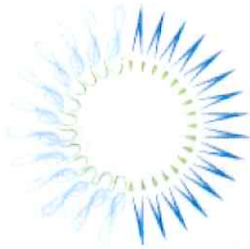


#7a

Additional Comments/Correspondence Received  
Re: 2010-2012 Herring Fishery Specifications





THE  
**PEW**  
 ENVIRONMENT GROUP



November 9, 2009  
 Ms Patricia A. Kurkul - Regional Administrator  
 National Marine Fisheries Service - Northeast Region  
 55 Great Republic Drive, Gloucester, MA 01930-2276

**RE: SSC GUIDANCE IN NEW ENGLAND - HERRING**

Dear Ms Kurkul:

I am writing to you on behalf of the Pew Environment Group concerning recent challenges to the Scientific and Statistical Committee's (SSC's) guidance on the Acceptable Biological Catch (ABC) for Atlantic Herring. The SSC has used the best available science in formulating its guidance for the next three years (2010-12). We urge NMFS, and the New England Fishery Management Council (NEFMC; Council), to use the scientific guidance of the SSC to establish appropriate Annual Catch Limits (ACLs) starting in 2010, as required by the National Standards and other legal requirements of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et. seq. (Magnuson-Stevens Act or Act).

The Pew Environment Group is broadly interested in ending overfishing through scientifically established catch limits (ACLs) and also, more specifically, in the Atlantic herring fishery. Atlantic herring, and other forage fishes, play a key role in the ecosystem serving as food for marine predators for which we also have Federal management objectives (e.g., Striped bass, Atlantic codfish, and whales). To that end, the National Standard 1 guidelines for the Magnuson-Stevens Act advise<sup>1</sup> "...*The benefits of protection afforded to marine ecosystems are those resulting from maintaining... adequate forage for all components of the ecosystem...*" and that "...*consideration should be given to managing forage stocks for higher biomass than  $B_{msy}$  to enhance and protect the marine ecosystem...*" Thus, the management of Atlantic herring has implications that extend far beyond the fisheries directed upon these fish, and cautious management guided by science is of paramount importance.

National Standard 2 of the Magnuson-Stevens Act (NS 2)<sup>2</sup> requires that "...*conservation and management measures shall be based upon the best scientific information available....*" The Act also mandates that the SSC shall provide ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, and that such recommendations be followed when setting annual catch limits.<sup>3</sup>

<sup>1</sup> Federal Register / Vol. 74, No. 11 / Friday, January 16, 2009 / Rules and Regulations

<sup>2</sup> Magnuson-Stevens Fishery Conservation And Management Act Public Law 94-265, May 2007, pg 58.

<sup>3</sup> Ibid, pp 66-68: sections 302(g)(1)(B) and 302(h)(6).

The SSC has evaluated the best available science for Atlantic herring and advised the New England Fishery Management Council on scientifically sound ABCs for the fishing years 2010-2012. Nevertheless, this advice has been challenged at the Council and there is ongoing discussion by the Council<sup>4</sup> and New England Congressional delegation<sup>5</sup> as to whether the scientific advice must be used now (i.e., during 2010) or whether to delay the use of science for a year.

Over the past 18 months we have followed the Council, its committees and the SSC closely. I have observed the work of the SSC as it has grappled with the challenges of making good on the promise of establishing a solid scientific foundation for fisheries management as mandated by the Magnuson-Stevens Act. The SSC has devoted itself to this task. The group has worked diligently to use the best available science to make responsible recommendations on ABCs for our various fisheries.

**The SSC in New England is composed of distinguished scientists.** New England's SSC is made up of 15 highly distinguished scientists from the region's leading academic institutions, research institutes and government research organizations. The breadth of expertise is broad, ranging from marine community ecology to populations dynamics, and includes individuals with extensive experience with stock assessments. This depth of knowledge and experience has been clear as the group has worked to deal with the difficult tasks it has been handed.

**The SSC based its guidance upon the best available science.** As the SSC considered Atlantic herring, it had the benefit of a recent stock assessment update (TRAC 2009), and the previous benchmark assessment upon which that was based, as well as estimates of landings and biomass over the past decade (1998-2008). These sources of information were evaluated and used in parallel approaches (i.e., *models*) to establishing an ABC for Atlantic herring.

The US and Canada established the Transboundary Resource Assessment Committee (TRAC) in 1998 to peer review assessments of transboundary resources in the Georges Bank area.<sup>6</sup> Like the other assessments used in the region, those conducted by the TRAC involve panels of expert scientists, with multiple stages of analysis and peer review. The TRAC outputs constitute the best available science upon which to base guidance about the overfishing limit (OFL) and ABC for Atlantic herring.

The SSC includes the chair of the most recent benchmark assessment (2006) and also heard from members of the 2009 TRAC team. The SSC discussed the TRAC results, and the strengths and weaknesses of the assessment, and justifiably accepted the TRAC as the best available science for stock projections, derivation of overfishing limit (OFL) and setting the ABC. Based on this approach, the OFL was determined from biomass projections with fishing at  $F_{MSY}$  (145,000 mt in 2010), and the ABC followed from a 40% buffer for

---

<sup>4</sup> Letter from Council member David E. Pierce to Council Chair John Pappalardo, dated 5 October 2009; Joint NEFMC Herring Committee/ASMFC Herring Section meeting October 6, 2009, summary available at [http://www.nefmc.org/herring/meetsum/herring\\_oct09.pdf](http://www.nefmc.org/herring/meetsum/herring_oct09.pdf)

<sup>5</sup> Letter from Senator Snowe to NOAA Administrator Dr. Lubchenco, dated 7 October 2009

<sup>6</sup> <http://www.mar.dfo-mpo.gc.ca/science/TRAC/meetings.html>

scientific uncertainty in the assessment (average retrospective error, 7 years; ABC = 90,000 mt for 2010-2012).

Additionally, the SSC observed that in recent years stock biomass estimates have been reasonably stable and above  $B_{msy}$  while total landings have been in the neighborhood of 90,000 mt. This empirical observation was taken as an independent line of support for an ABC of approximately 90,000 mt. After lengthy and substantive discussions, the SSC put forward their recommended ABC for the next three years based upon these two parallel approaches.<sup>7</sup>

**The SSC's decision on ABC for herring was based on multiple approaches.** Outside of the scientific arena, recent debate about the SSC's determination of the ABC for 2010 through 2012 has focused on the manner in which the SSC chose to evaluate the retrospective pattern in the assessment. The preoccupation with the retrospective is not appropriate and misplaced to some degree. First, the panel of 15 scientists considered the available science carefully and chose an approach for estimating uncertainty from the retrospective pattern that appeared sound to them (as it did to us). Second, it must be remembered that the SSC did not rely exclusively on the retrospective pattern as a basis for determining the ABC. The SSC effectively used two different *models* (see above) and averaged the outputs of the two. This makes their recommendations stronger than if either approach was used in isolation.

**The integrity of the SSC-Council system must be protected.** We are at a critical juncture over Atlantic herring in New England and the implementation of the recent changes to the Magnuson-Stevens Act for the Nation. A scientific body, the SSC, has been convened, diligently considered the best available science, and made its recommendation on the ABC for Atlantic herring as directed under current law.<sup>8</sup> A body of policymakers, the Council and its Herring Oversight Committee, have called into question the scientific approach agreed upon by the SSC, and formally requested that the SSC allocate more of its limited time to re-evaluating its determination of the ABC.<sup>9</sup> This request has been made without any foundation in new scientific information. The request appears to amount to asking the SSC to reevaluate its conclusions because they are unpopular or have been judged by some to cause short-term hardship. If SSCs are faced with this scenario each time they reach a decision that is in some manner inconvenient, the system of scientific guidance called for by the law will fail and stocks will continue to be overfished in New England and around the Nation.

---

<sup>7</sup> Memorandum from Dr. Steve Cadrin, SSC Chairman, to Mr. Paul Howard, NEFMC Executive Director, dated 23 September, 2009

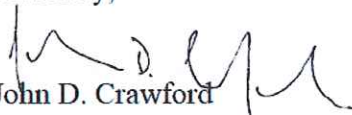
<sup>8</sup> Magnuson-Stevens Fishery Conservation And Management Act Public Law 94-265, May 2007, Section 302(g)(1)(B)

<sup>9</sup> Council motion Plymouth, MA (David Pierce) 23 September 2009 available at <http://www.nefmc.org/actions/motions/motions-sep09.pdf>

**The SSC guidance on ABC should be used now.** Like most laws, some language in the Magnuson-Stevens Act is subject to interpretation. Nevertheless, the law is clear that the best available science must be used to determine the OFL, set the ABC, and ultimately to set annual catch limits. The SSC in New England has responded to this mandate, and to a request from the Council, offering ABCs for the next three fishing years. This scientific guidance must be used now to set catch limits, not later. Herring is a keystone species in the New England ecosystem,<sup>10</sup> providing the food that helps our struggling groundfish to rebuild, supporting whales, bluefin tuna, striped bass and a diversity of other species that are highly valued. The consequences of diminishing herring abundance are thus particularly severe, so caution is warranted in establishing science-based catch limits as soon as possible.

To many it may seem peculiar that the United States would need to pass a Federal law to ensure that science was used for sustainable management of a natural resource. Nevertheless, in a momentous decision in 2006, we did so in the case of fisheries to safeguard these living resources for future generations. We are at a pivotal moment in the implementation of this legal requirement, blazing a new trail and setting precedent. It is essential that NMFS support the work of the SSC, and ensure that science-based catch limits are put in place for Atlantic herring during 2010 based on the best available science.

Sincerely,

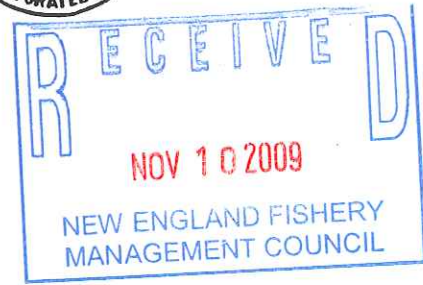
  
John D. Crawford

cc John Pappalardo, Chair NEFMC  
Paul Howard, Executive Director NEFMC  
Lori Steele, NEFMC

---

<sup>10</sup> Overholtz, W. J. and Link, J. S. 2007. Consumption impacts by marine mammals, fish, and seabirds on the Gulf of Maine-Georges Bank Atlantic herring (*Clupea harengus*) complex during the years 1977-2002. ICES Journal of Marine Science, 64: 83-96.

**Town of Stonington**  
 32 Main Street  
 Stonington, Maine 04681



November 9, 2009

To: New England Fishery Management Council &  
 Atlantic States Marine Fisheries Commission

Dear Council and Commission Members:


We respectfully request this letter become a part of your record for today's meeting. We wish to document to your council and commission members the drastic economic impacts that will be felt by Stonington and surrounding towns due the reductions of the herring you are considering. This information comes from a Community Development Block Grant the town was awarded several years ago, in addition to tax payer money, and business donations to fund an in depth analysis of the lobster industry in Stonington completed in 2009. It also examined and quantified economic impacts to our town's economy as well as mitigation options for the serious bait shortages we are facing because of the drastic decline of the TAC for area 1A. I have included statistics from the Executive Summary from the study done by James Wilson, Ph.D. and associates from the School of Economics, University of Maine.

- 23% of Stonington's workforce is employed in the Fishing sector.
- Stonington is the 34<sup>th</sup> largest port in the U.S. based on dollar value of species landed.
- 16.5% of statewide lobster licenses are held in Zone C; 40% of which are in Districts 2 thru 5, the area Stonington operates in.
- Approximately 450 harvesters register Stonington as their primary port; 16% of these registered harvesters are from off-island.
- Stonington Lobster Landings are reported between 8 to 12 million pounds in 2007; valued at \$30 million dollars. These landings account for 40% of Hancock county total landings and 11% of Maine's total lobster landings.
- The Stonington economy receives \$2.5 million dollars in indirect and induced economic effects from the lobster industry.
- Stonington faces the simultaneous challenges of increasing input costs for the industry (including bait availability issues), declining value for landed lobster and threats to their working waterfront infrastructure.

If the TAC for herring is cut in half as proposed, we will lose easily half of these above stated statistics. As a town, Stonington would suffer at least a \$10 to \$15 million dollar hit on landed value which is a huge part of our economy alone, not to mention the effects from the other above statistics such as job losses, ancillary businesses suffering economic losses and the demise of our valuable working waterfront.


Thank you for taking the time to read this and considering this information from Stonington and the plights of other lobster communities in your deliberations.

  
 John Robbins, Chairman

  
 Evelyn K. Duncan

  
 Christopher Betts

  
 Richard Larrabee, Sr.

  
 Stephen H. Robbins III

P.O. Box 9  
 Stonington, Maine 04681-0009  
 (207) 367-2351 (fax) (207) 367-6361  
 Email: [stoningtontown@adelphia.net](mailto:stoningtontown@adelphia.net)  
<http://www.stoningtonrocks.com>

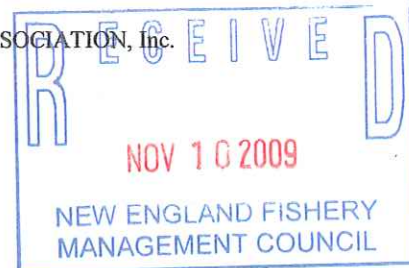
*rec'd 11/10/09 Ch Mtg.*







CAPE COD COMMERCIAL HOOK FISHERMEN'S ASSOCIATION, Inc.  
210-E Orleans Road  
North Chatham, MA 02650  
508-945-2432 • 508-945-0981 (fax)  
www.ccchfa.org • contact@ccchfa.org



MIDCOAST FISHERMEN'S ASSOCIATION



PO BOX 223 • PORT CLYDE, ME 04855  
INFO@MIDCOASTFISHERMEN.ORG  
207.372.0628

Frank Blount, Chairman  
Atlantic Herring Oversight Committee  
New England Fishery Management Council  
50 Water Street, Mill #2  
Newburyport, MA 01950

November 9, 2009

Dear Chairman Blount,

The Cape Cod Commercial Hook Fishermen's Association (CCCHFA) and the Midcoast Fishermen's Association (MFA) submit the following joint comments to the Herring Oversight Committee (OSC) regarding the development of 2010-2012 tri-annual specifications under the Atlantic Herring Fishery Management Plan (FMP).

CCCHFA and MFA are extremely concerned about the health of the herring resource in light of the emerging and convergent conclusions of the Council's Scientific and Statistical Committee (SSC) and Herring Plan Development Team (PDT). There has been widespread criticism of the SSC recommendation for a 40% reduction in the overall catch limit (ABC), which conflates the SSC's quantification of uncertainty with uncertainty in their conclusions in order to portray it as "bad science." This is exemplified by the OSC decision to include an overall ABC Alternative that would double the SSC ABC recommendation for 2010. There has also been a focus on management area Total Allowable Catch (TAC) options that would ignore the PDT risk analysis, under the justification that it lacks a formal peer review.

These individual approaches are missing the big picture regarding the sustainability of the herring stock. Specifically, attacking these scientific recommendations separately misses the critical point that they are both saying the same thing: something is wrong with the herring resource and the way we have been managing the fishery and we need to be cautious. In effect, two completely separate scientific panels applying completely different approaches have identified problems and are recommending a precautionary approach to future catch limits, for both the overall resource and the smaller and more vulnerable inshore component.

*rec'd info for C.C. Mtg.*

We urge the Committee, Council and Agency (NMFS) to focus on, forward and eventually approve overall ABC Alternatives and area TAC options that together follow the recommendations of the best available science by staying below the 2010-2012 ABC set by the SSC and which follow the guidance on inshore risk set by the PDT. We believe the precaution recommended by both the SSC and PDT is appropriate and necessary to protect the long-term health of the herring resource and the Gulf of Maine and Georges Bank ecosystem. We recognize that there will be difficult challenges for all participants and stakeholders in the herring fishery and all users of the herring resource and are committed to assisting in the development of mitigation strategies.

Thanks very much for your time and consideration,

Sincerely,

/s/ Tom Rudolph  
Tom Rudolph  
Herring Campaign Operations Director  
CCCHFA

/s/ Gary Libby  
Gary Libby  
Policy Advocate  
Midcoast Fishermen's Association

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400****3050 K STREET, NW****WASHINGTON, D.C. 20007-5108**

(202) 342-8400

NEW YORK, NY

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

MUMBAI, INDIA

FACSIMILE

**WHITE PAPER:****LEGAL ISSUES SURROUNDING THE ATLANTIC HERRING  
SPECIFICATION SETTING PROCESS FOR 2010-2012**By David E. Frulla & Shaun M. Gehan  
November 7, 2009**Executive Summary**

The current process for setting the total allowable catch ("TAC") for the Atlantic herring fishery by the New England Fishery Management Council has caused substantial concern and controversy. The Council is set to consider a specifications package designed to track and implement a process that itself is currently under development through Amendment 4 to the Atlantic Herring Fishery Management Plan ("FMP"), and therefore subject to change. By conducting the rulemaking process under prospective regulations, the Council is ignoring controlling standards authority and procedure contained in the Herring FMP, Amendment 1 to the FMP, and, perhaps most importantly, duly promulgated and currently effective regulations.

In part, the herring specification process has gone off-track largely due to initial confusion over the applicability of certain new provisions added to the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") by the MSA Reauthorization Act of 2006. Pub. L. 109-479, 120 Stat. 3575 (Jan. 12, 2007). In general, these currently distracting provisions relate to the Reauthorization Act's impending new requirement that each FMP include "a mechanism for specifying annual catch limits" ("ACL"), 16 U.S.C. § 1853(a)(15), and new procedural requirements applying to regional fishery management councils and their scientific and statistical committees ("SSC"). *See, e.g., id.* § 1852(g)(1)(B), (h)(6). The net effect of these provisions is that once an ACL mechanism is established through an FMP or amendment, a council must set ACLs at levels that do not exceed acceptable biological catch ("ABC") recommendations of an SSC. The Herring FMP does not provide a formula for calculating an ABC or ACL.

Congress, through the Reauthorization Act, however, in an apparent desire to ensure that councils first addressed issues in troubled fisheries, specified that ACL mechanisms be established for fisheries that are overfished or undergoing overfishing by 2010, but by 2011 for "all other fisheries." Pub. L. 109-479, § 104(b)(1)(B); 16 U.S.C. § 1853 note. The herring fishery falls into the latter category, being neither overfished nor subject to overfishing. Nonetheless, both the current specifications package and the SSC's scientific review have and

continue to proceed as if the ACL requirement currently exists and the terms of Amendment 4 were already lawfully governing the process.

As shown below, fundamental principles of administrative law and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, prohibit such a backwards process. Under the APA, there is no controlling regulation prior to completion of a rulemaking process. Thus, Amendment 4 has no legal effect. The current TAC setting process must be guided by current regulations, the Herring FMP, and applicable provisions of the MSA and other law. Moreover, it is highly questionable, at best, whether the MSA, as interpreted by relevant case law, would allow a council or the National Marine Fisheries Service (“NMFS”) to use the specifications process to implement the new Reauthorization Act ACL provisions in conjunction with development of TACs, were NMFS or the Council to consider implementing the herring ACL-setting standards standard and process via the specifications package itself.

Regarding the procedural requirements of the Reauthorization Act, there is no binding effect to the SSC’s acceptable biological catch recommendation for herring under MSA section 1852(h)(6). That provision is tied by, among other things, use of common legal terminology to the MSA section 1853(a)(15) ACL mechanism being developed through Amendment 4. That provision will, however, only become effective upon adoption of the amendment, which is on track for timely implementation in 2011. It is worth noting that Amendment 4’s procedural and substantive provisions will guide the *subsequent* specification setting processes. The MSA does not require retroactive application of the ACL requirement to then existing TACs, just as it does not authorize current rulemakings to be governed by standards anticipated to be adopted in the future.

Although they do not have binding effect, the SSC’s recommendations are not without weight under the MSA. Such recommendations, along with the report of the Transboundary Resource Assessment Committee, input from Council and NMFS scientific and technical advisors, and other sources of scientific information must all be considered by the Council in setting the herring TACs under existing regulatory authority. The Council must adhere to National Standard 2’s mandate to base its decision upon what it determines to be “the best scientific information available.” 16 U.S.C. § 1851(a)(2). As courts have repeatedly emphasized, however, the touchstone of the MSA is National Standard 1, requiring that such management measures prevent overfishing and achieve optimum yield. 16 U.S.C. § 1851(a)(1).

Ultimately, analysis of the probability that alternative herring TAC levels will result in overfishing will be the best scientific information with respect to the key questions raised by the herring specification setting process. In general, a quota must have at least a fifty percent probability of meeting its target fishing mortality rate (“F”), or achieving a level of catch that does not constitute overfishing, in order to fulfill the requirements of National Standard 1. The appropriate metric used in such analysis is the current overfishing definition contained in the Herring FMP. To the extent that employment of the current overfishing definition presents

difficulties,<sup>1</sup> then analysis can reasonably focus on the risks associated with various TAC levels, including those based on historical landings, set below the current estimate of overfishing levels.

Thus, to summarize the major points addressed herein:

- The Reauthorization Act's ACL requirements do not apply to this fishery until 2011. Herring Amendment 4 is currently on track to meet the law's implementation schedule.
- Because the herring ACL mechanism is not yet established, and no legal requirement exists requiring its immediate establishment, the SSC's recommendation does not carry the dispositive weight it will once Amendment 4 is adopted.
- The current specification setting process cannot be guided by the terms of Amendment 4, nor can the specification package be used to preempt Amendment 4 by establishing an ACL-setting mechanism. Rather, the present process must be guided by the Herring FMP and Amendment 1, their implementing regulations, and applicable provisions of law.
- While the SSC's recommendations must be considered along with other scientific information, the Council ultimately decides which information it deems the best available.
- In making this determination, information that bears on the question of risk that a TAC will result in overfishing is the most critical to informing the Council's determination. Analysis specific to that question, using the current operative overfishing definition or a proxy based on overfishing levels, will be the best scientific information with respect to that key question.

Under these circumstances, a "rollover" of current specifications in the form of a one-year interim quota to allow for development of a specifications package consistent with current regulations could be both necessary and justified. The basis for such an action relies on the fact that recent average United States and Canadian herring harvests have been tens of thousands metric tons below the level of harvest determined by the SSC to be the overfishing level.

Beyond this, the major issue to be resolved is the question of scientific uncertainty. The SSC, Council, NMFS, Atlantic States Marine Fisheries Commission ("ASMFC"), and industry all agree that a new benchmark assessment is required. The Council voted unanimously (with one abstention) that this new assessment occur in 2010, and the industry and ASMFC concur in this timing. That is because until such time as a workshop is performed to address sources of

---

<sup>1</sup> See Memorandum from Lori Steele, "Atlantic Herring Overfishing Definition – Proposed Modification to Control Rule" (Sept. 8, 2009), available at [http://www.nefmc.org/tech/cte\\_mtg\\_docs/090916/Herring/Doc%207\\_Final%20Memo%20SSC%20OFD%20Issues%20Sep%202009.pdf](http://www.nefmc.org/tech/cte_mtg_docs/090916/Herring/Doc%207_Final%20Memo%20SSC%20OFD%20Issues%20Sep%202009.pdf) (last visited Nov. 6, 2009) (explaining technical difficulties with strict application of the Herring FMP's control rule).

uncertainty in the assessment model, precautionary reductions in herring TACs to address scientific uncertainty will prevent achievement of optimum yield and result in unnecessary adverse economic impacts on the small businesses and small fishing communities that have relied on the resource for decades, if not over the centuries.

**I. The Herring Specifications Package Cannot Be Used to Implement New Reauthorization Act Provisions.**

The draft proposed Atlantic Herring Specifications for the 2010-2012 Fishing Years package<sup>2</sup> prepared for the upcoming New England Fishery Management Council meeting on November 17, 2009, is based on a legally flawed premise. Specifically, the package would have the Council use the specification process effectively, if not literally, to establish and implement the new MSA requirement, set forth in Reauthorization Act of 2006, that in each FMP a council must “establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.” 16 U.S.C. § 1853(a)(15).

The herring FMP currently is being amended, via Amendment 4, to include such a mechanism. That rulemaking process, however, is only in its earliest stages of development, though it is on a track to meet the Reauthorization Act’s 2011 deadline for completion. *See* Pub. L. 104-297, § 104(b)(1)(B), 110 Stat. at 3584 (noting that the effective date of this provision is 2011 for fisheries not overfished nor subject to overfishing). Until the Amendment 4 process is complete, existing regulations implementing the provisions of the Herring FMP and Amendment 1 govern the current specification process.

Despite the fact that Amendment 4 is no more than a proposal, the current specifications package has been explicitly designed to follow the process to be adopted in 2011 as opposed to the current regulations governing specification setting. For example, under all alternatives, the specifications package purports to implement an ACL for the herring fishery. For example, the document states: “The 2010-2012 Atlantic herring fishery specifications will be developed in accordance with the provisions and new requirements of the Magnuson-Stevens Fishery Conservation and Management Act, *including the requirement to establish ACLs and AMs* [accountability measures] *for herring by 2011.*” 2010-2012 Specifications Package at 2 (emphasis added); *see also id.* § 2.2.2, at 11 (option for establishing a “Stock-wide ACL”). Although the document notes that Amendment is still undergoing development, it confirms that “[t]he 2010-2012 specifications are consistent with the process *proposed* in Amendment 4 for specifying ACLs and AMs through the specification process.” *Id.* (emphasis added).

The draft herring specifications package thus suffers from two significant legal and logical flaws. First, it has been drafted to follow a regulatory proposal, rather than the currently existing regulatory scheme. Second, it purports to establish a required element of an FMP – the “mechanism for specifying annual catch limits,” 16 U.S.C. § 1853(a)(15) – ahead of development of this mechanism in Amendment 4.

<sup>2</sup>

Available at <http://www.nefmc.org/herring/index.html> (last visited Nov. 5, 2009).

It is a fundamental principle of administrative law that a rulemaking is guided by the law in place at the time a rule is promulgated, not anticipated future changes to the law or, in this case, regulations. *Cf. North Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 70 n.1 (D.D.C. 2007) (noting that, although the Reauthorization Act was passed subsequent to the finalization of the rule at issue, the “parties agree . . . that the version of the MSA in existence at the time plaintiffs filed governs this suit, and all references to the MSA will, unless otherwise noted, be to the version in effect in 2006.”). At a more general level, section 553 of the APA sets forth the steps that must be followed before any proposed rule can be given effect.

For instance, a rulemaking must generally be preceded by a “[g]eneral notice of proposed rulemaking” that provides “reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b). After such notice, an “agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” *Id.* § (c). Finally, unless specified exceptions exist, no substantive rule shall be given effect prior to thirty days following publication of a final determination. *Id.* § (d).

Prior to initiation even of these APA procedures, the MSA itself establishes its own procedural predicates for development of FMPs and amendments designed to implement mandatory FMP elements. For example, the council must “conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of [FMPs] and amendments to such plans.” 16 U.S.C. § 1852(h)(3). A “fishery impact statement” that “shall assess, specify, and analyze the likely affects, if any, including cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for” fishery participants and affected fishing communities must be developed.<sup>3</sup> *Id.* § 1853(a)(9)(A). Finally, there are MSA-specific notice and comment processes applying to such FMPs, amendments, and implementing regulations, which must be addressed. *See id.* § 1854(a),(b).

Current regulations and the Herring FMP and Amendment 1 all have been promulgated in accordance with these required procedures. Herring Amendment 4 has not. Predicating the current draft specifications package on Amendment 4’s terminology, definitions, and processes is legally fatal. To comply with well-settled law, the current TAC setting process must be premised on the rules and authorities currently in effect.

It does not solve this legal problem to attempt to use the current specifications process to, in essence, establish the ACL specification mechanism required by MSA section 1853(a)(15). For one, this would substantially render Amendment 4 a nullity, or at least create substantial regulatory confusion, particularly if the elements of proposed Amendment 4 to which the current

---

<sup>3</sup> Similar analytic requirements are likewise imposed by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, and the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612.

specifications are geared change during the amendment development process. More legally relevant, a specification procedure is the wrong regulatory vehicle through which to establish MSA-mandated elements of an FMP.

This issue was addressed in the decisions in cases involving Northeast Multispecies Amendment 13 and Atlantic Sea Scallop Amendment 10 and Framework 16. *See Oceana v. Evans* (“*Oceana I*”), 2005 U.S. Dist. LEXIS 3959 (D.D.C. Mar. 9, 2005) and *Oceana v. Evans* (“*Oceana II*”), 384 F. Supp. 2d 203 (D.D.C. 2005). In both cases, in response to plaintiffs’ claim that each plan lacked a “standardized bycatch reporting methodology,”<sup>4</sup> U.S. District Court Judge Huvelle drew an important legal distinction about how required elements of an FMP had to be procedurally developed. Judge Huvelle found that “defendants’ argument that a mandatory provision of an FMP may be created by the Secretary acting alone outside the context of the Amendment process defies the plain language of the MSA.” *Oceana I*, 2005 U.S. Dist. LEXIS at \*40. In short, these “required elements” cannot be implemented through processes more cursory than a full amendment complying with the MSA’s procedural standards, in addition to those of the APA.<sup>5</sup>

This principle applies with greater force to the present rulemaking. It is beyond dispute that the Herring FMP does not contain a mechanism to specify an ACL—that process is currently in development through Amendment 4. In *Oceana II*, the court found a *change* to an existing FMP element required under MSA section 1853(a) to be unlawful. Here, there is an attempt to use the specification process – one which has fewer procedural protections than even the scallop framework process – to implement a measure mandated by MSA section 1853(a)(15) to be included in an FMP as an initial matter. Attempting to implement ACLs in this manner could amount to an unlawful exercise of authority.

At the very minimum, such a step is in no way wise, given the existence of the current, legally-promulgated specification-setting process and the needed flexibility it provides.

---

<sup>4</sup> See 2005 U.S. Dist. LEXIS at \*39; 384 F. Supp. 2d at 231

<sup>5</sup> See also *Oceana II*, 384 F. Supp. 2d at 255-56 (finding that EFH protection measures promulgated under MSA § 1853(a)(7) could not altered through a framework adjustment). Quoting NMFS’ guidelines, the court noted: “‘It is likely that changes in regulating a fishery will require an amendment to the FMP when these: . . . introduce a new concept into the management of the fishery or eliminate or radically change an existing one [... or] alter management of the fishery in a way, or to an extent, not considered in the FMP or prior amendments, or in hearings held during their preparation.’” *Id.* at 255 (quoting Defs.’ Opp’n, Ex. 1 at 2.) (alteration in original).



## II. Changes Affecting Specification Setting Process Under the Reauthorization Act

The MSA Reauthorization Act was the first major overhaul to the MSA since the Sustainable Fisheries Act of 1996. Among many other changes, the Act strengthened both regional management councils' mandate to restore and rebuild fisheries<sup>6</sup> and the requirements for rigorous analysis of economic and social impacts and development of mitigation measures.<sup>7</sup> In transitioning to the new, more demanding management system, Congress, in certain specific instances, provided for an implementation period that was designed to insure that the fisheries most in need of management were addressed first.

Among the measures Congress included to insure that councils were meeting the requirement of National Standard 1, it added a requirement that each FMP include, as a mandatory element, an annual limit on allowable harvests. Section 104(a)(10) of the Reauthorization Act now requires that for each fishery, there be "establish[ed] a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." 120 Stat. at 3584 (codified at 16 U.S.C. § 1853(a)(15)). Unless a stock is overfished or subject to overfishing, however, this provision does not require action until 2011.<sup>8</sup> *Id.* (Pub. L. 109-479, sec. 104(b)(1)(B); 16 U.S.C. § 1853 note).

The Reauthorization Act also amended the duties that must be undertaken by regional fishery management councils established under MSA section 1852. "Each Council shall, in accordance with the provisions of this Act . . . develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g)." 16 U.S.C. § 1852(h)(6); *see* 120 Stat. at 3581. Thus, for plans which are newly adopted or amended to include a "mechanism" for setting an ACL, either the SSC or the peer review has the final say as to the upper limit on what that level can be.

<sup>6</sup> *See, e.g.*, Pub. L. 109-479, § 104(c) (requiring an immediate cessation of overfishing and allowing only two years to design and implement a program to rebuild overfished stocks). *See* also the provisions discussed immediately *infra*.

<sup>7</sup> *See, e.g., id.*, § 1§01 (mandating use of "economic and social data that meet the requirements of" National Standard 2 and requiring cumulative impacts analysis of conservation, economic, and social impacts of conservation and management measures and mitigation measures in an fishery management plan's ("FMP") fishery impact statement).

<sup>8</sup> The Reauthorization Act also specifies that MSA section 1853(a)(15) "shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(1) or 1854(e), respectively)." *Id.* (Pub. L. 109-479, sec. 104(b)(3)). The former refers to National Standard 1, which requires the prevention of overfishing and achievement of optimum yield from a fishery "on a continuing basis," 16 U.S.C. § 1851(a)(1), while the latter deals with rebuilding requirements for overfished fisheries. *Id.* § 1854(e).

**III. Application of New MSA Sections 1852(h)(6) and 1853(a)(15) to Atlantic Herring TAC Specifications Process**

Questions have been raised about whether the MSA section 1852 procedural requirements discussed above, for which Congress provided no effective date provision, can be read to effectively create an immediate ACL requirement irrespective of the phase-in period granted councils for implementing 16 U.S.C. § 1853(a)(15). Principles of statutory construction and a plain reading of the law support an answer of “no” to such questions.

As an initial matter, it is important to note that both sections 1852(h)(6) and 1853(a)(15) employ the same legal term. That is to say, each refer to “annual catch limits.” “Under the rules of statutory construction, when Congress uses the same word in separate sections of a statute to describe the same subject matter, the word is presumed to have been used with the same meaning in each section.” *Conservation Law Found’n v. United States Dept. of Commerce*, 229 F. Supp. 2d 29, 33 (D. Mass. 2002). Thus, the ACL referred to in MSA section 1853(a)(15) is the same as the ACL referred to in section 1852(h)(6).

Applying this basic rule of statutory construction, the prohibition on setting ACLs in excess of “the fishing level recommendations of” a council’s SSC does not come into effect until the council acts to establish a mechanism to specify an ACL under the timeframe established by Congress. For fisheries that are neither overfished nor subject to overfishing, establishment of an ACL is not required until 2011. *See* 16 U.S.C. § 1853 note. Related sections of a statute are to be read *in pari materia* with one another. *See Oceana I*, 2005 WL 555416 at \*12 (stating that National Standard 1 “must be read *in pari materia* with the rebuilding requirements of § 1854(e)(4)”). In this instance, where MSA section 1852(h)(6) states “[e]ach council shall . . . develop annual catch limits,” 16 U.S.C. § 1852(h)(6) (emphasis added), it would be inconsistent to interpret the Reauthorization Act as allowing councils to defer development of an ACL mechanism for healthy fisheries until 2011 in one section of the Act, while importing the requirement applicable to setting these ACLs in another section.<sup>9</sup>

As the current specifications setting process for the herring fishery does not already incorporate a duly-promulgated ACL mechanism – as mentioned, that process is underway through Amendment 4 to the FMP – the provision in MSA section 1852(h)(6) does not require the setting of an ACL “that may not exceed the fishing level recommendation” of an SSC. If the MSA were interpreted so as to require the Council to treat the SSC’s herring catch level recommendation as an ACL, ahead of the establishment the ACL specification mechanism, it would rob the plain terms of Reauthorization Act § 104(b)(1)(B)’s phased-in implementation period of its vitality and effect, in violation of basic precepts of statutory construction. *See Williams v. Taylor*, 529 U.S. 362, 407 (2000) (O’Connor, J., concurring) (“We must, . . . if possible, give meaning to every clause of the statute”).

<sup>9</sup> *See id.* (“It is, of course, a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (quoting *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) (internal quotations omitted)).

This is not to argue that the SSC's recommendation is not to be given weight. Indeed, as explained in the next section, its recommendations during the transition period must be given consideration by the Council to the extent it addresses relevant questions of management.

What is asserted, for reasons explained above, is that until the Council finalizes Amendment 4, the SSC's fishing level recommendation does not carry the legal weight ascribed by 16 U.S.C. § 1852(h)(6). The Reauthorization Act's structure provides the Council with some flexibility – assuming that the requirement to prevent overfishing is observed – to determine appropriate TAC levels, so long as it considers the SSC's recommendation, along with other pertinent information, during the specification setting process.

#### **IV. Issues Relating to the Prevention of Overfishing and Use of the Best Scientific Information Available (National Standards 1 and 2)**

As mentioned above, the fact that the Council is not bound by the “fishing level recommendations of its” SSC when setting herring specifications does not imply that the SSC's recommendation can be entirely ignored. The Council, however, is free to consider other sources of scientific information. As the National Standard 2 guidelines state:

Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature. Successful fishery management depends, in part, on the timely availability, quality, and quantity of scientific information, as well as on the thorough analysis of this information, and the extent to which the information is applied. If there are conflicting facts or opinions relevant to a particular point, a Council may choose among them, but should justify the choice.

50 C.F.R. § 600.315(b)(1). As part of this examination of various, and potentially conflicting, data, the Council must consider the relevance of the data to the conservation and management challenges it seeks to address. Ultimately, the Council is the final arbiter of what constitutes the best scientific information for its conservation and management purposes. *See, e.g.*, 16 U.S.C. § 1852(g)(1)(A) (the SSC “assist[s]” a council in evaluation of “scientific information ... relevant to such Council's development and amendment of any [FMP]”) (emphasis added).

Of course, more than the requirements of National Standard 2, National Standard 1 is the key MSA provision with respect to the current specifications process. *See, e.g.*, *A.M.L. Int'l v. Daley*, 107 F. Supp. 2d 90, 107 (D. Mass. 2000) (“Any fishery management plan must, first and foremost, contain measures which prevent overfishing and rebuild overfished stocks.”) (citing 16 U.S.C. § 1851(a)(1)). When setting fishery specifications, councils must insure that harvest levels are set at levels reasonably designed to prevent overfishing. *See Natural Resources Defense Council v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000); *see also Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164, 169-70 (4th Cir. 1996). Indeed, courts have suggested that to meet the requirements of National Standard 1, a quota must be set at a level that has “at least a

50% chance of attaining” the fishing mortality target or of otherwise ensuring that overfishing does not occur. *NRDC*, 209 F.3d at 754.

The SSC has determined that the 2010 herring overfishing level is 145,000 metric tons (“mt”), and recommended an “acceptable biological catch” (a term neither employed by nor defined in current regulations) of 90,000 mt based on its assessment of scientific uncertainty. For its part, the Herring FMP establishes an overfishing definition that is tied to a fishing mortality rate that varies with the status of the stock. Herring FMP § 2.6, at 12. The FMP also lays out a detailed procedure for determining appropriate TAC levels by applying the target fishing mortality rate to estimated stock biomass. *Id.* § 3.2, at 21. However, it does not appear that the SSC applied any of these standards and parameters in deciding to recommend an ACL that is approximately 60 percent of the SSC-approved overfishing level, perhaps due to difficulties in applying the current overfishing definition. *See Steele, supra* n.1.

The question remains, what is the way forward? The SSC and Herring Plan Development Team have agreed on an overfishing level for the years 2010-2012. Compliance with National Standard 1 would require that TACs not exceed this established overfishing level. The relevant question under applicable legal and Herring FMP standards is what are the risks associated with setting TACs at or near these limits. Analysis of this question would include discussion of relevant factors such as the retrospective pattern observed in the assessment, the fact that fishing mortality rates extending back almost two decades have been about half of the fishing mortality rate that should produce maximum sustainable yield, and that the herring biomass has been maintained around its long-term sustainable level.

In making its recommendation for “acceptable biological catch,” the SSC’s quantification of scientific uncertainty is best viewed as one form of “risk assessment,” the risk being the probability that a TAC set at a particular level will result in overfishing. However, the SSC’s uncertainty analysis is not analytically tied to the current overfishing definition or the FMP’s specification-setting standards and parameters. Nor did the SSC provide guidance as to whether a different, and possibly higher, TAC level, or precautionary discount less than the forty percent level it chose, provides an acceptable level of risk that overfishing will not result in any of the years covered by this specification-setting rulemaking. Additional analysis along these lines would be helpful, although the Council already has ample information along these lines to make a reasonable decision.

In sum, when making its ultimate TAC determination, the Council is entitled to: (1) seek additional advice from the Plan Development Team, Transboundary Resource Assessment Committee, or other scientific advisory, on whether different TAC levels present an unacceptable risk of overfishing; (2) make an informed determination as to what level of risk is appropriate based existing or new information; and (3) determine what constitutes the best scientific information available for the purposes of making this determination. The only limitation is that, whatever decision it ultimately makes, the Council must be reasonably assured that overfishing will not result.

Of course, the root of the difficulties encountered by the Council and NMFS during this process is tied to the need for a new benchmark assessment. Until this is performed, uncertainty will persist, and a constant threat of overly precautionary reductions in TAC will loom over the herring industry and those that rely on it. In order to reduce the prospects of widespread and unnecessary economic harm, this new assessment workshop should occur at the earliest possible time, preferably in 2010.

## V. Conclusion

Because the SSC's recommended catch levels are not binding, the law provides the Council and NMFS with flexibility to consider different, and possibly higher, herring specification levels for 2010 and beyond. Any such recommendations, however, must be justified in terms of the prevention of overfishing, including an assessment of the risk that selected TAC levels will not result in overfishing based on the best available science.

It is clear, however, that the current specifications package rests on legally infirm ground. By premising itself on an amendment that has not even gone out to public hearings, much less been adopted, acceptance of the package in its current form is neither legal, nor well-counseled.

Accordingly, if the Council cannot quickly change course with respect to the current troubled process, it should develop interim measures based on current specifications that will insure that overfishing does not occur. While there are many approaches that could be taken, perhaps the least cumbersome and most justifiable course would be to adopt a quota level based on some reasonable short term, say ten or five years, average catch by U.S. and Canadian fishermen (115,700 mt and 107,900 mt, respectively). These figures are comfortably below the overfishing levels, and above recent catches in the most recent years, providing an additional buffer.

Whatever specific course is adopted, and what specific TAC levels are selected, there must be a change in the present course.



*behind item 7a*

EXAMPLE OF 341 RECEIVED

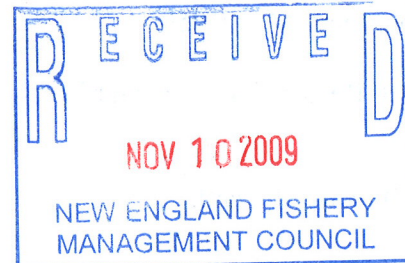
**vincent longo**

---

14 cable lane , hicksville, NY 11801

Executive Director Paul Howard  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

Subject: Responsible Herring Management



Dear Director Howard,

In 2006, Congress took an important step towards the responsible management of marine fisheries by requiring regional fishery management councils to follow the advice of their scientific committees when setting annual limits on catch. But recent pushback from the herring industry over a recommended reduction in the allowable catch for herring threatens to undermine this process and allow continued fishing at less precautionary levels.

As someone who cares about a healthy and biologically diverse marine ecosystem, I strongly urge the Council to act with precaution and in accordance with the best available science when setting catch limits for Atlantic herring. Herring play a critical role in the region's marine food web with whales, seabirds, tuna, groundfish and other marine life all depending on herring as forage. I encourage the Council to continue to protect and conserve our herring resource and the species that depend on them for survival by following the scientific recommendations provided by your Scientific and Statistical Committee.

Furthermore, as the Council determines its workload priorities for 2010, I ask that you make the development of a comprehensive catch monitoring program for the Atlantic herring fishery a top priority.

This program should provide reliable and timely information on a near real-time basis for accurate quota monitoring, to address slippage and minimize bycatch, and improve the quality data used in stock assessments.

We all want the long-term health of the herring resource, and a better monitoring program will help reduce the uncertainty and improve the management in this fishery.

Sincerely,  
vincent longo  
14 cable lane  
hicksville, NY 11801

## Harry Bartlett

---

152 Commonwealth Avenue Unit 5, Concord, MA 01742

Executive Director Paul Howard  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

Subject: Responsible Herring Management

Dear Director Howard,

In 2006, Congress took an important step towards the responsible management of marine fisheries by requiring regional fishery management councils to follow the advice of their scientific committees when setting annual limits on catch. But recent pushback from the herring industry over a recommended reduction in the allowable catch for herring threatens to undermine this process and allow continued fishing at less precautionary levels.

As someone who cares about a healthy and biologically diverse marine ecosystem, I strongly urge the Council to act with precaution and in accordance with the best available science when setting catch limits for Atlantic herring. Herring play a critical role in the region's marine food web with whales, seabirds, tuna, groundfish and other marine life all depending on herring as forage. I encourage the Council to continue to protect and conserve our herring resource and the species that depend on them for survival by following the scientific recommendations provided by your Scientific and Statistical Committee.

Furthermore, as the Council determines its workload priorities for 2010, I ask that you make the development of a comprehensive catch monitoring program for the Atlantic herring fishery a top priority.

This program should provide reliable and timely information on a near real-time basis for accurate quota monitoring, to address slippage and minimize bycatch, and improve the quality data used in stock assessments.

We all want the long-term health of the herring resource, and a better monitoring program will help reduce the uncertainty and improve the management in this fishery.

Sincerely,  
Harry Bartlett  
152 Commonwealth Avenue  
Unit 5  
Concord, MA 01742