

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

MARTHA'S VINEYARD / DUKES COUNTY
FISHERMEN'S ASSOCIATION
62 Menemsha Crossroad
Chilmark, MA 02535

MICHAEL S. FLAHERTY
5 Harkins Way
Wareham, MA 02571

Plaintiffs

v.

GARY LOCKE, in his official capacity as
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14th 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

ATLANTIC STATES MARINE FISHERIES
COMMISSION
1444 Eye Street, N.W., Sixth Floor
Washington, D.C. 20005

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Augusta, ME 04333

CA No.

Case: 1:10-cv-01580
Assigned To : Leon, Richard J.
Assign. Date : 9/20/2010
Description: Admin. Agency Review

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Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Martha's Vineyard / Dukes County Fishermen's Association and Michael S. Flaherty (collectively "Plaintiffs"), hereby challenge the continuing unlawful management of river herring and shad along the East Coast of the United States by two sets of Defendants: (1) United States Secretary of Commerce Gary Locke, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (hereinafter "NMFS" or "Fisheries Service"); and (2) the Atlantic States Marine Fisheries Commission ("ASMFC") and its member states' directors of marine fisheries acting in their official capacity as commissioners of the ASMFC (hereinafter "ASMFC" or "Commission"). The actions and failures by Defendants described in this complaint violate the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), the Administrative Procedure Act ("APA"), the Atlantic Coast Fisheries Cooperative Management Act ("Atlantic Coast Fisheries Act" or "ACFCMA"), the ASMFC's Interstate Fisheries Management Program Charter ("Charter"), and the ASMFC's Compact & Rules and Regulations ("Compact").

2. River herring and shad populations along the East Coast have plummeted by 95 percent in the last two decades. *See* ASMFC. 2008. River Herring Stock Status Report (Executive Summary), Exhibit 1. Commercial landings for these species have declined by 99 percent in the past 50 years.

3. The best scientific evidence indicates that neither species is recovering. These declines are due, in large part, to overfishing during years of inadequate and unlawful management and regulation by the Fisheries Service and the ASMFC.

4. Defendants' current fisheries management of river herring and shad is unlawful for several reasons. First, in violation of the Magnuson-Stevens Act, the Fisheries Service has

failed to implement a river herring and shad fishery management plan (“FMP”) that conserves and manages these species in accordance with the Act and its national standard requirements to prevent overfishing, rebuild depleted stocks, establish annual catch limits and accountability measures, and minimize bycatch. The Fisheries Service has also unlawfully failed to manage river herring and shad as a stock in the FMPs for Atlantic herring and mackerel (the Atlantic herring FMP and the Squid Mackerel Butterfish FMP). Separately, in violation of the Atlantic Coast Fisheries Act, the Fisheries Service has failed to implement regulations in the Exclusive Economic Zone (“EEZ” or “federal waters”) to manage river herring and shad consistent with the national standards, or to provide the statutorily required support to the ASMFC necessary to meet management obligations. Similarly, the ASMFC, and state officials acting in their official capacity as commissioners of the ASMFC, have failed “to prevent depletion and physical waste” of river herring and shad throughout their range based on the best scientific information available. These failures violate the Atlantic Coast Fisheries Act, the ASMFC’s Interstate Fisheries Management Program Charter (“Charter”), and the ASMFC’s Compact & Rules and Regulations (“Compact”).

APPLICABLE STATUTES, JURISDICTION, AND VENUE

5. This action arises under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706; the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. §§ 1801-1884; the Atlantic Coastal Fisheries Cooperative Management Act (“Atlantic Coast Fisheries Act”), 16 U.S.C. §§ 5101-5108; the ASMFC Interstate Fisheries Management Program Charter (“Charter”), and the ASMFC Compact & Rules and Regulations (“Compact”).

6. This Court has jurisdiction over this action pursuant to the APA, 5 U.S.C. §§ 701-706. This Court also 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).

7. 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.”

8. 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 APA, 5 U.S.C. §§ 701-706, and the Magnuson-Stevens Act, 16 U.S.C. §§ 1861(d).

9. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(b) & (e), because the federal Defendants 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

10. Plaintiff Martha’s Vineyard / Dukes County Fishermen’s Association (“MV/DCFA”) is comprised of fishermen and other active participants in local, state, regional and federal fisheries management, with direct interests in maintaining abundant populations of river herring and shad. River herring and shad are anadromous species of herring that are born in fresh water, migrate to the ocean, and then return to the river where they were born. (The return is called a herring “run.”) The Association was created by the Dukes County Commission and

represents Martha's Vineyard on fishery issues before local, state, regional and federal regulatory agencies in order to identify and champion fishing methods that are sustainable and consistent with sensible environmental goals. *See* http://www.dukescounty.org/pages/DukesCountyMA_Fishermen/Index. The MV/DCFA has observed a drastic decline in river herring returns to Dukes County runs since midwater trawling for herring and mackerel on the East Coast has been on the increase. Because river herring often swim in schools where they mix with Atlantic herring or mackerel, midwater trawl fishing vessels have the potential to wipe out an entire river's herring run by netting all of the school that make up a single run in the ocean. This extermination of thousands of river herring and shad directly and adversely affects the MV/DCFA and its members, who rely upon these fish as part of their economic base. The interests and work of the Martha's Vineyard/Duke's County Fishermen's Association 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. Moreover, unless the relief sought in this complaint is granted, those interests will continue to be adversely affected and irreparably harmed by the Defendants' unlawful failure to perform duties under the Fisheries Act, the Magnuson-Stevens Act, the Atlantic Coast Fisheries Act, and the APA.

11. Michael Flaherty is a recreational fisherman from Wareham, Massachusetts and is a past Vice President of the Massachusetts Striped Bass Association (headquartered in Braintree, MA). Mr. Flaherty has been a recreational fisherman for over 35 years. He presently fishes for striped bass - a species known to thrive when it consumes river herring as forage. 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 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 their numbers 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 river herring and shad will continue to be adversely affected and irreparably harmed by the Defendant's unlawful failure to perform duties under the Atlantic Coast Fisheries Act, the Magnuson-Stevens Act, and the APA.

12. 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 the Atlantic Coast Fisheries Act and the Magnuson-Stevens Act, including those Atlantic Coast Fisheries Act and Magnuson-Stevens Act provisions that require ending overfishing, rebuilding depleted stocks, establishing annual catch limits and accountability measures, and minimizing bycatch.

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

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

15. Defendant Atlantic States Marine Fisheries Commission was formed through an interstate compact approved by Congress pursuant to Article I, Section 10, clause 3 (the “Compact Clause”) and given responsibility for coastal fisheries including anadromous species of fish such as shad and river herring. The ASMFC was created for the purpose of “promot[ing] the better utilization of the fisheries . . . of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries.” Pub.L. 77-539 (1942), *as amended* by Pub.L. 81-721 (1950) (“ASMFC Compact”), Art.I. The ASMFC is primarily funded by the federal government, serves federal objectives found in the Magnuson-Stevens Act (conservation and management of fishery resources in the United States), and has federal obligations imposed under the Atlantic Coast Fisheries Act. River herring and shad are presently managed by the ASMFC’s Interstate Fishery Management Plan for Shad and River Herring. The Commission is the final approval authority for any fishery management plan promulgated under the Interstate Fisheries Management Program. Such decisions are made through majority votes by the member states, each of which receives one vote. Member states include Maine, New Hampshire,

Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida.

16. Defendant “Commissioners” are the state officials serving as ASMFC Commissioners and acting in their official capacity as directors of their states’ marine fisheries agencies: George Lapointe is the Commissioner of the Maine Department of Marine Resources; Douglas Grout is the Chief of the Marine Division of the New Hampshire Fish and Game Department; Paul Diodati is the Director of the Massachusetts Division of Marine Fisheries; Robert Ballou is the Acting Chief of the Rhode Island Department of Environmental Management; David Simpson is the Director of Marine Fisheries in the Connecticut Department of Environmental Protection; James Gilmore is the Chief of the Bureau of Marine Resources in the New York Division of Fish, Wildlife and Marine Resources; David Chanda is the Director of the New Jersey Division of Fish and Wildlife; John Arway is the Executive Director of the Pennsylvania Fish and Boat Commission; Patrick J. Emory is the Director of the Delaware Division of Fish and Wildlife; Thomas O’Connell is the Director of the Maryland Department of Natural Resources; Steven Bowman is the Commissioner of the Virginia Marine Resources Commission; Louis Daniel, Ph.D., is the Director of the North Carolina Division of Marine Fisheries; John Frampton is the Director of the South Carolina Department of Natural Resources; Spud Woodward is the Director of the Coastal Resources Division of the Georgia Department of Natural Resources; Jessica McCawley is the Administrator for the Florida Fish and Wildlife Conservation Commission Division of Marine Fisheries Management. *See*

<http://www.asmfc.org/>.

LEGAL AND FACTUAL BACKGROUND

Life History and Status of River Herring and Shad

17. “River herring” is the collective term for two species of fish – the alewife, *Alosa pseudoharengus*, and the blueback herring, *A. aestivalis*. These two species are difficult to distinguish from each other and are managed as a single stock.

18. River herring have been designated a “species of concern” by the NMFS Protected Species Division. 71 Fed. Reg. 61,022 (Oct. 17, 2006). This designation identifies species at risk and in need of protective measures before listing under the Endangered Species Act (“ESA”) becomes necessary. NMFS’s stated rationale for listing river herring as a species of concern is that “[r]iver herring populations have exhibited drastic declines throughout much of their range.” See http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring_detailed.pdf.

19. “Shad” is a collective term for two species of fish – the American shad, *Alosa sapidissima*, and the hickory shad, *Alosa mediocris*. Shad have not been designated a species of concern; however, the ASMFC has designated American shad stocks as “depleted” and “trending downward.” ASMFC 2009 Annual Report.

20. All four species (collectively, *alosines*) are migratory fish found in rivers, estuaries and the coastal waters of the North Atlantic. As anadromous fish, they spend the majority of their adult lives at sea (in federal waters) and undertake extensive migrations before returning to natal rivers and streams (state waters) in the spring and early summer to spawn.

21. Alosines 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. Ospreys, loons, herons, bald eagles, egrets, kingfishers, harbor seals,

porpoises, river otters, striped bass, weakfish, bluefish, perch, bluefin tuna, and sharks, among others, rely on river herring and shad to satisfy a significant portion of their forage food diet.

22. Historically, river herring and shad spawned in nearly every river and tributary on the East coast and supported the largest commercial and recreational fisheries along the Atlantic seaboard. These stocks are still highly valued by conservationists, recreational fishermen, Native Americans, and many other members of the public.

23. Today, due to riverine habitat degradation (dams, pollution, and poor water quality) and overfishing, these species are severely depleted. In the ocean, these species are killed in vast numbers as bycatch in directed fisheries for other fish – including particularly as bycatch in trawl fisheries for Atlantic herring and mackerel.

24. The Fisheries Service and the ASMFC, however, have failed to collect and analyze comprehensive and accurate data for shad and river herring in a stock assessment. As a result of this failure, they continue to designate the stock status of river herring and shad as “unknown.”

25. The ASMFC’s last full stock assessment for river herring was performed more than twenty years ago. Among other conclusions, it noted that “five [of 15] of the stocks were overfished and recruitment failure was apparent, . . .” Review of the ASMFC FMP for Shad and River Herring (*Alosa spp.*) 2009.

26. A new stock assessment for river herring is not scheduled to be completed until at least 2012.

27. A partial assessment of 31 American shad stocks by the ASMFC in 2007 concluded that “stocks are currently at all-time lows and do not appear to be recovering.” The ASMFC has never assessed the status of hickory shad.

28. Although commercial landings of river herring peaked at 140 million pounds in 1969, landings have declined continuously since that time, with recent (2000-2007) domestic landings totaling less than 2.1 million pounds in any given year. *See* ASMFC 2008 River Herring Stock Status Report (Executive Summary), Exhibit 1. Commercial landings of American shad have mirrored these declines. *See* <http://www.asmfc.org/> (Overview of Stock Status Shad & River Herring).

29. State restoration efforts for shad and river herring have focused primarily on protecting essential spawning and nursery habitats, and removing dams and other structures that impede fish passage as well as setting catch limits for fisheries in state waters. Despite state restoration efforts, available run size estimates continue to show dramatic declines in abundance. In New England, river herring run sizes in seven of fourteen rivers documented have declined precipitously and have not shown signs of recovery. *See* ASMFC. 2008. River Herring Stock Status Report (Executive Summary). Exhibit 1.

30. In response to these declines in abundance, at least four states (Connecticut, Massachusetts, North Carolina and Rhode Island) have implemented state moratoriums on the harvest of river herring (closed all directed in-river fisheries), with other states likely to follow.

31. Although a few states have submitted preliminary State Sustainable Fishery Plans to the ASMFC, with the hope of keeping some small runs in the fishery open past 2012 (or 2013 in the case of American shad), only two of these plans have been approved to date. Importantly, none of these plans limit the harvest of river herring in federal ocean waters

32. In federal ocean waters, juvenile and adult river herring and shad form large mixed-stock schooling aggregations and undertake seasonal migrations to congregate in the Gulf of Maine in the winter. For river herring there has been extensive analysis of the timing and

location of these congregations or “hotspots” using multiple fishery dependent and independent data sets by the Northeast Fisheries Science Center and the Northeast Fisheries Observer Program.

33. Industrial mid-water trawlers, targeting other species such as Atlantic herring and mackerel, and fishing singly or in pairs, haul small-mesh nets through the water column and catch millions of river herring and shad each year, a development that has generally been ignored by fishery managers since the fishery emerged 20 years ago. Small-mesh bottom trawl fisheries for squid, mackerel, herring and whiting also regularly catch river herring and shad – most of which is then discarded dead at sea. Gill net fisheries fishing for bluefish, weakfish and mackerel also harvest shad and river herring as incidental bycatch.

34. Bycatch in these fisheries is poorly monitored, reported, and regulated. This situation hides significant levels of mortality and stands as a major obstacle to the proper management of these stocks. One recent estimate of river herring bycatch in the Atlantic herring fishery alone suggests mortality of 1 - 2 million pounds of fish, a value that approximates the directed harvest in recent years, but the actual bycatch mortality is likely much higher. *See* Matthew Cieri et al., Estimates of River Herring Bycatch in the Directed Atlantic Herring Fishery. Exhibit 2.

35. Although it is generally accepted that the best way to monitor this bycatch is to place federal monitors (“observers”) on fishing vessels, the percentage of midwater trawl fishing trips actually observed has historically been very low, ranging from less than one to eighteen percent of the annual total fishing trips taken since the fishery emerged in New England in the 1990s. Under-sampling due to low numbers of catch samples and error caused by the extremely low level of observer coverage on vessels, including coverage in other small mesh bottom trawl

fisheries (such as for whiting and squid), contribute to the inability to properly quantify the magnitude of river herring and shad bycatch.

36. Bycatch of river herring in the New England Atlantic herring fishery alone can equal or exceed all directed fishery landings, contributing 50% or more to the total known fishing mortality. Observer data indicate that single trawls in the Atlantic herring fishery can take hundreds of thousands of river herring – more than an entire healthy river herring run.

37. In the case of American shad, the ASMFC enacted a 5% bycatch cap (by weight of landed catch per trip) on ocean landings in 1999. This 5% bycatch cap was selected without scientific analysis to demonstrate that the measure would effectively constrain bycatch mortality. Although the ASMFC could have requested that the Fisheries Service take compatible action in the EEZ, such as closing ocean fishing for shad, it chose not to make such a request.

38. Only a handful of states actually report shad landings, and those that do not report or that exceed the 5% cap established by the ASMFC are not held accountable.

Fisheries Management

39. River herring and shad spend the majority of their adult lives in federal ocean waters, yet remain exclusively managed by an interstate FMP whose authority is limited primarily to state waters. While stocks have steadily declined, the state and federal agencies responsible for their conservation and management continue to avoid the problem by passing responsibility back and forth. For their part, the Fisheries Service Defendants have refused to develop an FMP to regulate river herring and shad despite the acknowledged fact that these species are overfished and in desperate need of conservation and management measures required under the MSA. At the same time, the ASMFC and state commissioner Defendants have failed to comply with the requirements of the Atlantic Coast Fisheries Act to prevent overfishing and

conserve these species throughout their range. This failure to regulate the catch of river herring and shad in both state and federal waters, as well as the failure to enforce the limited conservation measures that are in place, implicates both state and federal fisheries managers.

Congress Intended to Protect Anadromous Species such as River Herring and Shad

a. Congress Created the ASMFC in 1950 to Protect Anadromous Species

40. In recognition that coastal fishery resources (such as the river herring and shad) do not respect state water boundaries, in 1950 Congress created the Atlantic States Marine Fisheries Commission (“ASMFC”), and the fifteen Atlantic states, along with the District of Columbia, entered into an interstate compact. Pub. L. No. 77-539, 56 Stat. 267 (1942); Pub. L. No 81-721, 64 Stat. 467 (1950). Under the Compact, states consenting to the ASMFC jointly coordinate management of coastal fisheries, including anadromous fish, with other member states. *See Atlantic States Marine Fisheries Compact & Rules and Regulations (“ASMFC Compact”)*, Art. II.

41. The purpose of the Compact is to develop a joint program that promotes and protects fisheries (such as those for anadromous species) on the Atlantic seaboard by preventing their physical waste from any cause. *See Compact*, Art. I. The Compact imposes a mandatory duty upon the ASMFC to prevent the depletion and physical waste of the anadromous fisheries on the Atlantic seaboard. *See Id.* Art. IV.

42. Under the Compact, the ASMFC adopted Rules and Regulations that mandate that fishery management plans and any actions to promote conservation adopted by the ASMFC shall use the best scientific information available. *See Id.* Art. VI, Section 3.

b. Congress Took Action Again in 1976 to Protect Anadromous Species in Federal Waters under the Fisheries Conservation and Management Act

43. In 1976 Congress enacted the Fishery Conservation and Management Act (“Magnuson-Stevens Act”), Pub. L. No. 94-265 (1976), *as amended*, 16 U.S.C. §§ 1801-1883, to “take immediate action to conserve and manage the fishery resources found off the coasts of the United States.” *Id.* § 1801(b)(1).

44. The legislative history of the Magnuson-Stevens Act demonstrates that Congress intended to protect and manage “all species of fish,” H. Rep. 94-445, *32, § 301(a), and that one of its express purposes was “to assume responsibility and management over anadromous species to the extent of their range”, *Id.* at *17, (b) Policy and Purpose.

45. Under the Magnuson-Stevens Act, the U.S. exercises exclusive fishery management authority over the fisheries in federal waters (3 to 200 miles offshore of the United States) through fishery management plans (“FMPs”). 16 U.S.C. § 1853. Regional management councils (“Council” or “Councils”) established under the Magnuson-Stevens Act are required to develop FMPs for each fishery that requires conservation and management, which are then approved by NMFS in accordance with national standards and other requirements of the Magnuson-Stevens Act. *Id.* §§ 1851-1854.

46. The Fisheries Service is authorized to prepare an FMP for a fishery if the appropriate Council fails to develop a plan and the fishery requires conservation and management. *See Id.* § 1854(c). The term “conservation and management” refers to all of the rules, regulations, conditions, and other measures required to rebuild, restore, or maintain any fishery resource and the marine environment in order to supply food, other products, and recreational benefits on a continuing basis, and to avoid irreversible or long-term adverse effects on the fishery resources and marine environment. *Id.* § 1802(5).

47. The Fisheries Service promulgates regulations to implement these plans, *id.* § 1854(b), that have the force of law. *Id.* § 1856(a).

c. In Response to Concerns Over Disparate State and Federal Regulation of Migratory Fish Stocks Congress Enacted the Atlantic Coastal Fisheries Cooperative Management Act in 1993

48. Forty years after the ASMFC began to manage coastal fisheries, and in response to concerns over “disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation” of coastal resources, Congress enacted the Atlantic Coast Fisheries Act to promote the conservation 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.” 16 U.S.C. § 5101(a)(1), (b).

49. As one of its stated purposes, the Atlantic Coast Fisheries Act states that “Congress finds. . . [i]t is in the national interest to provide for more effective Atlantic State fishery resource conservation and management.” 16 U.S.C. § 5101(a)(6).

50. In order to give the ASMFC some “teeth” Congress mandated state participation in the interstate FMPs promulgated by the ASMFC. 16 U.S.C. § 5104(a)(1).

51. The Atlantic Coast Fisheries Act provides authority to the ASMFC to manage migratory fish stocks on the Atlantic coast and requires that it prepare and adopt plans for those species to be followed by the states. 16 U.S.C. § 5104(a)(1)

52. A “coastal fishery management plan” developed under the Atlantic Coast Fisheries Act (also called an “interstate FMP” or “IFMP”) allows a migratory species to be managed uniformly as a stock by the ASMFC, rather than on a state-by-state basis.

53. Under the Atlantic Coast Fisheries Act, Congress mandated that IFMPs ensure the conservation of the species “throughout their ranges” . . . “based on the best scientific

information available.” 16 U.S.C. § 5104(a)(2)(A). A “fishery” is defined by the Atlantic Coast Fisheries Act as “one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographical, scientific, technical, commercial, recreational, or economic characteristics[.]” 16 U.S.C. § 5102(8)(A).

54. The Atlantic Coast Fisheries Act imposes additional federal obligations on the ASMFC (in addition to those expressed in the ASMFC Compact). It mandates the coordination of federal and state efforts for interjurisdictional coastal resources. 16 U.S.C. § 5101(a)(3). It also provides for the development of federal regulations to support the ASMFC’s coastal management efforts. *Id.* § 5103. Further, it requires that the ASMFC monitor state implementation of its plans and report to the Secretary of Commerce if it determines that a state is not in compliance with the IFMP. The Act further requires that the Secretary of Commerce impose a federally enforced moratorium on fishing in waters of any non-compliant state. *Id.* § 5106(c)(1).

55. The Atlantic Coast Fisheries Act also directs the ASMFC to work jointly with the regional Councils established under the Magnuson-Stevens Act to create IFMPs complementary to those developed by the Councils regulating the same species in federal waters. 16 U.S.C. § 5104(a)(1).

56. In the absence of a federal FMP promulgated by the appropriate Regional Council(s) (as in this case), and after consultation with the Council(s), the Atlantic Coast Fisheries Act authorizes the Secretary to implement regulations in the EEZ to regulate fishing that are compatible with the IFMP and that comply with the national standards set forth in the Magnuson-Stevens Act. *See Id.* § 5103(b)(1).

57. Under the Atlantic Coast Fisheries Act , an IFMP that governs fishing in the EEZ must contain three elements: 1) information on the status of the resource and related fisheries, 2) specific conservation and management measures for states to implement, and 3) recommended actions to be taken by the Secretary that are compatible with the IFMP and consistent with the Magnuson-Stevens Act’s national standards. *See* 16 U.S.C. § 5102(1); § 5103(b)(1).

d. After the Passage of the Fisheries Act, the ASMFC drafted an Interstate Fisheries Management Program Charter to provide Additional Operating Procedures and Policies

58. The ASMFC Charter was developed in response to the Atlantic Coast Fisheries Act and provided the ASMFC with additional responsibilities to ensure member state compliance with IFMPs.

59. The Charter requires that “[a]bove all, an FMP must include conservation and management measures that ensure the long-term biological health and productivity of fishery resources under management.” *See* ASMFC Interstate Fisheries Program Management Charter. 2009. Section Six. Standards and Procedures for Interstate Fishery Management Plans. P. 13.

60. To this end, the ASMFC adopted the following standards (among others):

- (1) Conservation programs and management measures shall be designed to prevent overfishing and maintain over time, abundant, self-sustaining stocks of coastal fishery resources. In cases where stocks have become depleted as a result of overfishing and/or other causes, such programs shall be designed to rebuild, restore, and subsequently maintain such stocks so as to assure their sustained availability in fishable abundance on a long-term basis.
- (2) Conservation programs and management measures shall be based on the best scientific information available.
- (4) Management measures shall be designed to minimize waste of fishery resources.
- (5) Conservation programs and management measures shall be designed to protect fish habitats.

Id. at 14.

61. The Charter provides that “[a]ll states are responsible for the full and effective

implementation and enforcement of fishery management plans within areas subject to their jurisdiction.” *See* Charter §7(a).

62. The Charter also provides the ASMFC with authority to enact additional adaptive management measures to its IFMPs in order to respond to changing circumstances such as dramatically declining stocks and the issue of ocean bycatch. *See* ASMFC Charter Section Six (b)(3) Adaptive Management.

The Interstate Fishery Management Plan for Shad and River Herring Fails to Ensure the Conservation of the Species throughout its range Based on the Best Scientific Information Available

63. River herring and shad are presently managed by the ASMFC’s Interstate Fishery Management Plan for Shad and River Herring. River herring management was most recently updated through “Amendment 2” in May 2009, while American shad management was recently updated through “Amendment 3” in February 2010.

64. Although the ASMFC has a duty under the Atlantic Coast Fisheries Act, the Compact, and the Charter to protect and conserve river herring and shad throughout their range, it failed to make adequate recommendations for actions to be taken by the Secretary of Commerce for management of these species in federal waters.

65. Instead, the ASMFC deferred to the Fisheries Service on actual bycatch minimization and other conservation and management measures, and generally recommended that NMFS examine existing habitat data, increase observer coverage to unspecified levels, requested that additional resources be dedicated to furthering cooperative efforts between the ASMFC and the regional councils, and requested emergency action to implement bycatch monitoring actions broadly under consideration in the federal Atlantic herring FMP amendment (a request that was denied by NMFS). *See* ASMFC. 7 May 2009 Spring Meeting Summary.

Because they are completely ineffectual to protect the populations of river herring and shad, these recommendations violate both the IFMP for Shad and River Herring and the Magnuson-Stevens Act's national standards. *See* 16 U.S.C. § 5102(1); § 5103(b)(1).

66. The IFMP for Shad and River Herring also provides a mechanism for new management actions, such as rebuilding schedules, fishing gear restrictions, and monitoring requirements, to be adopted quickly through adaptive management actions. *See* Amendment 2, §5.4; Amendment 3, §7.2 (providing similar mechanism). Nevertheless, the ASMFC has failed to use its authority under these adaptive management provisions to put in place management measures that limit the catch of shad and river herring throughout its range.

67. The ASMFC has failed to define “overfishing” for shad or river herring stocks.

Federal FMPs Enacted under the Magnuson-Stevens Act Similarly Fail to Protect River Herring and Shad

68. 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).

69. The legislative history of the Magnuson-Stevens Act reflects Congressional intent that the Fisheries Service should be the ultimate decision-maker regarding whether a plan is needed. *See* H. Rep. 94-445. *39, § 305(d).

70. The Magnuson-Stevens Act requires that regional fishery management councils prepare FMPs for all fisheries under their authority that require conservation and management, 16 U.S.C. §1852(h)(1); however, all federal FMPs and regulations implementing FMPs are subject to final review and approval by NMFS or NOAA, acting on behalf of the Secretary, 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). The Secretary may approve, disapprove, or partially approve a plan. *Id.*

71. The Secretary may also prepare his own FMP when a fishery requires conservation and management, and the regional Council has failed to develop one within a reasonable period of time. 16 U.S.C. § 1854(c). Under either scenario (Council or Secretarial promulgation) the Fisheries Service is directed to implement approved plans by promulgating appropriate regulations. 16 U.S.C. § 1855(d).

72. The Secretary is also authorized to promulgate emergency regulations or interim measures to reduce overfishing when an emergency situation exists within a given fishery. 16 U.S.C. § 1855(c)(1). An emergency rule or an interim measure is treated as an amendment to a fishery plan for the limited period of time it is in effect. *Id.* § 1855(c)(3).

73. NMFS policy guidelines explain that an emergency situation in a given fishery:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants.

62 Fed. Reg. 44,421 – 44,422 (Aug. 21, 1997).

74. Certain contents of a federal FMP are mandated. 16 U.S.C. § 1853(a). Among other things a federal FMP must be “necessary and appropriate for the conservation and

management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” §1853(a)(1)(A).

75. A federal FMP must also be “consistent with the national standards, the other provisions of this chapter, . . . and any other applicable law.” 16 U.S.C. § 1853(a)(1)(C).

The National Standards

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

77. Implementing guidelines specific to NS1 provide that the Councils determine whether all stocks are “in the fishery” or whether some fit the category of “ecosystem component species.” 50 C.F.R. §600.310(c). For all stocks and stock complexes that are in the fishery, the Councils must evaluate and amend their FMPs to align their management objectives to end or prevent overfishing. 50 C.F.R. §600.310(c). As a default, all stocks are “in the fishery” unless they are identified as an ecosystem component species (EC). §600.310(d). Neither river herring nor shad are identified as an EC species nor do they meet the EC species definition.

78. The NS1 guidelines provide that the requirement for Annual Catch Limits (ACLs) applies to all stocks in a fishery, including non-target species caught as bycatch and those retained or discarded at sea. § 600.310(d)(2-4); § 600.310(f)(2). “Catch” includes fish that are retained for any purpose as well as mortality of fish that are discarded. 50 C.F.R. § 600.310(f)(2)(i).

79. National Standard Two (“NS2”) 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).

80. National Standard Nine (“NS9”) of the Magnuson-Stevens Act requires that conservation and management measures (such as FMPs) must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

81. The Magnuson-Stevens Act also requires that a federal FMP set annual catch limits (“ACLs”) at a level such that overfishing does not occur in the fishery, and that the FMP accompany ACLs with measures that ensure accountability (“AMs”). 16 U.S.C. § 1853(a)(15).

82. The Magnuson-Stevens Act also requires that the Fisheries Service identify overfished fish populations and take action to rebuild affected stocks to healthy population levels. *See* 16 U.S.C. §§ 1802(33)(C); 1853(1)(1); 1853(a)(10); 1854(e).

83. The Magnuson-Stevens Act also requires that FMPs 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).

84. Two small-mesh fisheries in federal waters – the Atlantic Herring fishery and the Squid, Mackerel, and Butterfish fishery – target schooling pelagic species with ecological and behavioral characteristics similar to river herring and shad at sea. Under federal FMPs the New England Fishery Management Council (“NEFMC”) administers the Atlantic Herring FMP, and the Mid-Atlantic Fishery Management Council (“MAFMC”) administers the Squid, Mackerel and Butterfish FMP (“SMB FMP”).

85. The Fisheries Service has failed to perform a stock assessment for river herring and shad in over 20 years, and therefore has failed to identify stocks of shad and river herring as overfished. Instead, the Fisheries Service summarizes the stock status of river herring and shad as “unknown” rather than “overfished,” or as experiencing “overfishing,” thus no federal FMP has been triggered for these species and they are not counted toward the total of overfished stocks. *See* Table C. Summary of stock status for species not contained in federal fishery management plans, available at www.nmfs.noaa.gov/sfa/domes_fish/StatusofFisheries/2008/.

86. There is no federal FMP for shad and river herring, and the Fisheries Service failed to adopt ACLs and AMs for river herring and shad in other FMPs that regulate fisheries where the stocks are caught, landed and sold (Atlantic Herring fishery and Squid, Mackerel and Butterfish fishery). Although all federal FMPs are required to comply with NS 1, the Fisheries Service has also failed to take any action to include ACL alternatives for these species in any amendments currently under development - Amendment 5 for the Atlantic Herring FMP and Amendment 14 for the MSB FMP. The ASMFC requested both Councils to include shad ACLs and AMs in these amendments; however, to date the Fisheries Service has declined to do so.

Declines Associated with Failure to Effectively Manage the Bycatch of River Herring and Requests for Emergency and Permanent Secretary Action

87. The ASMFC admits that though managed under an IFMP, “commercial landings have decreased by 97 percent” since 1985, and “most rivers have experienced significant declines.” *See* May, 27 2009 Letter from ASMFC to Secretary of Commerce Requesting Emergency Action. Exhibit 3.

88. Scientists on the NEFMC Atlantic Herring Plan Development Team have recognize that “[b]ycatch is the one impact on river herring that is unmanaged and unmitigated.”

89. In response to dramatic declines in river herring and shad populations and concerns over the species bycatch occurring in federal waters, the ASMFC requested that the NEFMC and MAFMC monitor and take action to reduce the bycatch of river herring and shad occurring in all small mesh fisheries. *See* April 14, 2009 letter from ASMFC to MAFMC and NEFMC. Exh. 3.

90. To date, these councils have developed no species-specific federal FMP(s) and have adopted no species-specific measures, such as a catch limit, in any federal FMPs for fisheries where river herring and shad bycatch is occurring.

91. There are also no federal regulations implemented by the Secretary addressing the catch, including bycatch, of river herring and shad in the EEZ.

92. Citing concerns over the impact that federal fisheries have on stock status, the lack of sufficient at-sea sampling, and the lack of the necessary monitoring and management programs to minimize the impacts of bycatch of river herring, the ASMFC, NEFMC, MAFMC, and a coalition of commercial fishing, recreational fishing, and environmental organizations asked the Secretary of Commerce for emergency and permanent rulemaking to institute monitoring and management programs to minimize the impacts of bycatch of river herring and shad occurring in federally regulated small-mesh fisheries. *See* 27 May 2009 Letter from ASMFC to Secretary Locke; 24 June 2009 Letter from (MAFMC) to Secretary Locke; 26 June 2009 Letter from NEFMC to Secretary Locke; June 23, 2009 letter from Over One Hundred Organizations and Individuals. Exh. 3.

93. NMFS denied all requests for emergency and non-emergency action to implement monitoring measures to assess bycatch of shad and river herring in small-mesh fisheries in a letter to the MAFMC, and justified its denial, in part, by stating that it is working

though the Council process and relying on amendments under development there. *See* 15 December 2009 Letter from Balsiger (“NMFS Denial Letter”) to Robins Exh. 3.

94. However, such amendments are not scheduled to be implemented until at least 2012. Furthermore, the NEFMC is only now developing alternatives to mitigate river herring bycatch at sea in Amendment 5, and has not taken action to address shad bycatch as requested by the ASMFC. Amendment 14 in the MAFMC was recently initiated and only objectives have been approved to date.

95. As a result of these facts, at present there is a completely unregulated federal fishery for shad and river herring occurring in federal waters.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: FAILURE TO MANAGE RIVER HERRING AND SHAD IN CONFORMANCE WITH THE MAGNUSON-STEVENSONS ACT

96. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 95 of this Complaint in this First Claim for Relief.

97. In enacting the Magnuson-Stevens Act, Congress intended that immediate action be taken to conserve and manage the fishery resources found off the U.S. coast through FMPs, written and implemented in accordance with the national standards, which will achieve and maintain on a continuing basis the optimum yield from each fishery. 16 U.S.C. § 1801(b)(1)(4).

98. The MSA requires each fishery management council to prepare a plan for each fishery that requires conservation and management. 16 U.S.C. § 1852(h)(1). The Secretary of Commerce is authorized to prepare an FMP for a fishery if the appropriate councils fail to develop a plan and the fishery requires conservation and management. 16 U.S.C. § 1854(c).

99. 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. § 1853(a)(10).

100. The Act requires that the Fisheries Service Defendants identify overfished fish stocks and rebuild them to healthy population levels. 16 U.S.C. §§ 1854(e), 1802(28)(C).

101. FMPs, FMP amendments, and implementing regulations must comply with the requirements of the Magnuson-Stevens Act. Specifically, they must be consistent with all the National Standards, *see* 16 U.S.C. § 1851(a).

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

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

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

105. The Magnuson-Stevens Act also requires that a federal FMP set annual catch limits at a level such that overfishing does not occur in the fishery, accompanied by measures that ensure accountability. 16 U.S.C. § 1853(a)(15).

106. The Magnuson-Stevens Act requires that FMPs must “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery” and include practicable measures to minimize bycatch and bycatch mortality. 16 U.S.C. § 1853(a)(11).

107. The Fisheries Service Defendants can take emergency action or implement interim measures if an emergency or overfishing exists and interim measures are necessary to reduce overfishing. 16 U.S.C. § 1855(c).

108. The Fisheries Service has failed to prepare or implement management measures for river herring and shad that prevent overfishing, establish annual catch limits and accountability measures, achieve optimum yield, minimize or avoid bycatch and rely upon the best available scientific information available to specify objective and measurable criteria for the fishery. These failures include a failure to monitor the fisheries that kill river herring and shad.

109. The Fisheries Service's actions violate the Magnuson-Stevens Act National Standards for conservation. 16 U.S.C. § 1851(a)(1)-(10).

110. The Secretary also has failed to use his emergency authority under § 1855(c) to enact regulations to promulgate emergency regulations or interim measures to address the emergency or overfishing occurring in the fisheries that kill river herring and shad.

111. These actions and failures to act by the Fisheries Service Defendants are arbitrary, capricious, and contrary to law in violation of the Magnuson-Stevens Act and the APA.

112. These violations of the Magnuson-Stevens Act and the APA by the Fisheries Service Defendants threaten the Plaintiffs with irreparable injury for which they have no adequate remedy at law.

SECOND CLAIM FOR RELIEF: FAILURE TO REGULATE THE CATCH OF RIVER HERRING AND SHAD IN FEDERAL OCEAN WATERS IN CONFORMANCE WITH THE ATLANTIC COAST FISHERIES ACT

113. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 112 of this Complaint in this Second Claim for Relief

114. In the absence of a federal FMP, the Secretary of Commerce is authorized to issue

regulations in the EEZ compatible with the effective implementation of the interstate FMP, and consistent with the national standards set forth in the Magnuson-Stevens Act, after consultation with the Councils. 16 U.S.C. § 5103(b)(1).

115. The Commerce Secretary has a duty to develop and implement programs to support the interstate fishery management efforts of the ASMFC with enhanced collection, management and analysis of fishery data, law enforcement, habitat conservation, fishery research and fishery management planning. 16 U.S.C. § 5103(a).

116. The Fisheries Service Defendants have failed to enact regulations in the EEZ for river herring and shad complementary to the IFMP and consistent with the Magnuson-Stevens Act's national standards.

117. The Fisheries Service Defendants have failed to support the ASMFC and state coastal fisheries programs by failing to provide increased monitoring and other measures to address bycatch of river herring in federal fisheries as requested by the ASMFC.

118. These actions and failures to act by the Fisheries Service Defendants violate the Atlantic Coast Fisheries Act and the APA.

119. These violations of the Atlantic Coast Fisheries Act and the APA by the Fisheries Service Defendants threaten the Plaintiffs with irreparable injury for which they have no adequate remedy at law.

THIRD CLAIM FOR RELIEF: FAILURE TO ENSURE THE CONSERVATION OF SHAD AND RIVER HERRING THROUGHOUT THEIR RANGE IN VIOLATION OF THE ATLANTIC COAST FISHERIES ACT, COMPACT, AND CHARTER

120. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 119 of this Complaint in this Third Claim for Relief.

121. The Atlantic Coast Fisheries Act requires the ASMFC to establish coastal or “interstate” FMPs that ensure the conservation of fish stocks throughout their ranges based on the best scientific information available. 16 U.S.C. § 5104(a)(1) and (a)(2)(A).

122. The Atlantic Coast Fisheries Act requires the ASMFC to make recommendations for actions by the Secretary that are compatible with the IFMP and the Magnuson-Stevens Act’s national standards. 16 U.S.C. §§ 5102(1), 5103(b)(1).

123. The ASMFC’s Compact was intended to develop a joint program that promotes and protects fisheries on the Atlantic seaboard by preventing their physical waste from any cause, *see* ASMFC Compact, Art. I, and imposes a mandatory duty on the ASMFC to prevent the depletion and physical waste of the anadromous fisheries on the Atlantic seaboard. *See Id.* Art. IV.

124. The ASMFC’s Compact also requires that IFMPs and any actions to promote conservation adopted by the ASMFC shall use the best scientific information available. *See Id.* Art. VI, Section 3.

125. The ASMFC Charter requires that “[a]bove all, an FMP must include conservation and management measures that ensure the long-term biological health and productivity of fishery resources under management.” *See* Charter, Section Six (a).

126. ASMFC Charter standards require that the ASMFC prevent overfishing, maintain sustainable stocks, and rebuild depleted stocks. *See* Charter, Section Six (a)(1)-(8). In addition, these standards require the ASMFC to base its actions on the best available science, to minimize the waste of fishery resources, and to protect fish habitat. *Id.*

127. The ASMFC has the authority to take adaptive management actions in its FMP to adapt to changing circumstances such as dramatically declining stocks and the issue of ocean bycatch. *See* Charter Section Six (b)(3).

128. The ASMFC prepared and adopted a coastal fishery management plan for river herring and shad. 16 U.S.C. § 5102(1).

129. No federal FMP exists for river herring or shad.

130. The ASMFC failed to adequately coordinate state and federal efforts concerning the interjurisdictional fishery for river herring necessary to “prevent depletion and physical waste” when it failed to consult with the regional councils.

131. The ASMFC recommendations for Secretary action violate the requirement that such recommendations be compatible with the IFMP and the Magnuson-Stevens Act’s national standards.

132. The ASMFC has also opted to make river-by-river classifications in order to avoid recognition of the overall stock of shad and river herring as overfished,

133. The IFMP for Shad and River Herring fails to ensure the long term biological health and productivity of river herring and shad.

134. The IFMP for Shad and River Herring fails to prevent overfishing of river herring and shad.

135. The IFMP for Shad and River Herring is not based on the best scientific information available.

136. The IFMP for Shad and River Herring does not minimize the waste of river herring and shad.

137. The IFMP for Shad and River Herring fails to rebuild, restore or maintain stocks of river herring and shad so as to assure their availability on a long-term basis.

138. The IFMP for Shad and River Herring fails to make adaptive management measures to provide for changing circumstances in the fishery for those species.

139. These actions and failures to act by the ASMFC Defendants violate the Atlantic Coast Fisheries Act, the ASMFC Compact and Charter, and the APA..

140. These violations of the Atlantic Coast Fisheries Act, the ASMFC compact and Charter, and the APA by the ASMFC Defendants threaten the Plaintiffs with irreparable injury 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 Fisheries Service Defendants violated the Magnuson-Stevens Act, the Atlantic Coast Fisheries Act, and the APA by failing to fulfill their duties and obligations to manage and conserve river herring and shad;
2. Declare that the ASMFC Defendants violated the Atlantic Coast Fisheries Act, the ASMFC Charter, 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;
3. Declare that the Fisheries Service Defendants violated the Magnuson-Stevens Act by failing to enforce or draft an FMP that complies with the Magnuson-Stevens Act and the national standards using the best available science to end overfishing, rebuild populations, and minimize bycatch of river herring and shad;
4. Declare that the ASMFC Defendants and the Fisheries Service Defendants violated the Atlantic Coast Fisheries Act and the APA by failing to coordinate the management of

- river herring and shad in federal waters of the East Coast and failing to enact regulations in the EEZ to govern fishing for river herring and shad in the absence of a federal FMP;
5. Declare that the ASMFC Defendants violated the ASMFC Charter in failing to draft an IFMP that ensures the long term biological health of river herring and shad by ending overfishing, rebuilding stocks, minimizing waste and taking adaptive management measures in response to changing circumstances using the best science available;
 6. Declare that the ASMFC Defendants violated the Atlantic Coast Fisheries Act by failing to treat imperiled river herring and shad as a stock and treating them as a unit for purposes of conservation and management;
 7. Order the Defendants to prepare and implement an FMP that ends overfishing, sets river herring and shad ACLs and AMs, establishes rebuilding plans, minimizes bycatch to the extent practicable and implements other measures necessary to comply with the Magnuson-Stevens Act;
 8. Order the Defendants to establish emergency measures in the EEZ (including ACLs and bycatch triggered time-area closures) that limit the incidental take of river herring and shad as bycatch in the mid-water trawl fishery while awaiting action by the Councils on a new FMP;
 9. Order the Defendants to improve observer coverage and other monitoring programs, such as port sampling, to adequately account for all river herring and shad taken by the mid-water and small-mesh bottom trawling fleets, and implement limits on river herring and shad bycatch; order the Defendants to obtain the data necessary to support time area/closures;

10. Order the Defendants to take action to rebuild river herring and shad populations in the manner and under the time period required by the Magnuson-Stevens Act.
11. Maintain jurisdiction over this action until the Defendants are in compliance with the Magnuson-Stevens Act, the Atlantic Coast Fisheries Act, the APA, and every order of this Court;
12. Award the Plaintiffs all their reasonable costs and attorneys' fees; and
13. Provide the Plaintiffs all additional and further relief to which they may be entitled.

DATED: September 20, 2010

Respectfully submitted,



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