



November 3, 2012

John Bullard  
 Northeast Regional Administrator  
 NOAA Fisheries Northeast Regional Office  
 55 Great Republic Drive  
 Gloucester, MA 01930

**RE: Atlantic Herring Fishery Latest Sub-ACL Overage and Request for Fishery Closure**

Dear Regional Administrator Bullard:

We write 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 the recent sub-ACL overage in the Atlantic herring fishery and closure of Management Area 3. *See* 77 Fed. Reg. 61299 (October 9, 2012). We also write to bring to your attention the fact that as of the week ending October 27, 2012, landings in the Atlantic herring fishery are estimated to have reached 96 percent of its overall ACL. *See* [http://www.nero.noaa.gov/ro/fso/reports/reports\\_frame.htm](http://www.nero.noaa.gov/ro/fso/reports/reports_frame.htm) (showing Area 1A at 84% of its sub-ACL,<sup>2</sup> Area 1B at 146%, Area 2 at 95%, and Area 3 at 102%, with the total for all management areas at 96% of the total ACL).

The Area 3 overage represents the second area overage for this fishery this year. These overages continue to demonstrate that the current accountability measures (AMs), even with implementation of NMFS's 2011 rulemaking intended to improve reporting,<sup>3</sup> do not effectively prevent sub-ACLs from being exceeded and will not prevent the fishery's overall ACL from being exceeded. Therefore, our clients' reiterate their October 8, 2012 request that, consistent with the *Flaherty v. Bryson* Memorandum Opinion and Order, NMFS and the Council consider a reasonable range of new AM alternatives that will ensure that both the sub-ACLs and the overall ACL are not exceeded.<sup>4</sup> In addition, because the total landings in the fishery have already reached 96 percent of the ACL, our clients request that you immediately close the directed herring fishery in order to prevent the overall ACL from being exceeded, consistent with the requirements of the Magnuson-Stevens Act.<sup>5</sup>

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

<sup>2</sup> As of November 1, 2012, the Area 1A quota and the total quota include 3,295 mt that had been set-aside for fixed gear fisheries west of Cutler, ME and the New Brunswick weir fishery, consistent with 50 C.F.R. § 648.201(f).

<sup>3</sup> *See* 76 Fed. Reg. 54385 (Sept. 1, 2011),

<http://www.nero.noaa.gov/nero/regs/frdoc/11/11HerNotificationReportingRequireFR.pdf>. Further, while

Amendment 5 to the FMP includes important monitoring and management changes, none of these measures are likely improve the timeliness and quality of reporting in a way that can be expected to end the Sub-ACL overages.

<sup>4</sup> *See* October 8, 2012 Letter from Flaherty to NEFMC re Atlantic Herring Fishery Specification for FY 2013-2015.

<sup>5</sup> The Magnuson-Stevens Act requires ACLs to set specific limits on the total fish caught in each fishery to prevent overfishing. 16 U.S.C. §§ 1851(a)(1), 1853(a)(15); 50 C.F.R. § 600.310(f) (1).

Sub-ACL overages have a detrimental effect on herring populations, affecting both the discrete spawning components in the relevant management areas the FMP is designed to protect,<sup>6</sup> and in turn the overall herring stock. The relevant AM for the fishery prohibits vessels from catching more than 2000 lbs of Atlantic herring per day in an area once NMFS “projects that catch will reach 95 percent of the annual sub-ACL allocated to a management area before the end of the fishing year.” 50 C.F.R. § 648.201(a)(1). This AM, however, appears to be worded to specify that closures will occur only “in a given management area” when 95 percent of that area’s landings quota is reached, but will not close the fishery itself when 95 percent of the overall ACL is reached. The failure to close the fishery when the total landings reach 95 percent of the overall ACL presents an unacceptable risk that the ACL will be exceeded, and together with the record of sub-ACL overages shows there is a gaping loophole in the accountability system for this fishery in violation of the Magnuson-Stevens Act. 16 U.S.C. § 1853(a)(15).

As our clients described in their October 8, 2012 letter to Chairman Cunningham, which was also copied to you, significant and frequent overages occur in this fishery. The letter pointed to Agency data showing that from 2003-2011, overages occurred in Areas 1A or 1B in 6 out of 9 years, and likely occurred in Area 1A for the third year in a row in 2011.<sup>7</sup> In 2010 (the last year for which catch totals are final), the quota caught in Area 1A was 107 percent and the quota caught in Area 1B was a whopping 138 percent, despite “closure” at 95 percent. Now in 2012 there are additional overages including landings of 146 percent of the quota in Area 1B. The AMs in this fishery are not sufficient.

Further, as discussed in the October 8, 2012 letter, the Council identified two alternatives for new AM’s for consideration in its 2013-2015 Atlantic herring specifications package. However, neither of the proposed alternatives would have prevented the most recent overages in Area 1B or Area 3. Instead, both would apply only under very limited circumstances and could even provide an incentive to fish harder as an area as the catch limit is approached resulting in more frequent and larger overages.<sup>8</sup> Moreover, neither of the proposed alternatives would ensure the overall ACL is not exceeded by closing the fishery when the overall ACL is approached.

Given the history of recent overages in this fishery, NMFS and the Council must consider alternatives that close the areas, and overall fishery, when the catch for each is projected to reach 85, 90, and 92 percent of the sub-ACL and total ACL, respectively. Further, at this time NMFS must close this fishery in order to ensure the overall ACL is not exceeded in view of the fact that landings are currently projected at 96 percent of the total ACL. Finally, an alternative should be considered that eliminates the up to two year lag in overage deductions in order to increase accountability and provide a more meaningful incentive for current fishermen to stay within catch limits.

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<sup>6</sup> See *e.g.*, Amendment 5 DEIS at 13 (Objectives)(March 14, 2012).

<sup>7</sup> See Tab #2 Draft Discussion Document Atlantic Herring Fishery Specifications for the 2013-2015 Fishing Years, Tables 2, 3, and 4 and discussion on pp. 5-7.

<sup>8</sup> See October 8, 2012 Letter for a full discussion of these points.

Thank you for considering our clients' requests and please contact us should you have any questions.

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: C.M. "Rip" Cunningham, Jr., Chairman, New England Fishery Management Council  
Paul Howard, Executive Director, New England Fishery Management Council  
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