



# EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

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January 23, 2013

**RE: Draft Framework Adjustment 2 and Draft Atlantic Herring Fishery Specifications for the 2013-2015 Fishing Years (January 16, 2013)**

Dear Chairman Cunningham and Director Howard,

We are writing on behalf of our clients Michael Flaherty, Captain Alan Hastbacka, and the Ocean River Institute, the plaintiffs in *Flaherty v. Bryson*,<sup>1</sup> regarding *Draft Framework Adjustment 2 to the Atlantic Herring FMP and Draft Atlantic Herring Fishery Specifications for the 2013-2015 Fishing Years* ("Specifications"). The Court's Order in *Flaherty* required the Council, as part of the 2013-2015 specifications (or another appropriate action completed within one year of the Order), to "consider a range of alternatives . . . to the current AMs for the fishery, . . . and to the interim ABC control rule for the Atlantic herring fishery, at least one of which shall be based on the most recent best available science for setting ABC control rules for herring and other forage fish." Order at 12-13.

The purpose of this letter is to address the Council's failure to consider a reasonable range of alternatives to: 1) the interim ABC control rule; and 2) the closure threshold for the herring fishery (a current AM), in the 2013-2015 Specifications.<sup>2</sup> We also reiterate that in order to satisfy the requirements of the Court Order related to Amendment 4's failure to minimize bycatch to the extent practicable, the Council must consider the River Herring catch cap referenced in Amendment 5 prior to August 2, 2013.

*ABC Control Based on the Best Available Science*

To facilitate consideration of an alternative herring control rule based on the best available science, our clients provided the Council with two alternatives based on the most recent scientific studies of forage fish (Pikitch et al 2012; Smith et al 2011; Cury et al 2011; Tyrrell et al 2011) in October.<sup>3</sup> An appropriate ABC control rule establishes an approach for setting catch levels that will vary as a function of where the stock is relative to an appropriate target biomass

<sup>1</sup> See *Flaherty v. Bryson*, 850 F. Supp.2d 38 (D.D.C. 2012).

<sup>2</sup> Prior correspondence submitted to the Council on behalf of our clients addresses additional concerns identified by the Court related to the legal insufficiencies of Amendment 4. See October 8, 2012 Letter from Earthjustice on behalf of Flaherty to NEFMC re ABC AMs; see also October 8, 2012 Letter from Earthjustice on behalf of Flaherty to NEFMC re Priorities.

<sup>3</sup> See October 8, 2012 Letter from Earthjustice on behalf of Flaherty to NEFMC re: ABC and AMs at 2-6.

(target above  $B_{msy}$  for forage fish) and accounts for scientific uncertainty. *See e.g.*, 50 CFR § 600.310(c)(3), (f)(2)(ii)-(iii). A well designed ABC control rule establishes ABC under a wide range of stock conditions, including setting catch to zero when a minimum biomass limit is reached. The alternatives our clients provided (Lenfest Control Rule and Pacific Control Rule) were selected in consultation with scientists familiar with the studies in anticipation that the plan development team and the science and statistical committee (“SSC”) would carefully analyze and tailor them, as appropriate, for consideration by the Council.

To the Council’s credit, it added these alternatives<sup>4</sup> to the specifications package in November for further consideration by the SSC. *See* November 13-15, 2012 Council Meeting Report at 3. However, when the SSC met a week later (November 19, 2012) to discuss these options, it struggled with the Terms of Reference and delayed any robust discussion of them, in the absence of Council guidance.<sup>5</sup> While the SSC recognized the need to rebuild predator populations and examine the role of herring as forage in the ecosystem, the SSC ultimately concluded that the currently proposed control rule is good enough by default if not design for the next three years.<sup>6</sup> In determining that the control rules offered by our clients “could not be evaluated at this meeting,”<sup>7</sup> the SSC effectively foreclosed any meaningful consideration of control rule alternatives during the 2013-2015 specifications process.

In addition, although it appeared initially that the SSC might recommend that a thorough discussion of ABC control rules and related issues take place during the upcoming Risk Assessment Workshop (March 20-21), some on the SSC instead recommended that the SSC wait for broader operational guidance from a currently non-existent and unscheduled “broader national workshop.”<sup>8</sup> Any other hope for meaningful consideration of the control rules in the nearer term was eliminated by NERO staff comments at the November 2012 NEFMC meeting indicating that if additional time were provided to the SSC and Council to consider control rules, then NMFS would not be able to complete the required NEPA analysis by the August 4, 2013 Court deadline.<sup>9</sup>

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<sup>4</sup> The SSC provided the Council with a choice between two control rules used for non-forage stocks (constant catch and 75% F MSY) that they considered biologically equivalent in terms of their risk of overfishing. *See* September 21, 2012 Memo from SSC to Paul Howard re: Herring ABC for FY2013-2015.

<sup>5</sup> *See* December 10, 2012 SSC Report to NEFMC Executive Director Paul Howard re: Herring ABC Control Rule Alternatives; *see also* Audio of November 19, 2012 SSC Meeting. The SSC had previously requested guidance from the Council on long term management of herring in both its written report and during Chairman Legault’s presentation at the September 26, 2012 NEFMC Meeting. *See* September 21, 2012 Memorandum from SSC to Paul Howard entitled *Herring ABC for FY2013-2015* (“However, the SSC requests guidance from the Council as to how it would like to see this stock managed, i.e., as a typical fishery with MSY-based reference points, or a reduced fishing rate and higher stock size to account for its role in the ecosystem. This would ensure that the next time herring are assessed, a control rule could be created which meets the needs of the Council. A control rule which could be set for more than three years would need to consider a wide range of possible stock conditions and have a known objective.”); *see also* September 26, 2012 Council Meeting Audio Recording #12 *Scientific and Statistical Committee Report*

<sup>6</sup> *See* December 10, 2012 SSC Report to NEFMC Executive Director Paul Howard re: Herring ABC Control Rule Alternatives.

<sup>7</sup> *See id.* at 2.

<sup>8</sup> *See id.* at 2.

<sup>9</sup> Statement made at the November 13-15 NEFMC Meeting (Newport, RI).

As a result of these events, the specifications now, incorrectly, state that the two alternative control rules based on the most recent best available science have been “considered but rejected.” *See* Specifications, Figure 2 at 12. Although our clients appreciate the Council sending their proposed alternative control rules to the SSC, the fact is these rules have not received a “hard look” or otherwise been meaningfully considered as required by NEPA and the Court’s Order. *See* 40 C.F.R. § 1508.9(b); *see also Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 19-20 (D.D.C. 2000). Our client’s urge the Council to commit now to full and meaningful consideration of a range of ABC control rule alternatives consistent with NEPA and the Court’s Order.

### *Range of Accountability Measures*

With respect to the Council’s consideration of the current AMs, the Council was advised by NOAA General Counsel at its September 26, 2010 NEFMC meeting, that it needed to consider a “reasonable range of alternatives”<sup>10</sup> to the current AMs by August 2, 2013 to comply with the Court’s Order.<sup>11</sup> Our clients are generally supportive of alternatives that reduce the stockwide-ACL or any sub-ACL overages the following year based on In-Season catch estimates. This is a significant improvement over the current AM that deducts overages from the sub-ACL using a one-year lag time based on year-end catch estimation methods, and will increase accountability by increasing the likelihood that the same fishermen who contributed to an overage also participate in paying it back. However, if a comparison of “In-Season” and “Year-End” catch estimates shows statistically significant differences in catch, adjustments to quota should be made as soon as possible. *See* Specifications, Table 40 at p. 103 comparing Atlantic Herring “In-Season” and “Year-End” Catch Estimates by Area for 2010 and 2011.

While our clients have additional concerns, they are most concerned by the current AM intended to close each management area, and prohibit vessels from catching more than 2000 lbs of Atlantic herring per day, once NMFS determines that catch has reached 95 percent of the annual catch allocated in that management area. 50 C.F.R. § 648.201(a)(1). Overages in the last ten years show that this AM has not been effective.<sup>12</sup>

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<sup>10</sup> *See* 40 C.F.R. § 1502.14. “The phrase ‘range of alternatives’ ...includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.” *See* NEPA’s Forty Most Asked Questions, Nos. 1a. - 1b. Council on Environmental Quality, 46 Fed. Reg. 18026 (March 16, 1981), available at: <http://ceq.hss.doe.gov/nepa/regs/40/40P1.HTM>.

<sup>11</sup> *See* Council Audio Wednesday September 26, 2012, #15 Herring Committee Report. *See also* Opinion at 70 (In the absence of consideration of a range of alternatives to the accountability measures chosen in Amendment 4, NMFS had failed to take a “hard look” at the environmental impacts of Amendment 4).

<sup>12</sup> *See* Specifications, Table 38 at 97. The characterization of these overages as “relatively infrequent and minor in scale” is incorrect and should be removed from the document. *See* Specifications at 104.

Although the Specifications contain a number of possible alternatives to the current AM discussed above (p. 27-33), none of the alternatives close the fishery any earlier than when 92 percent of the quota is projected to be caught. Catch data contained in the Specifications from 2003-2012 by management area show overages ranging from 101 to 138 percent of the sub-ACLs quotas occurring in seven of the ten years.<sup>13</sup> In 2012, three of the sub-ACLs and the total ACL were exceeded.<sup>14</sup> Thus, although an improvement, it appears unlikely that a management area closure at 92 percent of projected quota would have prevented the sub-ACL overages in 2006, 2010, or 2012, and thus is unlikely to prevent overages in the future. Based on prior year's data, an appropriate range of alternatives, given the frequency and quantity of the overages, should include an alternative that closes the fishery when the catch is projected to reach 85 percent of the sub-ACL.<sup>15</sup>

### *River Herring Catch Cap*

Our clients recognize that the Council is not addressing the River Herring catch cap in these Specifications, however, the deadline to remedy the National Standard 9 violation in *Flaherty* is rapidly approaching. In addition to the NEPA violations discussed in part above, the Court held that Amendment 4 failed to comply with National Standard 9's substantive requirement to minimize bycatch of River Herring, and other species, to the extent practicable. *See* Opinion at 40-41. Although development of the catch cap could have begun immediately as part of these Specifications (as contemplated by Amendment 5), debate ensued over the proper procedural vehicle and its development has been delayed. As a result, the Council and NMFS have done nothing to satisfy National Standard 9's requirement to minimize bycatch to the extent practicable in the fishery, or in turn to satisfy the Court's Remedial Order requiring NMFS to demonstrate that bycatch has been minimized to the extent practicable, by August 2, 2013.<sup>16</sup>

There is no question the River Herring catch cap is practicable and currently it is the *only* bycatch minimization measures still on the table from Amendment 5. As a prior letter explained, "support" of a voluntary avoidance program and a promise to "consider" a river herring catch cap in an undefined future action are not conservation and management measures that minimize

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Although not relevant to this AM, the description on page 111 of Management Areas 1B and 3 as "offshore fisheries" is inaccurate and may contribute to a persistent lack of understanding among managers and the public that both areas in fact contain considerable inshore grounds. As shown in Figure 1 on page 2 of the Specifications, Areas 1B and 3 have their inshore boundaries tight to the shoreline. They share this attribute with the other two management areas (1A and 2) and thus to differentiate them as "offshore" areas is incorrect. In addition, the inshore Gulf of Maine Spawning Component is recognized to migrate seasonally through Area 1B.

<sup>16</sup> The deadline for a River Herring Catch Cap framework is August 2, 2013. *See* Order, Section III at 12 (Defendants shall consider whether the Atlantic herring FMP minimizes bycatch to the extent practicable under National Standard 9 and file a supplemental explanation of this consideration within one year); *see also* Order, FN3 at 13 ("The Court expects the Defendants to complete the remedial actions taken in response to this Order within one year from the date of this Memorandum Order"). Anything contained in Amendment 4 becomes null and void after that date. *See* Order, Section III, at 10. NMFS must file a status report with the Court within one year describing the actions taken in response to the Order. *See* Order, Section III at 13. Finally, the Order makes clear that remedial actions must be taken that are consistent with *both the Order and the March 8, 2012 Opinion* – the specific elements of the Order that follow are important and detail specific actions that must be taken, but it is the legal violations outlined in the Opinion that ultimately must be fixed by August 2, 2013 to bring the FMP into compliance with the law. *See* Order, Section III at 10.

bycatch as required under National Standard 9.<sup>17</sup> NMFS and the Council *may* have met their procedural requirement to consider a range of alternatives for minimizing bycatch to the extent practicable in Amendment 5. *See* Order Section III at 12. However, the Court also found a substantive violation of National Standard 9 that has not been cured. *See* Opinion at pp. 40-41. (“Defendants’ approval of Amendment 4, without addressing the minimization of bycatch to the extent practicable, was in violation of the MSA and APA.”). The Court squarely rejected the notion that existing measures are adequate to minimize the bycatch of river herring, *see* Opinion at 33, and required that “consistent with” the Court’s Opinion, Defendants must consider whether the herring FMP minimizes bycatch to the extent practicable and “within one year” provide a supplemental explanation to the Court explaining whether the FMP minimizes bycatch to the extent practicable in compliance with the MSA, *see* Order at 12.

It is conceivable that the Council could consider but reject the River Herring catch cap if it could demonstrate that it is not practicable, and reconsider one or more of the rejected bycatch minimization measures such as area closures to satisfy its National Standard 9 obligations. Alternatively, it could develop something entirely new that minimizes bycatch of river herring to the extent practicable. But given the analysis done to date and other practical considerations these scenarios are unlikely. Because a River Herring catch cap is the only measure contemplated in Amendment 5 with the potential to actually minimize bycatch, it must be in place by August 2, 2013.

\* \* \*

Thank you for considering these comments. We note that alternatives described here that are determined to be “too late” for this Specifications package should be considered in the next appropriate action (bycatch cap framework), consistent with NEPA and the Court’s Remedial Order.

Sincerely yours,

/s/ Roger Fleming  
Roger Fleming, Attorney  
Erica Fuller, Attorney  
Earthjustice

*On behalf of* its clients  
Michael Flaherty  
Captain Alan Hastbacka  
Ocean River Institute

Cc: John Bullard, Regional Administrator  
Gene Martin, NOAA General Counsel  
Mitch McDonald, NOAA General Counsel  
Carrie Nordeen, NERO Sustainable Fisheries Division

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<sup>17</sup> *See* October 8, 2012 Letter from Earthjustice on behalf of Flaherty to NEFMC re: Priorities.

Dr. Jacob Kritzer, SSC Chairman  
Dr. Chris Legault, SSC Member  
Rick Robbins, Chairman, MAFMC  
Lori Steele, Fishery Analyst Herring FMP