

February 27, 2004

Via Facsimile (978) 281-9135  
Ms. Patricia A. Kurkel  
Regional Administrator  
National Marine Fisheries Service  
One Blackburn Drive  
Gloucester, MA 01930

Re: Proposed Rule on Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 13

Dear Ms. Kurkel:

The Office of Advocacy of the U.S. Small Business Administration submits this comment letter in response to the above-referenced proposed rule. These comments reflect concerns that small entities have voiced to the Office of Advocacy.

### **Advocacy Background**

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>1</sup> On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations.<sup>2</sup> Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>3</sup>

### **The Proposed Rule**

On January 29, 2004, National Marine Fisheries Service (NMFS) published a proposed rule in the Federal Register on the "Magnuson-Stevens Fishery Conservation and Management Act

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>2</sup> Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

<sup>3</sup> Id.

Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery Amendment 13.<sup>4</sup> The proposed rule was developed to end overfishing and rebuild multispecies (groundfish) stock and to make other changes in the management of the groundfish fishery.<sup>5</sup>

### *Advocacy's Involvement with Amendment 13*

Representatives of the small businesses in the New England groundfish fishing industry first informed Advocacy of their concerns about Amendment 13 in September 2002. At that time, the small businesses expressed concerns about the potential inaccuracy of the stock assessment as well as the potential impact that Amendment 13 could have on the New England groundfish fishing industry. Shortly thereafter, Advocacy submitted a letter to the New England Fishery Management Council (Council) regarding the stock assessment and requested that the Council not consider Amendment 13 until an independent assessment of the stock could be completed.<sup>6</sup> Advocacy was pleased when the National Oceanic and Atmospheric Administration (NOAA) complied with Advocacy's request and asked Judge Kessler for a delay in the implementation of the New England groundfish fishing regulations.<sup>7</sup>

Throughout the process, Advocacy has met with several representatives of the fishing industry in Washington and New England to discuss the potential impact that Amendment 13 could have on the fishing industry and the fishing communities. Advocacy has also submitted comments pertaining to Amendment 13 on NMFS' emergency action on Days At Sea (DAS) leasing<sup>8</sup> and to urge the Council's inclusion of an industry suggested alternative for Amendment 13.<sup>9</sup> Advocacy also met with NMFS to discuss the economic analysis for Amendment 13, small entity impacts, and to encourage NMFS and the Council to continue working with the fishing industry to develop less burdensome alternatives.<sup>10</sup>

### **Requirements of the RFA**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an Initial Regulatory Flexibility Analysis (IRFA). The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5)

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<sup>4</sup> 69 *Fed. Reg.* 4362.

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Chief Counsel Thomas M. Sullivan to the New England Fishery Management Council (October 28, 2002), available at [http://www.sba.gov/advo/laws/comments/noaa02\\_1028.html](http://www.sba.gov/advo/laws/comments/noaa02_1028.html).

<sup>7</sup> Letter from Chief Counsel Thomas Sullivan to NOAA (November 8, 2002), available at [http://www.sba.gov/advo/laws/comments/noaa02\\_1108.html](http://www.sba.gov/advo/laws/comments/noaa02_1108.html).

<sup>8</sup> Letter from Chief Counsel Thomas M. Sullivan to NMFS (June 10, 2003), available at [http://www.sba.gov/advo/laws/comments/nmfs03\\_0610.html](http://www.sba.gov/advo/laws/comments/nmfs03_0610.html).

<sup>9</sup> Letter from Chief Counsel Thomas Sullivan to the New England Fishery Management Council and NOAA (November 3, 2003), available at [http://www.sba.gov/advo/laws/comments/doc03\\_1103.html](http://www.sba.gov/advo/laws/comments/doc03_1103.html) and [http://www.sba.gov/advo/laws/comments/noaa03\\_1103.html](http://www.sba.gov/advo/laws/comments/noaa03_1103.html), respectively.

<sup>10</sup> October 23, 2003, meeting with Advocacy, Commerce, and NMFS.

the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.<sup>11</sup>

### **NMFS' Compliance with the RFA in the Proposed Rule**

Overall, Advocacy is pleased with NMFS' effort to comply with the letter and spirit of the RFA. We offer the following recommendations to clarify the analysis and provide better insight into the possible economic impact that this rule may have on small entities.

#### *Overall Summary of Impacts*

Advocacy believes the IRFA would be improved by inclusion of a summary discussion of the various costs of the many compliance requirements of the rule. Although NMFS discusses the economic impacts of the various rule requirements individually, there is no discussion on what the final overall impact of all of the actions and compliance requirements will be on small fishers. For example, NMFS provides a discussion of potential reduction in profit as an impact of the DAS measure on page 4378 and later discusses the costs of the gear modifications on page 4388. In addition, there are separate discussions of the impacts of area closures, equipment and capital requirements, and paperwork burdens (as discussed below). Because of the size of the IRFA, and the number of requirements that impose costs on small entities, an overall summary of the economic impacts that assessed the totality of costs and offered cost totals for the different vessel types would be helpful. Essentially, Advocacy believes that the transparency and usability of the impact assessment would be improved for use by interested small entities if the costs were presented in a summary table.

Furthermore, because many costs, like revenue losses from area closures and new equipment requirements, are confined to vessels operating in specified geographic areas, it is difficult to easily discern the total cost of the rule on any particular vessel even if one knows all of the data regarding the vessels size and operating location. An additional change to the presentation of costs that would improve transparency of the analysis would be a detailed description of just which compliance requirements are included in the revenue loss and business closure analysis described on pages 4377 to 4379. Advocacy would also like to see an introductory statement that the affected fishing industry has X boats that generate \$X annually; the proposed rule will reduce annual revenues by \$X, or X%; revenue losses will lead to X small entities going out of business because they cannot cover costs, which is X% of all small entities, etc. A summary of the costs would provide a more complete picture of the overall economic impact on small entities.

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<sup>11</sup> 5 U.S.C. § 603 and 5 U.S.C. § 607.

### *Referenced Tables Are Not Easily Available to the Reader*

Throughout the analysis, NMFS refers to tables that are only available in other documents, most notably the Final Supplemental Environmental Impact Statement (FSEIS). This document is hundreds of pages long, yet there is no information in the IRFA about where referenced tables are located. Even though NMFS placed the tables on a website, there is no information in the Federal Register notice about the availability or the location of the documents on the Internet. Without the tables, parts of the analysis are difficult to understand and small entities may not be able to ascertain the impact that the proposed rule may have on their particular type of vessel and activity. In the future Advocacy recommends that NMFS publish information about the availability of the tables that are referenced in the IRFA along with the website address in the Federal Register to assist small entities in ascertaining the impact that the proposal will have on their businesses.

### *Discussion of Small, Midsize, and Large Commercial Vessels*

In the IRFA, NMFS distinguishes between small vessels, medium size vessels, and large vessels in terms of expected economic impact. With the exception of an explanation of what would be classified as a small trawl vessel,<sup>12</sup> there is no information about how NMFS has determined what is a small vessel, medium vessel, or large vessel. Advocacy encourages NMFS to provide this information, or at least a summary of the information and reference to where more detailed information can be found, so that the affected small entities can ascertain which classification would apply to the vessel owned by a particular small business. Since NMFS analyzes the economic impact in terms of vessel size, this information is crucial for a small business to ascertain how its vessels would be classified and the potential impact that the rule will have on its vessels. It would also improve the transparency of the analysis.

### *Discussion of Reporting and Recordkeeping Requirements*

The proposed rule has twenty-one reporting and recordkeeping requirements. However, NMFS states that the costs associated with the reporting and recordkeeping requirements are minimal and consist only of postage and copying costs without providing an estimate of those costs. Moreover, the estimated time for completing the paperwork is approximately 82 hours. There is no indication that the level of expertise for completing the forms has been considered. If these forms require the professional services, complying with the paperwork requirements of the rule could be costly. Even if the forms can be filed out by the business owner, it is time that is being spent that the business owner could use concentrating on something else. Were these things considered when NMFS concluded that the costs would be minimal? Advocacy encourages NMFS to provide an estimate of what the additional costs may be, as well as a better explanation of its conclusion that the costs will be minimal.

### *Treatment of Recreational Vessels*

NMFS appropriately discussed the impacts of the rule on commercial fishing vessels, Advocacy is concerned about the adequacy of NMFS' discussion of the impact on the recreational fishing

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<sup>12</sup> 69 Fed. Reg. 4378.

industry. For example, in the description and estimate of the number of small entities subject to the proposed rule, NMFS gives a thorough discussion of the commercial fishing industry. However, in terms of recreational party/charter vessels, NMFS merely states the size standard for a small party/charter vessel and the number of party/charter permits that it has issued in the past. There is no information about how many of the recreational vessels would qualify as small business under the 100 employee size standard.<sup>13</sup> Moreover, in the discussion of the impacts, NMFS asserts that the majority of the vessels earn at least 75 percent of fishing income from passenger fees. However, no basis is provided for that statement. There is also no information about the average recreational vessel income or the current practices. Without this information, small recreational fishers cannot ascertain whether NMFS assumptions are correct. If NMFS does not have the data, NMFS should solicit input from the industry. Advocacy encourages NMFS to reach out to the recreational fishing industry to address those issues.

### **Other Issues that May Affect the Accuracy of the IRFA**

#### *Reliability of Underlying Data*

As stated in the past, Advocacy has ongoing concerns about the accuracy of the underlying science that was used to establish the proposed rule. The viability of the groundfish industry depends on a fishery management plan that is based on proper stock assessments. Without reliable data, the appropriate course of action for protecting the species and the fishing industry cannot be determined.<sup>14</sup> If scientific information becomes available that indicates that stock is healthier than previously believed, Advocacy urges NMFS to reconsider this action immediately.

#### *Issues in the Proposed Rule that are Inconsistent with Amendment 13*

As noted above, Advocacy is in contact with the small business community on this issue. Advocacy understands that there are areas of the proposed rule that may be inconsistent with Amendment 13. For example, according to the Northeast Seafood Coalition, the proposed criteria for determining if the proposed default measures will be deferred or remain in place may not reflect the Council's intent. The Northeast Seafood Coalition contends that the process set forth in the proposed rule guarantees the failure of the rebuilding strategies. If the members of the industry are correct, the proposed rule may harm the fishing industry and the environment.

Moreover, it is Advocacy's understanding that some members of the fishing industry maintain that the NMFS proposed rule includes conditional fishing area closures that were not intended by the Council. Specifically, they contend that the closure of an area in George's Bank<sup>15</sup> may jeopardize Amendment 10 to the Scallop Fishery Management Plan. According to the Fishery Survival Fund, this action is inconsistent with the Council's actions on Amendment 13. Furthermore, the Trawler's Survival Fund and Associated Fisheries of Maine are concerned about the extension of cod trip limits and gear requirements to the eastern US/Canada area.<sup>16</sup> They are concerned that this is also contrary to the intent of Amendment 13. Although there is a

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<sup>13</sup> 69 Fed. Reg. 4376-4377.

<sup>14</sup> See, letters dated October 28, 2002 and November 3, 2003.

<sup>15</sup> 69 Fed. Reg. 4380.

<sup>16</sup> 69 Fed. Reg. 4381.

discussion of the NMFS action in the IRFA, it does not include specifics as to economic impact of these closures on small entities.

The examples listed above illustrate some of the small entity concerns with regard to the inconsistencies between the Council's actions and the proposed rule. While Advocacy recognizes that NMFS has some discretion in developing regulations to implement Amendment 13, Advocacy is concerned that these inconsistencies may increase the burden on small entities and that they may not have been considered fully in determining the economic impact of the rule, as required by the RFA. Advocacy encourages NMFS to give full consideration to the comments made by the small entities about the inconsistencies in the proposed rule. Advocacy also encourages NMFS to fully review its economic analysis to assure that the implications of these differences have been fully examined. Advocacy further encourages NMFS to reconsider whether the changes are necessary and whether there are less burdensome ways of accomplishing the NMFS' goal.

### **Conclusion**

Advocacy recognizes that NMFS is under a court imposed deadline to craft Amendment 13 in a manner that fulfills conservation objectives while ensuring the sustainability of the fishing industry. Despite the inclusion of the industry alternative, the overall impact of this rule will be devastating to the small fishing industry. Advocacy urges the Department of Commerce, NMFS, to give careful consideration to the comments filed by small entities and to clarify aspects of the rule that impose unnecessary burdens on small entities affected by the rule and to address the issues raised by Advocacy in the final regulatory flexibility analysis.

Thank you for the opportunity to comment on this important proposal and your consideration of Advocacy's comments. If you have any questions or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

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Chief Counsel for Advocacy

Jennifer A. Smith  
Assistant Chief Counsel  
For Economic Regulation

cc: Dr. John Graham, Administrator, Office of Information and Regulatory Affairs  
Dan Cohen, Chief Counsel for Regulation, Department of Commerce  
Galen Tromble, Chief, Domestic Fisheries Division, NMFS  
David Rostker, Office of Management and Budget

