

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL S. FLAHERTY, et al.,	:
	:
Plaintiffs,	:
	:
v.	: Civil Action No. 11-660 (GK)
	:
REBECCA BLANK, in her official	:
capacity as Acting Secretary of	:
the Department of Commerce,	:
et al.,	:
	:
Defendants.	:

MEMORANDUM ORDER

Plaintiffs Michael S. Flaherty, Captain Alan A. Hastbacka, and the Ocean River Institute bring this suit against Defendants Commerce Secretary John Bryson, the National Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS"). The Court previously held that Amendment 4 to the Atlantic Herring Fishery Management Plan violates certain provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1801 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 et seq. Flaherty v. Bryson, -F. Supp. 2d-, Civil Action No. 11-660 (GK), 2012 WL 752323 (D.D.C. Mar. 8, 2012).

At the conclusion of that Memorandum Opinion, the Court ordered the parties, based upon their earlier request at oral

argument, to provide additional briefing as to the appropriate remedy. This Memorandum Order sets forth that remedy.

I. BACKGROUND¹

On April 1, 2011, Plaintiffs filed a Complaint [Dkt. No. 1] challenging Amendment 4 to the Atlantic Herring Fishery Management Plan ("FMP"), developed by the New England Fishery Management Council (the "Council"). 76 Fed. Reg. 11373 (Mar. 2, 2011). Atlantic herring (Clupea harengus) have been managed through the Atlantic Herring FMP since January 10, 2001. Administrative Record ("AR") 5578.

Plaintiffs' principal concern was for four species, often caught incidentally with Atlantic herring but not, as of yet, actively managed by the Atlantic Herring Fishery Management Plan, collectively referred to as "river herring": (1) blueback herring (Alosa aestivalis), (2) alewife (Alosa pseudoharengus), (3) American shad (Alosa sapidissima), and (4) hickory shad (Alosa mediocris). Flaherty, 2012 WL 752323, at *3. Like Atlantic herring, river herring provide forage for large fish and mammals, including cod, striped bass, bluefin tuna, sharks, marine mammals, and seabirds. Id.; see also AR 763-64. The Atlantic Herring Fishery Management Plan, as updated by Amendment 4, provides Annual Catch

¹ A complete statutory, factual, and procedural background may be found at Flaherty, 2012 WL 752323, at *1-5.

Limits ("ACLs") and accountability measures ("AMs") for Atlantic herring but not for river herring.

In their Complaint, Plaintiffs alleged that: (1) Defendants violated the MSA and APA by failing to include river herring as stock in the fishery and to create catch limits for them in Amendment 4; (2) Defendants violated the MSA and APA by failing to set adequate ACLs for Atlantic herring in Amendment 4; (3) Defendants violated the MSA and APA by failing to set adequate AMs for Atlantic herring in Amendment 4; and (4) Defendants violated NEPA by failing to develop an EIS for Amendment 4. Compl. ¶¶ 70-113.

On March 8, 2012, the Court issued an Order and Memorandum Opinion granting in part and denying in part Plaintiffs' Motion for Summary Judgment and granting in part and denying in part Defendants' Motion for Summary Judgment [Dkt. Nos. 30, 32]. Specifically, the Court held that Defendants violated (1) the MSA and APA by failing to "reasonably and rationally consider[] whether Amendment 4's definition of the fishery [to exclude river herring] complied with the National Standards and with the MSA's directive that FMPs be generated for any fisheries requiring conservation and management"; (2) the MSA and APA by approving Amendment 4 "without addressing the minimization of bycatch to the extent practicable"; and (3) NEPA by failing to take "a 'hard look' at Amendment 4's environmental impacts." Flaherty, 2012 WL 752323, at *14, 17, 29.

Because the parties requested, at oral argument, an opportunity to provide further briefing on the proper remedy depending on how the Court decided the pending Motions, the Court deferred ruling on that issue. Id. at *30. Thereafter, the parties attempted, ultimately unsuccessfully, to reach an agreement as to the remedial action to be undertaken by Defendants. Accordingly, on May 4, 2012, both parties submitted briefs on this issue ("Defs.' Remedy Br." [Dkt. No. 34]; "Pls.' Remedy Br." [Dkt. No. 35]). In response to these briefs, the Court ordered a separate hearing on the remedy issue, which took place on July 26, 2012. On July 31, 2012, at the direction of the Court, the parties submitted supplemental briefs on remedy ("Defs.' Supp. Br." [Dkt. No. 39]; "Pls.' Supp. Br." [Dkt. No. 40]).

II. ANALYSIS

As explained above, a remedy in this case must address three violations: (1) Defendants' failure to evaluate the Council's determination not to include river herring as a stock in the fishery; (2) Defendants' failure to consider whether Amendment 4 minimized bycatch to the extent practicable; and (3) Defendants' failure to properly consider alternatives in its Environmental Assessment. Additionally, the Court must determine the status of Amendment 4 pending Defendants' remedial action. Each issue will be addressed in turn.

A. Vacatur

The first issue to be addressed is whether Amendment 4 should be vacated while Defendants take steps to comply with this Order. Defendants contend that Amendment 4 should not be vacated because the legal deficiencies are not serious and the disruptive consequences of replacing a vacated Amendment 4 with its predecessor could be profound. See Defs.' Remedy Br. at 17 (quoting Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002)). Plaintiffs propose that Amendment 4 be vacated, but that the vacatur be suspended for one year, which should, by both parties' estimations, provide ample time for all three remedies to be adopted. Pls.' Remedy Br. at 9.

"Both the Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for this type of violation." In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig., 818 F. Supp. 2d. 214, 238 (D.D.C. 2011) (citing Fed. Election Comm'n v. Akins, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case.") and Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("[A plaintiff who] prevails on its APA claim . . . is entitled to relief under that statute, which normally will be a vacatur of the agency's order.")). Plaintiffs' proposal both abides by this rule and avoids potential disruption to the regulation of the Atlantic

Herring Fishery by providing Defendants a window of time within which to remedy their violations without interrupting the operation of Amendment 4.

B. Stocks in the Fishery

The parties disagree as to the proper remedy for Defendants' failure to properly evaluate the composition of the Atlantic herring fishery and, specifically, to address whether river herring should be deemed a stock in the fishery. Plaintiffs argue that NMFS should be ordered to consider using its emergency rulemaking power to add river herring as a stock in the fishery and to recommend to the Council "that, in order to bring the FMP into compliance with the Court's Memorandum Opinion, the Council in Amendment 4 must include River Herring as non-target stocks in the Atlantic Herring FMP." Pls.' Remedy Br. at 13. In substance, Plaintiffs would like the Court to use NMFS's influence to instruct the Council to deem river herring a stock in the fishery and to implement accompanying management measures.

By contrast, Defendants argue that Amendment 4 should be remanded to the Agency for further explanation. They propose that NMFS both file a supplemental explanation to the Court within a month and also, within a month, "send a letter to the Council recommending that the Council consider, in an amendment to the Atlantic Herring FMP, whether river herring and shad should be designated as non-target stocks" Defs.' Remedy Br. at 2-9.

The law regarding this Court's remedial power is perfectly clear. "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Indeed, our Court of Appeals has repeatedly stated that "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." PPG Indus., Inc. v. U.S., 52 F.3d 363, 365 (D.C. Cir. 1995); see also N. Carolina Fisheries Ass'n, Inc., 550 F.3d at 20; Palisades Gen. Hosp. Inc. v. Leavitt, 426 F.3d 400, 403 ("the district court had jurisdiction only to vacate the Secretary's decision . . . and to remand for further action consistent with its opinion.").

This rule is particularly apt in this case, which involves especially complex decisions based on various areas of scientific expertise. Congress has created a detailed federal-state-local structure to investigate, study, and eventually make those decisions. It is not for "an 'appellate court . . . [to] intrude upon the domain which Congress has exclusively entrusted to an

administrative agency.'" INS v. Ventura, 537 U.S. 12, 16 (2002) (quoting SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)). Further, the relief requested by Plaintiffs would require the Court to conduct its own inquiry into whether river herring should be deemed a non-target stock -- a task the Court is neither equipped nor permitted to perform. Florida Power & Light Co., 470 U.S. at 744 ("The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."). Finally, Plaintiffs have provided no authority which would support the extraordinary relief requested here.

In sum, the appropriate remedy is for Defendants to do what they failed to do before: to consider whether Amendment 4's definition of the fishery complies with the MSA. Therefore, Amendment 4 will be remanded to the agency for reconsideration and action consistent with the Court's March 8, 2012, Memorandum Opinion.

C. Bycatch

Defendants contend that "the Court should withhold its power to grant equitable relief for the violation of National Standard 9 because the Council and NMFS are already considering management measures to address river herring and shad bycatch in Amendment 5 to the Atlantic herring FMP." Defs.' Remedy Br. at 12. Alternatively, Defendants argue that "any remedy for the National

Standard 9 violation should be limited to an order requiring NMFS to consider, within one year, whether the Atlantic herring FMP complies with National Standard 9.” Defs.’ Supp. Br. at 4. This time period would permit NMFS to determine whether Amendment 5, which has been approved by the Council, minimizes bycatch to the extent practicable. Id. at 4-5. Plaintiffs propose that NMFS be ordered to recommend that the Council minimize bycatch to the extent practicable as part of the 2013-2015 herring specifications. Pls.’ Proposed Order at 3 [Dkt. No. 40-5].

As already noted, the typical relief for a successful challenge to agency decisionmaking is a remand rather than an injunction. See N. Carolina Fisheries Ass’n, Inc. v. Gutierrez, 550 F.3d 16, 20 (D.C. Cir. 2008) (“the district court, sitting as a court in review of agency action under the Act and APA, should have done what a court of appeals normally does when it identifies an agency error: remand to the agency for further proceedings.”). Further, the National Standard 9 violation identified in this case was Defendants’ approval of Amendment 4 without “evaluating whether the FMP or amendment minimized bycatch to the extent practicable,” Flaherty, 2012 WL 752323, at *16-17, not the Council’s failure to do so to the extent practicable. Therefore, Amendment 4 must be remanded to the agency to consider whether bycatch has been minimized to the extent practicable.

D. Environmental Impact of Reasonable Alternatives

As to Defendants' failure to analyze the impacts of alternative measures, including alternatives to the Atlantic herring allowable biological catch control rule, annual catch limits, accountability measures, and measures for minimizing bycatch, Plaintiffs and Defendants agree that Defendants should recommend that the Council address these issues in its NEPA analysis for the 2013-2015 specifications and management measures for the Atlantic herring fishery. Pls.' Proposed Order at 3; Defs.' Proposed Order at 2 [Dkt. No. 39-1]. Therefore, consonant with the representations of both parties, Defendants shall be ordered to recommend that the Council address reasonable alternatives under NEPA, consistent with the Court's March 8, 2012, Memorandum Opinion, in the 2013-2015 specifications and management measures for the Atlantic herring fishery.

III. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED, that Amendment 4 is remanded to NMFS for reconsideration and action consistent with the Court's March 8, 2012, Opinion and this Memorandum Order; and it is further

ORDERED, that Amendment 4 is vacated, with vacatur stayed for one year from the date of this Memorandum Order; and it is further

ORDERED, that Defendants shall, consistent with this Court's March 8, 2012, Memorandum Opinion, consider whether Amendment 4's

determination of the stocks in the fishery complies with the MSA and shall, within one month from the date of this Memorandum Order, file with the Court a supplemental explanation setting forth its consideration of whether Amendment 4's definition of the fishery complies with the MSA; and it is further

ORDERED, that, within one month from the date of this Memorandum Order, Defendants shall send a letter to the New England Fishery Management Council explaining the applicable law and National Standard 1 Guidelines relating to determining the stocks to be included in a fishery, consistent with this Court's March 8, 2012, Memorandum Opinion, and recommending that the Council consider, in an amendment to the Atlantic Herring FMP, whether "river herring"² should be designated as a stock in the fishery based upon, at a minimum, consideration of the following materials:

- a. the 2012 ASMFC river herring stock assessment report and peer review report;
- b. NMFS's 2011 finding that listing river herring as a threatened species under the Endangered Species Act may be warranted;
- c. the 2007 shad stock assessment report and its peer review report; and

² River herring include alewife and blueback herring, and hickory and American shad.

- d. Alternative Set 9 in the MAFMC's Amendment 14 DEIS (April 2012) to the Mackerel Squid, Butterfish FMP; and
- e. a copy of the Court's Opinion of March 8, 2012; and it is further

ORDERED, that Defendants shall, consistent with this Court's March 8, 2012, Memorandum Opinion, consider whether the Atlantic herring FMP minimizes bycatch to the extent practicable under National Standard 9 and shall, within one year from the date of this Memorandum Order, file with the Court a supplemental explanation setting forth its consideration of whether the Atlantic herring FMP minimizes bycatch to the extent practicable in compliance with the MSA; and it further

ORDERED, that, in the letter to the New England Fishery Management Council described above, Defendants shall also, consistent with this Court's March 8, 2012, Memorandum Opinion, describe Amendment 4's other inconsistencies with applicable law and recommend that the New England Council, as part of the 2013-2015 herring specifications (or another appropriate action to be completed within one year of the date of this Memorandum Order), consider a range of alternatives:

- a. for minimizing bycatch to the extent practicable in the Atlantic herring fishery;

- b. to the current AMs for the fishery, including monitoring alternatives; and
- c. to the interim ABC control rule for the Atlantic herring fishery, at least one of which shall be based on the most recent best available science for setting ABC control rules for herring and other forage fish; and it is further

ORDERED, that no later than six months from the date of this Memorandum Order, Defendants shall file with the Court a status report describing their progress on the remedial actions ordered herein. No later than one year from the date of this Memorandum Order, Defendants shall also file with the Court a report describing all remedial actions taken in response to this Memorandum Order, including a completed NEPA analysis for the 2013-15 specifications and management measure for the Atlantic herring fishery demonstrating that Defendants took a "hard look" at the environmental impacts of the remedial actions, including an appropriate range of alternatives and examination of cumulative impacts;³ and it is further

³ The Court expects Defendants to complete the remedial actions taken in response to this Order within one year from the date of this Memorandum Order.

ORDERED, that this Court shall retain jurisdiction over this action pending full compliance by the Defendants with this Memorandum Order.

August 2, 2012

/s/

Gladys Kessler
United States District Judge

Copies to: counsel of record via ECF