

This action is taken under 50 CFR 622.41(b)(2) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule because such procedures are unnecessary. The AMs state that NMFS will file a notification with the Office of the Federal Register to close the recreational sector for Gulf gray triggerfish for the remainder of the fishing year if recreational landings reach or are projected to reach the recreational ACT specified in 50 CFR 622.41(b)(2)(iii). All that remains is to notify the public of the reduced recreational fishing season for gray triggerfish for the remainder of the fishing year.

Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect the gray triggerfish resource. Any delay in the closure of the recreational sector could result in the recreational ACL for gray triggerfish being exceeded, which, in turn, would trigger an additional AM for gray triggerfish. The AM states that if recreational landings exceed the ACL, and gray triggerfish is overfished, NMFS will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the ACL and the ACT for that following fishing year by the amount of the ACL overage in the prior fishing year. Reducing the ACL and ACT the following fishing season could be disruptive to business plans and would provide less flexibility to fishermen for when they could harvest the ACL.

For the aforementioned reasons, the Assistant Administrator, NMFS, also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: October 1, 2013.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 130408348-3835-02]

RIN 0648-BD17

#### Fisheries of the Northeastern United States; Atlantic Herring Fishery; Framework Adjustment 2 and Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing Framework Adjustment 2 to the Atlantic Herring Fishery Management Plan (Framework 2) and the 2013–2015 fishery specifications for the Atlantic herring fishery (2013–2015 specifications). Framework 2 allows the New England Fishery Management Council (Council) to split annual catch limits seasonally for the four Atlantic herring management areas, and the carryover of unharvested catch, up to 10 percent for each area's annual catch limit. The specifications set catch specifications for the herring fishery for the 2013–2015 fishing years and establish seasonal splits for management areas 1A and 1B as recommended to NMFS by the Council.

**DATES:** Effective September 30, 2014.

**ADDRESSES:** Copies of supporting documents used by the Council, including the Environmental Assessment (EA) 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, Mill 2, Newburyport, MA 01950, telephone (978) 465-0492. The EA/RIR/IRFA is also accessible via the Internet at <http://www.nero.nmfs.gov>.

**FOR FURTHER INFORMATION CONTACT:** Carrie Nordeen, Fishery Policy Analyst, (978) 281-9272, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

NMFS published a proposed rule for Framework 2 and the 2013–2015 specifications (Framework 2/2013–2015 Specifications) on August 2, 2013 (78 FR 46897). The comment period on the proposed rule ended on September 3, 2013. NMFS received five comments, which are summarized in the

“Comments and Responses” section of this final rule.

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) for herring appear at 50 CFR part 648, subpart K. The regulations at § 648.200 require the Council to recommend herring specifications for NMFS's review and proposal in the **Federal Register**, including the overfishing limit (OFL), acceptable biological catch (ABC), annual catch limit (ACL), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), U.S. at-sea processing (USAP), border transfer (BT), the sub-ACL for each management area, including seasonal periods as allowed by § 648.201(d) and modifications to sub-ACLs as allowed by § 648.201(f), and the amount to be set aside for the research set aside (RSA) (3 percent of the sub-ACL from any management area) for up to 3 years.

The 2013–2015 herring specifications are based on the provisions currently in the FMP, and provide the necessary elements to comply with the ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This action also includes measures in Framework 2 to the FMP.

#### Framework 2 Measures

The regulations implementing Framework 2 allow seasonal splits of sub-ACLs for all herring management areas through the specifications process. The FMP already authorizes seasonal splits of the Area 1A sub-ACL. The sub-ACL splitting under Framework 2 allows seasonal control of fishing effort and harvest in management areas by specifying the percent of the sub-ACL available for harvest. The fishing year (FY) 2013–2015 specifications include the following seasonal splits:

Area 1A: 100 percent of the sub-ACL available for harvest during June–December (none of the sub-ACL is available for harvest during January through May); and Area 1B: 100 percent of the sub-ACL available for harvest during May–December (none of the sub-ACL is available for harvest during January through April).

Framework 2 also allows the carryover of unharvested catch, up to 10 percent of each sub-ACL, provided the stock-wide catch did not exceed the stock-wide ACL. This measure allows a sub-ACL increase for a management area, but it does not allow a corresponding increase to the stock-wide ACL. Overall harvest would therefore remain constrained by the stock-wide ACL. Consequently, the fleet would be required to forego harvest in

one or more management areas in order to harvest the carryover available in an area. This measure maintains the management uncertainty buffer between ABC and the stock-wide ACL, while giving the fleet some flexibility in choosing where to harvest the stock-wide ACL.

Under this measure, NMFS will allocate carryover in the second year after the applicable year ends. The interim year is necessary because the herring fishery can be active up to the end of December, and NMFS cannot finalize herring catch data until about 6 months after the end of the FY. Therefore, NMFS will apply carryover from FY 2013 in FY 2015, for example.

### 2013–2015 Herring Specifications

The Gulf of Maine-Georges Bank herring stock complex is a transboundary stock that is found in both U.S. and Canadian waters. The 2012 Stock Assessment Review Committee of the 54th Northeast Regional Stock Assessment Workshop estimated the 2011 herring biomass at 517,930 mt (biomass supporting maximum sustainable yield ( $B_{MSY}$ ) = 157,000 mt) and the 2011 fishing mortality rate ( $F$ ) at 0.14 ( $F_{MSY}$  0.27). Because the herring stock complex is above  $\frac{1}{2} B_{MSY}$  and the  $F$  is below  $F_{MSY}$ , the stock is not overfished and overfishing is not occurring. This assessment increased natural mortality rates for 1996–2011 by 50 percent to resolve a retrospective pattern and ensure rates take into account estimated consumption of herring in the ecosystem.

On March 9, 2012, in *Flaherty v. Bryson*, 850 F. Supp.2d 38 (D.D.C. 2013) U.S. District Court for the District of Columbia (Court) found that the EA for Amendment 4 to the FMP did not analyze a reasonable range of alternatives for an ABC control rule or AMs. On August 2, 2012, the Court ordered NMFS to recommend that the Council consider an adequate range of alternatives for AMs and an ABC control rule based on the best available science for setting ABC control rules for herring and other forage fish. Therefore, in an August 31, 2012, letter to the Council, NMFS strongly recommended that the Council analyze a range of alternatives for an ABC control rule that consider Atlantic herring's role as forage and AMs as part of the 2013–2015 herring specifications.

On September 12, 2012, the Council's Scientific and Statistical Committee (SSC) considered various approaches for an ABC control rule. The SSC considered the ABC approaches examined by the Herring Plan

Development Team (PDT), including considering the forage aspects of Atlantic herring, discussed other possible approaches, and agreed to support both PDT approaches as alternatives for ABC and the ABC control rule for 2013–2015 as the most appropriate for management at this time. The first approach sets ABC for all 3 years based on 75 percent  $F_{MSY}$ . The second approach sets ABC at the same level for all 3 years, which has a no greater than 50-percent probability of exceeding  $F_{MSY}$  in 2015. The SSC concluded that these two approaches for setting ABC are nearly equivalent from a biological perspective, as they are expected to produce similar spawning stock biomass values for the herring stock in 2015. The SSC also determined that the two control rules would likely meet ecosystem-based targets for a forage species because they incorporated a major advance in accounting for natural mortality in the herring stock, which takes into account herring's role as forage in the ecosystem. The Council's Herring Oversight Committee met on September 20, 2012, to discuss the SSC's ABC and control rule recommendations, and to develop additional herring specifications (e.g., ACL, OY, RSA) based on that advice.

At its September 26, 2012, meeting, the Council considered the SSC's recommendations for an ABC control rule. Based on advice from its scientific advisors, the SSC, the Council selected the "constant catch" ABC control rule as its preferred alternative. This rule provides consistency and potential stability to fishing industry operations and an opportunity for providing a steady supply of catch to the market. At the same time, it maintains a low probability of overfishing or the stock being overfished.

Following the Council meeting, Earthjustice (representing the plaintiffs in the litigation on Amendment 4) sent a letter to the Council commenting that the Council's consideration of ABC control rules is not consistent with the Court order to evaluate an ABC control rule for forage fish. Earthjustice provided two additional forage fish ABC control rules for the Council to consider: One based on the Lenfest Forage Fish Report; and the other used by the Pacific Fishery Management Council for coastal pelagic species. As a result, the Herring PDT reviewed these two additional forage fish ABC control rules at its October 18, 2012, meeting. After considering and discussing these ABC control rules, the Herring PDT recommended to the Council that: (1) These two additional ABC control rules may not be appropriate for herring; and

(2) the SSC should evaluate the applicability of these control rules for herring at its November 19, 2012, meeting, both for the 2013–2015 specifications and for long-term management.

The Council also requested that the SSC evaluate the two additional ABC control rules recommended by Earthjustice. In considering the Lenfest and Pacific Council control rules in preparation for the SSC review, the Herring PDT expressed concern about adopting either of these control rules in the 2013–2015 specifications package. The Herring PDT stated that either would represent a significant change in management strategy, which may not be consistent with the Council's management regime or the underlying stock assessment advice, and that adopting such a rule would require consideration of a number of factors not appropriate to the specifications process (i.e., such a potentially significant deviation from the current management regime would be better considered in a Council amendment to the FMP).

The SSC carefully considered the additional two control rules it was asked to review, and concluded that forage fish control rules based on the Lenfest and Pacific Council models would yield short-term biomass projections for 2013–2015 that are very similar to their previous ABC control rule recommendations (i.e., 75 percent of  $F_{MSY}$  and constant catch control rules) (see Appendix II of the EA for the specifications). The SSC concluded that the 75-percent and constant catch control rules that it had already recommended to the Council are consistent with the intent of control rules recommended by Earth Justice. According to the SSC, the recommended control rules acknowledge that herring is an important forage species, take that into account, and allow for sufficient biomass through 2015 to support ecosystem considerations, including herring's forage role in the ecosystem. The SSC also noted that there are substantial differences between the Lenfest and Pacific Council control rules, and that considerably more analysis would be necessary to determine the suitability of applying forage fish control rules like the Lenfest and Pacific Council approaches to Atlantic herring in the future. The SSC concluded that it did not have sufficient information to evaluate the performance of the additional control rules for issues including predator-prey models, the relationship between MSY and changing natural mortality rates due to changes in consumption, and unintended

consequences of treating forage species differently than other managed species. As a result, the SSC recommended to the Council that control rules for forage species such as the Lenfest and Pacific pelagics control rules should receive further evaluation prior to any potential implementation as a long-term strategy for managing herring. Based on the SSC's recommendations, the Council determined that the 75-percent and constant catch control rules adequately account for herring's role as forage (and would yield similar results to short-term application of specific forage fish control rules) and that consideration of other approaches for the long term will require additional analyses of the appropriate multiple reference points, that should be evaluated in a full Council amendment to the FMP. Section 2.2.9.1 "Additional Alternatives for ABC Control Rule" in the EA fully explains the Council's rationale for considering and rejecting these forage fish control rule alternatives as part of the specifications. NMFS agrees that the Council's control rule for this action, which is based on the SSC's scientific advice, is the most appropriate approach at this time. NMFS also agrees with the Council's conclusions that the Council should further consider a more specific forage fish control rule, including a consideration of the implications of forage control rules on other components of the ecosystem and on the biological reference points for herring. NMFS has urged the Council to consider this in the context of an amendment to the FMP to potentially be used when developing the 2016–2018 specifications.

The 2013–2015 specifications also address the Court order relative to AMs for the herring fishery. Due to some recent challenges monitoring the herring fishery, NMFS provided specific AM recommendations to the Council in a letter dated January 23, 2013. Herring catch exceeded one or more management area sub-ACLs in 2010 and 2011, and preliminary data indicate that 2012 catch exceeded three management area sub-ACLs, as well as the stock-wide ACL. This reflects in the challenge of monitoring this high volume fishery, in which the fleet catches and lands large volumes of fish in a very short period of time. NMFS currently monitors herring catch using a combination of daily electronic vessel reports, weekly vessel trip reports, and weekly dealer reports. Data errors in catch reports, late reporting, or non-compliance have adversely affected monitoring the fishery in real-time.

As a result, in a letter dated January 23, 2013, NMFS recommended that the

Council revise its management area closure measure to be more precautionary (close the directed fishery when 92 percent, rather than 95 percent, of the area's sub-ACL is projected to be harvested) and adopt a measure that would close the directed fishery in all management areas when 92 percent of the stock-wide ACL is projected to be harvested. Additionally, the letter recommended that the Council maintain the current pound-for-pound overage deduction measure (allowing for an interim year to verify and finalize catch data) and that it not revise the overage deduction measure so that it would only require overage deductions when catch exceeded 105 percent of a management area sub-ACL.

The Council considered a range of AM alternatives for the herring fishery to help prevent ACL overages and account for overages when they do occur. The Council recommended revising the existing management area closure measure by lowering the directed herring fishery (landings >2,000 lb) closure trigger in a management area from 95 percent to 92 percent of the area's sub-ACL. The Council also recommended establishing a new AM that would close the entire directed herring fishery when 95 percent of the stock-wide ACL is harvested. Both of these measures would help prevent sub-ACL and stock-wide ACL overages that the fishery has experienced in 2010, 2011, and possibly 2012. Lastly, after considering a range of less precautionary overage deduction measures, the Council recommended maintaining the current overage deduction measure. This measure allows for an interim year to verify and finalize herring catch data before deducting overages from the sub-ACL and/or stock-wide ACL where the overage occurred, consistent with the carryover provision.

At its January 29, 2013, meeting, the Council recommended the 2013–2015 specifications for the herring fishery. This final rule implements the herring specifications as recommended by the Council as detailed in Table 1 below. For 2013–2015, the Council may annually review these specifications and recommend adjustments if necessary.

TABLE 1—2013–2015 SPECIFICATIONS

Atlantic Herring Specifications (mt) for 2013–2015	
Overfishing Limit .....	2013—169,000. 2014—136,000. 2015—114,000.

TABLE 1—2013–2015 SPECIFICATIONS—Continued

Allowable Biological Catch.	114,000.
Optimum Yield/Annual Catch Limit.	107,800.
Domestic Annual Harvest.	107,800.
Border Transfer .....	4,000.
Domestic Annual Processing.	103,800.
U.S. At-Sea Processing.	0.
Area 1A Sub-ACL .....	29,775.*
Area 1B Sub-ACL .....	4,600.
Area 2 Sub-ACL .....	30,000.
Area 3 Sub-ACL .....	42,000.
Fixed Gear Set-Aside	295.
Research Set-Aside ..	3 percent of each sub-ACL.

\* This value was reduced by 1,425 mt from 31,200 mt to 29,775 mt to account for an overage in 2011.

Consistent with the SSC's advice, the Council recommended changing the OFL from 127,000 mt in 2012 to 169,000 mt in 2013, 136,000 mt in 2014, and 114,000 mt in 2015, and increasing the herring ABC from 106,000 mt in 2010–2012 to a constant level of 114,000 mt for 2013–2015. The Council believes that the buffer between OFL and ABC is reflective of scientific uncertainty. Reductions for additional sources of scientific uncertainty (e.g., biomass projections, recruitment, forage/natural mortality) were not recommended. OY may not exceed OFL and may be reduced by social, economic, or ecological factors. The Council did not recommend any additional buffers for 2013–2015, so OY is set equal to ACL. Herring regulations (§ 648.200(b)(3)) specify that the ACL is less than or equal to ABC minus expected catch in the New Brunswick weir fishery and the uncertainty around discard estimates of herring caught in Federal and state waters. The Council recommended a 6,200-mt deduction for New Brunswick weir catch based on recent performance in that fishery. Because state-only catch and herring discards are tracked against the ACL, the Council did not recommend any additional buffer between ABC and ACL to account for the uncertainty around discard estimates.

Regulations at § 648.201(f) state that if NMFS determines that the New Brunswick weir fishery landed less than 9,000 mt through October 15, NMFS shall allocate an additional 3,000 mt to the Area 1A sub-ACL in November. Because the Council recommended, and this action proposes, a much smaller deduction for New Brunswick weir catch (6,200 mt) for 2013–2015 than in past years, the previous requirement to

allocate additional harvest to Area 1A if catch in the New Brunswick weir fishery is less than 9,000 mt is not appropriate for 2013–2015. Therefore, this action removes that requirement.

BT is a processing allocation available to Canadian transport vessels and dealers. The MSA provides for the issuance of permits to Canadian vessels transporting U.S.-harvested herring to Canada for sardine processing. The Council recommended setting the specification for BT at 4,000 mt. The amount specified for BT has equaled 4,000 mt since 2000. As there continues to be Canadian interest in transporting herring for sardine processing, the specification for BT remains unchanged.

The FMP specifies that DAH will be set less than or equal to OY and is comprised of DAP and BT. Consistent with the specifications for OY, the Council recommended setting the DAH at 107,800 mt for 2013–2015. DAH should reflect the actual and potential harvesting capacity of the U.S. herring fleet. Since 2001, total landings in the U.S. fishery have decreased, averaging 93,792 mt over the time series. Herring landings from the most recent 5-year period (2007–2011) averaged 86,373 mt. DAP is the amount of U.S. harvest that is processed domestically, as well as herring that is sold fresh (i.e., bait). DAP is calculated by subtracting BT from DAH. Using this formula, the Council recommended setting DAP at 103,800 mt. NMFS concurs that the U.S. herring fishery has the capacity to harvest and process the DAH and DAP recommended by the Council, so this final rule sets DAH at 107,800 mt and DAP at 103,800 mt for 2013–2015.

A portion of DAP may be specified for the at-sea processing of herring in Federal waters. When determining the USAP specification, the Council considers the availability of shore-side processing, status of the resource, and opportunities for vessels to participate in the herring fishery. During FY 2007–2009, the Council maintained a USAP specification of 20,000 mt (Areas 2/3 only) based on information received about a new at-sea processing vessel that intended to utilize a substantial amount of the USAP specification. At that time, landings from Areas 2 and 3—where USAP is authorized—were considerably lower than allocated sub-ACLs (formerly TACs) for each of the past several years. Moreover, the specification of 20,000 mt for USAP did not restrict either the operation or the expansion of the shoreside processing facilities during FY 2007–2009. However, the at-sea processing operation never materialized, and none of the USAP specification was used

during FY 2007–2009. Consequently, the Council set USAP at zero for FY 2010–2012. The Council has not received any information that would suggest changing this specification for FYs 2013–2015.

This final rule establishes a 3-percent herring research set-aside (RSA) for all management areas for fishing years 2014–2015. The RSA was established in Amendment 1 (0–3 percent for any management area). The herring RSA set-aside is removed from each sub-ACL prior to allocating the remaining sub-ACL to the fishery. If a proposal is approved, but a final award is not made by NMFS, or if NMFS determines that the allocated RSA cannot be utilized by a project, NMFS shall reallocate the unallocated or unused amount of the RSA to the respective sub-ACL, in accordance with the Administrative Procedure Act (APA), provided that the additional catch can be available for harvest before the end of the FY for which that RSA is specified. Herring regulations (§ 648.201(g)) specify that up to 500 mt of the Area 1A sub-ACL shall be allocated for the fixed gear fisheries in Area 1A (weirs and stop seines) that occur west of 44° 36.2 N. Lat. and 67° 16.8 W. Long. This set-aside shall be available for harvest by the fixed-gear within the specified area until November 1 of each year; any unused portion of the allocation will be restored to the Area 1A sub-ACL after November 1. During 2010–2012, the fixed gear set-aside was specified at 295 mt. Because the Area 1A sub-ACL for 2013–2015 is not substantially different from the Area 1A sub-ACL in 2012, the Council recommended that the fixed gear set-aside remain the same. This final rule sets the fixed gear set-aside at 295 mt for 2013–2015.

#### Comments and Responses

NMFS received five comment letters on the proposed rule for Framework 2/ 2013–2015 Specifications from: A tuna fisherman from Maine; Cape Seafoods, Inc. and Western Sea Fishing, Inc. (two related herring processing and fishing businesses hereafter referred to as Cape Seafoods/Western Sea); the Cape Cod Commercial Fishermen's Alliance (CCCFA), a Cape Cod, MA, fishing community-based organization that seeks to protect ecosystems and promote fishing businesses; and Earthjustice, a non-profit public interest law organization dedicated to protecting the environment and defending people's rights to a healthy environment (Earthjustice, earthjustice.org). Earthjustice wrote two letters: one was on behalf of Michael Flaherty, Alan Hastbacka, and the Ocean Rivers

Institute, the plaintiffs in the Flaherty legal challenge of Amendment 4 to the Herring FMP, and the other was on behalf of the Herring Alliance, an environmental organization that formed to protect and restore ocean wildlife and ecosystems in the northeast United States by reforming the Atlantic herring fishery (Herring Alliance, herringalliance.org). Earthjustice's two letters raised nearly identical issues on behalf of its clients. The summary of comments below includes Earthjustice's comments combined for its two clients except when the issue raised in one letter or the other is distinct.

*Comment 1:* The tuna fisherman expressed concern that herring midwater trawl and purse seine vessels are having a severe negative impact on herring abundance in the Gulf of Maine. He stated that, once herring vessels arrive, the herring are gone. He stated that this is having negative impacts on cod, birds, whales, and other animals in the Gulf of Maine that rely on herring as a source of food. CCCFA commented that it feels strongly that a robust forage base is necessary for the health of all our fish stocks, particularly New England's depleted groundfish stocks, and that the organization has long been concerned with the high-volume herring fishery's direct and indirect impacts on other fisheries. CCCFA and Earthjustice urged the continued evaluation of ABC control rules intended specifically for forage fish for possible inclusion in the next appropriate action.

*Response:* NMFS agrees that the Council should further consider catch control rules for herring that take into account herring's role as forage in the ecosystem. NMFS has asked the Council, in a letter dated August 29, 2013, to consider this, to the extent possible, prior to developing the next specifications for the herring fishery. The control rule implemented by these specifications, however, is based on a major advancement in accounting for herring's role as forage in the ecosystem. The Council's SSC concluded that the resulting catch levels established by these specifications allow for sufficient biomass to support ecosystem considerations, including herring's role as forage.

*Comment 2:* The tuna fisherman urged NMFS to monitor herring vessels at sea and at the dock.

*Response:* NMFS will continue to monitor the herring fishery through fishery observers, and vessel and dealer reports. NMFS cannot implement enhanced monitoring measures without further Council action. The Council would have to consider measures to implement dockside monitoring in an

amendment to the FMP, not through a specifications action. Previously, the Council removed consideration of dockside monitoring from Amendment 5 to the FMP. This is a complex issue due to funding and administration of such a program, but one that the Council may reconsider in a future action.

Observer coverage levels can be determined outside of the Council process by NMFS, and NMFS currently monitors herring vessels at sea through the Northeast Fisheries Observer Program (Observer Program) consistent with coverage required by the Standard Bycatch Reporting Methodology (SBRM). Coverage rates in the herring fishery vary by area and gear. In 2012, the Observer Program observed approximately 16 percent of purse seine, 18 percent of paired midwater trawl, 6 percent of single midwater trawl, and 5 percent of bottom-trawl herring trips in Area 1A (inshore Gulf of Maine). Coverage levels in other areas in 2012 were higher for some gears, including approximately 37 percent of paired midwater trawl trips in Area 1B (offshore Gulf of Maine) and 75 percent of paired midwater trawl trips in Area 3 (Georges Bank). Combined, this level of coverage was sufficient under SBRM to monitor bycatch in this fishery.

*Comment 3:* Cape Seafoods/Western Sea expressed concerns about the delay in implementing the specifications past January 1, 2013, and increasingly late in 2013. The stockwide ACL and sub-ACLs all will increase under the new specifications, and the representative was concerned that the increased catch will not be available before the current lower catch levels are harvested and the fishery closed in the various management areas.

*Response:* NMFS shares these concerns. For the 2013–2015 specifications, the Council took final action in January 2013 and submitted its first version of the action in March 2013. NMFS and the Council went through a substantial amount of work to complete the EA that supports the Council's recommendations. The Council's final submission was in July 2013, and NMFS proceeded with a proposed rule quickly with an August 2, 2013, publication. Through this rule, NMFS is putting the specifications in place as soon as possible and will be considering re-opening any herring management areas that closed due to herring catch under the lower rollover 2013 catch limits that can be reopened under the higher 2013 catch limits implemented through this final rule.

*Comment 4:* Cape Seafoods/Western Sea supported the seasonal control of

fishing effort in the herring fishery through percentage allocated by season, but opposed splitting seasons in Areas 2 and 3, and delaying herring fishing in Area 1B until May (through the zero-percent allocation in January through April).

*Response:* The comment provided no basis for opposing the Council's recommended and proposed seasonal splits for the herring management areas. The Council's justification for the measure is that the proposed seasonal sub-ACL split for Areas 1A and 1B would slow fishing effort by spreading it through the year, reducing the probability that the entire sub-ACL would be caught early in the fishing year. The Council noted that this may allow the fishery to maximize opportunities when market conditions may be more favorable. The Council noted that the seasonal split proposed for Area 1A is already in the FMP and has been effective for years through the Atlantic States Marine Fisheries Commission's (ASMFC's) days-out restrictions. The Council noted that the Area 1B sub-ACL is relatively small, and the fishery has exceeded the sub-ACL in that area in recent years. The split in Area 1B is intended, in part, to address this problem. NMFS agrees with this rationale, and also notes that the Council did not select seasonal allocation splits for Areas 2 and 3. If the Council considers such splits in the future, the Council would analyze the proposed splits as part of the appropriate specifications action. The herring industry and others interested in herring fishery management would have the opportunity to participate in the development of those actions.

*Comment 5:* Cape Seafoods/Western Sea supported carryover of sub-ACL, but urged NMFS to allow more than 10 percent of the sub-ACLs to be carried over because it believes sufficient buffers are built into setting the sub-ACLs and the payback provisions for overages minimize the need to limit carryover to 10 percent.

*Response:* NMFS cannot choose a higher percentage for carryover without further Council action, because the Council only considered carryover of up to 10 percent. The Council could consider higher carryover in future years if it believes it is warranted. Whether or not sufficient buffers are included already in setting herring fishery ACLs, as suggested in the comment, would need to be analyzed in that future action.

*Comment 6:* Cape Seafoods/Western Sea supported the sub-ACL specifications, but opposed the new AM that would close each area when it

reaches 92 percent of the catch, instead of the 95-percent threshold. Cape Seafoods/Western Sea argued that the fishery has been below overfishing thresholds in recent years and there is no valid justification for the more precautionary closure threshold.

*Response:* NMFS disagrees that the fishery has been below overfishing thresholds in recent years and there is no valid justification for the more precautionary closure threshold. Under MMSA requirements, NMFS must establish ACLs and ensure that the ACLs are not exceeded through fishery management measures. If ACLs are exceeded, NMFS must implement AMs to account for the overage. AMs can address management uncertainty, including uncertainty in quantifying catch and monitoring the quota on a real-time basis, as well as the ability of managers to constrain catch in order to avoid ACL overages. Setting the AM threshold at 92 percent for herring management area sub-ACLs, and 95 percent for the fishery-wide herring ACL, addresses management uncertainty, including NMFS's ability to constrain catch as the fishery approaches the applicable sub-ACL. The lower threshold is warranted because of the level of catch that can happen in a short time when the fishery is approaching the sub-ACLs. At a lower threshold, NMFS is more likely to account for management uncertainty such as catch occurring after the closure announcement (NMFS provides, in general, 72-hr notice of a closure), incidental catch of herring after the closure (up to 2,000 lb (907 kg) per trip), variable herring catch rates, and late/missing catch reports that cause catch to increase after the closure. For some areas, like Area 1B, that have very small sub-ACLs, the larger buffer is important since catch leading up to the closure and after the closure announcement can cause the sub-ACL to be exceeded in just a few trips.

*Comment 7:* CCCFA supported the 92-percent closure threshold for management areas and the 95-percent closure threshold for the stockwide ACL, as well as the carryover provision in Framework 2. However, CCCFA urged NMFS to eliminate the 1-year lag for implementing the overage deductions and carryover in favor of a more immediate response to under or over-harvesting the herring ACLs.

*Response:* The interim year between the year the overage occurs and the overage deduction AM, and the same for the under-harvest and the carryover under this action, is necessary because the herring fishery can be active during the entire fishing year (January to

December). This may be enhanced with the seasonal splits in Areas 1A and 1B. Once all data are available to NMFS (considering corrected and late reports), NMFS finalizes herring fishery year-end accounting about halfway through the interim year (in 2013, NMFS completed this in August). Within this process, NMFS completes quality control checks on herring catch data in February finalizes observer data in May, and finalizes dealer data in June. As we are seeing this year with late implementation of these specifications, an inseason adjustment of the herring sub-ACLs is disruptive and confusing to the herring fleet. Although NMFS understands that an adjustment sooner after the overage or underage occurred would be preferable, biologically, there is little difference in making the AM or carryover effective 1 year, or 2 years after the overage or underage.

*Comment 8:* CCCFA supported the sub-ACL specifications, but insisted that the specifications should be revisited annually to ensure that these allocations are still consistent with the resource. CCCFA commented that is particularly the case for the 2015 specifications, since the ABC is equal to the OFL for that year. The Herring Alliance, through Earthjustice, commented that NMFS and the Council initiate structured annual Council and SSC review of stock status similar to the procedures used by the Mid-Atlantic Council and its SSC for reviewing multi-year specifications annually in the Mackerel, Squid, and Butterfish Fishery Management Plan.

*Response:* The 3-year specifications for this and other species promotes efficiency in the Council process, which can be hampered by numerous conflicting actions and priorities in its various fishery management plans. However, nothing prevents the Council from adjusting the specifications within the 3-year period, if information suggests that the specifications need adjustment. The current herring regulations state that the Council can adjust the herring specifications within an established 3-year period if it determines that it should do so based on information provided by its herring PDT or the ASMFC's herring Plan Review Team, or other stock-related information. Further, the regulations state that the herring PDT will meet at least once during the 3 years to review the stock status in relations to the OFLs, if information is available to do so. The Council would use the specifications-setting process that it uses for the typical 3-year specifications. Currently, the need for adjustment is speculative. CCCFA and any other organization may suggest such action of the Council when

and if new information about the herring resource suggests that the Council should consider adjusting the herring specifications, either upward or downward.

*Comment 9:* Earthjustice commented that NMFS failed to consider a reasonable range of alternatives to the interim ABC Control Rule in the Specifications. Earthjustice claimed that the record for the action does not support NMFS's conclusion in the proposed rule that the two forage-based control rules, which were rejected, were carefully considered by the SSC during development of the Specifications. Earthjustice claims that NMFS has failed to satisfy the Court's remedial Order in *Flaherty*, which requires NMFS to consider a range of alternatives to the interim ABC control rule for the Atlantic herring fishery, at least one of which is based on the most recent best available science for setting ABC control rules for herring and other forage fish. Earthjustice commented that NMFS must implement an ABC Control Rule consistent with the best available science for herring and other forage fish in the next specifications package.

*Response:* Earthjustice's comment and summary of the Council's consideration of the two forage fish control rules does not provide an accurate summary of the Council's consideration of the range of control rules in the specifications. The Council considered five alternative control rules that could be used to set an ABC and ACLs for the herring fishery, including the no action alternative. Earthjustice and its clients presented two of the alternatives (the Lenfest and Pacific Control Rules) to the Council, and the Council used additional time in the specifications process to consider them. The Council's SSC evaluated all of the control rules and recommended to the Council that the two alternative forage-based control rules should not be used for the 2013–2015 specifications. The basis for this recommendation had two parts: First, the SSC found that evaluating catch limits through such as the alternatives proposed by Earthjustice required further scientific development and guidance from the Council because the rules as designed may not be suitable for the herring fishery; and second, that based on available information, the alternative control rules proposed by Earthjustice would yield ABC and ACLs similar to the three other control rules evaluated by the SSC and the Council. In suggesting that the record for the action does not support the Council's conclusions, Earthjustice failed to recognize or address the discussion of the two control rules that is included in

the EA that explains the SSC's consideration of the two control rules and the Council's reasons for including them in the considered but rejected section of the EA. In that section, the Council provides a thorough description of the two forage-based control rules proposed by Earthjustice, the SSC recommendations, and the reasons why those two control rules should not be further analyzed in the EA. Earthjustice also failed to recognize and address the two SSC reports, included as appendices to the EA, that present the SSC's full consideration of the two forage fish control rules and its full reasons for delaying consideration of the alternative forage-based control rules.

*Comment 10:* Earthjustice commented that NMFS's disapproval of Amendment 5's 100-percent observer coverage requirement, the net slippage cap, and the requirement for dealers to weigh fish undermines the specifications. It claims that the disapproval of these monitoring revisions is problematic because the catch limits in the specifications were analyzed with the expectation that these monitoring measures would be approved. Earthjustice characterized several statements in the EA as demonstrating that the full approval of Amendment 5 is necessary for the implementation of the Council's preferred specification alternatives. The Herring Alliance, through Earthjustice, commented that, as a result of the disapproval, NMFS should approve the "No Action" alternative for specifying ABC and ACL, which would maintain the status quo of 106,000 mt ABC and 91,200 mt ACL for the next 3 years.

*Response:* NMFS strongly disagrees with these comments. The specifications are not dependent on the approval of Amendment 5. With or without approved Amendment 5 management measures, the proposed specifications will continue to serve as management measures that are necessary and appropriate to comply and are consistent with the MSA and applicable laws. Earthjustice cited pieces of the Framework 2/2013–2015 Specifications document that reference Amendment 5, and provided its own interpretation of those statements, concluding that the proposed specifications are not legal as a result of the disapproval of Amendment 5. These statements are not accurate.

The EA for these specifications includes references to Amendment 5 as a reasonably foreseeable action. It includes references to the AM measures in the specifications that support Amendment 5 objectives. It also includes references to all of the monitoring measures in Amendment 5

and the expectation that those measures would build on recent monitoring improvements in the herring fishery. The 100-percent monitoring coverage requirement referred to by Earthjustice is only one of the Amendment 5 measures that were expected to build on these improvements. The monitoring and other measures approved in Amendment 5 are still expected to improve recent monitoring.

The record does not support Earthjustice's claims that additional uncertainty would need to be built into the specifications and that the 2013–2015 specifications should be reduced to account for the disapproval of some measures in Amendment 5. NMFS and the Council consider a full range of alternatives for an action that is dependent on possible approval or disapproval and implementation of measures included in an umbrella action (see Amendment 15 and Framework Adjustment 22 to the Scallop Fishery Management Plan (76 FR 43746, July 21, 2011, and 76 FR 43774, July 21, 2011, respectively)). These two scallop actions were directly related, and the documents supporting the action and the rules published in the **Federal Register** noted those relationships. As noted in this rule, the ABC is sufficient to prevent overfishing. New AMs are being implemented by this action to support those limits. For the 2013–2015 Herring Specifications, the Council merely noted improvements expected through Amendment 5. The Council did not state anywhere that the 2013–2015 Specifications rely on the approval of Amendment 5 in full.

*Comment 11:* Earthjustice commented that NMFS is past its deadline to establish management measures that minimize bycatch consistent with National Standard 9 of the MSA. It commented that NMFS must act quickly to implement a river herring catch cap through Framework 3 to the FMP. Earthjustice also noted that NMFS must ensure that the cap reduces bycatch and incidental catch of river herring consistent with National Standard 9 and the goals and objectives of the FMP.

*Response:* This comment is not relevant to Framework 2/2013–2015 Specifications. NMFS notes, however, that it has asked the Council to quickly move forward on its development and completion of Framework 3 to implement river herring catch cap for the herring fishery. NMFS disagrees that it has missed a deadline to minimize bycatch as required by the Court. Rather, NMFS believes that the measures implemented in Amendment 5 minimize bycatch and mortality of bycatch to the extent practicable, as

required by the MSA. NMFS will continue to implement a rigorous monitoring program for the herring fishery to maintain consistency with these requirements.

*Comment 12:* Earthjustice commented that NMFS violated the law by failing to consider adding river herring and shad to the FMP. It stated that, although the Council made such an action a priority for 2013, it has failed to take any action on it. Earthjustice commented that the Council inexplicably delayed action instead until the completion of the river herring catch cap action in Framework 3 and an action to establish an industry-funded observer program. Earthjustice commented that failure to initiate an amendment to consider adding river herring and shad to the FMP as managed species would further unlawfully delay NMFS meeting its statutory obligations to manage species in need of conservation and management and that the Council must initiate such an amendment at its September Council meeting.

*Response:* Adding river herring and shad to the herring FMP is outside of the scope of this action. NMFS agrees, however, that the Council should consider adding river herring and shad to the FMP as managed species, or managing river herring and shad under its own management plan, and has urged the Council to consider these issues in a letter to the Council from NMFS dated August 29, 2013. The Council will determine its management action priorities at its November Council meeting, and NMFS will urge it to prioritize consideration of managing river herring and shad. NMFS does not believe that considering industry-funded observer provisions would be an impediment to the Council's consideration of river herring and shad as stocks in the fishery, as NMFS is proposing to develop an action, with close coordination with both the New England and Mid-Atlantic Fishery Management Councils, that could establish provisions for industry-funded observer programs for all managed fisheries.

*Comment 13:* The Herring Alliance, through Earthjustice, opposed the 2013–2015 specifications because it believes they are too high and do not account for sufficient uncertainty related to monitoring of the fishery. The Herring Alliance is concerned about discarding and uncertainties in herring catch as a result of monitoring deficiencies created by NMFS's disapproval of some monitoring provisions in Amendment 5 to the FMP. The Herring Alliance, through Earthjustice, also opposed the 2015 specifications because the terminal

year of the 2013–2015 Specifications does not include any buffer for scientific uncertainty in setting OFL and ABC.

*Response:* The FMP, as adjusted by these specifications, is in compliance with the MSA and applicable law. The SSC concluded that the proposed specifications are unlikely to result in overfishing in the next 3 years, including FY 2015. The best available scientific information, as presented in the EA, supports these conclusions. If new scientific information about the herring resource and fishery shows that the Council should adjust the specifications, the Council may take action to do so to prevent overfishing or to address any issues that are not evident in the scientific information supporting this action. Further, the new lower AM thresholds implemented by these specifications will assist with maintaining these catch limits.

*Comment 14:* The Herring Alliance, through Earthjustice, opposed the “Constant Catch ABC Control Rule” and the failure to consider an ABC control rule that can respond to changing stock conditions necessary to determine how many fish can safely be removed from the ecosystem. The Herring Alliance stated that a well-designed ABC control rule establishes ABC under a wide range of stock conditions, including setting catch at zero when a minimum biomass limit is reached.

*Response:* The Constant Catch ABC Control Rule will apply to the next 3 years of the herring fishery. The SSC has analyzed this catch rule and determined it sufficiently accounts for herring's role as forage and protects from overfishing. If the Council finds that this control rule is insufficient, or results in too much risk of overfishing, it may choose to change the ABC control rule. In addition, NMFS is urging the Council to further consider control rules for the herring fishery that take into account the role of herring as forage in the ecosystem. Although the Council determined that forage-specific control rules would provide no distinct difference from the constant catch control rule or its alternatives in the next 3 years, it recognized the need to further develop and consider forage-based control rules for this species. NMFS therefore believes that the Council will further consider different control rules in the next scheduled specifications and that the herring resource is not at risk of overfishing in the meantime.

#### *Changes From Proposed Rule to Final Rule*

In § 648.201(g), the first sentence is changed to read “Subject to the

conditions described in this paragraph (f), unharvested catch in a herring management area in a fishing year (up to 10 percent of that area's sub-ACL) shall be carried over and added to the sub-ACL for that herring management area for the fishing year following total catch determination." The change brings the regulatory text in line with the Council's recommended measure because carryover is a maximum of 10 percent of the sub-ACL, not 10 percent of the unused portion of the sub-ACL and so the original text was in error.

### Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Herring FMP, other provisions of the MSA, and other applicable law.

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

The need to implement these measures in an expedited manner in order to help achieve conservation objectives for Atlantic herring constitutes good cause, under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness. If there is a delay in implementing the ACLs in this action, the herring fleet will continue to fish in Federal waters under lower ACLs that are currently in effect. In some cases, these allocations are close to being fully harvested, which would force a closure of the affected management areas prior to the end of the fishing year. NMFS would need to re-open the fisheries after the closures, and delaying such reopening could constrain catch for the remainder of the year. The allocations in this action were developed to reflect an updated estimate of the annual catch that can be harvested, and could be underutilized if the herring fishery is not given sufficient time to harvest it. The herring fishery supplies bait to the lobster and other fisheries, and the process of closing and reopening the fishery could lead to a potential under-harvest and also cause widespread fishery disruption. Further, continuation of inconsistent state and Federal management measures creates unnecessary confusion in the industry about regulatory requirements. For example, the states recently closed the herring fishery in Area 1A under Atlantic States Marine Fisheries Commission rules in order to prolong the fishery. This closure has confused vessel owners and interested members of the public because of the overlap in this state and Federal

management measures. This rule would allow the states to re-open the fishery.

A final regulatory flexibility analysis (FRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The FRFA describes the economic impact this final rule would have on small entities. A summary of the analysis follows.

### Statement of Objective and Need

This action implements management measures and 2013–2015 specifications for the herring fishery. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, are contained in the preamble to this final rule and are 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 no comments relative to the IRFA or economic impacts of the proposed Framework 2 or 2013–2015 herring fishery specifications.

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

NMFS determined in the Initial Regulatory Flexibility Analysis that based on 2012 permit data, the number of potential fishing vessels in each permit category in the herring fishery are as follows: 40 for Category A (limited access, All Areas); 4 for Category B (limited access, Areas 2 and 3); 45 for Category C (limited access, incidental); and 1,984 for Category D (open access). Using ownership data and this permit information, 61 entities were analyzed relative to the impacts on small entities when the Council made its recommendations on this action. Three entities, owning vessels with Category A permits, were considered large entities, as defined in section 601 of the RFA, based on the small business size standards in effect when the Council made its recommendations on this action.

Subsequent to Council action related to this rule, SBA revised its small business size standards for several industries in a final rule 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. NMFS has reviewed the analyses prepared for this action in light of the new size standards.

In preparing the FRFA for this final rule, NMFS reviewed permit, landings, and ownership data, and discovered an error in tabulating revenues and entities for 2012, which is now being corrected in this rule. NMFS has now identified 70 entities (compared to 61 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. In the IRFA, NMFS, determined that 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 criteria, there are seven large shellfish fishing entities to which the rule would apply. There are 63 small entities to which the rule would apply.

Of the 63 small entities, 39 reported no revenue from herring 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.

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 Framework 2/2013–2015 Specifications are not expected to be disproportional for small versus large entities, as the action will affect all entities, large and small, in a similar manner. As a result, this action would have proportionally similar impacts on revenues and profits of each vessel and each multi-vessel owner compared both to status quo (i.e., FY 2012) and no action levels. 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.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

This action does not contain any new collection-of-information, reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules.

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

Framework Adjustment 2 would improve profitability by allowing sub-ACL carryover, thus permitting the industry to maximize opportunities to fish when markets are favorable. The 2013–2015 herring specifications, ABC, and the corresponding sub-ACLs would increase (from 106,00 mt to 114,000 mt) for the upcoming 3 fishing years, which could also increase profitability. The AMs are expected to act as an incentive to avoid exceeding the ACL and are expected to have minimal impacts on profitability. The impacts of these measures are described below.

**Seasonal Splits of Sub-ACLs**

Relative to the status quo, the approved measures, which allow for seasonal splits, may have costs to the herring industry. A seasonal split would delay harvest of herring and potentially reallocate herring effort from earlier in the season to later in the season. The purpose of this measure is to ensure that the herring sub-ACLs are not met or exceeded early in the fishing year. Prolonging the fishing season, or delaying fishing opportunities until late in the fishing year may be desirable in many cases. For example, because herring and mackerel are jointly caught at the end of the fishing year in Area 2, there may be an opportunity to increase catch by delaying some effort until later during the year to provide an opportunity to catch mackerel along with herring. Therefore, there may be benefits to fishing businesses that participate in both the herring and mackerel fishery if the Council chooses to adopt a seasonal split in Area 2, or other areas, in future actions.

The specifications for 2013–2015 implement the actual seasonal splits. The status quo for seasonal splits includes a seasonal split for Area 1A (0 percent for January–May and 100 percent for June–December), and no seasonal splits for the other areas. The approved measures adds a seasonal split for Area 1B (0 percent January–April and 100 percent in May–December). This would delay fishing in Area 1B to allow for sufficient time for overage or carryover determinations so the industry may be better able to harvest within the sub-ACL. The Area 1B split may increase user-group conflicts, particularly between the midwater trawl herring vessels and recreational anglers who utilize Area 1B in June. With the exception of 2011 and 2012, however, Area 1B has been open year-round to the herring fishery (only in 2012 was it closed in June) without significant conflict with the recreational fishery though the seasonal split may increase herring vessel activity in Area 1B in June.

An Area 2 split of 67 percent in January–February and 33 percent in March–December was considered, but not selected. This seasonal splitting for Area 2 could ensure herring availability towards the end of the year. This could have positive economic benefits for fishing vessels that are jointly catching herring and mackerel at the end of the calendar year. Based on industry input during development of this action, the Council determined that allowing the fleet to operate in Area 2 based on market conditions and fish availability would be more preferable than setting a season in Area 2. Both herring and mackerel availability in this area occur during the winter and can be quite variable, and an early-year split like the one proposed for Area 2 could preclude the fleet from optimizing these fisheries.

**Carryover Provisions**

Relative to the status quo, the approved measures to allow for carryover of up to 10 percent of sub-ACL benefits the herring industry by increasing operational flexibility and efficiency. For all carryover options, there are slightly higher regulatory and monitoring costs for NMFS. The Council also considered three options for how to apply the carryover, which have different potential economic impacts to affected entities. Under the Preferred Option (Option 1), there would be no corresponding increase in the total stockwide ACL. Under Option 2, an increase in the total stockwide ACL would be possible and the determination would be authorized by the NMFS Regional Administrator.

Under Option 3, the total stockwide ACL could increase but could not exceed ABC in any fishing year. These options were not selected by the Council because increasing the stockwide ACL would increase the risk of exceeding overfishing limits for the herring fishery. All options would provide benefits to the herring industry in terms of increased operational flexibility, higher levels of catch in subsequent years, or both. There may be moderate increases in monitoring and reporting costs that would accrue to fishery managers (NMFS) associated with these options.

**Impacts of OFL/ABC Alternatives**

Relative to the status quo, the specifications for setting the herring constant catch ABC and OFL for 2013–2015 implemented by this rule will result in an increase in OFL and ABC. Increasing, then maintaining a stable OFL and ABC would provide net benefits to the herring industry in the short and long term, relative to the status quo. Moderately higher amounts of catch may result in slightly lower bait costs to the lobster industry. Alternative 3 for setting a declining ABC for 2013–2015 would also increase the overall amount of available catch over the 3-year specifications period and thereby the potential net benefits to the herring industry in the short and long term, relative to the status quo. However, Alternative 3 was rejected because its declining catch limits would provide lower net benefits than Alternative 2, the approved Alternative implemented through this final action, because it would not provide the industry with stable market expectations and improved ability for business planning.

**Sub-ACL Options**

Relative to the status quo, these specifications would provide 16,600 mt of additional yield each year in 2013–2015 relative to the yield available in 2012. Increasing a sub-ACL results in positive economic impacts, if the increase translates into increased catch. Increases in sub-ACLs that are not likely to be fully utilized will provide minimal, if any, economic benefits. The values of sub-ACLs under consideration in all options are within the range of recent sub-ACLs and catches. This suggests that the herring industry could approach full utilization of the sub-ACLs under any of the options. Relative to the status quo, all alternatives are expected to provide similar benefits because they are primarily distributive in nature.

### Impacts of Other 2013–2015 Fishery Specifications

No costs or benefits are expected for the specifications of management uncertainty, RSAs, Fixed Gear Set-Aside (FGSA), DAH, BT, or USAP relative to the status quo.

### Accountability Measures

The approved measures would close the directed fishery in each management area at 92 percent of the corresponding area sub-ACL. Relative to the status quo of 95 percent of the sub-ACL, this alternative may limit fishing opportunities, which would be a cost to the industry. However, this measure may also ensure that sub-ACLs are not exceeded and deducted from future ACLs. The measure would close the entire fishery at 95 percent of the total stockwide ACL; this differs from the status quo because there is currently no trigger to close the directed fishery in all areas based on a percentage of the total ACL. This may impose a small short-term cost on the herring industry relative to the status quo, but there are expected to be long-term benefits from reducing ACL overages. Moreover, the 92-percent trigger for the sub-ACLs in the management areas should minimize impacts associated with closures, especially when combined with carryover provisions in Framework 2.

Alternative 3 would continue to rely on herring catch estimation from NMFS' "year-end" catch tallying methods to trigger the AM for overage paybacks. The AM for closing the directed fishery in a management area would continue to be triggered based on NMFS' "in-season" monitoring but would be modified in the following ways: (1) The AM trigger for closing the directed herring fishery in a management area would be reduced to 92% of the sub-ACL and (2) The current AM to require a pound-for-pound sub-ACL overage deduction based on year-end catch tallies (with a one-year lag) would remain effective, but the deduction would only be required if the sub-ACL is exceeded by 5% or more when overfishing is not occurring and the stock is rebuilt (i.e., above the target biomass). Alternative 3 would have lowered costs to the herring industry but may be less effective at achieving the conservation objectives of the FMP. Under Alternative 4, the closure trigger would be affected by any previous overages. This would increase the management complexity for regulators and the industry because there could be different triggers for each management area. Alternative 4 was rejected because its complexity could slow the

implementation of the closures and disrupt the operations of vessel owners.

### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule, or group of related rules, for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to make to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of permits issued for the herring fishery. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator (see **ADDRESSES**) and may be found at the following Web site: <http://www.nero.noaa.gov>.

### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: September 30, 2013.

### Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the 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 § 648.14, paragraph (r)(1)(vi)(G) is added to read as follows:

#### § 648.14 Prohibitions.

\* \* \* \* \*

(r) \* \* \*  
(1) \* \* \*  
(vi) \* \* \*

(G) Fish for, possess, or retain herring in any management area during a season that has zero percent of the herring sub-ACL allocated as specified in § 648.201(d).

\* \* \* \* \*

■ 3. In § 648.201, paragraphs (a)(1), (d), and (f) are revised to read as follows:

#### § 648.201 AMs and harvest controls.

(a) \* \* \*

(1) *Herring sub-ACLs and ACL—* (i) *Management area closure.* If NMFS

projects that catch will reach 92 percent of the annual sub-ACL allocated to a management area before the end of the fishing year, or 92 percent of the Area 1A or Area 1B sub-ACL allocated to a seasonal period as set forth in paragraph (d) of this section, NMFS shall prohibit vessels, beginning the date the catch is projected to reach 92 percent of the sub-ACL, from fishing for, possessing, catching, transferring, or landing more than 2,000 lb (907.2 kg) of Atlantic herring per trip in the applicable area, and from landing herring more than once per calendar day, except as provided in paragraphs (b) and (c) of this section. NMFS shall implement these restrictions in accordance with the APA.

(ii) *Herring fishery closure.* If NMFS projects that catch will reach 95 percent of the ACL before the end of the fishing year, NMFS shall prohibit vessels, beginning the date the catch is projected to reach 95 percent of the ACL, from fishing for, possessing, catching, transferring, or landing more than 2,000 lb (907.2 kg) of Atlantic herring per trip in all herring management areas, and from landing herring more than once per calendar day, except as provided in paragraphs (b) and (c) of this section. NMFS shall implement these restrictions in accordance with the APA.

\* \* \* \* \*

(d) *Seasonal sub-ACL periods.* The sub-ACL for each herring management area may be divided into seasonal periods by month. Seasonal sub-ACLs for herring management areas, including the specification of the seasonal periods, shall be set through the annual specification process described at § 648.200. The seasonal allocation of sub-ACLs are as follows:

(1) *Area 1A:* Zero percent available for harvest during January–May; 100 percent available for harvest during June–December.

(2) *Area 1B:* Zero percent available for harvest during January–April; 100 percent available for harvest during May–December.

(3) *Area 2:* 100 percent available for harvest during January–December.

(4) *Area 3:* 100 percent available for harvest during January–December.

\* \* \* \* \*

(f) *Carryover.* Subject to the conditions described in this paragraph (f), unharvested catch in a herring management area in a fishing year (up to 10 percent of that area's sub-ACL) shall be carried over and added to the sub-ACL for that herring management area for the fishing year following the year when total catch is determined. For example, NMFS will determine total

catch from 2013 during 2014, and will add carryover to the applicable sub-ACL(s) in 2015. All such carryover shall be based on the herring management area's initial sub-ACL allocation for the fishing year, not the sub-ACL as increased by carryover or decreased by an overage deduction, as specified in paragraph (a)(3) of this section. All herring landed from a herring management area shall count against that area's sub-ACL, as increased by carryover. For example, if 500 mt of herring is added as carryover to a 5,000 mt sub-ACL, catch in that management area would be tracked against a total sub-ACL of 5,500 mt. NMFS shall add sub-ACL carryover only if the ACL, specified consistent with § 648.200(b)(3), for the fishing year in which there is unharvested herring, is not exceeded. The ACL, consistent with § 648.200(b)(3), shall not be increased by carryover specified in this paragraph (f).

[FR Doc. 2013-24271 Filed 9-30-13; 4:15 pm]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 130408348-3835-02]

RIN 0648-XC894

#### Fisheries of the Northeastern United States; Atlantic Herring Fishery; Removal of 2,000-lb (907.2-kg) Herring Trip Limit in Atlantic Herring Management Area 2

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

**ACTION:** Temporary rule.

**SUMMARY:** NMFS announces a temporary removal of the 2,000-lb (907.2 kg) trip limit for the Atlantic herring fishery in Management Area 2 (Area 2) because catch data indicate that 95 percent of the total sub-annual catch limit (sub-ACL) threshold in Area 2 has not been fully attained. Vessels issued a Federal permit to harvest Atlantic herring may resume fishing for and landing herring in amounts greater than 2,000 lb (907.2 kg), consistent with their respective Atlantic herring permit categories, effective 0001 hrs, October 1, 2013.

**DATES:** Effective 0001 hours, October 1, 2013, through December 31, 2013.

**FOR FURTHER INFORMATION CONTACT:** Christopher Biegel, Fishery Management Specialist, 978-675-9112.

**SUPPLEMENTARY INFORMATION:** Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area sub-ACLs. Final herring specifications for 2013-2015 set the total 2013 total herring ACL at 107,800 mt, allocated to the herring management areas as follows: 29,775 mt to Area 1A; 4,600 mt to Area 1B; 30,000 mt to Area 2; and 42,000 mt to Area 3. This is an increase in the sub-ACL's that had rolled over at the start of the herring fishing year (FY).

Regulations at § 648.201(a) require NMFS to monitor catch from the herring fishery in each of the herring management areas, using dealer reports, state data, and other available information, to determine when the catch of herring is projected to reach 92 percent of the sub-ACL allocated. When such a determination is made, NMFS is required to prohibit, through publication in the *Federal Register*, herring vessel permit holders from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of herring, per trip or calendar day, in or from the specified management area for the remainder of the closure period, with the exception of transiting as described below.

NMFS published a temporary rule, effective April 7, 2013, in the *Federal Register* (78 FR 21071, April 9, 2013) projecting that 95 percent (the closure threshold at the time) of the Area 2 sub-ACL had been harvested. Based upon information indicating that 95 percent of the sub-ACL would be reached by April 7, 2013, the temporary rule reduced the herring trip limit for all federally permitted herring vessels to 2,000 lb (907.2 kg) per trip in Area 2; the trip limit reduction was to be effective through December 31, 2013.

Upon implementation of the herring specifications for 2013-2015, the NMFS Northeast Regional Administrator determined, based upon dealer reports and other available information, that the herring fleet had not yet taken 92 percent of the new Area 2 sub-ACL as of September 25, 2013, and that there was approximately 6,079 mt of Atlantic herring quota still available in Area 2. Therefore, to ensure that the herring fleet is able to take up to 92 percent of the Area 2 sub-ACL, consistent with applicable regulations and trip limits, this action removes the 2,000-lb (907.2-

kg) trip limit implemented on April 7, 2013, and restores the trip limits, if any, in effect before April 7, 2013, at 0001 hours October 1, 2013. This means that, effective 0001 hrs, October 1, 2013, vessels issued an All Areas Limited Access Herring Permit are authorized to fish for, possess, or land Atlantic herring with no possession restrictions; vessels issued an Areas 2 and 3 Limited Access Herring Permit are authorized to fish for, possess, or land Atlantic herring only if issued an open access herring permit or a Limited Access Incidental Catch Permit; vessels issued a Limited Access Incidental Catch Herring Permit are authorized to fish for, possess, or land up to 55,000 lb (25 mt); and vessels issued an open access herring permit may not fish for, possess, or land more than 6,600 lb (3 mt) of Atlantic herring in Area 2.

Effective 0001 hrs, October 1, 2013, federally permitted dealers are advised that they may purchase more than 2,000 lb (907.2 kg) of Atlantic herring caught in Area 2 by federally permitted vessels.

#### Classification

This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action removes the 2,000-lb (907.2-kg) herring trip limit in Area 2 at 0001 hours October 1, 2013. The Atlantic herring fishery opened for FY 2013 at 0001 hrs on January 1, 2013. The Atlantic herring fleet was prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 mt) per trip or calendar day on April 7, 2013, based on projections that 95 percent of the available Area 2 herring sub-ACL had been harvested. If implementation of this temporary removal of the 2,000-lb (907.2-kg) trip limit is delayed to solicit prior public comment, the remaining quota may not be fully harvested before the end of FY 2013 on December 31. The AA finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

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

Dated: September 30, 2013.

**Kelly Denit,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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