

November 3, 2003

Dr. William T. Hogarth
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
1315 East West Highway
Silver Spring, MD 20910

Re: Amendment 13 to New England Groundfish Fishery Management Plan

Dear Dr. Hogarth:

Tomorrow, the New England Fishery Management Council (the "Council") will consider Amendment 13 to the New England Groundfish Fishery Management Plan. The Office of Advocacy is concerned that Amendment 13 could cause significant economic harm to small entities in the affected fishing industry. The Office of Advocacy is communicating its concerns to the New England Fishery Management Council as well. Because the Office of Advocacy is an independent office within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration.

The U.S. Congress established the Office of Advocacy ("Advocacy") under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is also responsible for monitoring agency compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").¹ The RFA requires Federal agencies to determine a rule's economic impact on small entities and consider significant regulatory alternatives that achieve the agency's objectives while minimizing the impact on small entities.

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small entities when writing new rules and regulations.² Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.³ 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 publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the

¹ Pub. L. No. 96-354, 94 Stat. 1164(1981), (codified as amended at 5 U.S.C. §§ 601-612).

² Exec. Order No. 13,272 § 1, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

³ E.O. 13272, at § 2(c), 67 Fed. Reg. at 53,461.

proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

The Office of Advocacy recognizes the Council's responsibility to craft Amendment 13 to fulfill conservation objectives while ensuring the sustainability of the fishing industry. Advocacy's concerns focus on the potential impact of Amendment 13 on small businesses in the New England groundfish fishing industry. 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 regarding the stock assessment and requested that the Council not consider Amendment 13 until an independent assessment of the stock could be completed. The Council complied with Advocacy's request. Since then, Advocacy has met with several representatives of the fishing industry in Washington and New England to discuss the impact that Amendment 13 could have on the fishing industry and the fishing communities. Although the industry may not agree on the best course of action, they agree that the situation is dire.

On October 23, 2003, Advocacy met with the National Marine Fisheries Service (NMFS) to discuss those concerns regarding small entity impacts, and to offer encouragement to NMFS and the Council to continue working with the fishing industry to develop less burdensome alternatives. Advocacy is hopeful that the Council's discussions with the affected industry will result in less burdensome alternatives being included in Amendment 13. We encourage NMFS to develop a proposed rule that promotes maximum flexibility and fully considers the concerns and suggestions of the fishing industry. Such an approach should ensure that Amendment 13 will not be overly burdensome to the affected small entities. We also encourage the Council and NMFS to make their assessment of the industry alternative, currently under review, available to the public as soon as possible.

Small entities in the affected fishing industry have also raised concerns about the quality of the scientific data that is being used to develop Amendment 13. As Advocacy stated in its October 28, 2002, letter to Council Chairman Thomas Hill, 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. Advocacy encourages NMFS to give careful consideration to the Data Quality Act petition that is currently undergoing administrative review.

Advocacy also urges NMFS to ensure the transparency and comprehensiveness of the economic analysis for Amendment 13. It is our understanding that an initial regulatory flexibility analysis (IRFA) will be developed when NMFS begins to prepare the draft proposed rule. Advocacy fully expects the IRFA will contain a detailed discussion of the

⁴ Id. at § 3(c), 67 Fed. Reg. at 53,461.

economic impacts that Amendment 13 will have on classes of small entities affected by the proposal as required by the Regulatory Flexibility Act. Advocacy commends NMFS for its practice of involving Advocacy early in rule development process. This practice will help to ensure that proper consideration is given to small entity impacts as required by E.O. 13272.

If you have any questions or concerns, please feel free to contact me or Jennifer Smith of my staff at (202) 205-6943. Thank you for your consideration.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation

Attachment

Cc: Frank Blount, Chairman, New England Fishery Management Council
New England Fishery Management Council Members
Dr. John D. Graham, Administrator, Office Information and Regulatory Affairs
Michael Barrera, National Ombudsman, SBA