

recent Vessel Monitoring System (VMS) reports and other available information, the Regional Administrator has determined that the current rate of harvest will result in the under-harvest of the GB yellowtail flounder TAC during the 2006 fishing year. Based on this information, the Regional Administrator is increasing the current 10,000-lb (4,536-kg) trip limit in the Western U.S./Canada Area, and the 5,000-lb (2,268-kg) trip limit in the Eastern U.S./Canada Area to 25,000 lb (11,340 kg) in both areas, effective April 5, 2007, through April 30, 2007. Accordingly, there is a 25,000-lb (11,340-kg) trip limit on the amount of GB yellowtail flounder that can be harvested or landed for the remainder of the fishing year for vessels subject to these regulations. GB yellowtail flounder landings will be closely monitored through VMS and other available information. Should 100 percent of the TAC allocation for GB yellowtail flounder be projected to be harvested, the Eastern U.S./Canada Area will close to all groundfish DAS vessels, and all vessels will be prohibited from harvesting, possessing, or landing yellowtail flounder from the U.S./Canada Management Area for the remainder of the fishing year. Additionally, the Eastern GB cod TAC will also be closely monitored, and should 100 percent of its TAC allocation be projected to be harvested, groundfish DAS vessels will be prohibited from entering the Eastern U.S./Canada Area for the remainder of the fishing year, as required by the regulations at § 648.85(a)(3)(iv).

#### Classification

This action is authorized by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator (AA) finds good cause to waive prior notice and opportunity for public comment for this action, because notice and comment would be impracticable and contrary to the public interest. The regulations at § 648.85(a)(3)(iv)(D) grant the Regional Administrator the authority to adjust the GB yellowtail flounder trip limits to prevent over-harvesting or under-harvesting the TAC allocation. Given that approximately 20 percent of the GB yellowtail flounder TAC remains unharvested and the 2006 fishing year ends on April 30, 2007, the time necessary to provide for prior notice, opportunity for public comment, or delayed effectiveness would prevent the agency from ensuring that the 2006 TAC for GB yellowtail flounder will be fully harvested. If implementation of this

action is delayed, the NE multispecies fishery could be prevented from fully harvesting the TAC for GB yellowtail flounder during the 2006 fishing year. Under-harvesting the GB yellowtail TAC would result in increased economic impacts to the industry and social impacts beyond those analyzed for Amendment 13, as the full potential revenue from the available GB yellowtail flounder TAC in the U.S./Canada Management Area would not be realized. This action also relieves a restriction placed on the NE multispecies fishing industry by liberalizing the trip limits for GB yellowtail flounder.

For the reasons specified above and because this action relieves a restriction, the AA finds good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the entire 30-day delayed effectiveness period for this action. A delay in the effectiveness of the trip limit modification in this rule would prevent the agency from meeting its management obligation and ensuring the opportunity for the 2006 TAC for GB yellowtail flounder specified for the U.S./Canada Management Area to be harvested at a level that approaches optimum yield. Any such delay could lead to the negative impacts to the fishing industry described above.

The rate of harvest of the GB yellowtail flounder TAC in the U.S./Canada Management Area is updated weekly on the internet at <http://www.nero.noaa.gov>. Accordingly, the public is able to obtain information that would provide at least some advanced notice of a potential action to provide additional opportunities to the NE multispecies industry to fully harvest the TAC for GB yellowtail flounder during the 2006 fishing year. Further, the potential for this action was considered and open to public comment during the development of Amendment 13 and Framework 42. Therefore, any negative effect the waiving of public comment and delayed effectiveness may have on the public is mitigated by these factors.

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

Dated: April 5, 2007.

#### James P. Burgess

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 061228342-7068-02; I.D. 122206A]

RIN 0648-AT66

#### Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2007-2009 Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS announces final specifications for the 2007-2009 fishing years for the Atlantic herring (herring) fishery. The intent of this final rule is to conserve and manage the herring resource and provide for a sustainable fishery.

**DATES:** Effective May 10, 2007, through December 31, 2009.

**ADDRESSES:** Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), and Essential Fish Habitat Assessment are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR/IRFA is also accessible via the Internet at <http://www.nero.gov>. NMFS prepared a Final Final Regulatory Flexibility Analysis (FRFA), a summary of which is contained in the Classification section of the preamble of this final rule. Copies of the FRFA and the Small Entity Compliance Guide are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298.

**FOR FURTHER INFORMATION CONTACT:** Eric Jay Dolin, Fishery Policy Analyst, 978-281-9259, e-mail at [eric.dolin@noaa.gov](mailto:eric.dolin@noaa.gov), fax at 978-281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

Proposed 2007-2009 specifications were published on January 10, 2007 (72 FR 1206), with public comment accepted through February 9, 2007. These final specifications are unchanged from those that were proposed. A complete discussion of the

development of the specifications appears in the preamble to the proposed rule and is not repeated here.

#### 2007–2009 Final Initial Specifications

The following specifications are established by this action: Allowable

biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVpt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing

(USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and total allowable catch (TAC) for each management area and subarea.

TABLE 1. SPECIFICATIONS AND AREA TACS FOR THE 2007–2009 ATLANTIC HERRING FISHERY

Specification	2007 Allocation (mt)	2008–2009 Allocation (mt)
ABC	194,000	194,000
OY	145,000	145,000
DAH	145,000	145,000
DAP	141,000	141,000
JVpt	0	0
JVP	0	0
IWP	0	0
USAP	20,000 (Areas 2 and 3 only)	20,000 (Areas 2 and 3 only)
BT	4,000	4,000
TALFF	0	0
Reserve	0	0
TAC - Area 1A	50,000 [48,500 fishery; 1,500 RSA] (January 1 - May 31, landings cannot exceed 5,000)	45,000 [43,650 fishery; 1,350 RSA] (January 1 - May 31, landings cannot exceed 5,000)
TAC - Area 1B	10,000 [9,700 fishery; 300 RSA]	10,000 [9,700 fishery; 300 RSA]
TAC - Area 2	30,000 [29,100 fishery; 900 RSA] (No Reserve)	30,000 [29,100 fishery; 900 RSA] (No Reserve)
TAC - Area 3	55,000 [53,350 fishery; 1,650 RSA]	60,000 [58,200 fishery; 1,800 RSA]
Research Set Aside	3 percent from each area TAC (2008 and 2009 FY only)	3 percent from each area TAC (2008 and 2009 FY only)

#### Comments and Responses

There were 460 comments received. Commenters included the American Pelagic Association; Cape Seafoods; Center for Oceanic Research and Education; Conservation Law Foundation; Garden State Seafood Association; Bumblebee Seafoods/Stinson Seafood; Maine Department of Marine Resources; Mid-Atlantic Fishery Management Council; Northern Pelagic Group, LLC; Ocean Conservancy; and 451 individuals and vessel owners.

*Comment 1:* Three organizations and 448 individuals support the proposed rule, especially NMFS's decision to reduce the Area 1A TAC to 45,000 mt in 2008 and 2009.

*Response:* This action is unchanged from the proposed rule.

*Comment 2:* Two organizations and three vessel owners opposed the Council's recommendation to reduce the Area 1A TAC to 50,000 mt for 2007–2009, and strongly opposed NMFS's further reduction of the Area 1A TAC to 45,000 mt for 2008 and 2009. They argue that the Council's recommendation was unnecessarily restrictive, in light of the stock's status. They further argue that NMFS should not have relied on the Plan Development Team's (PDT's) risk assessment in making its decision to further reduce the Area 1A TAC to 45,000 mt because it was not peer-reviewed, and was overly conservative. They disagreed that the Council's and NMFS's concern about the retrospective pattern in the stock assessment is an

appropriate reason to reduce the Area 1A TAC. They argued that the 29,000–mt buffer between ABC and OY was intended to account for the retrospective pattern and that it is, therefore, scientifically inappropriate to further reduce the Area 1A TAC. The commenters argue that the Council's specifications document pointed out that trawl survey results are highly variable, and that no trends are apparent from the most recent years of the survey across all strata. The commenters state that encounter rates are increasing, rather than declining, and a broader size distribution is evident; and that both of these trends indicate a healthy resource. One organization stated that it is misleading for NMFS to state that there

is considerable overlap between the inshore stock component and Area 1A.

One organization supported the reduction of the Area 1A TAC to 50,000 mt, but not to 45,000 mt in 2008 and 2009. They argue that the retrospective pattern described by the Transboundary Resource Assessment Committee (TRAC) applies to the stock as a whole, and not individual stock components, and that the 29,000-mt buffer between ABC and OY addresses the issue. They stated that the reduction in the Area 1A TAC to 45,000 mt and commensurate increase in the Area 3 TAC does not account for the retrospective pattern, because it maintains OY at the same level. They also argued that only the NMFS fall survey shows a decline in abundance and biomass, and the other surveys are either increasing or variable and stable. They noted that the PDT suggested that encounter rates may be a better indicator of stock status for herring, and that the Northeast Fisheries Science Center (NEFSC) fall surveys are not showing a decline in the encounter rates, and the Massachusetts inshore survey is showing an increase in encounter rates.

One organization opposed the reduction of Area 1A TAC, but provided no additional rationale. One vessel owner argued that the industry was not allowed to participate in the Advisory Panel's decisionmaking during the specifications-setting process.

*Response:* The herring stock is in good shape. However, both the Council and NMFS agree that, while the overall stock is healthy, there is a clear need to be precautionary with the inshore component of the stock. This is directly related to the establishment of the Area 1A TAC because, contrary to some comments, there is substantial overlap between the inshore stock component and Area 1A. The inshore component, at different times of year, is distributed throughout Areas 1A, 1B, and 2. Based on the stock mixing ratios employed in the specifications document (and in the FMP), it is reasonable to state that there is a considerable amount of overlap between the inshore stock component and Area 1A. The specifications document estimates that, in the summer, 50 percent of the catch from Area 1A comes from the inshore component. In the winter, 100 percent of the catch in Area 1A, and 20 percent of the catch in Area 2, is assumed to come from the inshore component of the resource. Removals from Area 1B are assumed to be composed of 30 percent of the inshore component at all times of the year.

Several aspects of the specifications analyses provided a strong basis for

NMFS to enact the Area 1A TACs specified in this action. Three elements in particular contributed to NMFS's determination that the 2008–2009 TACs should be set lower than recommended by the Council.

The Council's Scientific and Statistical Committee (SSC) met in 2003 to consider the status of the herring stock and found, among other things, that "no severe declines in the stock complex should be expected by maintaining current levels of catches over the short-term; however, the current concentration of harvest in the inshore Gulf of Maine is of concern and may be excessive." Thus, NMFS concluded that the issue is not whether there is a need for more caution when establishing the Area 1A TAC, but rather, how much caution is necessary.

Both the Council and NMFS agreed that the available data and concerns warranted a significant reduction in the Area 1A TAC over the next 3 years. NMFS, however, concluded that the Council's proposal, to set the Area 1A TAC at 50,000 mt, did not go far enough to protect the stock in Area 1A.

NMFS also concluded that the retrospective pattern in the stock assessment, which overestimates biomass and underestimates fishing mortality in the terminal year of the assessment, argues for caution. NMFS concluded that for the stock as a whole, the buffer of 29,000 mt between ABC (maximum OY) and OY specified in this action would help ensure that adequate spawning stock biomass (SSB) is available to produce strong recruitment in the future. However, the retrospective pattern indicates that, as more data are collected and analyzed, the stock, including the inshore stock component, will be found to be not as robust as current data imply.

Finally, the PDT's risk assessment provides a useful tool for evaluating TAC alternatives. The risk assessment is a tool that the Council asked the PDT to provide, and it was presented and debated by the PDT members, the Herring Advisory Panel (AP), and the Herring Committee, as well as the Council. According to the risk assessment, setting the Area 1A TAC at 45,000 mt for 2008–2009 will provide a slightly improved chance of producing exploitation rates that are more consistent with Fmsy for the stock component, within a range of realistic stock mixing ratios. Therefore, NMFS finds that the SSC advice, the retrospective pattern in the stock assessment, and the conclusions of the PDT's risk assessment combine to make a sound case for specifying the Area 1A

TAC at 45,000 mt in fishing years 2008 and 2009.

The commenters correctly characterize the variability of the trawl survey data and encounter rates. While NMFS acknowledges these points, it does not conclude that they overcome the concerns noted above. More specifically, although some of the encounter rates do not indicate a decline in stock status, they are just one of the indicators that the Council and NMFS needs to rely on in determining the appropriate levels for the various TACs. As mentioned above, taken together, the SSCs advice, the significant retrospective pattern in the stock assessment, and the PDT's risk assessment, even in the face of some positive or stable encounter rates, justify the precautionary approach being taken in this rule.

NMFS does not share the commenters' concerns about the use of the PDT's risk assessment. PDTs are established by the Council specifically to offer technical advice that will assist in making sound fishery management decisions. The current process for obtaining the PDT's advice does not include an additional formal peer review of that advice. A certain amount of informal peer review is built into the PDT process by virtue of its membership and the debates that take place at PDT meetings, the Council's committee meetings, and Council meetings. An additional layer of informal peer review takes place within NMFS, when the specifications package, including the PDT's products, are reviewed by NMFS staff.

The perception that the industry was not allowed to participate in the AP's deliberations is not accurate. Not only is the AP comprised of industry members, but all of its meetings were public meetings, for which public notice was provided. At those meetings a variety of industry members contributed their thoughts and ideas to the process, although not all of their suggestions were ultimately adopted.

*Comment 3:* Two organizations argued that the reduction of the Area 1A TAC to 45,000 mt is not justified. They also argued that the PDT analysis was presented to the Council at the last minute and that participants in the fishery did not have adequate opportunity to review and comment on it. One commenter argued that the use of this new analysis appears contrary to the recent Congressional reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), which specifies in section 302(g) that, "The Secretary and each Council may

establish a peer review process for that Council for scientific information used to advise the Council about the conservation and management of the fishery." Finally, this commenter argued that the assumption in the specifications that the New Brunswick (NB) weir fishery will catch 20,000 mt annually is an overestimate and, therefore, it serves to provide an additional level of caution in the specifications.

*Response:* The justification for setting the Area 1A TAC at 45,000 mt and the concerns about the PDT's risk assessment are addressed in the response to Comment 2. NMFS notes that the Council process provided several opportunities for public comment, including comment on the risk assessment.

The new Magnuson-Stevens Act requirement is not retroactively applicable to the process the Council followed to develop these herring specifications.

The Council adopted the estimate that the NB weir fishery will land 20,000 mt annually after public debate. Though in recent years landings by this fishery have not attained 20,000 mt, the Council and NMFS concluded it is a reasonable estimate. Historical catches in the NB weir fishery were much higher than those in recent years, and exceeded 20,000 mt in many years prior to 1995. Landings of herring in the NB weir fishery average 22,475 mt for 1978–2005, despite the fact that the 2005 landings are currently estimated to have been about 13,000 mt.

*Comment 4:* Five vessel owners pointed out that there is no stock assessment for the inshore component and, therefore, the target and threshold fishing mortality rates for the inshore stock component remain uncertain. Because of this, the owners argue that reducing the Area 1A TAC based on a concern that the Council's recommendations for 2008 and 2009 would be only marginally successful at producing an exploitation rate consistent with  $F_{msy}$  is not justified, because the  $F_{msy}$  for the inshore component remains uncertain. Furthermore, these owners pointed out that, although the TRAC assessment estimated that the inshore component of the stock represents 18 percent of the total stock biomass, the TRAC assessment does not provide guidance on the TAC allocations by management area or the mixing rates between stock components. The owners find the use of the 18 percent value to be problematic, and cast doubt on the usefulness of the PDT's risk assessment because it is not peer-reviewed. The risk assessment

should not, they contend, be used as a justification for draconian cuts.

*Response:* The commenters are correct that the stock assessment does not provide specific fishing mortality target and threshold rates for the inshore stock component or the specification of management area TACs. However, NMFS concluded that it is appropriate to use the risk assessment and the TRAC estimate that the inshore stock component represents 18 percent of the total biomass, for reasons outlined in detail in the response to Comment 2. The stock mixing ratios used in the risk assessment are, as the specifications document points out, supported by the best available scientific information.

*Comment 5:* Five organizations argued that the proposed reallocation of 5,000 mt from Area 1A to Area 3 should, instead, be a reallocation of the same amount into a reserve for Area 2. The rationale offered is that a higher percentage of the Area 2 TAC has been taken in recent years than of the Area 3 TAC. The establishment of such a reserve would, the commenters argue, increase the amount of herring available to the Atlantic mackerel fishery, which has an incidental catch of herring. This would reduce the likelihood of a closure of the herring fishery in Area 2. The commenters believe that a herring closure would de facto close the mackerel fishery in that area because vessels would not fish in the area for mackerel if they could not also retain more than 2,000 lb (907.2 kg) of herring.

*Response:* There are two reasons for transferring the 5,000 mt from Area 1A to Area 3. First, since Area 3 fish are assumed to come entirely from the offshore component of the stock, the addition of 5,000 mt to that Area's TAC will not impact the status of the inshore component. Second, this reallocation will increase opportunities for the fleet to fish for herring in Area 3 and, therefore, support one of the FMP's goals, which is to provide for the orderly development of the offshore herring fishery. In contrast, because of mixing of the subcomponents of the stock, a shift of 5,000 mt from Area 1A to Area 2 would still allow the fishery to harvest from the inshore stock component.

On a practical level, the Area 2 TAC has never been fully harvested. In 2006, roughly 22,000 mt of herring was landed from this area, while in the 4 prior years, landings from the area ranged from 11,000 mt to 16,000 mt. In light of this history, the 30,000 mt allocated to Area 2 would appear unlikely to constrain the mackerel fishery. The Council has the option of reviewing information relating to the herring stock

and fishery in 2007 and revising the Area 2 TAC for 2008–2009, if warranted.

*Comment 6:* Two organizations urged that a portion of the DAH be set-aside for use in value-added food grade products, and that such an allocation would be consistent with the allocation of 20,000 mt for USAP. These commenters also urged NMFS to establish three different fishing seasons within Area 1A, and to apportion the TAC among those seasons to extend the fishing season in Area 1A, achieve OY, and more effectively protect pre-spawning herring.

*Response:* These suggestions would require amendment of the Herring FMP, which defines the allocations that must be recommended by the Council and enacted by NMFS, and are therefore outside the scope, purpose, and authority of this action. Such changes may be pursued through the Council process.

*Comment 7:* Two organizations argued that the Council's decision to review the new survey data during 2007 and determine whether adjustments should be made to the specifications for the 2008 and 2009 fishing years was sufficiently precautionary and should be allowed to proceed. One organization believed that NMFS's revision of the allocations for 2008–2009 precluded the Council from conducting a review of the fishery during the 3-year specification period.

*Response:* NMFS's decision to reduce the Area 1A TAC to 45,000 mt for the 2008 and 2009 fishing years has no bearing on the review process that the Council stated that it plans to conduct during 2007. That review is expected to take place, and the Council is at liberty to recommend changes to the specifications for 2008 and/or 2009 based on its review, if warranted.

*Comment 8:* Five vessel owners supported the implementation of the status quo specifications for the herring fishery, which would set OY at 150,000 mt, the Area 1A TAC at 60,000 mt, and the Area 3 TAC at 50,000 mt. They argue that the recent landings levels of around 100,000 mt are sustainable. They note that the TRAC report supports this view, and that the PDT analysis indicates that all of the alternatives, including the status quo, are projected to result in removals of the inshore component that are less than the historical (1995–2006) removals within a reasonable range of stock mixing assumptions.

*Response:* The commenters are correct in noting that the TRAC concluded that removals at current levels (around 100,000 mt per year for the past 15 years) are sustainable. They are also

correct that the PDT's risk assessment indicated that setting the TACs at the status quo level was projected to result in removals from the inshore stock component that are less than historical removals for the period 1995–2005, during the winter (January–March; August–December). However, the PDT's risk assessment was not as clear cut for the summer period (April–July), where it showed that the status quo TACs would generate removals that would be at or below historical removals in about 50 percent of the possible scenarios. Both the Council's recommended TACs and the TACs established by this action would be more risk-averse than the status quo during the summer period, when a large amount of the Area 1A catch is taken.

The commenters failed to note that there was a second part to the PDT's risk assessment, which evaluated the success of proposed TAC alternatives in achieving an exploitation rate that equates to  $F_{msy}$  for the herring stock. As noted in the response to Comment 2, this aspect of the risk assessment was one of the reasons that both the Council and NMFS concluded that it was appropriate to make a significant reduction in the Area 1A TAC to reduce the risk of overfishing the inshore stock component.

*Comment 9:* One organization argued that, based on the TRAC results and reasonable assumptions about stock component mixing rates, the Area 1A TAC should be set between 35,000–42,000 mt. Furthermore, this organization does not support the addition of 5,000 mt to the Area 3 TAC, and argues that, at most, the Area 3 TAC should be 55,000 mt. The commenter argues that, because the natural mortality rate used by the TRAC in its assessment model is not accurate and might significantly underestimate natural mortality, NMFS has not accurately estimated the amount of herring that can be safely removed from the ecosystem and that, as a result, NMFS should be more precautionary in setting the herring specifications.

*Response:* The PDT stated that if it may be possible to apply a fishing mortality rate to an average biomass for the inshore stock component (assuming that it comprises 18 percent of total biomass), and estimate a TAC specifically for the inshore stock component. Using this approach would likely result in a TAC for the inshore stock component of about 35,000 mt - 42,000 mt. However, the PDT also stated that a TAC for the inshore stock component does not equate to a TAC for Area 1A, as fish from both the inshore

and offshore component are caught in Areas 1A, 1B, and 2.

Regarding the commenter's contention that the natural mortality rate used in the TRAC assessment is not accurate, the TRAC investigated values for natural mortality other than 0.2, but deemed that 0.2 was the appropriate value to use in the stock assessment. The peer-reviewed TRAC results constitute the best available scientific information on this point.

NMFS notes that  $F_{msy}$  for the stock was estimated at 0.31 by the TRAC. The analysis of the stockwide  $F$  associated with the specifications estimates  $F$ 's of 0.18 in 2007; 0.197 in 2008, and 0.221 in 2009. NMFS concludes that these fishing mortality estimates are sufficiently precautionary.

*Comment 10:* Five vessel owners argued that the perceived declines in the inshore component, based on the incorporation of recent data (2004 and 2005) from the NMFS trawl survey, appears to be a rush to judgment. They pointed out that, in 2006, herring fishermen reported very high inshore biomass and that, based on a personal communication with NEFSC staff, the fall 2006 survey results indicate a rebound to previous levels.

*Response:* The PDT noted the impact that recent data has on overall trends for the inshore component; however it also placed that data within its proper context, stating that, "While data specific to the inshore component of the stock is limited and the Herring PDT cannot make a status determination based on bottom trawl indices alone, a change in the direction of the trend line is an important consideration." The Council's 2007 review will consider any updated survey data and, if the results indicate a change in the apparent trend of recent years, then it could result in recommendations for TAC adjustments in 2008–2009. While NMFS took recent trawl survey information into account in taking this action, there were several factors that led NMFS to specify the Area 1A TAC at 45,000 mt for 2008–2009, as discussed in the response to Comment 2.

*Comment 11:* Five vessel owners argued that the 10,000–15,000 mt reduction of the Area 1A TAC will have greater economic impacts than the revenue loss estimates of \$136,350–204,500 per vessel for purse seine vessels. They contend that it is incorrect to assume that the reduced catch in Area 1A can be made up from Area 3. They explain that vessel size and weather make it difficult for their vessels to work offshore and make up for reduced landings from Area 1A.

*Response:* The analysis of the economic impacts of the proposed TACs takes into account the same points made by the commenter. The specific per-vessel revenue impacts cited by the commenter are part of the analysis of revenue impacts on vessels that have harvested herring from Area 1A in the past, and are likely to qualify for the limited access permit established by Amendment 1. The analysis presumes that these vessels will continue to harvest the same proportion of the Area 1A TAC as in the past. The analysis notes that there are several things that could affect this assumption, notably that the reduced TAC may create an incentive for vessel owners to compete more aggressively for the reduced Area 1A TAC, thus altering the proportion of fish available to past participants. The analysis also notes that, while there are opportunities to harvest fish from other management areas to compensate for the reduction in Area 1A, this may not be possible for all vessels. It notes that there are a number of reasons it may not be possible for all vessels to fish in other areas, particularly offshore Areas 2 and 3, because the size of some vessels creates safety concerns, and because there are higher operating costs associated with longer trips, notably the costs associated with additional steaming time and associated fuel costs.

*Comment 12:* One organization argued that, because of the mixing between offshore and inshore components during the spring, only the fall surveys should be considered as an indicator of the status of the inshore stock component. It also argued that a number of the survey results, as well as observed encounter rates, indicate that the health of the stock is not in decline.

*Response:* Overall, the herring stock is in good shape, but for reasons outlined in the response to Comment 2 there are concerns about the inshore stock component that resulted in the reduction of the Area 1A TAC.

### Classification

This action is authorized by 50 CFR part 648 and has been determined to be not significant for purposes of Executive Order 12866.

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

A description of the reasons for this action, the objectives of this action, and the legal basis for this final rule is found

in the preambles to the proposed rule and this final rule and is not repeated here.

#### *Statement of Need for this Action*

The purpose of this action is to establish specifications to conserve and manage the herring resource for the period 2007–2009, as required by the FMP.

#### *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 460 comments on the proposed specifications. Only one comment was specific to the IRFA. Comment 12 outlines concerns expressed by five vessel owners that the analysis of the Area 1A TACs underestimated the economic impacts they would experience due to the reductions in the allocation for the area. NMFS' assessment of the issues raised by this comment is contained in the preamble and not repeated here. The comment did not result in any changes to the Area 1A TAC, which was reduced for biological reasons.

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

During the 2005 fishing year, 143 vessels landed herring, 33 of which averaged more than 2,000 lb (907 kg) of herring per trip. The Small Business Administration's size standard for small commercial fishing entities is \$4 million in gross sales. Thus, all the entities participating in this fishery are considered small entities, as defined in section 601 of the RFA. Therefore, there are no disproportionate economic impacts between large and small 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.

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

The economic impacts of this action were assessed by the Council and NMFS in an analysis that compares the alternatives considered to the herring landings made in 2005, the most recent year for which complete data are available. From a fishery-wide perspective, these specifications are not expected to produce a negative economic impact to vessels prosecuting the fishery because it allows for landings levels that are significantly higher than the landings in recent years. The 2007–2009 specifications should allow for incremental growth in the industry, while appropriately addressing biological concerns. However, because of the allocation of the management area TACs, and the reduction in the Area 1A TAC in particular, these specifications could have a negative impact on various industry participants, despite the fact that overall landings levels could be higher than in recent years.

The specification of OY and DAH is 145,000 mt for 2007–2009. While higher levels of OY were considered (150,000 mt and 170,000 mt) the OY of 145,000 mt will allow an annual increase of up to 51,610 mt in herring landings compared to the 93,390 mt landed in 2005. This will generate \$10.4 million in revenues, based on an average price (in 2005) of \$202/mt. Therefore, there are no negative economic impacts associated with the specification of OY in this action. Individual vessels could increase their revenues under the proposed 2007–2009 specifications, depending on the number of vessels participating in the fishery, which will become a limited access fishery with the implementation of Amendment 1 to the FMP on June 1, 2007.

Several other specifications established by this action would also allow an increase in revenue to industry participants when compared to the 2005 landings. These include DAH and DAP, which are specified at 145,000 mt and 141,000 mt, respectively; USAP, which is specified at 20,000 mt; the Area 1B TAC, which is specified at 10,000 mt; the Area 2 TAC, which is specified at 30,000 mt; and the Area 3 TAC, which

is specified at 55,000 mt in 2007 and 60,000 mt in 2008–2009. In each instance, there are no negative economic impacts associated with these specifications because they would allow industry participants to harvest and/or process more herring than in 2005. There are no potential economic impacts associated with the allocation for JVPT of zero, because it is unchanged from 2005.

The only specification that could constrain the industry when compared to landings and revenue in 2005 is reduction of the Area 1A TAC to 50,000 mt in 2007, and 45,000 mt in 2008 and 2009. The impacts of these reductions were analyzed for the purse seine fleet, the single midwater trawl fleet, and the paired midwater trawl fleet.

In 2005, the currently active purse seine fleet caught 27 percent of the Area 1A TAC. With a 10,000–15,000–mt reduction in the Area 1A TAC, if the proportion of the herring catch by the purse seine fleet remains the same and the decrease in the Area 1A TAC cannot be made up from fishing in other areas, there would be a 2,700–mt loss in catch under this action in 2007, and a 4,050–mt loss in catch in 2008 and 2009. Using the 2005 average price of herring of \$202 per metric ton, this loss in catch would be worth \$545,400 and \$818,000, respectively, across the sector (there are four vessels in the currently active purse seine fleet). To make up for such a loss, these vessels would have to either increase their proportion of the herring catch in Area 1A relative to midwater trawlers, or move to other areas. There were no landings from Area 3 by these purse seine vessels in 2005, likely reflecting the fact that the vessels are too small to fish in these offshore areas. Moving offshore would also entail additional operating costs because the trips would be longer.

The impact of the 10,000–15,000–mt decrease in the Area 1A TAC on the single midwater trawl fleet is difficult to predict, because the Purse Seine/Fixed Gear (PS/FG) only area established by Amendment 1 will eliminate single midwater trawl vessels from Area 1A during the most productive part of the Area 1A fishery (June through September). The establishment of a PS/FG only area might intensify the race to fish in Area 1A, as midwater trawl vessels (single and paired) may try to catch more fish from the area prior to the closure to trawling on June 1.

If herring are plentiful in Area 1A during the spring (Area 1A catches increase in May, historically), the single midwater trawlers may be able to maintain their historical proportion of the Area 1A TAC. However, it is likely

that purse seine vessels and midwater pair trawl vessels would also participate in the pre-June race in order to keep their landings on par with previous years. In addition, single midwater trawl vessels might convert to purse seine gear in order to fish in Area 1A in the summer.

In 2005, the currently active single midwater trawl fleet caught 18 percent of the Area 1A TAC. If the proportion of the herring catch by the single midwater trawl fleet remains the same, and the decrease in the Area 1A TAC cannot be made up from fishing in other areas, there would be a 1,800-mt loss in catch under this action during 2007, and a 2,700-mt loss in catch in 2008 and 2009. Using the 2005 average price of herring of \$202 per metric ton, this loss in catch would be worth \$363,600 and \$545,400, respectively, across the sector (there are four vessels that were active in Area 1A from 2003–2005 in the single midwater trawl fleet). To make up for such a loss, the single midwater trawl vessels would have to either increase their proportion of the herring catch in Area 1A relative to purse seine vessels, or move to other areas. Moving to offshore areas may be problematic for two of the four single midwater trawl vessels, since these two are relatively smaller vessels and landed herring only from Area 1A during 2003 through 2005. The other two vessels are somewhat larger and have Area 3 catch history, so their loss of Area 1A catch may be mitigated by their ability to fish in Area 3. If the single midwater trawl vessels make up their catch in Areas 2 and 3, the vessel operating cost will increase because the trips will be longer.

With decreases in the Area 1A TAC of 10,000 mt to 15,000 mt under this action, the impact on the midwater pair trawl fleet could also be large. It is difficult to predict what the impact will be on the midwater pair trawl fleet, because these vessels will also be excluded from Area 1A for the period June–September due to the PS/FG only measure. In 2005, the currently active pair trawl fleet caught 55 percent of the Area 1A TAC. If the proportion of the herring catch by the pair trawl fleet remains the same and the decrease in the Area 1A TAC cannot be made up

from fishing in other areas, there would be a 5,500-mt loss in catch under this action in 2007, and a 8,250-mt loss in 2008 and 2009. Using the 2005 average price of herring of \$202 per metric ton, this catch is worth \$1,111,000 and \$1,666,500 respectively, across the sector (there are 12 vessels in the pair trawl fleet that were active from 2003–2005). To make up for such a loss, pair trawl vessels would have to either increase their proportion of the herring catch in Area 1A or move to other areas. All pair trawl vessels have Area 3 catch history, so their loss of Area 1A catch may be mitigated by their ability to fish in Area 3. If the pair trawl vessels make up their catch in Areas 2 and 3, the vessel operating cost will increase because the trips would be longer.

The 10,000-mt to 15,000-mt reduction in TAC in Area 1A may cause participants using all 3 gear types to increase their fishing activity in Area 1B. The Area 1B TAC has not been reached every year, and only 60 percent was harvested in 2005. Since Area 1B is farther from shore than Area 1A, vessel operating costs would increase because trips would be longer. Harvesting in Area 1B will only provide limited relief for vessels impacted by the reduction in the Area 1A TAC since the TAC is limited to 10,000 mt.

There were seven alternatives considered. Three of the alternatives would have set the Area 1A TAC at 60,000 mt. They were rejected because the biological concerns about the inshore herring stock component require a significant reduction in harvest within Area 1A. More specifically, NMFS concluded that the SSC's advice, the retrospective pattern in the stock assessment, and the conclusions of the PDT's risk assessment combine to make a sound case for being precautionary about protecting the inshore component and for specifying the Area 1A TAC at 45,000 mt.

One alternative would have set the Area 1A TAC at 50,000 mt for all three years. This was rejected for the reasons cited above; namely, that the SSC's advice, the retrospective pattern in the stock assessment, and the conclusions of the PDT's risk assessment combine to

make a sound case for being precautionary about protecting the inshore component and for specifying the Area 1A TAC at 45,000 mt.

Two of the alternatives would have reduced the Area 1A TAC to 45,000 mt for all three years. These were rejected because NMFS believed that it is sufficient to achieve biological objectives to implement the 45,000 mt TAC for 2008–2009, and establish the 2007 TAC at 50,000 mt, consistent with action taken by the states under the Atlantic States Marine Fisheries Commission's Interstate Fisheries Management Plan for Atlantic Sea Herring. The preferred alternative was selected because the SSC's advice, the retrospective pattern in the stock assessment, and the conclusions of the PDT's risk assessment combine to make a sound case for specifying the Area 1A TAC at 45,000 mt in fishing years 2008 and 2009.

#### *Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule, or group of related rules, for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide 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>.

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

Dated: April 2, 2007.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

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