IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA'S VINEYARD /DUKE'S COUNTY FISHERMEN'S ASSOCIATION, et al.,	)	Civ. No. 10-1580 RJL
Plaintiffs	)	
v.	)	
GARY LOCKE, et al.,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS ONE AND TWO OF PLAINTIFFS' AMENDED COMPLAINT

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FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS ONE AND TWO OF PLAINTIFFS' COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Federal Defendants Gary Locke, Secretary of Commerce; National Oceanic and Atmospheric Administration ("NOAA"), and National Marine Fisheries Service ("NMFS") hereby move to dismiss Counts 1 and 2 of Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, Dkt. No. 20 (Dec. 13, 2010) ("Amended Complaint").[1]

INTRODUCTION

Raising concerns about the status of river herring and shad, species that inadvertently are caught by fishermen pursuing other species, Plaintiffs seek to compel Federal Defendants to address such incidental take – commonly referred to as "bycatch" – through this action. However, instead of raising a direct challenge to the regulations governing the fisheries where bycatch of river herring and shad occurs, Plaintiffs purport to challenge an ambiguous "failure to manage" by Federal Defendants and failure to "support" the efforts of the Atlantic States Marine Fisheries Commission ("ASMFC" or "the Commission"). This Court lacks jurisdiction over Plaintiffs' claims against Federal Defendants, which at bottom challenge regulations under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), because the claims were not brought within the statute of limitations period under the Act. Alternatively, Plaintiffs fail to state a claim under the Magnuson-Stevens Act because they do

[1] Federal Defendants do not address Count 3 of Plaintiffs' Amended Complaint, which is directed against the non-Federal Defendants. See Amended Complaint ¶¶120-140.

This motion does not necessarily address all of the jurisdictional defects with Plaintiffs' Amended Complaint. Federal Defendants reserve their right to raise any other jurisdictional defenses, as appropriate, in the future.

not challenge a discrete agency action, as required under the Administrative Procedure Act ("APA"). Finally, Plaintiffs fail to state a claim for relief under the Atlantic Coastal Fisheries Cooperative Management Act ("Atlantic Coastal Fisheries Act" or "Act") because Federal Defendants have no duty to enact regulations under the Act, and their determination of the manner in which they will "support" interstate fishery management efforts is committed to agency discretion by law.

STATUTORY BACKGROUND

A. The Magnuson-Stevens Act

The Magnuson-Stevens Act originally was enacted in 1976, Pub. L. 94-265, 90 Stat. 331, and has been amended several times, most recently by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. L. 109-479 (Jan. 12, 2007). Congress passed the Magnuson Act (renamed the Magnuson-Stevens Fishery Conservation and Management Act by Pub. L. 104-208, 110 Stat. 3009-41 (Sept. 30, 1996)), inter alia, "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States. . ." and "to promote domestic commercial and recreational fishing under sound conservation and management principles. . . ." 16 U.S.C. § 1801(b)(1), (3).

To carry out specific management and conservation duties, the Magnuson-Stevens Act created eight independent regional Fishery Management Councils. See Natural Res. Def. Council v. Daley, 209 F.3d 747, 749 (D.C. Cir. 2000); see also Commonwealth of Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999). "Each Council is granted authority over a specific geographic region and is composed of members who represent the interests of the states included in that region." C&W Fish Co. v. Fox, 931 F.2d 1556, 1557-58 (D.C. Cir. 1991), citing 16 U.S.C. § 1852.

NMFS prepares and implements fishery management plans ("FMPs") in consultation with affected Councils. In developing these FMPs, NMFS uses the best scientific information available regarding target and non-target species, and protected species. 16 U.S.C. § 1851(a)(2). The FMPs are prepared through a planning process that includes extensive public comment and involvement of persons concerned with and affected by the management of these resources. See id. at § 1854(a)(1)(B). FMPs must be consistent with ten National Standards set forth in the Magnuson-Stevens Act.[2] The Secretary exercises discretion and judgment in weighing the National Standards, and in determining how to implement them needs to provide only "'a reason for doing [so] which was consistent with the statutory standards.'" Yakutat, Inc. v. Gutierrez, 407 F.3d 1054, 1071 (9th Cir. 2005), quoting Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996).

Plaintiffs raise claims in this case related to National Standards One, Two, and Nine. National Standard One requires NMFS to prevent "overfishing," defined in the MSA as "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum

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[2] The National Standards provide that conservation and management measures shall:

(1) prevent overfishing while achieving, on a continuing basis, optimum yield;
(2) be based on the best scientific information available;
(3) to the extent practicable, manage an individual stock of fish as a unit, and interrelated stocks of fish as a unit or in close coordination;
(4) not discriminate between residents of different States;
(5) where practicable, consider efficiency in the utilization of fishery resources;
(6) take into account variations among fisheries, fishery resources, and catches;
(7) where practicable, minimize costs and avoid unnecessary duplication;
(8) take into account the importance of fishery resources to fishing communities;
(9) to the extent practicable, (a) minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch; and
(10) to the extent practicable, promote the safety of human life at sea.

16 U.S.C. § 1851(a)(1)-(10).

sustainable yield on a continuing basis." 16 U.S.C. § 1802(34).[3] In addition, NMFS must prevent overfishing while achieving, on a continuing basis, "optimum yield." "Optimum yield" is defined as the amount of fish which:

> (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;
> (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and
> (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

16 U.S.C. § 1802(33). According to NMFS' National Standard One guidelines, "[i]n determining the greatest benefit to the Nation, the values that should be weighed and receive serious attention" are food production, recreational opportunities, and protection afforded to marine ecosystems." 50 C.F.R. § 600.310(e)(3)(iii). Responsibility for weighing these values rests with NMFS, as delegated by the Secretary.

National Standard Two provides that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). "Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature." 50 C.F.R. § 600.315(b)(1). NMFS' National Standard Two Guidelines clarify that an FMP must take into account the best scientific information available at the time the FMP is prepared. Id. at § 600.315(b)(2).

National Standard Nine provides that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided,

[3] "Maximum sustainable yield" ("MSY") is "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions." 50 C.F.R. § 600.310(e)(1)(i)(A).

minimize the mortality of such bycatch." 16 U.S.C. § 1851(a)(9) (emphasis added). The term "bycatch" means "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards." 16 U.S.C. § 1802(2). See also National Coal. for Marine Conservation v. Evans, 231 F. Supp. 2d 119, 126 (D.D.C. 2002) (defining "bycatch" as "fish that fishers catch but throw back into the ocean, either because they are not the kind of fish that people will buy. . . or because a regulation dictates that the fish cannot be kept").

B. The Atlantic Coastal Fisheries Cooperative Management Act

The ASMFC was created in 1942 by a congressionally approved interstate compact ("ASMFC Compact"). See Pub. L. No. 77-539, 56 Stat. 267 (1942), as amended by Pub. L. No. 81-721, 64 Stat. 467 (1950). The purpose of the ASMFC Compact "is to promote the better utilization of the fisheries . . . of the Atlantic seaboard" through a "joint program for the promotion and protection of such fisheries." ASMFC Compact, art. I. Each member state appoints three representatives to the Commission (the state's director of marine fisheries, a state legislator, and a citizen with knowledge relevant to the regulation of marine fisheries). ASMFC Compact, art. III. "The signatories to the ASMFC 'exercise joint regulatory oversight of their fisheries through the development of interstate [FMPs].'" New York v. Atlantic States Marine Fisheries Comm'n, 609 F.3d 524, 528 (2d Cir. 2010), quoting Rhode Island Fishermen's Alliance, Inc. v. Rhode Island Dep't of Envtl. Mgmt., 585 F.3d 42, 46 (1st Cir. 2009). Because participation in the interstate FMPs was voluntary, "compliance was spotty." New York, 609 F.3d at 528, quoting Medeiros v. Vincent, 431 F.3d 25, 27 (1st Cir. 2005).

In 1993 Congress adopted the Atlantic Coastal Fisheries Act, 16 U.S.C. §§ 5101-5108, to "support and encourage the development, implementation, and enforcement of effective

interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. § 5101(b). Recognizing that "[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 are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation," Congress found that "[i]t is in the national interest to provide for more effective Atlantic State fishery resource conservation and management." Id. § 5101(a)(1), (6). The Act takes advantage of the existing structure already in place through the ASMFC Compact, and adds the element of coordination between the Secretary and the ASMFC. The Act makes clear that the "responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the [Commission]." Id. § 5101(a)(4). The Federal Government's responsibility is to "support such cooperative interstate management of coastal fishery resources." Id.

STANDARD OF REVIEW

As set forth below, Plaintiffs' claims challenging Federal Defendants' management of river herring and shad are subject to dismissal under Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6). Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes a federal court to dismiss a claim that does not fall within the court's subject-matter jurisdiction. Where a motion to dismiss under Rule 12(b)(1) makes a facial attack on the complaint, the reviewing court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Ord v. District of Columbia, 587 F.3d 1136, 1140 (D.C. Cir. 2009), quoting Warth v. Seldin, 422 U.S. 490, 501 (1975). However, even though Federal Defendants move to dismiss the complaint, Plaintiffs bear the burden of proving that the Court has jurisdiction to decide the case. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) ("Federal

courts are courts of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction") (internal citations omitted). See also Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) ("Under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction.").

Alternatively, Plaintiffs fail to state a claim for relief under the Magnuson-Stevens Act or the Atlantic Coastal Fisheries Act. To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Iqbal explained that the pleading requirement of Fed. R. Civ. P. 8(a) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949 (2009) (citing Twombly, 550 U.S. at 555). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 129 S.Ct. at 1949 (citing Twombly, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Thus, a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim under Rule 8. Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555). A court need not "accept as true a legal conclusion couched as a factual allegation," or "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (citations omitted). The Court may "consider only the facts alleged in the complaint, any documents either attached to or incorporated [by reference] in the complaint and matters of

which [the court] may take judicial notice." Id. at 183, quoting EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

This Court lacks jurisdiction over Plaintiffs' first and second claims because Plaintiffs challenge actions taken by the Secretary under regulations implementing an FMP, and their claims were not brought within the statute of limitations period under the Magnuson-Stevens Act. Alternatively, Plaintiffs' first claim must fail because they do not challenge a discrete agency action as required under the APA. Further, Plaintiffs' second claim must fail because Federal Defendants' determination of the manner in which it will "support" interstate fishery management efforts under the Atlantic Coastal Fisheries Act is committed to agency discretion by law.

I. PLAINTIFFS' FIRST AND SECOND CLAIMS ARE TIME-BARRED UNDER THE MAGNUSON-STEVENS ACT.

This Court lacks jurisdiction over Plaintiffs' First and Second Claims for Relief because Plaintiffs failed to file their lawsuit within 30 days of promulgation of the challenged rules, as required by the Magnuson-Stevens Act. The Magnuson-Stevens Act provides that "[r]egulations promulgated by the Secretary under this chapter . . . 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)(1). This provision is jurisdictional. Norbird Fisheries v. NMFS, 112 F.3d 414, 416 (9th Cir. 1997).

Plaintiffs do not invoke the judicial review provision of the Magnuson-Stevens Act, 16 U.S.C. § 1855(f). However, it is clear from the face of their Amended Complaint that their first

and second claims are, at bottom, a challenge to the FMPs for the Atlantic herring and the squid, mackerel, and butterfish fisheries.[4] Plaintiffs, in essence, argue that NMFS has failed to prevent overfishing and to minimize bycatch by implementing FMPs for the Atlantic herring and squid, mackerel, and butterfish fisheries that do not include provisions to reduce bycatch of river herring and shad. But Plaintiffs failed to bring their suit within 30 days of publication of the regulations implementing the most recent amendments to those FMPs, and their claim is therefore time-barred.[5]

On its face, Plaintiffs' Amended Complaint challenges management of the Atlantic herring and the squid, mackerel and butterfish fisheries, where river herring and shad are caught. The crux of Plaintiffs' argument is that NMFS has not managed river herring and shad "as stocks in any other FMPs including Atlantic herring and mackerel (the Atlantic herring FMP and the Squid Mackerel Butterfish FMP)." See Amended Complaint at ¶ 4. See also id. at ¶ 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.");

[4] There is no federal FMP for river herring and shad. Those species are managed by the ASMFC's Interstate Fishery Management Plan for Shad and River Herring. Amended Complaint at ¶ 63.

[5] The regulations implementing the most recent amendments to these FMPs were published well over 30 days ago. The final rule implementing Amendment 2 to the Atlantic herring FMP (Standardized Bycatch Reporting Methodology Omnibus Amendment) was published on January 28, 2008 and became effective on February 27, 2008. 73 Fed. Reg. 4,736 (Jan. 28, 2008). Amendment 3 to the Atlantic herring FMP (Essential Fish Habitat Omnibus) is presently under development, and Amendment 4 was approved on November 9, 2010. NMFS published a proposed rule implementing Amendment 4 to the Atlantic herring FMP (to establish Annual Catch Limits and Accountability Measures) on October 18, 2010, and the comment period on the proposed rule closes on December 2, 2010. 75 Fed. Reg. 63,791 (Oct. 18, 2010). The final rule implementing Amendment 10 to the squid, mackerel, and butterfish FMP was published on March 11, 2010. 75 Fed. Reg. 11,441 (Mar. 11, 2010).

id. ¶ 86 (". . .[T]he 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.") (emphasis added). Plaintiffs further allege that NMFS has "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 [squid, mackerel, and butterfish] FMP." Id. See also id. at ¶ 90 (alleging that the relevant fisheries councils, see infra note 5, "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"). Plaintiffs' claim is, in essence, that NMFS has violated the Magnuson-Stevens Act by failing to issue regulations that address bycatch of river herring and shad in the Atlantic herring and squid, mackerel, and butterfish fisheries. Plaintiffs' claims are intertwined inextricably with the FMPs for those fisheries, and they cannot avoid the statute of limitations by raising general allegations of "failure to manage" under the Magnuson-Stevens Act.[6]

[6] The facts alleged by Plaintiffs illustrate that the applicable Councils are working to address the bycatch of river herring and shad through amendments to the FMPs for the Atlantic herring and squid, mackerel, and butterfish fisheries. In May 2009, the ASMFC requested that the Secretary take "emergency action to implement monitoring measures to determine bycatch of blueback herring and alewife (river herring) in small mesh fisheries," specifically citing bycatch in the Atlantic herring fleet. May 27, 2009 letter, Dkt. No. 1-3 at 1. The Mid-Atlantic Fishery Management Council ("MAFMC") sent a letter to the Secretary in June 2009 stating its support for the ASMFC's emergency request, and requesting increased observer coverage to monitor river herring in the small mesh trawl fisheries of the Mid-Atlantic. June 24, 2009 letter, Dkt. No. 1-3. at 2. In a separate letter, the New England Fishery Management Council ("NEFMC") requested implementation of a program to collect additional information on bycatch in small mesh fisheries throughout the range of river herring and shad. June 26, 2009 letter, Dkt. No. 1-3 at 4. In declining to exercise his discretion to take emergency action, the Secretary explained that the NEFMC and the MAFMC presently are developing amendments to the challenged FMPs to address bycatch of river herring and shad. See December 15, 2009 letter, Dkt. No. 1-3 at 17 ("The NEFMC is developing Amendment 5 to the herring FMP to specifically address bycatch issues in the Atlantic herring fishery. The MAFMC voted at its August meeting to develop Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish FMP, which will also specifically

Plaintiffs' first claim is subject to the statute of limitations in Section 1855(f) because it challenges actions and inactions by NMFS under regulations implementing the Atlantic herring and squid, mackerel, and butterfish FMPs. See Amended Complaint at ¶108 (alleging, inter alia, that NMFS has failed to "monitor the fisheries that kill river herring and shad"); id. at ¶110 (alleging that the Secretary has failed to enact emergency regulations "to address the emergency or overfishing occurring in the fisheries that kill river herring and shad"). Although pled in the context of NMFS' actions with respect to river herring and shad, it is clear that Plaintiffs seek to compel action with respect to the Atlantic herring and the squid, mackerel, and butterfish fisheries, which are governed by regulations that are subject to challenge only under Section 1855(f) of the Magnuson-Stevens Act. Thus, this case is similar to Midwater Trawlers Coop. v. Mosbacher, 727 F. Supp. 12, 14 (D.D.C. 1989), where the court held that the plaintiff's claims were barred by the Magnuson-Stevens Act's 30-day statute of limitations because, "[a]lthough plaintiff's complaint technically challenges the 1989 total allowable catch specifications, plaintiff's real grievance is with the optimum yield set in 1984." Id. at 14.

Plaintiffs' second claim similarly is barred by the Magnuson-Stevens Act statute of limitations because, although Plaintiffs invoke the Atlantic Coastal Fisheries Act, their grievance is with NMFS' actions with respect to Magnuson-Stevens Act regulations. The alleged failure to enact regulations "consistent with the Magnuson-Stevens Act's national standards," Amended Complaint ¶ 116, and failure to "provide increased monitoring and other measures to address bycatch of river herring in federal fisheries," id. at ¶117, at bottom challenge NMFS' actions and

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address river herring bycatch mortality in the small-mesh fisheries."). Plaintiffs' frustration with the pace of progress on those amendments, see Amended Complaint ¶ 94, does not provide a basis for avoiding the specific process that Congress adopted in the Magnuson-Stevens Act for challenges to regulations implementing FMPs.

inactions with respect to the FMPs for the Atlantic herring and the squid, mackerel, and butterfish fisheries. Rules implementing those FMPs plainly are subject to the Magnuson-Stevens Act's 30-day statute of limitations. It would defeat the purpose of the statute of limitations to permit a plaintiff to challenge regulations implementing FMPs by referring to other statutes that lack review deadlines, such as the Atlantic Coastal Fisheries Act.

Other courts confronting this issue have held that the Magnuson-Stevens Act's statute of limitations applies to challenges to regulations promulgated pursuant to the Magnuson-Stevens Act, even if plaintiffs frame those challenges in terms of different statutes. See, e.g., Turtle Island Restoration Network v. U.S. Dep't of Commerce, 438 F.3d 937, 949 (9th Cir. 2006) (rejecting Endangered Species Act ("ESA"), National Environmental Policy Act ("NEPA"), Migratory Bird Treaty Act ("MBTA"), and APA challenges to Magnuson-Stevens Act regulation); Sea Hawk Seafoods v. Gutierrez, No. C06-1616, slip op., Dkt. No. 19, at 2-3 (W.D. Wash. Aug. 14, 2007) (attached hereto as Exhibit 1) (rejecting as time-barred challenge to regulations developed to implement the American Fisheries Act ("AFA"), finding that regulations were promulgated under Magnuson-Stevens Act because they amended an FMP). As explained by the Ninth Circuit in Turtle Island, "the decisive question is whether the regulations are being attacked, not whether the complaint specifically asserts a violation of the Magnuson Act." Turtle Island, 438 F.3d at 945.

Allowing Plaintiffs to sidestep the Magnuson-Stevens Act review requirements would subvert clear congressional intent in enacting the jurisdictional provision. The 30-day statute of limitations for challenges to Magnuson-Stevens Act rules allows for adoption of appropriate measures to conserve and manage often limited fisheries resources while avoiding disruption of fishing by untimely litigation challenges. Congress did not intend to preclude judicial review of

fishing regulations, but it did intend to impose strict time limits within which such actions could be brought. To further promote the goal of prompt resolution, Congress shortened the time period for the Secretary to respond and stated that the Court "shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way." See 16 U.S.C. § 1855(f)(3) and (4). These time limits ensure prompt resolution of challenges to fishing regulations so that all stakeholders may have settled expectations. To allow Plaintiffs to avoid this statute of limitations would defeat Congressional intent in enacting the expedited review provisions of the Act. See Turtle Island, 438 F.3d at 948 ("The Magnuson Act's high level of specificity does not evince congressional intent to allow other, more general statutes of limitation to be transplanted or imported, and thus spoil this fine-tuned scheme."). Plaintiffs may not, by pleading their claim as a violation of another statute, achieve relief with respect to the Atlantic herring and squid, mackerel, and butterfish fisheries that is not available under the Magnuson-Stevens Act. Accordingly, because Plaintiffs failed to file their challenge to these Magnuson-Stevens Act regulations within the 30-day statute of limitations, Plaintiffs' First and Second Claims for Relief must be dismissed.

II. ALTERNATIVELY, PLAINTIFFS' CLAIMS AGAINST FEDERAL DEFENDANTS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR RELIEF UNDER THE MAGNUSON-STEVENS ACT OR THE ATLANTIC COASTAL FISHERIES ACT.

Plaintiffs may argue that their claims are not subject to the Magnuson-Stevens Act statute of limitations because they do not challenge specific actions taken by the Secretary under regulations which implement an FMP. See 16 U.S.C. § 1855(f). If that is the case, dismissal is warranted on an alternative basis: Plaintiff does not identify an agency action that is reviewable under the APA.[7]

Section 706(1) of the APA provides that a court reviewing agency action is empowered to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). See also Amended Complaint ¶6 (alleging that the Court has jurisdiction over this case pursuant to the APA). Plaintiffs have failed to state a claim under the APA because they do not allege that Federal Defendants failed to take a discrete agency action that they were required to take. Further, to the extent Plaintiffs identify an action under the Atlantic Coastal Fisheries Act, that action is committed to agency discretion by law.

A. Plaintiffs' First Claim Must Be Dismissed Because They Fail To Identify A Discrete Agency Action That Federal Defendants Were Legally Required To Take.

On its face Plaintiffs' First Claim for Relief – alleging a "failure to manage" – fails to state a claim under the APA. See Amended Complaint at 26. Plaintiffs' claim, which amounts to a generalized challenge to NMFS' management of the fishery, must fail because Plaintiffs do

[7] Because "the APA grants a cause of action rather than subject matter jurisdiction," these claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6). See Fund for Animals v. BLM, 460 F.3d 13, 18 n.4 (D.C. Cir. 2006), citing Califano v. Sanders, 430 U.S. 99, 107 (1977).

not articulate a specific final agency action that this Court can compel Federal Defendants to take.

In Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), the Supreme Court ruled that under the APA a plaintiff "cannot demand a general judicial review of the [agency's] day-to-day operations," simply by claiming that those operations are characterized by "failures" to abide by statutes or regulations. Id. at 899. Instead, a Plaintiff "must direct its attack against some particular 'agency action' that causes it harm." Id. at 891. The meaning of agency action for purposes of APA Section 702 is the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. See 5 U.S.C. § 551(13).

Even where they allege a "failure to act," Plaintiffs must identify a discrete action that they are seeking to compel. See Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 62-63 (2004). The Supreme Court has explained:

> Sections 702, 704, and 706(1) [of the APA] all insist upon an "agency action," either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)). The definition of that term begins with a list of five categories of decisions made or outcomes implemented by an agency--"agency rule, order, license, sanction [or] relief." § 551(13). All of those categories involve circumscribed, discrete agency actions . . . .
> ***
> The final term in the definition, "failure to act," is in our view properly understood as a failure to take an agency action – that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13). Moreover, even without this equation of "act" with "agency action" the interpretive canon of ejusdem generis would attribute to the last item ("failure to act") the same characteristic of discreteness shared by all the preceding items.

Id.

Plaintiffs' First Claim does not challenge "final agency action" within the meaning of 5 U.S.C. § 551(13) because they do not challenge a discrete order, rule, sanction or equivalent

determination. Instead, they attempt to challenge NMFS' ongoing program of daily operations with respect to river herring and shad. See, e.g., Amended Complaint ¶108 (alleging that NMFS has failed to "prepare or implement management measures for river herring and shad containing management measures 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," including an alleged "failure to monitor the fisheries that kill river herring and shad"). "Such broad review of agency operations is just the sort of 'entanglement' in daily management of the agency's business that the Supreme Court has instructed is inappropriate." Del Monte Fresh Produce N.A. v. United States, 706 F. Supp. 2d 116, 119 (D.D.C. 2010). See also SUWA, 542 U.S. at 67 ("The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.").

Thus, this case is similar to Montanans for Multiple Use v. Barbouletos, 568 F.3d 225 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 3331 (2010), where the D.C. Circuit held that plaintiffs could not state a claim for failure to act under APA Section 706(1) based on allegations that the Secretary of Agriculture "failed to carry out management activities in accordance with the National Forest Management Act and the 1986 Forest Plan." Id. at 227. The court held that "plaintiffs' complaint does not identify a legally required, discrete act that the Forest Service has failed to perform -- a threshold requirement for a § 706 failure-to-act claim." Id., citing SUWA, 542 U.S. at 64. Plaintiffs' "conclusory statements" that the Forest Service "neglected its general statutory and regulatory obligations" were found to "amount to nothing more than allegations of general 'deficiencies in compliance' that 'lack the specificity requisite for agency action.'" Id., quoting SUWA, 542 U.S. at 66. See also Foundation on Econ. Trends v. Lyng, 943 F.2d 79, 86

(D.C. Cir. 1991) (holding that plaintiffs could not "attack a broad program, involving a wide array of activities, and assert that the daily operation of that program should be handled differently," noting that "'the many individual actions referenced' in the record, and presumably actions yet to be taken as well – cannot be laid before the courts for wholesale correction") (citation omitted); Fund for Animals, 460 F.3d at 20 ("Unlike 'circumscribed, discrete agency actions' that are the ordinary subjects of judicial review. . . , the Bureau's strategy represents the sum of "many individual actions," including some "yet to be taken.") (citations omitted); Independent Petroleum Ass'n v. Babbitt, 235 F.3d 588 (D.C. Cir. 2001) (challenge to Department of Interior's policy as to royalty payments for oil and gas lease agreements was not challenge to final agency action); American Farm Bureau, v. EPA, 121 F. Supp. 2d 84, 102 (D.D.C. 2000) ("courts have repeatedly refused to entertain the type of programmatic attack on the general day-to-day operations of the agency that the plaintiffs are waging here") (citation omitted).

Further, to the extent Plaintiffs identify specific actions that they seek to compel, those actions are not legally required. Section 706(1) authorizes suit to compel only an action that is "legally required," such as "a specific, unequivocal command" or "the ordering of a precise, definite act ... about which [an official] had no discretion whatever." SUWA, 542 U.S. at 63 (internal quotations omitted). The Supreme Court explained that the "principal purpose" of this limitation "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." Id. at 66. See also Kaufman v. Mukasey, 524 F.3d 1334, 1338 (D.C. Cir. 2008) ("[C]onsistent with underlying separation of powers considerations, 'a

claim under [section] 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.'"), quoting SUWA, 542 U.S. at 64.

For example, Plaintiffs challenge the Secretary's "fail[ure] to use his emergency authority" under Section 1855(c) of the Magnuson-Stevens Act. Amended Complaint ¶ 110.[8] That section provides that "[i]f the Secretary finds that an emergency exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing. . . ." 16 U.S.C. § 1855(c) (emphasis added). This claim must fail, because there is no legal requirement for the Secretary to issue emergency regulations under the Magnuson-Stevens. See Sea Hawk Seafoods v. Locke, 568 F.3d 757, 766-67 (9th Cir. 2009) ("a claim that the Secretary had failed to fulfill his overall obligations under the AFA to protect salmon processors . . . would not state a judicially cognizable claim" because statutory term "'may' implies discretion [and thus] there is no legally required action imposed on the Agency"), cert. denied, 130 S. Ct. 1522 (2010) (emphasis in original) (citing SUWA). Thus, the APA does not provide a cause of action for Plaintiffs to compel Federal Defendants to issue regulations for river herring and shad. See SUWA, 542 U.S. at 65 (rejecting claim based on statutory requirement for BLM to "continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness," finding that the statute "is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it"). See also Association of Civilian Technicians, Inc. v. United States, 601 F. Supp. 2d 146 (D.D.C. 2009) (dismissing claims under

[8] Plaintiffs do not appear to state a direct challenge to the substance of the Secretary's December 15, 2009 letter denying the ASMFC's request for emergency rulemaking. Federal Defendants reserve their right to raise any jurisdictional arguments related to the substance of the December 15, 2009 letter in the future, should Plaintiffs raise a claim directly challenging that decision.

Section 706(1) where plaintiff failed to prove that agency was required by law to take the action that plaintiff sought to compel), aff'd 603 F.3d 989 (D.C. Cir. 2010); Long Term Care Pharm. Alliance v. Leavitt, 530 F. Supp. 2d 173, 187 (D.D.C. 2008) (where a statute imposes "a general duty to provide a process. . . but leaves the details of that process to the agency's discretion . . . a court may not mandate greater timeliness and accuracy"); Friends of the Earth v. U.S. Dep't of Interior, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) ("As to compelling a decision as action unlawfully withheld under § 706(1), plaintiffs have not identified a deadline or duty that has been violated."). Thus, Plaintiffs' First and Second Claims must be dismissed for failure to state a claim under the APA.

B. Plaintiffs' Second Claim Must Be Dismissed Because They Fail To State A Claim Under The Atlantic Coastal Fisheries Act.

Plaintiffs cannot state a claim under the Atlantic Coastal Fisheries Act for an alleged "failure to regulate" the river herring and shad fisheries. First, Federal Defendants legally are not required to issue regulations under the Atlantic Coastal Fisheries Act. Second, Plaintiffs cannot state a claim based on allegations that Federal Defendants have "failed to support" the ASMFC, because the decision of how to support the ASMFC is committed to agency discretion by law.

As an initial matter, it is plain that the Atlantic Coastal Fisheries Act establishes no duty or requirement that the Secretary must take any discrete action. As discussed above, supra Section II.A., the APA does not authorize a lawsuit to compel a discretionary action. See SUWA, 542 U.S. at 63 (Section 706(1) authorizes suit to compel only an action that is "legally required," such as "a specific, unequivocal command" or "the ordering of a precise, definite act ... about which [an official] had no discretion whatever"). Plaintiffs allege that Federal

Defendants "have failed to enact regulations in the [Exclusive Economic Zone ("EEZ")] for river herring and shad. . ." pursuant to the Atlantic Coastal Fisheries Act. Amended Complaint ¶ 116. The plain language of the law states that whether to issue regulations is discretionary with the Secretary. 16 U.S.C.S. § 5103(b)(1) ("In the absence of an approved and implemented fishery management plan under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Councils, the Secretary may implement regulations to govern fishing in the exclusive economic zone.") (emphasis added). Thus, this claim must fail for the reasons set forth above, because there is no legal requirement for the Secretary to issue regulations under the Atlantic Coastal Fisheries Act.

Nor can Plaintiffs state a claim under the Atlantic Coastal Fisheries Act based on allegations that Federal Defendants have "failed to support the ASMFC and state coastal fisheries programs. . . ." Amended Complaint ¶ 117. This claim must fail because there is no statutory standard for the Court to apply, thus the decision of how to support the ASMFC is committed to agency discretion by law.[9]

The judicial review provisions of the APA provide a limited cause of action for review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; see Califano, 430 U.S. at 104-07. But the APA does not apply to agency action "to the extent that . . . agency action is committed to agency

[9] The allegation that NMFS has "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," Amended Complaint ¶ 117, also raises an impermissible programmatic challenge to NMFS' actions under the Atlantic Coast Fisheries Act that is not subject to judicial review for the reasons stated supra, Section II.A. "The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance" with congressional directives such as how to "support" the ASMFC "is not contemplated by the APA." See SUWA, 542 U.S. at 67.

discretion by law." 5 U.S.C. § 701(a)(2). An agency action is committed to agency discretion by law where a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and where "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). See also Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002) ("Since the Court's decision in Overton Park, the 'no law to apply' formula has come to refer to the search for substantive legal criteria against which an agency's conduct can be seriously evaluated."). Whether a matter has been committed solely to agency discretion is determined by "consider[ing] both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." Id.

The Atlantic Coastal Fisheries Act requires the Secretary, in cooperation with the Secretary of the Interior, to "develop and implement a program to support the interstate fishery management efforts of the Commission." 16 U.S.C. § 5103(a). The Secretary's decisions regarding how it will "support" the efforts of the ASMFC are not reviewable under the APA because Congress did not provide any standards for reviewing the exercise of the Secretary's discretion. While the statute lists examples of the elements of a program, this does not equate to a mandatory duty to implement any or all of the listed items. See 16 U.S.C. § 5103(a) ("The program shall include activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning."). As explained by the Ninth Circuit in Sierra Club v. Whitman, 268 F.3d 898, 904 (9th Cir. 2001),

the mere use of the word "shall" does not always give rise to a mandatory duty to take certain actions:

> It is true that "shall" in a statute generally denotes a mandatory duty. Alabama v. Bozeman, 533 U.S. 146, --, 121 S. Ct. 2079, 2085, 150 L.Ed.2d 188 (2001). Nonetheless, the use of "shall" is not conclusive. See Escoe v. Zerbst, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). Particularly when used in a statute that prospectively affects government action, "shall" is sometimes the equivalent of "may." Richbourg Motor Co. v. United States, 281 U.S. 528, 534, 50 S.Ct. 385, 74 L.Ed. 1016 (1930). The question whether "shall" commands or merely authorizes is determined by the objectives of the statute.

Id. at 904.

In this case, the objective of the Atlantic Coastal Fisheries Act is to "support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. § 5101(b). The plain language of the statute makes clear Congress' intent "that the 'responsibility for managing Atlantic coastal fisheries rests with the [s]tates, which carry out a cooperative program of fishery oversight and management through the [ASMFC].'" New York v. Atlantic States Marine Fisheries Comm'n, 609 F.3d 524, 529 (2nd Cir. 2010), quoting 16 U.S.C. § 5101(a)(4). The Act provides for management of coastal fisheries by the Commission and the States, with coordination between the Secretary and the ASMFC. See H.R. Rep. No. 103-202 at 6 (1993) ("Under the legislation, the Commission and the States continue to be responsible for the management of coastal fisheries. The States, through the Commission, develop interstate fishery management plans implemented by each State and would be responsible for implementing them individually. The Federal Government provides resources for cooperative research activities."). See also S. Rep. No. 103-201 at 7 (1993) ("S. 1126 as reported allows states to develop coherent and compatible conversation goals for an Atlantic coastal fishery resource without interfering

with a State's authority to manage fisheries under its jurisdiction."). In contrast to the ASMFC, which is directed to develop coastal FMPs which the member states must implement, id. at § 5104, the Secretary's role under the statute is to "support" the efforts of the Commission. Id. at 5103(a). See also North Carolina Fisheries Ass'n v. Brown, 917 F. Supp. 1108, 1117 (1996) ("[The Atlantic Coastal Fisheries Act] says, without qualification, that the 'responsibility rests with the states.' It would be hard to find a clearer expression of Congressional intent. This design pervades the statute – the Commission manages, the federal government supports."). Put another way, the Federal government is "the tail on the dog" under the Act. See id.

The broad terms of the statute permit the Secretary to exercise discretion in determining how to carry out that supporting role. Here, judicial review of Federal Defendants' decisions regarding how to "support" the efforts of the ASMFC would interfere with the Secretary's discretion. See Orlov v. Howard, 523 F. Supp. 2d 30, 37 (D.D.C. 2007) ("the APA does not apply . . . 'where agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a)(1), (2). 'The principle purpose of the APA limitations . . . – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion…."), citing SUWA, 542 U.S. at 66. Thus, the Secretary's determination of how to support the ASMFC and state coastal fisheries programs is not reviewable under the APA because Congress did not provide any standards for reviewing the exercise of that discretion.[10]

[10] Alternatively, Plaintiffs lack standing to raise their second claim to the extent that it alleges that Federal Defendants have failed to support the efforts of the ASMFC. See Amended Complaint at ¶ 117. Plaintiffs bear the burden of proving that they have standing to sue. See Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 661 (D.C. Cir. 1996). To meet their burden, Plaintiffs must allege facts demonstrating that: (1) they have "suffered an 'injury-in-fact'" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as

opposed to "conjectural" or "hypothetical;" (2) there is a "causal connection between the injury and the conduct complained of;" and (3) it is "likely" – not merely "speculative" – "that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiffs lack standing because they have not demonstrated any concrete injury that is fairly traceable to the alleged failure to support the ASMFC. Plaintiffs may not challenge an alleged failure to "support" the ASMFC "in the abstract[], apart from any concrete application that threatens imminent harm to their interests." Summers v. Earth Island Inst., 129 S.Ct. 1142, 1149-50 (2009). Further, Plaintiffs must allege "a fairly traceable connection between [their] injury and the complained-of conduct of the defendant." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) (citation omitted). Contrary to Plaintiffs' allegations, the Act does not require any particular end result, such as "provid[ing] increased monitoring and other measures to address bycatch of river herring in federal fisheries. . . ." See Amended Complaint at ¶ 117. Rather, the Act is designed to provide a process for cooperation and coordination between governments, a process that Plaintiffs' allegations demonstrate has occurred and continues to occur. See, e.g., Amended Complaint at ¶ 92-93 (alleging that ASMFC and other parties requested that the Secretary take emergency action to reduce bycatch of river herring and shad, and that NMFS responded that "it is working through the Council process and relying on amendments under development there"). Thus, Plaintiffs cannot demonstrate that any of their alleged injuries result from a failure by the Secretary to support the efforts of the ASMFC.

Because they raise their claim under the APA, Plaintiffs also must establish that their alleged injury falls within the zone of interests to be protected by the Atlantic Coastal Fisheries Act. See Shays v. FEC, 414 F.3d 76, 83 (D.C. Cir. 2005). See also Lujan, 497 U.S. at 883 ("[T]o be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."). Plaintiffs' alleged interests do not fall within the zone of interests sought to be protected by the relevant provision of the Atlantic Coastal Fisheries Act. The Secretary's role under that provision is to "support" the efforts of the Commission, 16 U.S.C. § 5103(a), not to independently manage fisheries. By seeking to interfere with the autonomy of the Commission and the States to manage fisheries under their jurisdiction, Plaintiffs' claim is "more likely to frustrate than to further statutory objectives." Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922 (D.C. Cir. 1989) (quotations & citation omitted). Congress's intent in enacting this provision of the Act was to create a scheme whereby "the Commission manages, the federal government supports." See North Carolina Fisheries Ass'n, 917 F. Supp. at 1117. Just as the Plaintiffs lack standing to be a party to this state-Federal governmental coordination under the Act, so too do they lack standing to complain about how it is conducted.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts 1 and 2 of Plaintiffs' Amended Complaint.

Respectfully submitted this 14th day of January, 2011.

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