

plan was being drafted that was expected to provide improved protection for the subspecies. That finding was challenged in Federal District Court in Washington DC, in a suit filed on November 17, 1995, by 8 of the original 10 petitioners, plus 2 additional conservation organizations and 1 additional individual. The Court granted a summary judgment for the plaintiffs on September 25, 1996, holding that we should not have relied on a draft revision of the 1979 Tongass Land Management Plan "to provide sanctuary for the goshawk," remanded the decision to us, and instructed us to make a listing determination based on the existing Forest Plan, *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 2d 49 (D.D.C. 1996). The Court agreed to a deadline of May 31, 1997, to complete this analysis. On May 23, 1997, however, the Forest Service released a new plan, the Tongass Land and Resources Management Plan. We requested and received an extension from the court until August 31, 1997, to review the petitioned action and the status of the subspecies in light of the new plan. On September 4, 1997, we published our new finding that listing of the subspecies under the Act was not warranted (62 FR 46710), confirming our previous determination. This finding was challenged in District Court, and a decision was issued July 20, 1999. The finding was remanded to us, with instructions to provide a more accurate and reliable population estimate, and to consider a 1999 revision of the 1997 Tongass Land and Resources Management Plan. We appealed that decision, prevailed, and the case was remanded back to the District Court, *Southwest Center for Biological Diversity v. Babbitt*, 215 F. 3d 58 (D.C. Cir. 2000). On July 29, 2002, Magistrate Facciola, of the D.C. District Court, issued his findings and recommendations, *Southwest Center for Biological Diversity v. Norton*, 2002 WL 1733618 (D.D.C. July 29, 2002). Magistrate Facciola found that: (1) We had fulfilled the requirement of the Act to use the best scientific data available; (2) the "not warranted" determination was due deference; (3) our determination that the Queen Charlotte goshawk would persist in Alaska and certain Canadian islands was not unreasonable; (4) Vancouver Island, which constituted one-third of the subspecies' geographic range, was a "significant portion" of the subspecies' range; and (5) our failure to make a specific finding as to conservation of the subspecies on an island which

constituted one-third of the subspecies' geographic range was material omission.

On May 24, 2004, Judge Urbina, of the D.C. District Court, issued an order that adopted Magistrate Facciola's Findings and Recommendations in total, except for the Magistrate's finding that Vancouver Island constituted a significant portion of the range for Queen Charlotte goshawk. Instead, Judge Urbina directed us, upon remand, to reconsider and explain any determination regarding whether or not Vancouver Island is indeed a significant portion of the range, and assess whether the Queen Charlotte goshawk is endangered or threatened on Vancouver Island. This opening of the public comment period is consistent with Judge Urbina's order as we are re-evaluating the status of the subspecies in relation to Vancouver Island and as a taxon as a whole.

#### Author

The primary author of this document is Steve Brockmann, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, Juneau Fish and Wildlife Field Office, Juneau, Alaska.

**Authority:** The authority for this action is the Endangered Species Act of 1973 as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 7, 2005.

#### Marshall Jones Jr.,

Acting Director, U.S. Fish and Wildlife Service.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 051130316-5316-01; I.D. 110905C]

RIN 0648-AT21

### Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2006 Specifications

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

**ACTION:** Proposed specifications; request for comments.

**SUMMARY:** NMFS proposes specifications for the 2006 Atlantic herring fishery, which are the same as the specifications implemented in 2005. The regulations for the Atlantic herring fishery require NMFS to publish specifications for the

upcoming year and to provide an opportunity for public comment. The intent of the specifications is to conserve and manage the Atlantic herring resource and provide for a sustainable fishery.

**DATES:** Comments must be received no later than 5 p.m., eastern standard time, on January 17, 2006.

**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>.

Written comments on the proposed rule may be sent by any of the following methods:

- Mail to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments-2006 Herring Specifications";

- Fax to Patricia A. Kurkul 978-281-9135;

- E-mail to the following address: [Herr2006Specs@noaa.gov](mailto:Herr2006Specs@noaa.gov). Include in the subject line of the e-mail comment the following document identifier: "Comments-2006 Herring Specifications;" or

- Electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.

**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

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for consideration by the Council's Atlantic Herring Oversight Committee: 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 reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and subarea identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. Recommended specifications are presented to the oversight committee and the Council in order to make a recommendation to NMFS. NMFS reviews the Council recommendation, and may modify it if necessary to insure that it is consistent with the criteria in the FMP and other applicable laws.

In 2004, the Council proposed specifications that would have set OY at 180,000 mt. It also voted to maintain the 2005 specifications for 2006, unless stock and fishery conditions changed substantially. Upon review of the specifications package submitted by the Council for 2005, NMFS decided that the justification for setting the OY at 180,000 mt was not persuasive, given the recent history of landings in the fishery and concerns about allocating TALFF. As a result, NMFS proposed setting the OY at 150,000 mt, and readjusting the TACs in Areas 2 and 3 to reflect that change. NMFS also did not find the Council's argument for setting USAP at zero to be persuasive, noting that such an allocation would favor one segment of the U.S. processing sector over another, without any justifiable reasons based on conservation objectives. USAP could also provide an additional outlet for harvesters and, therefore, increase the benefits to the U.S. industry. As a result, NMFS proposed setting USAP at 20,000 mt for 2005. The modified alternative proposed by NMFS was added to and fully analyzed in the 2005 specification package's EA/RIR/IRFA. That package analyzed and evaluated the environmental, social, and economic impacts of maintaining the same specifications for 2 years. The 2005 specifications assumed that the PDT would update and evaluate stock and fishery information during 2005, and the Council and NMFS might

determine, based on the review by the Herring PDT, that no adjustments to the specifications were necessary for the 2006 fishing year. The PDT completed a comprehensive review of all herring related stock and fishery data as part of the development of the DSEIS for Amendment 1 to the FMP. It concluded that stock and fishery conditions have remained relatively constant. It found no reason to modify the specifications, as implemented by NMFS for 2005, for 2006. At its September 2005 meeting, the Council agreed and voted to recommend that the 2005 specifications, as implemented by NMFS, be maintained for 2006. Given that there has been no significant change in the herring fishery over the past year, and that the 2005 specifications package fully evaluated the impacts of maintaining the specifications for 2 years, NMFS concurs with the Council's recommendation.

#### Proposed 2006 Specifications

NMFS proposes the specifications and Area TACs contained in the following table.

#### PROPOSED SPECIFICATIONS AND AREA TACs FOR THE 2006 ATLANTIC HERRING FISHERY

Specification	Proposed Allocation (mt)
ABC	220,000.
OY	150,000.
DAH	150,000.
DAP	146,000.
JVPt	0.
JVP	0.
IWP	0.
USAP	20,000 (Areas 2 and 3 only).
BT	4,000.
TALFF	0.
Reserve	0.
TAC - AREA 1A	60,000 (January 1 May 31, landings cannot exceed 6,000).
TAC - Area 1B	10,000.
TAC - Area 2	30,000 (No Reserve).
TAC - Area 3	50,000.

The proposed measures are discussed here briefly. For a complete discussion of the development of and rationale for the specifications, please refer to the proposed rule for the 2005 specifications, published January 31, 2005 (70 FR 4808).

An ABC of 220,000 mt is proposed, consistent with the MSY proxy recommended in Amendment 1 to the FMP, which is currently being developed. The 220,000 mt proxy recommended in Amendment 1 is

intended to be a temporary and precautionary placeholder for MSY until the next stock assessment for the Atlantic herring stock complex is completed. Because of the importance of ABC as a means of determining the other values in the specifications, it is discussed in the specifications, even though it is not a value that is set by the specification process.

The FMP specifies that OY will be less than or equal to ABC minus the expected Canadian catch (C) from the stock complex. The estimate of C that is deducted from ABC will be no more than 20,000 mt for the New Brunswick weir fishery and no more than 10,000 mt for the Georges Bank fishery. With ABC set at 220,000 mt, OY could be less than or equal to 190,000 mt if the maximum catch is assumed for the Canadian herring fishery. The FMP also states that the establishment of OY will include consideration of relevant economic, social, and ecological factors and that, for this reason, OY may be less than ABC C. In addition, the Herring PDT recommended that OY be specified at a level lower than ABC for biological and ecological reasons.

As in 2005, OY is proposed to be specified at 150,000 mt, a level that can be fully harvested by the domestic fleet, thereby precluding the specification of a TALFF. This will enable the U.S. Atlantic herring industry to expand and will yield positive social and economic benefits to U.S. harvesters and processors.

NMFS proposes setting DAH at 150,000 mt. The highest level of landings in recent years was in 2001, when they reached 121,332 mt. The proposed DAH of 150,000 mt would allow a 23-percent increase in landings as compared to 2001, and reflect fishery performance in recent years, while at the same time giving the fishery an opportunity to expand. The proposed Area TACs would remain the same as they were in 2005. These area allocations are intended to permit the fishery to increase landings above the highest levels achieved in recent years. The highest recent landings in Area 2 were 27,198 mt in 2000; thus, the allocation would allow the fishery to slightly exceed that level. The highest recent landings in Area 3 were 35,079 mt in 2001; thus, the allocation would allow the fishery to exceed that level by a considerable amount because this is the area most likely to see expanded harvests.

The regulations, at § 648.200(e), allow for inseason adjustments of the herring specifications. Thus, if the herring fishery during the 2006 fishing year expands more than anticipated, the OY,

the DAH, the DAP, and the area TACs could be increased to enable the fishery to perform to its fullest potential. Such increases would be constrained by the analysis that the Council included in the specification recommendations. That means that DAH and OY could be increased to a maximum of 180,000 mt, the DAP could be increased to a maximum of 176,000 mt, and the Area 2 TAC and the Area 3 TAC could be increased to 50,000 mt and 60,000 mt, respectively, which are the highest levels that the Council originally recommended and analyzed for each of these measures.

Since DAH is proposed to be set at 150,000 mt (of which 4,000 mt would be allocated for BT), DAP is proposed to be specified at 146,000 mt. It is certainly possible, given the capacity of the current harvesting fleet, the potential for market expansion to occur, and the expressed intent (made clear through public testimony) of the U.S. industry to increase its participation in the Atlantic herring fishery, that processors will utilize the recommended DAP. Because the Council's recommended DAP is sufficient to process the entire DAH (minus the BT), the Council and NMFS propose setting JVP at zero. Future JVP operations would likely compete with U.S. processors for product, which could have a substantial negative impact on domestic facilities in a market-driven fishery. This is consistent with the following relationship, which is specified in the FMP:  $DAH = DAP + JVPt + BT$ .

NMFS proposes setting USAP at 20,000 mt in Areas 2 and 3 only. USAP could provide an additional outlet for harvesters and, therefore, increase the benefits to the U.S. industry.

#### Classification

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

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, which describes the economic impacts this proposed rule, if adopted, would have on small entities. A copy of the IRFA can be obtained from the Council or NMFS (see ADDRESSES) or via the Internet at <http://www.nero.noaa.gov>. A summary of the analysis follows:

#### Statement of Objective and Need

A description of the reasons why this action is being considered, and the objectives of and legal basis for this action, is contained in the preamble to this proposed rule and is not repeated here.

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

During the 2003 fishing year, 154 vessels landed herring, 38 of which averaged more than 2,000 lb (907 kg) of herring per trip. There are no large entities, as defined in section 601 of the RFA, participating in this fishery. 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. It does not duplicate, overlap, or conflict with any other Federal rules.

#### Minimizing Significant Economic Impacts on Small Entities

Impacts were assessed by the Council and NMFS by comparing the proposed measures to the Atlantic herring landings made in 2003. The proposed 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 average landings achieved by the fishery in recent years. The proposed 2006 specifications should allow for incremental growth in the industry, while taking into consideration biological uncertainty.

The specification of OY and DAH is proposed to be 150,000 mt for 2006. At this level, there could be an increase of up to 50,000 mt in herring landings, or \$7,150,000 in revenues, based on an average price of \$143/mt. This could allow individual vessels to increase their profitability under the proposed 2006 specifications, depending on whether or not new vessels enter the fishery (the herring fishery will remain an open-access fishery for the 2006 fishing year). The magnitude of economic impacts related to the 146,000-mt specification of DAP will depend on the shoreside processing sector's ability to expand markets and increase capacity to handle larger amounts of herring during 2006.

The potential loss associated with eliminating the JVPt allocation (20,000 mt for 2003 and 2004) could approximate \$2.9 million (based on an average price of \$143/mt) if all of the 20,000-mt allocation would have been utilized (10,000 mt for JVP and 10,000 mt for IWP). However, very little of the 10,000-mt JVP allocation was utilized

in 2002 and 2003 and, as of August 2004, no JVP activity for herring had occurred during the 2004 fishing year. The Council received no indication that demand for the JVP allocation will increase in 2006. As a result, no substantial economic impacts are expected from reducing the JVP allocation to 0 mt in 2006, as vessels that sold fish in the past to JVP vessels could sell to U.S. processors.

The Area 1A and 1B TACs of 60,000 mt and 10,000 mt, respectively, have been unchanged since the 2000 fishery. In 2002 and 2003, the Area 1A TAC for the directed herring fishery was fully utilized and is expected to be fully utilized for the 2006 fishery. Therefore, no change is expected in profitability of vessels from the 2006 Area 1A specification. Since only 4,917 mt of herring were harvested in Area 1B in 2003, the proposed 2006 specification of 10,000 mt should allow for increased economic benefits to individual vessels prosecuting the fishery in this management area. The potential economic gains associated with allocating 20,000 mt for USAP could approximate \$2.9 million (based on an average price of \$143/mt) if all of the 20,000-mt allocation were utilized in 2006.

The Council analyzed four alternatives for OY and the distribution of TACs. One alternative would have retained the specifications implemented during the 2003 and 2004 fishing years, which would have maintained the OY at 180,000 mt. This OY is still roughly 80 percent greater than the average historical landings for this fishery, and therefore that level of OY would not pose a constraint on the fishery. The three other alternatives considered by the Council would set the OY at 150,000 mt. This is still roughly 50 percent greater than the average historical landings for this fishery, and, therefore, that level of OY would not pose a constraint on the fishery. Each of the alternatives that would set the OY at 150,000 mt would establish varying levels for the area TACs.

One alternative would have established the following TACs: Area 1A, 60,000 mt; Area 1B, 10,000 mt; Area 2, 20,000 mt; and Area 3, 60,000 mt. The only area TAC that would be lower than 2003/2004 under this option is the Area 2 TAC. The most recent year in which the landings from this area were greater than 20,000 mt (the proposed TAC) was 2000 (27,198 mt). The average landings from 2001-2003 were 14,300 mt, with 2003 landings at 16,079 mt. Under current market conditions, the new TAC may become constraining if the fishery in 2006 is similar to that in 2000. If this

is the case, then the Area 2 TAC fishing season could end before the end of the year, creating a potential economic constraint on the fishery, especially if vessels are forced to travel farther (increased steaming time) to harvest in Area 3.

Another alternative considered would have established the following TACs: Area 1A, 45,000 mt; Area 1B, 10,000 mt; Area 2, 35,000 mt; and Area 3, 60,000 mt. With a 15,000-mt decrease in the combined Area 1 TACs, the economic impact of this option could be relatively large on vessels in the fishery that depend on herring in Area 1A,

especially if those vessels are not able to move to other areas to obtain fish. Even if vessels could fish in other areas, their operating costs would be increased because of increased steaming time. An Area 2 TAC of 35,000 mt proposed under this alternative should not be constraining, given recent landings history.

The final alternative considered would have established the following TACs: Area 1A, 55,000 mt; Area 1B, 5,000 mt; Area 2, 30,000 mt; and Area 3, 60,000 mt. With a 10,000-mt decrease in the combined Area 1 TACs, the impact of this alternative would be very

similar to the impact of the prior alternative, although not as severe. An Area 2 TAC of 30,000 mt proposed under this alternative should not be constraining, given recent landings history.

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

Dated: December 9, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.*

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