



# EARTHJUSTICE

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*Via electronic mail*

Paul J. Howard, Executive Director  
 New England Fishery Management Council  
 50 Water Street  
 Newburyport, Massachusetts 01950



Dear Mr. Howard:

I am writing on behalf of the Herring Alliance regarding the New England Fishery Management Council's scheduled discussion on April 8, 2009 of the recent data on groundfish bycatch by herring vessels in groundfish closed areas. I have enclosed a copy of a December 5, 2008 letter to Regional Administrator Kurkul demonstrating that under existing regulations the RA has broad authority to exclude midwater trawl vessels from fishing in groundfish closed areas when groundfish bycatch in closed areas reaches the levels recently reported by the National Marine Fisheries Service.

Midwater trawlers should be held to the same standard as groundfishermen and all other fishermen in New England seeking access to groundfish closed areas. Fishermen using bottom trawls ("Ruhle Trawl"), demersal longlines, and scallop dredges were all denied access to groundfish closed areas until they established through rigorous Exempted Fishery Permits (EFP) that their fishing activities would not undermine measures established to conserve and manage the groundfish fishery. In contrast, midwater trawl vessels received unfettered access to groundfish closed areas as a result of only 7 herring tows and 6 mackerel tows.<sup>1</sup> Even these tows were conducted under observer protocols that allowed fish to be dumped unobserved and it appears that some or all may not have even occurred inside actual groundfish closed areas.<sup>2</sup>

Further, the herring midwater trawl industry's claim that their "fisheries capture negligible amounts of regulated multispecies due to the spatial separation of pelagic and demersal species in the water column,"<sup>3</sup> have been proven false. While this claim was the basis for allowing midwater trawl access to closed areas, evidence from the Northeast Fisheries Observer Program (NEFOP) shows that these vessels fish on the bottom where there is no spatial separation between groundfish and herring,<sup>4</sup> and that significant amounts of groundfish are in

<sup>1</sup> See Framework 18: Northeast Multispecies FMP, 11-12 (July 23, 1997)

<sup>2</sup> See *id.* at 9-11.

<sup>3</sup> See 63 Fed. Reg. 7727, 7728 (February 17, 1998).

<sup>4</sup> See *e.g.*, A. van Atten, Operations Coordinator, Northeast Fisheries Observer Program. Presentation to Herring Oversight Committee of New England Fisheries Management Council, (May 22, 2008) ([www.nefmc.org/herring/index.html](http://www.nefmc.org/herring/index.html)) (showing that fishing occurs primarily during the daylight hours); see



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fact caught by herring midwater trawl vessels in groundfish closed areas.<sup>5</sup> As discussed in the enclosed letter, the RA has the authority, after consulting with the council, to prohibit any or all midwater trawl activities in closed areas if she determines that the bycatch of groundfish “exceeds, or is likely to exceed,” 1 percent of herring harvested by any individual fishing vessel.<sup>6</sup> While the existing data documents that the threshold for action has been exceeded at the trip level on at least two occasions and the tow level on at least occasions, when taking into consideration the limitations of the existing observer program there is a clear basis for action under the “likely to exceed” test. A clear example of those limitations may be found in the data presented by the NEFOP in November 2008, which show that no observers were deployed into Closed Area I in the second week of October, despite the detection of significant bycatch in the first week of that month and the fact that herring removals from the area doubled.

The Herring Alliance urges the Council to take action on April 8 that will provide the RA with the clear direction she needs to immediately exclude midwater trawl vessels from closed areas. The Council should also continue its work as part of herring Amendment 4 to develop criteria that would guide any future access through exempted fishing permits. Taking these actions would provide equal treatment for midwater trawl vessels when compared with other fishermen in New England that seek access to groundfish closed areas.

Thank you for your attention to this important matter.

Sincerely yours,

/s/ Roger Fleming  
Roger Fleming  
Attorney

Cc    NEFMC  
      Mr. Gene Martin, Deputy General Counsel, NMFS

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Memorandum from Lori Steele, Herring Plan Development Team Chairman, Atlantic Herring Stock/Fishery Update 17-18 (September 7, 2007)(summarizing NMFS observer program data showing the bycatch of metal debris).

<sup>5</sup> Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery (March, 2009).

<sup>6</sup> 50 C.F.R. §648.81(a)(2)(iii)(emphasis added).

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