HHS/CDC has determined that provisions to amend 42 CFR Part 34 will not have tribal implications.

*F. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

Under Executive Order 12630, if the contemplated rule would require a Federal taking of private property, then a takings analysis is required. Since the rule does not require a Federal taking of private property, the provisions in the Executive Order are not applicable.

*G. Executive Order 13132: Federalism*

Under Executive Order 13132, if the rule would limit or preempt State authorities, then a Federalism analysis is required. The agency must consult with State and local officials to determine whether the rule would have a substantial direct effect on State or local Governments, as well as whether it would either preempt State law or impose a substantial direct cost of compliance on them.

HHS/CDC has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*H. Executive Order 13211: Energy Effects*

Executive Order 13211 requires HHS/CDC to produce a statement of energy effects if the rule is significant or economically significant and likely to have a significant adverse effect on the supply, distribution, or use of energy. HHS/CDC has determined that this rule does not have that effect and that a statement of energy is not required.

*I. National Technology Transfer and Advancement Act*

This act, 15 U.S.C. 272, requires the adoption of technical standards developed or adopted by voluntary consensus standards bodies in rules promulgated by HHS. No voluntary consensus standards are applicable and feasible with regard to this rule.

*J. Assessment of Federal Regulations and Policies on Families*

Title 5 U.S.C.A. 601 (note) requires agencies to assess the impact of a regulatory action to determine whether such an action would affect family well-being. HHS/CDC has assessed the impact of this regulation and has determined that it would not negatively affect family well-being.

*K. Executive Order 12988: Civil Justice Reform*

HHS/CDC has reviewed this rule under Executive Order 12988, on Civil Justice Reform and determines that this rule meets the standard in the Executive Order.

*L. Plain Language in Government Writing*

Under 63 FR 31883 (June 10, 1998), Executive Departments and Agencies are required to use plain language in all proposed and final rules. HHS/CDC did not receive any comments seeking clarity on language used in the NPRM. HHS/CDC has attempted to use plain language in promulgating this Final Rule.

**List of Subjects in 42 CFR Part 34**

Aliens, Health care, Scope of examination, Passports and visas, Public health.

■ For the reasons stated in the preamble, the Centers for Disease Control and Prevention, within the U.S. Department of Health and Human Services, is amending 42 CFR part 34 as follows:

## PART 34—MEDICAL EXAMINATION OF ALIENS

■ 1. The authority citation for Part 34 continues to read as follows:

**Authority:** 42 U.S.C. 252; 8 U.S.C. 1182 and 1222.

### § 34.2 [Amended]

■ 2. Amend § 34.2 by removing paragraph (b)(6) and redesignating paragraphs (b)(7) through (10) as paragraphs (6) through (9) respectively.

■ 3. Amend § 34.3 by revising paragraphs (b)(1)(i), (e)(1) introductory text, (e)(2)(iv), (e)(5), and (e)(6) to read as follows:

### § 34.3 Scope of examinations.

* * * * *

(b) * * *

(1) * * *

(i) A general physical examination and medical history, evaluation for tuberculosis, and serologic testing for syphilis.

* * * * *

(e) * * *

(1) As provided in paragraph (e)(2) of this section, a chest x-ray examination and serologic testing for syphilis shall be required as part of the examination of the following:

* * * * *

(2) * * *

(iv) *Exceptions.* Serologic testing for syphilis shall not be required if the alien is under the age of 15, unless there is reason to suspect infection with syphilis. An alien, regardless of age, in the United States, who applies for adjustment of status to lawful permanent resident shall not be required to have a chest x-ray examination unless their tuberculin skin test, or an equivalent test for showing an immune response to *Mycobacterium tuberculosis* antigens, is positive. HHS/CDC may authorize exceptions to the requirement for a tuberculin skin test, an equivalent test for showing an immune response to *M. tuberculosis* antigens, or chest x-ray examination for good cause, upon application approved by the Director.

* * * * *

(5) *How and where performed.* All chest x-ray images used in medical examinations performed under the regulations to this part shall be large enough to encompass the entire chest (approximately 14 x 17 inches; 35.6 x 32.2 cm).

(6) *Chest x-ray, laboratory, and treatment reports.* The chest radiograph reading and serologic test results for syphilis shall be included in the medical notification. When the medical examiner's conclusions are based on a study of more than one chest x-ray image, the medical notification shall include at least a summary statement of findings of the earlier images, followed by a complete reading of the last image, and dates and details of any laboratory tests and treatment for tuberculosis.

* * * * *

Dated: October 22, 2009.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

[FR Doc. E9–26337 Filed 10–30–09; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 0907281181–91369–02]**

**RIN 0648–AX93**

## Fisheries of the Northeastern United States; Modification to the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Letter of Authorization

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

**ACTION:** Final rule.

**SUMMARY:** NMFS implements modifications to the requirements for midwater trawl vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fish in Northeast (NE) multispecies Closed Area I (CA I). When fishing in CA I, eligible midwater trawl vessels will be required to carry a NMFS-approved observer aboard the vessel and to bring the entire catch aboard, unless specific conditions are met, so that it is available to the observer for sampling. These changes to the Gulf of Maine/Georges Bank (GOM/GB) Herring Midwater Trawl Gear Letter of Authorization (LOA) are effective indefinitely, but may be superseded by monitoring measures currently under development as part of Amendment 5 to the Atlantic Herring Fishery Management Plan (FMP).

**DATES:** Effective November 2, 2009, with the following exception: §§ 648.14(r)(2)(vii) and 648.80(d)(7)(iii)(B), which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). Upon OMB approval of these requirements, the effective date will be announced in the **Federal Register**.

**ADDRESSES:** Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the Regional Administrator, NMFS Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930 and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Douglas Potts, Fishery Policy Analyst, (978) 281–9341, fax (978) 281–9135.

**SUPPLEMENTARY INFORMATION:** The New England Fishery Management Council (Council) voted at its April 8, 2009, Council meeting to request that the NMFS Northeast Regional Administrator modify the GOM/GB Herring Midwater Trawl Gear LOA to require midwater trawl vessels fishing in CA I to have 100–percent observer coverage; be prohibited from slipping codends; and be required to pump all fish aboard the vessel, to allow sampling by the observer.

A proposed rule was published on September 4, 2009 (74 FR 45798), and that proposed rule includes detailed information on the background of this action. Comments on the proposed rule were initially accepted through September 21, 2009. A notice published on September 24, 2009 (74 FR 48707), reopened the comment period through September 27, 2009. Comments received are summarized and responded to below.

Based on public comment received, NMFS is modifying the proposed measures to clarify, as well as to make measures more consistent with, the Council's April 8, 2009, motion. The Council motion used the term ''slipped codend'' to refer to the practice of opening the codend of the net and releasing the catch before all of the fish are brought on board the vessel. The proposed rule used this term, with that meaning. It has come to NMFS's attention that the term ''slipped'' in this context may suggest to some that the release is made with the intent of hiding the catch from the observer. Therefore, to reflect the fact that catch may be released for a wide range of reasons, and to make the rule clearer, the term ''released'' has been substituted for the term ''slipped'' throughout this final rule.

After careful consideration of public comment, many of the proposed rule measures have been modified in this final rule to more closely reflect the Council's request and to reduce negative economic impact on the commercial herring industry, while still achieving the intended goal of collecting better information on bycatch in the midwater trawl fishery. This final rule modifies the proposed measures to:

- Allow flexibility to fish outside of CA I (rather than end a trip), should a vessel release a codend due to safety or mechanical reasons.
- Limit the prohibition on codend releases to tows made in CA I.
- Include an exemption that allows the release of small amounts of fish that may remain in the net after pumping is complete.
- Remove the minimum 50–percent spiny dogfish threshold provision from the dogfish dumping exception.
- Require vessels that release a codend due to catches of spiny dogfish to leave CA I, consistent with the requirement to leave CA I if a codend is released due to safety or mechanical reasons.
- Broaden the mechanical failure exception to include all significant mechanical failures that prohibit pumping the catch.

Modifications to the proposed rule measures to allow vessels to continue fishing outside of CA I if they release their codend due to safety or mechanical reasons, and that restrict the prohibition on releasing non-exempt codends to only tows that fish inside CA I, have been made to more closely align this action with the Council's request. Many of the measures being modified were initially proposed in such a way as to ensure consistency of measures throughout a given fishing trip, and to assist in their enforceability. However, because tracking of potential violations is possible due to the vessel monitoring systems required onboard these vessels, NMFS concurs with many of the commenters that additional flexibility can be allowed. An explicit allowance for the release of fish that remain in the net after completion of pumping operations is made in the final rule to acknowledge that this is an unavoidable situation. Existing regulations require a vessel to assist the observer to view the codend prior to the release, allowing these fish to be documented. NMFS also acknowledges that differences in pumping capacity between vessels would likely make a firm minimum spiny dogfish threshold (as a proportion of the catch) problematic. The NMFS NE Fishery Observer Program (NEFOP), additionally, has expressed concern that this proposed minimum percentage could place the observer in an enforcement role. Based on these concerns, the final rule removes the minimum spiny dogfish threshold from the exception. To provide consistency across the exemptions for releasing catch, and to provide a disincentive to potential abuse, vessels that release a tow in CA I because of spiny dogfish will be required to exit CA I, but can continue to fish outside of CA I on the same trip. Finally, the final rule's regulatory text pertaining to the mechanical failure exception is broadened to include all significant mechanical failures that prevent pumping the catch, to expand the exception to reasons other than failure of the pump itself.

## Approved Measures

This final rule requires vessels using midwater trawl gear in the directed herring fishery to indicate their intention to fish in CA I when scheduling an observer through the NEFOP. This notification allows NMFS to ensure an observer is deployed on all vessels that intend to fish in CA I with midwater trawl gear for all or any part of their trip. To ensure 100–percent observer coverage, midwater trawl vessels are not permitted to fish in CA I without an observer.

Midwater trawl vessels in the directed herring fishery that have been assigned a NMFS-approved at-sea observer and that are fishing in CA I are prohibited, unless specific conditions are met (see below), from releasing fish from the codend of the net, transferring fish to another vessel that is not carrying a NMFS-approved observer, or otherwise

discarding fish at sea, unless the fish have first been brought aboard the vessel and made available for sampling and inspection by the observer.

NMFS recognizes that there are certain conditions under which fish must be released from the codend without being sampled. Therefore, fish that have not been pumped aboard the vessel may be released if the vessel operator finds that: Pumping the catch could compromise the safety of the vessel; mechanical failure precludes bringing some or all of a catch aboard the vessel; or spiny dogfish have clogged the pump and consequently prevent pumping of the rest of the catch. If a net is released for any of these three reasons, the vessel operator must complete and sign a CA I Midwater Trawl Released Codend Affidavit detailing where, when, and why the net was released as well as a good-faith estimate of both the total weight of fish caught on that tow and the weight of fish released (if the tow had been partially pumped). The completed affidavit form must be submitted to NMFS within 48 hr of the completion of the trip.

Following the release of a net for one of the three exemptions specified above, the vessel is required to exit CA I. The vessel may continue to fish, but may not fish in CA I for the remainder of the trip.

**Comments and Responses**

A total of 535 comments were received on the proposed rule, from 10 representatives of commercial fishing groups, 1 community organization, 1 recreational fishing group, 2 coalitions of herring interest groups, 1 environmental organization (Conservation Law Foundation (CLF)), 1 state-elected official (MA State Representative Sarah K. Peake), 1 state resource management agency (the State of Maine Department of Marine Resources), 516 individuals, and the U.S. Small Business Administration (SBA) Office of Advocacy. A significant majority of comments (523 out of 535) supported the proposed measures, and many expressed concern that any change could compromise the bycatch information collected. Most of the supporting comments urged quick implementation of these measures to ensure regulations are in place before midwater trawl vessels fish in CA I (generally the month of October). One comment from a U.S. Congressman (Representative William Delahunt, MA) supporting the action as proposed was received after the close of the comment period. Seven commenters expressed concerns outside the scope of this action, including the bycatch of river herring and general opposition to trawling of any kind.

*Observer Coverage and the Scope of the Action*

*Comment 1*: One representative of the commercial herring industry (Kelly Drye and Warren LLP) stated that, by requiring an observer for an entire midwater trawl trip, i.e., both inside and outside the boundaries of CA I, and requiring vessels to terminate a trip early if fish are released, the proposed measures exceed the Council's requested action, as well as NMFS' authority as specified in the regulations, and represent a significant regulatory action that would preempt the regulatory authority of the Council in its drafting of Amendment 5 to the FMP.

*Response*: The regulations implementing Framework Adjustment 18 (FW 18) to the NE Multispecies FMP (63 FR 7727, February 17, 1998), at § 648.81(a)(2)(iii), give the Regional Administrator conditional authority to ''place restrictions and conditions in the letter of authorization for any or all individual fishing operations or, after consulting with the Council, suspend or prohibit any or all midwater trawl activities in the closed areas.'' The presentation of recent observer data at the April 8, 2009, Council meeting, and the Council's subsequent request for increased observer measures, constitute a consultation with the Council. Therefore, the authority to suspend access to CA I to midwater trawl vessels that are not carrying an observer, as specified in the proposed rule and implemented through this final rule, is consistent with the cited authority. Moreover, the Council indicated a general belief that additional information on bycatch in CA I would be beneficial for future revisions to the Atlantic Herring FMP. There is additional, independent authority specified in section 402(a) of the Magnuson-Stevens Act to promulgate regulations to improve the information collection program in the Atlantic herring fishery. This action does not preempt the Council's efforts in developing Amendment 5 to the FMP, but rather contributes to them. NMFS' proposal to apply a discard prohibition to the entire midwater trawl trip was intended to collect the most information possible about bycatch in this fishery, and to provide a clear set of rules that would apply consistently throughout the trip. However, based on public comment, and to more closely reflect the Council's requested action, this final rule is modified such that tows made entirely outside of CA I would not be subject to the more restrictive CA I regulations implemented through this action. This action also eliminates the proposed restriction that vessels must end their trip if they release a net when fishing in CA I, i.e., vessels may fish out the remainder of their trip outside of CA I. Further details about these two modifications to the proposed rule measures can be found in the responses to Comments 4 and 10.

*Comment 2*: Three representatives of the commercial herring industry (Kelly Drye and Warren LLP, Lunds' Fisheries, Inc., and Northern Pelagic Group LLC (NORPEL)) stated that the proposed measures should be implemented through modifications to the current LOA and not codified in the regulations, a violation of which could entail significant civil liability.

*Response*: All requirements of the LOA, both before and after this final rule, are codified in the regulations. NMFS codifies these requirements to ensure their enforceability. Additionally, as explained in the response to Comment 1, the measures are codified pursuant to NMFS' authority in section 402(a) of the Magnuson-Stevens Act.

*Comment 3*: Seven representatives of the herring industry (Kelly Drye and Warren LLP, Lund's Fisheries, NORPEL, Western Sea Fishing, Cape Seafoods, Small Pelagic Group, and Shafmaster Fishing) commented that access to CA I should not be denied to a midwater trawl vessel if an observer is not available. Sixty-three commenters specifically supported the prohibition on fishing in CA I without an observer, as specified in the proposed rule.

*Response*: The NEFOP has committed sufficient funding to provide observers for all CA I herring midwater trawl trips for the 2009 and 2010 fishing years. NMFS intends to continue to provide observer coverage for this program in subsequent years; however, under the Federal budgetary process, such funding cannot be assured at this time. NMFS expects that monitoring provisions currently under development in Amendment 5 to the FMP are likely to supersede these measures. Therefore, it is anticipated, although not guaranteed, that 100–percent observer coverage of herring midwater trawl trips in CA I will be provided without limiting CA I access for any vessels for the foreseeable future. In Amendment 5, the Council could consider other ways to address the potential problems that would arise if observers are not available when requested.

*Comment 4*: Seven representatives of the commercial herring industry commented that the Council's request to prohibit released codends and to require

all fish to be pumped aboard the vessel was specific to vessels fishing inside CA I, and to require these provisions for tows fished entirely outside of CA I would exceed the scope of the Council's request.

In contrast, three commercial fishing organizations (Cape Cod Commercial Fishermen's Association (CCCHFA), GB Cod Hook Gear Sector, and GB Cod Fixed Gear Sector), one environmental group (CLF), MA State Representative Sarah K. Peake, and eight individuals expressed support for the proposed measure to require vessels to comply with the prohibition on releasing nets and the requirement for all fish to be pumped aboard the vessel for the entire trip, regardless of whether the vessel also fished outside of CA I on that trip. These latter commenters believe that this provision would maximize the amount of bycatch information collected on midwater trawl trips and could insulate the observer from having to determine which tows could be released without an exemption.

*Response*: Since implementation of FW 18 in 1998, herring midwater trawl vessels have been able to operate freely within the management areas of the Atlantic Herring FMP without additional consideration for the boundaries of the NE multispecies closed areas. NMFS acknowledges that the Council's request for 100–percent observer coverage was specific to midwater trawl vessels fishing in CA I. However, the measures of the proposed rule were designed to allow herring midwater trawl vessels to continue to operate freely throughout the herring management areas by establishing a consistent set of regulations so that vessel operators and observers would not need to be constantly aware of where the vessel was, relative to CA I, in order to know what rules applied. Based on public comment, and to more closely reflect the Council's requested action, this final rule has been modified such that tows made entirely outside of CA I are subject to the same regulations as any other midwater trawl vessel that did not declare into CA I. NMFS is modifying these provisions also, in part, due to the fact that vessels issued an All Areas and/or an Areas 2 and 3 Limited Access Herring Permit are currently required to use a NMFS-approved Vessel Monitoring System (VMS), and VMS provides NOAA's Office of Law Enforcement with the ability to better enforce these provisions. Thus, VMS allows for effective enforcement of these measures without any involvement of the observer.

*Comment 5*: One coalition of herring interest groups (Herring Alliance) and 52 individuals supported applying the proposed measures to midwater trawl vessels fishing in all the NE multispecies closed areas.

*Response*: The Council's request was specific to CA I. An analysis of the observed bycatch of NE multispecies in the midwater trawl fishery from 2004 through 2008 indicates that CA I was the only closed area where the FW 18 threshold of 1–percent bycatch of regulated species had been reached on the trip level. Furthermore, CA I had more observed bycatch of NE multispecies by number of tows and by pounds of fish than any other closed area. Expanding this action to all of the NE multispecies closed areas could result in greater negative impact on the midwater trawl fishery, while providing limited additional benefits to NFMS in the form of information on bycatch. Therefore, this proposal was not considered.

*Exemptions from the Prohibition on Released Codends*

*Comment 6*: Six representatives of the commercial herring industry, and the SBA Office of Advocacy, commented that some fish inevitably remain in a net at the conclusion of pumping, either because they are too large for the pump grate or because they are floating and cannot be pumped. The commenters argued that, under a strict interpretation of the proposed regulations, release of these fish could constitute a civil violation, with significant fines, through no direct fault of the vessel operator.

*Response*: NMFS acknowledges that a small amount of fish may be unpumpable and remain in a net at the end of pumping operations and should not, therefore, constitute grounds for a violation. Observer protocols include documenting fish that remain in the net before they are released, and existing regulations require vessel operators to assist the observer in this process. Therefore, any loss of bycatch information should be minimal. NMFS has modified this final rule to clarify that the prohibition on releasing fish does not extend to fish that cannot be pumped and that remain in the net at the end of pumping operations.

*Comment 7*: One herring industry representative (Kelly Drye and Warren LLP) commented that the exception for mechanical failure should be expanded, since the fish pump is not the only mechanical system whose failure could prohibit the pumping of some or all of a tow.

*Response*: NMFS acknowledges that the fish pump is not the only gear problem that could prohibit pumping the catch, and has modified this final rule accordingly. A review of observer data between 2005 and 2007 indicates that less than 18 percent of the tows that were partially or fully released were released for generic ''gear problems.'' Therefore, expanding this exemption to include additional mechanical failures that prohibit pumping the catch would not undermine the intention of this action to maximize the collection of data on bycatch in CA I.

*Comment 8*: Two herring industry representatives requested that short duration tows, or ''test tows,'' generally lasting less than 1 hr, and used to check the abundance and condition of target species, should also be exempted from the requirements to pump all fish onboard.

*Response*: The proposed rule for this action explained that the intention of this action is to increase the understanding of the potential bycatch of this fishery in CA I and, as such, it is necessary to collect bycatch information on all tows made by midwater trawl vessels in CA I. Therefore, an exemption for test tows would be inconsistent with the intent of this action.

*Comment 9*: Seven representatives of the herring industry commented that the proposed exemption for spiny dogfish (i.e., spiny dogfish constitute at least 50 percent, by weight, of the observed portion of the catch) is unworkable as proposed, and asserted that spiny dogfish cannot be pumped, no matter what percentage of the overall catch they comprise.

*Response*: Observer data clearly show that some spiny dogfish can be successfully pumped from the net. However, NMFS acknowledges that the variation in pumps being used by different vessels and the way that spiny dogfish are arranged at the pump intake could have a dramatic effect on whether a given concentration of spiny dogfish would clog the pump and prevent the pumping of the remainder of the catch. The use of a specific percentage threshold of spiny dogfish could also put undue pressure on the observer. Therefore, the spiny dogfish exemption has been modified to remove the 50–percent threshold and, if spiny dogfish clog the pump intake, the vessel operator is required to take reasonable measures to remove all of the fish that can be pumped from the net prior to releasing the codend.

*Comment 10*: The seven representatives of the herring industry, the State of Maine Department of Marine Resources, and the SBA Office of Advocacy raised concerns that the requirement to end a trip if a net is released for safety or mechanical

reasons could place an undue financial burden on vessels because of the high cost of outfitting a trip. As an alternative consequence for releasing a net, six members of the commercial herring industry suggested that vessels should be required to leave CA I, but allowed to continue fishing.

Alternatively, 3 commercial fishing organizations (CCCHFA, GB Cod Hook Gear Sector, and GB Cod Fixed Gear Sector), 2 coalitions of herring interest groups (Herring Alliance, and CHOIR Coalition), 1 community organization (Penobscot East Resource Center), 1 environmental organization (CLF), MA State Representative Sarah K. Peake, U.S. Congressman William Delahunt, and 383 individuals expressed their support for the proposed requirement to end a trip if a net is released for safety or mechanical reasons.

*Response*: The frequency of released nets in the midwater trawl fishery is relatively low. Based on observer data from 2005–2007, only 8.7 percent of tows were fully or partially released, and only 3 percent were released for apparent safety or mechanical reasons. Combined with the relatively few trips into CA I, and the low number of tows made on each trip (three tows per trip, on average), it is expected that roughly one trip per year might be subject to this provision. However, NMFS acknowledges that the proposed requirement to end the trip after releasing a net might have negative economic ramifications for that vessel, without significantly contributing to the understanding of bycatch in this fishery, which is the purpose of this action. Therefore, NMFS has adopted in this final rule the herring industry's suggested alternative that allows vessels to continue fishing outside of CA I on the same trip. Midwater trawl herring vessels fish in CA I when they have a reasonable expectation of finding a high concentration of herring there. NMFS believes that the loss of access to this productive fishing ground for the remainder of the trip is a sufficient disincentive for vessels to prevent abuse of these exemptions.

*Comment 11*: One coalition of herring interest groups (Herring Alliance), 1 community organization (Penobscot East Resource Center), and 339 individuals requested that the consequence of releasing fish unobserved should be consistent across all three exemptions (vessel safety, mechanical failure, and spiny dogfish) including any requirement to end the trip and return to port.

*Response*: Unlike the exemptions for releasing fish unobserved for vessel safety and mechanical failure, the exemption for spiny dogfish, as proposed, contained a relatively high threshold of 50–percent dogfish as a disincentive to vessels that might use this exemption to avoid observer sampling of the catch. As described under the response to Comment 9, the 50–percent trigger was determined to be unworkable and has been removed from this final rule. The loss of access to the CA I fishing ground is a reasonable disincentive for abuse of all three exemptions and provides a consistent response to a released net. Therefore, this final rule incorporates the requirement to leave CA I for the remainder of the trip as a result of releasing the catch before it can be sampled by the observer, regardless of which exemption prompted the release. As detailed in the response to Comment 10, vessels would be able to continue to fish outside of CA I for the remainder of the trip.

*Certification under the Regulatory Flexibility Act*

*Comment 12*: The SBA Office of Advocacy and one representative of the commercial herring industry (Kelly Drye and Warren LLP) questioned NMFS' determination that the action would not impact a substantial number of small entities. The commenters stated that the information provided in the proposed rule in support of the certification was vague and insufficient.

*Response*: NMFS acknowledges that additional information in the proposed rule would have made this determination clearer to the public. All 46 vessels issued an All Areas and/or an Areas 2 and 3 Limited Access Herring Permit in fishing year 2009 are considered ''small entities'' and are already subject to a requirement to call the observer program prior to each trip. This action adds a question to that call-in requirement prompting a vessel operator to indicate whether or not the vessel intends to fish in CA I on that trip. The increased observer coverage and catch releasing requirements apply only to vessels that indicate they intend to fish in CA I. Over the last 4 yrs, on average, there have been fewer than 15 midwater trawl trips annually that fished in CA I. The number of potentially impacted vessels is further reduced because some vessels take multiple trips into CA I. Therefore, this action applies to fewer than 30 percent of the vessels issued an All Areas and/or an Areas 2 and 3 Limited Access Herring Permit. From 2004 through 2008, of a total of 2,875 midwater trawl trips, only 59 reported fishing in CA I. Therefore, this action is expected to impact approximately 2 percent of all midwater trawl trips, and thus would not impact a substantial number of small entities.

*Comment 13*: The SBA Office of Advocacy and one representative of the commercial herring industry (Kelly Drye and Warren LLP) raised a concern that small businesses could experience a significant adverse economic impact due to this action because lack of an observer would prohibit access to CA I, resulting in potentially lower catch rates outside of CA I.

*Response*: NMFS has allocated sufficient funds and observer sea days to provide an observer for all trips into CA I during the 2009 and 2010 fishing years, and will consider requesting that such funding be continued. It is expected that catch monitoring provisions currently being developed by the Council as part of Amendment 5 to the FMP will likely supersede the provisions in this action in the relatively near future. Even if Amendment 5's progress is delayed, NMFS intends to maintain sufficient observer funding to cover all herring midwater trawl trips into CA I. However, the availability of future funding cannot be guaranteed. If, in the future, funding is insufficient to support 100 percent observer coverage for vessels fishing in CA I, then NMFS has the ability to reassess this requirement at that time.

Additionally, NMFS notes that the density of herring and the resulting catch rate inside CA I fluctuate seasonally as schools of fish migrate across Georges Bank. Although some herring midwater trawl vessels fish seasonally in CA I, the majority of vessels in the directed herring fishery currently do not fish in this area and seemingly do not suffer significant adverse economic impact as a result of that choice. Given the transient nature of herring, NMFS cannot state with any certainty how the catch rate of herring inside versus outside CA I will differ in any given year. Therefore, NMFS cannot make a prediction of how a vessel with an All Areas and/or an Area 2 and 3 Limited Access Herring Permit may be economically impacted by fishing outside of CA I should there be insufficient observer sea days in the future.

**Changes from the Proposed Rule**

NMFS has made several changes to the proposed rule as a result of public comment and to make measures more consistent with the Council's April 8, 2009, motion. These changes are listed below in the order that they appear in the regulations.

In § 648.14, paragraph (r)(2)(vii) has been revised to reflect that the prohibition on releasing fish from the codend is limited to tows that occur inside CA I.

In § 648.80, paragraph (d)(7)(ii) has been revised to reflect that the prohibition on releasing fish from the codend is limited to tows that occur inside CA I.

In § 648.80, paragraph (d)(7)(ii)(B) has been revised to remove specific reference to the fish pump.

In § 648.80, paragraph (d)(7)(ii)(C) has been revised to remove the 50–percent spiny dogfish threshold and to add vessel operator requirements.

In § 648.80, paragraph (d)(7)(ii)(D) has been added to clarify that fish that cannot be pumped from the net and, thus, remain in the net at the end of pumping operations, may be released.

In § 648.80, paragraph (d)(7)(iii)(A) has been revised to reflect that vessels that release a net for safety or mechanical concerns, or due to spiny dogfish in the catch, must exit CA I, but may continue fishing outside of CA I for the remainder of the trip.

In § 648.80, paragraph (d)(7)(iii)(B) has been revised to provide additional details of the CA I Midwater Trawl Released Codend Affidavit which will become effective at a later date, pending OMB approval.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Herring and NE Multispecies FMPs, other provisions of the Magnuson-Stevens Act, and other applicable laws.

There is good cause under 5 U.S.C. § 553(d)(3) to waive the 30-day delay in effective date because of the annual seasonal nature of fishing in CA I. The industry has expected this rule, since the Council made its initial request on April 8, 2009. This final rule was delayed due to reopening the comment period for 6 days at the request of the public. Because commercial herring midwater trawl vessels pursue herring in CA I predominantly during the fall, as herring migrate across Georges Bank, a 30-day delay in effective date would increase observer coverage too late to observe the annual pulse of effort in CA I. This would delay the collection of bycatch information for up to a year. The Council has expressed an interested in using data collected under this program in the current development of Amendment 5 to the FMP.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the SBA during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. Two comments were received on the factual basis for the certification and are addressed under the Comments and Responses section of this preamble. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains two collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The modification to the observer program notification to include a vessel's intention to fish in CA I has been added to the information collection for the Herring Vessel Observer Program Notification, which has been approved by OMB under control number 0648–0202. The new collection-of-information requirement pertaining to the CA I Midwater Trawl Released Codend Affidavit has not yet been approved, but OMB approval is expected in the near future. NMFS will publish notification in the **Federal Register** when this requirement is cleared by OMB and is, therefore, effective. Public reporting burden for the CA I Midwater Trawl Released Codend Affidavit is estimated to average 5 min per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS at the **ADDRESSES** above, and e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 27, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator For Fisheries, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.14, add paragraphs (r)(2)(v), (r)(2)(vi), and (r)(2)(vii) to read as follows:

### § 648.14 Prohibitions.

* * * * *

(r) * * *

(2) * * *

(v) Fish with midwater trawl gear in Closed Area I, as specified at § 648.81(a), without a NMFS approved observer onboard, if the vessel holds an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit.

(vi) Release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea before bringing the fish aboard and making it available to the observer for sampling, unless subject to one of the exemptions as defined at § 648.80(d)(7)(ii), if fishing any part of a tow inside Closed Area I, as defined at § 648.81(a).

(vii) Fail to complete, sign, and submit an affidavit if fish are released pursuant to the exemptions detailed at § 648.80(d)(7)(ii).

* * * * *

■ 3. In § 648.80, revise paragraph (d)(5) and add paragraph (d)(7) to read as follows:

### § 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(d) * * *

(5) To fish for herring under this exemption, vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit must provide notice of the following information to NMFS at least 72 hr prior to beginning any trip into these areas for the purposes of observer deployment: Vessel name; contact name for coordination of observer deployment; telephone number for contact; the date, time, and port of departure; and whether the vessel intends to engage in fishing in Closed

Area I, as defined in § 648.81(a), at any point in the trip; and

* * * * *

(7) *Fishing in Closed Area I.* (i) No vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may fish in, or possess or land fish from, Closed Area I with pelagic midwater trawl gear unless it has declared its intent to fish in Closed Area I as required by paragraph (d)(5) of this section, and is carrying a NMFS-approved observer.

(ii) No vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit when fishing any part of a midwater trawl tow in Closed Area I may release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer (e.g., an Atlantic herring at-sea processing vessel or an Atlantic herring carrier vessel), or otherwise discard fish at sea, unless the fish has first been brought aboard the vessel and made available for sampling and inspection by the observer, except in the following circumstances:

(A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(B) A mechanical failure precludes bringing the fish aboard the vessel for inspection; or,

(C) After pumping of fish onto the vessel has begun, the vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures (such as strapping and splitting the net) to remove all fish which can be pumped from the net prior to release; or

(D) When there are small amounts of fish that cannot be pumped and remain in the net at the completion of pumping operations.

(iii) If fish are released prior to being brought aboard the vessel due to any of the exceptions in paragraphs (d)(7)(ii)(A) through (C) of this section, the vessel operator must:

(A) Exit Closed Area I. Once the vessel has exited CA I, it may continue to fish, but may not fish inside Closed Area I for the remainder of that trip.

(B) Complete and sign a Closed Area I Midwater Trawl Released Codend Affidavit detailing the vessel name and permit number; the VTR serial number; where, when, and for what reason the catch was released; the total weight of fish caught on that tow; and the weight of fish released (if less than the full tow). A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

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