

October 28, 2002

Via Facsimile (978) 465-3116 and First Class Mail

Mr. Thomas Hill, Chairman
Executive Committee
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950

Re: New England Groundfish Management Plan

Dear Chairman Hill:

It is our understanding that the New England Fishery Management Council (NEFMC) may soon consider potential amendments to the New England Groundfish Management Plan. The Office of Advocacy of the U.S. Small Business Administration urges the NEFMC to: 1) postpone its consideration of amendments to the management plan pending the completion of the ten day confirmation survey and independent stock assessment surveys; 2) consider fully the economic impact of its actions on small businesses; and 3) assess alternatives that may be less burdensome to small businesses. We respectfully submit this letter to the NEFMC for inclusion in its official meeting record.

The U.S. Congress established the Office of Advocacy under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. The Office of Advocacy is also responsible for monitoring Federal agency compliance with the Regulatory Flexibility Act (RFA) which requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments.¹

¹ See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9, (D.D.C., 1998). When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a); Id.. In performing the analysis, the law also requires an agency to provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 USC § 603(c).

The Office of Advocacy is aware of the problems the National Oceanic and Atmospheric Administration (NOAA) is having assessing the status of the groundfish stock for the management plan. The NEFMC and NOAA are faced with the serious prospect that the recent stock assessment data is flawed because the trawl used by NOAA at Woods Hole to conduct the stock survey was set improperly. The Office of Advocacy urges the NEFMC to wait for the results of the confirmation study and the independent surveys before acting on the management plan. Completion of the confirmation study and the independent survey at Woods Hole will enable the NEFMC to obtain stock assessment that will be able to withstand public scrutiny. Moreover, it may provide information that could prevent unnecessary measures that would further harm an already depressed industry.

The Office of Advocacy appreciates that the NEFMC and NOAA are facing a court-imposed deadline. However, the viability of the groundfish industry depends on a fishery management plan that is based on proper stock assessments. Waiting for the confirmation survey and the independent research will not place too great of a burden on NEFMC in terms of meeting the court imposed deadline. Yet, not waiting for the information and relying on inappropriate data in developing a groundfish management plan could cause irreparable harm to small businesses, which make up 99% of the fishing industry.

By awaiting the results of the confirmation survey and the independent research, the NEFMC will have more reliable, scientific data on which to base its decisions on how best to protect the groundfish, without imposing undue burdens on the groundfish industry. Without reliable data, the appropriate course of action for protecting the species and the fishing industry cannot be determined. Furthermore, the fishery management plan is covered by NOAA's Information Quality Guidelines, which require use of the best information available in developing management plans. Proper science will also provide the appropriate foundation for performing a regulatory flexibility analysis and identifying less burdensome regulatory alternatives to achieve NEFMC's objectives. Compliance with the RFA is subject to judicial review.² If the science indicates that NEFMC's actions were too stringent, it is possible that a court may remand the entire rule to the agency for reconsideration.

It is imperative that the NEFMC use data gathered by the best scientific approach to decide what, if any, measures should be taken to manage the groundfish fishery. Using flawed data would appear to violate the Magnuson Act's requirement that the best available data be used in managing the groundfish fishery. Moreover, it may also interfere with the agency's ability to comply with the RFA's requirement that an agency consider fully the economic impact of its actions and meaningful alternatives that may minimize the economic impact on small entities. To assure the future viability of small businesses in the groundfish industry, we recommend that the NEFMC resist further consideration of a management plan for the groundfish fishery until the confirmation survey and the independent research surveys are completed.

If you have any questions or concerns regarding these comments, please feel free to contact

² 5 U.S.C. § 611.

Jennifer Smith or me at (202) 205-6533.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Barbara Manning
Regional Advocate
Region I

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

Enclosure

cc: NEFMC Members
V ADM Conrad Lautenbacher, Jr., U.S. Navy Retired,
Undersecretary of Commerce for NOAA
Dr. John D. Graham, Administrator, Office Information and Regulatory Affairs
Michael Barrera, National Ombudsman, SBA