



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

NOV - 7 2013

Richard B. Robins, Chairman
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Dear Rick:

On November 7, 2013, NOAA's National Marine Fisheries Service, on behalf of the Secretary of Commerce (Secretary), partially approved Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP).

A notice of availability (NOA) soliciting public comments on Amendment 14 was published on August 12, 2013, with a comment period ending October 11, 2013. A proposed rule was published on August 29, 2013, with the same comment period end date. A total of 15 comment letters (several of them form letters with thousands of signatures) were received and considered in making the decision to partially approve Amendment 14, as described below. A summary of the comments received, and NMFS's responses to those comments, will be published in the final rule.

Amendment 14 will improve the catch monitoring program for the mackerel and longfin squid fisheries and address river herring and shad bycatch issues. It contains many measures that will improve management of the MSB fisheries and that can be administered by NMFS. We support improvements to fishery dependent data collections, be it through increasing reporting requirements or expanding the at-sea monitoring of the herring fishery. We also share the Council's concern for reducing river herring and shad bycatch.

However, a few measures in Amendment 14 lacked adequate rationale or development by the Council, and we had utility and legal concerns about the implementation of these measures. These measures are: The dealer reporting requirement; the slippage cap that, if achieved, would require vessels to return to port; and the increased observer coverage requirements for the mackerel fishery, coupled with a limited industry contribution of \$325 per day toward observer costs.

We expressed our concerns about the implementation of these measures throughout the development of this amendment and articulated them in our comment letter (dated June 5, 2012) on the draft EIS. The proposed rule for Amendment 14 also described our concerns about these measures' consistency with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law. In addition, the proposed rule detailed our July 18, 2013, disapproval of similar measures in the New England Fishery Management Council's Amendment 5 to the Atlantic Herring FMP. While some of the measures disapproved in Amendment 5, in particular the slippage cap and the observer coverage measures, were slightly different from those proposed



in Amendment 14, the differences presented in Amendment 14 did not resolve the concerns that ultimately led to our Amendment 5 partial approval. Therefore, after review of public comment on the NOA and proposed rule, I partially approved measures in Amendment 14 on behalf of the Secretary.

Amendment 14 contains the following measures that improve MSB management and that I approved:

- Instituting weekly VTR for all MSB permits to facilitate quota monitoring and cross-checking with other data sources;
- Requiring 48-hour pre-trip notification to retain more than 20,000 lb of mackerel to facilitate observer placement;
- Requiring VMS and daily catch reporting via VMS for limited access mackerel vessels to facilitate monitoring and cross checking with other data sources;
- Requiring VMS and daily catch reporting via VMS for longfin squid/butterfish moratorium vessels to facilitate monitoring and cross checking with other data sources;
- Requiring 6-hour pre-landing notification via VMS to land over 20,000 lb mackerel to facilitate monitoring, enforcement, and portside monitoring;
- Expanding vessel requirements related to at-sea observer sampling to help ensure safe sampling and improve data quality;
- Prohibiting slippage on limited access mackerel and longfin squid trips, 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;
- Evaluating the joint Sustainable Fisheries Coalition/University of Massachusetts School for Marine Science and Technology/Massachusetts Department of Marine Fisheries bycatch avoidance program investigation of providing real-time, cost-effective information on river herring distribution and fishery encounters in River Herring Monitoring/Avoidance Areas;
- Implementing a mortality cap for river herring and shad in the mackerel fishery; and
- Establishing the ability to consider a river herring and shad catch cap, and time/area management to mitigate bycatch of river herring and shad in a future framework.

The following sections detail our concerns about the other measures proposed by the Council in Amendment 14, provides rationale for my disapproval of these measures, and offers recommendations on how to address the approvability concerns in future actions, should the Mid-Atlantic (Council) wish to do so.

Increased Observer Coverage Requirements

Amendment 14 contains a measure that recommends 100-percent observer coverage on midwater mackerel and Tier 1 small-mesh bottom trawl vessels, 50-percent on Tier 2 small mesh bottom trawl vessels, and 25-percent on Tier 3 small mesh bottom trawl mackerel vessels. The 100-percent observer requirement is coupled with an industry contribution of \$325 per day.

New measures developed for an FMP that have the potential for substantial costs, like increased observer coverage, need a funding source. The total costs for observer coverage include two types of costs: (1) Observer monitoring costs (e.g., observer salary and travel); and (2) NMFS

support and infrastructure costs (e.g., observer training, data processing, and infrastructure). While Amendment 14 proposes an industry contribution of \$325 per day to help cover observer monitoring costs, the total observer monitoring costs for the mackerel fishery are higher than \$325 per day. The Department of Commerce (DOC) Office of General Counsel has advised that cost-sharing violates the Anti-Deficiency Act. Based on DOC's advice, there is no current legal mechanism to allow cost-sharing of at-sea costs between NMFS and the industry. Further, budget uncertainties prevent NMFS from being able to commit to fully funding the cost of increased observer coverage in the mackerel fishery, or even commit to the increased support and infrastructure costs that would result under a fully industry-funded program. Because Amendment 14 does not identify a funding source to cover all of the increased costs of observer coverage, the measure is not sufficiently developed to approve at this time. Therefore, I disapproved the increased observer coverage recommendations.

The same measure that specifies 100-percent observer coverage coupled with a \$325 contribution by the industry also specifies that: (1) The increased observer coverage requirement would be re-evaluated by the Council 2 years after implementation; and (2) existing observer service provider requirements would apply to the mackerel fishery. Because these additional measures appear inseparable from the recommended increases in observer coverage, I had to also disapprove these measures.

Earlier this year, an FMAT/PDT was formed to identify a workable, legal mechanism to allow for industry-funded observer coverage in the mackerel fishery, which 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, Northeast Fisheries Science Center, NOAA General Counsel Northeast, and NMFS Headquarters staff.

As noted in our September 20, 2013, letter to both the Mid-Atlantic and New England Councils, the NMFS working group has 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 Standardized Bycatch Reporting Methodology (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 to make it an available tool, should the Council want to use it, and must be accompanied by a regional prioritization of the distribution of annual NMFS support and infrastructure funding. We are pleased that the Council is supportive of NMFS taking the technical lead on an omnibus amendment to establish the administrative mechanism to allow for industry-funded observer coverage in Mid-Atlantic and New England FMPs, and, if the Council desires, we are willing to include observer coverage targets for limited access mackerel vessels using midwater and small-mesh bottom trawls in the omnibus action. We will present an initial range of alternatives for the omnibus amendment at the Council's February meeting.

Measures to Minimize Slippage

Amendment 14 contains a measure that would require limited access mackerel and longfin squid vessels to bring all catch aboard the vessel and make it available for sampling by an observer. If catch is discarded before it has been made available to the observer, that catch is considered slippage.

Amendment 14 would allow catch to be slipped if: (1) Bringing catch aboard compromises the safety of the vessel, (2) mechanical failure prevents the catch from being brought aboard, or (3) spiny dogfish prevents the catch from being pumped aboard. If catch is slipped, the vessel operator would be required to complete a released catch affidavit detailing why catch was slipped and the estimated amount of slipped catch. Additionally, once there have been 10 un-exempted slippage events fleetwide by limited access mackerel vessels carrying an observer, vessels that subsequently slip catch while carrying an observer would be required to return to port.

We are concerned about the rationale for, and legality of, the slippage caps. The threshold for triggering a slippage cap (10 slippage events fleetwide) is arbitrary and does not have a strong supporting analysis in the EIS. The EIS noted that, while documented slippage events are relatively infrequent (an average of 15 unobserved hauls per year from 2006-2010), increases above the estimated 15 unobserved hauls per year could compromise observer data because large quantities of fish can be caught in a single tow. However, the EIS does not provide sufficient rationale for why it is biologically or operationally acceptable to allow the fleet 10 un-exempted slippage events prior to triggering the trip termination requirement, as opposed to any other number of slippage events.

Once a slippage cap has been met, vessels that slip catch with an observer aboard for reasons other than safety, mechanical failure, or spiny dogfish in the pump 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. For these reasons, we believe the slippage caps are inconsistent with the Administrative Procedure Act and National Standard 2, and had to be disapproved.

The requirements to bring all catch aboard and make it available for sampling by an observer and complete a released catch affidavit if catch is slipped appear separable from the slippage cap. Prohibiting slippage would improve the quality of observer catch data, especially data on bycatch species encountered in the mackerel and longfin squid fisheries, and the released catch affidavit would help provide insight into when and why slippage occurs. Therefore, I have approved the prohibition on slippage, except when safety, mechanical failure, or spiny dogfish catch would prevent the catch from being brought aboard the vessel, and the requirement that a released catch affidavit be completed for slipped catch.

If the Council wants to revise the slippage cap, the revisions would need to address issues concerning 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 the concern we had with the equitable application of the slippage cap among those who contribute to reaching the cap, as well as the concern we had with the basis for triggering the cap.

The consequence of slipped catch could be a requirement to either return to port, or leave the statistical area where the slippage event occurred. The measure proposed in Amendment 14 exempted slippage for safety, mechanical, or excess spiny dogfish catch from consequence, except that the vessel would still be required to complete a released catch affidavit. We recommend that the same exemptions should apply if the Council wishes to consider a measure that would require any vessel that slipped to return to port or leave the statistical area.

Reporting Requirements for Dealers

Amendment 14 contains a requirement that MSB dealers must accurately weigh all fish related to large mackerel and longfin squid landings and, if catch is not sorted by species, dealers would be required to document how they estimated relative species composition.

Dealers currently report the weight of fish, obtained by scale weights and/or volumetric estimates. Because this measure does not specify the methods dealers must use to determine weight and allows volumetric estimates, it is not expected to change dealer behavior and, therefore, is not expected to improve the accuracy of catch weights reported by dealers. Additionally, a qualitative description of how relative species composition is estimated cannot be incorporated into catch monitoring because we must use the weights reported by the dealers, regardless of the methods used to determine weights. Without standards for estimating species composition, we would be unable to evaluate the sufficiency of the information submitted. If this measure were a requirement, and dealers did not document how they estimated relative species composition, it would become a compliance issue and could affect future permit issuance.

For these reasons, we believe this measure does not comply with National Standard 7's requirement to minimize costs and avoid unnecessary duplication, and the Paperwork Reduction Act's requirement for the utility of the measure to outweigh the additional reporting and administrative burden on the dealers. Therefore, I have disapproved the dealer reporting requirement. Revisions to the dealer reporting requirement would need to address our concerns with the accuracy and utility of the information reported, which could be addressed in several ways.

For example, the Council could select Alternative 2b in Amendment 14 (requiring vessel owners to review and validate data for their vessels in Fish-on-Line). 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. 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 reporting and monitoring of landings data

may be insufficient to precisely estimate river herring and shad interactions, and revise the measure to better address that concern. This could take the form of a portside sampling program to provide third-party verification of landings.

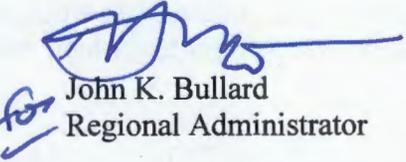
The sub-option requiring dealers to document how they estimate the composition of catch was intended to gather information on methods used by dealers to estimate species composition. Another way to obtain that type of information would be to gather it as part of a data collection program that would update community profiles for Northeast fisheries.

If the Council chooses to revise any of the measures disapproved in Amendment 14, my staff will work with the Council to design effective measures that help improve management of the MSB fisheries. Revised measures could be addressed in upcoming actions. Whether that action would be an amendment or framework would depend on the scope of the revised measure.

I realize the Council may want to address the disapproved measures as soon as possible. The Council will need to weigh the benefits of revising the disapproved measure against the need for putting time and resources towards completing other MSB priorities for 2014. To this point, I recommend that the omnibus amendment led by NMFS address industry-funded observer coverage for the mackerel fishery, and that the slippage cap be revised as part of an upcoming Council action. This would allow these measures to be addressed relatively quickly. Revisions to dealer reporting requirements may take longer to develop, especially if the Council chooses to consider a program that would provide third-party verification of landings, and could be included in a future Council action.

I appreciate the hard work that you and your staff put into developing Amendment 14. While several measures were disapproved, this amendment still does a lot to improve management of the MSB fisheries. I look forward to working with you and your staff on other ongoing improvements to management of the MSB fisheries. Please contact me if you have any questions.

Sincerely,


John K. Bullard
Regional Administrator