

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

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MICHAEL S. FLAHERTY  
5 Harkins Way  
Wareham, MA 02571

CAPTAIN ALAN A. HASTBACKA  
43 Chatfield Lane  
Chatham, MA 02633

OCEAN RIVER INSTITUTE  
12 Eliot Street  
Cambridge, MA 02138

Plaintiffs

v.

GARY LOCKE, in his official capacity as  
Secretary of the Department of Commerce,  
Room 5851  
14<sup>th</sup> Street and 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.

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CA No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs Michael S. Flaherty, Captain Alan A. Hastbacka, and the Ocean River Institute (collectively “Plaintiffs”), hereby challenge a Final Rule, promulgated on March 2, 2011 by Defendants Commerce Secretary Gary Locke, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (hereinafter “Defendants” or “NMFS” or “Fisheries Service”) entitled *Fisheries of the Northeastern United States; Atlantic Herring; Amendment 4*, 76 Fed. Reg. 11373 – 81 (Mar. 2, 2011). This Final Rule 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. The Final Rule, implementing management measures in Amendment 4 to the Atlantic Herring Fishery Management Plan (“FMP”), is unlawful for several reasons. In violation of the Magnuson-Stevens Act and its National Standards, including requirements to establish Annual Catch Limits (“ACLs”) and accountability measures for this fishery by 2011, this Final Rule: 1) fails to include shad and river herring as “stocks in the fishery” (thus avoiding required conservation and management requirements for those species); 2) fails to set a legally sufficient ACL for Atlantic herring by failing to include an acceptable biological catch (“ABC”) control rule (required to determine catch<sup>1</sup> limits for the fishery); and 3) fails to implement legally sufficient accountability measures for the fishery (necessary to prevent catch in excess of the ACL and prevent overfishing). In addition, in violation of NEPA, Defendants failed to complete an Environmental Impact Statement (EIS) analyzing a reasonable range of alternatives and associated impacts for the Final Rule. Each of these actions fails to comply with 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

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<sup>1</sup> “Catch” is the total quantity of fish, measured in weight or numbers of fish, taken in a fishery. 50 C.F.R. § 600.310 (f)(2)(iii). Catch includes fish that are retained for any purpose, as well as fish that are discarded. *Id.*

harmed the Plaintiffs' interest in healthy and sustainable Atlantic herring, 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. §§ 4321-4370f; 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). Defendants published the final rule implementing Amendment 4 on March 2, 2011 in the Federal Register. Plaintiffs are filing this Complaint within thirty (30) days of publication of the Final Rule. 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 Michael S. Flaherty is a recreational fisherman from Wareham, Massachusetts, a past Vice President of the Massachusetts Striped Bass Association, and is active in the Rhode Island Saltwater Anglers Association, and the fishing industry group CHOIR (Coalition for the Atlantic Herring Fishery’s Orderly Informed and Responsible Long Term Development). Mr. Flaherty has been a recreational fisherman for over 35 years. He presently fishes for striped bass - a species know to thrive when it consumes Atlantic herring, river herring, and shad as its prey. In the past, Mr. Flaherty fished for river herring to use as bait or consume as food. His local river herring run in Middleboro, Massachusetts, was formerly a well-managed run, with four wardens to ensure that fishermen only took what they were allowed – which at one time was up to 48 fish per week. Now, he is unable to fish for river herring because his local run is depleted and beginning in 2006 the Commonwealth of Massachusetts has banned the harvesting of river herring in the State. Mr. Flaherty is concerned that inadequate management

of the fisheries that catch river herring and shad has reduced those fish populations to a point that these species may never recover to sustainable levels. In that case, river herring and shad could no longer provide adequate amounts of forage to other species in the marine ecosystem, or be caught by local fishermen. Moreover, unless the relief sought in this complaint is granted, his 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 under the Magnuson-Stevens Act, NEPA, and the APA.

9. Plaintiff Captain Alan A. Hastbacka owns and operates GotStryper Charters, a fishing business based out of Chatham, Massachusetts, located on Cape Cod, and is active in CHOIR. Captain Hastbacka has spent summers in Chatham his entire life, and has been fishing in the waters surrounding Cape Cod since he was old enough to go on a boat. He currently resides year round in Chatham in order to actively pursue recreational fishing and his fishing business. GotStryper Charters can be hired by persons wishing to fish recreationally for striped bass, bluefish, tuna, and many other fish species. Captain Hastbacka takes his clients to many locations in the ocean waters near Cape Cod and the surrounding islands, including Monomoy, Nantucket, and Martha's Vineyard. Captain Hastbacka is concerned that inadequate management of the fisheries that catch Atlantic herring is allowing them, along with species caught with them like river herring and shad, to be caught at non-sustainable levels. This is especially true of local or "sub-" populations of Atlantic herring located closer to shore near Cape Cod and Nantucket. Captain Hastbacka also is concerned that intensely concentrated fishing for herring by one, two, or often more large midwater trawl vessels can quickly and completely deplete an area of herring, thereby driving off all species of fish seeking to feed on them, including the fish he seeks to catch as part of his business. For example, in 2010 his

business, like other charter boat operations fishing in areas east of Chatham, was experiencing one of the best fishing seasons in memory from May until mid-August. But then when a fleet of midwater trawl herring vessels arrived the area was quickly stripped of all herring, resulting in a premature end to his fishing season as the fish his business sought to catch also quickly disappeared. In fact, Defendants later determined that the catch in that area in 2010 significantly exceeded that allowed by regulation. *See* 76 Fed. Reg. 11376. Defendants admit that that the regulations contained in Amendment 4 are insufficient to stop this kind of exceedance from happening again. *Id.* Unless the relief sought in this complaint is granted, Captain Hastbacka'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 Ocean River Institute ("ORI") is a nonprofit organization with a longstanding interest in protecting New England's ocean and river ecosystems. "Ocean river" is a term used to describe the connectedness of the natural world, and the folly in attempting to separate ocean, river and watershed, which are inextricably linked as one. ORI's mission is to foster (through environmental stewardship, education, and citizen science) greater personal involvement in conservation, environmental monitoring, and protecting ecosystems by facilitating the grassroots efforts of individuals and groups working at local and regional levels. Among other actions to further these goals, ORI conducts activities promoting ecosystem-based ocean management and river science. ORI is an active member of the Herring Alliance, a coalition of non-profit conservation and environmental organizations working to reform New England's Atlantic herring fishery and protect river herring. Many of ORI's members fish, boat, study, swim and otherwise use and enjoy New England's ocean and river waters. The protection

and restoration of river herring, shad, and Atlantic herring, and the many predator species these fish support, is vital to the continued use and enjoyment of these waters by ORI members. Members of ORI include fishermen, 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 Atlantic herring fishery, and the failure to set science-based catch limits for Atlantic herring sufficient to help ensure healthy and abundant populations of fish, mammals, sea birds, and other animals that depend upon herring as prey. Unless the relief sought in this complaint is granted, these 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.

11. Defendant Gary Locke is Secretary of the United States Department of Commerce ("Secretary"). He is sued in his 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.

12. 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.

13. 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**

14. 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 requires them to prepare FMPs for all fisheries under their authority that require conservation and management. 16 U.S.C. §1852(h)(1).

15. 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).

16. 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).



17. 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).

18. 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).

19. 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).

20. The Magnuson-Stevens Act requires the Fisheries Service 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).

21. 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).

22. 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). When preparing FMPs, 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). The Atlantic Herring FMP must be in compliance with these provisions of the Magnuson-Stevens Act by 2011. *See e.g.*, 16 U.S.C. § 1853 (note).

23. The Magnuson-Stevens Act also requires that the relevant council specify the acceptable biological catch (“ABC”) in a fishery taking into consideration scientific uncertainty, upon recommendation from the council’s Science and Statistical Committee (“SSC”). 16 U.S.C. § 1852(h)(6), (g)(1)(B); *see also* 50 C.F.R. § 600.310(b)(2)(v)(B), (D) (“The SSC recommendation that is the most relevant to ACLs is ABC, as both ACL and ABC are levels of annual catch.”). The ABC must account for all retained catch and all discard mortality. 50 C.F.R. § 600.310(f)(2).

24. 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).

25. NMFS revised its guidelines for National Standard One in 2009 in order to provide guidance for complying with the new ACL and Accountability Measure requirements in the reauthorized Magnuson-Stevens Act. Both of these requirements are associated with its continuing National Standard One duty to prevent overfishing. *Final Rule*, 74 Fed. Reg. 3178 (Jan. 16, 2009).

26. In order to prevent overfishing, National Standard One guidelines require that an FMP contain the following items (among others) for all stocks “in the fishery:”: (1) an ABC

control rule; (2) mechanisms for specifying ACLs and possible sector –specific ACLs in relationship to the ABC; (3) accountability measures. 50 C.F.R. § 600.310(c).

27. National Standard One guidelines explain that “A control rule is a policy for establishing a limit or target fishing level that is based on the best available scientific information and is established by fishery managers in consultation with fisheries scientists. Control rules should be designed so that management actions become more conservative as biomass estimates, or other proxies, for a stock or stock complex decline and as science and management uncertainty increases.” 50 C.F.R. § 600.310(f)(1). The ABC Control Rule is the “specified approach to setting the ABC [allowable biological catch] for a stock or stock complex as a function of the scientific uncertainty in the estimate of the [overfishing limit] and any other scientific uncertainty.” *Id.* at § 600.310(f)(2)(iii).

28. In order to meet the Magnuson-Stevens Act’s ACL and Accountability Measure mandates, National Standard One guidelines require accountability measures for all stocks and stock complexes in the fishery, and require councils to develop management controls to prevent ACLs from being exceeded and to correct or mitigate an overage of the ACL (too much fish removed) “in as short a time as possible.” *See* 50 C.F.R. § 600.310(g).

29. National Standard Nine 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).

30. National Standard Nine 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).

31. 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).

32. 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).

33. National Standard One guidelines state that “as 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).

34. Stocks in the fishery can include both “target” 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).

35. The Secretary has the responsibility to carry out any FMP or amendment approved or prepared by him 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**

36. Congress enacted the National Environmental Policy Act (“NEPA”) to “promote efforts which will prevent or eliminate damages 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.

37. 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 decision makers 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.

38. 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).

39. 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).

40. 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 actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(2)(A).

41. NMFS’s issuance of its Final Rule implementing measures in Amendment 4 to the Atlantic Herring FMP and its associated Environmental Analysis (“EA”) is an “agency action” subject to judicial review under the APA.

## **FACTUAL ALLEGATIONS**

### **I. OVERVIEW OF THE ATLANTIC HERRING FISHERY**

42. The U.S. Atlantic herring fishery is managed through the *Fishery Management Plan for Atlantic Herring*. The first plan was developed by the New England Fishery Management Council (“NEFMC”) and became effective on January 10, 2001. Since then, the Atlantic herring fishery has been managed using a landings limit in each of four management areas, developed through the fishery specification process, and based on an estimate of allowable biological catch for the fishery. Additional management measures have been implemented through amendments to the FMP for Atlantic Herring.

43. The Atlantic herring fishery is a directed fishery dominated by midwater trawl vessels that target herring 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 Atlantic herring; because the mesh has narrow openings, these nets also catch other fish including haddock, mackerel, shad and river herring. Other gear types in the fishery include purse seines and a small amount of fixed gear, such as weirs and stop seines.

44. River herring and shad are important forage fish in the ocean ecosystem. They play a critical role in the biology of rivers, estuaries and ocean waters along the Atlantic seaboard providing much needed forage food to many species of birds, marine mammals and fish. These species include ospreys, loons, herons, bald eagles, egrets, kingfishers, harbor seals, porpoises, river otters, striped bass, weakfish, perch, bluefin tuna, and sharks.

45. Severely depleted stocks of shad and river herring remain unmanaged in federal waters although they are caught and kept in significant amounts in the Atlantic herring fishery. These stocks – once emblematic of the Atlantic seaboard’s rich fishing history – are now emblematic of the legacy of inadequate fishery management. Citing concerns over “drastic declines 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); *see also* [http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring\\_detailed.pdf](http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring_detailed.pdf).

46. River herring and shad are inextricably involved in the Atlantic herring fishery. River herring (a different species from Atlantic herring but similar in size and schooling behavior) and shad are landed and sold in the Atlantic herring fishery primarily as lobster bait. Thus, river herring and shad are not suitable for classification as an EC species because they are retained for sale or personal use, and are likely subject to overfishing and overfished according to the best available scientific information.

47. Catch of river herring in the New England Atlantic herring fishery alone equals or exceeds all directed river herring landings in any other fishery, and contributes significantly to the total known river herring fishing mortality. The best scientific information available demonstrates that the catch of overfished and depleted populations of river herring, shad, and other fish stocks in the herring midwater trawl 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.

48. 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 fishing trips actually observed is very low. Since the midwater trawl fishery emerged in New England in the 1990’s, observer coverage has ranged from less than one percent of the total annual fishing trips taken in many years to roughly twenty percent in a handful of years. Although this percentage is believed to have been slightly higher in the past year, coverage has historically been low and remains insufficient. NMFS has never provided observer coverage levels sufficient to derive accurate catch and bycatch estimates (i.e., to expand or “extrapolate” sample data across the fishery). The limited observer data indicate that single tows (hauls) of the net by midwater trawl vessels in the Atlantic herring fishery can take hundreds of thousands of river herring – more than an entire healthy river herring run of fish.

49. Presently, the only reasonably reliable data on catch that is counted when the government determines whether or not an ACL has been met is from those fish that make it to the dock. Vessels in the Atlantic herring fishery, however, dump unknown amounts of fish (though at a minimum hundreds of thousands of pounds) at sea, without ever actually bringing it aboard, simply because the fish are deemed 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, even though there is vertical integration of some sectors of the fishery. The current system for monitoring catch in this fishery, which is the one that will be continued under Amendment 4, 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.

## **II. DEVELOPMENT OF AMENDMENT 4**

50. On May 8, 2008, NMFS and the New England Fishery Management Council announced their intent to prepare an amendment to the FMP for Atlantic Herring and to prepare an EIS to analyze the impacts of any proposed management measures and initiate the public process to determine the scope of alternatives to be addressed. *Notice of Intent*, 73 Fed. Reg. 26082-84 (May 8, 2008). The purpose of Amendment 4 was to bring the FMP into compliance with new ACL and accountability measure requirements of the Magnuson-Stevens Act by a 2011 statutory deadline, improve the monitoring of catch in the Atlantic herring fishery, reduce bycatch and incidental catch, and manage the fishery at long-term sustainable levels. *Id.*

51. Late in 2009, NMFS notified the public that in order to meet the 2011 deadline, the original Amendment 4 would be split into two separate actions and only the ACL and accountability measure actions would move forward as Amendment 4. At this time, NMFS stated that “[b]ecause the establishment of ACLs and [accountability measures] is primarily a process-oriented change, the Council now intends to prepare an EA [rather than an EIS] to analyze the impacts of these proposed measures.” *Supplemental Notice of Intent*, 74 Fed. Reg. 68576-77 (Dec. 28, 2009).

52. Under this new approach, all of the other proposed measures, alternatives, and analysis formerly included in Amendment 4, including the measures necessary to improve the catch monitoring program, measures to address river herring catch in the fishery, and reform of the criteria for midwater trawl access to groundfish closed areas, would now be considered in the EIS for Amendment 5. *Id.* Amendment 5 remains a work in progress and its date of completion is unknown.

53. NMFS also decided to separate from this action its determination of the actual catch amounts that would be allowed as a result of Amendment 4, and used this decision as additional justification for only completing an EA instead of an EIS. *See, e.g.*, 76 Fed. Reg. 11377.

54. The final Amendment 4 and its EA were prepared by the New England Fishery Management Council (“NEFMC”) and completed on August 12, 2010. *Notice of Availability*, 75 Fed. Reg. 48920 (Aug. 12, 2010).

55. Despite the fact that Amendment 4 determines that thousands of tons of Atlantic herring and other forage fish will be removed from the ocean ecosystem annually, the EA provides little or no analysis of the environmental impacts, including the cumulative impacts, of such action on the larger marine ecosystem. *See Final Amendment 4 to the FMP for Atlantic Herring Including the Environmental Assessment (EA), Regulatory Impact Review (RIR), and Initial Regulatory Flexibility Analysis (IRFA), available at <http://www.nefmc.org/herring/index.html>.*

56. Further, the EA considers no alternatives or analysis of the impacts of its decision to restrict the number of “stocks in the fishery” to only Atlantic herring, and to exclude other species such as river herring and shad, despite the fact that hundreds of thousands of pounds of

river herring, shad, and other species are caught in this fishery. *Id.* at 20, 39-40, 139, 146.

57. The EA also provides an insufficient range of alternatives to its decision to set an “interim” ABC Control Rule, includes scant bycatch analysis, and analyzes not a single alternative that would minimize bycatch in the fishery. *Id.* at § 5.2.1.5 (Tables 33-45).

58. Finally, the EA includes an inadequate range of alternative accountability measures, including those necessary to provide the monitoring and reporting necessary to implement ACLs as required by the Magnuson-Stevens Act. *Id.* at 28-32, 35-38.

59. On October 18, 2010 NMFS published its Proposed Rule implementing measures in Amendment 4. *Proposed Rule*, 75 Fed. Reg. 63791-97 (Oct. 18, 2010).

60. On March 2, 2011 NMFS published its *Final Rule* implementing approved measures in “Amendment 4” to the Atlantic Herring FMP in the Federal Register. *Final Rule*, 76 Fed. Reg. 11373 (Mar. 2, 2011). These measures are effective April 1, 2011. *Id.*

### **III. AMENDMENT 4 AND THE FINAL RULE**

61. The Final Rule designates Atlantic herring as the only “stock in the fishery.” 76 Fed. Reg. 11373. NMFS failed to designate shad and River herring as stocks in the Atlantic herring fishery in Amendment 4. *Id.*

62. The Final Rule also fails to establish a legally sufficient ABC Control Rule based on the best scientific information available, in violation of the Magnuson-Stevens Act’s ACL requirements and National Standard Two. Instead, Amendment 4 implements an interim control rule that fails to consider the risk of overfishing and that determines the acceptable biological catch based on no more than recent catch estimates. Rather than taking scientific uncertainty into consideration as outlined in the National Standard One guidelines, the Final Rule concludes that an ABC Control rule cannot be derived until a new stock assessment for Atlantic herring is

conducted. *See* 76 Fed. Reg. at 11373, 375.

63. The use of recent landings history to arrive at an ABC recommendation is not, as required, a “specified approach to setting the ABC for [Atlantic herring] as a function of the scientific uncertainty in the estimate of OFL [“overfishing limit”] and any other scientific uncertainty.” 50 C.F.R. § 600.310(f)(2)(iii), (f)(4).

64. The Final Rule identifies three accountability measures that seek to prevent catch limits from being exceeded and hold the fishery accountable in the event they are exceeded. 76 Fed. Reg. 11375. Each of these measures is fundamentally flawed.

65. The Final Rule designates two existing management measures as accountability measures for the Atlantic herring fishery in Amendment 4: a haddock incidental catch cap and a management area closure approach. 76 Fed. Reg. at 11375.

66. The haddock incidental catch cap is not an accountability measure for Atlantic herring – it is an accountability measure for haddock managed in the Northeast Multispecies FMP. Without a link to the ACL for Atlantic herring, the haddock incidental catch cap is irrelevant as an accountability measure for Atlantic herring.

67. The existing management area closure alternative (designed to close the fishery when 95 percent of the allowable catch is caught) has already proven to be ineffective because it allows significant overages to occur in the fishery. A recent example of this phenomenon occurred in the summer of 2010, when a substantial overage occurred in herring management area 1B, which resulted in significant economic harm to other fishermen in the area. *See* 76 Fed. Reg. 11376.

68. There can be no meaningful accountability in the fishery until the actual catch, including bycatch, is reliably monitored in a timely basis that will prevent an ACL from being

exceeded. Amendment 4 originally recognized the need to improve the existing monitoring program in order to implement the Magnuson-Stevens Act's ACL and Accountability Measure requirements, taking up issues related to observer coverage levels, dumping of unobserved catch, and many other monitoring and reporting issues. However, NMFS elected to split these measures off from Amendment 4 into a separate Amendment 5. *Supplemental Notice of Intent*, 74 Fed. Reg. 68576-77.

69. The third accountability measure attempts to establish a method to account for ACL overages in the herring fishery. *See* 76 Fed. Reg. at 11375. However, this measure is fundamentally flawed because it delays corrective action for as much as two years. NMFS guidance requires that overages (catch exceeding the stock-wide ACL or a sub-ACL) be deducted in "as short a time as possible," 50 C.F.R. § 600.310(g)(1), which is necessary to ensure those responsible for an overage are held accountable. If an ACL is exceeded, accountability measures must be triggered and implemented as soon as possible to correct the operational issue that caused the ACL overage (i.e., to prevent it from occurring again), as well as any biological consequences to the stock or stock complex resulting from the overage when it is known. 50 C.F.R. § 600.310(g)(3).

### **CAUSES OF ACTION**

#### **COUNT I: AMENDMENT 4 FAILS TO INCLUDE CATCH LIMITS FOR RIVER HERRING AND SHAD IN VIOLATION OF THE MAGNUSON-STEVENSONS ACT ANNUAL CATCH LIMIT PROVISIONS AND NATIONAL STANDARDS**

70. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 of the Complaint in this First Cause of Action.

71. 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 by the year 2011. 16 U.S.C. § 1853(a)(15), (a)(note).

72. 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).

73. 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).

74. 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).

75. 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).

76. National Standard Nine 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).

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

78. The best available science shows that river herring and shad are overfished and that they are involved in the Atlantic herring fishery, as they are caught, landed, and sold along with Atlantic herring as part of that fishery.

79. Amendment 4 and its Final Rule fails to include the overfished river herring and shad as stocks in the Atlantic herring fishery and fails to set ACLs, accountability measures, measures to reduce their bycatch, and other required conservation and management measures for river herring and shad.

80. 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).

81. By approving the Final Rule implementing Amendment 4, Defendants violated the Magnuson-Stevens Act and the APA.

82. 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: AMENDMENT 4'S ANNUAL CATCH LIMITS FOR ATLANTIC HERRING VIOLATE THE MAGNUSON-STEVENSONS ACT ANNUAL CATCH LIMIT REQUIREMENTS AND FAIL TO RELY UPON THE BEST AVAILABLE SCIENCE**

83. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 82 of the Complaint in this Second Cause of Action.

84. 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 by the year 2011. 16 U.S.C. § 1853(a)(note), (a)(15).

85. 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).

86. 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).

87. The National Standard One guidelines confirm that FMPs must include an ABC control rule for all stocks in a fishery in order to establish science-based ACLs and accountability measures. 50 C.F.R. § 600.310(c)(3).

88. Amendment 4 does not meet the requirements of the Magnuson-Stevens Act and the National Standards because it implements only an interim ABC control rule for Atlantic herring that is based on no more than an estimate of recent catch levels in the fishery, and is not based on the best scientific information available.

89. As a result, Amendment 4’s ACLs for the Atlantic herring fishery are not based on the best available science, will not prevent overfishing, and otherwise fail to meet the Magnuson-Stevens Act’s ACL requirements.

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

91. By approving Amendment 4, despite its inconsistencies with applicable law, Defendants violated the Magnuson-Stevens Act and the APA.

92. 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 III: AMENDMENT 4 FAILS TO INCLUDE MEASURES NECESSARY  
TO MEET THE MAGNUSON-STEVENS ACT  
REQUIREMENT FOR ACCOUNTABILITY**



93. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 92 of the Complaint in this Third Cause of Action.

94. 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 by the year 2011. 16 U.S.C. § 1853(a)(note), (a)(15). This provision requires both a “limit” and “accountability” in the fishery.

95. Accountability measures must prevent ACLs from being exceeded, and must correct or mitigate overages of the ACL if they do occur. 50 C.F.R. § 600.310(c)(5); (g)(1). If an ACL is exceeded, accountability measures must be triggered and implemented as soon as possible to correct the operational issue that caused the ACL overage, as well as to address any biological consequences to the stock or stock complex resulting from the overage when it is known. 50 C.F.R. § 600.310(g)(3).

96. 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).

97. 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).

98. National Standard Nine 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).

99. National Standard Nine 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).

100. Amendment 4's identified accountability measures are inadequate to meet the Magnuson-Stevens Act's legal mandates to set science-based ACLs and to ensure accountability because they fail to ensure any "limit" set is meaningful. Among other things, the accountability measures of Amendment 4 fail to provide for the monitoring actions necessary to track catch reliably, fail to ensure timely action to prevent limits from being exceeded, and fail to hold the fishery accountable in the event catch limits are exceeded.

101. Thus, the Final Rule implementing Amendment 4 is inconsistent with the Magnuson-Stevens Act's National Standards One, Two and Nine, and the Defendants' own regulations.

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

103. By approving the Final Rule that implements Amendment 4 despite its inconsistencies with applicable law, Defendants violated the Magnuson-Stevens Act, the National Standards, and its own regulations, as well as the APA.

104. 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 IV: THE FAILURE OF THE FISHERIES SERVICE TO COMPLETE  
AN ENVIRONMENTAL IMPACT STATEMENT FOR AMENDMENT 4  
VIOLATES NEPA**

105. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 104 of the Complaint in this Fourth Cause of Action.

106. 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).

107. Amendment 4 is a major federal action that will significantly affect the quality of the human environment in New England. Accordingly, Defendants were required to prepare an EIS for Amendment 4.

108. The primary purpose of preparing an EA is to determine whether preparation of an EIS is required. 40 C.F.R. § 1508.9.

109. NEPA requires that an agency must consider connected actions, alternatives, and impacts, including the cumulative impacts, together as part of a single EIS. *See* 40 C.F.R. § 1508.25.

110. NEPA requires that an agency rigorously explore and objectively evaluate a reasonable range of alternatives and their associated environmental impacts on the environment. 42 U.S.C. 4332(C); 40 C.F.R. 1502.14.

111. 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).

112. The Defendants violated NEPA, its implementing regulations, and the APA by preparing an EA instead of an EIS to accompany Amendment 4, by pre-determining that an EA instead of an EIS would be sufficient, by segmenting its decision-making for this action in order to avoid preparing an EIS, by failing to consider alternatives and associated environmental impacts of its decision not to include river herring and shad as stocks in the Atlantic herring fishery, by failing to include an adequate range of ABC Control Rule and accountability measure alternatives, by failing to include an adequate range of alternatives for monitoring catch in the fishery, by failing to include an adequate range of alternatives for minimizing bycatch, and by failing to consider the cumulative impacts of its action.

113. These actions 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 their Final Rule fails to set ACLs for river herring and shad as “stocks in the fishery,” fails to establish a legally sufficient ABC Control Rule for Atlantic herring that considers the probability of overfishing and gives full weight to scientific uncertainty, and fails to implement legally sufficient accountability measures in the fishery to meet the Magnuson-Stevens Act mandates to prevent overfishing, use the best available science, 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 to accompany Amendment 4, pre-determining that an EIS was not necessary, unlawfully segmenting their decision-making for this action, failing to consider a reasonable range of alternatives, and failing to consider the impacts, including the cumulative impacts, of its actions;
3. Vacate the EA and the Final Rule implementing Amendment 4 to the FMP for Atlantic Herring;
4. Remand Amendment 4 and its EA to NMFS for preparation of a new Amendment 4 and EIS by May 1, 2012 that complies with the Magnuson-Stevens Act, NEPA, and the APA;
5. Maintain jurisdiction over this action until the Defendants are in compliance with the Magnuson-Stevens Act, NEPA, the APA, and every order of this Court;
6. Award the Plaintiffs all their reasonable attorneys' fees and costs; and
7. Provide such additional and further relief as to which the Plaintiffs may justly be entitled.

DATED: April 1, 2011

Respectfully submitted,



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