

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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MIDCOAST FISHERMEN'S  
ASSOCIATION, et ano.,

Plaintiffs,

No. 1:07-cv-02336 (HHK)

v.

GARY F. LOCKE, et al.

Defendants.

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**UNOPPOSED MOTION OF GLENN ROBBINS, KURT MARTIN,  
WILLIAM VANDERHOOP, TOM OSMERS, AND THE  
MARTHA'S VINEYARD/DUKES COUNTY FISHERMEN'S ASSOCIATION  
TO FILE A MEMORANDUM AS AMICI CURIAE**

Glenn Robbins, Kurt Martin, William Vanderhoop, Tom Osmers, and the Martha's Vineyard/Duke's County Fishermen's Association respectfully move this Court for leave to file a memorandum as amici curiae in support of Plaintiffs on cross-motions for summary judgment. The grounds for this motion are more fully set forth in the accompanying memorandum of points and authorities.

Pursuant to Local Rule 7(m), counsel for Amici has conferred with counsel for the parties concerning this motion. Counsel for Plaintiffs advised that they have no objection to this motion. Counsel for Defendants has advised that they take no position with respect to whether the Fishermen Amici should participate, but that they do not oppose this motion.

This motion and accompanying memorandum are submitted contemporaneously with Amici Curiae's Memorandum In Support Of The Plaintiffs On Cross-Motions For Summary Judgment.

Respectfully submitted,

/s/

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July 10, 2009

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**MEMORANDUM OF GLENN ROBBINS, KURT MARTIN,  
WILLIAM VANDERHOOP, TOM OSMERS, AND THE  
MARTHA'S VINEYARD/DUKES COUNTY FISHERMEN'S ASSOCIATION  
IN SUPPORT OF UNOPPOSED MOTION TO  
FILE BRIEF AS AMICI CURIAE**

**I. INTRODUCTION**

This case involves an appeal by the Midcoast Fishermen's Association and an individual fisherman of a decision by the National Marine Fisheries Service denying a petition for rulemaking under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* The petition sought to prohibit midwater trawling in certain areas off the coast of New England that are closed to groundfishing. Glenn Robbins, Kurt Martin, William Vanderhoop, Tom Osmers and the Martha's Vineyard/Dukes County Fishermen's Association ("Fishermen Amici") are community-based fishermen from Maine and Massachusetts who are directly affected by midwater trawling and the denial of the petition. Their participation would assist the Court in resolving the issues presented by the parties.

Counsel for Plaintiffs has advised that they have no objection to this motion. Counsel for Defendants has advised that they take no position with respect to whether the Fishermen Amici should participate, but that they do not oppose this motion.

Participation by amici curiae has been permitted on innumerable prior occasions in this District. See, e.g., National Association of Home Builders v. United States Army Corps of Engineers, 519 F. Supp. 2d 89, 93-94 (D.D.C. 2007); New York v. Microsoft Corp., 209 F. Supp. 2d 132, 136 (D.D.C. 2002); Community Housing Trust v. Department of Consumer and Regulatory Affairs, 257 F. Supp. 2d 208, 212 n.2 (D.D.C. 2003); Ellsworth Associates, Inc. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996). Indeed, this Court granted a trade association of midwater trawlers (which calls itself the “Sustainable Fishermen’s Coalition”) permission to participate as an amicus in this case.

## **II. INTEREST OF THE FISHERMEN AMICI**

Fishermen Amici live in communities that depend on a healthy and abundant fish supply for their prosperity. They fish for Atlantic herring and other species using traditional gear such as purse seines and fish weirs. They oppose midwater trawling for herring because it is an unsustainable fishing method that threatens herring, groundfish and other stocks through overfishing and the disruption of the ocean ecology. Midwater trawling undermines the viability of the traditional, more sustainable fishing methods used by the Fishermen Amici.

Fishermen Amici see federal policy on midwater trawling as deeply flawed. On the one hand, serious limits are put on non-midwater trawler fishermen who target striped bass, cod, river herring, and other species. On the other hand, midwater trawlers can catch those same species as bycatch (unintentionally caught fish) whenever they trawl. The instant case highlights the absurdity of this: certain areas of the ocean are closed to groundfishing in order to rebuild

groundfish stocks. Yet midwater trawlers can work those same waters and catch groundfish as bycatch. Fishermen Amici view this policy as undercutting efforts to rebuild and protect fish stocks, as well as being simply unfair.

A. Glenn Robbins

Glenn Robbins lives in Eliot, Maine. He has been a fisherman for approximately fifty years. He uses a purse seine to fish for Atlantic herring, and competes against midwater trawlers. He is also an active lobsterman. Over the years he has scalloped and midwater trawled, among other types of fishing. Although Mr. Robbins practiced midwater trawling in the past, he no longer uses midwater trawling as a fishing method because he believes it will eventually lead to a die-off of fisheries. Mr. Robbins is also concerned that midwater trawling interferes with his lobster gear.

B. Kurt Martin

Kurt Martin lives in Orleans, Massachusetts, which is on Cape Cod. He has been a fisherman for twenty-five years. He fishes for Atlantic herring and a variety of other species (including mackerel, scup, porgies, sea bass, butterfish and bluefish) using weirs in Nantucket Sound, off Cape Cod.

Mr. Martin started weir fishing ten years ago. Over the past ten years, as midwater trawling has increased, Mr. Martin's herring catch has decreased. He went from catching 40,000 to 50,000 pounds in a season in his weir fishing business to zero this year. He has also seen a dramatic decrease in the amount of mackerel (which is also targeted by midwater trawls) caught in his weirs over the last decade. Mr. Martin is debating whether to operate his weirs any longer, given the paucity of fish they are catching.

Like Mr. Robbins, Mr. Martin is also a lobsterman concerned about interference by midwater trawling with his lobster gear.

C. William Vanderhoop

William “Buddy” Vanderhoop lives in Aquinnah, Massachusetts, which is on Martha’s Vineyard. He is a member of the Wampanoag Tribe of Aquinnah. Mr. Vanderhoop is a herring fisherman and a charter captain, and he has been a swordfisherman among other things.

For thirty-five years, Mr. Vanderhoop has fished for river herring (also called blueback herring and alewife), an anadromous species of herring that is born in fresh water, migrates to the ocean, and then returns to the river where it was born. (The return is called a herring “run.”)

Mr. Vanderhoop has leased and managed the Aquinnah Wampanoag river herring run. He no longer fishes for river herring, however, because the Commonwealth of Massachusetts has banned the harvesting of river herring in the state. 322 Mass. Code Regs. 6.17 (2009). (This is year four of the six-year ban.)

Even though the Aquinnah Wampanoag run has pristine water, has no obstacles to fish passage, and is near no development, Mr. Vanderhoop has observed a drastic decline in the river’s herring run over the last six years, when midwater trawling was on the increase. Because river herring swim in schools, Mr. Vanderhoop is concerned that midwater trawling has the potential to wipe out an entire river’s herring run by netting its school in the ocean before it returns.

D. Tom Osmer

Tom Osmer lives in West Tisbury, Massachusetts, which is on Martha’s Vineyard. He has been a fisherman for thirty years. For ten years he fished for river herring, but the Commonwealth of Massachusetts shut down the herring runs. Like Mr. Vanderhoop, Mr.

Osmers is concerned that midwater trawling has the potential to wipe out an entire river's herring run. Mr. Osmers is the herring warden for West Tisbury.

For 20 years, Mr. Osmers fished for tuna and swordfish. He is concerned that midwater trawling has reduced Atlantic herring to the point that these species do not have enough forage to hold them in New England.

E. The Martha's Vineyard/Dukes County Fishermen's Association

The Martha's Vineyard/Dukes County Fishermen's Association was created by the Dukes County Commission. The Association represents Martha's Vineyard on fishery issues before local, state, regional and federal regulatory agencies. The Association has about 100 members, including Mr. Vanderhoop and Mr. Osmers, both of whom are board members. Its goals include: (1) "identify and champion methods to make fishing sustainable and consistent with sensible environmental goals;" (2) "maintain employment and create opportunities to help Martha's Vineyard retain its strong maritime heritage;" and (3) "conduct the research necessary to advocate for the sustainable harvest of seafood." The Association has actively urged federal officials to curb midwater trawling, which it sees as detrimental to the livelihoods of its members.

**III. REASONS WHY PERMITTING FISHERMEN AMICI TO FILE A BRIEF IS DESIREABLE**

When a non-party has a special interest in a litigation and familiarity and knowledge of the issues raised that could aid in resolution of the case, or a unique perspective that could help a court, a court will grant the non-party permission to participate as amicus curiae. Cobell v. Norton, 246 F. Supp.2d 59, 62 (D.D.C. 2003); Ellsworth Associates, 917 F. Supp. at 846.

Fishermen Amici can provide the Court with a unique perspective in this case: that of Atlantic herring fishermen who use practices that are more sustainable than midwater trawling.

They are able to comment on the ways in which midwater trawling is less sustainable than the practices they use, and on the detrimental effect the federal Defendants' support of midwater trawling had had on the livelihood of those who use those more sustainable practices.

Because Fishermen Amici also fish for species other than groundfish, including species not fished for by Plaintiffs, such as Atlantic herring and river herring, they are able to discuss the larger effects of midwater trawling on fisheries in New England.

Further, the broad array of the Fishermen Amici's experiences enable them to discuss midwater trawling in the context of the purposes and policies of the Magnuson-Stevens Act, which include promoting "domestic commercial and recreational fishing under sound conservation and management principles" (18 U.S.C. § 1801(b)(3)), fostering and maintaining "the diversity of fisheries in the United States" (16 U.S.C. § 1801(c)(6)), and assuring "that the national fishery and conservation program . . . encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish," 18 U.S.C. § 1801(c)(3).

Clearly, the perspective of the Fishermen Amici would be very different from the perspective of the midwater trawling company trade association that the Court has permitted to file an amicus brief.



#### IV. CONCLUSION

For the reasons set forth above, Fishermen Amici's Motion To File An Amicus

Memorandum should be granted.

Respectfully submitted,

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	)	
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	)	
Defendants.	)	
	)	

**ORDER**

It is hereby **ORDERED** this \_\_\_ day of \_\_\_\_\_, 2009 that the Unopposed Motion of Glenn Robbins, Kurt Martin, William Vanderhoop, Tom Osmers and the Martha's Vineyard/Dukes County Fishermen's Association To File A Brief As Amici Curie in the above-captioned matter is **GRANTED**.

\_\_\_\_\_  
Hon. Henry H. Kennedy, Jr.  
United States District Judge

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**MEMORANDUM OF AMICI CURIAE GLENN ROBBINS,  
KURT MARTIN, WILLIAM VANDERHOOP, TOM OSMERS, AND THE  
MARTHA'S VINEYARD/DUKES COUNTY FISHERMEN'S ASSOCIATION  
IN SUPPORT OF THE PLAINTIFFS ON  
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Amici curiae are community-based commercial fishermen (hereinafter "Fishermen Amici") from Maine and Massachusetts who fish for Atlantic herring and other species using traditional gear. They oppose midwater trawling for herring because it is an unsustainable fishing method that threatens herring and other fish stocks in New England through overfishing and disruption of the ocean ecology, and because it undermines the viability of the traditional, more sustainable fishing methods used by the Fishermen Amici. Accordingly, the Fishermen Amici support Plaintiffs' Petition for Immediate and Permanent Rulemaking to Protect Groundfish From Midwater Trawl Fishing in Northeastern Groundfish Closed Areas ("Petition").

This memorandum sets forth the reasons why the National Marine Fisheries Service's ("NMFS's") decision to deny Plaintiffs' petition to ban midwater trawling for herring in

sensitive waters of the Atlantic Ocean threatens the Fishermen Amici's livelihood and undermines the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or the "Act"), 16 U.S.C. §§ 1801, et. seq.

## **II. INTEREST OF AMICI**

The Fishermen Amici earn their livelihoods by catching herring, mackerel, tuna, lobster, and other marine species using traditional fishing gear such as the purse seine and fish weir.<sup>1</sup> Fishermen Amici, and the communities in which they live, thus depend on the continued presence of healthy and abundant fish stocks in New England.

Over the past several years, however, Fishermen Amici have observed declines in herring and other fish, which they attribute to the increased practice of midwater trawling. For example, Mr. Martin's weir fishing business has substantially decreased over the past ten years. He went from catching 40,000 to 50,000 pounds of herring per season in the late-1990s to zero this year. He has also seen a dramatic decrease in the amount of mackerel (which are also targeted by midwater trawls) caught in his weirs over the last decade. Given the paucity of fish he has been catching, Mr. Martin may not be able to operate his weirs any longer.

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<sup>1</sup> Glenn Robbins of Eliot, Maine, who has been a fisherman for approximately 50 years, uses a purse seine to catch herring. Kurt Martin, of Orleans, Massachusetts on Cape Cod, who has been a fisherman for 25 years, fishes for Atlantic herring and other species in Nantucket Sound using weirs. William "Buddy" Vanderhoop, a member of the Wampanoag Tribe of Aquinnah on Martha's Vineyard, has been a herring fisherman, swordfisherman, and charter boat captain. Tom Osmers, of West Tisbury, Massachusetts on Martha's Vineyard, has been a fisherman for thirty years and has fished for herring, tuna and swordfish. The 100-member Martha's Vineyard/Dukes County Fishermen's Association (the "Association") advocates sustainable fishing methods before local, state, regional and federal regulatory agencies. See Memorandum of Glenn Robbins, Kurt Martin, William Vanderhoop, Tom Osmers, and the Martha's Vineyard/Dukes County Fishermen's Association in Support of Unopposed Motion to File Brief as Amicus Brief.

Additionally, the Fishermen Amici have observed a decline in spring “runs” of anadromous river herring.<sup>2</sup> Over the past six years, as midwater trawling has increased, the Aquinnah Wampanoag run has declined dramatically even though the run has virtually pristine water, contains no obstacles to fish passage, and is not located near any significant development. Mr. Vanderhoop, who has leased and managed the Aquinnah Wampanoag river herring run for many years, is concerned that midwater trawling may wipe out the entire river’s herring run by netting its school in the ocean before it returns.

Fishermen Amici see federal policy on midwater trawling as deeply flawed. On the one hand, serious limits are put on non-midwater trawler fishermen who target striped bass, cod, river herring, and other species. On the other hand, midwater trawlers can catch those same species as bycatch (unintentionally caught fish) whenever they trawl. The instant case highlights the absurd result of this policy: certain areas of the ocean are closed to groundfishing in order to rebuild groundfish stocks. Yet midwater trawlers can work those same waters and catch groundfish as bycatch. Fishermen Amici view this policy as undercutting efforts to rebuild and protect fish stocks, as well as being simply unfair.

Fishermen Amici seek to ensure that the traditional methods of Atlantic herring fishing—purse seining and weir fishing—remain viable in spite of the development of midwater trawling. And they seek to ensure that the New England fishing industry as a whole remains a sustainable source of income for their families and communities far into the future.

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<sup>2</sup> There are two types of herring in the northeastern U.S.: Atlantic herring, which live exclusively in the ocean, and river herring, which are anadromous (*i.e.*, they migrate from the ocean to fresh water rivers to spawn). The annual river herring migration from the ocean to the rivers is called a “run.” Because of a drastic decline in river herring runs throughout Massachusetts, the Commonwealth has banned all harvesting of river herring for six years. 322 Mass. Code Regs. 6.17 (2009).

### **III. FACTUAL BACKGROUND**

#### **A. THE IMPORTANCE OF HERRING TO THE NEW ENGLAND FISHERY**

Atlantic herring have been identified as a “keystone species” whose “very presence contributes to a diversity of life and whose extinction would consequently lead to the extinction of other forms of life” and which “help to support the ecosystem of which they are a part.” New England Fishery Management Council (“NEFMC”), “Final Amendment 1 to the Atlantic Herring Fishery Management Plan,” at 478 (2006), available at [http://www.nefmc.org/herring/planamen/final\\_herring\\_a1.htm](http://www.nefmc.org/herring/planamen/final_herring_a1.htm) (follow the “Sections 8 – 8.2” hyperlink) (“Herring FMP Amend. 1”). An abundant supply of herring is essential to a robust fishery for a variety of species: cod, hake, dogfish, shark, tuna, bluefish, pollock and striped bass, among other species, feed on herring at all life history stages. Gulf of Maine Research Institute, Herring Biology: Ecology, <http://www.gma.org/herring/biology/ecology> (last visited July 10, 2009).

Historically, herring (together with its related businesses of canning and smoking) was the most important New England fishing industry other than cod. United States Commission of Fish and Fisheries, Report of Commissioner for the Year Ending June 30, 1894 at 125 (1894), available at [http://penbay.org/cof/cof\\_1894.pdf](http://penbay.org/cof/cof_1894.pdf). Today, however, canneries have all but disappeared from New England, and the vast majority of New England herring is sold as bait for lobster fishermen. See Memorandum of Amicus Curiae Sustainable Fisheries Coalition at 9.

#### **B. HISTORY OF HERRING FISHING METHODS**

##### **1. Traditional Methods: Purse Seining and Weir Fishing**

Purse seining is the process of catching a school of fish by encircling it with a net. A small boat generally holds one end of the net, while the purse seine vessel tows the net around the school. A wire (purse line) that runs through the bottom of the net is then winched tight to

close the net, like tightening the drawstring on a purse. The net is either hoisted on to the boat or brought to the side of the boat and the fish are then put into holds. Before the rapid expansion of midwater trawling in the mid-1990's, purse seining was the primary method of catching herring in New England's waters.

Weir fishing is a labor-intensive method of fishing that was used by Native Americans hundreds of years ago. A weir is essentially a maze-like fence staked into the water, with nets attached between the posts. Fish are lured into the enclosure and they cannot escape. Prior to seining, weir fishing was the major method of catching Atlantic herring.

## 2. Midwater Trawling.

In midwater trawling, a cone-shaped net is towed either behind a single boat and then spread by two large metal foils called "doors," or behind two boats (pair trawling) that act as the spreading device. The nets can be as long as a football field and, when spread between two boats, up to 150 feet wide. Midwater trawlers sometimes pull a net for up to eight hours. The boats that pull the trawls are also very large, measuring up to 165 feet long. They are equipped with forward-looking sonar and other electronic devices that help locate the fish. Gulf of Maine Research Institute, Herring Harvest: Mid-Water Trawling, [http://www.gma.org/herring/harvest\\_and\\_processing/trawling](http://www.gma.org/herring/harvest_and_processing/trawling) (last visited July 9, 2009).

When the trawling net is full, it is brought along side of the vessel and in most operations a pump is attached to the end of the cone. The fish are essentially vacuumed from the net into a dewatering box, and then into holds below the deck. The biggest midwater trawling boats can hold over a million pounds of herring.

Although midwater trawls are intended to catch herring in the middle of the water column, they are often used to fish on the bottom of the water column as well, including the

ocean floor. See discussion infra pp. 12-14. This practice kills large amounts of adult and juvenile groundfish as bycatch, thus contributing to the decline in their population.

Administrative Record (“AR”) 702-710. See also Declaration of Curt Rice in support of Plaintiffs’ Motion for Summary Judgment (“Rice Dec.”) at ¶ 8; Declaration of Glen Libby in support of Plaintiffs’ Motion for Summary Judgment at ¶¶ 6-7. Bycatch is a particularly significant problem when juveniles are killed because they are unable to grow to maturity and spawn. AR 705-706.

The use of midwater trawling expanded rapidly in the 1990s and it is now the dominant method of herring fishing in New England, at the expense of traditional methods like purse seining and weir fishing. In 2006, for example, midwater trawlers accounted for at least seventy-five percent of the total herring catch in Georges Bank and the Gulf of Maine. AR 77. And in 1997, the NEFMC voted to allow midwater trawling for herring in groundfish-closed areas, in part to provide an alternative for large vessels that had their groundfish fishing days reduced due to depleted stocks.<sup>3</sup> AR 4.

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<sup>3</sup> Nineteen different stocks of groundfish, such as cod, haddock, and flounder are managed in a fishery plan as a “multispecies” fishery, and are sometimes referred to as “regulated multispecies.” In its effort to justify opening groundfish-closed areas to midwater trawling, NEFMC stated that “[a]vailable sea sampling information does not show bycatch of regulated multispecies . . .” AR 11. This conclusion was based on data obtained from just six midwater trawler trips. AR 11, 13. The notion that midwater trawling does not catch regulated bycatch has, in fact, proven to be completely false. See discussion supra pp. 5-6, and infra pp. 9, 16 n.6.



#### IV. ARGUMENT

##### A. NMFS' REFUSAL TO BAN MIDWATER TRAWLING IN GROUND FISH-CLOSED AREAS UNDERMINES CONGRESS' MANDATE TO PROMOTE COMMERCIAL FISHING UNDER SOUND CONSERVATION AND MANAGEMENT PRINCIPLES.

One of Congress' key purposes in passing the Magnuson-Stevens Act was to "promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(3). In furtherance of this goal, Congress declared its policy to "foster and maintain the diversity of fisheries in the United States," 16 U.S.C. § 1801(c)(6), and more specifically, "to assure that the national fishery and conservation program . . . encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish." 18 U.S.C. § 1801(c)(3). See also National Standard 9 for Fishery Conservation and Management in the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(9) ("Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality for such bycatch."). By permitting midwater trawling in areas otherwise closed to groundfishing, however, NMFS threatens fish stocks, fails to minimize bycatch, and impedes the use of more sustainable fishing practices, all of which undermine the purpose and policies of the Act.

##### 1. Midwater Trawling Threatens Fish Stocks.

The Government bodies responsible for oversight of Atlantic fisheries have expressed "significant and growing concern about the status of the inshore component of the herring resource and the potential impacts of midwater trawl fishing."<sup>4</sup> Herring FMP Amend. 1 at 94. According to the NEFMC, "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

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<sup>4</sup> "Inshore" refers to waters closer to shore.

ecosystem.” *Id.* at 95. This concern ultimately led NEFMC and NMFS to ban midwater trawling for herring in certain inshore areas between June 1st and September 30th each year.<sup>5</sup> NMFS Final Rule implementing Herring FMP Amend. 1, 42 Fed. Reg. 11,252, 11,257 (March 12, 2007).

Midwater trawling also threatens the river herring fishery, because the high-volume nature of midwater trawling can lead to substantial quantities of river herring bycatch. For example, a study by Maine and Massachusetts officials showed that “[o]verall, [river herring] bycatch was highest in both single and paired midwater trawls, while it was lowest in purse seines.”<sup>6</sup> Cieri, et al., *Estimates of River Herring Bycatch in the Directed Atlantic Herring Fishery* (2008) at 1, 4, available at [http://www.mass.gov/dfwele/dmf/spotlight/river\\_herring\\_bycatch\\_cieri\\_et\\_al.pdf](http://www.mass.gov/dfwele/dmf/spotlight/river_herring_bycatch_cieri_et_al.pdf). Additionally, the Atlantic States Marine Fisheries Commission (“ASMFC”) has warned that “in some years, the total bycatch of river herring by the Atlantic herring fleet alone could be equal to the total landings from the entire river [herring] directed fishery on the East Coast.” Letter from John V. O’Shea, ASMFC, to Gary Locke, Secretary of the U.S. Department of Commerce, May 27, 2009, available at [http://www.nefmc.org/herring/council\\_mtg\\_docs/June%202009/10\\_herring.pdf](http://www.nefmc.org/herring/council_mtg_docs/June%202009/10_herring.pdf) (“ASMFC Letter”).

Midwater herring trawling has also had an adverse effect on the tuna fishery. Tuna fishermen associations have reported, for example, that the transition in the Atlantic herring industry from the use of purse seine gear to “overly efficient large midwater trawl vessels” has

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<sup>5</sup> Furthermore, the model used to estimate the amount of spawning herring stock “tends to overestimate.” Atlantic States Marine Fisheries Commission, “Species Profile: Atlantic Herring,” *Fisheries Focus*, Vol. 16, Issue 9 (Nov/Dec 2007) at 2, available at <http://www.asmfc.org/speciesdocuments/herring/speciesprofileNov07.pdf>.

<sup>6</sup> The study also noted that “the lack of large bycatch estimates for purse seines may not reflect the gears’ inability to catch river herring. Rather, purse seines are not currently operating in areas and seasons where the vast majority of estimated river herring removals occur.” *Id.* at 5.

caused tuna catches to decline “dramatically” by “greatly reduc[ing] available forage [food] to attract and hold giant bluefin tuna.”<sup>7</sup> Letter from East Coast Tuna Association to Dr. Bill Hogarth, NMFS, Dec. 3, 2005, available at <http://www.winterbluefin.org/responses/4tunagroupsletter.pdf> (“Tuna Association Letter”). See also Herring FMP Amend. 1 at 98. Recreational fishermen have expressed similar concerns about the threat midwater trawling poses to the forage needs of striped bass and other important recreational species. Id.<sup>8</sup>

Furthermore, data show that midwater trawls frequently catch juvenile and adult groundfish, often in significant amounts. See, e.g., Memorandum from Lori Steele, Herring Plan Development Team Chairman, Atlantic Stock/Fishery Update, at 15-16, Tables 9 and 10 (Sept. 7, 2007) (attached as Exhibit B to Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment) (2006 observations discovered bycatch of haddock totaling over 18,000 pounds and redfish totaling over 7,000 pounds); John Richardson, Officials Back Off Estimating Dead Haddock, Portland Press Herald, at B3 (Sept. 21, 2004) (attached as Exhibit C-3 to Plaintiffs’ Petition) (random sampling of midwater trawler tows found 4.5 percent juvenile haddock bycatch); National Marine Fisheries Service, “Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery,” at 3, available at [http://www.nefmc.org/herring/council\\_mtg\\_docs/April%202009/herring\\_4.pdf](http://www.nefmc.org/herring/council_mtg_docs/April%202009/herring_4.pdf) (57,560 pounds of haddock bycatch in a 4.5 year period).

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<sup>7</sup> Conversely, however, “[p]urse seiners are not . . . blamed for a lack of tuna.” Herring FMP Amend. 1 at 98.

<sup>8</sup> Midwater trawls can also physically interfere with lobster gear. See Atlantic Herring Fishery Management Plan, Vol. 1, § 6, p. 89 (1999). This negatively impacts the Fishermen Amici because they regularly catch lobsters for commercial purposes.

A reduction in midwater trawling would thus greatly reduce the hazards discussed above. By denying Plaintiffs' petition to reduce midwater trawling in groundfish-closed areas, however, NMFS has failed to foster and maintain the diversity of New England's fisheries and to promote sound conservation and management principles, as required by the Magnuson-Stevens Act.

2. Midwater Trawling Displaces Alternative Sustainable Fishing Methods.

NMFS' encouragement of midwater trawling at the expense of more sustainable fishing methods is also inconsistent with the Magnuson-Stevens Act's commitment to promote the conservation of fisheries by encouraging methods that minimize bycatch.

Purse seining, for example, produces substantially less bycatch than does midwater trawling for several reasons. First, purse seines catch far fewer groundfish than midwater trawls. See Herring FMP Amend. 1 at 97. This is mainly because purse seines operate only at night, whereas midwater trawlers operate around the clock. Id. See also discussion infra pp. 12-13. In addition, purse seines do not fish on the bottom of the water column, while midwater trawlers often chase herring on the ocean floor. Id.; Rice Dec. at ¶ 8.

Second, purse seines are able to release a larger portion of bycatch alive than midwater trawlers can. See Herring FMP Amend. 1 at 97.

Third, purse seining impacts other marine species, such as tuna, to a much lesser degree than does midwater trawling. Herring FMP Amend. 1 at 98; Tuna Associations Letter at 1.

Fourth, purse seining has less of an impact on anadromous species, such as river herring, than do midwater trawls. See Cieri et al., supra, at 1, 4; ASMFC Letter, supra.

Bycatch from midwater trawling has had such a negative impact on the local fishing industry that, despite trawling's efficiency in catching herring, the herring market itself (i.e. those who purchase the herring) has begun to question its use. As previously mentioned, the vast

majority of herring is now used as bait for lobstermen. Yet even the Maine Lobstermen Association (“MLA”), which supported the Plaintiffs’ petition, has recognized that, “[a]t a time when the New England groundfish fleet continues to struggle to rebuild its stocks, it is unconscionable to allow any fishing gear with potential to kill groundfish into [groundfish] closed areas.” MLA Letter at 1 (attached as Exhibit 1). The MLA also noted that it had supported the ban on inshore midwater trawling because of their concern that the trawling gear “breaks up schools of herring and leads to localized depletion of the [herring] resource.” *Id.* The MLA found that when midwater trawling was banned inshore, “the purse seine fleet was very capable of providing a steady supply of bait over the course of the fishing season.”<sup>9</sup> *Id.*

Purse seining thus represents a viable herring fishing method that is consistent with the conservation goals of the Magnuson-Stevens Act. By denying Plaintiffs’ petition to ban midwater trawling in groundfish-closed areas, however, NMFS makes it difficult for fishermen who use such sustainable methods to compete in the herring market and thus threatens the vitality of the entire Atlantic fishing industry.

**B. THERE IS NO SCIENTIFIC BASIS SUPPORTING NMFS’ REFUSAL TO BAN MIDWATER TRAWLING IN GROUNDFISH-CLOSED AREAS.**

The Magnuson-Stevens Act establishes a policy of ensuring that the national fishery conservation program will be “based upon . . . the best scientific information available.” 16 U.S.C. § 1801(c)(3). NMFS’s decision to deny Plaintiffs’ Petition to ban midwater trawling in

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<sup>9</sup> In its amicus brief, the Sustainable Fisheries Coalition (a trade group of midwater trawlers hereinafter referred to as the “Midwater Trawling Companies”) suggests that purse seines cannot operate on a year-round basis is simply not true. See NMFS, *Characterization of Fishing Practices and Marine Benthic Ecosystems of the Northeast Shelf*, (2004) at 52, <http://www.nefsc.noaa.gov/publications/tm/tm181/3.pdf> (explaining that purse seining is a year-round pursuit in the Gulf of Maine). *Midwater Trawlers’ Brief* (“MWT Br.”) at 9-10.

groundfish-closed areas is inconsistent with this policy because it is based on irrational and unsupported conclusions.

1. The Levels of Groundfish Bycatch Are Significantly Higher Than NMFS and the Midwater Trawler Companies Assert.

NMFS cites bycatch figures generated by the Northeast Fishery Observer Program to justify opening groundfish-closed areas to midwater trawling. Federal Defendants' Combined Memorandum in Support of Cross-Motions for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 12-13 ("Def. Br."). It is clear, however, that the observer program drastically undercounts bycatch from midwater trawling. To begin with, observers typically do not inspect nets that have their contents dumped back into the ocean instead of being pumped on board (these are sometimes called "slipped" nets, or "slippage"). See Presentation of Amy Van Atten, NMFS, at 29, available at [http://www.nefmc.org/herring/cte%20mtg%20docs/NEFOP\\_Overview\\_Herring\\_Committee\\_0508\\_36pgs.pdf](http://www.nefmc.org/herring/cte%20mtg%20docs/NEFOP_Overview_Herring_Committee_0508_36pgs.pdf) (showing that 16.5 percent of tows in 2007 were either totally or partially dumped).

Moreover, even if the observers were accurately reporting bycatch, the nature of the program itself likely causes the bycatch figures to appear lower than they really are.<sup>10</sup> This is because, when a vessel has an observer on board, the crew will probably take steps to minimize bycatch, but they may not take those same steps when unobserved. For instance, fishermen are often familiar with locations where the bycatch will be high, and can thus avoid those areas when they are being observed. Also, they may choose not to haul in a net suspected to have bycatch

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<sup>10</sup> From 1994-2004, the percentage of midwater trawling trips observed ranged, on an annual basis, from 0%-9.55%. Herring Amend. 1 at 339. From 2005-2007, the percentage of midwater trawler trips observed averaged 13% annually. Northeast Fisheries Observer Program presentation to the Herring Committee meeting, May 22, 2008 (Exhibit A to Plaintiffs' summary judgment brief). For that same period, only 9 percent of the herring caught was caught by vessels with an observer on board. Id.

or, in the situation of a midwater pair trawl, to haul it onto an unobserved boat. It will usually be more economically beneficial to the fishermen to forego a single tow with bycatch than to haul the tow and risk stricter regulation.<sup>11</sup>

The weakness of the observer program and the severity of the bycatch problem were laid bare in a recent NMFS report showing that, from May 2004 through October 2008, 57,560 pounds of haddock bycatch were taken from a single groundfish-closed area in only sixteen trawling trips. NMFS, “Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery,” at 3 (2009), available at [http://www.nefmc.org/herring/council\\_mtg\\_docs/April%202009/herring\\_4.pdf](http://www.nefmc.org/herring/council_mtg_docs/April%202009/herring_4.pdf). These numbers were so high that, in April 2009, the NEFMC voted to request that NMFS require 100 percent observer coverage and prohibit net dumping (slippage) in that area.<sup>12</sup> Minutes of April 9-11, 2009 NEFMC Meeting at 5, available at <http://www.nefmc.org/actions/motions/motions-apr09.pdf>. Unfortunately, similar restrictions are not being pursued in other groundfish-closed areas (although there is no principled reason why that should be the case) as the Government continues to bury its head in the sand with respect to the overall bycatch numbers.

The Midwater Trawler Companies argue that it is not possible for midwater trawling nets to catch groundfish as bycatch. MWT Br. at 13 (“midwater trawl nets are specifically designed and deployed so as not to catch groundfish that live and spawn on the bottom.”). They also contend that midwater trawlers avoid the bottom because their nets would tear, and imply that

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<sup>11</sup> NMFS itself acknowledged the “potential biases” in observer data in its Standardized Bycatch Reporting Methodology (“SBRM”). 73 Fed Reg. 4,737, 4,749 (January 28, 2008). The SBRM does not fix these biases because it does not require observation of slipped bags and preserves flexibility in setting the percentage of vessels to be observed. In fact, the SBRM leaves it up to others to decide how monitoring should be conducted, within certain broad constraints. *Id.* at 4,743.

<sup>12</sup> These requests have not yet been adopted or implemented by NMFS.

there is no need to fish there anyway because herring “usually swim well above the bottom.” MWT Br. at 11, 8, respectively.

In fact, however, herring spend much of each twenty-four hour period on the sea floor. See NEFMC, “Atlantic Herring Fishery Management Plan,” at 1, available at <http://www.nefmc.org/herring/summary/herring.pdf>. (Atlantic herring “typically undertake diurnal vertical migrations, sinking to the sea floor during the day and rising to the surface after dusk.”). Midwater trawlers therefore must have the ability to fish on the bottom because they operate twenty-four hours per day, including the lengthy part of the day when the herring are near the sea floor. If midwater trawling nets truly were not able to fish on the bottom, then there would be no reason for the trawlers to work during the day because the herring would be out of their reach.<sup>13</sup>

2. The Bycatch Thresholds Cited By NMFS And The Midwater Trawlers Are Not Rationally Related To The Protection Of Fish.

A major thrust of NMFS’ and the Midwater Trawler Companies’ arguments is that there is no need to close groundfish-closed areas to midwater trawling because the amount of bycatch has not exceeded either of two numerical thresholds used by NEFMC and NMFS in the protection of regulated species. The fundamental flaw with this argument is that these thresholds are essentially meaningless in this case because they were established in a manner that is not rationally related to the protection of fish, and therefore cannot be used by NMFS as a basis for denying Plaintiffs’ Petition.

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<sup>13</sup> The Midwater Trawler Companies also claim they are researching “gear modification” (changing their nets somewhat) to minimize bycatch of haddock, which rise in the water column as a trawl approaches. MWT Br. 3-4. Given the staggering amount of haddock bycatch reported in Closed Area I from May 2004 through October 2008, the gear modification approach clearly has not worked (or the modified gear is not used). NMFS, “Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery,” supra at 12.



One threshold the Midwater Trawler Companies invoke is: if bycatch of regulated multispecies (groundfish) exceeds or is likely to exceed one percent, by weight, of the herring caught (either industry-wide or from an “individual fishing operation,” a term that is not defined) in a groundfish-closed area, then NMFS may (but is not required to) restrict or even ban midwater trawling in groundfish-closed areas.<sup>14</sup> Framework Adjustment 18 to the Northeast Multispecies Fisheries Management Plan (“Framework 18”) (AR 3). See also NMFS Final Rule implementing Framework 18, 63 Fed. Reg. 7,727 (Feb. 17, 1998). Based on figures generated by the observer program, the Midwater Trawler Companies assert that the one percent threshold has never been exceeded on an industry-wide basis, and only occasionally on an individual trip or tow level. MWT Br. at 14.

The problem with the one percent figure, however, is that it compares apples to oranges. The threshold compares the amount of regulated multispecies (e.g., groundfish) bycatch to the amount of herring caught, instead of comparing the amount of bycatch to the population needs of the regulated multispecies’ stock itself. Thus, if a midwater trawler caught 2,000 pounds of cod as bycatch, it would not exceed the one percent bycatch threshold if it also caught 300,000 pounds of herring in the same tow. But it would exceed the one percent threshold if it were caught in a net with only 175,000 pounds of herring. Under this approach, then, consideration of whether the loss of 2,000 pounds is significant to the cod stock would not be a factor.<sup>15</sup>

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<sup>14</sup> It should be noted that, although NMFS and the Midwater Trawler Companies have characterized this one percent figure as a “limit” or “limitation” (AR 924, MWT Br. at 14, 20) and as a “trigger” (MWT Br. at 14), it is in fact no such thing. The Regional Administrator is not actually required to do anything except review bycatch information. 63 Fed. Reg. 7,727.

<sup>15</sup> Even if one were to consider the one percent threshold useful, the haddock bycatch numbers in Closed Area I reported by NMFS from May 2004 through October 2008 show that it has not been met: two trips exceeded the 1 percent threshold (2.11 percent and 2.85 percent) and two other trips came close. NMFS, “Observed Haddock Bycatch in the Closed Areas in the Midwater

The other threshold NMFS and the Midwater Trawler Companies invoke is: if haddock bycatch in the Georges Bank and Gulf of Maine exceeds 0.2 percent, by weight, of the total allowable catch (“TAC”) of haddock under the haddock directed fishery (*i.e.*, 0.2 percent of the total amount of haddock that is allowed to be caught by all haddock fishermen), then herring vessels are prohibited from fishing for, possessing or landing more than 2,000 pounds of herring per trip. NEFMC, Framework Adjustment 43 to the 2006 Northeast Multispecies (Groundfish) Fishery Management Plan (“Framework 43”), available at [http://www.nefmc.org/nemulti/frame/fw43/final\\_fw43\\_feb06.pdf](http://www.nefmc.org/nemulti/frame/fw43/final_fw43_feb06.pdf). See also NMFS Final Rule implementing Framework 43, 71 Fed. Reg. 46,871 (Aug. 15, 2006). This is called a “catch cap.” NMFS and the Midwater Trawlers assert that, based on information generated by the observer program, the 0.2 percent catch cap has never been exceeded. Def. Br. at 7, 13; MWT Br. at 15.

The 0.2 percent figure has a patina of rationality because it at least compares apples to apples: the threshold compares the amount of haddock bycatch in the herring fishery to the amount of haddock intentionally caught by the haddock fishing industry. But, when examined more closely, it is apparent that the threshold does not make sense. To arrive at the 0.2 percent number, the NEFMC started with a one percent catch cap (the origins of which are not apparent).<sup>16</sup> The NEFMC then assumed that observer coverage for the herring industry would be twenty percent, and simply applied the twenty percent to the one percent to arrive at 0.2 percent. Framework 43 at 38 (AR 95).

Since the observer coverage was a key factor in originally setting the catch cap, then logically the cap must slide lower when the observer rates goes below twenty percent. However,

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Trawl Herring Fishery,”supra at 12. Eight individual tows also exceeded the threshold, with bycatch reaching as high as 9.69 percent in a single tow. Id.

<sup>16</sup> This is not the same as the one percent threshold for groundfish-closed areas previously discussed.

the NEFMC and NMFS, in implementing Framework 43, refused to structure the cap that way, and instead made the 0.2 percent cap inflexible relative to observer coverage. AR 135. But, in reality, observer coverage is usually well below twenty percent and the 0.2 percent catch cap is therefore a meaningless benchmark.

Moreover, the catch cap was established using data that the Government otherwise considers to be of dubious value. In Framework 43, the Government declared that “no extrapolations will be made from the observed trips to estimate haddock bycatch across the entire herring fishery.” AR 64. Thus, observer data generated in groundfish-closed areas were not reliable enough to use in assessing the status of bycatch in the herring fishery outside the closed areas. But if the data are not good enough to make extrapolations fishery-wide, then it is difficult to see how they can be a sufficient basis for making bycatch extrapolations inside the groundfish-closed areas.

In short, there is simply no scientific basis for using the one percent and 0.2 percent thresholds as justification for denying Plaintiffs’ Petition.

**V. CONCLUSION**

For the reasons set forth above, the Fishermen Amici respectfully urge this Court to grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

/s/

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Attorneys for Amici Curiae

July 10, 2009



Glen Libby, Chairman  
Midcoast Fishermen's Association  
450 Glenmere Road  
Port Clyde, ME 04855

June 23, 2008

Dear Glen:

The Maine Lobstermen's Association (MLA) would like to express our strong support for the Midcoast Fishermen's Association's (MFA) effort to exclude midwater trawlers from the groundfish closed areas. The MLA is an industry based fishing organization representing the interests of 1200 lobstermen and industry stakeholders along the Maine coast.

The MLA has been concerned about the midwater trawl fleet fishing in the groundfish closed areas because this gear is known to catch groundfish as a bycatch. At a time when the New England groundfish fleet continues to struggle to rebuild its stocks, it is unconscionable to allow any fishing gear with potential to kill groundfish into these closed areas. The groundfish industry cannot afford to have any of the benefits of the management plan undermined as they continue to face even more stringent management measures.

The MLA supported a ban on single and paired midwater trawl vessels in Herring Management Area 1A because of our concern that this gear breaks up schools of herring and leads to localized depletion of the resource. Based on anecdotal reports from Area 1A during the 2007 fishing season, banning midwater trawlers from Area 1A has had a positive impact on the resource.

The lobster industry had concerns that banning midwater trawl gear could negatively impact bait supply. However, we found that the purse seine fleet was very capable of providing a steady supply of bait over the course of the fishing season. In fact, when the midwater trawl ban was lifted, the remainder of the herring quota was immediately caught flooding the market with bait. This experience has given us confidence that purse seine gear is not only better for the herring resource and ecosystem, but it also avoids the potential bait shortages during the peak fall lobster fishing season.

Midwater trawl gear has tremendous fishing power and should be carefully monitored and regulated to ensure that it does not negatively impact the ecosystem. We strongly

support your effort to keep midwater trawl vessels out of the groundfish closed areas to aid in the recovery of groundfish stocks and ensure that fishing management regulations are applied equitably across all fisheries.

We wish you luck with this important effort.

Sincerely,

A handwritten signature in blue ink that reads "Patrice McCarron". The signature is written in a cursive, flowing style.

Patrice McCarron  
Executive Director