August 31, 2006

Dr. William Hogarth
Director
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Patricia Kurkul
Regional Administrator
Northeast Region
NOAA Fisheries
One Blackburn Drive
Gloucester, MA 01930-2298

Re. Amendment 1 to the Atlantic Herring Fishery Management Plan

Dear Dr. Hogarth and Ms. Kurkul:

We are writing to urge approval of Amendment 1 to the Atlantic Herring Fishery Management Plan (Amendment 1). We are increasingly concerned that the National Marine Fishery Service (NMFS) is considering not approving the purse seine/fixed gear area as part of Amendment 1. We are familiar with the record before NMFS and it is our view that the failure to approve this measure, which is supported by the best scientific information available, the record before the agency, the New England Fishery Management Council, and a broadly-based coalition of fisheries stakeholders and other members of the public, would be contrary to the agency's responsibilities under the Magnuson-Stevens Act (MSA).

On January 31, 2006 the New England Fishery Management Council approved Amendment 1 to the Atlantic Herring Fishery Management Plan. This amendment was submitted to NMFS for review this Spring. One of the critical measures in the amendment establishes a purse seine/fixed gear only area for the inshore Gulf of Maine (Area 1A) from June 1 through September 30 of each year. This measure was deemed necessary, among other reasons, to ensure access to the resource by certain gear types and to address the negative impacts resulting from the indiscriminate fishing techniques of the herring midwater trawl fleet that result in localized herring resource depletion, bycatch, and impacts on protected species

The purse seine/fixed gear conservation and management measure addresses several of the Council's longstanding objectives, including to prevent overfishing, prevent overfishing of discrete spawning components, provide for the orderly development of the fishery, fully utilize

14 Maine Street, Brunswick, Maine 04011 • 207-729-7733 • Fax: 207-729-7373 • www.clf.org
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NEW HAMPSHIRE: 27 North Main Street, Concord, NH 03301-4930 • 603-225-3060 • Fax: 603-225-3059
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VERMONT: 15 East State Street, Suite 4, Montpelier, VT 05602-3010 • 802-223-5992 • Fax: 802-223-0060

optimum yield,[1] minimize the race to fish, and promote and support research.[2] It also addresses several National Standards, such as the requirement minimize bycatch and bycatch mortality and moves the region toward more responsible management of a keystone species in the Gulf of Maine ecosystem.[3]

National Standard 2 requires that conservation and management measures be based upon the best scientific information available.[4] The record for Amendment 1 supports approval and implementation of the purse seine/fixed gear area in accord with this standard. For example, there are several scientific papers in the record that support that provide evidence of localized depletion of the herring resource in the in-shore area.[5] Together with scientific information from the Council and NMFS[6] and corroborating testimony from fishermen and many others with

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[1] This measure will not affect the ability of this fishery to achieve optimum yield and there will be ample opportunity for the midwater trawl vessel affected by this measure to move to a more sustainable method of harvesting herring. In fact, restricted access to the Gulf of Maine during the summer months provides incentive for the industry to pursue the orderly development of the underexploited offshore herring resource.

[2] See Amendment 1 at 93.

[3] See id. at 93, 95.

[4] In view of some of the comments from interested members of the industry, the scientific standard the Council and NMFS uses in reaching its management decisions also needs to be clarified. The Magnuson Stevens Act requires that "conservation and management measures shall be based upon the best scientific information available" (16 U.S.C. 1851(2)). It has been suggested that to meet this standard only peer reviewed scientific information may be used. While some of the "best scientific information available" may be peer-reviewed, there is no legal requirement that all scientific information be peer-reviewed. In fact, none of New England's management plans meet a bar so high and realistically it would require years to take management actions if only peer-reviewed science could be used. For good reason, the authors of the MSA recognized that science upon which fishery management decisions are made is constantly evolving, and management needs to be adaptive in order to respond to the latest and the best scientific information available. But by no means does this require peer review of all scientific information relied upon by fishery management councils.

[5] See e.g., Aliza J. Milette[1], Toby A. Stephenson[1], Joel T. Barkan[1], Peter T. Stevick[2], Zackary R. Klyver[3], and Sean Todd[1] (1) Allied Whale, College of the Atlantic, Bar Harbor, ME 04609, USA, (2) Gulf of Maine Research Institute, University of Southern Maine, 350 Commercial St., Portland, ME 04101, USA, (3) Bar Harbor Whale Watch, LLC, Bar Harbor, ME 04609, USA. *The Efects of the Shift in Herring Fishery Gear Type on the Abundance of Two Species of Baleen Whales of Eastern Maine*. (Amendment 1, Vol. III and referenced at Amendment 1, p. 98); Weinrich, Mason T. 1, Sardi, Katherine A. 1, Gwalthney, Jon 2, Schulte, Dianna W. 3, and Kennedy, Jennifer L. 3 *Is Herring Fishing Displacing Humpback Whales on Their New England Feeding Grounds?* (1) Whale Center of New England, PO Box 159, Gloucester MA 01930 (2) PO Box 7177, Ocean Park, ME 04063 (3) Blue Ocean Society for Marine Conservation, 370 Portsmouth Ave # 9, Greenland, NH 03840 (Amendment 1, Vol. III); Neal, B. and Brehme, Christopher. *Eastern Gulf of Maine Atlantic Herring Spawning Area Survey Project Year 4 Summary: Identifying spawning habitat of Clupea harengus in coastal eastern Maine and Grand Manan, New Brunswick.* Island Institute, Rockland, ME (January 10, 2001): 10. (Amendment 1, Vol. III); Read, A.J and C. R. Brownstein. 2003. *Considering other consumers: fisheries, predators, and Atlantic herring in the Gulf of Maine.* Conservation Ecology 7(1): 2. [online] URL: http://www.consecol.org/vol7/iss1/art2. (Amendment 1, Vol. III). Note that additional scientific information was also entered into the record concerning the biological impacts from scarcity of herring to sea bird and tuna.

[6] E.g., the Council's Scientific and Statistics Committee identified the critical need to prevent overfishing of individual spawning components as far back as 2003. The SSC explicitly noted that concentration of effort in the inshore Gulf of Maine is of concern and may be excessive. *Recommendations of the NEFMC Scientific and Statistics Committee*, June 19, 2003; In addition, data from the NMFS autumn trawl survey reveal that, with the exception of a lone data point in 2003, inshore survey indicies for number and weight per tow have been steadily declining since 199. Amendment 1DSEIS at 123; Also note that the 2006 TRAC assessment recommends decreasing the overall MSY for the fishery from 220,000 mt to 194,000 mt

knowledge of the fishery, there is significant support for the Council's decision to address localized depletion in the in-shore area through the management measure establishing the purse seine/fixed gear area. While it is true that the science quantifying localized depletion is still developing, based on the best scientific information available and numerous comments from individuals with knowledge of the fishery, the Council was fully justified in approving the purse seine/fixed gear area. Further, the rationale of the Council was clearly articulated as based on the scientific and additional information before it and the Council's desire, in view of this information, to take a proactive and precautionary approach in order to protect this critical component of the Gulf of Maine ecosystem.[7] This represents the type of decision making by fishery management councils that should be encouraged by your Agency.

Equally important to your approval decision is the fact that while concern over localized depletion received much attention in the debate over this purse seine/fixed gear area measure, the Council may take management action for reasons other than a clear biological need or resource problem. It is well documented in Amendment 1 and the record that the purse seine/fixed gear area was approved to also address issues related to bycatch (National Standard 9), ensuring access to the resource for the purse seine and fixed gear groups (National Standard 8), reducing gear conflicts (National Standards 8 and 10), and improving the scientific understanding of the herring fishery (National Standard 2).[8] The Council also noted within the context of its precautionary approach NMFS' Guidelines for identifying essential fish habitat (EFH) and adverse impacts on EFH, which reflect the importance of keystone species like Atlantic herring to the overall health of the ecosystem as well as the importance of prey abundance for other species.[9]

The delay in implementing this critical measure has already resulted in harm to New England fisheries, the Gulf of Maine ecosystem, and our interest in healthy and sustainable New England fisheries and ocean ecosystem. It is now apparent that the earliest the inshore buffer zone will be implemented is next year – too late to address the urgent need for herring protection that was brought to your attention earlier this year.[10] As a result of the delay in implementation another summer of mid-water trawling in the near-shore Gulf of Maine is currently underway and there have been several reports that there is a lack of forage, predators, and mammals in areas where such fauna were historically present, along with documented cases of unfortunate waste in this fishery. Our concern is heightened by your Agency's decrease in observer coverage from 20% to below 3% of trips in the herring fishery.

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and based on the TRAC report the Council's herring committee has recommended decreasing the inshore TAC from 60,000 mt to 45,000 mt.

[7] See Amendment 1, sec. 6.5. E.g., Amendment 1 states that "While the Council certainly is not suggesting that the herring resource is on the brink of extinction, it is obvious that significant damage to a keystone species like herring could result in long-term and possibly irreversible damage to many other components of the Gulf of Maine ecosystem. Given the importance of herring in the Gulf of Maine ecosystem, overwhelming concerns expressed about the health of the inshore stock, and the general lack of detailed biological data specific to the inshore stock, the Council has concluded that a precautionary approach to managing the herring fishery in the inshore Gulf of Maine is warranted. The Council's precautionary approach is embedded in this measure, which would restrict concentrated midwater trawl (single and pair) effort in the inshore Gulf of Maine during the summer months, some of which incorporate important spawning months for this stock." Id. at 95.

[8] See Id.

[9] See Id. (citing 50 C.F.R. 600 at 2378 (January 17, 2002)).

[10] For example, members representing "CHOIR" and other interested parties including CLF met with you in support of requests that you take emergency action under the Magnuson Stevens Act to implement a buffer zone prohibiting the midwater fleet from entering Area 1A from June though September of 2006.

It is our view that there exists ample justification for approval of the purse/fixed gear area and that the failure to approve this important management measure would open the Agency to several causes of action under the MSA and other federal law. The Conservation Law Foundation would like to be able to support you in your approval of this carefully considered measure that is designed to help ensure the health of not only the Atlantic herring stocks, but also the myriad of other species that rely in herring as forage. We urge you to approve Amendment 1 including the purse seine/fixed gear area as quickly as possible in order to ensure that it is in place prior to the beginning of the next fishing season.

Sincerely yours,

/S/

Roger Fleming, Esq.
Senior Attorney
Conservation Law Foundation
14 Maine Street, Suite 200
Brunswick, ME 04011

Cc Frank Blount
Paul Howard
Gene Martin