

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ANGLERS CONSERVATION NETWORK,  
9 Williamsburg Drive  
Tinton Falls, NJ 07753

CAPTAIN PAUL EIDMAN,  
9 Williamsburg Drive  
Tinton Falls, NJ 07753

GATEWAY STRIPER CLUB, INC.,  
56-30 49th Street  
Maspeth, NY 11378

PHILIP LOFGREN,  
10 Lochmere Avenue  
North Weymouth, MA 02191

*Plaintiffs*

v.

PENNY PRITZKER, in her official capacity as  
Secretary of the Department of Commerce,  
Room 5851  
1401 Constitution Avenue, NW  
Washington, DC 20230

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION,  
United States Department of Commerce  
Room 5128  
1401 Constitution Avenue, NW  
Washington, DC 20230

NATIONAL MARINE FISHERIES SERVICE,  
Department of Commerce, Room 14555  
1315 East-West Highway  
Silver Spring, MD 20910

*Defendants.*

CA No.

## **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs Anglers Conservation Network, Captain Paul Eidman, Gateway Striper Club, and Philip Lofgren (together hereinafter “ACN”) hereby challenge final agency action terminating Amendment 15 to the Fishery Management Plan for Mackerel, Squid, and Butterfish taken on October 8, 2013 by the Mid-Atlantic Fishery Management Council, and by Defendants Commerce Secretary Penny Pritzker, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (hereinafter “Defendants” or “NMFS”). This final agency action violates the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), the National Environmental Policy Act (“NEPA”), and the Administrative Procedure Act (“APA”).

2. NMFS’s final action terminating Amendment 15 to the Mackerel, Squid, and Butterfish Fishery Management Plan (“MSB FMP”) is unlawful for at least two reasons. First, in violation of the Magnuson-Stevens Act and its National Standards, including requirements to prepare a fishery management plan or an amendment to a plan for each stock of fish under its authority that requires conservation and management, Defendants failed to include four species of shad and river herring as “stocks in the [MSB] fishery” (thus avoiding required conservation and management requirements such as annual catch limits and habitat protections for those species). Second, in violation of NEPA, Defendants failed to prepare an environmental impact statement (“EIS”) for Amendment 15 to take a hard look at the associated environmental impacts of its decision whether to include river herring and shad in an FMP. Each of these actions and failures to act violates the statutory requirements of the Magnuson-Stevens Act and NEPA and is arbitrary, capricious, and an abuse of discretion, in violation of the APA. These actions and failures to act by the Defendants have harmed the Plaintiffs’ interest in healthy and sustainable

river herring and shad populations, and their interest in maintaining a healthy ocean ecosystem.

This harm will continue in the absence of action by this Court.

**APPLICABLE STATUTES, JURISDICTION, AND VENUE**

3. This action arises under the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. §§ 1801-1884; the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370; and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

4. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act, which provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861(d). The Magnuson-Stevens Act also provides that actions taken by the Secretary of Commerce under regulations implementing a fishery management plan (“FMP”) shall be subject to judicial review “if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855(f). Plaintiffs are filing this Complaint within thirty (30) days of Defendants’ final agency action on October 8, 2013. This Court, further, has jurisdiction over this action pursuant to the APA, which provides that final agency action for which there is no other adequate remedy in a court is subject to judicial review. 5 U.S.C. §§ 701-706.

5. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States,” and 28 U.S.C. § 1361, which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an

officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

6. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and may grant relief pursuant to the Magnuson-Stevens Act, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. §706.

7. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(b) & (e), where the Defendants are officers or employees of the United States and reside in this district, and a substantial part of the events and omissions which gave rise to this action occurred in this district.

#### **DESCRIPTION OF THE PARTIES**

8. Plaintiff Anglers Conservation Network (“ACN”) is a nonprofit corporation registered in the State of New Jersey composed of like-thinking, conservation-minded anglers (recreational fishermen) that “put the fish first.” ACN is based in Tinton Falls, New Jersey, and has a dedicated interest in protecting the East Coast’s ocean and river ecosystems. ACN’s members believe that our resources could be lost if fishermen are not good stewards of the waters they fish. ACN’s mission includes fostering stewardship of the waters fished by its members, promoting conservation ethics, and meeting the responsibilities of its members to future generations by conserving fish and the ecosystems on which they rely. Among other actions to further these goals, ACN seeks to increase personal involvement in regulatory activities affecting ocean fishing, facilitate the grassroots efforts of individuals and groups working at local and regional levels, help fishermen network with groups of other fishermen to participate in grass roots programs seeking to help conserve fishing resources, facilitate its members’ participation in regulatory matters through letter writing, petitions, and attending

hearings and meetings, and encourage its members to take kids fishing. Many of ACN's members fish, boat, study, and otherwise use and enjoy the Atlantic Ocean and river waters. The protection and restoration of river herring and shad, and the many predator species these fish support, is vital to the continued use and enjoyment of these waters by ACN members. Members of ACN include fishermen, outdoor writers, scientists, educators, photographers and others who are directly affected by NMFS's failure to address the at-sea catch of river herring and shad in the MSB fishery, and the failure to include river herring and shad in the MSB FMP. These failures by NMFS adversely affect ACN and its members because they deprive ACN and its members of conservation and management measures, including science-based catch limits and habitat and incidental catch protection, for river herring and shad sufficient to help ensure healthy and abundant populations of the fish that depend upon river herring and shad as prey. River herring and shad are also critical prey for other species that ACN members recognize and value as part of a healthy ocean ecosystem like striped bass, mammals, sea birds, and other animals. Unless the relief sought in this complaint is granted, ACN's interests in healthy and sustainable populations of river herring and shad will continue to be adversely affected and irreparably harmed by the Defendants' unlawful failure to perform their duties required by the Magnuson-Stevens Act, NEPA, and the APA.

9. Plaintiff Captain Paul Eidman owns and operates Reel Therapy, a fishing business based out of Tinton Falls, New Jersey, and is the founder of ACN. Captain Eidman is a fishing guide, and as part of his business he guides kayak-based eco-tours and other boat trips for people to see dolphins, osprey, bald eagle, wading birds like great blue herons, great and snowy egrets, turtles, and enjoy a healthy ocean environment. Captain Eidman has also worked with Rutgers University on "geo-tagging" river herring and shad to learn more about their life cycles, and has

worked with NOAA Fisheries on the Raritan River Fish Passage Initiative, intended to improve and restore access to habitat on that river for river herring and shad. Captain Eidman has spent over 15 years operating his fishing business and has been fishing in the waters off the New Jersey shore since age 14. He currently resides year round in Tinton Falls in order to actively pursue recreational fishing and his fishing business. Reel Therapy can be hired by persons wishing to fish recreationally for striped bass, bluefish, weak fish, summer flounder, and many other fish species. Striped bass, in particular, are known to thrive when they consume river herring and shad as prey. Captain Eidman takes his clients to many locations, including federal waters near northern New Jersey, to fish for many species other than striped bass that depend upon river herring and shad as prey, such as marine mammals and sea birds. Captain Eidman is concerned that inadequate management of the fisheries that catch Atlantic mackerel, Atlantic herring, squid and butterfish is resulting in the species caught with them like river herring and shad, to be caught at non-sustainable levels. In the mid 1970's Mr. Eidman recalls a number of waters that were literally teeming with river herring in the spring. He has been surveying these same waters for the past 5 years with his group (River Herring Rescue) and they have found that there are few or no river herring present. It is Mr. Eidman's view that there is no other explanation, such as decreased water quality or habitat loss, that could explain the decline in this river herring abundance other than the increased fishing in recent years by midwater trawl vessels. Captain Eidman also is concerned that intensely concentrated fishing for mackerel or Atlantic herring by large midwater pair or single trawl vessels can quickly and completely deplete an area of forage fish like river herring and shad, thereby "driving off" all species of fish seeking to feed on them, including the fish he seeks to catch recreationally or as part of his business. Unless the relief sought in this complaint is granted, Captain Eidman's interests in

healthy and sustainable populations of Atlantic herring, river herring, and shad will continue to be adversely affected and irreparably harmed by the Defendants' unlawful failure to perform their duties required by the Magnuson-Stevens Act, NEPA, and the APA.

10. Plaintiff Gateway Striper Club, Inc. ("GSC") is a fishing-based organization that was formed by local New York fisherman for the purpose of discussing, practicing, and promoting the sport of surf fishing. The club was organized in 1977, and maintains a general membership count of between 25 and 30 members. The current club mailing address is in Maspeth, Queens, New York, but meetings have typically been held in the Gateway National Recreation Area of Breezy Point, New York. Its members are surfcasters who fish primarily for striped bass, bluefish, and weakfish, and do most of their fishing in and around the waters of New York and New Jersey. Gateway Striper Club's club motto has long been "Conservation First," and the Club has always had a longstanding interest in protecting the Mid-Atlantic Region's ocean and river ecosystems. GSC's mission includes teaching the art and sport of surfcasting and promoting the conservation of the ocean resources upon which their sport relies, which includes river herring and shad, which are vital prey species for the fish they catch. Members of GSC have always taken active roles in local beach clean-ups, grass planting, and other environment-related activities in an effort to preserve the habitat and resource on which they depend. Among other actions to further these goals, GSC seeks to become more politically active and to help support more conservation-related issues that affect the striped bass, bluefish, and weakfish fisheries that they share in. GSC's members fish and otherwise use and enjoy the Mid-Atlantic's ocean and river waters. The protection and restoration of river herring and shad, and the many predator species that these fish support, including striped bass, bluefish, and weakfish, is vital to the continued use and enjoyment of these waters by GSC members.

Members of GSC are fishermen, and they are also, scuba divers, teachers, businessmen, photographers, and others who have an interest in seeing that our ocean species are protected as per the requirements of the Magnuson-Stevens Act. The members of GSC have been adversely affected by NMFS's failure to address the at-sea catch of river herring and shad in the MSB fishery by not including river herring and shad in the MSB FMP. Inclusion in the MSB FMP would result in conservation and management measures for river herring and shad, including science-based catch limits and habitat and bycatch protection, sufficient to help ensure healthy and abundant populations of not just river herring and shad, but also the fish that depend upon river herring and shad as prey. It is the fish that depend upon the river herring and shad as prey that GSC's members catch; i.e., striped bass, bluefish, and weak fish. At certain times of the season, river herring and shad can be a significant and critical part of the diets of these striped bass, bluefish, and weakfish. Unless the relief sought in this complaint is granted, GSC's interests in healthy and sustainable populations of river herring and shad will continue to be adversely affected and irreparably harmed by the Defendants' unlawful failure to perform their duties required by the Magnuson-Stevens Act, NEPA, and the APA.

11. Plaintiff Philip Lofgren is the assistant herring warden for the Town of Weymouth, Massachusetts. Mr. Lofgren has been a herring warden for 18 years. As a herring warden, his responsibilities include ensuring functional fish passage for adult and juvenile river herring in the Weymouth Herring Run. These duties last from early April when river herring adults move upstream through mid-December as juveniles move downstream on this run. On his own time, Mr. Lofgren also monitors and ensures safe passage on other local river herring runs in Cohasset, Scituate, Kingston, and Hanover, Massachusetts. Mr. Lofgren publishes his fish counts on his "Weymouth Herring Run" Facebook Page. While the Weymouth Herring Run is



in the New England region, and the MSB fishery is managed by the Mid-Atlantic Council, the MSB fishery overlaps into New England waters during certain months of the year when river herring are at sea and current scientific information does not indicate where in the ocean river herring from the Weymouth Herring Run travel. Mr. Lofgren strongly believes that the at-sea catch of river herring and shad is a primary factor affecting the weakness or strength in the number of fish returning to the Weymouth Herring Run and other East Coast rivers because the size of the runs he monitors vary greatly from year to year. In Mr. Lofgren's view as herring warden, no other factors in his local runs, such as decreased water quality or habitat loss, could explain the fluctuation in the returning number of fish, other than fishing by mackerel and herring midwater trawl vessels. Mr. Lofgren's work as herring warden demonstrates his use and enjoyment of the Weymouth Herring Run and the ocean waters offshore where river herring and shad spend the majority of their life cycles. The protection and restoration of river herring and shad, and the many predator species these fish support, is vital to the continued use and enjoyment of these waters by Mr. Lofgren. Mr. Lofgren is directly affected by NMFS's failure to address the at-sea catch of river herring and shad in the Atlantic mackerel and herring fisheries, and the failure to set science-based catch limits and measures to reduce bycatch and enhance habitat for river herring and shad, sufficient to help ensure healthy and abundant populations of these fish, along with the fish, mammals, sea birds, and other animals that depend upon river herring and shad as prey. Unless the relief sought in this complaint is granted, Mr. Lofgren's interests in healthy and sustainable populations of river herring, and shad will continue to be adversely affected and irreparably harmed by the Defendants' unlawful failure to perform their duties required by the Magnuson-Stevens Act, NEPA, and the APA.

12. Defendant Penny Pritzker is Secretary of the United States Department of Commerce (“Secretary”). She is sued in her official capacity as the chief officer of the Department charged with overseeing the proper administration and implementation of NEPA and the Magnuson-Stevens Act, including provisions of that Act that require implementation of ACLs, accountability measures, an end to overfishing, and minimization of bycatch.

13. Defendant National Oceanic and Atmospheric Administration (“NOAA”) is an agency of the United States Department of Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary of the Department of Commerce has delegated responsibility to ensure compliance with the Magnuson-Stevens Act to NOAA, which in turn has sub-delegated that responsibility to the National Marine Fisheries Service.

14. Defendant National Marine Fisheries Service (“NMFS” or “Fisheries Service”) is an agency of the United States Department of Commerce that has been delegated the responsibility to review Fishery Management Plans (“FMPs”) and amendments to those plans, and to issue implementing regulations. NMFS is the United States government agency with primary responsibility to ensure that the requirements of the Magnuson-Stevens Act are followed and enforced, including the requirements to end overfishing, to rebuild overfished populations of fish, and to minimize bycatch.

## **STATUTORY AND REGULATORY BACKGROUND**

### **MAGNUSON-STEVENSONS ACT**

15. The Magnuson-Stevens Act is designed to conserve and manage fish populations in the United States territorial waters and in the exclusive economic zone, which extends from the boundaries of state waters (3 miles from shore) to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. § 1801(b)(1). The Magnuson-Stevens Act

creates eight regional fishery management councils and mandates that each council “shall” prepare an FMP “for each fishery under its authority that requires conservation and management.” 16 U.S.C. §1852(h)(1).

16. All FMPs and regulations implementing FMPs are subject to final review and approval by NMFS to ensure that they comply with the requirements of the Magnuson-Stevens Act, as well as with other applicable laws and requirements. 16 U.S.C. § 1854(a), (b).

17. In enacting the Magnuson-Stevens Act, Congress found that:

Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls....

Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

16 U.S.C. § 1801(a)(2), (5).

18. The Act explicitly declares that it is the purpose of Congress in this Act “(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States...” 16 U.S.C. § 1801(b)(1).

19. The Magnuson-Stevens Act requires that each FMP must include a description of the fishery, including a description of the species of fish involved in the fishery. 16 U.S.C. § 1853(a)(2).

20. The Act defines a “fishery” as: “...(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics...” 16 U.S.C. § 1802(13).

21. A “stock of fish” is defined to include a species, subspecies, geographical grouping, or other category of fish capable of management as a unit. 16 U.S.C. § 1802(42).

22. The Magnuson-Stevens Act requires each Council, in accordance with the Act, to proceed as follows: “(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed).” 16 U.S.C. § 1852(h)(1).

23. The Magnuson-Stevens Act defines “conservation and management” as follows: “The term ‘conservation and management’ refers to all of the rules, regulations, conditions, methods, and other measures

(A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and

(B) which are designed to assure that —

- i. a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
- ii. irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and
- iii. there will be a multiplicity of options available with respect to future uses of these resources.”

16 U.S.C. § 1802(5).

24. If a Council fails to develop an FMP or amendment for a fishery that requires conservation and management within a reasonable period of time, the Secretary is required to prepare it herself in accordance with the Act, the National Standards, and any other applicable law. 16 U.S.C. § 1854(c).

25. According to the Magnuson-Stevens Act, FMPs are to “contain the conservation and management measures...necessary...to prevent overfishing and rebuild overfished stocks,

and to protect, restore, and promote the long-term health and stability of the fishery.” 16 U.S.C. § 1853(a)(1)(A).

26. The Magnuson-Stevens Act requires NMFS to identify overfished fish populations and manage those populations by attaining the optimum yield that will rebuild them to a healthy population level. 16 U.S.C. § 1802(33)(C) (optimum yield for an overfished fishery provides for rebuilding the population); 16 U.S.C. § 1853(a)(10) (FMPs must “specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished” and “contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery”); 16 U.S.C. § 1854(e) (requirements to identify overfished fisheries, to end overfishing immediately, and to rebuild overfished fisheries as soon as possible).

27. The Magnuson-Stevens Act defines the terms “‘overfishing’ and ‘overfished’ [to] mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. § 1802(34).

28. The Magnuson-Stevens Act requires that any fishery management plan prepared by a Council or the Secretary shall specify ACLs and measures to ensure accountability that prevent overfishing. 16 U.S.C. §1853(a)(15).

29. Regional councils must develop ACLs for each of their managed fisheries that may not exceed fishing level recommendations of their scientific and statistical committee or the peer review process. 16 U.S.C. §1852(h)(6).

30. The Magnuson-Stevens Act requires that FMPs, FMP amendments, and any regulations promulgated to implement such FMPs, must be consistent with the “national standards” for fishery conservation and management, and certain other requirements. 16 U.S.C. § 1851(a).

31. National Standard 1 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery . . . .” 16 U.S.C. § 1851(a)(1).

32. National Standard 2 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

33. National Standard 9 of the Magnuson-Stevens Act requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

34. National Standard 9 and section 303(a)(11) of the Magnuson-Stevens Act also require FMPs to assess the bycatch occurring in the fisheries to which they apply. Any FMP must

establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority —  
(A) minimize bycatch; and  
(B) minimize the mortality of bycatch which cannot be avoided[.]

16 U.S.C. § 1853(a)(11); 50 C.F.R. § 600.350(d).

35. The Magnuson-Stevens Act requires the Secretary (acting through NMFS) to establish guidelines for these National Standards. 16 U.S.C. § 1851(b). The guidelines reflect Secretarial interpretation of the National Standards. 50 C.F.R. § 600.305(a)(3).

36. NMFS revised its guidelines for National Standard 1 in 2009 in order to provide guidance for complying with the recently enacted ACL and Accountability Measure requirements in the reauthorized Magnuson-Stevens Act. Both of these requirements are

associated with its continuing National Standard 1 duty to prevent overfishing. *Final Rule*, 74 Fed. Reg. 3178 (Jan. 16, 2009).

37. National Standard 1 guidelines state that “[a]s a default, all stocks in an FMP are considered to be ‘in the fishery,’ unless they are identified as EC [Ecosystem Component] species (see Sec. 600.310(d)(5)) through an FMP amendment process.” 50 C.F.R. § 600.310(d)(1). An EC species must: (A) be a non-target species; (B) not be determined to be subject to overfishing, approaching overfished, or overfished; (C) not be likely to become subject to overfishing or overfished, according to the best available information, in the absence of conservation and management measures; and (D) not generally be retained for sale or personal use. *Id.* § 600.310(d)(5)(A)-(D).

38. Stocks in the fishery can include both “[t]arget” stocks, which are defined as stocks that fishers seek to catch for sale or personal use, and “non-target” stocks, which are fish caught incidentally during the pursuit of target stocks including regulatory discards. *Id.* § 600.310(d)(3); *id.* § 600.310(d)(4).

39. The Secretary has the responsibility to carry out any FMP or amendment approved or prepared by her in accordance with the Magnuson-Stevens Act. 16 U.S.C. § 1855(d). The Secretary may promulgate such regulations, pursuant to APA rulemaking procedures, as may be necessary to carry out this responsibility or to carry out any other provisions of the Magnuson-Stevens Act. *Id.*

### **NATIONAL ENVIRONMENTAL POLICY ACT**

40. Congress enacted the National Environmental Policy Act (“NEPA”) to “promote efforts which will prevent or eliminate damage to the environment . . . .” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to fully consider and disclose the

environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5. Agencies' evaluation of environmental consequences must be based on scientific information that is both "[a]ccurate" and of "high quality." 40 C.F.R. § 1500.1(b). In addition, federal agencies must notify the public of proposed projects and allow the public the chance to comment on the environmental impacts of their actions. *See id.* § 1506.6.

41. The cornerstone of NEPA is the EIS. An EIS is required for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. It must provide a "full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

42. In an EIS, the federal agency must identify the direct, indirect, and cumulative impacts of the proposed action, and consider alternative actions and their impacts. *See* 42 U.S.C. § 4332(2)(C).

43. Agencies must consider "[c]onnected actions," "[c]umulative actions," and "[s]imilar actions" together in one environmental impact statement. 40 C.F.R. § 1508.25(a)(1)-(3). Actions are "connected actions" if they: a. "[a]utomatically trigger other actions which may require environmental impact statements," b. "[c]annot or will not proceed unless other actions are taken previously or simultaneously;" or c. "[a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.* § 1508.25(a)(1)(i)-(iii).

44. The Council on Environmental Quality regulations clarify that "actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by



courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 C.F.R. § 1508.18.

45. The APA confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C. § 702. The APA provides that the reviewing court “shall...hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and shall “compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1).

46. The decision by Defendants to terminate development of Amendment 15 and its accompanying DEIS is an “agency action” subject to judicial review under the APA.

### **FACTUAL ALLEGATIONS**

#### **I. PLIGHT OF RIVER HERRING AND SHAD IN THE MID-ATLANTIC REGION**

47. River herring and shad<sup>1</sup> are important forage fish in the ocean ecosystem. As “anadromous” species that spawn in rivers but spend the majority of their life cycle at sea, they play a critical role in the biology of rivers, estuaries and ocean waters along the Atlantic seaboard as prey, or “forage,” for many species of fish, birds, and marine mammals. These species include striped bass, weakfish, bluefish, bluefin tuna, marlin, sharks, ospreys, loons, herons, bald eagles, egrets, kingfishers, harbor seals, porpoises, whales, and river otters. River herring and shad are particularly critical to striped bass because in the spring when river herring and shads swim up the coast and enter into freshwater rivers, striped bass follow, feeding on them en route to their own spawning grounds.

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<sup>1</sup> For the purposes of this Complaint, the term river herring includes two species of river herring: blueback herring (*Alosa aestivalis*) and alewife (*Alosa pseudoharengus*). The term shad includes two species of shad: American shad (*Alosa sapidissima*) and hickory shad (*Alosa mediocris*).

48. Once abundant throughout the region, river herring and shad populations have declined to historic lows in recent decades as a result of overfishing, habitat loss, and other factors. Coastwide commercial landings for river herring and shad have declined precipitously in the last fifty years, including a 97 percent decline in commercial landings of river herring from 1985 to 2009. Various population surveys spanning more recent time frames show similar declining trends for these species.

49. The most recent stock assessment for river herring found that 23 of 24 adequately assessed stocks are depleted, including 10 stocks that are listed as overfished in part due to ocean intercept fisheries.<sup>2</sup> The most recent stock assessment for shad found that stocks were at all-time lows and did not appear to be recovering to sustainable levels.<sup>3</sup>

50. Specifically in the Mid-Atlantic region, the best available science notes that “[r]ecent ... declines may have been triggered by overharvest in marine fisheries,” and finds that Mid-Atlantic populations are particularly in need of conservation.<sup>4</sup> The primary marine fishery in the Mid-Atlantic that catches river herring and shad is the mackerel fishery, which has been dominated beginning in the 1990s by industrial single and paired midwater trawl vessels. These vessels can catch millions of pounds of river herring and shad per year and could catch an entire river run of river herring or shad with one tow of their net.

51. These four species of fish – once emblematic of the Atlantic seaboard’s rich

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<sup>2</sup> See ASMFC *River Herring Stock Assessment Overview* (May 2012); see also ASMFC, *Stock Assessment Report No. 12-02, River Herring Benchmark Stock Assessment, Volume II* (May 2012), at 412.

<sup>3</sup> See ASMFC American Shad Stock Assessment Peer Review Panel. Stock Assessment Report No. 07-01 of the Atlantic States Marine Fisheries Commission, Terms of Reference & Advisory Report to the American Shad Stock Assessment Peer Review.

<sup>4</sup> Palkovacs, E.P., *et al.* 2013. Combining genetic and demographic information to prioritize conservation efforts for anadromous alewife and blueback herring. *Evolutionary Applications* ISSN 1752-4571.

fishing history – are now emblematic of the legacy of inadequate fishery management. Citing concerns over the “drastic decline in river herring populations throughout much of their range,” the Protected Species Division of NMFS designated river herring as a “*species of concern*” in 2006. 71 Fed. Reg. 61022 (Oct. 17, 2006).

52. NMFS recently considered listing river herring as a threatened species under the Endangered Species Act, however NMFS ultimately determined that because in its view the *entire* species would not be in danger of extinction, even if the Mid-Atlantic populations were lost forever, they should not be listed as a threatened species at this time. *See* 78 Fed. Reg. 48944 (August 12, 2013). River herring continue to be listed as a “*species of concern*” by NMFS.

53. Existing state and federal regulatory mechanisms are insufficient to conserve and manage these species in large part because state and federal management bodies with shared responsibilities for these migratory fish have played a game of “jurisdictional hot potato” that has avoided the coordinated management necessary to conserve and manage them.

54. When in state waters, river herring and shad (as anadromous fish) are managed by the Atlantic States Marine Fisheries Commission (“ASMFC”) under Interstate Fishery Management Plans (“IFMPs”). The ASMFC has concluded that river herring and shad are “depleted on a coast-wide basis” and implemented a moratorium on fishing within state waters for these species, with limited exceptions in some states where the sustainability of specific catch levels can be demonstrated. However, regulatory measures drafted by the ASMFC, and implemented through state laws, have proven insufficient in significant part because this interstate compact agency confines the reach of its management plans for river herring and shad to state waters only. When increasing evidence of river herring and shad bycatch in federal industrial midwater trawl fisheries was brought to the ASMFC’s attention in 2009, the ASMFC

did not take action itself through its IFMP, as required by the Atlantic Coastal Fisheries Act. Instead, the ASMFC made a general request that the Secretary of Commerce initiate emergency rulemaking to institute monitoring and management programs in these fisheries. *See* 27 May 2009 Letter from ASMFC to Secretary Locke. Defendants rejected that request.

55. Currently, when river herring and shad are in federal waters there are no catch limits, or other measures to reliably monitor catch, protect their ocean habitat, or reduce the incidental catch of river herring and shad in the MSB fishery.

## **II. THE ATLANTIC MACKEREL FISHERY**

56. The mackerel fishery is managed through the *Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan*. This plan, which manages Atlantic mackerel, longfin squid, *Illex* squid, and butterfish, was first developed and implemented by the Mid-Atlantic Fishery Management Council in 1983. Since then, these species have been managed using landings, and more recently catch, limits. Additional management measures are implemented through amendments to the MSB FMP.

57. The mackerel fishery is a directed fishery dominated by midwater trawl vessels that also target Atlantic herring (often at the same time) by dragging large nets behind their vessels. These vessels often operate in pairs as “pair trawls” so they can drag even larger nets behind two vessels. These nets have small mesh to capture mackerel and herring; because the mesh has narrow openings, these nets also catch other fish including river herring and shad.

58. River herring and shad are inextricably involved in this fishery. Although they are different species from Atlantic mackerel and Atlantic herring, river herring and shad are similar in size and schooling behavior, and are landed and sold in the fishery primarily as bait. River herring and shad are likely subject to overfishing, and are overfished, according to the best

available scientific information, although Defendants have declined to make such designations official.

59. Catch of river herring and shad in the mackerel fishery contributes significantly to their total known mortality. Analysis used by Defendants in Amendment 14 to the MSB FMP demonstrates:

...on average, about 960,000 pounds of river herrings and about 120,000 pounds of shads were caught in ocean intercept fisheries during [2006-2010]. Ocean-intercept fish often are juveniles, so, if you assume five fish per pound, these numbers translate into around 5 million river herrings and 600,000 shads being caught each year on average. The data suggest that the mackerel and longfin squid fisheries account for a portion of this total catch and that the mackerel fishery may have substantial encounters with river herrings in some years.

Amendment 14 FEIS at 104 of 526 (pdf), available at:  
<http://www.nero.noaa.gov/regs/2013/August/13smbamend14prfeis.pdf>.

60. The ASMFC stock assessment report found that additional management of river herring is required:

Due to the poor condition of many river herring stocks, management actions to reduce total mortality are needed. These could include reductions in directed commercial or recreational fishery mortalities, reductions in total incidental catch (retained and discarded fish), habitat restoration, and improvements in upriver and downstream fish passage.

ASFMC, Stock Assessment Report No. 12-02, *River Herring Benchmark Stock Assessment, Volume I, Section C, River Herring Stock Assessment Report for Peer Review*, at 58 (May 2012).

61. The best scientific information available demonstrates that the catch of overfished populations of river herring and shad stocks in the mackerel fishery is likely much more severe than currently estimated due to the inability of the existing monitoring program to provide reliable estimates of the amount of catch, including bycatch, actually occurring in the fishery.

62. Although it is generally accepted that the best way to monitor fisheries is to place federal monitors (“observers”) on fishing vessels, historically the percentage of mackerel trips

actually observed is very low (from 2006-2010 approximately 6.5 % of mackerel catch by weight were observed). Observer coverage in the mackerel fishery is determined by methods outlined in Defendants' Standardized Bycatch Reporting Methodology; however, because river herring and shad are not federally-managed species, Defendants do not include them in this analysis. Considerable uncertainty in catch of river herring and shad remains, especially in pair-trawling and in bottom-trawling due to large but infrequent ("episodic") catch events.

63. While some additional river herring and shad catch data exist based on fish that are brought back to the dock and observed there, vessels in the mackerel fishery dump significant unknown amounts of fish at sea for a number of reasons, including the vessel captain's view that the directed catch (e.g., mackerel) may be the wrong size or quality for the market, or because the catch contains bycatch of protected species. Moreover, there is no independent weighing or verification of estimated weights of the fish landed. The current system for monitoring catch in this fishery is based largely on unverified vessel reports of catch provided by vessel operators and contains other known gaps in the monitoring system that allow for, among other things, unobserved fishing trips and the ability to dump unobserved catch, even when a fishery observer is on board the vessel.

### **III. THE FLAHERTY DECISION**

64. In the only case law directly on point, this Court very recently held that NMFS violated the law by failing to consider adding river herring and shad to the Atlantic Herring FMP, consistent with requirements of the Magnuson-Stevens Act. *See Flaherty v. Bryson*, 850 F. Supp. 2d 38, 53-56 (D.D.C. Mar. 8, 2012) (noting that "the MSRA requires ACLs and AMs for *all* stocks in need of conservation and management") (emphasis in original).

65. The *Flaherty* Opinion outlined in detail the relevant statute-based analysis a

Council must undertake when determining whether a stock should be added to an FMP: 1) determine which stocks can be treated as a unit for purposes of conservation and management and thus should be considered a fishery and managed together in a plan; and 2) determine which of these stocks require conservation and management based on the facts and the best available science.

66. The *Flaherty* Opinion also explained that NMFS must review the Council decision for compliance with applicable law and standards, thus, “councils do not have unlimited and unreviewable discretion to determine the makeup of their fisheries,” rather, decisions must be based on the statutory criteria and reviewed by NMFS to ensure it complies with the law. *Flaherty* at 56.

67. On August 2, 2012, the *Flaherty* Court vacated and remanded Amendment 4 to the Atlantic herring FMP, and issued an Order requiring NMFS to remedy its violations consistent with Memorandum Opinion and Order by August 2, 2013.<sup>5</sup> Memorandum Order, Doc. 41.

68. In response to the *Flaherty* Court’s Order, the Regional Administrator for NMFS emphasized the importance of federal management in an August 31, 2013 Letter to the New England Council, recommending that the New England Council consider adding river herring and shad as stocks in the Atlantic herring fishery: “The consideration of federal management for river herring and shad is an opportunity to engage management partners and stakeholders to thoughtfully evaluate holistic management of these species.” See *Flaherty v. Bryson*, Civil No. 1:11-cv-00660-GK, Doc. 42-2.

69. The *Flaherty* Opinion provides the proper legal framework and analysis for any

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<sup>5</sup> This deadline subsequently was extended to November 8, 2013.

council to use when determining which species should be added as stocks in a fishery, and it is particularly useful here where it is undisputed that river herring and shad are in need of conservation and management in the Mid-Atlantic region, and many of the same vessels are catching river herring and shad in the mackerel fishery that catch them in New England's Atlantic herring fishery.

#### **IV. DEVELOPMENT OF AMENDMENTS 14 AND 15 TO THE MSB FMP**

70. In 2010, the Council initiated Amendment 14 to conserve and manage river herring and shad. One of the stated purposes of Amendment 14 was to "consider alternatives that would bring RH/S into the MSB plan as a managed stock in terms of Council management responsibilities, including annual catch limits and accountability measures, in order to improve overall RH/S management and conservation."

71. Amendment 14's DEIS included extensive analysis of the alternatives to add blueback herring, alewife, American shad, and hickory shad, as stocks in the MSB FMP, either individually or collectively.

72. In June 2012, the Council took final action on Amendment 14 and voted for a suite of measures designed to reduce and monitor incidental catch of river herring and shad in the mackerel and squid fisheries, including authority for a mortality cap for river herring and shad to be developed in the next specifications package. However, NMFS, at the last minute, advised the Council that Amendment 14's analysis was insufficient to add river herring and shad as a stock in the MSB fishery, and recommended initiation of a new amendment to fully analyze the issue.

73. Amendment 14's Final EIS states:

The Council initially considered adding none, one, or any combination of the RH/S species as "stocks" in the fishery. However, given the scope and complexity of the issue,



the Council chose instead to develop a separate amendment, Amendment 15 to the MSB FMP, that would fully analyze the necessity of managing these stocks under the Magnuson-Stevens Act, the interjurisdictional issues related to management of these stocks, as well as the required and discretionary FMP provisions that would apply to those stocks if added to the fishery.

Amendment 14 FEIS, at p. 111 of 526 (pdf) (underline added)

74. Although NMFS has not yet made a final decision on Amendment 14, it appears that many of the monitoring reforms in Amendment 14, intended to reduce incidental catch of river herring and shad in the mackerel fishery, will be disapproved. *See Proposed Rule*, 78 Fed. Reg. 53404 (Aug. 29, 2013).

75. The Council released a Draft Scoping Document for Amendment 15 in September 2012, and announced its intent to prepare an EIS to analyze the impacts of any proposed management measures in October. *Notice of Intent to Prepare an Environmental Impact Statement*, 77 Fed. Reg. 65867 (Oct. 31, 2012).

76. The Council also drafted an Action plan for Amendment 15 which contemplated a possible joint action with the ASMFC, the New England Fishery Management Council, and the Southeast Fishery Management Council. Relevant technical committees required by the Magnuson-Stevens Act were in place and a fishery management action team (FMAT) was formed to consider measures for direct river herring and shad management, comprised of staff from the ASMFC, NMFS's Northeast Regional Office (including NOAA General Counsel), the Northeast Fisheries Science Center, and the U.S. Fish and Wildlife Service.

77. In June of 2013, NMFS provided the Mid-Atlantic Fishery Management Council with a guidance memorandum outlining how to make the determination whether or not to include river herring and shad as stocks to be managed in the MSB fishery, and recommended reliance

on National Standard 7 guidelines, even though National Standard 7<sup>6</sup> applies to development of management measures for a stock of fish *after* it is added to an FMP. NMFS did not recommend reliance on the statutory process outlined in the Magnuson-Stevens Act and the *Flaherty* decision, nor did it recommend reliance on the statutory definition of “conservation and management.” *See* June 6, 2013 Letter from NMFS to MAFMC.

78. Based on Defendants’ flawed guidance, Mid-Atlantic Fishery Management Council Staff was asked to write a memorandum to consider whether “additional management” is required. *See* September 30, 2013 Memorandum from Jason Didden to MSB Committee/Council re River Herring/Shad Management Am 15 (“White Paper”).

79. The White Paper prepared by staff for the Mid-Atlantic Fishery Management Council strongly suggests that the decision regarding whether or not to include river herring and shad as managed stocks in the MSB FMP should be based on application of the National Standards and their (non-binding) guidelines. While the Standards are valuable for designing management measures, the advice to rely on them when deciding whether to add river herring and shad to the MSB FMP is inconsistent with the plain language of the Act and the legal analysis in the only court case directly on point. Of particular concern is its reliance on National Standard 7 and its guidelines because such reliance unlawfully introduces a “cost-benefit” analysis into the decision of which stocks comprise the “fishery” and should be added to a plan.

80. The relevant statutory provision, Section 302(h), requires that the decision whether to add a stock to the fishery be based on the need for conservation and management, and it does not include a cost-benefit analysis. The White Paper also largely ignores the statutory definition of “conservation and management.” This definition requires that the decision whether

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<sup>6</sup> National Standard 7 states: “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” 16 U.S.C. § 1851(a)(7).

to add a stock to an FMP should be based on the need for rebuilding, restoring, or maintaining the resource and the marine environment, assuring a food supply and recreational benefits, and avoiding long-term adverse effects on fishery resources and the marine environment. The Mid-Atlantic Council staff's White Paper was not peer reviewed prior to its use in decision-making.

**V. FINAL ACTION ON AMENDMENT 15 TO THE MSB FMP**

81. On October 8, 2013, the Council met to discuss Amendment 15 and its accompanying DEIS. Council staff noted that 37,000 comments were received in favor of adding river herring and shad to the MSB FMP, and only one (1) comment opposed it. In addition to numerous fishermen and other members of the public, the ASMFC also spoke in favor of moving forward with Amendment 15 and its accompanying DEIS.

82. At this meeting, as at the Committee meeting the previous day, NMFS Regional Administrator John Bullard advocated strongly against adding river herring and shad to the MSB FMP, based on a number of factors not relevant to the applicable legal standard, including "tradeoffs" due to the Agency's lack of resources to help develop the amendment and then implement it on the water. Administrator Bullard also provided contradictory information to the Mid-Atlantic Fishery Management Council at this meeting. For example, he suggested he could deliver funding for "real observer coverage" in the fishery, even though earlier at the same meeting he indicated that the Council should expect some of the Council's key Amendment 14 monitoring reforms it had developed, such as the requirement for 100 percent observer coverage for the dominant fishing vessels in the MSB fishery, would be disapproved.

83. Although the Council discussed a motion to move forward with the continued development of Amendment 15 and its accompanying DEIS at the meeting on October 8, 2013, the motion was ultimately defeated in a 9:10 vote.

84. At that October 8, 2013 meeting, NMFS Regional Administrator Bullard cast the deciding vote to terminate Amendment 15 and further development of its EIS.

85. After this vote at the October 8, 2013 meeting, the Mid-Atlantic Fishery Management Council went on to approve creation of an *ad hoc* interagency working group to study the issue of river herring and shad management for a number of years. As described by Council member Lee Anderson who made the motion, this working group would work “outside” requirements of the Magnuson-Stevens Act.

86. After stating that there is no dispute that these stocks are depleted and in need of conservation and management, Mr. Anderson’s original motion would have required the Council to wait five (5) years before it revisited its decision whether to add river herring and shad to the MSB FMP. In the meantime, Mr. Anderson’s stated intent was for the Council to wait for an abundance of new science to be created on river herring, shad, and their interactions with the MSB fishery, despite the fact that the Magnuson-Stevens Act requires decisions be based on the best available science and other species already in the MSB FMP are considered “data-poor” and managed using proxies, rather than highly refined science-based ACLs. The motion was ultimately changed to require the Council to revisit its decision in three (3) years.

87. Defendants’ failure to comply with statutory requirements of the Magnuson-Stevens Act and NEPA by terminating Amendment 15 and its accompanying EIS is unlawful. In addition, this failure is arbitrary, capricious, and an abuse of discretion, in violation of the APA. These actions and failures to act by the Defendants have harmed the Plaintiffs’ interest in healthy and sustainable river herring and shad populations, and their interest in maintaining a healthy ocean ecosystem. This harm will continue in the absence of action by this Court.

**CAUSES OF ACTION**

**COUNT I: DEFENDANTS' FAILURE TO INCLUDE RIVER HERRING AND SHAD IN THE MACKEREL SQUID AND BUTTERFISH FISHERY MANAGEMENT PLAN VIOLATES THE MAGNUSON-STEVENSON ACT AND THE APA**

88. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 87 of this Complaint in this First Cause of Action.

89. The Magnuson-Stevens Act requires that each FMP must include a description of the fishery, including a description of the species of fish involved in the fishery. 16 U.S.C. § 1853(a)(2). A “stock of fish” is defined to include a species, subspecies, geographical grouping, or other category of fish capable of management as a unit. 16 U.S.C. § 1802(42).

90. National Standard One guidelines confirm that both target and non-target stocks can be “in the fishery.” See 50 C.F.R. § 600.310(d).

91. The Magnuson-Stevens Act requires Councils, in accordance with the Act, to “(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed).” 16 U.S.C. § 1852(h)(1).

92. The Magnuson-Stevens Act’s definition of conservation and management requires that the decision whether to add a stock to an FMP be based on the need for rebuilding, restoring, or maintaining that resource and the marine environment, assuring a food supply and recreational benefits to the nation, and avoiding long-term adverse effects on fishery resources and the marine environment. 16 U.S.C. § 1802(5).

93. The Magnuson-Stevens Act requires NMFS to identify overfished fish populations and manage those populations by attaining the optimum yield that will rebuild them to a healthy population level. 16 U.S.C. § 1802(33)(C); 16 U.S.C. § 1854(e) (requirements to identify overfished fisheries, to end overfishing immediately, and to rebuild overfished fisheries as soon as possible).

94. The Magnuson-Stevens Act requires that FMPs manage those stocks in need of conservation and management consistent with the national standards and any other applicable law. 16 U.S.C. § 1853(a)(1).

95. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery...” 16 U.S.C. 1851(a)(1).

96. National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

97. The Magnuson-Stevens Act requires that any fishery management plan shall establish a mechanism for specifying annual catch limits at such a level that overfishing does not occur in the fishery, including measures to ensure accountability. 16 U.S.C. § 1853(a)(15).

98. The best available science shows that river herring and shad are involved in the mackerel fishery, as they are either caught and discarded at sea, or landed and sold along with Atlantic mackerel as part of that fishery.

99. The best available science also shows that river herring and shad are in need of conservation and management and are overfished.

100. The Secretary is required to disapprove an FMP or FMP amendment to the extent it is inconsistent with the National Standards or other applicable law. 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), 1854(a)(3).

101. NMFS's decision to terminate Amendment 15 and to not include river herring and shad as stocks in the mackerel fishery, along with NMFS's related failure to establish annual catch limits that prevent overfishing, rely on the best available science, identify and protect essential habitat, and to include measures to minimize bycatch and meet other requirements for conservation and management of river herring and shad, violated the Magnuson-Stevens Act and the APA.

102. These actions and failures to act by the Defendants are arbitrary and capricious and violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiffs for which they have no adequate remedy at law.

**COUNT II: DEFENDANTS' FAILURE TO PREPARE AN ENVIRONMENTAL  
IMPACT STATEMENT VIOLATES NEPA AND THE APA**

103. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 102 of the Complaint in this Second Cause of Action.

104. NEPA requires all federal agencies to prepare an environmental impact statement for all major federal actions significantly affecting the quality of the human environment. *See* 42 U.S.C. § 4332(2)(C). Failures to act can constitute actions that trigger NEPA. 40 C.F.R. § 1508.18.

105. In an EIS, the federal agency must identify the direct, indirect, and cumulative impacts of the proposed action, and consider alternative actions and their impacts. *See* 42 U.S.C. § 4332(C).

106. NEPA requires that an agency rigorously explore and objectively evaluate a reasonable range of alternatives and their associated environmental impacts on the environment. An EIS must provide a “full and fair discussion of significant environmental impacts and . . . inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 42 U.S.C. 4332(C); 40 C.F.R. § 1502.1; 40 C.F.R. § 1502.14.

107. Defendants’ action terminating further development of Amendment 15 to include river herring and shad as stocks in the mackerel, squid, butterfish fishery management plan is a major federal action that will significantly affect the quality of the human environment. Accordingly, Defendants were required to prepare an EIS for Amendment 15 and their termination decision.

108. The APA requires that courts “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that are “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

109. The Defendants violated NEPA, its implementing regulations, and the APA by failing to prepare an EIS for Amendment 15 and their decision to terminate the amendment, and by failing to consider a range of alternatives and associated environmental impacts, including the direct, indirect and cumulative impacts of their decision not to include river herring and shad as stocks in the Atlantic mackerel fishery.

110. These actions and failures to act by Defendants are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and are causing irreparable injury to the Plaintiffs, for which they have no adequate remedy at law.



**PRAYERS FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully request this Court to enter the following relief:

1. Declare that the Defendants have violated the Magnuson-Stevens Act and the APA as described above because of their failure to prepare an amendment to include river herring and shad as stocks in the mackerel, squid, butterfish fishery management plan, and that this action fails to meet related Magnuson-Stevens Act mandates including the duty to prevent overfishing, use the best available science, identify and protect essential fish habitat, and minimize bycatch to the extent practicable;
2. Declare that the Defendants have violated NEPA and the APA as described above by failing to prepare an EIS for their action terminating Amendment 15;
3. Remand Amendment 15 and its DEIS to Defendants and compel Defendants to reconsider their decision whether to add river herring and shad as stocks in the MSB FMP, applying the correct Magnuson-Stevens Act standards and requirements and preparing a complete EIS that is fully consistent with the requirements of NEPA, by January 1, 2015;
4. Maintain jurisdiction over this action until the Defendants are in full compliance with the Magnuson-Stevens Act, NEPA, the APA, and every order of this Court;
5. Award the Plaintiffs all their reasonable attorneys' fees and costs; and
6. Provide such additional and further relief as to which the Plaintiffs may justly be entitled.

DATED: November 7, 2013

Respectfully submitted,

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