revision would alleviate NMFS's concern with the equitable application of the slippage cap among those who contribute to reaching the cap, as well as its concern with the basis for triggering the cap. The consequence of slipped catch could be a requirement to leave the area where the slippage event occurred; the area could be a herring management area or a statistical area. But the consequence should not be so severe as to create a safety issue. To alleviate safety concerns, slippage for safety, mechanical, or excess spiny dogfish catch reasons could be exempt from any consequence, except that the vessel would still be required to complete a released catch affidavit.

Even though the slippage caps were disapproved, the prohibition on slippage, the released catch affidavit, and the ongoing data collection by NEFOP, and 100-percent observer coverage requirement for midwater trawl vessels fishing in groundfish closed areas still allow for improved monitoring in the herring fishery, increased information regarding discards, and an incentive to minimize the discarding of unsampled catch.

3. Reporting Requirements for Dealers

During the development of Amendment 5, some stakeholders expressed concern that herring catch is not accounted for accurately and that there needs to be a standardized method to determine catch. In an effort to address that concern, Amendment 5 proposed requiring herring dealers to accurately weigh all fish and, if catch is not sorted by species, dealers would be required to document for each transaction how they estimate relative species composition. During the development of Amendment 5, NMFS identified potential concerns with the utility of this measure.

Dealers are currently required to accurately report the weight of fish, which is obtained by scale weights and/or volumetric estimates. Because this proposed measure did not specify how fish are to be weighed, and would still allow volumetric estimates, the measure may not have changed dealer behavior and, therefore, the requirement may not have led to any measureable change in the accuracy of catch weights reported by dealers. Further, this measure did not provide standards for estimating species composition. Without standards for estimating species composition or for measuring the accuracy of the estimation method, NMFS may have been unable to evaluate the sufficiency of the methods used to estimate species composition. For these reasons, the proposed requirement for dealers to document the methods used to estimate species composition may have not improved the accuracy of dealer reporting.

While the measure requiring dealers to document methods used to estimate species composition may not have direct utility in monitoring catch in the herring fishery, it may still inform NMFS's and the Council's understanding of the methods used by dealers to determine species weights. That information may aid in development of standardized methods for purposes of future rulemaking. Furthermore, full and accurate reporting is a permit requirement; failure to do so could render dealer permit renewals incomplete, precluding renewal of the dealer's permit. Therefore, there is incentive for dealers to make reasonable efforts to document how they estimate relative species composition, which may increase the likelihood that useful information will be obtained as a result of this requirement.

In light of the foregoing, NMFS evaluated whether the proposed measure has practical utility, as required by the MSA and the Paperwork Reduction Act (PRA), that outweighs the additional reporting and administrative burden on the dealers. In particular, NMFS considered whether and how the proposed measure would help prevent overfishing, promotes the long-term health and stability of the herring resource, monitors the fishery, facilitates inseason management, or judges performance of the management regime.

NMFS determined that this measure would not measurably improve the accuracy of dealer reporting or the management of the herring resources. NMFS also determined that this measure does not comply with National Standard 7's requirement to minimize costs and avoid unnecessary duplication, and the PRA's requirement for the utility of the measure to outweigh the additional reporting and administrative burden on the dealers. Therefore, NMFS disapproved the dealer reporting requirements. With the disapproval of this measure, the existing requirement that dealers accurately report the weight of fish is still in effect.

If the Council wants to revise dealer reporting requirements in a future action, the revisions would need to address issues concerning accuracy and utility of the information reported and could be addressed in several ways.

The Council could select Alternative 3.1.5.2 Sub-Option 2C in Amendment 5 (requiring vessel owners to review and validate data for their vessels in Fish-on-Line) and propose that measure in a future action. This measure would be a change from status quo, and it has some utility, as it helps identify, and possibly reduce, discrepancies between dealer and vessel reports. This option has an accompanying recommendation for daily vessel trip and dealer reports. Changing reporting frequency would increase the timeliness of reports and would provide data to NMFS for validation sooner than they are currently available.

Another way for the Council to revise the dealer reporting requirement would be to clarify and standardize the methods used to ''accurately weigh all fish.'' Does the measure require fish to be weighed using a scale? Does the measure require a volumetric estimate based on a certified fish hold or standardized totes? If the methods to ''accurately weigh all fish'' were specified, it would likely change dealer behavior from status quo, and may, depending on the methods, improve the accuracy of dealer reports.

Alternatively, the Council could take this opportunity to revisit the original concern that sparked the development of the dealer reporting requirement, that

landings data were not verified by a third party, and revise the measure to better address that concern. Lastly, the sub-option requiring dealers to document how they estimate the composition of catch was intended to gather information on methods used by dealers to estimate species composition. Another way to obtain that type of information would be to gather it as part of a data collection program that would update community profiles for Northeast fisheries.

Comments and Responses

NMFS received 8,163 comments during the comment period on the proposed rule. Form letters, comprising 8,008 comments, were submitted by two environmental advocacy groups (EAGs). Comments were also submitted by other EAGs, individuals involved in other fisheries (e.g., groundfish, tuna, recreational), the general public, the herring industry, and the Council. Only comments relevant to measures considered in Amendment 5 are summarized and addressed below. Comments related to other fishery management actions or general fishery management practices are not addressed here. Some commenters re-submitted comments on the DEIS for Amendment 5. Comment letters submitted on the DEIS for Amendment 5 are addressed in the Section 8.1.4 of the Amendment 5 FEIS, so neither the comment nor the response is repeated here.

1. General Comments

Comment 1: Many commenters urged NMFS to approve Amendment 5 in its entirety, but provided no specific comments on the proposed measures. Additional commenters acknowledged that the amendment contains many important components, but they believe the slippage cap and 100-percent observer coverage requirement are the two measures that are critical to managing the herring fishery. One commenter does not believe that any of the concerns voiced by NMFS regarding the 100-percent observer coverage requirement and the slippage cap are valid because the Council designed these measures with safety and fairness in mind. Many commenters believe it is essential that NMFS approve and implement Amendment 5 because the herring resource, a cornerstone of the Northeast ecosystem, is too important to manage inadequately.

Response: NMFS agrees with the commenters that herring is critical to the health of the Northeast ecosystem and that it must have careful and effective management. NMFS also supports improvements to fishery dependent data collections by expanding, to the extent practicable, at-sea monitoring of the herring fishery and reducing bycatch and unnecessary discarding. While the Council may have designed the 100-percent observer coverage requirement and slippage cap measure to consider safety and fairness, as described previously, NMFS believes the resulting 100-percent observer requirement and slippage caps proposed in Amendment 5 are inconsistent with the MSA and other applicable law. Therefore, regardless of NMFS's desire to increase monitoring and reduce bycatch in the herring fishery, it cannot approve and implement measures it believes inconsistent with applicable law.

NMFS agrees with the commenter that herring is an important marine resource in the Northeast and that Amendment 5 has many of the tools to improve management of the herring fishery, but disagrees that the amendment has no utility without the 100-percent observer coverage requirement and slippage caps. Amendment 5 implements many measures that improve monitoring and bycatch minimization in the herring fishery, including adjustments to the fishery management program and at-sea monitoring, such as prohibiting slippage; and measures to address river herring interactions and midwater trawl access to groundfish closed areas.

Comment 2: Two EAGs expressed their concern that, in the proposed rule, NMFS explained that it may not be able to approve several critical elements of Amendment 5. The commenters believe that NMFS fails to recognize the substantial need for these measures, their central role in the overall Amendment 5 reform package, and their strong justification in the FEIS. A number of other commenters raised similar sentiments focusing on their belief that these measures strike a carefully designed balance between conservation and industry needs, are consistent with the MSA and other applicable law, and should be approved in full.

Response: NMFS expressed concern with the 100-percent observer coverage requirement, the slippage caps, and the dealer reporting requirements throughout the development of this amendment. But these measures have strong support from many stakeholders, and they were not modified in such a way as to alleviate NMFS's concerns. The proposed rule for Amendment 5 described potential concerns about these measures' consistency with the MSA and other applicable law. No new or additional information was identified by commenters during the public comment period on the NOA for Amendment 5 to address NMFS's concerns with the identified deficiencies of these measures. Therefore, on July 18, 2013, NMFS determined these three measures must be disapproved.

On September 20, 2013, NMFS sent a letter to the Council with recommendations on how these measures could be revised to address these measures' identified deficiencies. If the Council chooses to revise these measures, NMFS will work with the Council to design effective measures that help improve management of the herring fishery. Revised measures could be addressed in upcoming Council actions. Whether that action would be an amendment or framework will depend on the scope of the revised measure.

The measures in Amendment 5 that were approved by NMFS are consistent with the MSA and other applicable law, and analysis in the FEIS indicates these measures will improve data quality as well as bycatch avoidance and minimization.

Comment 3: Several EAGs commented that NMFS undermined the public's opportunity to effectively comment on Amendment 5 measures prior to NMFS's decision to approve, disapprove, or partially approve Amendment 5. The commenters stated that because the preamble of the proposed rule outlined NMFS's serious concerns about the approvability of several Amendment 5 measures and requested public comment, all comments received through the proposed rule's comment period deadline (July 18, 2013) should be considered in Amendment 5's approval decision.

Response: The NOA for Amendment 5 published on April 22, 2013; the notice for its accompanying FEIS published on April 26, 2013; and the Amendment 5 proposed rule published on June 3, 2013. The comment periods for the NOA and proposed rule overlapped for 19 days. NMFS must approve/disapprove an amendment by 30 days after the close of the comment period on the NOA. That decision date for Amendment 5 was July 19, 2013. Therefore, it would not have been possible to consider all public comments received through July 18, 2013, in the decision to approve/disapprove Amendment 5.

NMFS received over 100 comments during the NOA comment period. While most of those comments expressed strong support for the full approval of Amendment 5, they did not offer solutions to NMFS's identified

deficiencies in Amendment 5 measures. Additionally, while not explicitly considered in the decision to partially approve Amendment 5, NMFS reviewed and considered all comments received during the proposed rule comment period prior to publishing this final rule. However, no new or additional information was identified by commenters during the public comment period on the proposed rule to address NMFS's concerns with the disapproved measures.

Additionally, NMFS's approvability concerns with the three measures disapproved in Amendment 5 should have been no surprise to interested stakeholders. NMFS's concerns with these measures had been discussed throughout the development of Amendment 5, and were clearly articulated in a comment letter to the Council (dated June 5, 2012) prior to the Council taking final action on Amendment 5 in June 2012.

Comment 4: One EAG believes that Amendment 5 segments decision making and fails to: (1) Consider whether river herring and shad should be stocks in the Herring FMP, (2) minimize river herring and shad bycatch to the extent practicable, and (3) consider a range of alternatives for an acceptable biological catch (ABC) control rule for herring.

Response: Amendment 5 is not required to consider all aspects of management of the herring fishery; instead the amendment is focused on considering measures to improve monitoring and address bycatch. Considering whether river herring and shad should be stocks in the Herring FMP or considering a range of alternatives for an ABC control rule for herring are outside the scope of Amendment 5.

Amendment 5 implements the following measures to address bycatch in the herring fishery: (1) Prohibiting slippage, with exceptions for safety concerns, mechanical failure, and spiny dogfish preventing catch from being pumped aboard the vessel, and requiring a released catch affidavit to be completed for each slippage event; (2) expanding at-sea sampling requirements for all midwater trawl vessels fishing in groundfish closed areas; (3) establishing a new open access permit to reduce the potential for the regulatory discarding of herring in the mackerel fishery; (4) establishing the ability to consider a river herring catch cap in a future framework; (5) establishing River Herring Monitoring/Avoidance Areas; (6) evaluating the ongoing bycatch avoidance program investigation of providing real-time, cost-effective information on river herring distribution and fishery encounters in River Herring Monitoring/Avoidance Areas; and (7) expanding and adding reporting and sampling requirements designed to improve data collection methods, data sources, and applications of data to better determine the amount, type, disposition of bycatch.

The Herring FMP, and related bycatch measures in the Northeast Multispecies FMP, comply with National Standard 9's requirement to minimize bycatch and bycatch mortality to the extent practicable. Amendment 5 implements many measures designed to provide incentives for incidental catch and bycatch avoidance and gather more information that may provide a basis for future bycatch avoidance or bycatch mortality reduction measures. These measures are supported by sufficient analysis and consideration of the best available scientific information and the MSA National Standards, and represent the most practicable bycatch measures based on the information available at this time.

In November 2012, the Council voted to consider whether river herring and shad should be stocks in the herring fishery in an amendment during 2013. The Council did not have the time to consider whether river herring and shad should be stocks in the Herring FMP during 2013; therefore, the Council made this consideration a Herring FMP priority for 2014.

The Council considered an ABC control rule for herring as part of the 2013–2015 Herring Specifications/ Framework 2 to the Herring FMP. The Council determined, based on recommendations from its Scientific and Statistical Committee (SSC), that the constant catch ABC control rule adequately accounts for Atlantic herring's role as forage, as it allows for sufficient Atlantic herring biomass through 2015 to support ecosystem considerations, including Atlantic herring's forage role in the ecosystem, and yields short-term biomass projections for 2013–2015 that are very similar to other forage fish control rules (e.g., Lenfest Forage Fish Report control rule; Pacific Fishery Management Council's control rule for coastal pelagic species). The June 2012 herring stock assessment made a significant advance in accounting for herring's role as a forage species by revising natural mortality rate and the constant catch ABC control rule was developed from catch projections in that assessment. The SSC recommended that considerably more analysis would be necessary before it could support applying forage fish control rules like the Lenfest and Pacific Council approaches to herring in the future, including evaluating predator-prey models, the relationship between maximum sustainable yield and changing natural mortality rates due to changes in consumption, and unintended consequences of treating forage species differently than other managed species. Based on the SSC's recommendations, the Council discussed that control rules for forage species, such as the Lenfest and Pacific Council control rules, should receive further evaluation prior to any potential implementation as a long-term strategy for managing herring, and should be evaluated in a future amendment to the Atlantic Herring FMP. NMFS concurs with the Council's conclusions on the constant catch ABC control rule and further consideration on forage-based control rules for Atlantic herring, as described in NMFS's August 29, 2013, letter to the Council, including the implications of forage-based control rules on other components of the ecosystem and on the biological reference points for Atlantic herring. The effective date of the 2013–2015 Atlantic Herring Specifications/ Framework 2 was September 30, 2013, and NMFS published the final rule on October 4, 2013, (78 FR 61828).

Comment 5: One EAG believes that Amendment 5 was unlawfully delayed because the NOAs for the amendment and its FEIS were not published until April 2013, despite Amendment 5 being completed by the Council and submitted to NMFS on December 21, 2012.

Response: The Council adopted Amendment 5 on June 20, 2012, and submitted Amendment 5 to NMFS for initial review on September 10, 2012. NMFS reviewed the amendment for consistency with NEPA requirements and identified deficiencies in the NEPA analysis that needed to be addressed. Following a series of revisions, the Council submitted Amendment 5 to NMFS on March 25, 2013. Following the March submission, NMFS determined that the NEPA analysis for Amendment 5 met the necessary requirements and transmitted Amendment 5 to the Secretary on April 16, 2013. An NOA for the FEIS was prepared for Amendment 5 and published on April 26, 2013, with a comment period ending May 28, 2013, and an NOA for the amendment published on April 22, 2013, with a comment period ending June 21, 2013.

2. Comments on Adjustments to the Fishery Management Program

Comment 6: One commenter opposes transfers-at-sea because they believe that all fish should be counted at the dock before they are transferred.

Response: During the early development of Amendment 5, NMFS identified transfers-at-sea as one potential issue to address when developing a more comprehensive catch monitoring program for the herring fishery. Herring is transferred at sea between harvesting vessels and vessels purchasing herring for personal use as bait, herring carriers, and other permitted herring vessels for transport. The Council's Herring Plan Development Team (PDT) reviewed herring transfer-at-sea data and found that issues related to reporting and monitoring of transfers-at-sea had largely been clarified in recent years through explicit reporting guidance from NMFS. Additionally, data in Table 127 in Section 6.1.2.2.5 of the Amendment 5 FEIS support the conclusion that the amount of herring transferred at sea is minimal and represents a very small fraction of the herring fishery. Given the improved monitoring of transfers-at-sea, his action allows for status quo transfer-at-sea activities to continue in the herring fishery because any additional reporting burden would outweigh the potential benefit of limiting transfers-at-sea.

Comment 7: Commenters urged NMFS to approve the requirement that herring dealers accurately weigh all fish, because accurate landings data will ensure catch accountability, including catch estimates for river herring and shad, for the herring fishery and it has strong support from stakeholders. Commenters disagree with NMFS's language in the proposed rule that describe this measure is essentially status quo. They believe this measure is intended to end the practice of dealers reporting visual estimates of catch weight in favor of verifiable methods such as scales or volumetric estimates of fish holds. Additionally, commenters encouraged NMFS to include effective regulations implementing this measure in the final rule for Amendment 5, especially prohibiting visual volumetric estimates of catch weight and specifying third-party verification of landings.

Response: Section 6.1.4.1 of the Amendment 5 FEIS provides examples of how dealers would comply with the requirement to ''accurately weigh all fish.'' It describes dealers weighing fish on scales, obtaining volumetric estimates from certified fish holds, and using a volumetric estimate of a box or container of fish to serve as the weight of any box of fish of a similar size. All of these practices are currently used by dealers. Because the FEIS describes using a volumetric estimate of a container of fish to generate the weight of any container of a similar size, NMFS believes that the amendment would have continued to allow, rather than end, the practice of visual estimates of catch weight. In analyzing the effectiveness of using a volumetric estimate of a container of fish to generate the weight of any container of a similar size, the FEIS concludes that this example would result in very little, if any, change in dealer behavior and that estimates may, therefore, not be an improvement over status quo.

The MSA only allows NMFS to approve or disapprove a measure in an amendment; it does not allow NMFS to substantially modify a measure. NMFS would have had to substantially modify the proposed requirement for dealers to ''accurately weigh all fish'' in order to prohibit visual volumetric estimates of catch weight or to require third-party verification of landings. Dealers are currently required to accurately report the weight of fish. Lacking the ability to modify the proposed dealer weigh requirement, NMFS disapproved the proposed requirement because it would not likely have changed dealer behavior and would not likely have improved the accuracy of weights reported by dealers.

Comment 8: Some commenters believe that requiring dealers to document their methods for estimating catch composition, as proposed in Amendment 5, would ensure that mixed-species catches are more accurately weighed by dealers, thus aiding in the monitoring of depleted species such as river herring and certain groundfish species.

Response: NMFS disagrees that requiring dealers to document their methods for estimating catch composition would ensure that mixed-species catch are more accurately weighed by dealers. As described previously, the proposed measure that dealers ''accurately weigh all fish'' did not require dealers to weigh fish on a scale. Additionally, the requirement to document how the composition of a mixed catch is estimated would not require the use of any particular method to estimate species composition. In the absence of a requirement to change estimation methods, dealers would be unlikely to change their estimation methods from current practices; therefore, it is unlikely that that this measure would have improved the accuracy of weights reported by dealers.

Comment 9: One commenter supports the requirement that dealers accurately weigh all fish and sort catch by species. The commenter believes that the mechanical weighing of fish, not relying on volumetric estimates, is the most accurate way to monitor catch in the herring fishery. The commenter also believes these proposed dealer reporting requirements would aid in accurate catch reporting, help prevent overfishing, and promote long-term health of the herring resource by ensuring that catch stays within catch limits.

Response: NMFS agrees that the mechanical weighing of fish, rather than relying on volumetric estimates, is often the most accurate method to determine weight. However, Amendment 5 would not have required the mechanical weighing of fish, nor would it have required dealers to sort catch by species. Therefore, the proposed measure would not have improved the accuracy of catch reporting, help prevent overfishing, or promote the long-term health of the herring resource by ensuring catch stays within catch limits any more that the current requirement that dealers accurately report the weight of fish.

Comment 10: Several EAGs stated that the Amendment 5 FEIS does not contain sufficient justification to indicate that a new open access herring permit with a 20,000-lb (9-mt) herring possession limit for limited access mackerel vessels fishing in Areas 2 and 3 is needed. They believe that this new permit would result in new, poorly understood effort in the mackerel fishery outside the scope of the new monitoring program and would increase directed herring fishing during times and areas where river herring and shad incidental catch is of great concern. Additionally, they do not believe this measure would help satisfy National Standard 9 requirements.

Response: NMFS believes the FEIS provides sufficient justification for establishing the new Areas 2/3 Open Access Herring Permit. Section 6.1.5 of the FEIS describes the significant overlap between the mackerel and herring fisheries. Mackerel and herring co-occur, particularly during January through April, which is a time that vessels often participate in both fisheries. Not all vessels participating in the mackerel fishery qualify for a limited access herring permit because they either did not have adequate herring landings or they are new participants in the mackerel fishery.

Currently, vessels issued an open access herring permit and participating in the mackerel fishery are required to discard any herring in excess of the

open access permit's 6,600-lb (3-mt) possession limit. The FEIS suggests that herring discards in the mackerel fishery are currently low, and states that the extent to which discarding may be minimized by increasing the possession limit to 20,000 lb (9 mt) is unclear. However, VTR data may not be well suited to reflect a discard problem at this time, and may not fully characterize the potential for this problem to exist in the future. Additionally, the industry has stated that it has not been fishing for mackerel as much in recent years because mackerel are less available to the fishery now as they may have shifted to offshore areas, and because of concerns about encountering herring in quantities larger than the current open access herring permit possession limit.

Therefore, the creation of the new Areas 2/3 Open Access Herring Permit is intended to minimize the potential for regulatory discarding of herring by limited access mackerel vessels that did not qualify for a limited access herring permit, especially if effort in the mackerel fishery should approach historical levels. This is consistent with National Standard 9's requirement to minimize bycatch to the extent practicable. All herring catch and discards are tracked against herring ACL/sub-ACLs, so the biological impact of the new permit on herring is expected to be neutral.

Ongoing observer coverage in the herring fishery, in combination with the measures in Amendment 5 prohibiting slippage, should improve observer data on bycatch and incidental catch in the herring fishery. Further, possession limits can be modified through a framework adjustment or the specifications process. If the catch of river herring and shad is determined to be too high, the 20,000-lb (9-mt) possession limit could be modified in a future action.

Comment 11: A few commenters support approval of the following measures: (1) Revising regulatory definitions of transfer at-sea and offload, particularly to lessen the likelihood of double counting catch; (2) revising operating provisions for herring carriers (i.e., At-Sea Dealer Permit, exempting herring carriers from VTR requirements) to minimize data mismatches between dealer and vessel reports and lessen the likelihood of double counting catch; (3) providing herring carriers with flexibility in the 7-day enrollment period associated with the herring carrier LOA by also allowing carriers to declare trips via VMS; (4) establishing an Areas 2/3 Open Access Permit (Category E) to limit the potential for regulatory discards of herring during mackerel fishing; (5) modifying the existing 72-hr trip notification requirement to a 48-hr notification requirement; (6) prohibiting vessels from turning off their VMS when in port; and (7) requiring vessels working cooperatively to be subject to the most restrictive possession limit.

Response: NMFS concurs with the commenters. These measures were approved, and this action implements them, because NMFS believes these measures will help improve monitoring and address bycatch in the herring fishery, improve overall management of the herring fishery, and are consistent with the MSA and other applicable law.

Comment 12: One commenter questioned why vessels issued the new Areas 2/3 Open Access Permit (Category E) would be subject to the same notification requirements as limited access vessels, but not limited access catch monitoring requirements.

Response: Amendment 5 states that Category E permits would be subject to the same notification and reporting requirements as Category C (Incidental Catch Limited Access Herring Permit) vessels. Therefore, this action establishes notification and reporting requirements for the Category E permit that are consistent with the requirements for Category C vessels, including the requirement to possess and maintain a VMS, VMS activity declaration and pre-landing requirements, and catch reporting requirements (i.e., submission of daily VMS catch reports and weekly VTRs).

Amendment 5 does not state that Category E permits would be subject to the same catch monitoring requirements as Category C vessels, including the proposed vessel requirements to help improve at-sea sampling and measures to minimize the discarding of catch before it has been made available to observers for sampling. When describing or analyzing catch monitoring requirements, Amendment 5 does not describe extending catch monitoring requirements for Category C vessels to Category E vessels, nor does it analyze the impacts of catch monitoring requirements on Category E vessels. Because the Category C catch monitoring requirements were not discussed or analyzed in relation to Category E vessels, this action does not extend those catch monitoring requirements to Category E vessels.

Comment 13: One commenter was concerned that herring midwater trawl and purse seine vessels would still be subject to the more restrictive groundfish requirement that vessels contact NMFS 72-hr in advance of fishing trip to request an observer, rather than the less restrictive 48-hr trip notification requirement in Amendment 5. To minimize the potential for confusion, one commenter encourages NMFS to work with the Council to change the 72-hr groundfish requirement to be consistent with the 48-hr herring requirement.

Response: NMFS agrees that differences in the pre-trip observer notification requirement may cause the herring industry confusion, and NMFS will work with the Council toward standardizing the 72-hr requirement to a 48-hr requirement in an upcoming groundfish action.

3. Comments on Adjustments to At-Sea Monitoring

Comment 14: Several commenters urged NMFS to approve critical measures in Amendment 5 designed to better monitor catch and bycatch in the herring fishery, including the 100-percent coverage requirement. They explain that the Council approved the 100-percent observer coverage requirement on Category A and B vessels with widespread public support from commercial and recreational fishermen, eco-tourism and coastal businesses, river herring and coastal watershed advocates, and other members of the public. They believe that 100-percent observer coverage is justified, given the fleet's harvesting capacity and its demonstrated bycatch, and makes it possible to document rare bycatch events. Additionally, they believe the 100-percent coverage measure is consistent with the MSA and other applicable law, and necessary to meet requirements to end overfishing, minimize bycatch, and ensure accountability.

Response: NMFS supports increasing observer coverage to the extent practicable to better monitor catch and bycatch in the herring fishery. Throughout the development of Amendment 5, NMFS advised the Council that Amendment 5 must identify a funding source for increased observer coverage because NMFS's annual appropriations for observer coverage are not guaranteed. Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery. Requiring NMFS to pay for 100-percent observer coverage would amount to an unfunded mandate. Because Amendment 5 does not identify a funding source to cover the costs of increased observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, NMFS had to disapprove the 100-percent observer coverage requirement.

With the disapproval of the 100-percent observer coverage requirement measure, the existing SBRM observer coverage levels and Federal observer funding for the herring fishery remain in effect. The approved at-sea sampling measures and other bycatch minimizing measures in Amendment 5 reduce bycatch to the extent practicable. Current observer coverage includes SBRM coverage levels that used to monitor bycatch. In addition to SBRM coverage, Amendment 5 provides for full accounting of catch in groundfish closed areas, aimed at determining the accuracy of claims of recreational fishermen and environmental groups of high incidence of unreported groundfish bycatch. Given the increased level of coverage in groundfish closed areas and data indicating that herring vessels have low bycatch incidence, NMFS's disapproval of the 100-percent observer coverage measure did not appreciably reduce the Herring FMP's ability to minimize bycatch.

The MSA National Standards also require the Councils and NMFS to consider costs and efficient use of resources to the extent practicable. The 100-percent observer coverage requirement was accompanied by a cost-sharing measure that attempted to mitigate the impact of the relatively high cost of 100-percent observer coverage on the industry. However, the Council's recommendation for NMFS and the industry to share the observer monitoring costs was not sufficiently developed to avoid conflicting with the Antideficiency Act. Consequently, maintaining the existing SBRM coverage rates that have been determined to be sufficient for vessels fishing for herring outside of groundfish closed areas, combined with increasing coverage for vessels fishing for herring inside groundfish closed areas, plus other measures such as improved sampling and administrative measures are the most practicable observer coverage measures for the fishery at this time. In total, the new measures approved as part of Amendment 5 meet the MSA requirements to end overfishing, minimize bycatch to the extent practicable, and ensure catch accountability.

Recognizing funding challenges, Amendment 5 specified status quo observer coverage levels and funding for up to 1 yr following the implementation of Amendment 5, with the 100-percent observer coverage and partial industry funding requirement to become effective 1 yr after the implementation of Amendment 5. During that year, the Council and NMFS, in cooperation with the industry, would attempt to develop a way to fund 100-percent observer coverage.

During 2013, staff from NMFS and the New England and Mid-Atlantic Councils formed a working group to identify a workable, legal mechanism to allow for industry-funded observer coverage in the herring and mackerel fisheries. To further explore the legal and logistical issues surrounding industry-funded observer coverage, NMFS formed a working group of Northeast Regional Office, NEFSC, General Counsel Northeast, and NMFS Headquarters staff. The NMFS working group identified an administrative mechanism to allow for industry funding of observer monitoring costs in Northeast Region fisheries, as well as a potential way to help offset funding costs that would be borne by the industry, subject to available funding. This administrative mechanism would be an option to fund observer coverage targets that are higher than SBRM coverage levels and would likely include a prioritization process to allocate available funding across fisheries. The mechanism to allow for industry-funded observer coverage is a potential tool for all Northeast Region FMPs, but would need to be added to each FMP through an omnibus amendment to make it an available tool, should the Council want to use it. Additionally, this omnibus amendment could establish observer coverage targets for Category A and B herring vessels.

In a September 20, 2013, letter to the Council, NMFS offered to be the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in New England and Mid-Atlantic FMPs. At its September 2013 meeting, the Council considered NMFS's offer and encouraged NMFS to begin development of the omnibus amendment. At this time, NMFS expects to present a preliminary range of alternatives for the omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Comment 15: Several commenters claim: (1) The Council did identify a funding source for the 100-percent observer coverage requirement; (2) the Council's recommendation that the industry pay a maximum target of $325 per day towards observer costs was only a target value; and (3) the Council intended that the industry should pay whatever costs are necessary to ensure 100-percent observer coverage.

Response: The amendment states that the preferred funding option for the 100-percent observer coverage requirement is a target maximum industry contribution of $325 per sea day. NMFS does not believe this description indicates that the industry would be responsible for paying whatever cost is necessary to fund 100-percent observer coverage, but rather would target industry costs around $325.

There are two types of costs associated with observer coverage: (1) Observer monitoring costs, such as observer salary and travel costs; and (2) NMFS support and infrastructure costs, such as observer training and data processing. Monitoring costs can either be paid by industry or paid by NMFS, but they cannot legally be shared; NMFS support and infrastructure costs can only be paid by NMFS. The monitoring costs associated with an observer in the herring fishery are higher than $325 per day. The FEIS for Amendment 5 analyzes an alternative with the industry paying $325 per day toward observer monitoring costs and paying $1,200 per day (estimated sum of observer monitoring costs and NMFS support and infrastructure costs), but it does not analyze a range of that would approximate total monitoring costs.

The amendment neither describes nor analyzes an option where the industry is responsible for paying all observer monitoring costs. Therefore, Amendment 5 does not identify a funding source to cover the costs of increased observer coverage, and the industry-funded observer requirement is not sufficiently developed to approve in Amendment 5.

Comment 16: EAGs disagree with NMFS's statement in the proposed rule that there is no legal mechanism to allow timely implementation of the Council's preferred funding options, and point to successful precedents set on the West Coast for cost-sharing between NMFS and the industry.

Response: In Amendment 5, the 100-percent observer requirement is coupled with a target maximum industry contribution of $325 per day. The monitoring costs associated with an observer in the herring fishery are higher than $325 per day. The Department of Commerce Office of General Counsel has advised that cost-sharing of observer monitoring costs between NMFS and the industry would violate the Anti-Deficiency Act. NMFS may pay all the observer monitoring costs (e.g., NEFOP observers) or the industry may pay all the observer monitoring costs (e.g., Atlantic scallop fishery), but NMFS and the industry cannot both pay towards observer monitoring costs. Therefore, there is no current legal mechanism to allow cost-sharing of monitoring costs between NMFS and the industry.

In the Pacific Groundfish Trawl Program, the industry is required to pay all observer monitoring costs. However, as a way to transition the industry to paying all observer monitoring costs, NMFS is reimbursing the observer service providers a percentage of the observer monitoring costs through a grant with the Pacific States Marine Fisheries Commission. The level of reimbursement is contingent on available NMFS funding and is expected to decrease over time, such that, eventually, the industry will be paying all observer monitoring costs. Subject to NMFS funding, this grant mechanism may also be a temporary option to reimburse the herring industry for observer monitoring costs. But this funding mechanism is very different than the measure proposed in Amendment 5, and NMFS cannot modify the proposed measure to make it consistent with the Anti-deficiency Act.

As described previously, NMFS has offered to be the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in the New England and Mid-Atlantic FMPs. At its September 2013 meeting, the Council considered NMFS's offer and encouraged NMFS to begin development of the omnibus amendment. NMFS expects to present a preliminary range of alternatives for the omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Comment 17: Several commenters expressed concern that waivers are not a viable alternative to 100-percent observer coverage and must not be allowed to undermine monitoring of the herring fleet. They also felt that NMFS must clarify the two-year review process for the 100-percent observer coverage requirement to ensure coverage lapses do not occur and that 100-percent observer coverage requires both vessels in a pair trawl operation to carry an observer. Additionally, commenters suggested NMFS should disapprove the ''grandfathering'' of states as observer service providers and explicitly require that state service providers meet NEFOP standards and protocols, including procedures for data sharing and transparency.

Response: NMFS determined that the proposed measures for waivers, the process to review the 100-percent observer coverage requirement, and the measure authorizing states as observer service providers were inseparable from the 100-percent observer coverage requirement. Therefore, NMFS disapproved these proposed measures along with the 100-percent observer coverage requirement. The Council will likely revisit these issues when it reconsiders industry-funded observer coverage in the omnibus amendment.

Comment 18: One commenter supports the disapproval of the 100-percent observer coverage requirement for the herring fishery because observer coverage in the herring fishery is already scientifically determined by the SBRM and the costs associated with 100-percent observer coverage far outweigh the benefits associated with additional data.

Response: NMFS agrees that observer coverage in the herring fishery is currently determined by the SBRM and is sufficient for monitoring catch and bycatch in the herring fishery. Increasing observer coverage in the herring fishery, through a future action, would provide additional data. When the Council reconsiders increasing observer coverage in the herring fishery, it will evaluate how the benefits of the additional data compare to the economic impacts.

Comment 19: One commenter supports the proposed 100-percent observer coverage requirement for the herring fishery, as well as limiting the industry contribution to $325 per day. However, since Amendment 5 is not sufficiently developed to establish an industry-funded observer program, the commenter supports NMFS's recommendation to continue the development of an industry-funded observer program in a future action. Additionally, the commenter believes that measures associated with the 100-percent observer requirement, such as waivers and observer service provider requirements, are inseparable from the 100-percent observer coverage requirement and should not be approved at this time.

Response: NMFS acknowledges the commenter's support for developing an industry-funded observer program in a future action and, as previously described, expects to present a preliminary range of alternatives for the industry-funded observer coverage omnibus amendment to the New England and Mid-Atlantic Councils in early 2014.

Comment 20: Several commenters disagree with language in the proposed rule justifying the disapproval of the 100-percent observer coverage requirement and slippage caps because Amendment 5 would expand at-sea monitoring requirements in the groundfish closed areas. Commenters believe that groundfish closed areas do warrant greater protection, but robust monitoring of the herring fishery across the fishery is critical as well.

Response: NMFS expressed concern in the proposed rule regarding the legality of the 100-percent observer coverage requirement and slippage caps, but also explained that those two measures were not the only proposed measures in Amendment 5 that would improve monitoring and reduce discarding in the herring fishery.

Analyses in the Amendment 5 FEIS suggest that midwater trawl vessels are not catching significant amounts of groundfish either inside or outside the groundfish closed areas. Additionally, the majority of groundfish catch by midwater trawl vessels is haddock, and the catch of haddock by midwater trawl vessels is already managed through a haddock catch cap for the herring fishery. However, the Council believes it is important to determine the extent and nature of bycatch in the herring fishery. NMFS approved the 100-percent observer coverage and increased sampling requirements for midwater trawl vessels fishing in groundfish closed areas because it is a way to incrementally increase observer coverage in the herring fishery and increase opportunities for improved sampling of herring catch.

NMFS disapproved the 100-percent observer coverage requirement and slippage caps for the herring fishery because NMFS believes those measures are inconsistent with the MSA and other applicable law. However, despite those disapprovals, the approved measures in Amendment 5, such as the prohibition on slippage and the released catch affidavit requirement, and increased sampling requirements for midwater trawl vessels fishing in groundfish closed areas, as well as the ongoing data collection by NEFOP, still provide for improved monitoring in the herring fishery, increased information regarding discards, and an incentive to minimize the discarding of unsampled catch.

Comment 21: One EAG commented that Amendment 5 fails to consider cumulative impacts of ongoing Federal actions, including a future amendment to the Herring FMP to consider listing river herring and shad as stocks in the fishery, Framework 48 to the Northeast Multispecies FMP, and the Omnibus Essential Fish Habitat (EFH) Amendment.

Response: NMFS disagrees with the comment that Amendment 5 failed to consider cumulative impacts of ongoing Federal actions. Section 6.6.4 of the FEIS describes the impacts of cumulative effects. That section describes the future amendment to the Herring FMP to consider listing river herring and shad as stocks in the fishery and the Omnibus EFH Amendment and

discusses their potential under reasonably foreseeable future actions. Because those actions are still being developed, it is not possible to definitively analyze the impacts of those actions until the range of alternatives for those amendments has been finalized. Frameworks 48 and 50 to the Multispecies FMP revised management of the groundfish fishery. While groundfish regulations may affect the herring fishery, not including Frameworks 48 (revised groundfish sector management) or 50 (revised groundfish harvest specifications) in the cumulative effects section of the FEIS does not invalidate the entire cumulative effects analysis, because those actions have minimal impact on management of the herring fishery. Framework 48 revised the possible list of exemptions for groundfish sectors, including access to groundfish closed areas, but a future action would be required to consider allowing sectors access to groundfish closed areas. Additionally, Framework 50 reduced the amounts of the haddock catch caps for the herring fishery, but that reduction is not expected to significantly affect the herring fishery because it is minimal.

Comment 22: One EAG commented that Amendment 5 fails to analyze the impacts of an industry-funded observer program.

Response: NMFS disagrees with the commenter's assertion that Amendment 5 failed to analyze the impacts of an industry-funded observer program. Section 6.2 of the FEIS analyzes the impacts of an industry-funded observer program on herring, non-target species and other fisheries, the physical environment and EFH, and fishery-related businesses and communities. This analysis focuses on the biological impacts of a range of observer coverage levels, the economic impacts of the industry paying a range of costs, and the biological and economic impacts of observer service provider requirements.

Comment 23: Several commenters urged NMFS to approve measures prohibiting slippage, requiring a released catch affidavit, and slippage caps to improve catch monitoring and reduce wasteful discarding. They believe slippage caps, and the subsequent trip termination provisions, are critical to the effectiveness of catch monitoring and bycatch estimation in the herring fishery; are consistent with the MSA and other applicable law; and are necessary to meet requirements to end overfishing, minimize bycatch, and ensure accountability. They believe the proposed caps on the number of slippage events (i.e., 10 per gear type and herring management area) are a carefully designed expansion of the regulations in place for Closed Area I or the requirement to stop fishing in an area when the sub-ACL has been harvested, and that the cap amounts are based on existing data and set at levels high enough to allow the fleet to avoid trip termination, while preventing unlimited slippage. Additionally, several commenters believe the trip termination requirement that is in effect once a slippage cap had been achieved is reasonable, safe, and fair because vessels should return to port when experiencing mechanical difficulties or have overloaded vessels.

Response: NMFS approved measures prohibiting slippage and requiring a released catch affidavit for slippage events. NMFS expects that prohibiting slippage will help reduce slippage events in the herring fishery; thus, improving the quality of observer catch data, especially data on bycatch species encountered in the herring fishery. NMFS also expects the released catch affidavit to help provide insight into when and why slippage occurs. Additionally, NMFS expects that the slippage prohibition will help minimize bycatch, and bycatch mortality, to the extent practicable in the herring fishery.

NMFS disapproved the proposed slippage caps, and the associated trip termination requirement, because of concerns with the legality of the slippage cap. Once a slippage cap has been met, vessels that slip catch, even if the reason for slipping was safety or mechanical failure, would be required to return to port. Vessels may continue fishing following slippage events 1 through 10 but must return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10, may continue fishing after the 11th slippage event provided they do not slip catch again. NMFS believes this aspect of the measure is inequitable. Additionally, this measure may result in a vessel operator having to choose between trip termination and bringing catch aboard, despite a safety concern. For these reasons, NMFS believes this measure is inconsistent with the MSA National Standards 2 and 10 and disapproved it.

The measures to minimize slippage are based on the sampling requirements for midwater trawl vessels fishing in Groundfish Closed Area I. However, there are important differences between these measures. Under the Closed Area I requirements, if midwater trawl vessels slip catch, they are allowed to continue fishing, but they must leave Closed Area I for the remainder of that trip. The requirement to leave Closed Area I is less punitive than the proposed requirement to return to port. Therefore, if the safety of bringing catch aboard is a concern, leaving Closed Area I and continuing to fish would likely be an easier decision for a vessel operator to make than the decision to terminate the trip and return to port. Additionally, because the consequences of slipping catch apply uniformly to all vessels that slip catch under the Closed Area I requirements, or when a closure becomes effective in an area where the ACL has been harvested, inequity among the fleet is not an issue for the Closed Area I requirements or closure measures, like NMFS believes it is for the proposed slippage caps.

Even though NMFS disapproved the slippage caps, the prohibition on slippage, the released catch affidavit, the ongoing data collection by NEFOP, and 100-percent observer coverage requirement for midwater trawl vessels fishing in groundfish closed areas still allow for improved monitoring in the herring fishery, increased information regarding discards, and an incentive to minimize discards of unsampled catch.

Comment 24: NMFS received numerous comments from EAGs that the analysis in the FEIS provides a reasonable basis for capping slippage events at 10 slippage events by gear (midwater trawl, bottom trawl, purse seine) and by herring management area. A number of commenters also disagreed with NMFS's statements in the proposed rule that the slippage caps may be punitive, unfair, unsafe, or not operationally feasible.

Response: The Amendment 5 FEIS documents that the frequency of slippage in the herring fishery is highly variable. During 2008–2011, the number of slippage events per year ranged between 35 and 166. The annual average number of slippage events by gear type during 2008, 2009, and 2011 were as follows: 4 by bottom trawl, 36 by purse seine, and 34 by midwater trawl. Because the frequency of slippage was not consistently analyzed in the FEIS by gear type and management area, NMFS believes it difficult to use the analysis in the FEIS to select a value for slippage caps by gear type and management area. For example, based on the available data for past years, the proposed slippage cap would not have affected bottom trawl vessels. On the other hand, it might have affected vessels using purse seine and midwater gear if slippage events were concentrated in one or two management areas. For these reasons, NMFS believes the FEIS does not provide a strong operational basis for

the slippage cap trigger (i.e., 10 slippage events by gear type and area).

Throughout the development of Amendment 5, NMFS identified potential concerns with the rationale supporting, and legality of, the slippage caps. NMFS highlighted its concerns with these aspects of the slippage cap in the proposed rule. As described in the response to the previous comment, NMFS believes the inequitable nature of the slippage cap, the potential for vessel operators having to choose between trip termination and bringing catch aboard despite a safety concern, and the potential for inequity among the fleet as a result of the slippage caps, render the proposed slippage caps inconsistent with the MSA and other applicable law. For these reasons, NMFS disapproved the proposed slippage caps.

Comment 25: One commenter supports the approval of the slippage prohibition and the requirement that a released catch affidavit be completed if catch is slipped, but they do not support approval of the slippage caps. The commenter does not recognize any biological need for a slippage cap, and believes the caps would result in a vessels operator being forced to choose between trip termination and bringing catch aboard, despite a safety concern, which is inconsistent with National Standard 10.

Response: NMFS acknowledges the commenter's support for approval of the slippage prohibition and the released catch affidavit requirement. NMFS agrees that making the vessel operator choose between trip termination and bringing catch aboard despite a safety concern is inconsistent with National Standard 10, and that the analysis in the Amendment 5 FEIS does not provide compelling evidence for the need for or trigger for slippage caps.

Comment 26: Two commenters believe the proposed measure to prohibit slippage, with exceptions for safety concerns, mechanical issues, or dogfish preventing pumping, is sufficient to discourage indiscriminate discarding of catch and improve monitoring in the herring fishery. They also believe the proposed slippage caps violates National Standard 2 (not based on the best scientific information available) and National Standard 10 (lacks any serious consideration of safety) and should not be approved.

Response: NMFS agrees that the slippage prohibition and the associated released catch affidavit requirement are expected to provide a strong incentive to minimize the discarding of unsampled and increased information regarding discards. As described previously, NMFS agrees with the commenter that the proposed slippage caps are inconsistent with National Standards 2 and 10.

Comment 27: Several commenters believe that the Council's modifications to the slippage cap, specifically the three-fold increase to the trigger for the slippage cap (trigger increased from 10 events to 10 events by gear type and area) and exempting slippage events due to excess catch of spiny dogfish from counting against the caps, addressed both the industry's and NMFS's concerns with safety and fairness.

Response: One of NMFS' primary concerns with the proposed slippage cap is safety. Even though the Council modified the slippage cap, slippage events resulting from situations when (1) bringing catch aboard compromises the safety of the vessel, and/or (2) mechanical failure prevents the catch from being brought aboard, would have still counted against the slippage cap. So while the Council's modification to the slippage catch helped reduce the potential for a safety risk, NMFS believes the proposed slippage cap is still inconsistent with National Standard 10.

NMFS is also concerned with fairness of the proposed slippage cap because the consequences to individual vessels of slipping catch have the potential to be inequitably applied. Vessels may continue fishing following slippage events 1 through 10, but must return to port following the 11th slippage event, regardless of the vessel's role in the first 10 slippage events. Conversely, vessels responsible for slippage events 1 through 10 may continue fishing after the 11th slippage event, provided they do not slip catch again. The Council's modification to the amount of the trigger for the slippage cap does not address NMFS's concern that the consequences of slipping catch do not uniformly apply across the fleet to vessels that slip catch.

Comment 28: One commenter is concerned that there are inconsistent and misleading statements in the FEIS regarding the need for additional goals, objectives, and standards for an industry-funded observer program. The commenter believes that Amendment 5 contains a comprehensive set of goals and objectives for the fishery and its monitoring program and that no further development of goals and objectives are needed. Additionally, with respect to standards for observer service providers, the commenter believes that the amendment is clear that NEFOP standards would apply to observer service providers.

Response: The Amendment 5 FEIS does contain goals and objectives for an industry-funded observer program. However, NMFS determined that the proposed measures for observer service provider requirements were inseparable from the 100-percent observer coverage requirement. Therefore, these proposed measures were disapproved along with the 100-percent observer coverage requirement. The Council will likely revisit these issues when it considers the industry-funded observer coverage omnibus amendment.

Comment 29: One commenter believes that measures to improve at-sea sampling proposed for limited access herring vessels should also be applied to open access vessels (Categories D and E). Additionally, the requirement for limited access vessels to provide an observer with visual access to the codend or purse seine after pumping has ended is a loophole to avoid bringing fish on aboard.

Response: When developing Amendment 5, the Council considered applying measures to improve at-sea sampling, such as increased observer coverage, requirements to help improve at-sea sampling, and prohibiting slippage, to Category D vessels. However, because Category D vessels catch such a small percentage of total herring harvest (less than 2 percent), the Council recommended that compliance burden associated with the new at-sea sampling requirements in Amendment 5 only apply to the vessels that harvest the majority of the herring. NMFS can only approve or disapprove measure in Amendment 5; it cannot change or modify measures in Amendment 5.

Regarding Category E vessels, Amendment 5 does not consider whether Category E permits would be subject to the same catch monitoring requirements as limited access vessels. When describing or analyzing catch monitoring requirements, Amendment 5 does not describe extending catch monitoring requirements for limited access vessels to Category E vessels, nor does it analyze the impacts of catch monitoring requirements on Category E vessels. Because the limited access catch monitoring requirements were not discussed or analyzed in relation to Category E vessels, this action does not extend those catch monitoring requirements to Category E vessels.

Amendment 5 prohibits slippage, and NMFS expects that this prohibition will reduce the discarding of unsampled catch. However, the pumps and hoses that remove fish from the codend and bring it aboard the vessel are not able to pump aboard every last fish out of the codend or purse seine. If vessels are not able to bring codends/purse seines aboard the vessel after pumping is completed, the requirement that vessels

must provide the observer with visual access to codend/purse seine, and any of its contents after pumping has ended is intended to help the observer document what, if any, catch remains in the codend/purse seine after pumping.

Comment 30: Several commenters support proposed measures requiring limited access herring vessels to provide observer with: (1) Safe sampling stations, (2) reasonable assistance, (3) notification of pumping and sampling, (4) visual access to codend or purse seine, and (5) estimated weight of catch and discard.

Response: NMFS recognizes the commenters' support for these measures, and believes these measures will help improve monitoring in the herring fishery.

Comment 31: One commenter believes that Amendment 5 should require vessels pair trawling together to both carry observers, as this would be a simple measure to prevent catch from being pumped to a vessels without an observer and, therefore, not be available for sampling.

Response: NEFOP randomly assigns observers to herring vessels consistent with SBRM coverage requirements to optimize sampling of the herring fishery. If NEFOP desires to place observers on both vessels in a pair trawl operation, then it can do so. The Council will be considering a 100-percent observer coverage requirement for the herring fishery in the observer-funding omnibus amendment. Until then, NEFOP will continue to assign observers to herring vessels in order to best meet SBRM requirements.

4. Comments on Measures To Address River Herring Interactions

Comment 32: Some commenters urged NMFS to promptly implement Framework 3 to the Herring FMP, which would develop and implement herring and shad catch caps. They disagree with NMFS's statement in the proposed rule that a catch cap developed in a framework cannot be implemented prior to the implementation of Amendment 5, stating that the authority to set incidental catch caps in the herring fishery was established through Amendment 1 to the Herring FMP.

Response: Amendment 1 identified catch caps as management measures that could be implemented via a framework or the specifications process, with a focus on a haddock catch cap for the herring fishery. Amendment 5 contains a specific alternative that considers implementing a river herring catch cap through a framework or the specifications process, while Amendment 1 does not specifically consider or analyze bycatch measures or catch caps for river herring. On the basis of the explicit consideration of a river herring catch cap and the accompanying analysis in Amendment 5, NMFS advised the Council that it would be more appropriate to consider a river herring catch cap in a framework subsequent to the implementation of Amendment 5.

While Amendment 5 contains preliminary analysis of a river herring catch cap, additional development of a range of alternatives (e.g., amount of cap, seasonality of cap, consequences of harvesting cap) and the environmental impacts (e.g., biological, economic) of a river herring catch cap is necessary prior to implementation. Therefore, it is more appropriate to consider implementing a river herring catch cap through a framework, rather than through the specifications.

At its June 2013 meeting, the Council discussed the development of river herring catch caps in Framework 3 to the Herring FMP. The Council considered establishing catch caps by area and gear, as well as establishing catch caps for both river herring and shad. While Amendment 5 does not explicitly consider catch caps for shad, river herring and shad are closely related species and the nature of their encounters with the herring fishery are similar. Therefore, implementing a catch cap that applies to both river herring and shad is likely a natural extension of the catch cap considered in Amendment 5, and Framework 3 would specifically evaluate the technical merits of developing a shad catch cap for the herring fishery. At its September 2013 meeting, the Council took final action on Framework 3 and recommended establishing river herring and shad catch caps for midwater and bottom trawl gear in the herring fishery. Framework 3, if approved, is expected to be implemented in the spring or summer of 2014.

Comment 33: The Council clarified that the ability to establish catch caps for river herring was intended to also apply to shad. The FEIS for Amendment 5 contains life history, stock status, and state fishery information for shad, as well as analysis on the co-occurrence of river herring and shad and the potential impacts of Amendment 5 measures to address fishery interactions with both river herring and shad.

Response: Given the similar life histories of river herring and shad, and that both are encountered in the herring fishery, establishing catch caps would apply to both river herring and shad is likely a natural extension of the catch cap considered in Amendment 5. However, Amendment 5 was not explicit that river herring catch caps would apply to shad; therefore, the analysis in Framework 3 will need to more fully explain and support establishing catch caps for both river herring and shad.

Comment 34: Several commenters expressed support for establishing catch caps for river herring and shad catch caps as quickly as possible. Additionally, some stressed that NMFS must assist the Council in developing and implementing these catch caps as they are the only regulatory measure in Amendment 5 that will satisfy the MSA's requirement to minimize bycatch to the extent practicable and address the Court-ordered remedy for Amendment 4 to the Herring FMP.

Response: NMFS is supporting the Council in its efforts to establish river herring/shad catch caps for the Atlantic herring fishery. The Council developed Framework 3 to consider establishing river herring and shad catch caps for the herring fishery. The Council discussed a range of catch cap alternatives on June 18, 2013, and voted to adopt measures in Framework 3 on September 26, 2013. The Council recommended a combined river herring/shad catch cap (based on the median of historical catch) for the herring fishery, specifically for mid-water trawl gear in the Gulf of Maine, mid-water trawl gear in the Cape Cod area, and for both bottom and mid-water trawl gears in Southern New England. Council staff is currently finalizing Framework 3, and its accompanying environmental assessment, and submitted it to NMFS for review in January 2014. If approved, NMFS expects to implement river herring/shad catch caps for the herring fishery in 2014.

Based on the ASMFC's recent river herring and shad assessments, data are not robust enough to determine a biologically based river herring/shad catch cap and/or assess the potential effects on river herring/shad populations of such a catch cap on a coast-wide scale. However, both the Council and NMFS believe catch caps would provide a strong incentive for the herring industry to continue avoiding river herring and shad and reduce river herring and shad bycatch to the extent practicable.

NMFS disagrees that the river herring/shad catch caps are the only measure in Amendment 5 that will satisfy the MSA's requirement to minimize bycatch to the extent practicable. Rather, Amendment 5 implements several measures that address bycatch in the herring fishery: (1) Prohibiting catch from being discarded prior to sampling

by an at-sea observer (known as slippage), with exceptions for safety concerns, mechanical failure, and spiny dogfish preventing catch from being pumped aboard the vessel, and requiring a released catch affidavit to be completed for each slippage event; (2) expanding at-sea sampling requirements for all midwater trawl vessels fishing in groundfish closed areas; (3) establishing a new open access permit to reduce the potential for the regulatory discarding of herring in the mackerel fishery; (4) establishing the ability to consider a river herring catch cap in a future framework; (5) establishing River Herring Monitoring/Avoidance Areas; (6) evaluating the ongoing bycatch avoidance program investigation of providing real-time, cost-effective information on river herring distribution and fishery encounters in River Herring Monitoring/Avoidance Areas; and (7) expanding and adding reporting and sampling requirements designed to improve data collection methods, data sources, and applications of data to better determine the amount, type, disposition of bycatch. NMFS believes these measures provide incentives for bycatch avoidance and will allow NMFS to gather more information that may provide a basis for future bycatch avoidance or bycatch mortality reduction measures. These measures are supported by sufficient analysis and consideration of the best available scientific information and represent the most practicable bycatch measures for the Herring FMP based on this information at this time.

Comment 35: Several commenters urged disapproval of the voluntary program investigating river herring distribution and fishery encounters because they believe as a voluntary program, it has no place in a regulatory action and will not satisfy the MSA's requirement to minimize bycatch to the extent practicable.

Response: NMFS disagrees with the commenter's assertion that the program has no place in a regulatory action and will not satisfy the MSA's requirement to minimize bycatch to the extent practicable. As described previously, Amendment 5 contains several measures that address bycatch in the herring fishery. While the voluntary program for river herring monitoring and avoidance does not currently include regulatory requirements, NMFS believes the program, along with the Council's formal evaluation of the program, has the potential to help vessels avoid river herring during the fishing season and to gather information that may help predict and prevent future interactions. Additionally, as described previously, NMFS believes Amendment 5 establishes several measures that minimize bycatch, provide incentives for bycatch avoidance, and will allow NMFS to gather more information that may provide a basis for future bycatch avoidance or bycatch mortality reduction measures. These measures are supported by sufficient analysis and consideration of the best available scientific information and represent the most practicable bycatch measures for the Herring FMP based on this information at this time.

Comment 36: Several commenters support: Amendment 5 establishing River Herring Monitoring/Avoidance Areas, although some caution that this measure does not satisfy the MSA National Standard 9 requirements; Amendment 5 establishing River Herring Protected Areas; and the approval of a prohibition on fishing in River Herring Monitoring/Avoidance Areas without a NMFS-approved observer.

Response: Amendment 5 establishes River Herring Monitoring/Avoidance Areas and NMFS acknowledges the commenters' support for that measure. As described previously, Amendment 5 contains several measures, including establishing River Herring Monitoring/Avoidance Areas, that address the MSA's requirement to minimize bycatch to the extent practicable.

Amendment 5, as adopted by the Council, does not propose establishing River Herring Protection Areas, instead it proposes establishing River Herring Monitoring/Avoidance Areas. The Council considered establishing River Herring Protection Areas but instead choose to recommend River Herring Monitoring/Avoidance Areas and the development of a river herring catch cap to advance the goal of river herring monitoring by providing the industry with incentives to develop their own methods to minimizing river herring bycatch. Because NMFS cannot approve and implement measures that are not proposed in Amendment 5, it cannot approve and implement River Herring Protection Areas.

The proposed measure to require vessels to carry a NMFS-approved observer when fishing in the River Herring Monitoring/Avoidance Areas was part of the Suite of measures proposing to require 100-percent observer coverage and an industry contribution of $325 per day on Category A and B vessels. As described previously, NMFS disapproved that proposed 100-percent observer coverage measure because the measure was not sufficiently developed to avoid conflicting with the Antideficiency Act and amounted to an unfunded mandate. NMFS believes the Suite of proposed measures associated with the 100-percent observer coverage requirement are inseparable from the 100-percent observer coverage requirement; therefore, NMFS had to disapprove those measures too. The Council will likely revisit observer coverage in the herring fishery when it considers the industry-funded observer coverage omnibus amendment.

Comment 37: One commenter supports the approval of the ongoing, voluntary program investigating river herring encounters in the herring fishery so that the fleet can be alerted to areas with concentrations of river herring in real time and move away from those areas. Some commenters support the voluntary program because it helps address the requirement to minimize bycatch to the extent practicable. One commenter does not support establishing River Herring Monitoring/Avoidance Areas because they believe the measure conflicts with the ongoing avoidance program and that the measure may be used to prohibit herring fishing in certain areas.

Response: NMFS agrees with the commenter who stated that the ongoing program can help the fleet recognize and avoid areas with high concentrations of river herring, thereby helping to minimize bycatch in the herring fishery. This action allows for a comprehensive Council evaluation of the ongoing, voluntary river herring avoidance program. As part of that evaluation, the Council can consider adjustments to the River Herring Monitoring/Avoidance Areas and whether measures associated with the River Herring Monitoring/Avoidance Areas, or the areas themselves, conflict with the river herring avoidance program.

Comment 38: Two commenters expressed concern with establishing River Herring Monitoring/Avoidance Areas. Their concerns were based on the ability to obtain/fund increased observer coverage in these areas and the potential for redundancy with river herring catch caps. One commenter recommended that coverage levels for these areas not be established in this action and that NMFS delay in defining these areas until river herring catch caps are established.

Response: NMFS believes that River Herring Monitoring/Avoidance Areas and the river herring catch caps serve complementary purposes in management of the herring fishery and are not redundant. However, modifications to both River Herring

Monitoring/Avoidance Areas and river herring catch caps can be considered through the specifications and/or a framework adjustment. If these measures become duplicative, they can be modified in a future action.

Because the proposed requirement for observer coverage in River Herring Monitoring/Avoidance Areas is inseparable from the disapproved 100-percent observer coverage measure, no required level of observer coverage for River Herring Monitoring/Avoidance Areas is established in this action. The Council will likely revisit observer coverage in the herring fishery when it considers the industry-funded observer coverage omnibus amendment.

Comment 39: One commenter supports the measure that would establish a river herring catch cap through a future framework, and believes that establishing a catch cap may improve the performance of the voluntary river herring avoidance program.

Response: This action allows a river herring catch cap to be established through a future framework. Establishing a catch cap may improve the performance of the river herring avoidance program by providing a strong incentive to avoid and reduce river herring bycatch to the extent practicable. The Council is expected to evaluate the interaction between catch caps and the avoidance program when it formally evaluates the avoidance program.

Comment 40: One commenter supports Amendment 5 establishing a mechanism to consider regulatory requirements for a byatch avoidance strategy in a future action.

Response: This action establishes a mechanism to develop, evaluate, and consider regulatory requirements for a river herring bycatch avoidance stategy. Additionally, this action establishes River Herring Monitoring/Avoidance Areas that will likely help support any future considerations of river herring bycatch avoidance strategies.

5. Comments on Measures To Address Midwater Trawl Access to Groundfish Closed Areas

Comment 41: Many commenters recommended that NMFS approve measures expanding the at-sea monitoring of midwater trawl vessels fishing in groundfish closed areas, including 100-percent observer coverage and Closed Area I sampling requirements, to improve catch monitoring in the herring fishery. Additionally, some commenters recommended that expanded at-sea monitoring requirements for midwater trawl vessels fishing in groundfish closed areas should also apply to vessels with the new Areas 2/3 Open Access Permit (Category E).

Response: This action expands at-sea monitoring requirements to all herring vessels fishing with midwater trawl gear in groundfish closed areas, regardless of permit type, consistent with the commenters' recommendations.

Comment 42: One EAG urges NMFS to keep at-sea monitoring requirements in place for midwater trawl vessels fishing in the groundfish closed areas under the Omnibus EFH Amendment 2 or any changes to the groundfish closed areas under the Northeast Multispecies FMP, unless and until such actions explicitly change the herring vessel access requirements and fully analyzes the impacts of those changes.

Response: The Council's intent for measures specifying midwater trawl access to groundfish closed areas was that those measures would be dynamic and evolve as requirements and restrictions in the groundfish closed areas evolved. If other Council actions modify requirements and/or restrictions for groundfish closed areas, those actions will consider modifications to the measures in this action implementing requirements for midwater trawl access to groundfish closed areas. If the Council considers changes to the measures implemented in this action, the action considering the changes would fully analyze the impacts of those changes.

Comment 43: Some commenters believe the relatively low amount of groundfish bycatch in groundfish closed areas does not warrant expanding at-sea sampling requirements for midwater trawlers. Commenters recognize that midwater trawl vessels do catch haddock, but they believe the catch of haddock in the herring fishery is already managed through a haddock catch cap. Additionally, one commenter is concerned that NMFS does not have adequate resources to place observers on all trips to Groundfish Closed Area 1, that expanding those at-sea monitoring requirements to all groundfish closed areas would further dilute available funds, and that it would be impracticable for NMFS to implement additional observer coverage requirements without additional funding.

Response: The Council and NMFS both believe it is important to better understand the nature of catch, including directed catch, bycatch, and incidental catch, in the herring fishery. As a way to improve that understanding, this action incrementally expands the at-sea monitoring requirements, including a 100-percent observer coverage requirement, to midwater trawl vessels fishing in groundfish closed areas.

Expanding the Closed Area I sampling requirement to midwater trawl vessels fishing in groundfish closed areas provides a greater source of information regarding the nature and extent of incidental catch and bycatch in the herring fishery. This measure also addresses perceived inequities expressed by many stakeholders during development of Amendment 5 regarding allowing gear that is capable of catching groundfish into the groundfish closed areas. This action still allows the midwater trawl fishery to operate in the groundfish closed areas, but ensures that monitoring and sampling are maximized, based on measures that already have proven to be effective in Closed Area I.

Under current practice, as well as under the proposed revisions to the SBRM that are being developed, the NEFSC would allocate all existing and specifically identified observer funding to support SBRM observer coverage. Therefore, herring vessels would be assigned observers based on SBRM coverage, including trips by midwater trawl vessels into the groundfish closed areas. All trips by midwater trawl vessels into the groundfish closed areas would have observer coverage, thereby increasing observer coverage in the groundfish closed areas. But until there is additional funding available, the number of trips midwater trawl vessels can make into the groundfish closed areas would be limited by SBRM funding. Additional observer coverage specifically for midwater trawl trips into the groundfish closed areas would be possible after SBRM monitoring is fully funded or if funds are specifically appropriated for such trips.

If a midwater trawl vessel cannot fish in the groundfish closed areas on a particular trip because an observer is not assigned to that trip, any negative economic impact to that vessel is expected to be minimal. Analyses in the FEIS indicate that less than 10-percent of herring fishing effort occurs in the groundfish closed areas and less than 13-percent of the annual herring revenue comes from trips into the groundfish closed areas. Midwater trawl vessels will still have access to the groundfish closed areas during SBRM covered trips, even if there are less SBRM covered trips than in years past. Additionally, midwater trawl vessels can fish outside the groundfish closed areas without an observer.

NMFS agrees that analyses in the Amendment 5 FEIS suggest that

midwater trawl vessels are not incidentally catching significant amounts of groundfish either inside or outside the groundfish closed areas. Additionally, NMFS agrees that the majority of groundfish catch by midwater trawl vessels is haddock, and the catch of haddock by midwater trawl vessels is already managed through a haddock catch cap. However, this action expands at-sea monitoring requirements to midwater trawl vessels fishing in all groundfish closed areas because it will allow the midwater trawl fishery to continue to operate in the groundfish closed areas, while ensuring that opportunities for monitoring and sampling are maximized.

Comment 44: Several commenters urged disapproval of the measure expanding at-sea sampling of midwater trawl vessels fishing in groundfish closed areas and, instead, recommended that the use of midwater trawl gear in groundfish closed areas be prohibited.

Response: As described previously, this action expands at-sea monitoring requirements to midwater trawl vessels fishing in all groundfish closed areas because it will ensure that opportunities for monitoring and sampling are maximized while still allowing the midwater trawl fishery to continue to operate in the closed areas. Because a measure to prohibit midwater trawl gear in groundfish closed areas was not recommended by the Council as part of Amendment 5, it cannot be implemented as part of this action.

6. Comments on Adjustments to List of Measures Modified Through Framework Adjustments or Specifications

Comment 45: Two EAGs commented that NMFS should modify the list of items that could be developed through a framework or specifications package to exclude observer coverage levels, stating that modifying observer coverage levels through a framework or the specifications was not contemplated in the DEIS for Amendment 5.

Response: NMFS believes the DEIS does contemplate modifying observer coverage levels through a framework adjustment. Section 3.5 of the DEIS for Amendment 5 explained that, if any new management measures are adopted in Amendment 5, changes to those measures and related adjustments would be added to the list of measures that can be implemented through a framework adjustment to the Herring FMP in the future. Additionally, the DEIS explained that the public should consider whether or not any of the new measures proposed in Amendment 5 should be allowed to be modified in the future through a framework adjustment. The DEIS explained that for the FEIS, the list of measures would be based on the management measures adopted by the Council.

As part of Amendment 5, the Council adopted two measures specifying observer coverage levels, the 100-percent observer coverage requirement for Category A and B vessels, and the 100-percent observer coverage requirement for midwater trawl vessels fishing in the groundfish closed areas. Because the Council adopted observer coverage levels as part of Amendment 5, observer coverage levels were added to the list of measures in the FEIS that could be modified through a framework adjustment when appropriate.

While NMFS approved, and this action implements, the 100-percent observer coverage requirement for midwater trawl vessels fishing in the groundfish closed areas, NMFS disapproved the 100-percent observer coverage requirement for Category A and B vessels. The Council is expected to revisit the issue of specifying observer coverage levels outside of groundfish closed areas in the NMFS-led observer-funding omnibus amendment starting in January 2014. Therefore, at this time, NMFS concurs with the commenters, and believes it is not appropriate to include observer coverage levels outside of groundfish closed areas in the list of measures that could be modified through a framework.

Comment 46: One commenter supports modifying the list of measures that could be modified through a framework to only include: (1) Changes to vessel trip notification and declaration requirements; (2) provisions for river herring bycatch avoidance program; and (3) river herring catch caps. They believe these measures should be changed through a framework, and not the specifications, because the framework process is a more deliberative way to make substantive changes to management of the herring fishery.

Response: This action allows for modifications to vessel trip notification and declaration requirements, provisions for the river herring bycatch avoidance program, and river herring catch caps to be made through a framework when appropriate. Additionally, it allows for modifications to river herring catch caps to be made through the specifications process. The ability to modify river herring catch caps, especially the amount of catch caps, through the specifications process is necessary to ensure catch caps are based on the best available data and that catch caps are revisited and modified, if necessary, as frequently as other specifications for the herring fishery.

Changes From the Proposed Rule

The proposed rule for Amendment 5 contained all the measures in the amendment that were adopted by the Council in June 2012. As described previously, the proposed rule highlighted NMFS's utility and legal concerns with three measures adopted by the Council. NMFS disapproved the 100-percent observer coverage measure coupled with a $325 per day industry contribution, slippage cap, and dealer reporting requirements, thus, the regulatory requirements associated with those three measures are not included in this final rule. Specifically, the following sections from the proposed rule have been removed: §§ 648.11(h), 648.11(l)(5), 648.14 (r)(2)(xiii), 648.200(g)(5), 648.203(c), and 648.206(b)(33) and (b)(34) and are not being implemented in this rule. Additionally, proposed § 648.206(b)(32) was revised to remove provisions related to the slippage cap.

The proposed rule stated that herring carriers were only permitted to transport herring. This final rule clarifies that requirement and specifies that herring carriers are permitted to transport herring and certain groundfish species, including haddock and up to 100 lb (45 kg) of other regulated groundfish species, consistent with current groundfish regulations. Additionally, to ensure consistency with other Northeast Region VMS requirements, the final rule clarifies that once a vessel declares a herring carrier trip via VMS, it is bound to VMS operating requirements for the remainder of the fishing year.

To avoid confusion, this final rule standardizes the title of the affidavit required when catch is slipped by midwater trawl vessels fishing in groundfish closed areas in both the Northeast multispecies and herring regulations. It is now called a released catch affidavit. Lastly, this final rule clarifies that (1) Fish that cannot be pumped and remain in the codend or seine at the end of pumping operations are considered to be operational discards and not slippage and (2) discards that occur after the catch is brought on board and sorted are also not considered slippage.

Classification

The Administrator, Northeast Region, NMFS, determined that Amendment 5 to the Herring FMP is necessary for the conservation and management of the herring fishery and that it is consistent with the MSA and other applicable laws.

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

The Council prepared a FEIS for Amendment 5; a notice of availability was published on April 26, 2013 (78 FR 24743). The FEIS describes the impacts of the proposed measures on the environment. Revisions to fishery management program provisions, including permitting provisions, vessel notification requirements, and measures to address carrier vessels and transfers at-sea are expected to improve catch monitoring in the herring fishery, with positive biological impacts on herring and minimal negative economic impacts on fishery participants. Measures to improve at sea-sampling by observers and minimize the discarding of catch before it has been sampled by observers are also expected to improve catch monitoring and to have positive biological impacts on herring. The economic impacts on fishery participants of these measures are varied, but negative economic impacts are expected to be moderate compared to status quo. Measures to address bycatch are expected to have positive biological impacts and moderate negative economic impacts on fishery participants. Lastly, all measures are expected to have positive biological impacts on non-target species and neutral impacts on habitat. In partially approving Amendment 5 on July 18, 2013, NMFS issued a record of decision (ROD) identifying the selected alternatives. A copy of the ROD is available from NMFS (see **ADDRESSES**).

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses to support this action. A copy of this analysis is available from the Council or NMFS (see **ADDRESSES**) or via the Internet at *http://www.nero.noaa.gov.*

Statement of Need

This action helps improve monitoring and addresses bycatch issues in the herring fishery through responsible management. A description of the action, why it was considered, and the legal authority for the action is contained elsewhere in this preamble and is not repeated here.

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 8,163 comments during the comment periods on the NOA and proposed rule. Those comments, and NMFS' responses, are contained elsewhere in this preamble and are not repeated here. NMFS did not receive any comments focused solely on the economic impacts of this rule.

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

The Office of Advocacy at the Small Business Administration (SBA) suggests two criteria to consider in determining the significance of regulatory impacts: Disproportionality and profitability. The disproportionality criterion compares the effects of the regulatory action on small versus large entities (using the SBA-approved size definition of ''small entity''), not the difference between segments of small entities. The changes in profits, costs, and net revenues due to Amendment 5 are not expected to be disproportional for small versus large entities, as the proposed action will affect all entities, large and small, in a similar manner. Therefore, this action is not expected to have disproportionate impacts or place a substantial number of small entities at a competitive disadvantage relative to large entities.

In 2011, there were 2,240 vessels with herring permits. Of these vessels, 91 vessels with limited access herring permits (Category A, B, and C) and 2,149 vessels with open access herring permits (Category D) would be considered small entities for Regulatory Flexibility Act (RFA) purposes. Category D vessels participate incidentally in the herring fishery and would only be subject to the proposed regulatory definitions and the requirements for midwater trawl vessels fishing in the Groundfish Closed Areas. The regulatory definitions are primarily administrative in nature; however they may reduce confusion and/or errors related to catch reporting. Additionally, currently, there are no Category D vessels that fish with midwater trawl gear. Therefore, this RFA analysis is focused on the 91 vessels with limited access herring permits.

Herring vessels can work cooperatively in temporary, short-term partnerships for pair trawling or seining activities, and vessels may also be affiliated with processing plants. NMFS currently has no data regarding vertical integration or ownership. Therefore, for the purposes of this RFA analysis, the entity in the harvesting sector is the individual vessel.

Subsequent to completing the IRFA for Amendment 5, on June 20, 2013, the SBA issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398, June 20, 2013). The rule increased the size standard for Finfish Fishing from $4.0 to $19.0 million, Shellfish Fishing from $4.0 to $5.0 million, and Other Marine Fishing from $4.0 to $7.0 million. Therefore, this FRFA contains updated permit information consistent with SBA's revised size standards. NMFS reviewed the analyses prepared for this action in light of the new size standards. Under the former, lower size standards, 91 entities subject to this action were considered small entities. These entities would all continue to be considered small under the new size standards. However, using more recent permit information, the number of entities that would be considered small under SBA's revised size standards decreased between 2011 and 2012.

Based on more recent permit information, NMFS has now identified 70 entities (compared to 91 in the original analysis) that held at least one limited access herring permit (category A, B, or C) in 2012. Many of these entities were active in both finfish fishing and shellfish fishing industries. In order to make a determination of size, fishing entities are first classified as participants in either the Finfish Fishing or Shellfish Fishing industry. If an entity derives more than 50 percent of its gross revenues from shellfish fishing, the $5.0-million standard for total revenues is applied. If an entity derives more than 50 percent of its gross revenues from finfish fishing, the $19.0-million standard for total revenues is applied. Based on the revised economic criteria, as well as updated permit and revenue data, there are 7 large shellfish fishing entities to which this final rule will apply and 63 small entities to which this final rule will apply.

Of the 63 small entities, 39 reported no revenue from herring fishing during 2012. For the 24 small entities that were active in the herring fishery, median gross revenues were approximately $872,000, and median revenues from the herring fishery were approximately $219,000. There is large variation in the importance of herring fishing for these small entities. Eight of these 24 active small entities derive less than 5 percent of their total fishing revenue from

herring. Seven of these 24 active small entities derive more than 95 percent of their total fishing revenue from herring.

Amendment 5 establishes measures to improve catch reporting and address bycatch. These measures primarily affect limited access herring vessels, the component of the herring fleet that harvests approximately 98-percent of the available herring harvest. After considering the new permit information and the new SBA size standards, NMFS still believes that the proposed action would affect all entities, whether large or small, in a similar manner because measures in Amendment 5 apply similarly across the limited access herring fleet.

Section 5.0 in Amendment 5 describes the vessels, key ports, and revenue information for the herring fishery; therefore, that information is not repeated here.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Minimizing Significant Economic Impacts on Small Entities

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) which have been approved by the Office of Management and Budget (OMB) under control number 0648–0674. The new requirements, which are described in detail in the preamble, were approved as a new collection. Amendment 5 also removes a VMS power-down exemption for herring vessels and a catch reporting requirement for herring carrier vessels. Amendment 5 prohibits herring vessels from powering-down their VMS units in port, unless specifically authorized by the NMFS RA. The existing power-down exemption was approved under OMB Control Number 0648–0202 and, upon renewal, will be removed from that information collection. Additionally, Amendment 5 removes the existing weekly VTR requirement for herring carrier vessels. That requirement was approved under OMB Control Number 0648–0212 and, upon renewal, will be removed from that information collection. The action does not duplicate, overlap, or conflict with any other Federal rules.

Amendment 5 establishes two new herring permits. The application process to obtain a new Areas 2/3 Open Access Permit takes an estimated 1 min to complete, and costs $0.46 to mail. The new Areas 2/3 Open Access Herring Permit requires the vessel to purchase and maintain a VMS. Because other Northeast Federal permits require vessels to maintain a VMS, it is estimated that only six vessels that were issued the current open access permit, which is re-named the All Areas Open Access Permit as part of this action, do not already have a VMS. The average cost of purchasing and installing a VMS is $3,400, the VMS certification form takes an estimated 5 min to complete and costs $0.46 to mail, and the call to confirm a VMS unit takes an estimated 5 min to complete and costs $1. The average cost of maintaining a VMS is $600 per year. Northeast regulations require VMS activity declarations and automated polling of VMS units to collect position data. Each activity declaration takes an estimated 5 min to complete and costs $0.50 to transmit. If a vessel takes an average of 5 trips per year, the annual burden estimate for the activity declarations would be 25 min and $3. Each automated polling transmission costs $0.06, and a vessel is polled once per hour every day of the year. The annual estimated cost associated with polling is $526. In summary, the total annual burden for a vessel to purchase and maintain a VMS is estimated to be 35 min and $4,530.

Amendment 5 also requires that vessels issued the new Areas 2/3 Open Access Herring Permit comply with existing catch reporting requirements for Category C vessels—specifically the submission of daily VMS reports and weekly VTRs. The cost of transmitting a catch report via VMS is $0.60 per transmission and it is estimated to take 5 min to complete. If a vessel takes an average of 5 trips per year and each trip lasts an average of 2 days, the total annual burden of daily VMS reporting for a vessel is estimated to be 50 min and $6. Category D vessels are currently required to submit weekly VTRs, so there will be no additional burden associated with VTRs for those vessels. If a vessel without a Category D permit was issued the new Areas 2/3 Open Access Herring Permit, the annual burden estimate of VTR submissions is $18. This cost was calculated by multiplying 40 (52 weeks in a year minus 12 (number of monthly reports)) by $0.46 to equal $18. The VTR is estimated to take 5 min to complete. Therefore, the total annual burden of weekly VTRs is estimated to be $18, and 3 hr and 20 min.

This action establishes new reporting burdens associated with obtaining an At-Sea Herring Dealer Permit. The new herring dealer permit is for herring carriers that sell fish. Historically, approximately 25 vessels per year have been issued an LOA to act a herring carrier. The application for an At-Sea Herring Dealer Permit would take an estimated 15 min to complete and $0.46 to mail. The annual burden to renew an At-Sea Herring Dealer Permit is estimated to be 5 min to complete the renewal, and $0.46 to mail the renewal. Dealers are required to submit weekly reports via the internet. These reports are estimated to take 15 min to complete; therefore, the annual burden associated with dealer reporting is 13 hr. The cost for this information collection is related to internet access. The 25 vessels that may obtain the new At-Sea Herring Dealer Permit may not already be accessing the internet for other reasons/requirements and would have to obtain internet access. Internet access is required for the submission of weekly dealer reports. Operating costs consist of internet access, available through either dial-up or cable modem, with an average annual cost of $652 per year. Therefore, the annual cost burden associated with dealer reporting is estimated to be $652.

Amendment 5 expands the number of herring vessels required to submit a VMS pre-landing notification and adds a gear declaration to the existing VMS activity declaration requirement. A subset of herring vessels are currently required to notify NMFS Office of Law Enforcement (OLE) via VMS at least 6 hr prior to landing, and this action expands that requirement to all limited access herring vessels, vessels issued the new Areas 2/3 Open Access Herring Permit (Category E), and herring carrier vessels. It is estimated that Amendment 5 will require an additional 51 Herring Category C vessels, 80 Herring Category E vessels, and 25 herring carriers to submit VMS pre-landing notification. Each VMS pre-landing notification is estimated to take 5 min to complete and costs $1. Category C vessels are estimated to take an average of 13 trips per year, so the total annual burden for a Category C vessel making VMS pre-landing notifications is estimated to be 65 min and $13. The new Category E vessels will take an estimated 5 trips per year, so the total burden for a Category E vessel making VMS pre-landing notifications is estimated to be 25 min and $5. Herring carriers are estimated to take an average of 4 trips per year, so the total annual burden for a herring carrier making VMS pre-landing notifications is estimated to be 20 min and $4. The gear declaration applies to limited access herring vessels. There is no additional reporting burden associated with the gear declaration because it is only adding an additional field to the existing VMS activity declaration requirement, approved under OMB 0648–0202.

Amendment 5 allows vessels to choose between enrolling as a herring

carrier with an LOA or declaring a herring carrier trip via VMS. Vessels may declare a herring carrier trip via VMS, if they already have and maintain a VMS, or continue to request an LOA. There is no additional reporting burden associated with this measure because both the LOA and the VMS activity declaration are existing requirements for herring vessels.

Amendment 5 increases the reporting burden for measures designed to improve at-sea sampling by NMFS-approved observers. A subset of herring vessels are currently required to notify NMFS to request an observer, and this action expands that requirement to all limited access herring vessels, vessels issued the new Areas 2/3 Open Access Herring Permit (Category E), and herring carrier vessels. This pre-trip observer notification requirement is estimated to affect 156 additional vessels. Vessels will be required to call NMFS to request an observer at least 48 hr prior to beginning a herring trip. The phone call is estimated to take 5 min to complete and is free. If a vessel has already contacted NMFS to request an observer and then decides to cancel that fishing trip, Amendment 5 requires that vessel to notify NMFS of the trip cancelation. The call to notify NMFS of a cancelled trip is estimated to take 1 min to complete and is free. If a vessel takes an estimated 25 trips per year, the total annual reporting burden associated with the pre-trip observer notification is estimated to be 2 hr 30 min.

Amendment 5 requires a released catch affidavit for limited access vessels that discard catch before the catch has been made available to an observer for sampling (slipped catch). The reporting burden for completion of the released catch affidavit is estimated to average 5 min, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The cost associated with the affidavit is the postage to mail the form to NMFS ($0.46). The affidavit requirement affects an estimated 93 limited access herring vessels. If those vessels slipped catch once per trip with an observer onboard, and took an estimated 38 trips per year, the total annual reporting burden for the released catch affidavit is estimated to be 3 hr 10 min and $17. Amendment 5 requires vessels fishing with midwater trawl gear in Groundfish Closed Areas to complete a released catch affidavit if catch is discarded before it is brought aboard the vessel and made available for sampling by an observer. At this time, there are no known Category D vessels that fish with midwater trawl gear; therefore, there is no additional reporting burden, beyond that described above, for the released catch affidavit associated with Groundfish Closed Areas.

Amendment 5 requires that when vessels issued limited access herring permits are working cooperatively in the herring fishery, including pair trawling, purse seining, and transferring herring at-sea, vessels must provide to observers, when requested, the estimated weight of each species brought on board or released on each tow. NMFS expects that the vessel operator would do this for each trip, and not on a tow-by-tow basis. Vessel operators should have this information recorded and available to report to the observer, so NMFS estimates the response to take 1 min. It would not have any associated cost, since it would be a verbal notification for the observer to record.

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 email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

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.

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

1. Adjustments to the Fishery Management Program

Amendment 5 revises several existing fishery management provisions, such as regulatory definitions and VMS requirements, and establishes new provisions, such as a new dealer permit and the mechanism to consider a river herring catch cap in a future framework, to better administer the herring fishery. Two alternatives, the selected action and the no action alternative, were considered for each of these provisions. Because of the administrative nature of the proposed measures, the economic impacts of the selected action relative to the no action alternative is anticipated to have a neutral or low positive economic impact on fishery-related businesses and communities. For this reason, the no action alternative was rejected for each of these provisions. Revising the regulatory definitions for transfer at-sea and offload for the herring fishery may reduce confusion and/or errors related to catch reporting, which may, in turn, improve reporting compliance, help ensure data accuracy and completeness, and lessen the likelihood of double counting herring catch. Establishing an At-Sea Herring Dealer Permit for herring carrier vessels that sell herring at sea may improve catch monitoring by allowing catch reported by harvesting vessels to be matched with sales of herring by herring carrier vessels. Expanding vessel requirements related to observer sampling may help ensure safe sampling and improve the quality of monitoring data. Measures that result in improved catch monitoring are anticipated to have low positive economic impacts because they may, over the long-term, result in less uncertainty and, ultimately, result in additional harvest being made available to the herring industry. Specifying that vessels working cooperatively in the herring fishery are subject to the most restrictive possession limit associated with the permits issued to the vessels may improve enforcement of herring possession limits in multi-vessel operations. Eliminating the VMS power-down provision for herring vessels may make provisions for herring vessels more consistent with other FMPs and enhance enforcement of the herring regulations. Lastly, establishing the mechanism to consider a river herring catch cap in a future framework may be a potential way to minimize river herring catch in the herring fishery.

Amendment 5 allows herring carriers to choose between enrolling as a herring carrier with an LOA or declaring a herring carrier trip via VMS. Currently, herring carriers enroll as herring carriers with an LOA. When vessels are enrolled as carriers they cannot have fishing gear aboard, fish for any species, or carry any species other than herring or groundfish. The LOA has a minimum enrollment period of 7 days.

In addition to the selected action, Amendment 5 considered the no action alternative (herring carriers enroll with an LOA) and a non-selected alternative (vessels must declare herring carrier trips via VMS). Both the selected action and the non-selected alternative would provide increased operational flexibility at the trip level as compared to the no

action alternative, without the minimum 7-day enrollment period. However, the non-selected alternative would require vessels that did not already use a VMS to purchase and maintain a VMS. In 2010, approximately 20 vessels that were not required to maintain a VMS aboard their vessels requested herring carrier LOAs. The cost of purchasing a VMS ranges between $1,700 and $3,300, and operating costs are approximately $40 to $100 per month. The selected action has the potential for low positive impacts for fishery-related businesses and communities resulting from the increased operational flexibility of allowing trip-by-trip planning in comparison to the no action alternative. The non-selected alternative and the selected action would both have the potential for low positive benefits from allowing trip-by-trip planning. In comparison to the selected action, the non-selected alternative may have a low negative impact by requiring vessels to purchase and maintain a VMS, but that impact would be minimal because of the small number of vessels likely affected. Overall, the selected action is anticipated to have the greatest positive impact on fishery-related business and communities in comparison the no action and non-selected alternative, but that impact is low. Because the no action and non-selected alternatives are expected to have a net negative impact, they were rejected.

Amendment 5 requires that existing pre-trip observer notification and VMS pre-landing notification requirements be expanded to additional herring vessels and that a gear declaration be added to the existing VMS activity declaration. The intent of these requirements is to: (1) Better inform NEFOP of when/where herring fishing activity may occur and assist in the effective deployment of observers; (2) better inform NMFS OLE of when/where vessels will be landing their catch land to facilitate monitoring of the landing and/or catch; and (3) provide OLE with trip-by-trip information on the gear being fished to improve the enforcement of herring gear regulations. Amendment 5 considered only one alternative to the selected action, the no action alternative. The no action alternative would not impose additional trip notification requirements; therefore, there would be no additional impacts on fishery-related business and communities. Any impact to the herring fishery because of the selected action would be through increased administrative and regulatory burden, but the number of vessels affected and the actual cost of the additionally reporting is low. In comparison to the no action alternative, the selected action is anticipated to result in improved catch monitoring and enforcement of herring regulations, translating into low positive impacts for fishery-related businesses and communities. For this reason, the no action alternative was rejected.

Dealer Reporting Requirements

Amendment 5 proposed requiring herring dealers to accurately weigh all fish and, if catch is not sorted by species, dealers would be required to document how they estimate relative species composition in each dealer report. However, the proposed measure was disapproved, so this action maintains the no action alternative. Dealers currently report the weight of fish, obtained by scale weights and/or volumetric estimates. Because the proposed action did not specify how fish are to be weighed, the proposed action is not anticipated to change dealer behavior and, therefore, is expected to have neutral impacts in comparison to the no action alternative. Amendment 5 considered three alternatives to the proposed action, the no action alternative, Option 2A, and Option 2C. Option 2A would require that relative species composition be documented annually and Option 2C would require that a vessel representative confirm each dealer report. Overall, relative to the selected, no action alternative, the proposed action and Option 2A may have a low negative impact on dealers due to the regulatory burden of documenting how species composition is estimated. In comparison, Option 2C may have a low positive impact on fishery participants, despite an increased regulatory burden, if it minimizes any loss of revenue due to data errors in the dealer reports and/or the tracking of herring catch.

Areas 2/3 Open Access Herring Permit

Amendment 5 establishes a new open access herring permit with a 20,000-lb (9-mt) herring possession limit in herring management Areas 2 and 3 for limited access mackerel vessels. Amendment 5 considered two alternatives to the selected action, the no action alternative (6,600-lb (3-mt) herring possession limit) and the non-selected alternative (10,000-lb (4.5-mt) herring possession limit). The impact of the selected action on fishery-related businesses and communities is expected to be more positive than that of the no action alternative or the non-selected alternative. There is significant overlap between the mackerel and herring fisheries. Currently, vessels issued an open access herring permit and participating in the mackerel fishery are required to discard any herring in excess of the open access permit's 6,600-lb (3-mt) possession limit. The analysis predicts that approximately 60 vessels would be eligible for the new open access herring permit. In comparison to the no action and non-selected alternatives, the selected action could decrease the occurrence of regulatory discards and increase revenue for vessels that are eligible for this permit. For this reason, the no action and non-selected alternatives were rejected.

As described previously, the cost of purchasing a VMS ranges between $1,700 and $3,300, and operating costs are approximately $40 to $100 per month. Economic impacts on small entities resulting from the purchase costs of new VMS units required by the new open access permit have been minimized through a VMS reimbursement program (July 21, 2006, 71 FR 41425) that made available approximately $4.5 million in grant funds for fiscal year (FY) 2006 for vessel owners and/or operators who have purchased a VMS unit for the purpose of complying with fishery regulations that became effective during or after FY 2006. As of April 3, 2007, an additional $4 million was being added to the fund. Reimbursement for VMS units is available on a first come, first serve basis until the funds are depleted. More information on the VMS reimbursement program is available from the Pacific States Marine Fisheries Commission (see **ADDRESSES**) and from the NMFS VMS Support Center, which can be reached at 888–219–9228.

2. Adjustments to the At-Sea Catch Monitoring

Amendment 5 proposed requiring 100-percent observer coverage on Category A and B vessels, coupled with an industry contribution of $325 per day. However, the proposed measure was disapproved, so this action maintains the no action alternative. Amendment 5 considered three alternatives to the proposed action (Alternative 2), the no action alternative (existing SBRM process for determining observer coverage levels), Alternative 3 (modified SBRM process for determining observer coverage levels), and Alternative 4 (Council-specified targets for observer coverage levels). Additionally, for each of the action alternatives, Amendment 5 considered funding options, NMFS funding (no action alternative) versus NMFS and industry funding, and observer service provider options, all observer service

providers subject to the same requirements (no action alternative) versus states as authorized observer service providers. The proposed action specifies the highest level of observer coverage in comparison to the no action alternative and the non-selected alternatives. The specific coverage levels under the no action alternative and the non-selected alternatives are unknown at this time, because they would depend on an analysis of fishery data from previous years, but coverage levels under these alternatives are expected to be less than 100 percent. The proposed action specifies an industry contribution of $325 per day. For Category A and B vessels, a contribution of $325 is estimated to be 3–6 percent of daily revenue and 8–45 percent of daily operating costs. The other non-selected alternatives (no action, Alternative 3, Alternative 4) do not specify an industry contribution, so a comparison of direct costs to industry across alternatives is not possible. The proposed action is likely to have the largest negative impact on fishery-related businesses and communities of any alternatives due to the cost of observer coverage, potentially resulting in less effort and lower catch. In the long-term, increased monitoring and improved data collections for the herring fishery may translate into improved management of the herring fishery that would benefit fishery-related businesses and communities. Options for observer service providers are likely to have neutral impacts on fishery-related businesses across alternatives.

Amendment 5 requires limited access vessels to bring all catch aboard the vessel and make it available for sampling by an observer. If catch was slipped before it was sampled by an observer, it would count against a slippage cap and require a released catch affidavit to be completed. Amendment 5 proposed that if a slippage cap was reached, a vessel would be required to return to port immediately following any additional slippage events. However, the proposed measure was disapproved and, instead, this action implements Option 2 and Option 3. Amendment 5 considered four alternatives to the proposed action: The no action alternative, Option 2, Option 3, and Option 4. The selected and non-selected alternatives include various elements of the proposed action, including a requirement to complete a released catch affidavit (Option 2), requirement to bring all catch aboard and make it available to an observer for sampling (Option 3), and catch deduction for slipped catch (Option 4). The no action alternative would not establish slippage prohibitions or slippage caps, but it would maintain the existing sampling requirements for midwater trawl vessels fishing in Groundfish Closed Area I.

Negative impacts to the herring fishery associated with all these alternatives include increased time spent pumping fish aboard the vessel to be sampled by an observer, potential decrease in vessel safety during poor operating conditions, and the administrative burden of completing a released catch affidavit. The penalties associated with slippage vary slightly across the alternatives. Negative impacts associated with the proposed action and Option 4 are likely the greatest. A deduction of 100,000 lb (45 mt) per slippage event in each management area (Option 4) would reduce the harvest available to fishing vessels and a trip termination (proposed action) after a slippage event would result in higher costs for fishing vessels, especially those fishing in offshore areas. The overall impacts of the options that propose catch deductions (Option 4) and trip termination (proposed action) are similar and, in comparison to the no action alternative, are negative. Costs associated with herring fishing trips are high, particularly with the current cost of fuel. Trips terminated prematurely could result in unprofitable trips, leaving not only the owners with debt, but crewmembers without income and negative impacts on fishery-related businesses and communities. Option 4 that proposed a catch deduction was rejected because of the potential negative economic impacts, including loss of revenue from catch deduction and operating cost of returning to port, to vessels. As described previously, the proposed action was disapproved because it was inconsistent with MSA National Standards 2 and 10. Options 2 and 3 were selected because they may improve information on catch in the herring fishery by requiring vessels operators to document when and why slippage occurs (Option 2), and by prohibiting catch from being discarded before it was sampled by an observer (Option 3). The no action alternative was rejected because it was not expected to improve information on catch in the herring fishery.

3. Measures To Address River Herring Interactions

Amendment 5 establishes River Herring Monitoring/Avoidance Areas. Amendment 5 considered two alternatives to the selected action: The no action alternative and a non-selected alternative (establishing River Herring Protection Areas). Relative to the no action alternative, the selected action and the non-selected alternative are expected to have a negative impact on fishery-related businesses and communities due to the costs associated with increased monitoring and/or area closures. The impact of the River Herring Areas would depend on the measures applied to the areas, such as increased monitoring, requirement that catch be brought aboard the vessels for sampling by observers, and closures. The non-selected option, requiring 100-percent observer coverage in the River Herring Monitoring/Avoidance Areas, would likely have the largest negative impact on fishery-related businesses and communities, especially with the industry required to pay $325 per day. The selected option, requiring all catch to be brought aboard, would have a less negative impact than the non-selected option requiring 100-percent observer coverage. The non-selected option implementing either increased monitoring or closures after a river herring catch trigger was reached would have less impact on fishery-related businesses and communities than the proposed action, because the additional requirements would not become effective until the catch trigger is reached. The selected action also includes support for the existing river herring bycatch avoidance program involving SFC, MA DMF, and SMAST. This voluntary program seeks to reduce river herring bycatch with real-time information on river herring distribution and herring fishery encounters. This aspect of the selected action has the potential to mitigate some of the negative impacts of the selected action by developing river herring bycatch avoidance measures in cooperation with the fishing industry. The no action alternative would not have provided for the formal evaluation of the existing river herring bycatch avoidance program, therefore, it was rejected. The non-selected alternative of establishing River Herring Protection Area was rejected because of the potential negative impacts of closing areas to herring fishing and not providing for support for the existing river herring bycatch avoidance program.

4. Measures To Address Midwater Trawl Access to Groundfish Closed Areas

Amendment 5 expands the existing monitoring and sampling requirements for Groundfish Closed Area I to all herring vessels fishing with midwater trawl gear in the Groundfish Closed Areas. Amendment 5 considered three

alternatives to the selected action (Alternative 3/4), the no action alternative (maintain existing sampling requirements for Closed Area I), Alternative 2 (removing existing sampling requirements for Closed Area I), and Alternative 5 (prohibiting fishing with midwater trawl gear in the Closed Areas). Compared to the no action alternative and the non-selected alternatives, the selected action would have the highest negative impact on fishery participants because of the following requirements: (1) 100-percent observer coverage, (2) bringing all catch aboard for sampling, (3) leaving the Closed Areas if catch is released before it has been sampled by an observer, (4) and completing a released catch affidavit. The midwater trawl fleet may avoid the Closed Areas if fishing in the Areas becomes too expensive. If observers are not available, the impact of the proposed action would be similar to Alternative 5, which would close the Closed Areas to midwater trawl vessels. While a portion of the herring revenue has been shown to come from the Closed Areas, that revenue is not expected to completely disappear. Instead, the midwater fleet would likely fish in other areas, this would be a potential additional cost for the fleet if those areas are less productive than the Closed Areas. The selected action is expected to improve catch data on herring vessels fishing in the Closed Areas. The no action alternative and Alternatives 2 and 5 were not selected because they would not have resulted in improved data catch for the Closed Areas by either not increasing sampling requirements in the Closed Areas (no action and Alternative 2) or by prohibiting fishing in the Closed Areas (Alternative 5).

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 will publish one or more guides to assist small entities in complying with the rule, and will designate such publications as ''small entity compliance guides.'' The agency will 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 letter to permit holders that also serves as a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide (i.e., permit holder letter) will be sent to all holders of permits for the herring fishery. The guide and this final rule will be available upon request.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: February 7, 2014.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.2, the definitions for ''Atlantic herring carrier'' and ''Atlantic herring dealer'' are revised and definitions for ''Atlantic herring offload,'' ''Atlantic herring transfer at-sea,'' and ''Slippage in the Atlantic herring fishery'' are added in alphabetical order 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 that has on board a letter of authorization from the Regional Administrator to transport herring caught by another fishing vessel or has declared an Atlantic herring carrier trip via VMS consistent with the requirements at § 648.4(a)(10)(ii).

Atlantic herring dealer means:

(1) Any person who purchases or receives for a commercial purpose other than solely for transport or pumping operations any herring from a vessel issued a Federal Atlantic herring permit, whether offloaded directly from the vessel or from a shore-based pump, for any purpose other than for the purchaser's own use as bait;

(2) Any person owning or operating a processing vessel that receives any Atlantic herring from a vessel issued a Federal Atlantic herring permit whether at sea or in port; or

(3) Any person owning or operating an Atlantic herring carrier that sells Atlantic herring received at sea or in port from a vessel issued a Federal Atlantic herring permit.

Atlantic herring offload means to remove, begin to remove, to pass over the rail, or otherwise take Atlantic herring off of or away from any vessel issued an Atlantic herring permit for sale to either a permitted at-sea Atlantic herring dealer or a permitted land-based Atlantic herring dealer.

* * * * *

Atlantic herring transfer at-sea means a transfer from the hold, deck, codend, or purse seine of a vessel issued an Atlantic herring permit to another vessel for personal use as bait, to an Atlantic herring carrier or at-sea processor, to a permitted transshipment vessel, or to another permitted Atlantic herring vessel. Transfers between vessels engaged in pair trawling are not herring transfers at-sea.

* * * * *

Slippage in the Atlantic herring fishery means catch that is discarded prior to it being brought aboard a vessel issued an Atlantic herring permit and/or prior to making it available for sampling and inspection by a NMFS-approved observer. Slippage includes releasing catch from a codend or seine prior to the completion of pumping the catch aboard and the release of catch from a codend or seine while the codend or seine is in the water. Fish that cannot be pumped and remain in the codend or seine at the end of pumping operations are not considered slippage. Discards that occur after the catch is brought on board and sorted are also not considered slippage.

* * * * *

■ 3. In § 648.4, paragraph (a)(10)(ii) is revised and paragraph (a)(10)(vi) is added to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(10) * * *

(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 or it must have been issued and have on board a herring permit and have declared an Atlantic herring carrier trip via VMS consistent with the requirements at § 648.10(m)(1). Once a vessel declares an Atlantic herring carrier trip via VMS, it is bound to the VMS operating requirements, specified at § 648.10, for the remainder of the fishing year. On Atlantic herring carrier trips under either the letter of authorization or an Atlantic herring carrier VMS trip declaration, an Atlantic herring carrier is exempt from the VMS, IVR, and VTR vessel reporting requirements, as specified in § 648.7 and subpart K of this part, except as

otherwise required by this part. If not declaring an Atlantic herring carrier trip via VMS, an Atlantic herring carrier vessel must request and obtain a letter of authorization from the Regional Administrator, and there is a minimum enrollment period of 7 calendar days for a letter of authorization. Atlantic herring carrier vessels operating under a letter of authorization or an Atlantic herring carrier VMS trip declaration may not conduct fishing activities, except for purposes of transport, or possess any fishing gear on board the vessel capable of catching or processing herring, and they must be used exclusively as an Atlantic herring carrier vessel, and they must carry observers if required by NMFS. While operating under a valid letter of authorization or Atlantic herring carrier VMS trip declaration, such vessels are exempt from any herring possession limits associated with the herring vessel permit categories. Atlantic herring carrier vessels operating under a letter of authorization or an Atlantic herring carrier VMS trip declaration may not possess, transfer, or land any species other than 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 specified at § 648.86(a)(3) and (k).

* * * * *

(vi) *Open access herring permits.* A vessel that has not been issued a limited access Atlantic herring permit may obtain:

(A) An All Areas open access Atlantic herring permit to possess up to 6,600 lb (3 mt) of herring per trip from all herring management areas, limited to one landing per calendar day; and/or

(B) An Areas 2/3 open access Atlantic herring permit to possess up to 20,000 lb (9 mt) of herring per trip from Herring Management Areas 2 and 3, limited to one landing per calendar day, provided the vessel has also been issued a Limited Access Atlantic Mackerel permit, as defined at § 648.4(a)(5)(iii).

* * * * *

■ 4. In § 648.7, paragraphs (b)(2)(i), (b)(3)(i) introductory text, (b)(3)(i)(A), and (b)(3)(i)(C)(*2*) are revised to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(2) * * *

(i) *Atlantic herring owners or operators issued an All Areas open access permit.* The owner or operator of a vessel issued an All Areas opn 9access permit to fish for herring must report catch (retained and discarded) of herring via an IVR system for each week herring was caught, unless exempted by the Regional Administrator. IVR reports are not required for weeks when no herring was caught. The report shall include at least the following information, and any other information required by the Regional Administrator: Vessel identification; week in which herring are caught; management areas fished; and pounds retained and pounds discarded of herring caught in each management area. The IVR reporting week begins on Sunday at 0001 hr (12:01 a.m.) local time and ends Saturday at 2400 hr (12 midnight). Weekly Atlantic herring catch reports must be submitted via the IVR system by midnight each Tuesday, eastern time, 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.

* * * * *

(3) * * *

(i) *Atlantic herring owners or operators issued a limited access permit or Areas 2/3 open access permit.* The owner or operator of a vessel issued a limited access permit or Areas 2/3 open access permit to fish for herring must report catch (retained and discarded) of herring daily via VMS, unless exempted by the Regional Administrator. The report shall include at least the following information, and any other information required by the Regional Administrator: Fishing Vessel Trip Report serial number; month and day herring was caught; pounds retained for each herring management area; and pounds discarded for each herring management area. Daily Atlantic herring VMS catch reports must be submitted in 24-hr intervals for each day and must be submitted by 0900 hr (9:00 a.m.) of the following day. Reports are required even if herring caught that day 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 or Areas 2/3 open access permit must submit a catch report via VMS each day, regardless of how much herring is caught (including days when no herring is caught), unless exempted from this requirement by the Regional Administrator.

* * * * *

(C) * * *

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

* * * * *

■ 5. In § 648.10, paragraphs (b)(8) and (c)(2)(i)(B) are revised, paragraph (c)(2)(i)(C) is removed and reserved, and paragraph (m) is added to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(b) * * *

(8) A vessel issued a limited access herring permit (i.e., All Areas Limited Access Permit, Areas 2 and 3 Limited Access Permit, Incidental Catch Limited Access Permit), or a vessel issued an Areas 2/3 open access herring permit, or a vessel declaring an Atlantic herring carrier trip via VMS.

* * * * *

(c) * * *

(2) * * *

(i) * * *

(B) For vessels fishing with a valid NE multispecies limited access permit, a valid surfclam and ocean quahog permit specified at § 648.4(a)(4), an Atlantic sea scallop limited access permit, or an Atlantic herring permit, the vessel owner signs out of the VMS program for a minimum period of 30 consecutive days by obtaining a valid letter of exemption pursuant to paragraph (c)(2)(ii) of this section, the vessel does not engage in any fisheries until the VMS unit is turned back on, and the vessel complies with all conditions and requirements of said letter; or

* * * * *

(m) *Atlantic herring VMS notification requirements.* (1) A vessel issued a Limited Access Herring Permit or an Areas 2/3 Open Access Herring Permit intending to declare into the herring fishery or a vessel issued an Atlantic herring permit and intending to declare an Atlantic herring carrier trip via VMS must notify NMFS by declaring a herring trip with the appropriate gear code prior to leaving port at the start of each trip in order to harvest, possess, or land herring on that trip.

(2) A vessel issued a Limited Access Herring Permit or an Areas 2/3 Open Access Herring Permit or a vessel that declared an Atlantic herring carrier trip via VMS must notify NMFS Office of Law Enforcement through VMS of the

time and place of offloading at least 6 hr prior to landing or, if fishing ends less than 6 hours before landing, as soon as the vessel stops catching fish. The Regional Administrator may adjust the prior notification minimum time through publication of a document in the **Federal Register** consistent with the Administrative Procedure Act.

■ 6. In § 648.11, paragraph (m) is added to read as follows:

§ 648.11 At-sea sea sampler/observer coverage.

* * * * *

(m) *Atlantic herring observer coverage*—(1) *Pre-trip notification.* At least 48 hr prior to the beginning of any trip on which a vessel may harvest, possess, or land Atlantic herring, a vessel issued a Limited Access Herring Permit or a vessel issued an Areas 2/3 Open Access Herring Permit on a declared herring trip or a vessel issued an All Areas Open Access Herring Permit fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), and herring carriers must provide notice of the following information to NMFS: Vessel name, permit category, and permit number; contact name for coordination of observer deployment; telephone number for contact; the date, time, and port of departure; gear type; target species; and intended area of fishing, including whether the vessel intends to engage in fishing in the Northeast Multispecies Closed Areas, Closed Area I, Closed Area II, Nantucket Lightship Closed Area, Cashes Ledge Closure Area, and Western GOM Closure Area, as defined in § 648.81(a) through (e), respectively, at any point in the trip. Trip notification calls must be made no more than 10 days in advance of each fishing trip. The vessel owner, operator, or manager must notify NMFS of any trip plan changes at least 12 hr prior to vessel departure from port.

(2) When vessels issued limited access herring permits are working cooperatively in the Atlantic herring fishery, including pair trawling, purse seining, and transferring herring at-sea, each vessel must provide to observers, when requested, the estimated weight of each species brought on board and the estimated weight of each species released on each tow.

(3) *Sampling requirements.* In addition to the requirements at § 648.11(d)(1) through (7), an owner or operator of a vessel issued a Limited Access Herring Permit on which a NMFS-approved observers is embarked must provide observers:

(i) A safe sampling station adjacent to the fish deck, including: A safety harness, if footing is compromised and grating systems are high above the deck; a safe method to obtain samples; and a storage space for baskets and sampling gear.

(ii) Reasonable assistance to enable observers to carry out their duties, including but not limited to assistance with: Obtaining and sorting samples; measuring decks, codends, and holding bins; collecting bycatch when requested by the observers; and collecting and carrying baskets of fish when requested by the observers.

(iii) Advance notice when pumping will be starting; when sampling of the catch may begin; and when pumping is coming to an end.

(iv) Visual access to the net, the codend of the net, and the purse seine bunt and any of its contents after pumping has ended and before the pump is removed from the net. On trawl vessels, the codend including any remaining contents must be brought on board, unless bringing the codend on board is not possible. If bringing the codend on board is not possible, the vessel operator must ensure that the observer can see the codend and its contents as clearly as possible before releasing its contents.

(4) *Measures to address slippage.* (i) No vessel issued a limited access Atlantic herring permit and carrying a NMFS-approved observer may release fish from the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea, unless the fish has first been brought on board the vessel and made available for sampling and inspection by the observer, except in the following circumstances:

(A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(B) A mechanical failure precludes bringing some or all of the catch on board the vessel for inspection; or,

(C) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish which can be pumped from the net prior to release.

(ii) Vessels may make test tows without pumping catch on board if the net is re-set without releasing its contents provided that all catch from test tows is available to the observer to sample when the next tow is brought on board for sampling.

(iii) If fish are released prior to being brought on board the vessel due to any of the above exceptions, the vessel operator must complete and sign a Released Catch Affidavit detailing the vessel name and permit number; the VTR serial number; where, when, and for what reason the catch was released; the estimated weight of each species brought on board or released on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

■ 7. In § 648.13, paragraph (f)(2)(i) is revised to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(f) * * *

(2) * * *

(i) A vessel issued an Atlantic herring permit may operate as a herring carrier vessel and receive herring provided it either is issued a carrier vessel letter of authorization and complies with the terms of that authorization, as specified in § 648.4(a)(10)(ii), or it must have been issued and have on board a herring permit and have declared an Atlantic herring carrier trip via VMS, consistent with the requirements at § 648.10(l)(1).

* * * * *

■ 8. In § 648.14, paragraphs (r)(1)(ii)(C) and (r)(1)(vii)(B) are revised; and paragraphs (r)(1)(viii)(C) and (D), and (r)(2)(viii) through (xii) are added to read as follows:

§ 648.14 Prohibitions.

* * * * *

(r) * * *

(1) * * *

(ii) * * *

(C) Possess or land more herring than is allowed by the vessel's Atlantic herring permit or the most restrictive herring possession limit associated with the permits issued to vessels working cooperatively, including vessels pair trawling, purse seining, or transferring herring at-sea.

* * * * *

(vii) * * *

(B) Receive Atlantic herring at sea in or from the EEZ, solely for transport, without an Atlantic herring carrier letter of authorization from the Regional Administrator or having declared an Atlantic herring carrier trip via VMS consistent with the requirements at § 648.4(a)(10)(ii).

* * * * *

(viii) * * *

(C) Fail to declare via VMS into the herring fishery by entering the appropriate herring fishery code and appropriate gear code prior to leaving port at the start of each trip to harvest, possess, or land herring, if a vessel has been issued a Limited Access Herring Permit or issued an Areas 2/3 Open

Access Herring Permit or is intending to act as an Atlantic herring carrier.

(D) Fail to notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to landing or, if fishing ends less than 6 hours before landing, as soon as the vessel stops catching fish, if a vessel has been issued a Limited Access Herring Permit or issued an Areas 2/3 Open Access Herring Permit or has declared an Atlantic herring carrier trip via VMS.

* * * * *

(2) * * *

(viii) Fish with midwater trawl gear in any Northeast Multispecies Closed Area, as defined in § 648.81(a) through (e), without a NMFS-approved observer on board, if the vessel has been issued an Atlantic herring permit.

(ix) Release fish from the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard, as defined in § 600.10 of this chapter, fish at sea before bringing the fish aboard and making it available to the observer for sampling, unless subject to one of the exemptions defined at § 648.202(b)(2), if fishing any part of a tow inside the Northeast Multispecies Closed Areas, as defined at § 648.81(a) through (e).

(x) Fail to immediately leave the Northeast Multispecies Closed Areas and complete, sign, and submit an affidavit as required by § 648.202(b)(2) and (4).

(xi) Release fish from the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard, as defined in § 600.10 of this chapter, fish at sea before bringing the fish aboard and making it available to the observer for sampling, unless subject to one of the exemptions defined at defined at § 648.11(m)(4)(i).

(xii) Fail to complete, sign, and submit an affidavit if fish are released pursuant to the requirements at § 648.11(m)(4)(iii)(A).

* * * * *

■ 9. In § 648.80, paragraph (d)(7)(iii)(B) is revised to read as follows:

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

* * * * *

(d) * * *

(7) * * *

(iii) * * *

(B) Complete and sign a Released Catch Affidavit detailing the vessel name and permit number; the VTR serial number; where, when, and for what reason the catch was released; the total weight of fish caught on that tow; and the weight of fish released (if less than the full tow). A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

* * * * *

■ 10. In § 648.200, paragraph (f)(4) is added and paragraph (g) is revised to read as follows:

§ 648.200 Specifications.

* * * * *

(f) * * *

(4) *River Herring Monitoring/Avoidance Areas.*

(i) January-February River Herring Monitoring/Avoidance Areas. The January-February River Herring Monitoring/Avoidance Areas include 4 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) January-February River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 43°00′ N Lat., 71°00′ W Long.;
(*2*) 43°00′ N Lat., 70°30′ W Long;
(*3*) 42°30′ N Lat., 70°30′ W Long;
(*4*) 42°30′ N Lat., 71°00′ W Long.; and
(*5*) 43°00′ N Lat., 71°00′ W Long.

(B) January-February River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 42°00′ N Lat., 70°00′ W Long.;
(*2*) 42°00′ N Lat., 69°30′ W Long.;
(*3*) 41°30′ N Lat., 69°30′ W Long,;
(*4*) 41°30′ N Lat., 70°00′ W Long.; and
(*5*) 42°00′ N Lat., 70°00′ W Long.

(C) January-February River Herring Monitoring/Avoidance Sub-Area 3.

(*1*) 41°30′ N Lat., 72°00′ W Long.;
(*2*) 41°30′ N Lat., 71°00′ W Long.;
(*3*) 40°30′ N Lat., 71°00′ W Long.;
(*4*) 40°30′ N Lat., 72°30′ W Long.;
(*5*) The southernmost shoreline of Long Island, New York, 72°30′ W Long.;
(*6*) The north-facing shoreline of Long Island, New York, 72°00′ W Long.; and
(*7*) 41°30′ N Lat., 72°00′ W Long.
(*8*) Points 5 and 6 are connected following the coastline of the south fork of eastern Long Island, New York.

(D) January-February River Herring Monitoring/Avoidance Sub-Area 4.

(*1*) 40°30′ N Lat., 74°00′ W Long.;
(*2*) 40°30′ N Lat., 72°30′ W Long.;
(*3*) 40°00′ N Lat., 72°30′ W Long.;
(*4*) 40°00′ N Lat., 72°00′ W Long.;
(*5*) 39°30′ N Lat., 72°00′ W Long.;
(*6*) 39°30′ N Lat., 73°30′ W Long,;
(*7*) 40°00′ N Lat., 73°30′ W Long.;
(*8*) 40°00′ N Lat., 74°00′ W Long.; and
(*9*) 40°30′ N Lat., 74°00′ N Long;
(*10*) Points 8 and 9 are connected following 74°W Long. and the easternmost shoreline of New Jersey, whichever is furthest east.

(ii) March-April River Herring Monitoring/Avoidance Areas. The March-April River Herring Monitoring/Avoidance Areas include 5 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) March-April River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 43°00′ N Lat., 71°00′ W Long.;
(*2*) 43°00′ N Lat., 70°30′ W Long.;
(*3*) 42°30′ N Lat., 70°30′ W Long.;
(*4*) 42°30′ N Lat., 71°00′ W Long.; and
(*5*) 43°00′ N Lat., 71°00′ W Long.

(B) March-April River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 42°00′ N Lat., 70°00′ W Long.;
(*2*) 42°00′ N Lat., 69°30′ W Long.;
(*3*) 41°30′ N Lat., 69°30′ W Long.;
(*4*) 41°30′ N Lat., 70°00′ W Long.; and
(*5*) 42°00′ N Lat., 70°00′ W Long.

(C) March-April River Herring Monitoring/Avoidance Sub-Area 3.

(*1*) 41°00′ N Lat., The easternmost shoreline of Long Island, New York;
(*2*) 41°00′ N Lat., 71°00′ W Long.;
(*3*) 40°30′ N Lat., 71°00′ W Long.;
(*4*) 40°30′ N Lat., 71°30′ W Long.;
(*5*) 40°00′ N Lat., 71°30′ W Long.;
(*6*) 40°00′ N Lat., 72°30′ W Long.;
(*7*) The southernmost shoreline of Long Island, New York, 72°30′ W Long.; and
(*8*) 41°00′ N Lat., The easternmost shoreline of Long Island, New York.
(*9*) Points 7 and 8 are connected following the southern shoreline of Long Island, New York.

(D) March-April River Herring Monitoring/Avoidance Sub-Area 4.

(*1*) 40°00′ N Lat., 73°30′ W Long.;
(*2*) 40°00′ N Lat., 72°30′ W Long.;
(*3*) 39°00′ N Lat., 72°30′ W Long.;
(*4*) 39°00′ N Lat., 73°30′ W Long.; and
(*5*) 40°00′ N Lat., 73°30′ W Long.

(E) March-April River Herring Monitoring/Avoidance Sub-Area 5.

(*1*) 40°30′ N Lat., 74°00′ W Long.;
(*2*) 40°30′ N Lat., 73°30′ W Long.;
(*3*) 40°00′ NLat., 73°30′ W Long.;
(*4*) 40°00′ N Lat., 74°00′ W Long.; and
(*5*) 40°30′ N Lat., 74°00′ W Long.
(*6*) Points 4 and 5 are connected following 74° W Long. and the easternmost shoreline of New Jersey, whichever is furthest east.

(iii) May–June River Herring Monitoring/Avoidance Areas. The May–June River Herring Monitoring/Avoidance Areas include 2 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) May–June River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 44°00′ N Lat., 69°30′ W Long.;
(*2*) 44°00′ N Lat., 69°00′ W Long.;
(*3*) 43°30′ N Lat., 69°00′ W Long.;
(*4*) 43°30′ N Lat., 69°30′ W Long.; and

(*5*) 44°00′ N Lat., 69°30′ W Long.

(B) May–June River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 42°00′ N Lat., 70°00′ W Long.;

(*2*) 42°00′ N Lat., 69°30′ W Long.;

(*3*) 41°30′ N Lat., 69°30′ W Long.;

(*4*) 41°30′ N Lat., 70°00′ W Long.; and

(*5*) 42°00′ N Lat., 70°00′ W Long.

(iv) July–August River Herring Monitoring/Avoidance Areas. The July–August River Herring Monitoring/Avoidance Areas include 2 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) July–August River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 44°00′ N Lat., 70°00′ W Long.;

(*2*) 44°00′ N Lat., 69°30′ W Long.;

(*3*) 43°00′ N Lat., 69°30′ W Long.;

(*4*) 43°00′ N Lat., 70°00′ W Long.; and

(*5*) 44°00′ N Lat., 70°00′ W Long.

(*6*) The boundary from Points 4 to 5 excludes the portions Maquoit and Middle Bays east of 70°00′ W Long.

(B) July–August River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 44°00′ N Lat., 69°00′ W Long.;

(*2*) 44°00′ N Lat., 68°30′ W Long.;

(*3*) 43°30′ N Lat., 68°30′ W Long.;

(*4*) 43°30′ N Lat., 69°00′ W Long.; and

(*5*) 44°00′ N Lat., 69°00′ W Long.

(v) September–October River Herring Monitoring/Avoidance Areas. The September–October River Herring Monitoring/Avoidance Areas include 2 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) September–October River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 44°30′ N Lat., 68°00′ W Long.;

(*2*) 44°30′ N Lat., 67°00′ W Long.;

(*3*) 44°00′ N Lat., 67°00′ W Long.;

(*4*) 44°00′ N Lat., 68°00′ W Long.; and

(*5*) 44°30′ N Lat., 68°00′ W Long.

(B) September–October River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 43°00′ N Lat., 71°00′ W Long.;

(*2*) 43°00′ N Lat., 70°30′ W Long.;

(*3*) 42°30′ N Lat., 70°30′ W Long.;

(*4*) 42°30′ N Lat., 71°00′ W Long.; and

(*5*) 43°00′ N Lat., 71°00′ W Long.

(vi) November–December River Herring Monitoring/Avoidance Areas. The November–December River Herring Monitoring/Avoidance Areas include 2 sub-areas. Each sub-area includes the waters bounded by the coordinates below, connected in the order listed by straight lines unless otherwise noted.

(A) November–December River Herring Monitoring/Avoidance Sub-Area 1.

(*1*) 43°00′ N Lat., 71°00′ W Long.;

(*2*) 43°00′ N Lat., 70°00′ W Long.;

(*3*) 42°00′ N Lat., 70°00′ W Long.;

(*4*) 42°00′ N Lat., 69°30′ W Long.;

(*5*) 41°30′ N Lat., 69°30′ W Long.;

(*6*) 41°30′ N Lat., 70°00′ W Long.;

(*7*) The south-facing shoreline of Cape Cod, MA, 70°00′ W Long.;

(*8*) 42°00′ N Lat., The west-facing shoreline of Cape Cod, MA Long.;

(*9*) 42°00′ N Lat., 70°30′ W Long.;

(*10*) 42°30′ N Lat., 70°30′ W Long.;

(*11*) 42°30′ N Lat., 71°00′ W Long.; and

(*12*) 43°00′ N Lat., 71°00′ W Long.

(*13*) Points 7 and 8 are connected following the coastline of Cape Cod, MA.

(B) November–December River Herring Monitoring/Avoidance Sub-Area 2.

(*1*) 41°30′ N Lat., 72°00′ W Long.;

(*2*) 41°30′ N Lat., 70°00′ W Long.;

(*3*) 40°30′ N Lat., 70°00′ W Long.;

(*4*) 40°30′ N Lat., 70°30′ W Long.;

(*5*) 41°00′ N Lat., 70°30′ W Long.;

(*6*) 41°00′ N Lat., 72°00′ W Long.; and

(*7*) 41°30′ N Lat., 72°00′ W Long.

(g) All aspects of the following measures can be modified through the specifications process:

(1) AMs;

(2) Possession limits;

(3) River Herring Monitoring/Avoidance Areas; and

(4) River herring catch caps.

■ 11. In § 648.202, paragraph (b) is added to read as follows:

§ 648.202 Season and area restrictions.

* * * * *

(b) *Fishing in Northeast Multispecies Closed Areas.* (1) No vessel issued an Atlantic herring permit and fishing with midwater trawl gear, may fish for, possess or land fish in or from the Closed Areas, including Closed Area I, Closed Area II, Nantucket Lightship Closed Area, Cashes Ledge Closure Area, Western GOM Closure Area, as defined in § 648.81(a) through (e), respectively, unless it has declared first its intent to fish in the Closed Areas as required by § 648.11(m)(1), and is carrying onboard a NMFS-approved observer.

(2) No vessel issued an Atlantic herring permit and fishing with midwater trawl gear, when fishing any part of a midwater trawl tow in the Closed Areas, may release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea, unless the fish has first been brought aboard the vessel and made available for sampling and inspection by the observer, except in the following circumstances:

(i) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(ii) A mechanical failure precludes bringing some or all of the catch on board the vessel for inspection; or,

(iii) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish which can be pumped from the net prior to release.

(3) Vessels may make test tows without pumping catch on board if the net is re-set without releasing its contents provided that all catch from test tows is available to the observer to sample when the next tow is brought on board.

(4) If fish are released prior to being brought aboard the vessel due to any of the above exceptions, the vessel operator must:

(i) Stop fishing and immediately exit the Closed Areas. Once the vessel has exited the Closed Areas, it may continue to fish, but may not fish inside the Closed Areas for the remainder of that trip.

(ii) Complete and sign a Released Catch Affidavit detailing the vessel name and permit number; the VTR serial number; where, when, and for what reason the catch was released; the estimated weight of each species brought on board or released on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

■ 12. In § 648.204, paragraph (b) is revised to read as follows:

§ 648.204 Possession restrictions.

* * * * *

(b) Each vessel working cooperatively in the herring fishery, including vessels pair trawling, purse seining, and transferring herring at-sea, must be issued a valid herring permit to fish for, possess, or land Atlantic herring and are subject to the most restrictive herring possession limit associated with the permits issued to vessels working cooperatively.

■ 13. Section 648.205 is revised to read as follows:

§ 648.205 VMS requirements.

The owner or operator of any limited access herring vessel or vessel issued an Areas 2/3 Open Access Permit, 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. (See § 648.10(m) for VMS notification requirements.)

■ 14. In § 648.206, paragraphs (b)(30) and (b)(31) are revised, and paragraphs (b)(32) through (37) are added to read as follows:

§ 648.206 Framework provisions.

* * * * *

(b) * * *

(30) AMs;

(31) Changes to vessel trip notification and declaration requirements;

(32) Adjustments to measures to address slippage, including sampling requirements;

(33) River Herring Monitoring/Avoidance Areas;

(34) Provisions for river herring catch avoidance program, including adjustments to the mechanism and process for tracking fleet activity, reporting catch events, compiling data, and notifying the fleet of changes to the area(s); the definition/duration of 'test tows,' if test tows would be utilized to determine the extent of river herring catch in a particular area(s); the threshold for river herring catch that would trigger the need for vessels to be alerted and move out of the area(s); the distance that vessels would be required to move from the area(s); and the time that vessels would be required to remain out of the area(s).

(35) Changes to criteria/provisions for access to Northeast Multispecies Closed Areas;

(36) River herring catch caps; and

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

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