

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

December 7, 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.

On April 11, 2017, CoA Institute submitted a comment to the New England and Mid-Atlantic Fishery Management Councils, and the National Oceanic and Atmospheric Administration (“NOAA”) Greater Atlantic Regional Fisheries Office, concerning the draft Industry-Funded Monitoring (IMF) Omnibus Amendment.² Specifically, CoA Institute expressed concern over the lack of statutory authority for the Councils and NOAA to compel regulated parties to pay for supplemental at-sea monitoring services.³

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following:

All records concerning the aforementioned April 2017 comment, including any correspondence between or amongst members of the New England and Mid-Atlantic Councils; officials, employees, or representatives of NOAA; or any other third party.

The time period for this request is April 11, 2017 to the present.⁴ Search terms may include, but are not limited to, “Cause of Action,” “CoA,” “Julie Smith,” “Eric Bolinder,” and “Ryan Mulvey.”

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

² Letter from CoA Inst. to Dr. John Quinn, New Eng. Fishery Mgmt. Council (Apr. 12, 2017) (attached as Exhibit 1); E-mail from CoA Inst. to Dr. John Quinn, New Eng. Fishery Mgmt. Council (Apr. 11, 2017) (attached as Exhibit 2); E-mail from CoA Inst. to Michael Luisi, Mid-Atl. Fishery Mgmt. Council (Apr. 11, 2017) (attached as Exhibit 3); E-mail from CoA Inst. to John Bullard, Nat’l Oceanic & Atmospheric Admin. (Apr. 11, 2017) (attached as Exhibit 4).

³ See April 12, 2017 Letter, *supra* note 2; see CoA Inst., Press Release: Withdraw Unlawful Plan Forcing Fishermen to Pay for At-Sea Monitors (Apr. 12, 2017), available at <http://coainst.org/2AYOikc>; see also *Fishermen in New England Face Another Costly Regulation*, COA INST. (Apr. 26, 2017), <http://coainst.org/2owyd5H>.

⁴ 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

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.”⁵

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, NOAA’s regulatory efforts, in conjunction with the New England and Mid-Atlantic Fishery Management Councils, to transition the herring and mackerel fisheries to an industry-funded at-sea monitoring regime and, moreover, to lay a foundation for the introduction of industry funding across all regional fisheries. The public interest value of the requested records is demonstrated by the widespread concern over the economic feasibility of industry funding among vessel owners and operators. Indeed, the legality of industry-funded monitoring has even been the subject of litigation.⁶ The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, records concerning CoA Institute’s comment have not been made publicly available.

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.⁷ 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.”⁸ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requester, not the specific request at issue.⁹ CoA Institute satisfies this test because it gathers information

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”).

⁵ 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).

⁶ *See Goethel v. Pritzker*, 854 F.3d 106 (1st Cir. 2017); *Goethel v. Pritzker*, No. 15-497, 2016 WL 4076831 (D.N.H. 2016); *see also* CoA Inst., Press Release: Supreme Court Denies Petition to Review Job-Killing Fishery Rule (Oct. 2, 2017), *available at* <http://bit.ly/2B5Hxx2>.

⁷ *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

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

⁹ *See Cause of Action*, 799 F.3d at 1121.

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.¹⁰ 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.¹¹ 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 “alternative media[,] shall be considered to be news-media entities.”¹² 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.¹³

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.¹⁴

¹⁰ 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[.]”).

¹¹ See generally CAUSE OF ACTION INST., *Media*, www.causeofaction.org/media (last visited Dec. 5, 2017).

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹³ 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).

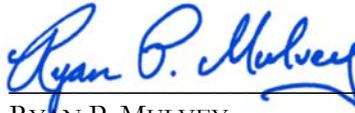
¹⁴ See 15 C.F.R. § 4.3(d) (“Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit[.]”); see also 36 C.F.R. § 1230.3(b); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it 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).

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

EXHIBIT

1

CAUSE of ACTION INSTITUTE

Pursuing Freedom and Opportunity through Justice and Accountability

April 12, 2017

VIA ELECTRONIC MAIL

New England Fishery Management Council
ATTN: Dr. John Quinn, Chairman
50 Water Street, Mill 2
Newburyport, MA 01950
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.

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. The Magnuson-Stevens Act Does Not Authorize the Industry-Funded Monitoring Programs Intended by the Omnibus Amendment.

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.

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

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

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. Comm’n’s Comm’n*, 704 F.3d 992, 999 (D.C. Cir. 2013); *Ry. Labor Execs.’ Ass’n v. Nat’l 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’n, 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 Act²² and the Miscellaneous Receipts Statutes.²³ Finally, industry funding requirements would impermissibly compel fishermen into commercial transactions in violation of the Commerce Clause²⁴ and violate other parts of the Constitution, including the Fourth Amendment.

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

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

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 *Env’tl. 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 pursuing 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

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.

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>.

Dr. John Quinn, NEFMC

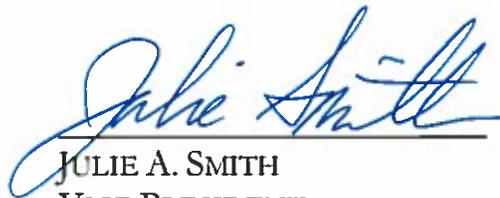
April 12, 2017

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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,



JULIE A. SMITH
VICE PRESIDENT
CAUSE OF ACTION INSTITUTE

cc: Mr. Michael Luisi, Chairman
Mid-Atlantic Fishery Management Council
800 North State Street, Ste. 201
Dover, DE 19901
E-mail: michael.luisi@maryland.gov

Mr. John Bullard, Administrator
Greater Atlantic Regional Fisheries Office
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930
E-mail: john.bullard@noaa.gov

Mr. Benjamin Friedman
Acting Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW, Rm. 5128
Washington, D.C. 20230

Hon. Wilbur L. Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitutional Avenue N.W.
Washington, D.C. 20230

EXHIBIT

2

Ryan Mulvey

From: Julie Smith
Sent: Tuesday, April 11, 2017 4:45 PM
To: comments@nefmc.org
Cc: jqinn3@umassd.edu
Subject: Omnibus Amendment Comment Letter
Attachments: Omnibus Comment Letter.pdf

Dear Dr. Quinn,

Please find attached a letter with Cause of Action Institute's comments on the draft Industry-Funded Monitoring Omnibus Amendment. We hope that you and the other Council members will take these comments under consideration at your upcoming monthly meeting. Thank you.

Best Regards,

Julie Smith | Vice President
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006
(o) 202.400.2722 / (c) 202.603.8010
julie.smith@causeofaction.org

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— INSTITUTE —

EXHIBIT

3

Ryan Mulvey

From: Julie Smith
Sent: Tuesday, April 11, 2017 4:48 PM
To: Michael.luisi@maryland.gov
Subject: NEFMC Omnibus Amendment Comment Letter
Attachments: Omnibus Comment Letter.pdf

Dear Mr. Luisi,

Please find attached a letter with Cause of Action Institute's comments on the draft Industry-Funded Monitoring Omnibus Amendment, which we have submitted to the New England Fishery Management Council in advance of its upcoming meeting. Our comments are also relevant to the Mid-Atlantic Regional Council's consideration of the Omnibus Amendment. We hope that you find them useful as well. Thank you.

Best Regards,

Julie Smith | Vice President
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006
(o) 202.400.2722 / (c) 202.603.8010
julie.smith@causeofaction.org

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EXHIBIT

4

Ryan Mulvey

From: Julie Smith
Sent: Tuesday, April 11, 2017 4:49 PM
To: john.bullard@noaa.gov
Subject: NEFMC Omnibus Amendment Comment Letter
Attachments: Omnibus Comment Letter.pdf

Dear Mr. Bullard,

Please find attached a letter with Cause of Action Institute's comments on the draft Industry-Funded Monitoring Omnibus Amendment, which we have submitted to the New England Fishery Management Council in advance of its upcoming meeting. Thank you.

Best Regards,

Julie Smith | Vice President
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006
(o) 202.400.2722 / (c) 202.603.8010
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