

CAUSE of ACTION INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

May 8, 2020

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: Promoting American Seafood Competitiveness & Economic Growth

Dear Mr. President,

I want to bring to your attention an important reform you can enact to save our nation's fishermen. I write on behalf of Cause of Action Institute ("CoA Institute"), a 501(c)(3) nonpartisan government-oversight organization that, among other things, uses legal tools to educate the public about how the rule of law protects individual liberty and economic opportunity.¹ To this end, CoA Institute monitors the overregulation of our nation's fisheries and represents clients in challenging efforts to compel the regulated industry to pay for at-sea monitoring services.²

Thank you for issuing an executive order yesterday that seeks to revitalize and strengthen the domestic fishing industry by removing unnecessary regulatory burdens.³ The American fisherman is an iconic figure in our nation's history. Over the past several decades, however, environmental pressure groups have captured an ideologically motivated, anti-business federal bureaucracy, leading to a loss of countless jobs and oppressive regulations founded on bad science. Your leadership on this issue comes at a critical time. It is vital that the White House intervene to stop the government from destroying these age-old jobs.

I would like to draw your attention to a timely opportunity for reform that I believe would be an excellent target for your task force to review. The National Marine Fisheries Service ("NMFS") and the New England Fishery Management Council ("NEFMC") recently finalized the *New England Industry-Funded Monitoring Omnibus Amendment* ("Omnibus Amendment")—a regulation conceived during the Obama Administration—that forces fishermen to pay for third-party monitors to watch them fish.⁴ This regulation is emblematic of the sort of overreach that has plagued fisheries management and impeded a vibrant commercial industry. We currently represent several New Jersey-based fishermen in a lawsuit that seeks to overturn the Omnibus Amendment.⁵ But our hope is that,

¹ *About Us*, CAUSE OF ACTION INST., <https://causeofaction.org/about> (last visited May 8, 2020).

² *See generally Free the Fishermen*, CAUSE OF ACTION INST., <https://coainst.org/2Dp200f> (last visited May 8, 2020).

³ The White House, Executive Order on Promoting American Seafood Competitiveness and Economic Growth (May 7, 2020), available at <https://bit.ly/2WbRMso>; see generally Joe Grogan & Peter Navarro, *Trump Lifts the Net off American Fishing*, WALL ST. J. (May 7, 2020), <https://on.wsj.com/2YN7g8q>.

⁴ Industry-Funded Monitoring, 85 Fed. Reg. 7,414 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648); see New Eng. Fishery Mgmt. Council, Industry-Funded Monitoring Omnibus Amendment (Dec. 2018), available at <https://go.aws/39eKRTu>.

⁵ See *Loper Bright Enters. v. Ross*, No. 20-0997(D.D.C. filed Feb. 19, 2020); see also *Family Fishermen Challenge Illegal, Industry-Killing At-Sea Monitoring Rule from Department of Commerce*, CAUSE OF ACTION INST. (Feb. 19, 2020), <https://coainst.org/3bkdCPv>.

as part of your new effort to revitalize the commercial fishing sector, the Trump Administration can take an historic lead in dismantling efforts to impose industry-funded monitoring on an already beleaguered regulated community. Our nation's fishermen are desperate for help and your intervention could immediately save jobs.

Industry-funded at-sea monitoring is especially pernicious because it requires fishermen to carry non-essential (and sometimes confrontational) third-party agents of the state on their boats in often dangerous conditions and, moreover, to pay for that privilege as a condition of participation in the market. That is not how American business is supposed to work.

In the herring fishery specifically, monitoring costs are expected to exceed \$710 per sea day, which could be higher than the daily landings revenue of the typical small-scale vessel, particularly considering recent quota reductions. This was certainly the case in the Northeast multispecies fishery. Under the groundfish sector at-sea monitoring program, the *government itself* expected 60% of the fleet to “see negative returns to owner when full” monitoring costs were “factored in.”⁶ A report from the Northeast Fisheries Science Center confirms the continued decline of the groundfish fishery following the introduction of industry funding, which will only accelerate once monitoring costs fully shift to fishermen.⁷ We cannot continue to ignore the devastating economic effects of industry funding.

Equally concerning is that the rule itself is unlawful. NMFS finalized the rule despite a complete *lack of statutory authorization* under the Magnuson-Stevens Act (“MSA”), 16 U.S.C. § 1801 *et seq.*, for industry funding in most fisheries. 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 finance in the first place. In this sense, the basic presumption of the Omnibus Amendment—that government can require the industry by fiat to fund a supplemental 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 Although the MSA may authorize the *placement* of monitors,⁹ regulators cannot design novel *funding* mechanisms for that monitoring. Congress never gave them that power; the administrative state simply seized it for itself.

The plain meaning of the MSA is clear and unambiguous. The statute only authorizes industry funding in a few specific regions and under certain circumstances: (1) foreign fishing,¹⁰ (2) limited

⁶ NEW ENG. FISHERY MGMT. COUNCIL, DRAFT REPORT: PRELIMINARY EVALUATION OF THE IMPACT OF GROUND FISH-SECTOR FUNDED AT SEA MONITORING ON GROUND FISH FISHERY PROFITS at 10 (June 19, 2015), *available at* <http://bit.ly/28QUXWT>. These costs were predicted to be heaviest for small vessels. *Id.* at 13 (Table 12). NMFS recognized these prospects but dismissed them as a “restructuring of the fleet.” *Id.* at 10.

⁷ *See generally* NAT’L OCEANIC & ATMOSPHERIC ADMIN., 2015 FINAL REPORT ON THE PERFORMANCE OF THE NORTHEAST MULTISPECIES (GROUND FISH) FISHERY (MAY 2007 – APRIL 2016), Ref. Doc. 18-13 (Nov. 2018).

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

¹⁰ 16 U.S.C. § 1821(h)(4).

access privilege programs,¹¹ and (3) the North Pacific fisheries research plan.¹² Congress's decision to permit NMFS and the regional councils to require industry-funded monitoring or observing in *only* these three situations clearly manifests Congress's intent not to authorize mandatory industry funding in other scenarios.¹³ To read the MSA otherwise renders provisions relating to industry funding mere surplusage,¹⁴ offends important canons of statutory construction,¹⁵ and contradicts well-established legislative history.

Indeed, with respect to the legislative history of the MSA, there is *no* evidence of congressional recognition for any sort of pre-existing, implied authority to impose monitoring costs on the regulated industry. Congress has, in fact, *repeatedly declined* the opportunity to permit industry funding nationwide. Each time that Congress reauthorized the MSA, it considered and rejected bills that would have created blanket authority for mandatory industry-funded monitoring programs.¹⁶ The regime that NMFS and the NEFMC now seek to impose on the herring fishery—and the future programs it envisions for the remaining New England fisheries—runs afoul of this legislative history.

In the absence of statutory authorization, NMFS and the NEFMC can only be described as preparing to impose a “tax” to extract money from regulated parties to fund desired regulatory programs. This cannot stand: “only Congress has the power to levy taxes.”¹⁷ The Omnibus Amendment also may violate numerous statutes governing agency finance, such as the Anti-Deficiency Act¹⁸ and Miscellaneous Receipts Statute.¹⁹ For example, 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.”²⁰ Yet this sort of rearrangement of financial obligations and receipts is exactly what would occur under the Omnibus Amendment. Instead of charging a “fee” to fishermen as a form of cost recovery, the government instead would order fishermen to pay monitoring providers directly as a condition of retaining and using a permit. Finally, industry-funding programs impermissibly compel fishermen into commercial transactions, which arguably violates the Commerce Clause of the United States Constitution.²¹

¹¹ *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.

¹² *Id.* § 1862(a).

¹³ *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).

¹⁴ *Nat'l Credit Union Admin v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998).

¹⁵ *See Duncan v. Walker*, 533 U.S. 167, 173 (2001); *see also EchoStar Satellite L.L.C. v. Fed. Comm'ns 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).

¹⁶ H.R. 5018, 109th Cong. § 9(b) (2006); H.R. 39, 104th Cong. § 9(b)(4) (1995); H.R. 1554, 101st Cong. § 2(a)(3) (1989).

¹⁷ *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[.]”).

¹⁸ *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).

¹⁹ *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).

²⁰ GOV'T ACCOUNTABILITY OFFICE, 2 PRINCIPLES OF FED. APPROPRIATIONS L. at 6-177 (3d ed. 2006).

²¹ *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.”).

President Donald J. Trump

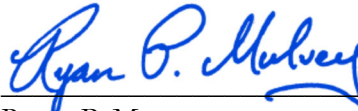
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It appears that NMFS and the NEFMC prejudged the legality of the Omnibus Amendment and intended to force it through regardless of the public outcry, clear and unaddressed legal infirmities, and the devastating economic impact on the long-term viability of the commercial fishing fleet. It is time to put a stop to this rule and save our fishermen.

I respectfully request that your Administration advise NMFS and the NEFMC of the lack of statutory authority for industry funding and accordingly direct the NEFMC to initiate efforts to repeal the Omnibus Amendment. In the meantime, the Department of Commerce should indefinitely delay the effective date of unlawful industry-funding requirements for the herring fishery, which it has already postponed through June 15, 2020,²² and consider other options to prevent the devastating implementation of industry funding in America's fisheries. The Department should likewise suspend industry-funded monitoring requirements in the groundfish fishery and pursue options to undue coercive regulations affecting those fishermen. Please do not hesitate to contact me with questions, or if additional information would be useful, at ryan.mulvey@causeofaction.org or (571) 444-2841.

Sincerely,



RYAN P. MULVEY

COUNSEL

CC:

The Honorable Wilbur L. Ross, Jr., Secretary of Commerce
U.S. Department of Commerce

Mr. Peter Navarro, Director
Office of Trade and Manufacturing Policy
The White House



²² See NOAA Fisheries Bulletin, *Notification, Reporting, and Monitoring Requirements for the Atlantic Herring Fishery* (Mar. 31, 2020), <https://bit.ly/3clNVij>.