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

C.M. "Rip" Cunningham, Jr., Chairman  
 Paul Howard, Executive Director  
 Members of the Executive Committee  
 New England Fishery Management Council  
 50 Water Street, Mill 2  
 Newburyport, MA 01950



**RE: Atlantic Herring Fishery Priorities for 2013**

Dear Chairman Cunningham, Director Howard, and Members of the Executive Committee:

We write on behalf of our clients Michael Flaherty, Captain Alan Hastbacka, and the Ocean River Institute,<sup>1</sup> the plaintiffs in *Flaherty v. Bryson*, regarding the management priorities for Atlantic herring in 2013.<sup>2</sup> These draft priorities as revised at the most recent Council meeting include: 1) the 2013-2015 specifications package with alternatives to address the Amendment 4 court order; 2) a framework adjustment to establish the River Herring catch cap; and 3) an amendment to consider River Herring as stocks in the Atlantic herring fishery.<sup>3</sup>

The *Flaherty v. Bryson* Memorandum Opinion and Order<sup>4</sup> requires consideration of River Herring<sup>5</sup> as stocks in the Atlantic herring FMP and measures to minimize the bycatch of River Herring (and other species) to the extent practicable consistent with National Standard 9. The Order also requires consideration of a range of reasonable alternatives to the existing AMs and the interim ABC control rule in the specifications package (or another appropriate action to be completed within one year), including at least one alternative "based on the most recent best available science for setting ABC control rules for herring and other forage fish." None of these requirements have been met. All of the remedial actions, including the supporting NEPA analysis demonstrating Defendants took a "hard look" at the environmental impacts of these actions, must be completed by August 2, 2013.<sup>6</sup>

In order to comply with the Court's remedial order and August 2, 2012 deadline, we request that the Council consider the following:

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

<sup>2</sup> See Draft Management Priorities for 2013 (Sep 25, 2012) at p.2 under Herring, available at: [http://www.nefmc.org/press/council\\_discussion\\_docs/Publish/Sept2012.html](http://www.nefmc.org/press/council_discussion_docs/Publish/Sept2012.html). (The draft priorities also include development of an industry-funded observer program).

<sup>3</sup> *Id.*

<sup>4</sup> The Memorandum Opinion and Order in *Flaherty v. Bryson* are found behind Tab #1 to the NEFMC Council Meeting Materials for the Herring Committee Report for Wednesday, September 26, 2012, available at: <http://www.nefmc.org/herring/index.html>; see also August 31, 2012 Letter from John Bullard (NMFS) to Rip Cunningham (NEFMC) behind Tab #1 Herring Committee Report for Wednesday September 26, 2012.

<sup>5</sup> The term River Herring is defined in the Court Opinion and Order includes blueback herring, alewives, hickory shad and American shad.

<sup>6</sup> See Order at 13 fn. 3.

cc: LS, PMF (10/17)

rule are needed. *See* Pikitch et al 2012; Smith et al 2011; Cury et al 2011; Tyrrell et al 2011. This is necessary to account for the special risks associated with fisheries for forage fish, including the risk of dependent predator-populations collapsing and the particular vulnerability of forage species to over-exploitation. Herring are particularly vulnerable to over-exploitation because of their schooling behavior and because they undergo substantial population shifts even without fishing, making the risk of overfishing during down cycles even higher. Forage stocks must be given special consideration, above and beyond proper treatment of natural mortality in assessments, in order to avoid collapsing the forage stock and / or dependent predator populations, and causing destructive impacts on ecosystems. *See* Pikitch et al 2012; Smith et al 2011.

The Science and Statistical Committee (SSC) met on September 12, 2012 in order to develop its ABC recommendations for catch in the 2013-2015 fishing years and to discuss ABC control rules for the fishery. The SSC concluded that the two approaches for setting ABC developed by the Herring Plan Development Team (PDT) were nearly equivalent from a biological perspective (similar spawning stock biomass in 2015), thus the SSC gave the Council the choice of the two approaches for setting catch. However, many SSC members at that meeting recognized that both of these alternatives fell short of a proper control rule. *See* SSC discussion, September 12, 2012.

When the Council in turn considered only these two approaches for the 2013-15 specifications package, the Council failed to consider an ABC control rule alternative based on the best available science for setting ABC for forage fish and failed to meet the National Standard One guidelines for setting ABC for forage fish. The first approach, the 75%  $F_{msy}$  approach, is simplistic and undifferentiated from the default control rule used for many of the non-forage stocks (such as New England groundfish): ABC is based upon a fishing mortality rate (F) of 75%  $F_{msy}$ . The second approach, the “constant catch-based approach,” is similar to the interim approach used for setting ABC during the 2010-2012 specifications (average catch 2006-2008). This approach (based on the maximum catch that will still have less than a 50% chance of overfishing in any of the three years) allows for more herring to be caught (342 mt as compared to 320 mt), is not based upon the above default control rule (75%  $F_{msy}$ ), and was not part of the peer-reviewed material developed for the benchmark assessment. This approach fishes at twice MSY justified in part by a single year class (the strength of which can often be overestimated in the short-term<sup>11</sup>), and has no buffer for scientific uncertainty in its third year.

The SSC requested guidance from the Council regarding how it would like to see this Atlantic herring stock managed in the future, as would be appropriate to develop a permanent ABC control rule, yet none was provided.<sup>12</sup> As the SSC noted, neither approach in the specifications

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<sup>11</sup> *See* DRAFT Atlantic Herring Specifications 2013-2015 at § 5.2.2 at p. 19 (2008 Atlantic Herring Year Class).

<sup>12</sup> The SSC requested guidance in their written report and Dr. Legault reiterated this request in the oral 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*

Therefore, the Council must at a minimum analyze a reasonable range of alternatives to the two existing AMs for the fishery listed below:

1. Management Area Closures - 50 C.F.R. § 648.201(a)(1) (prohibits vessels from catching more than 2000 lbs of Atlantic herring per day once NMFS has determined that catch will reach 95% of the annual catch allocated in a given management area).
2. Overage Deduction - 50 C.F.R. § 648.201(a)(3) (mitigates ACL overages by deducting the amount of any overage from the relevant ACL or sub-ACL for the fishing year following NMFS's determination of the overage).

**Overages occur in this fishery frequently and are significant.** For example, from 2003-2011, numerous 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>16</sup> In 2010 (the last year for which catch totals are final), the quota caught in Area 1A was 107% and the quota caught in Area 1B was a whopping 138%, despite “closure” at 95%. These facts demonstrate that the current AMs are ineffective at constraining ACLs, sub-ACLs in particular, because they allow ACLs to be exceeded and for rolling overages to occur -- both counter to the objectives of the Magnuson-Stevens Act.

The Council identified two AM alternatives for consideration in the 2013-2015 specifications package:<sup>17</sup>

1. A “proactive” AM that would close the directed fishery in a given management area when the catch is projected to reach 92% of the area annual catch limits under the following two conditions:
  - a) the stock is overfished or overfishing is occurring and;
  - b) the sub-ACL for a management area has been exceeded in either of the preceding two years.
2. A “reactive” AM providing that if overfishing is not occurring and the stock is rebuilt (spawning stock biomass exceeds the target), the accountability measure (a pound for pound payback) will not be triggered until the sub-ACL is exceeded by 5% or more.

These alternatives do not constitute a “reasonable range of alternatives” consistent with the National Environmental Policy Act.<sup>18</sup>

At best, the first alternative might require an earlier closure to the fishery under very limited circumstances (the fishery must be both overfished (or overfishing is occurring) *and* the area in question has suffered its second overage in three years). The second alternative is less restrictive than the current reactive AM for the fishery because it would eliminate the requirement for overage paybacks in many circumstances and makes unclear what the effective limit for the

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<sup>16</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>17</sup> See September 28, 2012 NEFMC News Brief at 2, available at: <http://www.nefmc.org/> (Council Meeting Brief); see also Council Audio # 15 Herring Committee Report.

<sup>18</sup> See 40 C.F.R. § 1502.14

only “support” of a voluntary industry avoidance project (SMAST /SFC/ DMF) and an undefined promise to “consider” a River Herring catch cap in a future action.<sup>20</sup>

Although the development of the River Herring catch cap could have begun immediately as part of the 2013-2015 specifications process (as contemplated by Amendment 1 to the FMP), debate ensued over the proper procedural vehicle for the cap which has delayed its development and implementation. As a result, the Council and NMFS have taken no action to date that satisfies the Courts Remedial Order to demonstrate that it has minimized bycatch to the extent practicable, by August 2, 2013. The Council must promptly initiate a framework adjustment that will implement the River Herring catch cap, and begin its NEPA analysis immediately, in order to meet its August 2, 2013 deadline.

### **Amendment That Considers River Herring As Stocks In The Atlantic Herring Fishery**

Consistent with the Remedial Order, NMFS also recommended that the Council consider in an amendment to the Atlantic Herring FMP, whether river herring (alewife and blueback) and shad (American and hickory) should be designated as stocks in the Atlantic herring fishery.<sup>21</sup> The Court Order and NMFS’s letter provided a list of legal, scientific, and related materials that should be considered, at a minimum, when making this determination. This list includes the requirements of the Magnuson-Stevens Act related to including a stock in an FMP, the most recent river herring and shad stock assessments and peer review reports, NMFS own finding that a listing under the Endangered Species Act for river herring “may be warranted,” Alternative Set 9 in the MAFMC’s Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish FMP, and the Court’s Memorandum Opinion in *Flaherty v. Bryson*.<sup>22</sup>

The Opinion, in addition to the Order, in the *Flaherty v. Bryson* case is critical to completing this work and bringing the Atlantic herring FMP into compliance with the law. When finding that NMFS failed the first time to “reasonably and rationally consider [] whether Amendment 4’s definition of the fishery [to exclude river herring] complied with the National Standards and with the MSA,” Opinion at 32, the Court made clear that “councils do not have unlimited and unreviewable discretion to determine the make-up of their fisheries,” *id.*, and they must follow the “MSA’s directive that FMP’s be generated for any fisheries requiring conservation and management.” The determination of what stocks make up a fishery must be consistent with the applicable legal standard, 16 U.S.C. § 1852(h), based on the best available scientific information, 16 U.S.C. § 1851(a)(2), and reviewed by NMFS for compliance with the Magnuson-Stevens Act and other applicable law, 16 U.S.C. § 1854(a). The Court in *Flaherty* laid out the legal standard: **Section 1852(h) requires the Council prepare an FMP or amendment for any stock of fish that requires conservation and management.** See Opinion at 30.

NMFS filed a supplemental explanation on the definition of the fishery with the Court on August 31, 2012, stating that based on the information available at the time Amendment 4 was approved it had “determined that Amendment 4’s definition of the stocks in the fishery complies with the

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<sup>20</sup> See June 2012 Council Report at 1 (Amendment 5 Measures Receive Final Council Approval); see also NEFMC Motions Report for Wednesday June 20, 2012 (Management measures to address River Herring bycatch).

<sup>21</sup> See August 31, 2012 Memorandum from John Bullard (Daniel Morris) to Rip Cunningham, Chairman NEFMC

<sup>22</sup> See FN 10.



Supplemental Explanation is arbitrary and capricious and not in accordance with law. It should be given no weight.

**I. Defendants' Supplemental Explanation Is Not Consistent With the Magnuson Stevens Act, the National Environmental Policy Act, and this Court's Memorandum Opinion and Order**

As an initial matter, the Defendants' Supplemental Explanation is fatally flawed because it avoids the procedural requirements of the Magnuson-Stevens Act and other applicable law. Defendants admit that "[d]esignating river herring as a stock in the fishery was not considered by the Council in Amendment 4" and was not analyzed in the environmental assessment. 76 Fed. Reg. 11373, 11377 (Mar. 2, 2011) (AR 6329). Defendants did not review the Council's failure to include River Herring as a stock in the fishery, arguing in their summary judgment memorandum they believed Congress left such decisions entirely to the Council's discretion and thus beyond the Magnuson-Stevens Act's mandate that the Secretary review Council decisions for compliance with applicable law. Defs' Opp. and Cross-MSJ at 18-19 (Doc. 18). These arguments were rejected, Opinion at 26-33, and this Court held that Defendants violated the Magnuson-Stevens Act and the APA by failing to "reasonably and rationally consider[] whether Amendment 4's definition of the fishery [to exclude river herring] complied with the National Standards and with the MSA's directive that FMPs be generated for any fisheries requiring conservation and management." Order at 3.

This Court concluded that the law regarding its remedial power requires that in cases where "the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances is to remand to the agency for additional investigation or explanation." Order at 7 (citation

view the decision regarding which stocks to be included in a fishery management unit was left entirely to the discretion of the Council. *Id.* at 27. The Council, apparently relying upon this incorrect legal interpretation,<sup>5</sup> chose early in the development of Amendment 4 not to consider adding River Herring as a stock to the fishery, and as a result the Council never evaluated whether River Herring are in need of conservation and management and never developed the Amendment 4 record with the scientific information and data that would be necessary to determine if River Herring need to be added to the fishery management plan. *See* 76 Fed. Reg. at 11377 (AR 6329); Opinion at 9; Opinion at 23-26 (pointing to lack of record evidence and analysis for Council's decision not to consider adding River Herring to the fishery).

Thus, while the proper remedy was to remand Amendment 4 to the Agency for reconsideration of whether River Herring should be added to the fishery, Defendants' Supplemental Explanation is arbitrary and capricious and contrary to the law and this Court's Memorandum Opinion because it bypassed the Council, and merely reflects NMFS's current opinion based on the undeveloped record as it existed at the time Amendment 4 was approved on November 9, 2010. Supplemental Explanation at 1. This approach fundamentally conflicts with the Magnuson-Stevens Act's structure demanding such decisions first be made by the Council, consistent with the applicable legal standard, 16 U.S.C. § 1852(h), based on the best available scientific information, 16 U.S.C. § 1851(a)(2), and that NMFS then review such decisions for compliance with the Magnuson-Stevens Act and other applicable law. 16 U.S.C. § 1854(a); Opinion at 26-33.

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standard that is at issue in this case. Supplemental Explanation at 1 ("If a stock in a fishery is determined to be overfished or subject to overfishing, it must be included in an FMP."); Council Letter at 2 ("If a stock of fish is determined to be overfished or subject to overfishing, it must be included in an FMP.").

<sup>5</sup> Fishery management councils do not employ their own legal counsel but rather rely upon Defendants' attorneys provided by NOAA's Office of General Council for legal advice. *See* <http://www.gc.noaa.gov/sw-office.html>

**II. Defendants Incorrectly Assert That it is Impracticable to Manage River Herring as a Unit**

Defendants have never disputed, nor could they, that River Herring school with Atlantic herring or that River Herring are caught in significant numbers in the Atlantic herring fishery. Defendants now argue, for the first time, that the best "information available at the time Amendment 4 was approved demonstrates that it was impracticable to treat shad and river herring as a 'unit' on a regional or coast-wide scale as contemplated by National Standard 3." See Supplemental Explanation at 3.<sup>7</sup> As justification, Defendants argue that stock assessments existing at the time Amendment 4 was approved evaluate individual river runs of fish, assert that the extent and rate of mixing in the ocean is uncertain, and claim that existing catch data does not always differentiate between river herring and shad. *See* Supplemental Explanation at 1, 3. These assertions are not supported by National Standard 3 and other applicable law, the record, or the best available science.

National Standard 3 states that "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as unit or in close coordination." 16 U.S.C. § 1851(a)(3). The National Standard 1 guidelines, cited but ignored by Defendants, also provide guidance for classifying multiple stocks in a plan, and require that an FMP include a description of fish involved in the fishery. 50 C.F.R. § 600.310(d)(1). To facilitate this inclusive description, the guidelines include those stocks already in an FMP by default, and provide definitions for "non-target species" (such as River Herring caught incidentally and retained for sale or personal use) and "ecosystem component species," so that other stocks involved in the fishery can be added to the plan. *See id.* § 600.310(d)(1)-(5).

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<sup>7</sup> *See infra* at III, p. 12 for an extensive list of other species that NMFS manages as a unit on a regional or coast-wide scale.



trips) for Atlantic herring PDT consideration). This body of science shows, among other things, that the amount of incidental catch of River Herring in the Atlantic herring fishery, may be equivalent to nearly *all of the commercial river landings coastwide*. AR 662.

Defendants also ignored their own data which also supports a finding that these stocks can be managed as a unit. *See* AR 5641, 6170, 6172, 6173-6176, 6178, 6179 (Catch and Discard Data for Cat. A and B permit holders (these permit holders catch 98% of the Atlantic herring) in Final Amendment 4). This scientific evidence shows that in the directed trips (targeting herring and mackerel) by Category A and B permit holders, the catch of blueback's, alewives, and other unidentified herring that was kept and sold, was significant and far exceeded any other species caught incidentally by a large margin. AR 6172.

Finally, NMFS's assertion that management of River Herring is "impracticable," *see* Supplemental Explanation at 1, 3, is contradicted by its actions in Amendment 5, where it analyzed alternatives for catch caps and bycatch avoidance plans for River Herring in federal waters using the very same data it now claims is insufficient. *Id.* According to Defendants' Supplemental Explanation, in order for it to be practicable to manage River Herring as a unit, there would first have to be coast-wide stock assessments, evidence of the extent and rate of mixing of river herring and shad in the ocean traceable to each different natal river on the East Coast, catch data that always differentiates between river herring and shad, and information that links fish caught in the ocean traceable to each from different natal rivers on the East Coast). *Id.* This is an arbitrary and capricious standard, especially in view of the fact that both the New England Council and the Mid Atlantic Councils have examined the best *available* science and determined that an Alosine catch cap (a catch limit incorporating catch of all four species of River Herring together) as an interim measure in the herring and mackerel fisheries is feasible.

While NMFS makes passing references to the law, citing 16 U.S.C. § 1852(h)(1) and 1853(a)(2) in its statutory background section, its analysis (Section III) never applies the statutory conservation and management standard, or even references the statutory definition and related National Standard 7 guidance, and ultimately fails to evaluate in any meaningful way whether River Herring require conservation and management. *See* Supplementary Explanation at 3-4. Instead, Defendants continue to rely heavily upon the statutory standard that requires the axiomatic addition of stocks designated as “overfished” or “subject to overfishing” by the Secretary. *See* Supplementary Explanation at 1, 3-4. Defendants’ arguments that these are the only triggers for adding stocks to a fishery are not supported by the Act and were explicitly rejected by this Court: the standard is whether a stock is capable of being managed as a unit and requires conservation and management. *See* Opinion at 29.

Moreover, the information NMFS relies on for its conclusion that River Herring are not in need of conservation and management, and thus should not be added to the fishery, is also incomplete and does not reflect the best available science (even at the time of the Amendment 4 decision). Most notable among the scientific information NMFS *failed* to consider in Amendment 4 is the underlying data and materials used to justify its listing of river herring (bluebacks and alewives) as *species of concern*. *See* 71 Fed. Reg. 61022 (Oct. 17, 2006); Plaintiffs Supp. Mem. (Doc. 35-0) at 6. Similarly, the underlying data and materials that supported its finding that a listing of river herring under the Endangered Species Act “may be warranted” was not considered. 76 Fed. Reg. 67652 (Nov. 2, 2011); Plaintiffs Supp. Mem. (Doc. 35-0) at 6.

In addition, NMFS cannot rely upon ASMFC management measures designed to manage directed fisheries in in state waters to justify its own inaction in federal waters. Plaintiffs

enough over the catch of River Herring to request emergency action to regulate catch of River Herring in federal waters during Amendment 4. *See Exhibit 1*. In its May 27, 2009 Letter to Gary Locke, the Executive Director of the ASMFC cited concerns about coastwide depletion and significant declines in most river runs, and pointed out that “bycatch of river herring in federal fisheries has become a significant concern, as it may be having considerable impact on stock status.” *Exhibit 1* at 1. The ASMFC concluded its letter with a plea: “We urgently need monitoring and management programs to minimize the impacts of by catch on river herring.” *Id.* NMFS refused that urgent request for emergency action. *Exhibit 1* at 18.

Finally, this Court already found that any reliance on the Atlantic Herring Plan Development Team document that NMFS again cites in its Supplemental Explanation at 3-4 is arbitrary and capricious, stating, “[t]hat document does not explain why an estimate could not have been generated prior to issuance of Amendment 4, nor why the Council could not at the very least have devised an interim Acceptable Biological Catch control rule based on the best available science, as it did in Amendment 4 for Atlantic herring.” Opinion at 24.

In sum, NMFS ignored best available science that River Herring are in need of conservation and management and unlawfully relied on management in state waters for its inaction in federal waters

**IV. Defendants Wrongly Assert That it Would be Duplicative to Manage River Herring in Federal Waters**

Defendants’ last attempt to justify inaction is to claim, for the first time, that managing River Herring in federal waters would be “impracticable and unnecessarily duplicative” under National Standard 7. *See* Supplemental Explanation at 4. National Standard 7 provides that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” 16 U.S.C. § 1851(a)(7). As support, Defendants cite the same

**Conclusion**

For these reasons, Defendants' Supplemental Explanation is arbitrary and capricious and not in accordance with law. It should be given no weight.

Dated: September 25, 2012

Respectfully submitted,

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