

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

December 5, 2017

VIA FOIAonline

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Silver Spring, MD 20910

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to all issues of “*Fathoms*,” a NOAA-generated publication of the Greater Atlantic Regional Office, published between December 1, 2015 and the present.² You may exclude from the scope of this request the April 1–15, 2017 issue of *Fathoms*, which has been already disclosed in response to another FOIA request.³

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that NOAA shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the activity of the NMFS Northeast field staff, which regularly interacts with government employees, commercial fisherman, industry processors and dealers, and the general public (including third-party stakeholders, such as environmental advocates) on a variety of

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Dec. 5, 2017).

² For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

³ See, e.g., Letter from Samuel D. Rauch III, Nat’l Oceanic & Atmospheric Admin., to CoA Inst. (Nov. 13, 2017) (FOIA Request No. DOC-NOAA-2018-000109) (on file with CoA Inst.).

⁴ 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(a); see also *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015).

fisheries-management issues. The public interest value of the requested records is demonstrated by a review of the April 1–15, 2017 issue of *Fathoms*, which covers a myriad of important topics, including season opening information for the recreational fishery, the impact of weather patterns on fishing activity, scientific developments, perceived industry frustration with planned regulatory efforts, and enforcement developments.⁵ The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, *Fathoms* has not typically been made publicly available. CoA Institute intends to educate the interested public about the content and purpose of this publication.

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.⁶ In addition, CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and it has no commercial interest in making this request.

Request to Be Classified as a Representative of the News Media

For fee purposes, CoA Institute also qualifies as a “representative of the news media.”⁷ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.⁸ CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.⁹ Although not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work product, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹⁰ These distinct works are distributed to the public through various media, including the Institute’s website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via “al-

⁵ See Nat’l Oceanic & Atmospheric Admin., *Fathoms* (Apr. 1–15, 2017) (attached as Exhibit 1).

⁶ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

⁸ See *Cause of Action*, 799 F.3d at 1121.

⁹ CoA Institute notes that the Department of Commerce’s definition of “representative of the news media” conflicts with the statutory definition and controlling case law. The agency has retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement[.]”).

¹⁰ See generally CAUSE OF ACTION INST., *Media*, www.causeofaction.org/media (last visited Dec. 5, 2017).

ternative media[,] shall be considered to be news-media entities.”¹¹ In light of the foregoing, numerous federal agencies—including the Department of Commerce—have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.¹²

Record Preservation Requirement

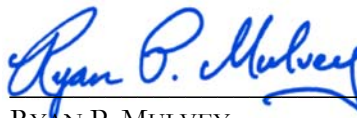
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹³

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹² See, e.g., FOIA Request 2016-11-008, Dep’t of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep’t of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Mgmt. (Oct. 21, 2016); FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (Oct. 17, 2016); FOIA Request 17-00054-F, Dep’t of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-09-101, Dep’t of the Treasury (Sept. 21, 2016); FOIA Request DOC-OIG-2016-001732, Office of Inspector Gen., Dep’t of Commerce (Sept. 15, 2016); FOIA Request OS-2016-00435, Dep’t of the Interior (Aug. 31, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dep’t of State (Aug. 11, 2016); FOIA Request 2016-08-070, Dep’t of the Treasury (Aug. 10, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep’t of the Interior (Aug. 10, 2016); FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep’t of Educ. (Aug. 13, 2015).

¹³ See 15 C.F.R. § 4.3(d) (“Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit[.]”); see also 36 C.F.R. § 1230.3(b); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

EXHIBIT

1

FATHOMS



photo credit Pam Thames

(b) (4) from (b) (4) based in (b) (4) is tending mussels in this photo at his kelp and mussel aquaculture farm. Read a blog by Pam Thames in this edition of Fathoms to learn more about his operation!

2017 Recreational Groundfishing Season in the GOM Begins Tomorrow!

Posted on Friday, April 14th, 2017 by CALEB GILBERT

The MA "For Hire" fleet is ready for action to target haddock tomorrow! In Gloucester, the (b) (4) and the (b) (4) are both planning on heading out for "head boat" trips tomorrow at the start of the April 15th - April 30th Gulf of Maine haddock recreational opening in federal waters.

(b) (4)

(b) (4)

Many of the old commercial groundfish boats docked on the Jodrey State Fish Pier are now commercial lobster and 6-pack charter boats. (b) (4), (b) (6) front in center in the photo included here of the Fish Pier slips taken yesterday, is one such boat. According to (b) (4), (b) (6) the haddock fishing's hot right now, so look forward to reports next week on the recreational groundfishing effort in federal waters of the Gulf of Maine!



photo credit - Caleb Gilbert

Gloucester's (b) (4) and Their Issues with Small Haddock

Posted on Friday, April 14th, 2017 by CALEB GILBERT

(b) (4)

(b) (4)

(b) (4)

(b) (4)



(b) (4)

Nice weather and the end of fishing year brings the Maine groundfish fleet out of hibernation

Posted on Thursday, April 13th, 2017 by PAM THAMES

It is good to see some cod being landed lately, some fishermen say there are so many out there, others say they aren't seeing any, then when some cod are landed, there's the guy that says "NOAA Fisheries Science is BAD".

(b) (4)

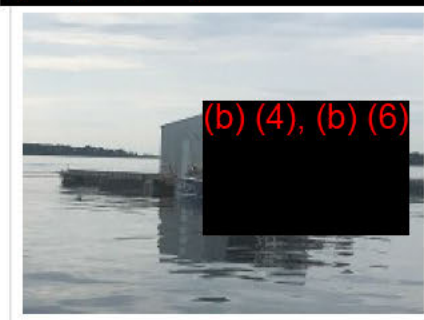
(b) (4)

(b) (4)

Local mussel and kelp farmer is going to try to grow scallops

Posted on Thursday, April 13th, 2017 by PAM THAMES

(b) (4)



(b) (4)



Maybe next time you will see new information on their scallop farming.



APAIS Survey Comment

Posted on Thursday, April 13th, 2017 by JOANNE PELLEGRINO

Immigrants that fish along the Manasquan inlet sea wall have told a local Bait & Tackle Shop manager that they do not talk to APAIS interviewers and avoid them all together. They are afraid to speak with any government representative, they told him. They have stood around in his shop until the interviewer is gone. This was a hard thing to hear, especially as I was talking MRIP & APAIS up and the importance of talking with the interviewers and getting "good data" in order for managers to make good decisions.

A Tale of Two Trips at (b) (4)

Posted on Thursday, April 13th, 2017 by CALEB GILBERT

(b) (4)



(b) (4)

(b) (4)

Lumpers dumped a basket of redfish from (b) (4) into a deicing vat in the photo included here. From there redfish are graded on a (b) (4) (b) (4) Redfish are then weighed in totes at 100 lb increments, then dumped into large cardboard vats, unlike other more valuable groundfish that are sold on the auction from the totes.

Photo credit - Caleb Gilbert

Industry Efforts Slow to Improve the Redfish Market

Posted on Thursday, April 13th, 2017 by CALEB GILBERT

Ex-vessel prices for redfish continue to be low and trip fishing vessels equipped with ice slurry machines don't seem to yield better prices on the auctions for redfish. (b) (4)

(b) (4)

(b) (4)

(b) (4)

(b) (4)

Fluke Regs of Great Concern

Posted on Thursday, April 13th, 2017 by JOANNE PELLEGRINO

(b) (4)

Dayboat Groundfishing in Gloucester Picking Up!

Posted on Wednesday, April 12th, 2017 by CALEB GILBERT

(b) (4)



(b) (4)

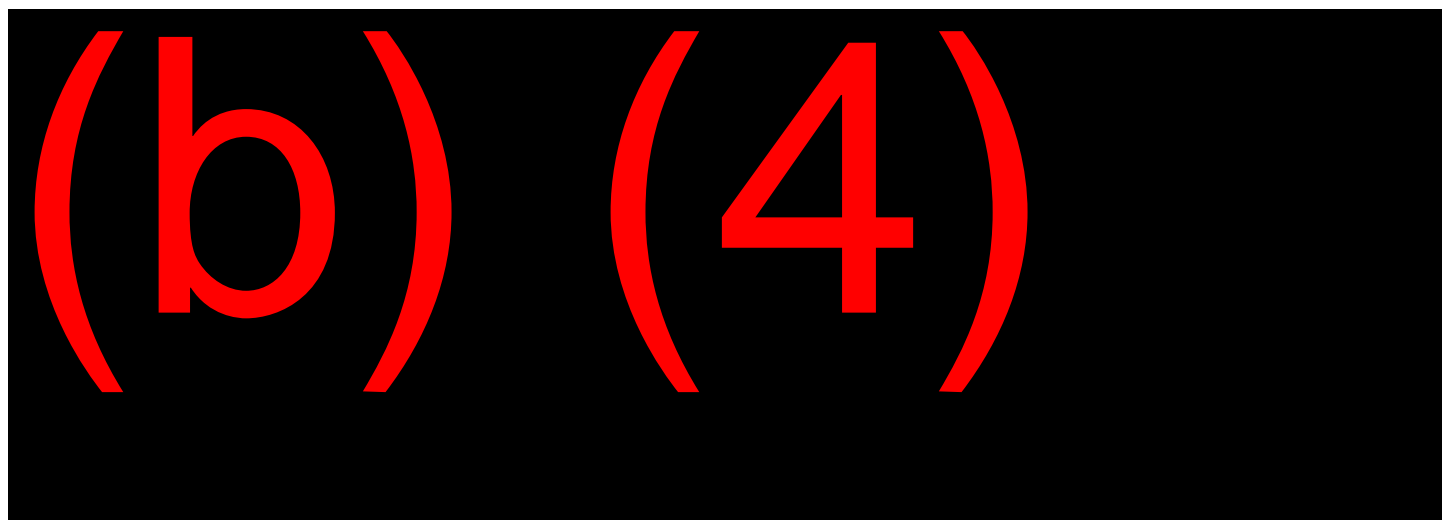
photo credit - Caleb Gilbert

Clam Industry's First Ever ABS Class Vessel to be Launched

Posted on Friday, April 7th, 2017 by JOSHUA O'CONNOR

The F/V SEAWATCHER II is expected to be launched as early as this Saturday in Pensacola, FL. This vessel is said to be the first clam vessel in the American Bureau of Shipping (ABS) class to be ever built. The vessel is being built by Patti Marine Enterprises, Inc., based out of Pensacola.

Patti Marine also built the original 134' SEAWATCHER back in 2004 for Truex Industries. This was the first aft house clam vessel with integrated stacks which was designed by Patti Marine & Truex Industries back in 2003. The new vessel, SEAWATCHER II, is 152' and was designed to hold about 200 cages.



2017 Massachusetts Striped Bass Association Sport Fishing Expo

Posted on Thursday, April 6th, 2017 by WILLIAM DUFFY

The hot topics at last weekend's Massachusetts Striped Bass Association (MSBA) Sport Fish Expo were cod regulations, fishing for striped bass in federal waters, marine sanctuaries, and the Northeast Canyons and Seamounts Marine National Monument. Joining me for the event were OLE Officer Tim Wilmarth, Anne-Marie Runfola, Volunteer Coordinator for the Stellwagen Bank Marine Sanctuary (SBMS), and Paul Peck, also with the sanctuary office. This is the third outreach collaboration between GARFO and the SBMS during the winter/spring recreational trade show season. The proposed recreational cod regulations got mixed reactions from expo participants. A few people agreed that cod need to be protected no matter what, while most were not happy with the proposed zero possession. Some complaints were: "I can't escape the cod" and "I throw so many cod back, why can't I keep any?" or "what a waste". One of the more surprising revelations about the show, was the amount of fishermen that didn't know you couldn't possess striped bass in federal waters. We had maps displayed at our booth showing where fishermen can and cannot catch or possess striped bass. Those maps were a good reference for fishermen, and I had a number of people asking for me to send them some.

Finally, there were a few other comments made by people who attended the event. One fishermen believes that we should post all the fishing regulations at every town harbor and work with the local harbor masters and make sure they have up to date information. And it wouldn't be a recreational fishing show if I didn't have multiple people explain to me how seals on Cape Cod were ruining fishing for everyone and that "it will be on our heads when someone dies from a great white shark attack".

Posted on Thursday, April 6th, 2017 by JOANNE PELLEGRINO



(b) (4)

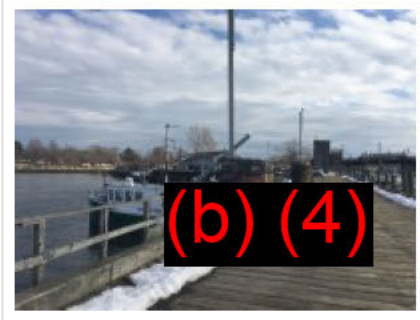
(b) (4)

Posted on Wednesday, April 5th, 2017 by CALEB GILBERT

(b) (4)

(b) (4)

photo credit - Caleb Gilbert



Biological Sampling Blog 4-5-17

Posted on Wednesday, April 5th, 2017 by LUCAS CURCI

Jason Turnure- Portland, ME- Foul weather continues to be one of the final arbiters determining sampling opportunities in my region – even as we turn a page of the calendar into April. Another large storm swept through the area this past weekend, keeping boats in port or out to sea (but mostly in) and creates a runner's gate scenario, where all the boats tend to leave and return from port at roughly the same time. Still, I'm starting to see glimmers of hope and an increase in fleet diversity at the Portland Fish Exchange. The (b) (4) has reemerged out of its winter den and is using up its Atlantic cod quota. In the past several days, I have been heartened to see some more market and large cod from this small day-boat gillnetter on the floor of the auction house. Even if this changes as we progress throughout the quarter, I think I am on pace to collect more local cod samples than I did all of last quarter.

While it has been even slower down in New Hampshire, several groundfish boats have been sneaking out this winter and I finally had a chance to check out the scene this week. With one of these day-boats out, I went to Yankee Fisherman's Co-op in Seabrook, NH and (b) (4)

(b) (4)

While on the topic of lobster, I continue to have consistent lobster sampling opportunities at Little Bay Lobster in Newington, NH but there is a bit of a dirge in landings as of lately ("it's barely paying the expenses", someone told me). One boat had to be towed in after an engine fire at sea and the others are just not seeing as many lobsters in their traps. One has to wonder what the future holds for the lobster industry, with the record landings it has experienced recently, and whether it will be sustainable moving forward. Recently, fisheries scientists have been scratching their heads over the disconnect between the decrease in young-of-the-year lobster seen in their annual settlement index and the large increase in the numbers of market-sized lobster in the lobsterman's traps. As I see the landings decrease at Little Bay, which is natural at this time of the year to some extent, I wonder what will be the first signs of an overall slow-down (if there ever is one) in the lobster fishery in the years to come.

David Andrews- Gloucester, MA- The final two weeks of any quarter can be slow given that this is the time when a majority of the samples have been filled already. Despite this and the great work the whole team did this quarter filling samples (doing away with the need to flex many we have in the past) I had a productive conclusion to the first three months of 2017. With the closure of the middle bank scallop fishing many of the day boat fleet out of Gloucester has returned to groundfishing. Yellowtail continue to come in along with winter flounder, both species I had been seeking throughout the quarter. Yellowtail flounder continue to be sold as mixed fish but I flexed some to the large market category and found that the size was good for a majority of these samples with the weight coming to 100 pounds or less (one-pound fish are usually classified as large). I am happy that these fish are being represented in the samples and that the size seems to have picked up a bit from what we were seeing earlier in the year.

The longline vessels continue to land fish and I was able to fill out some cusk requests over the past two weeks. There should be some more at the auction today so hopefully I can get a jump on longline samples for this quarter as they can become impossible to find once the boats stop fishing. Any samples taken today will mark my first samples of the new quarter as yesterday I actually sampled fish from vessel that landed just before midnight on the 31st of March. From these vessels I was able to fill a couple of flex samples including the yellowtail flounder mentioned above, some sow hake and a partial of regular silver hake (sold as "mixed" at CASE they have a few larger fish mixed in but are separated from the "kings"). Lastly I had one last chance to sample the (b) (4), a trip gillnet vessel. I was able to fill the medium pollock request from this trip. Unfortunately, due to the fact that this vessel always unloads starting around 3AM (which usually turns into 430 or 500) the fish are only available for a very short time and I can't always get to everything. This time they had a nice box and a half of large haddock that I would have liked to have gotten but couldn't due to time constraints.

One of the vessels that I sampled yesterday was the (b) (4), returned from a long hiatus. They had been out for some time and the fish that I sampled from them looked to be of pretty good quality. I'm not sure who was running the boat but it's nice to see good fish come off the vessel that many of the buyers have come to refer to as (b) (4) !

Mary Hughes- New Bedford, MA - The second to last week of this quarter was a slow one due in part to the storms that blew through. I was only able to collect a few samples during that week. I'll take a second to note that when trying to sample lobster from the (b) (4) it must be above 32 degrees Fahrenheit, to maintain the quality of the product, because sampling occurs outside. The temperature has been a problem the last couple of times this vessel landed, but I am hopeful that the temperature should not slip below 32 for the next several months.

I spoke with the personnel at (b) (4)

(b) (4)

The final week of this past quarter was a productive one and I was able to sample a couple of species that I was having a hard time finding (yellowtail flounder and winter flounder). There has been a dramatic increase in the number of winter flounder samples requests for this coming quarter, which may be a challenge to find, but I plan to keep in close contact with the personnel at Bergie's to catch these species when available.

(b) (4)

I think that this past quarter finished out pretty well here in New Bedford and I hope to have a successful second quarter.

Marc Renaghan – Point Judith, RI – Not much has changed in Point Judith in the last couple weeks. Landings are still a bit slow as the fleet works around more winter storms and persistent high winds. Loligo squid and other small mesh species are the primary target for most trips landing here. There have been a couple trips with strong landings of scup. I was able to collect a few samples of silver hake after seeing trip after trip of offshore hake. I was also able to gather a whole monkfish sample as a few monkfish boats have started working. Groundfish landings have continued to be very thin. The couple boats that have been landings these trips have had some luck with cod and winter flounder but continue to land under 50 pounds of yellowtail flounder.

Bait skate vessels have been back to work with the end of the closure and I was able to pick up a couple samples. It wasn't enough to fill all the available samples as a result of the closure but it helped, and the owner and staff at the Bait Co. were happy to be back at work.

Craig Jobes- East Hampton, NY- The last weeks of the first quarter ended pretty slowly on Long Island as not many vessels sailed; the ones that did landed samples that were no longer needed. At the end of the day however I feel that I was able to have a strong quarter in the Long Island region as the samples that I was not able to obtain were either extremely rare or non-existent at the docks in this region.

In Montauk, the scup grind has continued with many vessels fishing in the shipping lanes to the south of Montauk Point. A few of the vessels have been making some longer multi-day trips out to the Hudson Canyon and are landing what seems to be a pretty mixed bag. (b) (4) and (b) (4) has continued to do their extended split trips targeting both silver hake and scup.

Things have been extremely quiet in Hampton Bays as it seems not even (b) (4) has been sailing much as of late. Every once in a while a vessel will make a trip but it has become very difficult to obtain any samples at these docks with the exception of a (b) (4) landing every ten days or so.

I hope to have a quick start to the new quarter in the coming weeks so that we are able to get out and jump ahead for the Long Island region.

Robert Aluck- Toms River, NJ-A new quarter brings a refreshing wave of new fish to collect. The weather has been good allowing for boats to land regularly throughout New Jersey though areas like Cape May have been slow.

Many boats in Point Pleasant are now switching gear from trawling to scallop dredging which will help me quickly complete the scallop quota. Besides scallop Point Pleasant has been seeing landings of both summer flounder and black sea bass. Barnegat Light has been dominated by scallops for some time now and it won't be changing any time soon and (b) (4) are ok with that. The (b) (4) out of (b) (4) is currently out targeting golden tilefish and should be landing in the next week; this is good because golden tilefish was rare for the region last quarter. Belford has been

active with most vessels targeting spiny dogfish and a couple of offshore trawlers landing a variety of species. (b) (4)

has been landing a mix bag of silver hake, summer flounder, and even unclassified golden tilefish.

The previous quarter ended on a high note and will be a tough act to follow but as long as New Jersey continues to have any variety in the landings then it should be possible to make an early dent in the region's quota.

Elizabeth Shores- Hampton, VA-Landings have been more abundant during the past couple of weeks. Winds were high for a couple of days, but for the most part boats have been going out as planned. I was able to complete my deep sea red crab and sea scallop samples for the quarter and I continued to focus on summer flounder. MEDIUM and LARGE summer flounder samples were easy to come across, but some of them were only partials. I have been successful at (b) (4) but it is hard to get complete samples there. I collect fish from the sorting line and I am usually able to get a box off of the pallets after the fish have been packed, but once the pallets are full they are loaded onto shipping trucks. Hopefully I will continue to get faster so I can get complete samples from the sorting line. I was able to get a few complete summer flounder samples from (b) (4) as well. They are continuing to make a lot of progress with their facility.

The new quarter started on Saturday and I am confident I have several leads for scallop shells. I plan to focus on scallop and spiny dogfish samples as much as I can since their seasons close near the end of April. I expect to continue to see more summer flounder for a while longer and I am hoping to start seeing some black sea bass again. Goosefish will be a new request for me this quarter and I will be making a trip up to Chincoteague soon in order to get started on that.