



Mr. John Bullard, Regional Administrator
National Marine Fisheries Service
Greater Atlantic Regional Fisheries Office
55 Grant Republic Drive
Gloucester, MA 01930

October 5, 2015

Re: Catch Caps for River Herring and Shad in FY 2016-2018

Dear Mr. Bullard,

We are writing on behalf of our clients in *Flaherty v. Bryson* to urge you to reject the New England Council's recommendation for the river herring and shad (RH/S) catch caps in the proposed 2016-2018 Atlantic herring specifications. On September 29, 2015 the Council voted to recommend Catch Cap Alternative 3, which would increase three out of the four catch caps for RH/S in the Atlantic herring fishery. These increases are inconsistent with the Magnuson-Stevens Act's requirement to minimize bycatch to the extent practicable, are inconsistent with the goals and objectives of the FMP, Amendment 5 (address bycatch), and Framework 3 (reduce bycatch and incentivize the fleet to avoid RH/S), and cannot be approved. Instead, NMFS should exercise its authority to make final specification determinations,¹ and implement caps that reduce RH/S catch consistent with National Standard 9.

Our clients appreciate that you have consistently urged the Council to set catch caps at levels that minimize bycatch as required by National Standard 9, and to take actions consistent with the goals and objectives of the Atlantic Herring FMP. As you noted during the discussion prior to the vote, catch caps that would actually reduce bycatch were the reason for your decision not to add RH/S as stocks in the herring and mackerel fisheries. Unfortunately, the Council's recommendation to raise the RH/S catch caps will increase bycatch and mortality of these severely depleted species.

Amendment 5 was intended to improve compliance with the legal requirement to minimize bycatch,² however, ultimately only three regulatory measures were implemented: 1)

¹ See 50 C.F.R. § 648.200 (c), (d).

² 16 U.S.C. § 1851(a)(9). A Court has also ordered NMFS to minimize bycatch in this fishery. See August 2, 2012 Order in *Flaherty v. Bryson*, Civ. No. 1:11-cv-00660, ECF No. 41; see also August 31, 2012 Letter from John Bullard to Rip Cunningham, ECF No. 42-2 ("NMFS is also ordered to recommend to the NEFMC that it consider a range of alternatives for minimizing bycatch in the Atlantic herring fishery, to the extent practicable. Amendment 5 to the Atlantic Herring FMP considers a range of alternatives to minimize bycatch. Therefore, Amendment 5 should explain why the range of alternatives considered in Amendment 5 was reasonable and how measures adopted by the NEFMC as part of Amendment 5 minimize bycatch, to the extent practicable, in the Atlantic herring fishery.")

visual access to the cod-end (Section 3.2.2); 2) measures to address net slippage (Section 3.2.3 and proposed Framework Adjustment 4); and 3) river herring and shad catch caps (implemented in Framework 3). Of these measures, only the river herring and shad catch caps have the potential to minimize bycatch to the extent practicable. Analysis produced for the Omnibus Industry-Funded Monitoring Amendment demonstrates that the requirement to provide visual access to the cod-end will not minimize bycatch – in fact, even with an observer, the number of operational discard violations documented shows that the industry regularly chooses not to bring the cod-end on board for visual access.³ The measures to address net slippage in Amendment 5 are equally ineffective – these measures only apply when an observer is on board (coverage is now less than 5-percent in the midwater trawl fleet), and even on observed trips the number of documented slippage violations demonstrate that these measures have not changed behavior in the fishery. *Id.* If you were to approve the recommended catch cap increases, which will *increase* the bycatch and mortality of RH/S, there would be no measures in the Atlantic herring FMP that would meet the legal requirement to minimize bycatch.

Reducing the bycatch and mortality of RH/S in the Atlantic herring fishery requires *both* minimizing bycatch at-sea, consistent with the Magnuson Stevens Act definition of bycatch, and minimizing the landing of RH/S that is technically considered “incidental catch” under the Act. The small mesh bottom trawl fleet is estimated to discard 74-percent of its RH/S catch – dumping these stocks at sea as bycatch. Midwater trawlers arguably have lower discard rates (arguable because of low observer coverage and the fact these rates ignore significant amounts of slipped catch on both observed and unobserved trips), however, the incidental catch of river herring and shad - caught, landed, and sold by this high volume industrial fleet - is significant. Catch with both of these gear types contributes to the depleted status of these species, harms their ability to rebuild, and counteracts the millions of dollars that NMFS spends on state restoration efforts.

Raising the RH/S catch caps would not only be inconsistent with the law and the goals and objectives of the Atlantic herring FMP, it also would be an absurd result. It would reward the fleet for increasing its RH/S catch nearly 100 mt in the last two years after it became obvious that a catch cap would be implemented (compare Alt. 2 weighted mean (2008-2012) with Alt. 3 weighted mean (2008-2014). On the backside of the Cape, it would nearly triple the allowable mortality of RH/S, even though the fleet has only caught 14-percent of the cap during the first 10 months of implementation. Similarly, in southern New England, where the Council

³ http://s3.amazonaws.com/nefmc.org/2b_150817.DRAFT.GF.Closed.Area.Obs.Data.Summary.IFM.pdf. In 2012/2013, out of 125 observed trips, there were at least 27 non-exempt slippage events – 12 events for “other,” 1 for “no market value,” 8 for “vessel capacity filled,” 2 for “not enough fish to pump,” and 2 for “clogged;” In addition, there were 94 operational discard events. In 2014, out of 18 observed trips into closed areas, there were 7 slippage events in Closed Area1 for non-exempt reasons and 22 operational discard events (CA1 plus 2 trips into WGOM CA). Ms. Steele confirmed on September 28, 2015 that all of these events are violations.

expressed concern about potentially constraining the small mesh bottom trawl fleet, only 57 percent of the cap has been caught, and the fleet reported that the existing cap has worked to minimize RH/S catch as intended because existing fishery participants intervened when new participants made no effort to avoid RH/S despite SMAST avoidance advisories. A recently published paper demonstrates that this bycatch from New Jersey to Southern New England is particularly significant because it is mostly comprised of less migratory juveniles with greater impacts to nearby rivers and year-classes.⁴

Approval of the Council's recommended RH/S catch caps will not minimize bycatch in the Atlantic herring fishery as required by law. We urge you to reject the New England Council's recommendation and to exercise your authority to make final specification determinations to implement caps that reduce RH/S catch.

Sincerely,

Erica Fuller
Roger Fleming
Earthjustice

Cc: Mitch Macdonald, NOAA General Counsel
Peter Christopher, GARFO

⁴ <http://s3.amazonaws.com/nefmc.org/Bethoney-et-al-2014-MWT-river-herring-bycatch-characterization.pdf>.