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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 181031994-8999-01]

RIN 0648-XG608

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to Atlantic Herring Specifications and Sub-Annual Catch Limits for 2019

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

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes an in-season adjustment to the Atlantic herring specifications and sub-annual catch limits for 2019. These adjustments are necessary to reduce 2018 herring catch limits that would otherwise remain in effect for 2019. This action is intended to prevent overfishing of the herring resource while minimizing negative social and economic impacts of reduced catch limits.

DATES: Public comments must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2018-0131, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0131.

0131, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit written comments to Michael Pentony, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, “Comments on Adjustments to Atlantic Herring Specifications for 2019.”

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by us. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Copies of this action, including the Supplemental Environmental Assessment and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (SEA/RIR/IRFA) prepared in support of this action, are available from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the Internet at: <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, 978-281-9272.

SUPPLEMENTARY INFORMATION:

Background

We implemented 2016-2018 Atlantic herring specifications on November 1, 2016 (81 FR 75731), as recommended by the New England Fishery Management Council. The specifications

included an overfishing limit (OFL) of 111,000 mt for 2018. The acceptable biological catch (ABC) for 2018 was also set at 111,000 mt. The ABC was based on the Council's interim control rule, set equal to the OFL with at least a 50-percent probability of preventing overfishing, and consistent with the Council's Scientific and Statistical Committee's (SSC) advice. The annual catch limit (ACL) for 2018 was 104,800 mt.

In June 2018, a new Northeast Regional Stock Assessment Workshop (SAW) for herring, reviewed by the Stock Assessment Review Committee (SARC), was completed. The assessment concluded that although herring was not overfished and overfishing was not occurring in 2017, poor recruitment would likely result in a substantial decline in herring biomass. The stock assessment estimated that recruitment had been at historic lows during the most recent 5 years (2013-2017). The assessment projected that biomass could increase, after reaching a low in 2019, if recruitment returns to average levels, but that herring catch would need to be reduced, starting in 2018, to prevent overfishing and lower the risk of the stock becoming overfished. The final assessment summary report is available on the Northeast Fisheries Science Center (NEFSC) website (www.nefsc.noaa.gov/publications/).

The Atlantic Herring Fishery Management Plan (FMP) allows us to make in-season adjustments to the herring specifications and sub-ACLs, after consultation with the Council, consistent with the Herring FMP's objectives and other FMP provisions. In August 2018, at the request of the Council, we used an in-season adjustment to reduce the 2018 ACL from 104,800 mt to 49,900 mt to reduce the risk of overfishing (83 FR 42450, August 22, 2018). This ensured at least a 50-percent probability of preventing overfishing in 2018. However, assessment projections indicated that catch would need to be further reduced in 2019 to prevent overfishing and lower the risk of the stock becoming overfished.

By regulation, herring catch limits for 2018, as modified by the 2018 in-season adjustment, will remain in effect until replaced. At its September 2018 meeting, the Council adopted a new ABC control rule for the herring fishery developed in Amendment 8 to the Herring FMP and recommended we use an in-season adjustment to reduce 2018 herring catch limits for 2019 while it develops new specifications starting in 2020. The Council was scheduled to begin developing the 2019-2021 herring specifications at its September meeting and take final action on the new specifications at its December 2018 meeting. The Council planned for us to implement the new specifications during 2019, based on the new ABC control rule it adopted in Amendment 8. However, because of the time required for the Council to prepare the necessary documentation and for us to review and approve the control rule in Amendment 8 and implement final approved measures, the new specifications would not have been effective early enough to prevent catch from exceeding the lower catch limits required to prevent overfishing in 2019.

Proposed Adjustments to Herring Specifications

We are proposing to adjust the current herring specifications and sub-ACLs for 2019, consistent with the Herring FMP’s objectives of preventing overfishing while maximizing social and economic benefits. We will strive to publish the final rule as close as possible to the start of the new fishing year in January 2019. The 2019 specifications and sub-ACLs proposed in this action, as well as the Council’s recommendations for 2019, are shown in Table 1.

Table 1. 2019 Atlantic Herring Specification and Sub-ACL Alternatives (mt)

	Alternative 1 - No Action	Alternative 2 - Council- Recommended	Alternative 3 - Proposed Action
Overfishing Limit	111,000	30,688	30,688
Acceptable Biological Catch	111,000	21,266	30,688

Management Uncertainty	6,200	6,200	6,200
Optimum Yield/ACL	49,900*	15,065*	24,488*
Domestic Annual Harvest	104,800	15,065	24,488
Border Transfer	4,000	0	0
Domestic Annual Processing	100,800	15,065	24,488
U.S. At-Sea Processing	0	0	0
Area 1A Sub-ACL	27,743* (55.6%)	4,354* (28.9%)	7,077 * (28.9%)
Area 1B Sub-ACL	2,639 (5.3%)	647 (4.3%)	1,053 (4.3%)
Area 2 Sub-ACL	8,200 (16.4%)	4,188 (27.8%)	6,808 (27.8%)
Area 3 Sub-ACL	11,318 (22.7%)	5,876 (39%)	9,550 (39%)
Fixed Gear Set-Aside	295	39	64
Research Set-Aside	3% of sub-ACLs	3% of sub-ACLs	3% of sub-ACLs
* If New Brunswick weir fishery catch through October 1 is less than 4,000 mt, then 1,000 mt will be subtracted from the management uncertainty buffer and added to the ACL and Area 1A Sub-ACL.			

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potential 2019 specifications during the Council’s September 2018 meeting. At that meeting, the Council recommended that we:

- Use the most recent assessment and projections to develop the 2019 specifications
- Use the ABC control rule approved by the Council in Amendment 8
- Maintain the sub-annual catch limits for herring management areas based on the proportions allocated in the 2016-2018 specifications package
 - Area 1A: 28.9 percent
 - Area 1B: 4.3 percent
 - Area 2: 27.8 percent
 - Area 3: 39 percent
- Proportionally reduce the fixed gear set-aside allocation which is based on a small weir fishery west of Cutler, ME

- Set the border transfer (which allows U.S. vessels to transfer herring to Canadian vessels to be processed as food) at 0 mt.

Based on the best available science, we are proposing to reduce the OFL for 2019 to 30,688 mt. The Herring FMP specifies that the OFL must be equal to catch resulting from applying the maximum fishing mortality threshold to a current or projected estimate of stock size. When the stock is not overfished and overfishing is not occurring, this is usually the fishing rate supporting maximum sustainable yield. Catch that exceeds this amount would result in overfishing. An OFL of 30,388 mt would ensure at least a 50-percent probability of preventing overfishing in 2019. This OFL is based on projections by the SAW/SARC, as updated by NOAA's NEFSC staff using 2018 catch, and was recommended by both the SSC and the Council.

The Herring FMP specifies that the ABC may be equal to or less than the OFL depending on scientific uncertainty concerning stock size estimates, variability around recruitment estimates, and consideration of ecosystem issues. For the 2019 ABC reduction, we are proposing to continue applying the interim control rule that was used to set ABC in recent specifications (2016-2018). Our proposed ABC would have a 50-percent probability of preventing overfishing in 2019 and would be set equal to the OFL. In contrast, the SSC and Council recommended reducing the ABC for 2019 based on the new control rule the Council adopted in Amendment 8 that accounts for herring's role in the ecosystem. Our proposed ABC is 30,688 mt and the SSC/Council recommended ABC is 21,266 mt.

Our proposed ABC prevents overfishing and accounts for scientific uncertainty in the short-term until we are able to consider the Council's recommendation for addressing scientific uncertainty in a long-term control rule in Amendment 8. The approach to continue using the

interim control rule for 2019 is independent of and involves different considerations than our consideration of the Council's recommended control rule in Amendment 8. We expect the Council to submit Amendment 8 to us for review and approval in late 2018. Additionally, while the 2018 assessment showed that the probability of the stock becoming overfished has increased since the last stock assessment, our proposed ABC is intended to reduce the risk of the stock becoming overfished.

We are proposing to maintain the current management uncertainty buffer (6,200 mt), as recommended by the Council, so the resulting ACL would be 24,488 mt. This ACL is almost 10,000 mt higher than the ACL that would result from the Council-recommended ABC (15,065 mt). Allowing this additional harvest helps to achieve optimum yield (OY) by accounting for social, economic, and ecological factors, specifically the need to conserve herring biomass while mitigating severe economic hardship on the herring industry. Because the majority of herring catch is bait for the lobster fishery, we expect this additional harvest to help minimize the negative economic impacts associated with bait shortages and higher bait prices on the lobster fishery. The management uncertainty buffer, in conjunction with low fishery closure thresholds (95 percent of the ACL and 92 percent of a sub-ACL), has prevented herring catch from ever exceeding the ABC, which further minimizes the probability of overfishing.

We are proposing to maintain the sub-ACL allocations used in the recent specifications (2016-2018) for 2019. This means that 28.9 percent of the ACL would be allocated to Area 1A, 4.3 percent allocated to Area 1B, 27.8 percent allocated to Area 2, and 39 percent allocated to Area 3. These sub-ACL allocations were recommended by the Council for past specifications, as well as for 2019, because they do not substantially impact one stock component (inshore versus offshore) more than the other while maximizing opportunities for the fishery to achieve OY.

Adjusting the sub-ACL allocations for the herring management area may have impacts beyond those we considered in this action. For that reason, we are seeking public comment on the proposed sub-ACL allocation versus other possible sub-ACL allocations that would be consistent with the Herring FMP's objectives.

Based on the Council's recommendations, we are also proposing to reduce border transfer to 0 mt and reduce the fixed gear set-aside to 64 mt for 2019. Border transfer is a processing quota and is the maximum amount of herring that can be transshipped to Canada via Canadian carrier vessels for human consumption. Border transfer has been under-utilized in recent years, and there has been no border transfer since 2015. Reducing the border transfer to 0 mt for 2019 would ensure all herring caught in U.S. waters are available to U.S. Federal dealers for lobster bait or human consumption. Additionally, we are proposing that the fixed gear set-aside be reduced proportionally to the Area 1A sub-ACL to 64 mt. The Herring FMP allows up to 500 mt of the Area 1A sub-ACL to be allocated for the fixed gear fisheries in Area 1A (weirs and stop seines) that occur west of 67°16.8' W. long (Cutler, Maine). This set-aside is available for harvest by fixed gear within the specified area until November 1 of each fishing year. Any portion of this allocation that has not been harvested by November 1 is transferred back to the sub-ACL allocation for Area 1A. The proposed reduction of the fixed gear set aside is intended to allow additional herring harvest to be available to both fixed and mobile gears in Area 1A to help ensure OY is achieved. Like border transfer, the fixed gear set-aside has been under-utilized in recent years. Fixed gear landings tracked against the set-aside have averaged less than 12 mt in the past 5 years.

The Herring FMP requires we adjust for catch overages and underages in a subsequent year. Total catch in 2017 did not reach or exceed any of the management area sub-ACLs, so

typically we would carryover those underages, or a portion of the underages, to increase sub-ACLs in 2019. However, to help ensure catch does not exceed the ABC/OFL in 2019 and to help prevent overfishing, we are proposing to not increase any sub-ACLs in 2019 based on carryover from underages in 2017.

All other herring specifications for 2019, including the river herring and shad catch caps, would remain unchanged from 2018. While our proposed adjustments to the herring specifications in 2019 are generally consistent with the Council's recommendations, our proposed ABC and the resulting ACL and sub-ACLs are not as conservative as those recommended by the Council. However, the specifications proposed in this action are expected to prevent overfishing and reduce the risk of the stock becoming overfished. We expect that implementing an ABC lower than the 30,688 mt ABC proposed in this action would not increase the probability of preventing overfishing or the stock from becoming overfished enough to outweigh the increased financial hardship on the herring and lobster fisheries. If herring specifications are too low, they may preclude a viable fishery in 2019 and some businesses may not be sustainable and may fail. Our proposed specifications for 2019 are intended to balance preventing overfishing and maintaining a viable herring fishery to achieve OY, while we consider approval and implementation of a long-term ABC control rule in Amendment 8 to the Herring FMP.

Herring Research Set-Aside Announcement

We are soliciting public comment on the Herring Research Set-Aside (RSA) program awards for 2019-2021. The Herring RSA Program allocates up to 3 percent of each management area sub-ACL annually, as established by the Council in Amendment 1 to the Herring FMP (72 FR 11251, March 12, 2007). Exempted Fishing Permits (EFPs) exempting vessels from certain

herring management regulations have been routinely approved since 2007 to support compensation fishing that funds herring-related research consistent with RSA priorities identified by the Council. By continuing to issue these EFPs we would facilitate compensation fishing in support of the projects funded under the 2019 Herring RSA Program. Herring RSA proposals for 2019 are currently under review with the NEFSC, with selections expected in late November or early December of this year. RSA compensation fishing may be allowed as early as January 2019.

Consistent with previous herring RSA compensation fishing EFPs, vessels would be authorized to harvest herring RSA after a herring management area sub-ACL had been caught and the directed herring fishery is limited to a 2,000 lb (907.2 kg) limit of herring per day/trip. It would also allow vessels to harvest RSA during times when the sub-ACLs were not seasonally available for harvest, specifically during January through May in Area 1A and January through April in Area 1B. RSA grant recipients would be required to meet all EFP application requirements prior to the issuance of the EFPs.

If approved, the EFP applicants may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be issued without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Herring FMP, national standards and other provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable law.

This proposed rule is exempt from review under Executive Order (E.O.) 12866 because this action contains no implementing regulations.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for this proposed rule, as required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule would have on small entities, including small businesses, and also determines ways to minimize these impacts. The IRFA includes this section of the preamble to this rule and analyses contained in the SEA/RIR/IRFA for this action. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the IRFA follows.

Description of the Reasons Why Action by the Agency is Being Considered and Statement of the Objectives of, and Legal Basis for, the Proposed Rule

This action proposes in-season adjustments to the herring specifications and sub-ACLs for 2019. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, are contained in the preamble to this proposed rule and are not repeated here.

Description and Estimate of Number of Small Entities to Which this Proposed Rule Would Apply

The RFA recognizes three kinds of small entities: small businesses, small organizations, and small governmental jurisdictions. For purposes of the RFA only, the small business criteria in the finfish fishing industry (NAICS 114111) is a firm that is independently owned and operated and not dominant in its field of operation, with gross annual receipts of \$11 million or less. Small organizations and small governmental jurisdictions are not directly regulated by this action.

There are five permit categories in the herring fishery: (1) Limited access permit for all management areas (Category A); (2) limited access permit for access to Areas 2 and 3 only (Category B); (3) limited access incidental catch permit for 25 mt per trip (Category C); (4) an open access incidental catch permit for 3 mt per trip (Category D); and (5) an open access permit for limited access mackerel permit holders authorizing up to 9 mt per trip (Category E) in Areas 2 and 3.

In 2017 there were a total of 1,566 permitted herring vessels. Of those, 1,434 were exclusively Category D vessels. Of the remaining 132 permitted herring vessels, 22 belonged to large businesses. Every Category B permit was also authorized for Category C, and all but one Category E permitted vessel also carried a Category D authorization. We included Category E vessels that also have Category D authorization in the analysis. Table 2 presents the counts of permitted vessels by category along with their affiliated entity's small or large business status (the status of the company that holds the herring permit).

Table 2. Number of Herring Permits by Category, 2015-2017

Herring Permit Categories	Number of Herring Permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	5	32	5	30	6	30
B/C	4	4	4	4	4	4
C (exclusive)	3	37	3	37	3	37
D (exclusive)	112	1222	115	1306	114	1320
E	9	39	9	40	9	39
Total	133	1334	136	1417	136	1430

Source: NMFS

Table 3 refines the counts from Table 2 to include only those vessels that had revenue from herring at least once in the 3-year period of analysis. In 2017, there were 4 large businesses and 69 small that had revenue from herring.

Table 3. Number of Herring Permits with Herring Revenue, 2015-2017

Herring Permit Categories	Number of Herring Permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	4	20	4	19	4	19
B/C	0	2	0	2	0	3
C (exclusive)	0	11	0	9	0	12
D (exclusive)	0	27	0	29	0	31
E	0	4	0	1	0	4
Total	4	64	4	60	4	69

Source: NMFS

Finally, Table 4 defines the small entities affected by this proposed action - small businesses with a Herring Category A, B, C, or E permit and revenue from herring during the 2015-2017 period of analysis. There were 37, 31, and 38 such vessels in 2015, 2016, and 2017 respectively.

Table 4. Affected Small Entities, Permitted Herring Vessels with Herring Revenue, 2015-2017

Herring Permit Categories	Number of Herring Permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	4	20	4	19	4	19
B/C	0	2	0	2	0	3
C (exclusive)	0	11	0	9	0	12
E	0	4	0	1	0	4
Total	4	37	4	31	4	38

Source: NMFS

To better understand the impact of this action on the affected small businesses, we compared the revenue from herring fishing to total revenue brought in by the entity (business) that holds the herring permit. The 17 to 18 small entities with Category A permits show the most dependence on the herring fishery, with 49.75 percent to 62.03 percent of their revenue coming from herring landings. The 4 small Category E permitted entities have the least dependence on the herring fishery with less than one percent of total entity revenue coming from the herring fishery.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This proposed rule does not introduce any new reporting, recordkeeping, or other compliance requirements.

Federal Rules Which may Duplicate, Overlap, or Conflict with the Proposed Rule

This action does not duplicate, overlap, or conflict with any other Federal rules.

Description of Significant Alternatives to the Proposed Action Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact on Small Entities

We are proposing to adjust the current herring specifications and sub-ACLs for 2019, consistent with the Herring FMP's objectives of preventing overfishing while maximizing social and economic benefits. Non-preferred alternatives would likely not accomplish these objectives for this action as well as the proposed action.

Alternative 1 would not achieve the stated objectives of the action because it has a less than 50-percent probability of preventing overfishing in 2019 and, thus, is inconsistent with the Magnuson-Stevens Act. Additionally, Alternative 1 would negatively impact the herring stock by increasing the probability that it would become overfished. The primary difference between Alternative 2 (Council-recommended) and Alternative 3 (proposed action) are the proposed specifications for ABC and the resulting ACL for 2019. The ABC associated with the proposed action (30,688 mt) is higher than the ABC associated with Alternative 2 (21,266 mt). After applying the management uncertainty buffer (6,200 mt) to the ABC, the resulting ACL associated with the proposed action (24,488 mt) is almost 10,000 mt higher than the ACL associated with the Alternative 2 (15,065 mt).

We expect that implementing an ABC lower than 30,688 mt in 2019 would not increase the probability of preventing overfishing or the stock from becoming overfished enough to outweigh the increased financial hardship on the herring and lobster fisheries. If the ACL is too low, it may preclude a viable fishery in 2019 and some businesses may not be sustainable and may fail. The proposed ABC for 2019 is intended to balance preventing overfishing and

maintaining a viable herring fishery to achieve OY, while we consider approval and implementation of a long-term ABC control rule in Amendment 8 the Herring FMP.

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

Dated: November 27, 2018.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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