

Re-Adopting Fis 602.12 Regarding Lobster Legal Length, and Re-Adopting Fis 603.01 and Adopting Fis 604.05 Regarding River Herring

New Hampshire Fish and Game Department

December 16, 2024

Comment by New England Fishermen’s Stewardship Association

Thank you for the opportunity to provide comments on the New Hampshire Fish and Game Department’s (“NHFG”) proposal, titled “Fis 602.12 Regarding Lobster Legal Length, and Re-Adopting Fis 603.01 and Adopting Fis 604.05 Regarding River Herring.”

For the reasons outlined below, the New England Fishermen’s Stewardship Association (“NEFSA”) urges the NHFG to consider the foregoing substantive concerns and procedural irregularities that counsel against enacting the proposal.

I. Background of New England Fishermen’s Stewardship Association.

NEFSA is a fishing advocacy group that was formed to represent all wild harvesters in all fisheries within our New England Communities. NEFSA was founded in the Spring of 2023 and boasts nearly eight-hundred members across New England. NEFSA is an alliance of wild harvesters of the waters off New England and is dedicated to educating the public about how best to manage our seafood resources through sound science and best practices at conservation used by fishermen, with a view toward economic well-being, ecosystem sustainability, and U.S. food security.

II. The NHFG appears to have transgressed a number of procedural requirements on its way to promulgating the proposal at issue.

The NHFG has stated that it “will modify existing rules to set a new legal length for lobster.” The proposal would increase the minimum lobster length by one-sixteenth of an inch starting July 1, 2025, which is, according to the NHFG, “pursuant to federal regulations.”

The process that the NHFG must follow when modifying a rule is set out in NH Rev Stat § 541-A:3 (2022) According to that provision, the NHFG “shall adopt a rule by”:

- I. Filing a notice of the proposed rule under RSA 541-A:6, including a fiscal impact statement and a statement that the proposed rule does not violate the New Hampshire constitution, part I, article 28-a;
- II. Providing notice to occupational licensees or those who have made timely requests for notice as required by RSA 541-A:6, III;

- III. Filing the text of a proposed rule under RSA 541-A:10;
- IV. Holding a public hearing and receiving comments under RSA 541-A:11;
- V. Filing a final proposal under RSA 541-A:12;
- VI. Responding to the committee when required under RSA 541-A:13; and
- VII. Adopting and filing a final rule under RSA 541-A:14.

It appears that the NHFG has (1) failed to follow proper notice procedures for a public hearing (NH Rev Stat § 541-A:6 (2022)); (2) failed to submit a fiscal impact statement (NH Rev Stat § 541-A:5 (2022)), and (3) failed to include a statement that the proposed rule does not violate the New Hampshire constitution (NH Rev Stat § 541-A:3 (2022)).

First, under NH Rev Stat § 541-A:6 (2022), the NHFG “shall give at least 20 days’ notice of its intent to hold a public hearing and shall also give notice of the cut-off date for the submission of written testimony” on any proposed rule amendment. The notice must include, among other things, the date of the first agency public hearing and the cut-off date for the submission of written materials to the agency; a listing of people, enterprises, and government agencies affected by the rule; the fiscal impact statement completed by the legislative budget assistant; and a statement, with adequate details and supporting data, that the proposed rule does not violate the New Hampshire constitution. Further, the “agency shall send notice to the director of legislative services, to all persons regulated by the proposed rules who hold occupational licenses issued by the agency, and to all persons who have made timely request for advance notice of rulemaking proceedings.”

The NHFG, however, appears to have issued the proposed rule and notice of hearing on November 21, 2024, and set the hearing for December 9, 2024—totaling just eighteen days’ notice.

Second, with respect to NH Rev Stat § 541-A:5 (2022) (“Fiscal Impact Statements”), the NHFG “shall provide the legislative budget assistant with adequate details of the intended action and supporting data to enable the legislative budget assistant to prepare a fiscal impact statement.” This section also covers proposed amendments to a rule.

The NHFG website featuring the proposed rule, however, lacks any reference to a fiscal impact statement. Nor does it include a constitutional assurance.

Third, the NHFG’s proposed rule is in direct response to a federal mandate. This triggers additional statutory requirements. For example, NH Rev Stat § 541-A:25 (2022) (“Unfunded State Mandates”) provides:

- I. A state agency to which rulemaking authority has been granted, including those agencies, the rulemaking authority of which was granted prior to May 6, 1992, shall not mandate or assign any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate further expenditures by the political subdivision unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision. Such programs include those functions of a nature customarily undertaken by municipalities whether or not performance of such functions is required by statute.
- II. Such programs also include, but are not limited to, functions such as police, fire and rescue, roads and bridges, solid waste, sewer and water, and construction and maintenance of buildings and other municipal facilities or other facilities or functions undertaken by a political subdivision.
- III. Included in the scope and nature of such programs are those municipal functions which might be undertaken by a municipality or by a private entity and those functions which a municipality may legally choose not to undertake.

The NHFG has provided no assurances that it has complied with this restriction.

Additionally, NH Rev Stat § 541-A:26 (2022) (“Administration of Federal Mandates”) provides:

Any state agency, when administering federal mandates, shall not mandate or assign to any political subdivision any new, expanded or modified programs or responsibilities additional to the federal mandate in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

The NHFG has provided no assurances that it has complied with this restriction either.

And finally, NH Rev Stat § 541-A:27 (2022) (“Notification of Federal Statute and Regulation”) provides: “Any new, expanded, or modified programs or responsibilities based upon a federal mandate and lawfully mandated or assigned to any political subdivision shall specifically state the federal statute and regulation requiring such new, expanded, or modified programs or responsibilities.”

It does not appear that the NHFG has identified the specific federal statute or regulation requiring the amended rule in this case; instead, it only references a vague “pursuant to federal regulations.”

Each of these apparent statutory violations counsels in favor of halting implementation of the NHFG's proposal.

III. The proposal suffers from a multitude of substantive flaws.

Even if the NHFG had followed the necessary processes for implementation of this rule—and it appears that it has not—the substance of the proposal itself is unreasoned, extreme, and deleterious to all stakeholders. For example:

- The increase of 1/16th of an inch is twice as much of an increase than previous increases from the late 80's. Doubling the increase in this fashion has far more of an economic burden on fishermen. NEFSA, fishermen, and others suggested 1/32 increases for less of an economic burden on fishermen, but those suggestions were never addressed. NEFSA believes that many fishermen will not survive a major reduction in catch while also keeping all the same expense levels, and many dealers believe the price per pound may decrease with the lower volume as consumers are priced out of the marketplace and demand falls.
- The Proposal ignores entirely the issue of the Gray Zone. Specifically, in the waters off Eastern Maine, American and Canadian lobstermen fish alongside one another. Canadian lobstermen will have no maximum gauge, and with the proposed increase in the minimum gauge size, Canadian lobstermen will be able to keep the 3.25" carapace lobsters that American lobstermen would be throwing back. In other words, the proposal will decimate the American lobster industry without benefiting conservation or egg production.
- The Proposal will destroy the "chick" market. Canadians would have exclusivity to the one-pound lobster market, which remains in high demand to cruise lines and even restaurants.
- The Proposal will cause New England processors to lose volume, and they may not be able to stay in business while catch remains reduced.
- Addendum XXX was passed as a result of Addendum XXVII, and Addendum XXX blocked live Canadian product coming across the border if it was smaller than the minimum size gauge. This further constrained access of American processors to Canadian product during the time of year when American lobstermen are landing minimal supply. Even if proper grading infrastructure is established, it will cost American processors more money to purchase Canadian lobster, which will in turn place them at a competitive disadvantage vis-à-vis Canadian processors.

- The gauge increase is intended to increase egg production. Theoretically, increased egg production will lead to more lobsters in the future. NEFSA, however, is unaware of any specific scientific data establishing that this will actually work—other than a failed attempt in Long Island Sound. The NHFG has not cited any scientific data, which suggests that this proposal is entirely unreasoned.
- The trigger index used by the NHFG to measure the health of the stock only uses three surveys: trawl, ventless, and sea sampling. The reference period used as the base line are the best years on record for those surveys, which shows a magnified reduction which is now calculated at 44 percent. This coming year (2025), however, a major benchmark stock assessment will be released, which will have a five-year data set that can be compared to the previous five-years. It also will include data from more scientific surveys and would provide a much better picture of the health of the stock. Making a gauge change two months prior to a major benchmark stock assessment makes no sense and suggests unreasoned decision-making.
- As best as NEFSA can tell, the NHFG has never discussed any alternative resiliency options.

Conclusion

The NHFG's proposal is poised to wreak havoc on the New Hampshire lobster industry. It is doing so on the basis of apparent transgressions of numerous statutory requirements for implementing a rule change of this nature. It is doing so on the basis of faulty science. And it is doing so even though the only thing it will accomplish is decimation of a long, storied, New England industry, with no benefit whatsoever to conservation or stock-preservation efforts. Simply put, it is flawed from end-to-end, and the NHFG should thus decline to move forward with its implementation.

Sincerely,

/s/ Dustin W. Delano

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New England Fishermen's Stewardship Association