

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 111207734-2119-02]

RIN 0648-BB50

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to 2012 Annual Catch Limits

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

ACTION: Final rule.

SUMMARY: This action reduces the 2012 annual catch limits (ACLs) for the Atlantic herring (herring) fishery to account for catch overages in 2010 and to prevent overfishing.

DATES: Effective February 24, 2012, through December 31, 2012.

ADDRESSES: Copies of supporting documents, the 2010–2012 Herring Specifications and Amendment 4 to the Herring Fishery Management Plan (FMP), are available from: Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950, telephone (978) 465–0492. These documents are 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**

The Atlantic herring harvest in the United States is managed under the Herring FMP developed by the New England Fishery Management Council (Council), and implemented by NMFS, in 2000. The Council developed herring specifications for 2010–2012, which were approved by NMFS on August 12, 2010 (75 FR 48874). Although herring is not overfished and is not experiencing overfishing, the herring annual acceptable biological catch for fishing years 2010–2012 (106,000 mt) was reduced from previous years (145,000 mt in 2009) due to concerns about a retrospective pattern in the 2009 herring stock assessment that over-estimates biomass.

The stock-wide herring ACL (91,200 mt) is divided among three management areas, one of which has two sub-areas. Area 1 is located in the Gulf of Maine

(GOM) and is divided into an inshore section (Area 1A) and an offshore section (Area 1B). Area 2 is located in the coastal waters between Massachusetts and North Carolina, and Area 3 is on Georges Bank (GB). The herring stock complex is considered to be a single stock, but there are inshore (GOM) and offshore (GB) stock components. The GOM and GB stock components segregate during spawning and mix during feeding and migration. Each management area has its own sub-ACL to allow greater control of the fishing mortality on each stock component. While the stock-wide herring ACL for 2010–2012 was not reduced below the 2008 catch level, the management area sub-ACLs were reduced from 2009 levels by 20 to 60 percent. The management area sub-ACLs established for 2010–2012 were: 26,546 mt for Area 1A, 4,362 mt for Area 1B, 22,146 mt for Area 2, and 38,146 mt for Area 3.

Amendment 4 to the Herring FMP (Amendment 4) (76 FR 11373, March 2, 2011) revised the specification-setting process, bringing the Herring FMP into compliance with ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the FMP, if NMFS determines catch will reach 95 percent of the sub-ACL allocated to a management area or seasonal period, then NMFS prohibits vessels from fishing for, possessing, catching, transferring, or landing more than 2,000 lb (907.2 kg) of herring per trip from that area or period. This AM slows catch to prevent or minimize catch in excess of a management area or seasonal period sub-ACL. As a way to account for ACL overages in the herring fishery, Amendment 4 established an AM requiring overage deductions. If the catch of herring in any given fishing year exceeds any ACL or sub-ACL, the overage will be deducted from the corresponding ACL/sub-ACL in the next full fishing year (e.g., an overage in FY 2010 will be deducted from the ACL/sub-ACL in 2012).

Fishing year 2010 was the first year that NMFS monitored herring catch against the recently reduced management area sub-ACLs. NMFS experienced difficulty determining when to implement the 2,000-lb (907.2-kg) possession limit in Area 1B because of a pulse of fishing effort in that area. NMFS had similar difficulties determining when to implement the reduced possession limit in Area 1A because catch rates were highly variable. Ultimately, catch from Areas 1B and 1A exceeded their allocations by

1,639 mt and 1,878 mt, respectively. These experiences demonstrated that more timely catch reporting was needed to better monitor catch against sub-ACLs and to allow catch to achieve, but not exceed, management area sub-ACLs. Therefore, in September 2011, NMFS revised vessels reporting requirements to obtain more timely catch reports (76 FR 54385, September 1, 2011). As a result of that rulemaking, limited access herring vessels are required to report herring catch daily via vessel monitoring systems, open access herring vessels are required to report catch weekly via the interactive voice response system, and all herring-permitted vessels are required to submit vessel trip reports (VTRs) weekly.

Final Adjustment to the 2012 Annual Catch Limits

In accordance with regulations at § 648.201(a)(3), this action deducts the 2010 overages from 2012 catch limits. Therefore, in 2012, the sub-ACL for Area 1A is revised to 24,668 mt (reduced from 26,546 mt) and the sub-ACL for Area 1B is 2,723 mt (reduced from 4,362 mt). The sub-ACLs for Areas 2 and 3 remain unchanged at 22,146 mt for Area 2 and 38,146 mt for Area 3. The methods for determining the final 2010 catch rates and subsequent 2012 adjustments were discussed in detail in the proposed rule and are not repeated here (76 FR 79610, December 22, 2011).

Comments and Responses

Six comment letters were received on the proposed rule for this action from the following: The Cape Cod Commercial Hook Fishermen's Association (CCCHFA); Cape Seafoods Inc./Western Sea Fishing Company; O'Hara Corporation/Starlight Inc. (a herring fishing organization); a fishing/environmental organization (CHOIR Coalition), the Herring Alliance (an environmental advocacy group); and a member of the public.

Comment 1: The CCCHFA supports reducing 2012 herring sub-ACLs in Areas 1A and 1B to account for catch overages in those areas in 2010, but it believes that the reductions should have been implemented in a timelier manner.

Response: The timing of this rulemaking is consistent with the overage deduction AM implemented in Amendment 4 that once the total catch of herring for a fishing year is determined, using all available information, any ACL or sub-ACL overage results in a reduction of the corresponding ACL/sub-ACL the following year. Therefore, the catch overages in Areas 1A and 1B in 2010, are being deducted from the 2012 Area

1A and 1B sub-ACLs. The proposed rule explained that both Federal and state dealer data are used to compile final catch; final state data became available in September, and 2010 herring data were finalized November 25, 2011; this action deducts 2010 overages as soon as is possible.

Comment 2: The Herring Alliance and CHOIR Coalition both expressed support for reducing 2012 herring sub-ACLs in Areas 1A and 1B to account for 2010 catch overages in those areas. However, CHOIR Coalition and the Herring Alliance believe 2010 overages should have been deducted from 2011 sub-ACLs, rather than waiting until 2012, and that this action is only a step toward bringing accountability to the herring fishery. Additionally, the Herring Alliance, CHOIR Coalition, and CCFHA commented that overages accrued in 2010, underscore the need for a more comprehensive catch monitoring and reporting system, including a third party monitoring system, evident by sub-ACLs overages and data issues with the herring landings reported by vessels and dealers (e.g., missing VTRs, missing dealer reports, discrepancies between vessel and dealer reports).

Response: As explained in the proposed rule, 2010 herring data were not finalized until November 25, 2011. Given the timing of data availability and the need to provide the herring industry with notice of catch limit changes, this action deducts 2010 overages as soon as is possible. While the sub-ACLs for Areas 1A and 1B were exceeded, total herring catch in 2010 (72,852 mt) did not exceed the stock-wide ACL of 91,200 mt. According to the MSA, ACLs must be set at a level that prevents overfishing. The sub-ACLs overages in 2010 did not result in overfishing, therefore, the current AMs are sufficient. As NMFS reviewed the 2010 herring data, and compared individual VTRs with individual dealer reports, it resolved data errors resulting from misreporting. Because the quality of inseason data could be affected by misreporting, NMFS strongly encourages vessel owner/operators and dealers to double check reports for accuracy and ensure reports are submitted on a timely basis. However, because NMFS resolved data reporting issues as part of the 2010 review, data issues did not negatively affect 2010 data. For these reasons, NMFS does not believe there is a significant failure of the current catch reporting system, and that the current catch reporting system fulfills the requirements of the MSA. Additionally, the Council is considering changes to catch reporting and

monitoring for the herring fishery in Amendment 5 to the Herring FMP (Amendment 5), currently scheduled for implementation in 2013, and those changes have the potential to further improve the catch monitoring system for the herring fishery.

Comment 3: The Choir Coalition urged NMFS to ensure that Amendment 5 implements a third-party monitoring system for the herring fishery.

Response: While the Council did consider third-party monitoring of herring catch in developing Amendment 5, that alternative was ultimately rejected by the Council and is no longer under consideration in Amendment 5.

Comment 4: The Herring Alliance criticized the methodology used by NMFS to calculate a discard estimate for the herring fishery. The Herring Alliance believes that discards coded as “fish not known (fish nk)” contain substantial amounts of herring, while acknowledging that these discards also likely contain fish other than herring. When calculating a herring discard estimate, the Herring Alliance recommended that NMFS assume all “fish nk” discarded from limited access herring vessels are herring and that the fleet-wide estimate of discarded “fish nk” should be added to the discard estimate of herring to calculate total herring discards in 2010.

Response: NMFS calculated 2010 herring discards by dividing the amount of observed herring discards (“herring” and “herring not known (herring nk)”) by the amount of all observed fish landed. That discard ratio was then multiplied by the amount of all fish landed for each trip to calculate total amount of herring discards in 2010. If an observer verifies that fish are Atlantic herring, those fish are coded as “herring.” If an observer verifies that fish are a type of herring but cannot verify species of herring, those fish are coded as “herring nk.” If an observer cannot verify species identification on catch that is discarded, that discard event is coded by observers as “fish nk.” Because the discards coded as “fish nk” likely contain species other than herring, NMFS believes it is not appropriate to count those discards against herring management area sub-ACLs. When developing the discard methodology, NMFS consulted with the Council’s Herring Plan Development Team (PDT), which concurred that the discard estimate for the herring fishery should be calculated based on the amount of observed “herring” and “herring nk” and that it should not include discards coded as “fish nk.” In accordance with Amendment 4, NMFS will be annually determining catch

(landings and discards) in the herring fishery and evaluating that catch against management area sub-ACLs.

Additionally, the Council is considering changes to catch reporting and monitoring for the herring fishery in Amendment 5. As more information is known about catch in the herring fishery, the methodology to calculate herring landings and discards can be revised, as appropriate.

Comment 5: The herring fishing organizations (Cape Seafoods Inc./ Western Sea Fishing Company, O’Hara Corporation/Starlight Inc.) raised concerns about the common vessel and dealer reporting errors described in the proposed rule. They expressed frustration that they make every effort to report accurately and wondered why NMFS is not doing more to resolve reporting errors.

Response: NMFS reviews vessel and dealer data inseason and works to resolve reporting errors as soon as possible by comparing vessel and dealer data and contacting either the vessel or the dealer if data are questionable. The list of common reporting errors was included in the proposed rule to help make industry aware of the reporting issues that NMFS is seeing in the data and, ultimately, to minimize the number of reporting errors that need to be resolved. NMFS will continue to work with herring industry members to ensure that herring catch information is being accurately reported and any data errors are corrected in a timely manner.

Comment 6: The herring fishing organizations also both disagreed with NMFS’s conclusion that the economic effects of this action are anticipated to be minimal because the reduction is relatively minor and herring vessels generate most of their revenue in other fisheries. The commenters stated that, while some vessels with herring permits generate most of their income from other fisheries, most of the herring harvest is caught by only a few vessels that rely on herring revenue as the primary, and sometimes only, source of fisheries revenue.

Response: As described in the proposed rule, Amendment 4 analyzed the effects of deducting overages. Since deductions are the same magnitude as the overages, there is no overall change to the amount of fish available for harvest. Therefore, if participants are active in the fishery during the overage year and the deduction year, the total economic impact on participants is neutral across years. Additionally, NMFS reviewed 2010 economic data to further evaluate the economic effect of this action. In 2010, herring revenue averaged 20 percent of total fisheries

revenue for limited access vessels (44 percent for Category A vessels, 13 percent for Category B vessels, 3 percent for Category C vessels) and less than 1 percent of total fisheries revenue for open access vessels. Total herring revenue in 2010 equaled approximately \$18.8 million for limited access vessels, and \$150,000 for open access vessels. Absent the sub-ACL reductions in Areas 1A and 1B, the total potential herring revenue in 2012 is estimated to be \$26.4 million. The sub-ACL reductions in Areas 1A and 1B would reduce the total potential herring revenue by 4 percent in 2012. While this action reduces the amount of fish available for harvest, both the fishery-wide and individual-vessel economic effects are anticipated to be minimal, because the reduction is relatively minor and the majority of herring vessels generate most of their revenue participating in other fisheries. There are a small number of herring vessels that generate a large percentage of their revenue from herring catch, and the herring fishing organizations are correct in that fishery participants who typically harvest a large percentage of the herring ACL may be more affected than others by the 2012 reductions. However, since the reduction in the ACL for FY 2012 is relatively small on an individual vessel basis, the economic impacts of this reduction will not be significant, nor will it affect a substantial number of small entities.

Comment 7: A member of the public supports reducing the 2012 herring sub-ACLs, but believes NMFS is not doing enough to protect marine fish stocks.

Response: For the reasons explained in this rule, NMFS has reduced the herring sub-ACLs in Areas 1A and 1B for the 2012 fishing year.

Changes From the Proposed Rule

There are no changes from the proposed rule.

Classification

The Administrator, Northeast Region, NMFS, determined that this final rule is necessary for the conservation and management of the herring fishery and that it is consistent with the MSA and other applicable law.

The National Environmental Policy Act (NEPA) analysis to support this action was completed in Amendment 4 (76 FR 11373, March 2, 2011). A copy of the NEPA analysis is available upon request (see **ADDRESSES**).

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this rule and establish the date of publication in the **Federal Register** as the effective date for this action because delaying the effectiveness of the rule is contrary to the public interest and impracticable. This action reduces the 2012 herring sub-ACLs in Areas 1A and 1B account for catch overages in 2010 and to prevent overfishing. The 2012 herring fishing year began on January 1, 2012, and sub-ACLs for each management area were already in place as specified by the 2010–2012 herring specifications. The regulations at § 648.201(a) require implementing a 2,000-lb (907.2-lb) possession limit in a management area if herring catch in that area is projected to reach 95-percent of that area's sub-ACL. This accountability measure helps ensure that herring catch does not exceed a management area sub-ACL. As of February 1, 2012, herring catch in Area 1B is 2,932 mt, which is 67-percent of the original sub-ACL specified for Area 1B, and 107-percent of the reduced 2012 sub-ACL. Because herring catch in Area 1B has already exceeded 95

percent of reduced 2012 sub-ACL (2,587 mt) implemented in this action, triggering the need to implement a 2,000-lb (907.2-kg) possession limit in that area, any delay in this action will likely cause catch to further exceed the reduced Area 1B sub-ACL. Due to the high volume nature of the herring fishery, and the amount of herring already caught in Area 1B for the 2012 fishing year, if implementation of this action is delayed, the reduced 2012 sub-ACL for Area 1B could be exceeded by a large amount, thereby undermining the purpose and focus of the rule, which seeks to prevent overfishing as required by the MSA. Accordingly, any delay in the rule's effectiveness would be contrary to the conservation objectives of the MSA and the Herring FMP.

This final rule has been determined to be not significant for purposes of Executive Orders 12866 and 13563.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration (SBA) that this final rule, if adopted, would not have a significant economic impact on a substantial number of small entities. NMFS received two comments on this certification. The comments are addressed in the response to comments section above, and the certification remains unchanged from the proposed rule. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

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

Dated: February 21, 2012.

Alan D. Risenhoover,
Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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