

September 24, 2018

Via Electronic Mail

Dr. John F. Quinn, Chairman
New England Fishery Management Council
50 Water Street, Mill #2
Newburyport, MA 01950

RE: Final Action on Amendment 8 to the Atlantic Herring Fishery Management Plan

Dear Dr. Quinn:

This letter is submitted on behalf of the Sustainable Fisheries Coalition (“SFC”) in relation to the Herring Committee report at next week’s New England Fishery Management Council meeting. The SFC is comprised of the F/V Darana R, Lund’s Fisheries, Inc., Seafreeze, Inc., The Town Dock, Irish Venture, Cape Seafoods, Western Sea Fishing Co., Ocean Spray Partnership, and O’Hara Corporation. These entities operate midwater trawl (“MWT”) vessels, small mesh bottom trawlers, and purse seine vessels which harvest the majority of the total allowable catch of Atlantic herring, as well as shoreside facilities which process and sell the majority of herring for bait and food. They serve fishing communities from southern New Jersey to mid-coast Maine.

The SFC supports the primary recommendations of the Herring Advisory Panel (“AP”). Those include Alternative 1 for the Acceptable Biological Catch (“ABC”) control rule with annual application for the next specifications package. SFC, however, does not agree that either the constant catch or annual application of the rule should be chosen now for all time as part of Amendment 8. Rather, the Council should maintain the status quo and decide whether to have fixed or varying catches for each specifications package.

Alternative 1 performs as well or better on most metrics of concern to the Council and public, including impacts on predator species, particularly when analyzed under models that assume no assessment bias. This is the only realistic assumption, as bias is accounted for when identified. Alternative 1 also provides the highest amount of what will be a very limited catch over at least the next three years. This will help mitigate adverse impacts on herring fishing and lobster-dependent communities while still allowing the environmentally-depleted herring stock to grow.

As to the “localized depletion/user conflict” alternatives, SFC agrees with the AP that Alternative 9 is the only viable option. This would lift the restriction on fishing in Area 1B from January 1 through April, a time when few other marine resource users are present in this area. Thus, Alternative 9 provides the opportunity for greater temporal separation between users, while increasing flexibility for MWT operations. It is “win/win” alternative.

SFC does not support any of the so-called “buffer zone” (or, more accurately, save for Alternative 6, MWT exclusion zone) alternatives, even as it recognizes some have less impact on the herring and mackerel fisheries than others. As explained herein, SFC does not believe any of these measures can be justified under the Magnuson-Stevens Fishery Conservation and Management Act’s (“MSA”) National Standards. As a legal matter, the National Marine Fisheries Service (“NMFS”) cannot approve conservation and management measures that are inconsistent with these standards.

National Standard 1 outlines the primary legal objectives for conserving and managing the Atlantic herring resource: to prevent overfishing and achieve optimum yield (“OY”) “for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). As part of determining the appropriate level of OY, the Council may consider herring’s role as forage in the ecosystem. However, and importantly, Amendment 8 achieves that objective through the ABC control rule. In other words, the control rule itself is the means by which herring’s role as forage is considered and provided for.

Thus, the important legal question is whether the herring management plan allows the fishery to actually “achieve” the amount of yield the Council allocates. To varying degrees, the exclusion zone alternatives make it difficult to impossible to harvest not only herring OY but also OY in the Atlantic mackerel fishery, in contravention of law. The reason MWTs operate in inshore areas at certain times of the year is because that is where the fish can be found. Without access, at least some portion of yield from the herring and mackerel fisheries determined to be sustainable will remain uncaught.

Further, the MWT exclusion zone alternatives effectively manage herring for the benefit of non-herring fisheries and other non-consumptive commercial uses (*e.g.*, whale watching). That is not a legitimate MSA objective. Any alternative selected to address localized depletion/user conflict concerns must be shown to be consistent with all the National Standards for conservation and management. None of the alternatives that include an exclusion zone can meet this test.

Below are the other relevant standards and analysis of the inconsistency of these measures:

National Standard 2: “Conservation and management measures shall be based upon the best scientific information available.”

- The best available scientific information shows that there is no basis for distinguishing herring removals based on gear type. The Herring Plan Development Team (“PDT”) has consistently counseled that “depletion is depletion.” In fact, purse seines are more efficient at removing a higher percentage of fish from a school than are MWTs. Nor does the Draft Environmental Impact Statement (“DEIS”) for Amendment 8 provide a scientific basis for closing areas to MWTs. Analysis shows significant and demonstrable costs on this sector, but can identify no tangible benefits from implementation of the buffer zones to others. In fact, analysis shows minimal overlap between the various fisheries. There is no analytical basis upon which to determine that any MWT exclusion will lead to gains in other fisheries and non-consumptive uses that will even come close to outweighing impacts on herring and mackerel fishermen, lobstermen, and their communities.

National Standard 4: “Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to *allocate or assign fishing privileges among various United States fishermen*, such allocation shall be (A) *fair and equitable to all such fishermen*; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.”

- Both the goal and effect of the exclusion zones is “to allocate and assign fishing privileges” away from MWT trawlers to other herring gear types and marine uses. The DEIS contains no analysis or scientific information that would support an argument that such allocation or assignment is either fair or equitable. Closed areas have very real and identifiable costs, including a high likelihood of not achieving the full quota allocation in some management areas, harming herring and mackerel fishermen, freezer plants and other existing infrastructure, lobstermen, and their communities. These are not outweighed by benefits, quantifiable or qualitative, on the other side. More importantly, no compromise being requested from other fishermen or users, as has been the case in other (more tangible) conflicts, such as between mobile and fixed gear fisheries, which have been addressed by the Council. A one-sided “solution” cannot meet this Standard.

National Standard 5: “Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.”

- These alternatives have no identified conservation purpose. In effect, their effective purpose is to effectuate an economic allocation to non-MWT herring gear, even though many areas MWTs operate cannot be fished by purse seine, or nearly as efficiently by bottom-trawls. These exclusion zones bar use of the most efficient and environmentally-benign gear, used on the west coast of the U.S. and throughout Europe, with no countervailing benefits.

National Standard 7: “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”

- The exclusion zone alternatives burden the MWT fleet with costs unnecessary to meet conservation and management goals. Analysis shows that trip costs double for those occurring beyond 12 miles from shore.

National Standard 8: “Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.”

- The DEIS states: “[New closures] could have a negative impact on the *Historical Dependence on and Participation* in the affected fisheries.” DEIS, at 398. Certainly, these measures will have concrete adverse impacts of varying degrees (depending on the

particular alternative) on MWT communities. They are additive to the many existing measures, such as river herring and haddock catch caps, observer requirements in the year-round groundfish closed areas, Area 1A seasonal closures, and others. They also adversely impact lobster- and mackerel-dependent communities. With no scientific conservation or management rationale, these historical fishing ports are harmed. The ability of the most herring-dependent communities to participate in the fishery may be completely eliminated.

National Standard 10: “Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”

- All the exclusion options push some MWT fishing effort further offshore than in absence of the restriction. They will also increase the length of some trips. The more extreme the measure, the greater these impacts. This means vessels, some as small as 82-feet, will be exposed to harsher sea conditions further offshore and be at sea longer than otherwise necessary. This puts human life at greater risk without providing conservation benefits.

SFC is cognizant of the passion for this issue of those who advocate for greater restrictions on (if not outright elimination of) the MWT fleet. Its participants desire to minimize adverse interactions, but must also make a sustainable living in an increasingly challenging and costly regulatory environment. That said, any decision to impose further restrictions on this sector must be based on a reasoned analysis of scientific information demonstrating real and meaningful net benefits to the Nation. NMFS cannot approve a measure just because it satisfies a passionate and vocal constituency.

We believe the best way forward is for the Council to adopt Alternative 9, which provides the opportunity for temporal separation of these groups on the water. That, combined with the very low quotas that will be in effect for the near future should minimize perceived conflicts. During this period, SFC would urge the Council to help facilitate dialogue among the parties to see if more discrete accommodations can be made, either in a regulatory or non-regulatory context. SFC would be pleased to engage in structured and civil dialogue.

We appreciate your attention to these comments. I and other SFC participants will be in attendance at the meeting next week to answer any questions you may have.

Sincerely,

/s/ Shaun M. Gehan

Shaun M. Gehan

Counsel to the Sustainable Fisheries Coalition

cc: Michael Pentony, Regional Director, NMFS Greater Atlantic Regional Office
 Peter Christopher, Acting Assistant Regional Administrator for Sustainable Fisheries,
 GARFO
 Members of the New England Fishery Management Council