



September 24, 2009

Patricia A. Kurkel
Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930-2276

Re: Fisheries of the Northeastern United States; Modification of the Gulf of
Maine/Georges Bank Herring Midwater Trawl Gear Authorization Letter ,74 Fed.
Reg. 45798

Dear Ms. Kurkel:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the Department of Commerce, National Marine Fisheries Services' (NMFS) proposed rule on the *Fisheries of the Northeastern United States; Modification of the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Authorization Letter*. Advocacy is concerned that the proposed rule may have a significant economic impact on a substantial number of small entities and may require an initial regulatory flexibility analysis (IRFA).

The Office of Advocacy

Congress established the Office of Advocacy to represent the views of small business before Federal agencies whose policies and activities may affect small businesses.¹ Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. The Office of Advocacy also monitors agency compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act.²

¹ See, 15 U.S.C. § 634c (4).

² 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).

In addition, Executive Order 13272 enhances Advocacy's RFA mandate by directing Federal agencies to implement policies protecting small entities when writing new rules and regulations. 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.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an initial regulatory flexibility analysis (IRFA) to assess the economic impact of a proposed action on small entities. 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) 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.³ In preparing the 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.⁴ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.⁵

Pursuant to section 605(a), in lieu of an IRFA, the head of the agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

The Proposed Rule

On September 4, 2009, NMFS published a proposed rule on *Fisheries of the Northeastern United States; Modification of the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Authorization Letter*.⁶ For vessels fishing in closed Area I (CAI), the proposed rule modifies the requirements for midwater trawl vessels that have been issued All Areas and/or Areas 2 and 3 Atlantic herring limited access permits. In order to fish in CAI,

³ 5 USC § 603.

⁴ 5 USC § 607.

⁵ 5 USC § 603.

⁶ 74 Fed. Reg. 45798.

midwater trawl vessels with these permits would be required to carry a NMFS-approved observer and to bring the entire catch aboard the vessel, unless specific conditions are met, so that it is available to the observer for sampling. The proposed changes to the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Letter of Authorization would be effective indefinitely, until changed by a subsequent action.⁷

Compliance with the RFA

NMFS prepared a certification in lieu of an IRFA for the proposed rule. The basis of the certification is that “very few midwater trawl trips fish in CA I on an annual basis, and vessels that do not receive an observer are still able to fish in any areas open to this gear.”⁸ This certification is vague and insufficient. In addition, after talking to industry representatives, Advocacy believes that this rule may have a significant economic impact on a substantial number of small entities. As such, the certification may be inappropriate and an IRFA may be warranted.

The Proposed Rule Will Impact A Substantial Number of Small Entities

The statement that very few midwater trawl trips fish in CA I is not sufficient in terms of an assertion of no impact on a substantial number of small entities. To be considered small, a fishing business must have less than four million dollars in average annual receipts.⁹ The universe for determining “substantial number” in this rule is the number of small businesses that have vessels with permits to fish in CA I. NMFS should have that information and be able to provide it to the public. In this particular case, it appears as though this rule will impact all of those vessels. As such, if the vessels are owned by small businesses, it will impact a substantial number of the regulated small entities.

The Proposed Rule Will Have a Significant Economic Impact

The proposed rule prohibits fishing vessels from fishing in CA I if they do not have a NMFS observer on the vessel. If an observer is not available for a trip to CA I, the fishing vessel may go to another area to fish. NMFS determined that the observer requirement will not have a significant economic impact. The determination is based on an assumption that fishing in another area will reap the same benefits.¹⁰ NMFS provided no information to indicate that the catches in the different areas are in any way similar to support the assumption. The industry tells Advocacy that the fishing areas are not the same. According to the industry, herring are more abundant in CA I. As such, not being able to obtain an observer could result in catching fewer fish and a loss of a significant amount of revenue. Advocacy recommends that NMFS provide information about the catch rates and revenue garnered from the particular areas so that the public can assess the economic impact of this proposal.

⁷ Id. at 45799.

⁸ Id. at 45800.

⁹ 13 CFR §121.

¹⁰ Id.

Moreover, the requirement that a vessel forfeit a trip if there is a mechanical failure or a safety concern that prevents a vessel from bringing all of the fish on board may be costly. According to the industry, it costs approximately \$10,000 to outfit a midwater trawl vessel for a trip. The majority of that cost is fuel. To require a vessel to forfeit a catch because of an unforeseen problem would result in a pointless trip at a significant cost of \$10,000 per forfeited trip. Furthermore, the industry asserts that the compliance requirements may be difficult because it is virtually impossible to pump all of the fish out of a net. Will a vessel be fined if it cannot perform a virtually impossible task?

Alternatives

The RFA requires an agency to consider less costly alternatives when it prepares an IRFA. The proposed rule will prohibit fishers from fishing if no observer is available. It is unfair to penalize fishers due to the lack of an observer. Although NMFS states that there are currently enough observers, this proposal will be in effect indefinitely. If there is a change in budget, there may be a reduction in available observers. In such circumstances, a fisher will not be able to fish in CA I and may lose revenue through no fault of his own. Advocacy recommends that NMFS lift the prohibition on fishing without an observer if no observer is available.

In addition, the industry informs Advocacy that the phrase “unless the fish has been brought aboard the vessel” is unclear because all fish cannot be pumped. Advocacy encourages NMFS to clarify that phrase. Clarification will improve compliance and prevent fishers from being penalized unnecessarily.

Further, the industry informs Advocacy that the spiny dogfish exemption is unworkable because dogfish cannot be pumped. Advocacy understands that the industry is proposing a rewritten version of the dogfish exemption. Advocacy encourages NMFS to give full consideration to the industry’s suggested rewrite.

As noted above, it is expensive for a vessel to forfeit a trip if there is a mechanical failure or a safety concern that prevents a vessel from bringing all of the fish on board. Rather than forcing a vessel to forfeit an entire trip, Advocacy recommends that the vessel discontinue fishing in Closed Area I but keep the fish that they caught prior to the failure or safety concern.

Conclusion

Advocacy appreciates the opportunity to comment on this proposed rule. Advocacy encourages NMFS to perform an IRFA to provide the public with information about the number of small businesses that will be affected, the nature of that impact, and alternatives that may reduce the economic burden on the small entities involved. Advocacy encourages NMFS to analyze fully the economic burden of this rulemaking on small entities. In addition, Advocacy encourages the agencies to work with representatives from the fishing industry to develop a less costly alternative. Advocacy further encourages the agencies to publish the new analysis for public comment prior to finalizing the proposed rule.

Advocacy recognizes the importance of this undertaking and is available to assist the NMFS in any way possible. Please feel free to contact me or Jennifer A. Smith at (202) 205-6943 or jennifer.smith@sba.gov if you have any questions or require additional information. We look forward to working with you.

Sincerely,

/s/

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation & Banking

cc: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs, OMB