April 12, 2017

VIA ELECTRONIC MAIL

New England Fishery Management Council
ATTN: Dr. John Quinn, Chairman
50 Water Street, Mill 2
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E-mail: comments@nefmc.org

Re: Industry-Funded Monitoring (IFM) Omnibus Amendment

Dear Chairman Quinn:

I write on behalf of Cause of Action Institute ("CoA Institute") with respect to the New England Fishery Management Council's ("NEFMC" or "Council") consideration of final action on the Industry-Funded Monitoring Omnibus Amendment ("Omnibus Amendment").[1] The Omnibus Amendment raises a number of serious legal questions concerning the Council's authority to compel regulated parties, *i.e.*, fishermen, to pay for supplemental monitoring services. As set forth in detail below, there is no authority under the Magnuson-Stevens Act ("MSA"), 16 U.S.C. § 1801 *et seq.*, for industry funding requirements in most of the Atlantic fisheries. As such, the Omnibus Amendment, and future attempts to implement industry-funded monitoring under the Omnibus Amendment's framework, will almost certainly face legal challenge. CoA Institute requests that the Council either abandon the Omnibus Amendment or develop alternative ways to achieve the Council's goals of increased data collection and expanded policing of annual catch totals.[2] The NEFMC could, for example, work with the National Marine Fisheries Service ("NMFS") to reallocate existing funds for monitoring or petition Congress to appropriate funding specific to expanded monitoring. Attempting to shift monitoring costs without legal authority onto an already economically-beleaguered industry would be ill-advised.

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[1] New Eng. Fishery Mgmt. Council & Mid-Atl. Fishery Mgmt. Council, Industry-Funded Monitoring Omnibus Amend. (Sept. 2016) [hereinafter Omnibus Amend.], *available at* http://bit.ly/2mQxrtn.

[2] CoA Institute acknowledges that the Council has chosen its preferred alternatives, including Omnibus Alternatives 2.2 and 2.6 and Herring Alternatives 2.5 and 2.7. *See, e.g.*, New Eng. Fishery Mgmt. Council, Press Release: Council Selects Industry-Funded Monitoring Alternatives for Omnibus Amendment, Atlantic Herring Category A and B Boats (Jan. 25, 2017), *available at* http://bit.ly/2nKW463. Nevertheless, final approval by the NEFMC and the Mid-Atlantic Fishery Management Council are required before the Omnibus Amendment is submitted to NMFS for secretarial review and publication in the Federal Register. *See* 16 U.S.C. § 1854(a), (f)(1).

CoA Institute is a nonpartisan 501(c)(3) nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[3] In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability, as well as agency adherence to the rule of law. CoA Institute advocates on behalf of clients facing federal overreach and overregulation, including members of the New England fishing industry. CoA Institute currently represents David Goethel—a former member of the NEFMC—and the members of Northeast Fishery Sector XIII in a challenge to the Northeast multispecies industry-funded sector at-sea monitoring program.[4] That case raises many of the same issues faced by the Council vis-à-vis the Omnibus Amendment.

I. <u>The Magnuson-Stevens Act Does Not Authorize the Industry-Funded Monitoring Programs Intended by the Omnibus Amendment</u>.

The stated purpose of the Omnibus Amendment is straightforward: the Council is "interested in increasing monitoring and/or other types of data collection to assess the amount and type of catch, to more precisely monitor annual catch limits, and/or provide other information for management,"[5] but its ability to fund that increased monitoring is limited.[6] The proposed solution is to design a standardized mechanism that would permit the government to order fishermen to cover a substantial portion of monitoring costs.[7] Yet the Council fails to point to *any provision* in the MSA that gives it the authority to implement such a plan.

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[3] CAUSE OF ACTION INST., *About*, http://www.causeofaction.org/about (last visited Apr. 12, 2017).
[4] *See Goethel v. Pritzker*, No. 16-2103 (1st Cir. argued Mar. 7, 2017); *Goethel v. Pritzker*, No. 15-497, 2016 WL 4076831 (D.N.H. July 29, 2016).
[5] *See* Omnibus Amend. at 41.
[6] *See id.* at 43–44 ("NMFS has limited funding for monitoring, so both Councils have considered requiring industry to contribute to the cost of monitoring."); Greater Atl. Reg'l Fisheries Office, Nat'l Marine Fisheries Serv., Press Release: Industry-Funded Monitoring Omnibus Amendment, Public Hearings and Comment Period (Sept. 20, 2016) ("The amount of available Federal funding to support additional monitoring is limited[.]"), *available at* http://bit.ly/2nHNpl1.
[7] *See, e.g.*, Omnibus Amend. at 62 ("Under Omnibus Alternative 2, there would be an established, standardized structure for new industry-funded monitoring programs . . . [that addresses] (1) standard cost responsibilities associated with industry-funded monitoring for NMFS and the fishing industry, (2) a process for FMP-specific industry-funded monitoring to be implemented via [amendment and revised via] a . . . framework adjustment action, (3) standard administrative requirements [for industry-funded monitoring service providers] . . . (4) [a] process to prioritize new industry-funded monitoring programs in order to allocate available Federal resources for industry-funded monitoring across FMPs, including the type of weighing approach and the timing of revising the weighing approach, and [(5)] a process for FMP-specific monitoring set-aside programs to be

a. The Council Requires Explicit Statutory Authorization to Require Industry to Fund Supplemental Discretionary Monitoring Programs

Federal agencies do not enjoy unbridled power in choosing which programs to pursue; they cannot impose new fees or taxes, nor can they simply demand that citizens pay for programs that the government ought to be financing in the first place. In this sense, the most basic presumption in the Omnibus Amendment, namely, that the Council can order industry to fund a monitoring program, is gravely mistaken and runs afoul of a fundamental principle of administrative law: "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."[8] The Council appears to acknowledge as much, but does not give the principle due credit: "A Federal agency cannot spend money on a program beyond the maximum authorized program level without authorization from Congress. [It] also cannot get around the maximum authorized program level by adding to its appropriations from sources outside the government without permission from Congress."[9]

The MSA does not authorize the Council to redesign fishery management plans to introduce the sort of industry-funded monitoring envisioned by the Omnibus Amendment. At most, the MSA authorizes the *placement* of observers and monitors.[10] The Council, however, is not at liberty to design any particular *funding* mechanism for those monitors. The plain meaning of the MSA, here, is clear and unambiguous.[11] The statute only authorizes industry-funded monitoring in a few specific regions and circumstances: (1) foreign fishing,[12] (2) limited access privilege programs,[13] and (3) the North Pacific fisheries research plan.[14] Congress's decision to permit NMFS and the regional councils to require industry-funded monitoring and observing in those, and

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implemented via a future framework adjustment action. Additionally, [it] would include a range of options for the process to prioritize industry-funded monitoring across all FMPs.") (alternations indicate changes in the April 2017 Omnibus Amendment draft, *available at* http://bit.ly/2omwA0Q).

[8] *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986); *see Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427, 2466 (2014) ("An agency confronting resource constraints may change its own conduct, but it cannot change the law.").

[9] *See* Omnibus Amend. at 45.

[10] 16 U.S.C. § 1853(b)(8); 50 C.F.R. § 648.2.

[11] *See generally Palmieri v. Nynex Long Distance Co.*, 437 F.3d 111, 115 (1st Cir. 2006); *Bonilla v. Muebles J.J. Alvarez, Inc.*, 194 F.3d 275, 277 n.2 (1st Cir. 1999).

[12] 16 U.S.C. § 1821(h)(4).

[13] *Id.* § 1853a(e). The Greater Atlantic Region contains two fisheries that permit cost recovery through a fee system: the Atlantic sea scallop individual fishing quota and golden tilefish individual fishing quota limited access privilege programs. *See* Omnibus Amend. at 51.

[14] 16 U.S.C. § 1862(a).

only those, three situations shows its intent to disallow industry funding in other instances.[15] To read the statute otherwise violates Congress's clear intent and the well-established legislative history of the MSA.[16]

b. The Omnibus Amendment's Industry-Funded Monitoring Scheme Would Violate the National Standards and Other Important Legal Principles.

Notwithstanding the Council's lack of explicit legal authority, the introduction of industry-funded monitoring across the Greater Atlantic fisheries would also impose a tremendous economic burden on the fishing industry and could lead to the elimination of small-scale fishing. This result would violate National Standards 7 and 8.[17] Congress never intended to grant the Council the authority to regulate a substantial portion of the Atlantic fleet out of existence.[18] Indeed, as the Supreme Court has held, "Congress . . . does not alter the fundamental details of a regulatory scheme [such as the one intended by the MSA] in vague terms or ancillary provisions,"[19] nor does it "delegate a decision of such economic and political significance [as the introduction of

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[15] Any other reading of the MSA would render provisions discussing industry funding surplusage, *Nat'l Credit Union Admin v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998), and offend important canons of construction. *Duncan v. Walker*, 533 U.S. 167, 173 (2001); *see also EchoStar Satellite L.L.C. v. Fed. Commc'ns Comm'n*, 704 F.3d 992, 999 (D.C. Cir. 2013); *Ry. Labor Execs.' Ass'n v. Natl' Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994); *cf. Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 116 n.9 (D.D.C. 2015) ("'[C]ost sharing' programs with industry participants in other fisheries in order to provide higher observer coverage levels . . . were expressly authorized by statute *for particular fisheries only*.") (emphasis added) (citing 16 U.S.C. § 1862).

[16] There is no evidence of Congressional recognition for some pre-existing, implied authority to impose monitoring costs on industry. Congress has repeatedly declined the opportunity to permit industry funding nationwide. Each time the MSA has been reauthorized, Congress considered (and rejected) bills that would have created blanket authority for mandatory industry funding. H.R. 1554, 101st Cong. § 2(a)(3) (1989); H.R. 39, 104th Cong. § 9(b)(4) (1995); H.R. 5018, 109th Cong. § 9(b) (2006).

[17] *See* 16 U.S.C. § 1851(a)(7)–(8). It should not lightly be concluded that Congress intend to grant authority for the Council and NMFS to take actions that would put fishermen out of business. *See Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1061 (W.D. Wash. 2008) (rejecting agency interpretation because it "leads to absurd results—the inevitable elimination of the fishery); *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 140 (D. Mass. 2010) ("[The MSA] creates a duty to allow for harvesting at optimum yield in the present, while at the same time protecting fishery output for the future[.]").

[18] The Council could certainly repeal or revoke any of its fishery management plans, but it must do so explicitly and by three-quarters majority approval of its voting members. 16 U.S.C. § 1854(h).

[19] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

industry-funded monitoring] in so cryptic a fashion."[20] Industry-funded monitoring as a normal course of fishery regulation is not only novel, but represents a shift of economic and political significance.

In the absence of authorization for the sort of industry-funded monitoring programs contemplated by the Omnibus Amendment, the Council can only be described as preparing to impose a "tax" to extract money from regulated parties in order to fund desired regulatory programs. This cannot stand as "only Congress has the power to levy taxes."[21] The Omnibus Amendment, as applied in future fishery management plan amendments, would also violate numerous statutes governing agency finance, such as the Anti-Deficiency Act[22] and the Miscellaneous Receipts Statutes.[23] Finally, industry funding requirements would impermissibly compel fishermen into commercial transactions in violation of the Commerce Clause[24] and violate other parts of the Constitution, including the Fourth Amendment.

II. <u>The Expected Economic Impact of the Omnibus Amendment, including Provisions for the Herring and Mackerel Fisheries, and Stakeholder Feedback Expose Other Important Deficiencies</u>.

In line with the National Standards, the Omnibus Amendment and future industry-funded monitoring programs must "minimize costs,"[25] "provide for the sustained participation of [fishing] communities,"[26] and "minimize adverse economic impacts."[27] The Omnibus Amendment fails to meet these standards, both generally

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[20] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (rejecting the argument that Congress would delegate "broad and unusual authority through an implicit delegation").
[21] *Thomas v. Network Solutions*, 2 F. Supp. 2d 22, 29 (D.D.C. 1998); *see* U.S. Const., art. I., § 8, cl. 1; *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes[.]").
[22] *See* 31 U.S.C. § 1341(a)(1)(A)–(B); *see also Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995).
[23] *See* 31 U.S.C. § 3302(b); *see also Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). The Government Accountability Office has rejected the proposition that an agency can avoid the Miscellaneous Receipts Statute "by authorizing a contractor to charge fees to outside parties and keep the payments in order to offset costs that would otherwise be borne by agency appropriations." Gov't Accountability Office, 2 Principles of Fed. Appropriations L. at 6-177 (3d ed. 2006).
[24] *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (The government cannot "compel[] individuals to become active in commerce by purchasing a product.").
[25] 16 U.S.C. § 1851(a)(7).
[26] *Id.* § 1851(a)(8).
[27] *Id.*

and with respect to the herring and mackerel alternatives, because it will have a severe and adverse impact on the fishing industry.

The expected economic impact on fishery-related business and communities is uniformly negative.[28] Monitoring costs in the herring fishery, for example, will likely exceed $710 per sea day for an at-sea monitor and $818 per sea day for a NEFOP-level observer.[29] Such costs are probably higher than the daily landings revenue of the typical small-scale vessel. This is certainly the case in the Northeast multispecies fishery. Under the groundfish sector at-sea monitoring program, up to 60% of the fleet is expected to "see negative returns to owner when full" monitoring costs "are factored in."[30] The Council cannot ignore the devastating economic effects of industry funding in the herring and mackerel fisheries, just as it cannot ignore the costs associated with the Omnibus Alternatives, which it has deemed too "speculative" to consider.[31]

It is worth noting the overwhelmingly negative feedback that the Council and NMFS have received in pursing the Omnibus Amendment. Of the eighty-three (83) submissions posted to the electronic docket during the last round of public comment, only six (6) voiced various levels of support for industry-funded monitoring; the vast majority — 93% — opposed it.[32] The reasons for this opposition are straightforward enough. Many small-scale fishermen cannot remain profitable if they must assume

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[28] *See, e.g.*, Omnibus Amend. at xiii–xxiv; *id.* at 244 ("Overall, there will be *negative direct economic impacts to fishing vessels* as a result of selecting Omnibus Alternative 2[.]") (emphasis added).

[29] *Id.* at 291 (Table 89). For fishermen active in both the herring and the mackerel fisheries, these costs could rise even further. *See id.* at 301 ("Many of the vessels that would be impacted by industry-funded monitoring costs in the herring fishery would also be impacted by industry-funded monitoring costs in the mackerel fishery."). Total estimated costs for vessels active in the mackerel fishery will depend, of course, on the Mid-Atlantic Fishery Management Council's preferred mackerel coverage target alternatives, which have not yet been chosen.

[30] New Eng. Fishery Mgmt. Council, Draft Report: Preliminary Evaluation of the Impact of Groundfish-Sector Funded At Sea Monitoring on Groundfish Fishery Profits at 10 (June 19, 2015), *available at* http://bit.ly/28QUXwT. These costs are predicted to be heaviest for small vessels. *Id.* at 13 (Table 12). NMFS recognized these prospects, describing them as a "restructuring of the fleet." *Id.* at 10.

[31] Omnibus Amend. at 237 ("[P]otential downstream effects (e.g., subsequent management measures to address bycatch issues) of this action are considered too remote and speculative to be appropriate for consideration[.]").

[32] Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., 81 Fed. Reg. 64,426 (Sept. 20, 2016), Docket No. NOAA-NMFS-2016-0139-0001, *available at* http://bit.ly/2p5NO1s.

monitoring costs.[33] The Long Island Commercial Fishing Association, for example, expects that the Omnibus Amendment's approximately $800 per sea day cost would force more than half of the entire New York-based fleet out of business.[34] Stakeholders are also skeptical that increased monitoring has any connection to conservation or maintaining the sustainability of the fisheries, and they question the quality of the data collected. Most importantly, however, the public recognizes that the MSA does *not*, in fact, authorize industry-funded monitoring simply because the Council or NMFS wishes it to do so,[35] and they acknowledge the potential constitutional problems.[36]

Apart from the lack of authority under the MSA for the Council and NMFS to impose monitoring costs on vessels, the Council has also failed to provide an adequate explanation for why increased monitoring is necessary, let alone justify that monitoring in light of the extreme financial burden it will put on fishermen. Industry-funded monitoring, as proposed, would destroy multi-generational, small-business fishermen up-and-down the East Coast while benefitting industrial fishing firms. That result is unacceptable.

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[33] *See* Comment of Meghan Lapp, Seafreeze Ltd., on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0009, *available at* http://bit.ly/2nUf8Ph (discussing impact of herring and mackerel alternatives).

[34] *See* Comment of Long Island Commercial Fishing Ass'n on Omnibus Amend. (Nov. 8, 2016), Docket No. NOAA-NMFS-2016-0139-0084, *available at* http://bit.ly/2odOrsX ("The onus for NMFS required observer coverage should be on NMFS, not industry. It is cost prohibitive.").

[35] *See, e.g.*, Comment of David Goethel on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0010, *available at* http://bit.ly/2o04Mye ("Monitoring is a function of government and should be funded at levels Congress deems appropriate through NOAA line items in the budget. . . . [The MSA] allows for the placement of observers on fishing boats but is silent on cost recovery except in specific fisheries in the North Pacific Region."); *see also* Comment of Gregg Morris on Omnibus Amend. (Nov. 8, 2016), Docket No. NOAA-NMFS-2016-0139-0080, *available at* http://bit.ly/2o09hJp (same).

[36] *E.g.*, Comment of N.C. Fisheries Ass'n on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0082, *available at* http://bit.ly/2oXBtAa (raising due process concerns) ("There was no reasonable opportunity for [public hearings] down in the affected states of Maryland, Virginia, and North Carolina. Their involvement in the public hearings process was substantially truncate. [Those] whose stand to be severely impacted . . . have not been given a single public hearing reasonably close enough for them to be expected to attend."); *cf.* Brooke Constance White, *Stonington fishermen, first selectman: Camera proposal violates Fourth Amendment rights*, THE WESTERLY SUN (Apr. 7, 2017), http://bit.ly/2o00maB.

III. Conclusion

Thank you for your consideration of the foregoing comments. If you have any questions, please do not hesitate to contact me at julie.smith@causeofaction.org or (202) 499-4232.

Sincerely,

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VICE PRESIDENT
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