IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA'S VINEYARD/DUKES COUNTY FISHERMEN'S ASSOCIATION, *et al.*, Plaintiffs, v. GARY LOCKE, in his official capacity as Secretary of the U.S. Department of Commerce, *et al.*, Defendants.	No . 1:10-cv-01580-RJL

ATLANTIC STATES MARINE FISHERIES COMMISSION DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT III OF THE FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

*Authorities chiefly replied upon by the ASMFC Defendants are marked with an asterisk.

Defendant Atlantic States Marine Fisheries Commission ("ASMFC" or "Commission") and the 30 individual defendants who are ASMFC Commissioners, collectively referred to herein as "ASMFC Defendants," respectfully submit this memorandum in support of their motion to dismiss the Third Claim for Relief ("Count III") in the First Amended Complaint for Injunctive and Declaratory Relief ("Amended Complaint") filed by Plaintiffs Martha's Vineyard/Dukes County Fisherman's Association and Michael S. Flaherty (collectively, "Plaintiffs").

The Commission is an interstate compact entity, created by the coastal States between Maine and Florida (including Pennsylvania), that develops management plans for fisheries in state waters. It is comprised of 45 individual members, representing three-member delegations from each of the 15 States.

The Amended Complaint names as defendants, in addition to the Secretary of Commerce and other federal officials and agencies concerned with fisheries (collectively, "Federal Defendants"), the ASMFC itself and 30 of its Commissioners. Only one count, Count III, asserts claims against these ASMFC Defendants.

As we explain below, Count III must be dismissed because Plaintiffs lack any cause of action against the ASMFC or its Commissioners. Congress has not created a right for private parties to sue the Commission or its individual Commissioners for judicial review of ASMFC fishery management decisions, and the member States have never agreed to such a procedure. Therefore, the claims against the Commission and the 30 Commissioners must be dismissed.

STATUTORY AND FACTUAL BACKGROUND

Responsibility for management of saltwater fisheries is divided between the federal government and the States, with States retaining authority for managing fisheries in "State" coastal waters (generally, waters within three miles of shore), and the federal government

exercising authority in "federal" waters from the seaward boundary of State coastal waters to the outer boundary of the Exclusive Economic Zone (EEZ), 200 miles from shore.[1] Although federal laws and regulations provide for cooperation between federal and State authorities, Congress has consistently recognized and confirmed States' sovereign authority over fisheries located in State coastal waters.[2]

The ASMFC. In 1942, Congress approved the ASMFC Compact, an agreement among the fifteen Atlantic coastal States, pursuant to Art. I, § 10, cl. 3, of the Constitution. Pub. L. No. 77-539, 56 Stat. 267 (1942), as amended by Pub. L. No. 81-721, 64 Stat. 467 (1950). *See generally New York v. Atlantic States Marine Fisheries Comm'n*, 609 F.3d 524, 528-29 (2d Cir. 2010) ("*ASMFC*") (describing Commission's background and authority); *Rhode Island Fishermen's Alliance v. R.I. Dep't of Envt'l Mgt*., 585 F.3d 42, 46 (1st Cir. 2009). The Compact's purpose is to "promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause." Art. I.[3]

---

[1] The Magnuson-Stevens Fishery Conservation and Management Act recognizes state regulatory authority in state coastal waters (generally, within three miles of a state's coastline). 16 U.S.C. §§ 1856(a)(1), (a)(2)(A). *See also* 16 U.S.C. § 5102(6) (definition of "exclusive economic zone" for purposes of Atlantic Coastal Fisheries Cooperative Management Act as not including state coastal waters). States' interest in protecting their fisheries is a traditional and important aspect of their police power. *E.g.*, *California v. FERC*, 495 U.S. 490, 497 (1990).

[2] *See*, *e.g*, 16 U.S.C. § 1856(a), § 5101(a)(4). *See also United States v. Alaska*, 521 U.S. 1, 5 (1997) (noting that Submerged Lands Act, 43 U.S.C. § 1311(a), "establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States"); 43 U.S.C. § 1301(e) (defining "natural resources" subject to state ownership and control to include "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life").

[3] The Compact, the Rules and Regulations adopted under it, and the ASMFC's Interstate Fishery Management Program Charter ("Charter") are available on the Commission's website, asmfc.org, under "About Us."

Each member State appoints three representatives to the Commission: its marine fisheries director; a State legislator; and a public member with fisheries experience who is appointed by its Governor. Art. III. Regulations adopted pursuant to Article V of the Compact provide that "[v]oting in any meeting of the Commission, or any of its sections, shall be by states, one vote per state, with the vote of each State being determined by the majority of that state's delegation of Commissioners who are present." Rules and Regulations, Art. III, Sec. 2.

While the Compact did not "limit the powers of any signatory state," Art. IX, the Commission was granted "power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation" of fisheries, and to recommend adoption of regulations by member States, Art. IV. By the parties' common consent, the Compact remains binding on a State until it formally withdraws. Art. XII.

The ASMFC promulgates fishery management plans prescribing management measures for interjurisdictional fisheries, which plans are then implemented by the respective member States, usually by adopting regulations pursuant to State law. *See Medeiros v. Vincent*, 431 F.3d 25, 27-28 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2968 (2006). The Commission generally acts through species-specific management boards whose membership includes the ASMFC Commissioners from each member State with an interest in the fishery. *See* Charter, § 4. Boards' decisions are reached through an extensive public process as set forth in the Charter, *see id*., and their decisions are appealable by a member State to the ASMFC's Interstate Fishery Management Policy Board, *id*., §§ 3(d)(9), 4(h).

The ASMFC today coordinates State management of more than 20 Atlantic coastal fisheries covering 24 species/species groups, in pursuit of its mission to build, restore and maintain stocks "to assure their continued availability in fishable abundance on a long-term

basis." Charter, § 6(a)(1). Among the species for which the Commission has promulgated management plans are the anadromous fish species at issue in this case, river herring and shad. *See* Complaint ¶ 15; Amendment 3 to the Interstate Fishery Management Plan for Shad and River Herring (approved Feb. 2010).[4]

ACFCMA. After the ASMFC had been active for five decades, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), Pub. L. No. 103-206 (1993), 16 U.S.C. §§ 5101-5108, to "support and encourage the development, implementation, and enforcement of effective interstate conservation and management" of "[c]oastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the federal Government[.]" *Id.* § 5101(a)(3), (b).

ACFCMA arose from concern that States' "[i]nconsistent implementation" of ASMFC plans had contributed to the continued decline of fish stocks. H. Rep. No. 103-202 at 6 (1993). *See ASMFC*, 609 F.3d at 528. Congress found that "[t]he failure of one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of the Atlantic coastal fisheries, and can discourage other States from fully implementing coastal fishery management plans." 16 U.S.C. § 5101(a)(5). At the same time, it reaffirmed that "responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the [ASMFC]," and declared it "the responsibility of the Federal Government to support such cooperative interstate management." *Id*. § 5101(a)(4).

The Act calls upon the Commission to "prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources," to "identify each state that is

[4] The Complaint makes frequent reference to ASMFC staff research and to the Commission's ongoing management activities concerning river herring and shad. *See* Complaint, ¶¶ 19, 25-29, 31, 37, 65, 66, 87, 89, 92, 117, 128, Exhibits 1, 3.

required to implement and enforce" each of its plans, and to "specify the requirements necessary for States to be in compliance with the plan." 16 U.S.C. § 5104(a)(1). It required the Commission, by December 20, 1994, to establish "standards and procedures to govern the preparation of coastal fishery management plans," in order to ensure that plans "promote conservation of fish stocks throughout their ranges," reflect "the best scientific information available," and provide an "opportunity for public participation[.]" *Id.* § 5104(a)(2).

ACFCMA provides that each of the States subject to a Commission management plan must "implement and enforce the measures of such plan within the timeframe established in the plan." 16 U.S.C. § 5104(b)(1), and the statute created a new, federal remedy to address State failures to discharge these responsibilities. *See ASMFC*, 609 F.3d at 529; *Medeiros*, 431 F.3d at 27-28. Should a member State fail to implement an essential element of an ASMFC plan, the Commission must notify the Secretary of Commerce, who must provide the State an opportunity to present its comments "directly to the Secretary," and then give "careful consideration" to these comments, 16 U.S.C. § 5106(b)(A). After considering the views of the Commission, the Secretary must then determine, independently, (1) whether the State has failed to implement specified management measures and (2) whether the measures, in fact, "are necessary for the conservation of the fishery in question." *Id.* § 5106(a). If the Secretary makes affirmative findings, he "shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." *Id.* § 5106(c). Such a moratorium is effected through federal regulations and federal agency enforcement. *Id.* § 5106(d), (e), (f).

ACFCMA also directs the Secretary of Commerce to develop a program to support the Commission's work, including "activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery

research, including biological and socioeconomic research; and fishery management planning," 16 U.S.C. § 5103(a), and authorizes the Secretary to provide financial support to the ASMFC and its member States. *Id*. § 5107.

ACFCMA provides for cooperation between federal and State fisheries managers, particularly with respect to fisheries located in both federal and State waters. *See, e.g*., 16 U.S.C. § 5103(a). It authorizes the Secretary, when there is no federal plan in place to govern fishing in the EEZ, to adopt regulations for such federal waters that are based upon the ASMFC plan for the species in question. *See id*. § 5103(b).

Federal Fisheries Management. Fishery management in federal waters is governed principally by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Pub. L. No. 94-265 (1976), *as amended*, 16 U.S.C. §§ 1801-1883. That statute establishes eight Regional Councils responsible for developing and recommending to the Secretary of Commerce fishery management plans governing each fishery within their respective geographic areas. *See id.* § 1853; *Nat'l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 125 (D.D.C. 2002). The Secretary, advised by the Councils and the National Marine Fisheries Service (NMFS), possesses final authority to approve federal fishery management plans under the Act. 16 U.S.C. § 1854. The Act requires that the federal plans be consistent with ten distinct "national standards." *Id*. § 1851(a). *See, e.g*., Complaint, ¶¶ 76, 79. Parties aggrieved by the Secretary's regulations have an express statutory right to judicial review, *id*. § 1855(f), conducted in accord with the review provisions of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 701, *et seq*. The Act, however, prescribes limits on such suits, including tight time limits on seeking judicial review of regulations and a prohibition on preliminary injunctive relief. 16 U.S.C. § 1855(f)(1).

Plaintiffs' Original Complaint. Plaintiffs filed this action on September 20, 2010, against the Federal Defendants, the ASMFC, and 15 of the ASMFC Commissioners. Their Complaint for Declaratory and Injunctive Relief alleged that the federal defendants had violated federal fisheries statutes and Administrative Procedure Act (APA) requirements, *see* 5 U.S.C. § 706, by, among other things, failing to adopt a federal management plan to protect river herring and shad. As to the ASMFC Defendants, Plaintiffs alleged violations of the ACFCMA, the ASMFC Compact and Charter, and the APA, all predicated on alleged failures to adopt adequate measures to protect river herring and shad.

Defendants filed motions to dismiss. In support of dismissal, the ASMFC maintained, among other things, that Plaintiffs lacked any cause of action against the ASMCF or its Commissioners. The 15 Commissioners named in the original complaint were the officials who also serve as the heads of their respective States' fisheries agencies. The original complaint was not entirely clear as to whether these officials were being sued in their capacity as ASMFC Commissioners, in their capacities as the heads of State administrative agencies, or both. Partly out of that concern, the 15 named commissioners filed a separate brief asserting sovereign immunity of their respective States. Both the Commission's submission and the Commissioners' pointed out – among the many reasons why suit against the Commissioners was not proper –the 15 commissioners represented only one-third of the ASMFC's voting membership, so that an order directed at these Commissioners could not redress Plaintiffs' claimed injuries, thereby defeating Article III standing.

The Amended Complaint. On December 13, 2010, Plaintiffs filed the Amended Complaint (Doc. 20). The Amended Complaint is substantively very similar to the original complaint, but now names as defendants 15 additional ASMFC commissioners. The newly sued

officials are the public representative members, each appointed to the Commission by his or her state's governor. (The 15 ASMFC who are not named as defendants are those that also serve as State legislators). Thus, the roster of defendants now includes, in addition to the Federal Defendants and the ASMFC, 30 of the 45 individual Commissioners.

Another significant difference between the original complaint and the Amended Complaint is that the latter makes clear that the named Commissioners are sued in their official capacities as ASMFC commissioners. See, *e.g.*, Amended Complaint Caption (naming George Lapointe "in his official capacity as a Commissioner of the A.S.M.F.C.")The original Complaint, by contrast, had stated that the Commissioners where sued in their capacities as heads of their respective state's marine resources agency. See, *e.g.*, Original Complaint, Caption (naming Mr. Lapointe "in his official capacity as Commissioner of the Maine Department of Marine Resources").[5]

In the Amended Complaint, plaintiff Martha's Vineyard/Duke's County Fishermen's Association alleges that its interests in "maintaining healthy and sustainable populations of river herring and shad" are

> directly and adversely affected by the Defendants' failure to regulate the catch of river herring and shad in ocean waters, rebuild depleted populations, and minimize bycatch of midwater trawl vessels fishing in federal waters.

Amended Complaint, ¶ 10. Plaintiff Michael S. Flaherty alleges that he formerly fished for river herring, but now cannot because Massachusetts has banned the river herring harvest, and that

[5] Plaintiffs' Amended Complaint disclaims any effort to sue the 15 ASMFC administrative commissioners named in the original complaint in their capacities as state marine resources agency officials. Accordingly, these 15 defendants, who are now named only in their official capacities as ASMFC commissioners, have not repeated the arguments made in support of their motion to dismiss filed on December 8, 2010 (Doc. 14.1). Should Plaintiffs revive claims or arguments relying upon these defendants' capacities as state officials, Defendants reserve the right to urge dismissal on appropriate grounds including state sovereign immunity.

"inadequate management of the fisheries that catch river herring and shad has reduced their numbers to a point that these species may never recover to sustainable levels." *Ibid*.

The Amended Complaint asserts that the Federal Defendants should have adopted a Magnuson-Stevens Act plan for river herring and shad or to provide adequate protections for these species in management plans for other species, *e.g.*, ¶¶ 85, 86, 96-119; that they failed to comply with ACFCMA provisions addressing fisheries for these species, *id*. ¶¶ 107-119; and that, while the ASMFC has adopted a management plan for river herring and shad, that plan is insufficient, *id*. ¶¶ 63-66, 86, 128. Although the Amended Complaint points to several factors that have contributed to the species' decline, it places central emphasis upon the practice of midwater trawling in federal waters for species such as Atlantic herring and mackerel, which results in river herring and shad being taken in large quantities as bycatch. *See*, *e.g.*, *id*. ¶¶ 33-36, 84, 87-88.

In Count I, Plaintiffs charge that the Federal Defendants, by failing to take adequate steps to protect river herring and shad – especially, to limit bycatch in fisheries prosecuted in federal waters – violated the Magnuson-Stevens Act, including certain of the National Standards and provisions authorizing emergency action to protect imperiled stocks. Complaint ¶¶ 96-112 (citing, *inter alia*, 16 U.S.C. §§ 1851(a), 1855(c)).

In Count II, Plaintiffs allege that the Federal Defendants violated ACFCMA and the APA by failing to enact regulations under 16 U.S.C. § 5103(b)(1) and by failing to adopt measures to support the ASMFC and State coastal fisheries programs. *See* Amended Complaint, ¶¶ 113-119. Specifically, Plaintiffs fault the Federal Defendants for "failing to provide increased monitoring and other measures to address bycatch of river herring in federal fisheries *as requested by the ASMFC*." *Id*. ¶ 117 (emphasis added). *See also id.* ¶ 92 (citing Exhibit 3 to the Complaint,

which includes a May 27, 2009, letter from the ASMFC's Executive Director to Secretary Locke requesting emergency action to support monitoring of bycatch of river herring), ¶ 115.

Only the final count runs against the ASMFC and the 30 Commissioner defendants. In Count III, Plaintiffs allege that the ASMFC's fishery management plan for river herring and shad is inadequate and violates provisions of the Compact, the Charter, ACFCMA, and the APA. They assert that the Commission violated ACFCMA by "fail[ing] to consult with the regional councils," Amended Complaint ¶ 130, and by making recommendations to the Secretary that were not compatible with the relevant ASMFC management plan and the Magnuson-Stevens Act's national standards, *id.* ¶ 131. Plaintiffs charge that the ASMFC's management plan, among other defects, fails to ensure the long-term biological health and productivity of river herring and shad and is not based on the best available scientific information. *See id.* ¶¶ 130-138.

For relief, Plaintiffs seek a variety of declaratory and injunctive relief against the ASMFC and the Commissioners, including:

- a declaration "that the ASMFC Defendants violated [ACFCMA,] the ASMFC Compact, and the APA by failing to fulfill their duties and obligations to protect and conserve river herring and shad throughout their range," Prayer for Relief, ¶ 2;
- a declaration that the ASMFC and the Commissioners violated ACFCMA and the APA by "failing to coordinate the management of river herring and shad in federal waters of the East Coast" with federal fisheries agencies, and "failing to enact regulations" to govern fishing for river herring and shad in the EEZ, Prayer for Relief, ¶ 4;

- a declaration "that the ASMFC Defendants violated [ACFCMA] and ASMFC Charter" in failing to draft a fishery management plan that "ensures the long term biological health of river herring and shad throughout their range by ending overfishing, rebuilding stocks, minimizing waste and taking adaptive management measures in response to changing circumstances using the best science available" and an order to the ASMFC Defendants "to draft" a management plan that produces these results, Prayer for Relief, ¶¶ 5, 9;
- a declaration that the ASMFC violated ACFCMA by failing to treat river herring and stock as a single stock and as a unit for purposes of conservation and management, Prayer for Relief, ¶ 6;
- an order that the ASMFC improve monitoring programs, and "obtain the data necessary to support time area/closures," Prayer for Relief, ¶ 10;
- an order that the ASMFC Defendants "take action to rebuild river herring and shad population in the manner and under the time period required by the Magnuson-Stevens Act," Prayer for Relief, ¶ 11.

They also ask the Court to maintain jurisdiction over the action "until the Defendants are in compliance" with the various statutes, and that it award Plaintiffs their costs and attorneys' fees. Prayer for Relief, ¶¶ 12, 13.

STANDARD OF REVIEW

In evaluating a motion under Fed. R. Civ. P. 12(b)(6), a district court accepts as true the factual allegations in the complaint, and evaluates whether the allegations, construed favorably to plaintiff, make out a legally sufficient claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Holmes-Ramsey v. Dist. of Columbia*, 2010 WL 4314295 (D.D.C. Nov. 2, 2010); *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994).

A plaintiff in federal court "bears the burden of establishing that the court has jurisdiction." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001).

ARGUMENT

PLAINTIFFS HAVE NO PRIVATE RIGHT OF ACTION AGAINST THE ASMFC OR ITS COMMISSIONERS

To state a claim sufficient to survive a Rule 12(b)(6) motion, a plaintiff must have a cause of action – a right to pursue relief against the defendant. *See*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (plaintiff must "identify a cause of action – a 'source of substantive law * * * [that] provides an avenue for relief") (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). "[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a 'cause of action' is employed specifically to determine who may judicially enforce the statutory rights or obligations." *Davis v. Passman*, 442 U.S. 228, 239 & n.18 (1979).

These requirements, as the Supreme Court has recently emphasized, derive from constitutional concerns that place responsibility for creating rights of action with Congress. "The

determination of who can seek a remedy has significant consequences for the reach of federal power. * * * * The decision to extend the cause of action is for Congress, not for [courts]." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). Furthermore, a still sharper degree of statutory clarity is required when the defendant is a State or the matters a plaintiff seeks to have a federal court decide affect State sovereignty and fall within States' historic police power jurisdiction. *See, e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

None of the federal statutes that Plaintiffs invoke expresses a congressional intent to allow private parties to obtain federal judicial review against the ASMFC or its Commissioners. This complete legislative silence is dispositive under the governing precedent, and is particularly compelling in light of the fact that authorizing suit against the ASMFC or its Commissioners would have far-reaching implications for State sovereignty. Plaintiffs lack any viable cause of action against the ASMFC or its Commissioners.

A. The Administrative Procedure Act is Inapplicable

The Complaint appears to rely upon the Administrative Procedure Act as the source of their right of action against the Commission. *See* Amended Complaint, ¶¶ 6, 8, 139-140. The APA, however, by its terms does not apply to the ASMFC. Its provisions on judicial review – like those on administrative rulemaking and adjudication – are confined to entities within the express definition of "agency," which instructs, in identical iterations, that "'agency' means each authority of the Government of the United States." 5 U.S.C. §§ 551(1), 701(b)(1).

The ASMFC, manifestly, is not an APA "agency." Therefore, the "right of review" the APA extends to authorizing parties aggrieved by "agency" action, *see* 5 U.S.C. § 702, is not

available to Plaintiffs here. In a recent decision squarely addressing this question, the Second Circuit, on a certified interlocutory appeal under 28 U.S.C. § 1292(b), held that the ASMFC is not an "agency" within the meaning of the APA, and that the Commission's fishery management decisions are therefore not subject to judicial review at the behest of private parties. *ASMFC*, 609 F.3d 524. In *ASMFC*, the district court had allowed the United Boatmen of New York, an association of recreational fishing businesses, to intervene in a suit brought by the State of New York against federal authorities challenging their regulation of summer flounder fishing in federal waters, an had allowed the intervenors the add the ASMFC as a defendant and assert claims that the Commission's management measures for summer flounder fishery in State waters violated the APA, the ASMFC Compact, the Charter, and ACFCMA. The Second Circuit ruled that the claims against the Commission had to be dismissed because the United Boatmen lacked a right of judicial review against the Commission. The court held that "the ASMFC is not a federal agency within the meaning of the APA," and that "the APA's definition of a federal agency does not fit the Commission." 609 F.3d at 532.

Noting that extending the APA to authorize review of an interstate compact entity "would upset 'the federal-state balance,'" 609 F.3d at 532 (quoting *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)), the Second Circuit explained that:

> The authority exercised by ASMFC under the Compact is not federal in nature. The signatory states have agreed to coordinate their regulatory activity in order to "promote the better utilization of the fisheries." ASMFC Compact, art. I. But, there is no indication that the contracting states understood themselves to be compacting to create a federal agency. * * * * We therefore decline to find that ASMFC is anything other than a state cooperative agreement, from which states are free to withdraw upon notice to the other member states. ASMFC Compact, art. XII.

ASMFC, 609 F.3d at 533.[6]

The Second Circuit's conclusion is plainly correct. An "explicit definition" in a statute, such as the APA's definition of "agency," is "controlling." *See, e.g., Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008). When a statute's text is plain, "the inquiry should end," and "'the sole function of the courts is to enforce it according to its terms,'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). "As a rule, [a] definition which declares what a term 'means'" – as does the APA definition of "agency" – "excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-393, n. 10 (1979)); *see ASMFC*, 609 F.3d at 532. An interstate compact agency, composed of State elected officials and administrators, and exercising police power delegated by the member States, is plainly not an "authority of the government of the United States." *See Old Town Trolley Tours of Washington, Inc. v. Washington Metropolitan Area Transit Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997) (Washington Metropolitan Area Transit Commission, a compact entity, is not an "an authority, not of the federal government, but of Virginia, Maryland, and the District of Columbia").[7]

Congress limited the APA to instrumentalities of the United States government. Courts are not free to expand a statute's scope beyond the legislated limits. While it is dispositive that the Commission does not fall within the plain language of the "agency" definition, such a

[6] The Second Circuit also ruled that the ASMFC could not be subjected to review under cases allowing APA-style review of entities that do not satisfy the APA's definition of agency. 609 F. 3d at 534. The court explained that the "quasi-federal agency" doctrine had only "scant support" in the case law, expressing "skeptic[ism]" about "the validity of this judge-created concept," and it concluded that "the 'quasi-federal' agency doctrine –whatever its merit – does not apply to the Commission." *Id*.

[7] *See Ritter v. Cecil County*, 33 F.3d 323, 327 (4th Cir. 1994) (APA does not apply to county housing authority that administered federal program because it is not an APA "agency"); *Day v. Shalala*, 23 F.3d 1052,1063-64 & n.12 (6th Cir. 1994) (state entity administering federal program not subject to APA because not within statutory definition of "agency").

construction would have to be rejected even if it were linguistically plausible, based on the myriad serious constitutional and practical difficulties it would raise. First, the Commission is an entity created by and composed of *States*, which enjoy a distinctive status in our federal system. Moreover, the actions the Plaintiffs ask the Court to overturn involve the coordinated exercise of State *police powers* over matters where State sovereignty has been repeatedly reaffirmed. Whether Congress could, consistently with the Constitution, impose detailed, APA-style procedural requirements, enforceable in federal court at the behest of private parties, on State administrative processes, doing so would at the least require an extraordinarily "clear statement." *See Gregory*, 501 U.S. at 470; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64-65 (1989). *See also McNally v. United States*, 483 U.S. 350, 360 (1987) (avoiding construction of federal statute that "involves the Federal Government in setting standards of disclosure and good government for local and state officials"). Jettisoning the explicit textual limitation of the "agency" definition would likewise subject the Commission to a panoply of federal APA requirements, rulemaking, adjudication, and public records, *see* 5 U.S.C. §§ 552-559, in addition to judicial review. There is no indication that Congress ever contemplated, let alone intended, such a result. *See United States* v. *Bass*, 404 U.S. 336, 349 (1971) (clear statement rule ensures that Congress "ha[d] in fact faced" federalism consequences and actually intended them).

The Commission's organization – including its membership of State legislators, State fishery conservation administrators, governor-appointed citizen representatives, with voting by State delegations, *see* Compact, Arts. III, VI – only emphasizes its distinctive State (and distinctively non-"federal") character.[8] That structure and the practice of state-by-state voting reflect a form of decisionmaking that differs markedly from federal "agencies." *See ASMFC*,

[8] As the Second Circuit noted, federal legislators "are constitutionally prohibited from serving as federal agency officials." *ASMFC*, 609 F.3d at 536 n.13 (citing U.S. Const., Art. I, § 6, cl. 2).

609 F.3d at 536 (noting that, insofar as it coordinates member States' police powers, "the Commission is more akin to a legislative body than to a federal agency").

For these same reasons, it would be highly inappropriate and impermissible to devise an *ad hoc* form of APA-like judicial review for entities that do not fit within the statutory definition of "agency." Although, as discussed in *ASMFC*, 609 F.3d at 533-36, some district court decisions have appeared to allow APA-style review suits to proceed against compact entities on a "quasi-federal agency" theory,[9] this theory is extremely dubious in all circumstances and (as the Second Circuit concluded) could not, in any event, support a private right of judicial review against the Commission.

First, as demonstrated above, the APA specifically defines "agency" as limited to authorities of the "Government of the United States," 5 U.S.C. §§ 551(1), 701(b)(1) – language that plainly does not include nonfederal entities such as interstate compact agencies. The "quasi-federal agency" doctrine's premise that a court may, for policy reasons, disregard a defined statutory term is contrary to the principle that "'[w]hen a statute includes an explicit definition, [a court] must follow that definition.'" *Burgess*, 553 U.S. at 130 (citation omitted).

Second, the "quasi-federal agency" approach contradicts clear and recent precedent from the Supreme Court that causes of action are created by Congress, not courts, and that their recognition requires clear evidence of congressional intent, *see, e.g.*, *Stoneridge Inv. Partners,* 552 U.S. at 164-65, and that, absent proof that Congress has provided such a right, courts may not do so, "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286.

---

[9] *See Seal & Co. v. WMATA*, 768 F. Supp. 1150 (E.D. Va. 1991); *Otis Elevator Co. v. WMATA*, 432 F. Supp. 1089 (D.D.C. 1976); *The Bootery, Inc. v. WMATA*, 326 F. Supp. 749 (D.D.C. 1971). *See also Elcon Enterprises v. WMATA*, 977 F.2d 1472, 1480 n. 2 (D.C. Cir. 1992) (discussing *The Bootery* and *Otis*).

Third, judicial recognition of a cause of action against interstate entities in the absence of an express congressional direction would violate basic principles of judicial federalism. *See Gregory*, 501 U.S. at 470 (discussing "clear statement" rule).[10]

B. Neither the Compact Nor Any Statute Creates a Private Right to Judicial Review of ASMFC Fishery Management Decisions

Nor does any other law create a private right of judicial review of ASMFC decisions. As the Second Circuit explained

> The district court properly rejected the idea that United Boatmen could avail themselves of an implied right of action. *Gutierrez*, 2008 WL 5000493, at *9. "[T]he Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor." *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir.2002). An implied private right of action exists only if Congress intended to create such a right. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In looking to the "text and structure," *id.* at 288, of the ASMFC Compact and the ACFCMA, we find no exception to the ordinary rule is warranted.

609 F.3d at 530 n.6.

This conclusion is plainly correct. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. As the Supreme Court explained,

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

[10] Although the absence of any private right to judicial review requires dismissal of Count III, allegations such as that the Commission "has the authority to take adaptive management actions in its [plan] to adapt to changing circumstances," Complaint, ¶ 127, and that the Commission's plan "fails to make adaptive management measures to provide for changing circumstances, *id*. ¶ 138, would fail to support APA review even as against a federal agency because they fail to identify any "legally required discrete act" the Commission is "required to perform." *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009) (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)), *cert. denied*, 130 S. Ct. 3331 (2010).

Id. at 286. *See Stoneridge Inv. Partners*, 552 U.S. at 164-66. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 33 (D.D.C. 2002) ("*Sandoval* makes very clear that courts cannot read into statutes a cause of action that has no basis in the statutory text.").

In order to create a private cause of action, a statute's "text must be phrased in terms of the persons benefited." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13 (1979)).[11] "[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy.*'" *Gonzaga*, 536 U.S. at 285 (quoting *Sandoval*, 532 U.S. at 286) (emphases added by *Gonzaga* Court). Moreover, "the burden is on [the plaintiff] to demonstrate that Congress intended to make a private remedy available to enforce" the relevant provision of federal law. *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992).

These rigorous standards serve important constitutional purposes: "The determination of who can seek a remedy has significant consequences for the reach of federal power," *Stoneridge*, 128 S.Ct. at 772-73, and the rule requiring clear congressional intent "'reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes,'" *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 509 n.9 (1990) (citation omitted).

None of the relevant sources of federal law provides the requisite affirmative evidence that Congress (or the compacting States) intended to create a private right of action against the ASMFC. No language in the ASMFC Compact, either as originally adopted in 1942, or as

[11] *Gonzaga* addressed whether provisions of a federal educational privacy statute were privately enforceable under 42 U.S.C. § 1983; as the Court noted, while inquiry is distinct from the implied right of action inquiry, "the inquiries overlap" in that "in either case we must first determine whether Congress *intended to create a federal right*." 536 U.S. at 283.

amended in 1950, even arguably confers on private parties a right of review of the ASMFC decisions. The Compact concerns the relationships among and mutual undertakings and obligations of member States; it confers no rights on private parties. Nor do the acts of Congress approving the Compact and its amendment, Pub. L. No. 77-539, 56 Stat. 267 (1942); Pub. L. No. 81-721, 64 Stat. 467 (1950), contain any suggestion that Congress intended to create a private right to obtain judicial review of Commission conservation plans. No judicial precedent from the Compact's 68-year history recognizes such a cause of action.

The ASMFC Compact and legislation stand in notable contrast to other compacts and authorizing statutes that expressly provide for judicial review of various compact entities' decisions.[12] The express rights of judicial review in these other compacts and approval statutes are often subject to carefully drawn, express limitations, such as specifications concerning the timing of review, scope of review, exhaustion of administrative remedies, and venue in particular federal district courts or courts of appeals (or State court). *See*, *e.g.*,WMATA Compact, Art. XIII (requiring that assignments of error first be placed before Commission by petition for reconsideration, § 4(g), and that petitions for review of WMATA decisions be filed only in the D.C. Circuit or the Fourth Circuit, within 60 days of denial of reconsideration, § 5); Columbia

[12] *See*, *e.g.*, Washington Metropolitan Area Transit Regulation Compact ("WMATA Compact"), Pub. L. No. 101–505, 104 Stat. 1300, 1311-12, Art. XIII, Sec. 5(a) (1990) ("Any party to a proceeding under this Act may obtain a review of the Commission's order" in Fourth or D.C. Circuits by filing a petition for review within 60 days); Tahoe Regional Planning Compact , Pub. L. No. 96-551, Art. VI(j)(3) (1980) ("Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency."); Northeast Dairy Compact, Sec. 16(c), S.J. Res. 28 (1995) (authorizing judicial review of rulings of compact commission). See also Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839f(e); Central Interstate Low-Level Radioactive Waste Compact, Compact, Art. IV, ¶ (*l*), *reprinted in* 2A NEB.REV.STAT. app. ¶ (BB) at 964 (1989) (approved by Pub. L. No. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986)); Delaware River Basin Compact, Pub. L. No. 87-328, § 3.8; Columbia River Gorge National Scenic Act, 16 U.S.C. § 544m(b)(4).

River Gorge National Scenic Act, 16 U.S.C. § 544m(b)(4), (6) (providing separately for "citizen suits" against compact commission, subject to 60-day notice requirement, and for actions for judicial review of compact commission's decisions, but providing that proper forum for these actions is State court in Washington or Oregon); Tahoe Compact, Art. VI(j)(3) (authorizing review of compact entity decision in federal or State court).

ACFCMA, enacted in 1993, likewise does not evidence a congressional intent to create a private right of action against the ASMFC. Most important, and in stark contrast to the Magnuson-Stevens Act, with its express (and carefully circumscribed) judicial review provision, 16 U.S.C. § 1855(f), there is no language in ACFCMA providing for review of ASMFC decisions. To the contrary, the statute's text and legislative history emphatically confirm the continuing primacy, discretion, and independence of the States, acting through the Commission. *See*, *e.g.*, *id*. § 5101(a). *See also ASMFC*, 609 F.3d at 537 ("The Commission is designed to address concerns that are traditionally within the province of the states").[13]

This feature of ACFCMA was central to the Commission's support for the 1993 legislation. At hearings on the legislation, the ASMFC Chairman, Philip G. Coates – also then Director of Massachusetts' Division of Marine Fisheries – expressed the Commission's support for the legislation and testified that: "This bill – in its entire theory and concept – relies on the good judgment of the states to determine what is necessary for Atlantic coastal fishery resources." Hearing Before the Subcommittee on Fisheries Management of the House

[13] *See also* H.R. Rep. No. 103-202 at 6 (1993) ("Under the legislation, the Commission and the States continue to be responsible for the management of coastal fisheries."); Sen. Rep. No. 103-201 at 7 (1993) (describing legislation as "allow[ing] states to develop coherent and compatible conservation goals for an Atlantic coastal fishery resource without interfering with a State's authority to manage fisheries within its jurisdiction").

Committee on Merchant Marine and Fisheries, H.R. 2134 at 59 (May 19, 1993).[14] The Commission had been promulgating fishery management plans since long before ACFCMA's enactment – indeed, ASMFC plans for 19 fisheries were in place at the time of the hearings on the proposes federal legislation, *see id*. at 54 – and a private right to judicial review would have been novel, consequential and controversial; yet nothing in ACFCMA's text or history hints at any such intent.

The mechanism ACFCMA adopted for cases in which States failed to implement fishery management plan components developed by the Commission – whereby the Secretary of Commerce may impose and enforce a federal moratorium based on his independent findings of noncompliance with the measures and of conservation need, *see* 16 U.S.C. § 5106 – also reflects Congress's concern for the Commission's independent status. That mechanism ensures that disputes over non-implementation of a plan would be resolved by the Secretary of Commerce (after hearing from the affected State and the Commission).[15] The moratorium mechanism indicates the care with which Congress addressed the sensitive federalism issues presented, and makes the absence of a statutory right for private parties to seek judicial review of ASMFC management decisions all the more prominent.

At the time the ACFCMA was enacted in 1993, the Magnuson-Stevens Act provision expressly subjecting federal fishery management plans promulgated by the U.S. Department of Commerce to APA review, *see* 16 U.S.C. § 1855(f), had been in place, and frequently invoked, for 17 years. That provision contains special limitations that recognize the special exigencies of

---

[14] Indeed, a bill introduced in the previous Congress failed due to "controversy" over a proposal "to give the Federal Government a substantial role" in managing fisheries in state jurisdictional waters. H.R. Rep. No. 103-202 at 6.

[15] A party aggrieved by the Secretary's imposition of a moratorium under ACFCMA could obtain APA review of that federal "agency action," *see* 5 U.S.C. §§ 702, 704.

fishery management – including a requirement that suit be filed within 30 days of publication of the Secretary of Commerce's action, and a provision barring preliminary relief, *see* 16 U.S.C. 1855(f)(1)(A). Congress, in enacting ACFCMA, did not choose to extend any such review provision to the Commission. Nor has it done so in any other statute.[16]

C. Plaintiffs Have No Right of Action Against the ASMFC Commissioner Defendants

In addition to the ASMFC itself, Plaintiffs have named as defendants 30 of its 45 Commissioners – specifically, the 15 "administrative commissioners" who also serve as fisheries agency administrators in their respective States and the 15 governor-appointed public representatives. See ASMFC Compact, Art. III (prescribing that commissioners from each member State include "the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources," a State legislator, and "a citizen who shall have knowledge of the interest in the marine fisheries problem").

For numerous reasons, the claims in Count III against these defendants, like those against the Commission itself, must be dismissed. First, just as they have no right of action against the Commission, Plaintiffs do not have a private right of action against the Commissioners. Despite some clarification, the precise theory behind Plaintiffs' naming of the 30 ASMFC Commissioners (and not naming the 15 remaining ones) remains unclear. Insofar as Count III seeks to subject these Commissioners to suit in their official capacities *as ASMFC Commissioners*, it sets forth what are in substance claims against the Commission. *See Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55 (1978) (noting that official

[16] The Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, likewise does not provide a cause of action, but only provides for a declaratory remedy when jurisdiction is proper. *See*, *e.g.*, *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 14 F.3d 726, 731 (2d Cir. 1993) ("The Declaratory Judgment Act does not * * * provide an independent cause of action.") (citations omitted); *Walpin v. Corp. for Nat. & Cmty. Serv.*, 718 F. Supp. 2d 18, 24 (D.D.C. 2010).

capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent"); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

For all the reasons the Commission is not an "agency" for purposes of the APA, *see supra*, pp. 13-18, so too State officials who serve as voting members of the Commission are not subject to APA review in connection with their actions as Commissioners. There is simply no plausible case to be made that the Commissioners themselves fall within the APA's carefully crafted definition of "agency." The APA allows suits to be brought against "against the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. But the appropriate officer must be an officer *of an APA* "*agency*," and what the APA authorizes review of is the action of "agencies" as defined in 5 U.S.C. § 701(b)(1). See *id*. §§ 702, 704, 706.

The naming of 30 of the 45 AMSFC Commissioners does not cure the absence of a cause of action, or transform either the Commission itself or its Commissioners into "authorit[ies] of the Government of the United States." Moreover, all the reasons that the Compact and ACFCMA do not confer a private right of action against the Commission itself, *see supra*, pp. 18-22, apply with at least equal force to suits against ASMFC Commissioners. The federalism concerns raised by subjecting State officials to judicial review in federal court at the behest of private citizens are obvious and acute, and would at a minimum require a clear statement of congressional intent. *ee*, *e.g*., *Gregory*, 501 U.S. at 470; *Bass*, 404 U.S. at 349. There is not even the slightest textual hint in support of this result in any of the relevant provisions.

The Commissioners are not proper defendants for other reasons. As the Second Circuit noted, the "actions of the ASMFC involve the coordinate exercise of the States' sovereign policy-making powers," and "[i]n this regard, the Commission is more akin to a legislative body than to a federal agency." *ASMFC*, 609 F.3d at 536. It would be unusual, and highly problematic, to

require members of a *deliberative voting body* to answer in court for the legality of their votes for or against alternative policy proposals. Decisions confirming the absolute immunity of legislators from suit for their official acts emphasize the need for legislators to make decisions without being summoned to court to answer for their votes:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130 that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Tenney v. Brandhove, 341 U.S. 367, 377 (1951). "This reasoning is equally applicable to federal, state, and regional legislators." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404-05 (1979); *id.* at 406 (compact commission members absolutely immune from damages liability for actions taken in a legislative capacity) . *See also Bogan v. Scott-Harris*, 523 U.S. 44, 44-45 (1998) ("Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities."); *Spallone v. United States*, 493 U.S. 265, 278 (1990) (noting that court had applied doctrine of absolute legislative immunity "to actions for both damages and injunctive relief") (citing *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980)); *Cathy's Tap v. Vill. of Mapleton*, 65 F.Supp. 2d 874, 895 (C.D. Ill. 1999) ("Supreme Court precedent [holds] that the absolute immunity afforded to legislators includes immunity for damages, declaratory, and injunctive relief") (citing cases).

A measure of the intrusive form of review Plaintiffs seek – problematic on both federalism and separation of powers grounds – is seen by noting Plaintiffs' requests that the

Court order the ASMFC Commissioners to draft a management plan that contains various elements, and that it maintain continuing jurisdiction over the Commission and Commissioners. Prayer for Relief, ¶¶ 9, 12. And a form of judicial review that involves brining into court so many officials would be troublingly burdensome even if there were some colorable statutory basis for it.[17]

Allowing suits against ASMFC Commissioners would impose significant new burdens for them, for the States that they serve, and for the Commission. *Cf. Supreme Court of Virginia,* 446 U.S. at 733 ("a private civil action, whether for an injunction or damages, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation"). One of the two groups of Commissioners Plaintiffs have sued here consists of State fisheries administrators who have extensive administrative responsibilities as agency heads or other high officials in their own States. Subjecting these officials to suit in their role as ASMFC Commissioners carries a real cost to their ability to carry out their dual State and Commission responsibilities.

Due respect for Commissioners' roles as members of interstate policymaking body, and their important functions in their own States, would, at a bare minimum, require a pointed and unambiguous indication from Congress before such officials could be sued in connection with their work for the interstate compact commission. *See Gregory*, 501 U.S. at 470. Here, it is

[17] We presume plaintiffs added 15 more Commissioners defendants in response to points made in the motions to dismiss that the 15 Commissioners originally named did not have enough votes to adopt any policy. It is noteworthy that Plaintiffs chose to stop short of naming all of the 45 Commissioners, and left out the 15 Commissioners who are state legislators, even though there is no suggestion that the legislator-Commissioners have any different role on the Commission than do others. But the result is an enormous number of defendants, who together constitute only two-thirds of the voting members of the policymaking body – a further illustration of the ungainliness and peculiarity of the form of review they seek.

plain that neither the compacting States nor Congress chose to impose such burdens on Commissioners, their respective States, or the Commission.

D. A Right of Federal Judicial Review Against an Interstate Compact Agency that Makes Policy on Matters of Core State Police Power Would, At a Minimum, Require Express Statutory Language

Although the absence of a cause of action is dispositive, basic precepts of federalism and State sovereign immunity would preclude recognition, in the absence of any manifestation of consent from the member States or any condition imposed by Congress on its approval of the Compact, of a private right of action authorizing review of an interstate agency's exercise of core police powers delegated to it by its member States.

It is not necessary here to decide whether Congress could provide for a right of judicial review in such circumstances. The Supreme Court rejected an interstate compact entity's claim of Eleventh Amendment immunity (over strong dissent) in *Hess v. Port Authority Trans-Hudson Co.*, 513 U.S. 30 (1994), but *Hess* involved a cause of action that by its terms unquestionably applied to the compact entity.[18] The federal statute at issue there—the Federal Employers Liability Act, 45 U.S.C. §§ 51, *et seq.* (FELA) – unambiguously provided injured workers a right of recovery against their employers for personal injuries suffered in the workplace. The *Hess* Court confronted an instance in which Congress had already expressed a clear intent that the federal statute apply to the States – and where the Supreme Court had expressly sustained its power to do so, in the face of State objections. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-207 (1991) (reaffirming *Parden v. Terminal Ry. of Alabama State*

[18] Dicta in a footnote in *Alabama v. North Carolina*, 130 S. Ct. 2295, 2323 n.5 (2010), described *Hess* as holding that "an entity created through a valid exercise of the Interstate Compact Clause is not entitled to immunity from suit under the Eleventh Amendment," but the holding of *Hess* is manifestly not so categorical. See 513 U.S. at 44-45. *See also ASMFC*, 609 F.3d at 533 n.7 (finding it unnecessary to decide the immunity question).

Docks Dept., 377 U.S. 184, 190-191 (1964)). The only question actually presented in *Hess* was whether the Eleventh Amendment nonetheless barred application of FELA to a railroad operated by an interstate compact agency – and even on that question, four Justices dissented. The federal courts in *Hess* were not asked to pronounce State policy decisions "arbitrary and capricious" or enforce procedural requirements on State decision-making; they were required only to determine whether a railroad employer was factually and legally responsible for particular injuries.

In contrast to *Hess*, here there is no "federal statutory right," *see* 513 U.S. at 52-53, that Congress intended to extend against State actors. Thus, the critical first step in the sovereign immunity inquiry—whether Congress has attempted to subject the State entity to suit, *see Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) ("Congress may * * * abrogate [Eleventh Amendment] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute"); *Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989) – has not occurred in the case of the ASMFC. Assuming that, notwithstanding *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Congress *could* subject States to searching APA-style federal court review of the "coordinated exercise" of their police powers, Congress surely has not done so by the requisite "unmistakable" statutory language. *See Lizzi v. Alexander*, 255 F.3d 128, 133 (4th Cir. 2001) (in post-*Hess* decision, holding that interstate compact agency possessed Eleventh Amendment immunity and that immunity had not been validly abrogated). As noted above, even a statute conditioning acceptance of congressional funds on compliance with federal requirements would be subject to a clear statement requirement, *see South Dakota v. Dole*, 483 U.S. 203, 206-208 (1987), and would still not be enforceable by private parties, absent an express congressional provision of such a right, *see*

Sandoval, 532 U.S. at 287-88. Here there is no clear statutory language – or any language – indicating such a legislative decision.

Unlike the tort suit against a state-controlled business enterprise in *Hess*, Plaintiffs' claims implicate powers at the very core of State sovereignty – they claim the right to initiate federal court review of the States' *policy* decisions under the Compact, and to invoke the powers of a federal court to set aside the Commission's decisions. Those decisions concern the "coordinated exercise" of the Atlantic States' police powers over their waters and fisheries – subjects that are, again, at the heart of State sovereignty. *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *California*, 495 U.S. at 497.[19]

Indeed, Congress recognized that sovereign immunity is not limited to suits seeking money damages: that is why the APA contains an express waiver, 5 U.S.C. § 702, allowing (only) suits for declaratory and injunctive relief to proceed against agencies of the United States.[20] Even a "federal" entity would be immune from the sort of lawsuit at issue here, absent an applicable statutory waiver of federal sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally

[19] It is not determinative that plaintiffs do not seek money damages. *Cory v. White*, 457 U.S. 85, 91 (1982) ("the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity"); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment").

[20] It is plain that Plaintiffs could not recover attorney fees from the ASMFC or its commissioners. Where applicable, the APA waives the United States' sovereign immunity only for relief "other than money damages," 5 U.S.C. § 702, and does not confer a right to attorneys fees. Even the federal government "'is shielded by sovereign immunity from attorneys fee liability 'except to the extent it has waived its immunity.'" *In re Turner*, 14 F.3d 637, 640 (D.C. Cir. 1994) (per curiam) *(quoting Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)). *See also* 28 U.S.C. § 2412 (authorizing fee awards in certain circumstances in litigation by or against "the United States or any agency or any official of the United States").

expressed in statutory text, and will not be implied.") (citations omitted) . A regime that nonetheless allowed courts to recognize a private right to judicial review of an interstate entity's decisions concerning core State police powers, without any affirmative indication from Congress, is not compatible with our system of constitutional federalism.

CONCLUSION

Plaintiffs' claims against the ASMFC Defendants should be dismissed.

Respectfully submitted,

/s/ Sean H. Donahue

Bruce V. Spiva, D.C. Bar No. 443754
bspiva@spivafirm.com
THE SPIVA LAW FIRM PLLC
1776 Massachusetts Ave., N.W. Ste. 600
Washington, D.C. 20036
Telephone: (202) 785-0601
Facsimile: (202) 785-0697
Counsel for ASMFC

Sean H. Donahue, D.C. Bar No. 450940
sean@donahuegoldberg.com
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W., Ste. 808
Washington, DC 20036
Telephone: (202) 277-7085
Facsimile : (202) 315-3582
Counsel for ASMFC Defendants

Paul J. Cucuzzella
pcucuzzella@oag.state.md.us
Assistant Attorney General
Office of the Attorney General
Maryland Department of Natural Resources
580 Taylor Ave., C-4
Annapolis, MD 21401
Tel: (410) 260-8352
Fax: (410) 260-8364
Counsel for Thomas O'Connell, Director, Fisheries Service, Maryland Department of Natural Resources and ASMFC Commissioner William Goldsborough

David H. Wrinn
david.wrinn@ct.gov
Assistant Attorney General
State of Connecticut
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. 860-808-5250
Counsel for David G. Simpson Director, Marine Fisheries Division State of Connecticut Dept. of Environmental Protection

David L. Ormond, Jr.
david.ormond@state.de.us
Deputy Attorney General
Civil Division, 3rd Floor
102 W. Water Street
Dover, DE 19904
Tel.: (302) 739-4636
Counsel for Patrick J. Emory, Director
Delaware Division of Fish and Wildlife

Harold G. Vielhauer
bud.vielhauer@myfwc.com
General Counsel
Florida Fish and Wildlife
Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399
Tel: (850) 487-1764
Counsel for Jessica McCawley
Biological Administrator
Florida Fish and Wildlife
Conservation Commission

Timothy J. Ritzka
tritzka@law.ga.gov
Senior Assistant Attorney General
40 Capital Square SW
Atlanta, GA 30334-1300
Tel: (404) 657-3976
Counsel for Spud Woodward
Director of Dept. of Natural Resources,
Coastal Resources
State of Georgia

William J. Schneider
Attorney General
Mark Randlett
mark.randlett@maine.gov
Assistant Attorney General
SHS 6
Augusta, ME 04333-0006
Tel: (207) 626-8588
Counsel for George Lapointe Commissioner of the
Maine Department of Marine Resources

Kenneth T. Cuccinelli, II
Attorney General of Virginia
Richard F. Neel, Jr. (DC Bar. No. 412618)
Deputy Attorney General
David C. Grandis
dgrandis@oag.state.va.us
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Tel: (804) 225-2741
Counsel for Steven G. Bowman
Commissioner, Virginia Marine Resources
Commission

Christine Baily
Christine.Baily@state.ma.us
Assistant Attorney General
Government Bureau
One Ashburton Place, 20th Floor
Boston, MA 02108
Tel: (617) 963-2617
Counsel for Paul Diodati
Director, Mass. Division of Marine Fisheries

Michael L. Delaney
Attorney General
Peter C.L. Roth
peter.roth@doj.nh.gov
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
Tel: (603) 271-3679
Counsel for Douglas Grout
Chief, Division of Marine Fisheries
State of New Hampshire Fish &
Game Department

Paula T. Dow
Attorney General
Ellen Barney Balint,
ellen.balint@dol.lps.state.nj.us
Deputy Attorney General R.J Hughes Justice
Complex
25 Market Street
P.O. Box 093
Trenton, NJ 08625
Tel: (609) 984-5065
Counsel for David Chanda
New Jersey Division of Fish
And Wildlife

Eric T. Schneiderman
Attorney General
Norman Spiegel
norman.spiegel@ag.ny.gov
Assistant Attorney General, Of Counsel
120 Broadway
New York, NY 10271
Tel: (212) 416-8454
Counsel for James Gilmore
Chief of the Bureau of Marine Resources
Division of Fish, Wildlife and Marine
Resources
New York State Department of
Environmental Conservation

Roy Cooper
Attorney General
J. Allen Jernigan
ajern@ncdoj.gov
Special Deputy Attorney General
North Carolina Department of Justice
Environmental Division
Post Office Box 629
Raleigh, NC 27602-0629
Tel: (919) 716-6600
Counsel for Dr. Louis B. Daniel
Director, North Carolina Division of Marine
Fisheries

Susan J. Forney
sforney@attorneygeneral.gov
Chief Deputy Attorney General
Office of Attorney General
Commonwealth of Pennsylvania
15th Fl., Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-3391
Counsel for John Arway
Executive Director
Pennsylvania Fish and Boat Commission

Gary Powers
gary.powers@dem.ri.gov
Deputy Chief Legal Counsel
State of Rhode Island
Department of Environmental Management
Office of Legal Services
235 Promenade Street
Providence, RI 02908-5767
Tel: 401-222-4700 ext.2308
Counsel for Robert Ballou
Acting Chief
Division of Fish and Wildlife of the
Rhode Island Department of
Environmental Management

Henry D. McMaster
Attorney General
J. Emory Smith, Jr.
agesmith@scag.gov
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Counsel for John E. Frampton
Director, South Carolina Department
Of Natural Resources

Dated: January 14, 2011