IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA'S VINEYARD / DUKES COUNTY FISHERMEN'S ASSOCIATION, *et al.*,	
Plaintiffs,	
v.	No. 1:10-cv-01580-RJL
GARY LOCKE, in his official capacity as Secretary of the U.S. Department of Commerce, *et al.*,	ORAL HEARING REQUESTED
Defendants.	

PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO FISHERIES SERVICE DEFENDANTS' MOTION TO DISMISS COUNTS ONE AND TWO AND ATLANTIC STATES MARINE FISHERIES COMMISSION DEFENDANTS' MOTION TO DISMISS COUNT THREE

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PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO FISHERIES SERVICE DEFENDANTS' MOTION TO DISMISS COUNTS ONE AND TWO AND ATLANTIC STATES MARINE FISHERIES COMMISSION DEFENDANTS' MOTION TO DISMISS COUNT THREE

Plaintiffs Martha's Vineyard/Dukes County Fishermen's Association and Michael S. Flaherty ("Plaintiffs") hereby oppose the motions filed by Defendants U.S. Secretary of Commerce Gary Locke, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service ("NMFS") (collectively "Fisheries Service Defendants"), and the Atlantic States Marine Fisheries Commission ("ASMFC") and its member states' executive officers charged with conservation of fisheries resources and governors' appointees, acting in their official capacity as commissioners of the ASMFC, (collectively "ASMFC") to dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

INTRODUCTION

This case challenges the Defendants' failure to comply with their legal duties to conserve and manage two fish species – river herring and shad – that are key components of Eastern coastal ecosystems and local coastal economies. Defendants recognize that these fish populations are severely depleted, and Fisheries Service Defendants have listed river herring as a "species of concern" – only one step removed from being listed as threatened or endangered. Moreover, Congress has declared that maintaining healthy populations of river herring and shad is a matter of national interest and established a carefully constructed statutory scheme requiring that the Fisheries Service and the ASMFC establish comprehensive management plans and take other specific actions designed to sustain these fish populations. Yet no such plans exist, no effective actions have been taken, and river herring and shad populations have collapsed. This case at heart is about restoring river herring and shad populations on the Eastern Seaboard to healthy levels, as Congress intended for the benefit of people like Plaintiffs.

Plaintiffs are recreational and commercial fishermen who are now unable to catch river herring or shad. They cannot catch these fish because Defendants continue to fail to meet federal requirements to develop fishery management plans that conserve and manage these species sustainably throughout their range. Instead, Defendants have allowed the populations of both river herring and shad to collapse.

Rather than engaging this case on the merits, Defendants have filed motions to dismiss. Unsurprisingly, neither set of Defendants provides a single sentence in their papers describing the condition of these fish populations. Doing so would unavoidably result in an admission that they have failed to meet their statutory mandates. This tactic is consistent with Defendants' longstanding pattern where each has endeavored to pass off responsibility to the other for taking the concrete steps necessary to conserve these important fish populations, or to move the problem indefinitely down the road.

But this case cannot properly be dismissed. Both sets of Defendants are charged by federal statutes with clear and enforceable duties to prevent the catastrophe that triggered this action: the collapse of river herring and shad. Plaintiffs have a valid cause of action under the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701-706 for the unlawful failure of the Fisheries Service Defendants to carry out discrete, legally required actions under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") 16 U.S.C. §§ 1801-1884, and the Atlantic Coastal Fisheries Cooperative Management Act ("Atlantic Coastal Fisheries Act") 16 U.S.C. §§ 5101-5108. These actions include the duty – based squarely on the plain language of section 302(h)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1852(h)(1), and related provisions in that Act and in the Atlantic Coastal Fisheries Act – to develop and implement a fishery management plan that manages and conserves river herring and shad in

federal waters, and to support the ASMFC through specifically mandated actions. The mandatory duty imposed on the Fisheries Service Defendants by section 302 and related provisions cannot be avoided. Moreover, because the Fisheries Service Defendants have never issued any regulations related to these failures to act, Plaintiffs' claims are not barred by the Magnuson-Stevens Act's statute of limitations.

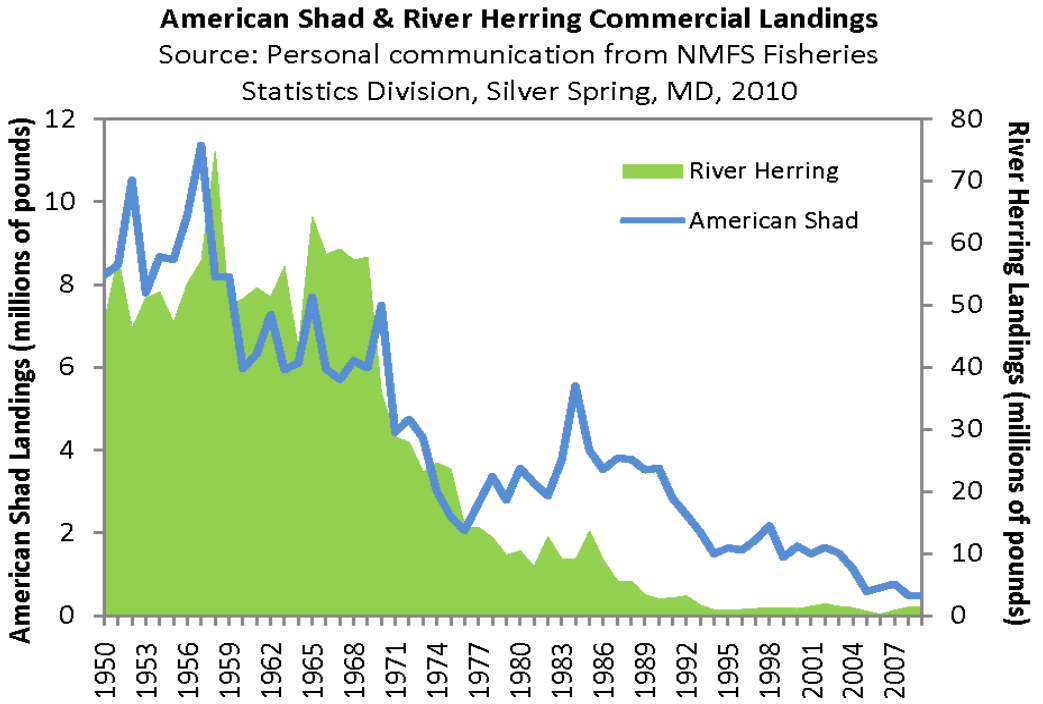
Further, Plaintiffs have a separate cause of action against the ASMFC under the APA for its failure to conserve and manage river herring and shad sustainably throughout their range. Congress intended that the ASMFC function as a federal agency with respect to its responsibilities under the Atlantic Coastal Fisheries Act and thus be subject to suits under the APA by aggrieved stakeholders. The ASMFC's stab at invoking sovereign immunity fails because the ASMFC's federal status for purposes of the Atlantic Coastal Fisheries Act means that the APA waives any sovereign immunity for this suit. Even if that were not the case, Plaintiffs' suit would remain viable against the ASMFC, or, alternatively, the ASMFC Commissioners, under settled legal principles, including the doctrine of *Ex parte Young*.

I. STATUTORY AND FACTUAL BACKGROUND

River Herring and Shad Populations Are Severely Overfished

Due to "drastic declines throughout much of their range," river herring was designated a "species of concern" more than five years ago by the Fisheries Service's Protected Species Division, 71 Fed. Reg. 61,022 (Oct. 17, 2006). This designation identifies species whose populations are "at risk" and in need of protective measures before listing under the Endangered Species Act becomes necessary. In adding river herring to its species of concern list, the Fisheries Service found 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. Similarly, shad stocks are considered "depleted" and trending downward. ASMFC 2009 Annual Report at 11, *available at* http://www.asmfc.org (follow "About Us" hyperlink; then follow "Guiding Documents" to "2009 Annual Report" hyperlink). One proxy for demonstrating the status of fish like river herring and shad is their catch history over time. The resulting chart shows a dramatic population decline:



ASMFC Stock Status Overview 21 (Jan. 2011), *available at* www.asmfc.org (follow links to "About Us," then "Status of the Stocks").

As this chart shows, commercial landings for river herring and shad have declined precipitously in the last fifty years. Various population surveys spanning more recent time frames show similar declining trends—a 97 percent decline in commercial landing of river herring from 1985 to 2009. *See* ASMFC 2008 River Herring Stock Status Report (Executive

Summary), attached to the Amended Complaint as Exhibit 1; *see also ASMFC Stock Status Overview*, *supra*, at 21. The last full stock assessment for river herring was performed more than twenty years ago, at which time "five [of 15] of the stocks [surveyed] were overfished and recruitment [the number of young born that grow to maturity] failure was apparent . . . ." Review of the ASMFC Fishery Management Plan for Shad and River Herring 2009, *available at* http://www.asmfc.org. A 2007 benchmark stock assessment of American shad stocks concluded that "stocks are currently at all-time lows and do not appear to be recovering." ASMFC 2009 Annual Report at 28. The ASMFC has never assessed hickory shad stocks. Amended Compl. ¶ 27. Although it is typical for the Fisheries Service to perform stock assessments for most species on a regular basis, a new stock assessment for river herring has faced numerous delays and is now not scheduled to be completed until at least 2012. Amended Compl. ¶ 26. But even in the absence of recent stock assessments, one thing is perfectly clear: if ever a fishery was in need of restoration and rebuilding, and proper conservation and management, the fishery for river herring and shad is such a fishery.

River herring[1] and shad[2] are anadromous fish, meaning they spend the majority of their adult lives in offshore ocean waters but return to rivers and streams to spawn. 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. http://www.asmfc.org (follow "Managed Species" hyperlink; then follow "Shad & River Herring" hyperlink). These fish serve as forage for other fish, birds, and other animals, and are highly valued by conservationists, commercial and recreational fishermen, and many other members of the public.

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

[2] Shad is the collective term for two species of fish – the American shad, *Alosa sapidissima*, and the hickory shad, *Alosa mediocris*.

The Herring Alliance, *Empty Rivers: The Decline of River Herring and the Need to Reduce Mid-Water Trawl Bycatch* 4 (2007). Due to the declines in abundance, at least four states (Connecticut, Massachusetts, North Carolina, and Rhode Island) have imposed a moratorium on the harvest of river herring in state waters. ASMFC, Species Profile: Shad & River Herring: Atlantic States Seek to Improve Knowledge of Stock Status and Protect Populations Coastwide 4 (Oct. 2007), *available at* http://www.asmfc.org. Many others may soon follow. *See* ASMFC Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring (River Herring Management) 93 (May 2009).

When at sea, juvenile and adult river herring and shad form large mixed-stock schooling aggregations and undertake long seasonal migrations to the Gulf of Maine and surrounding waters. *Id.* at 20. Fishermen using industrial mid-water trawl gear generally seeking to catch both Atlantic ("sea") herring (distinct from river herring) and mackerel haul very large small-mesh nets through the water column and catch millions of river herring and shad each year, *id.* at 73, most of which is landed and sold with the Atlantic herring and mackerel as bait for lobster fishermen, *id. at 65.* Other small-mesh bottom trawl fisheries and gill net fisheries fishing for squid, butterfish, bluefish, weakfish, and mackerel also harvest shad and river herring, most of which is discarded dead or dying at sea. Cieri et al., Estimates of River Herring Bycatch in the Directed Atlantic Herring Fishery 4 (Sept. 23, 2008) (attached to the Amended Complaint as Exhibit 2).

The catch of river herring and shad in these fisheries is poorly monitored, reported, and regulated by the Fisheries Service and the ASMFC. Amended Compl. ¶ 34. This situation masks significant levels of mortality and stands as a major obstacle to quantifying the location and magnitude of the river herring and shad catch occurring in each fishery, and to convincing these

managers of the need to conserve these fish populations. Yet the bycatch of river herring in the New England Atlantic herring fishery alone can equal or exceed all directed fishery landings on the entire Eastern Seaboard in a given year, ASMFC Species Profile: River Herring, *available at* www.asmfc.org, contributing 50 percent or more to the total known fishing mortality. Amended Compl. ¶ 34. The economic loss from fishing and tourism-related business due to low abundance and closed river herring and shad fisheries is likely enormous. For example, in the State of Maryland alone, "the estimated values of a restored [Susquehanna River] shad run . . . range from $42 million to $178 million." ASMFC Amendment 3 to the Interstate Fishery Management Plan for Shad and River Herring (American Shad Management) 11 (Feb. 2010).

The Magnuson-Stevens Act and the Fisheries Service

In 1976, Congress enacted the Fishery Conservation and Management Act ("Magnuson-Stevens Act"), Pub. L. No. 94-265 (1976), *codified as amended*, 16 U.S.C. §§ 1801-1884, in order to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States." *Id.* § 1801(b)(1). Under the Magnuson-Stevens Act, the federal government 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. Congress intended the Magnuson-Stevens Act to protect and manage "all species of fish," H. Rep. 94-445, at 32, § 301(a) (1975), and 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.

The Magnuson-Stevens Act establishes eight regional fishery management councils. Significantly, section 302(h)(1) of the Act requires the councils to prepare FMPs for each fishery that "requires conservation and management." 16 U.S.C. § 1852(h)(1). The Act makes clear that

a fishery requires conservation and management when it is in need of restoration, and when its population needs to be rebuilt. *Id.* § 1802(5). In order to carry out the conservation and management mandate of section 302(h)(1), the Fisheries Service is required to review FMPs prepared by the regional fishery management councils and to approve or disapprove them in accordance with 10 national standards for fishery conservation and management ("National Standards"), and other requirements of the Magnuson-Stevens Act. *Id.* §§ 1851-1854. 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).

Among the National Standards an FMP is required to meet, National Standard 1 requires that conservation and management measures prevent overfishing while achieving, on a continuing basis, optimum yield; National Standard 2 requires that conservation and management measures be based on the best scientific information available; and National Standard 9 requires that, to the extent practicable, conservation and management measures (a) minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. *Id.* § 1851(a)(1), (2), (9). FMPs must also specify criteria for identifying when the fishery is overfished and contain conservation and management measures to rebuild overfished fisheries to healthy population levels. *Id.* § 1853(a)(10); *id.* §§ 1854(e), 1802(33)(C). Recent amendments to the Magnuson-Stevens Act require 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. *Id.* § 1853(a)(15).

The Atlantic Coastal Fisheries Act and the ASMFC

In recognition that coastal fishery resources (such as river herring and shad) do not respect state and federal water boundaries, Congress approved the Atlantic States Marine

Fisheries Commission ("ASMFC") in 1942, and the fifteen Atlantic states (including Pennsylvania) entered into an interstate compact. *See* Pub. L. No. 77-539, 56 Stat. 267 (1942); *as amended by* Pub. L. No. 81-721, 64 Stat. 467 (1950). Under this interstate compact, member states jointly coordinate management of coastal fisheries, including anadromous fish, through fishery management plans approved by majority vote, with each state receiving one vote. *See* ASMFC Compact & Rules and Regulations, Rules & Regs. [hereinafter ASMFC Rules & Regs.] art. III, sec. 2. Each state has three representatives: 1) the director of the state's marine fisheries management agency; 2) a state legislator; and 3) an individual with knowledge of marine fisheries appointed by the state's governor to represent fishery interests. ASMFC Compact & Rules and Regulations, Compact [hereinafter ASMFC Compact] art. III. At present, about 90 percent of the Commission's funding comes from the federal government. ASMFC, *2009 Annual Report* 56-57 (2010), *available at* www.asmfc.org/publications/09AnnualReport.pdf (stating that total state contributions to ASMFC from July 1, 2008, to June 30, 2009, totaled $501,594, while total federal expenditures on ASMFC in same period totaled $5,664,191).

Importantly for this case, Congress became dissatisfied with the failure of the ASMFC to prevent the depletion of the nation's fisheries resources and, in 1993, established new federal fisheries management standards and requirements for the ASMFC through the Atlantic Coastal Fisheries Cooperative Management Act ("Atlantic Coastal Fisheries Act"). Congress was motivated by "disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole." *See* 16 U.S.C. § 5101(a)(3). Congress found that 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

are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation," *id.* § 5101(a)(1), and that "[i]t is in the national interest to provide for more effective Atlantic State fishery resource conservation and management," *id.* § 5101(a)(6).

In order to address these concerns, the Atlantic Coastal Fisheries Act wove the ASMFC tightly into the federal regulatory system. It required the ASMFC to prepare and adopt "coastal fishery management plans" (also called "interstate FMPs" or "IFMPs"). *Id.* § 5104(a). Congress established federal standards for IFMPs, mandating that IFMPs "promote the conservation of fish stocks throughout their ranges" "based on the best scientific information available." *Id.* § 5104(a)(2)(A). Congress also required that the ASMFC coordinate state and federal efforts for these interjurisdictional coastal resources when developing an IFMP, including that the ASMFC "consult with appropriate [regional fishery management] Councils to determine areas where such coastal fishery management plan[s] may complement Council fishery management plans." *Id.* § 5104(a)(1).

Moreover, Congress gave the ASMFC some "teeth" by rendering state participation in IFMPs mandatory. *R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 46 (1st Cir. 2009); *see* 16 U.S.C. § 5104(a)-(b). Prior to that time, participation in IFMPs had been voluntary and "spotty." *Medeiros v. Vincent*, 431 F.3d 25, 27 (1st Cir. 2005). Further, where the ASMFC finds that a state is in non-compliance with an IFMP, the Atlantic Coastal Fisheries Act requires the ASMFC to make a finding and notify the Secretary of Commerce within 10 working days of such determination. *Id.* § 5105(a), (b). In this circumstance, a non-complying state may be penalized by the Secretary, who has the authority to institute a federal moratorium on taking fish in the regulated fishery within state waters of the non-complying state. *Id.* § 5105(b), (c).

As discussed further below, the ASMFC's Interstate Fisheries Management Program ("ISFMP") Charter was developed in response to the federal Atlantic Coastal Fisheries Act and provides the ASMFC with further responsibilities to ensure member state compliance with these federal requirements that are similar to those found under the Magnuson-Stevens Act.

The Atlantic Coastal Fisheries Act and Fisheries Service Defendants

The Secretary of Commerce has a mandatory duty under the Atlantic Coastal Fisheries Act to support state coastal fisheries programs. 16 U.S.C. § 5103(a) ("The Secretary . . . shall develop and implement a program to support the interstate fishery management efforts of the Commission"). The Act provides a list of matters that this program "shall" address. *Id.* Notably, in furtherance of the fundamental requirement set out in section 302(h)(1) of the Magnuson-Stevens Act to prepare FMPs for fisheries that are in need of conservation and management, the Atlantic Coastal Fisheries Act also contains a specific provision that applies if – as is the case with respect to river herring and shad – no council has prepared such an FMP. In particular, in the absence of a federal FMP promulgated by the appropriate federal council(s), and after consultation with the council(s), the Atlantic Coastal Fisheries Act authorizes the Secretary to implement regulations in the Exclusive Economic Zone ("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). In this manner, the Atlantic Coastal Fisheries Act links directly with the Magnuson-Stevens Act and ensures that the Fisheries Service Defendants can comply with the fundamental requirement of section 302(h)(1) of the Magnuson-Stevens Act to prepare FMPs for fisheries, like river herring and shad, that require conservation and management.

The Shad and River Herring FMP

Although it has not saved the stocks from collapse, there is currently an Interstate Fishery Management Plan for Shad and River Herring. ASMFC Interstate Fishery Management Plan for Shad and River Herring, *available at* www.asmfc.org (follow "Managed Species" hyperlink; then follow "Shad and River Herring" hyperlink). The Plan was most recently updated to address river herring through "Amendment 2" in May 2009, and updated to address American shad through "Amendment 3" in February 2010. *Id.* (follow "Amendment 2" and "Amendment 3" hyperlinks). This IFMP does not provide for the conservation and management of river herring and shad throughout their range. Instead, the ASMFC has simply deferred to the Fisheries Service to implement conservation and management measures in federal waters. *See* Amendment 2 at 1; Amendment 3 at iii. The IFMP contains only general "recommendations" that the Fisheries Service examine existing habitat data, increase observer coverage to unspecified levels, and request additional resources for furthering cooperative efforts between the ASMFC and the regional councils. Moreover, there is no federal FMP or regulation for river herring and shad in federal waters. Summary of Stock Status for Species Not Contained in Federal Fishery Management Plans, *available at* http://www.nmfs.noaa.gov/sfa/statusoffisheries/2010/second/q2_2010_nonfederal_stocks.pdf . As a result, at present there is an entirely unregulated federal fishery for shad and river herring occurring in federal waters.

When increasing evidence of river herring and shad bycatch in federal industrial midwater trawl fisheries was brought to the ASMFC's attention in 2009, the ASMFC did not take action itself through its IFMP, as required by the Atlantic Coastal Fisheries Act. Instead, the ASMFC made a general request that the Secretary of Commerce initiate emergency

rulemaking to institute monitoring and management programs in these fisheries. *See* 27 May 2009 Letter from ASMFC to Secretary Locke, attached to the Amended Complaint as part of Exhibit 3. The Secretary in turn denied the request, stating that the Fisheries Service was working thought the Regional Council process on related matters. *See* 15 December 2009 Letter from Balsiger to Robins, attached to the Amended Complaint as part of Exhibit 3. The two regional councils with jurisdiction to act on the matter have failed to take any action to date. The regional councils often defer actions necessary for management of river herring and shad in federal waters to the ASMFC, as is the case with the long overdue stock assessment that is typically a fundamental building block for meeting the Magnuson-Stevens Act's requirements. Amended Compl. ¶¶ 24-26.

In summary, as of 2011, the population of river herring and shad remains in a collapsed state. Manifestly, the fisheries are in desperate need of conservation and management measures that will lead to restoration and rebuilding. Yet both the Fisheries Service Defendants and the ASMFC Defendants continue to avoid their legal responsibilities to conserve and manage these important fish populations.

II. ARGUMENT

A. Standard of Review

The Fisheries Service and ASMFC Defendants contend that this case should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). While it is the plaintiff's burden to establish subject matter jurisdiction, a court should not grant a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) "unless plaintiffs can prove no set of facts in support of their claim which would entitled them to relief." *Kowal v. MCI Commun. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). In ruling on such a

motion, courts should liberally construe the plaintiff's complaint and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625 (D.C. Cir. 1997).

In ruling on a Rule 12(b)(6) motion, "a court does not test whether the plaintiff will prevail on the merits, but instead whether the claimant has properly stated a claim." *Scolaro v. Dist. of Columbia Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (internal quotation marks and citation omitted). The Court "must accept the plaintiffs' factual allegations as true," but need only accept allegations pled with factual support "to the extent they plausibly give rise to an entitlement to relief." *Wilson v. Dist. of Columbia*, 269 F.R.D. 8, 13 (D.D.C. 2010) (internal quotation marks and citation omitted). The Court must also "liberally construe[ ] the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Id.* (internal quotation marks and citation omitted). A claim will survive a motion to dismiss under Rule 12(b)(6) so long as it is "facially plausible," *i.e.*, it is supported by "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 12-13 (internal quotation marks and citation omitted).

It is well settled that an agency is entitled to no deference on issues of jurisdiction. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-1039 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*."); *Murphy Exploration & Prod. Co. v. Dep't of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) ("'[I]nterpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.'"). Further, the inquiry into jurisdiction is distinct from

an inquiry into the merits of a plaintiff's claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

B. Plaintiffs Have Causes of Action Against the Fisheries Service Defendants Under the Magnuson-Stevens Act and Atlantic Coastal Fisheries Act

Through the Magnuson-Stevens Act and Atlantic Coastal Fisheries Act, Congress carefully wove together a comprehensive management scheme requiring that the Fisheries Service and the ASMFC conserve and manage fisheries resources along the Atlantic Seaboard. Under the Magnuson-Stevens Act, the Fisheries Service exercises exclusive fishery conservation and management authority over fisheries in federal waters. The Act requires that regional fishery management councils develop FMPs for each fishery in need of conservation and management, which are then reviewed and approved or disapproved by the Fisheries Service in accordance with the requirements of the Magnuson-Stevens Act, including the 10 National Standards. If a regional council fails to develop a plan, the Fisheries Service is required to ensure the Magnuson-Stevens Act's mandates are carried out. It may do so by developing and implementing its own "Secretarial Plan" pursuant to Magnuson-Stevens Act authority. Or alternatively, when, as here, ASMFC has developed a fishery management plan for an inter-jurisdictional (state and federal waters) fishery, pursuant to Atlantic Coastal Fisheries Act authority, the Fisheries Service may implement regulations in the EEZ that both are compatible with the ASMFC plan and comply with the Magnuson-Stevens Act's National Standards and other requirements.

Fisheries Service Defendants advance three arguments for dismissal under Fed. R. Civ. P. 12(b)(1) or (6). First, they argue that Plaintiffs' First Claim for Relief, under the Magnuson-Stevens Act, fails because it does not identify a discrete action that the Magnuson-Stevens Act

requires them to take. FSD Mem. at 14-19.[3] Second, they argue that Plaintiffs' Second Claim for Relief, under the Atlantic Coastal Fisheries Act, should be dismissed because it does not require Fisheries Service Defendants to issue regulations and because the way in which Fisheries Service Defendants support the ASMFC "is committed to agency discretion by law."[4] *Id.* at 14, 19-23. Third, as an alternative to the first two arguments, Fisheries Service Defendants argue that Plaintiffs' first and second Claims for Relief are barred by the Magnuson-Stevens Act's 30-day statute of limitations. *Id.* at 8-13. Each of the Fisheries Service Defendants' arguments is incorrect.

As a threshold matter, Fisheries Service Defendants misapprehend this action. Contrary to their understanding, this action challenges the Fisheries Service's violations of the statutory requirement to implement a fishery management plan to conserve and manage river herring and shad in federal waters by failing to take any of the following steps: (1) approving a council plan, (2) developing a Secretarial Plan, or (3) implementing regulations consistent with the ASMFC coastal plan. As discussed below in Part II.B.1, Magnuson-Stevens Act section 302(h)(1), 16 U.S.C. § 1852(h)(1), expressly requires the Fisheries Service Defendants to issue a fishery management plan for fisheries that "require[ ] conservation and management." Further, as shown in Part II.B.2, Fisheries Service Defendants are obligated by the Atlantic Coastal Fisheries Act to support the ASMFC and, under certain conditions, to issue regulations. The failures to comply with these requirements are subject to review because the statute makes clear the elements that such support must contain, as well as the conditions for issuing such regulations. *See* 16 U.S.C. § 5103(a), (b). Finally, as demonstrated in Part II.B.3, since the Fisheries Service

[3] Plaintiffs will refer to the Memorandum of the Fisheries Service Defendants as "FSD Mem." and the Memorandum of the ASMFC Defendants as "ASMFC Mem."

[4] In addition, in a footnote, Fisheries Service Defendants assert that Plaintiffs lack standing to raise this second claim to the extent it alleges a failure to support the ASMFC. *Id.* at 23 n.10

has never issued any regulations related to any of these failures to act, this action—aimed at forcing Fisheries Service Defendants to satisfy their statutory duty to act to conserve and manage river herring and shad—is not limited by the Magnuson-Stevens Act's statute of limitations.

1. The Secretary Has a Mandatory Duty to Implement a Management Plan and Take Related Actions for River Herring and Shad Under the Magnuson-Stevens Act

The Fisheries Service Defendants incorrectly suggest that Plaintiffs failed to point to anything in the Magnuson-Stevens Act that requires them to act with regard to river herring and shad. As stated clearly in the Amended Complaint, the Magnuson-Stevens Act imposes mandatory duties on the Fisheries Service Defendants related to river herring and shad, rendering them susceptible to suit under the APA for review of their failure to perform those duties. These duties are contained in the plain text of the statute, and made even clearer when viewed in conjunction with the statutory purpose and policy, as evidenced in the Magnuson-Stevens Act's text, structure, and legislative history. Specifically, the Fisheries Service Defendants must issue an FMP for river herring and shad, meeting the National Standards and other requirements, pursuant to the Magnuson-Stevens Act. 16 U.S.C. § 1852(h)(1). Alternatively, as discussed *infra* in Part II.B.2, the Fisheries Service must promulgate regulations under the Atlantic Coastal Fisheries Act, 16 U.S.C. § 5103(b) that complement the ASMFC's Interstate FMP and are consistent with the National Standards and other requirements.

The Magnuson-Stevens Act requires that fishery management councils prepare FMPs for fisheries that need "conservation and management." 16 U.S.C. § 1852(h)(1); *see also* Amended Compl. ¶¶ 70, 98 (citing provision). Specifically, the Magnuson-Stevens Act says,

> Each Council *shall*, in accordance with the provisions of this chapter . . . for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary . . . a fishery management plan . . . .

16 U.S.C. § 1852(h)(1) (emphasis added). Federal courts recognize that this is a mandatory duty. *E.g.*, *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1058 (9th Cir. 2005); *cf. Bennett v. Spear*, 520 U.S. 154, 172 (1997) (Endangered Species Act provision stating that "Secretary *shall* designate critical habitat" imposes nondiscretionary duty); *see also N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 97 (D.D.C. 2007) ("The term 'shall,' of course, is a mandatory one denoting a non-discretionary duty."). Indeed, the § 1852(h)(1) provision has been described as using "clear, command language" to impose "duties" on fishery management councils. *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 248 (D. Conn. 2005) (dictum).

While section 302(h)(1) of the Magnuson-Stevens Act directs the councils to prepare FMPs in the first instance, the final responsibility for all FMPs lies with the Commerce Secretary. "[T]he Secretary holds ultimate authority regarding the preparation and implementation of Fishery Management Plans and amendments." *Yakutat*, 407 F.3d at 1059; *see also Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996) (council actions "are clearly subject to the Secretary's control and responsibility."); 4B Op. Off. Legal Counsel 778, 782 (1980) ("[Councils] are a part of the Department of Commerce and subject to its overall control."). The Department of Justice has opined that it would be impermissible under the Constitution for the fishery management councils to wield "significant authority." H.R. Rep. 104-171, at 45-46 (1995) (reprinting Letter from Kent Markus, Acting Ass't Att'y Gen., to Don Young, Chairman, H. Comm. on Resources (May 10, 1995)). Therefore, the duty to prepare and implement FMPs ultimately falls on Fisheries Service Defendants. They generally comply with this duty either by approving FMPs prepared by the councils, 16 U.S.C. § 1854(a), or by preparing Secretarial FMPs where the councils fail to act, *id.* § 1854(c).

Further, Congress provided manageable standards by which to review whether a council—or the Secretary where the council fails to act—must develop an FMP. *Cf. Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998) (provision that uses "shall" provides "more than enough law against which a court can measure agency compliance" in case challenging inaction); *see also Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (court presumes agency action is reviewable, to be "only rebutted by an affirmative showing that the statute's allocation of discretion is so broad that the courts simply have no standards to apply"). In particular, as noted above, the Magnuson-Stevens Act requires FMPs to be prepared for each fishery that "requires conservation and management." 16 U.S.C. § 1852(h)(1). The term "conservation and management" is defined in the statute to

> refer[ ] to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that—
>
> > (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
> >
> > (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and
> >
> > (iii) there will be a multiplicity of options available with respect to future uses of these resources.

Id. § 1802(5). This explicit statutory language makes clear that an FMP is required for river herring and shad under the following circumstance (among others): if the fishery needs assistance to maintain, rebuild, or restore itself such that it can still be used as food supply, for recreational purposes, or other future uses, and if without assistance, the fishery and broader maritime environment would face "irreversible or long-term adverse effects."

The purposes of the statute and its legislative history debunk any claim that the duty to prepare an FMP for river herring and shad is not in fact a mandatory action. The Magnuson-

Stevens Act makes clear that Congress intended a "national program for the conservation and management of the fishery resources of the United States . . . to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources." 16 U.S.C. § 1801(a)(6). The Act's protections extend to "the anadromous species," like river herring and shad. *Id.* § 1801(b)(1); *see also id.* § 1801(c)(6) (declaring policies of Congress to include "foster[ing] and maintain[ing] the diversity of fisheries in the United States"). Fisheries Service Defendants thus have an obligation to manage fish stocks, including river herring and shad, in order to protect them from depletion and to rebuild them if their populations decline so that the nation can achieve the full benefit of their sustained presence at healthy levels in the nation's waters.

Further, the legislative history of the Sustainable Fisheries Act of 1996 and the Fishery Conservation and Management Act of 1976, which laid the groundwork for today's Magnuson-Stevens Act, illustrates that Congress intended to establish a comprehensive system for conserving and managing fisheries and to charge the Secretary to take action to rebuild depleted fisheries. Thus, in 1976, Congress recognized that fisheries lacked effective management, especially for anadromous fish that move from state to federal waters, and beyond. H.R. Rep. No. 94-445 at *8 ("True management under these circumstances is awkward and inefficient at best and essentially nonexistent at worst."); *id.* at *18 (noting "absence of a sound, comprehensive management system"). The House therefore concluded that "the critically needed conservation and management of our fish stocks cannot be obtained without improved coordination and integration of the respective State and Federal roles." *Id.* at *8. The House explained that it was the Secretary's responsibility "to carefully study those species of fish that

may possibly fall within [the definition of "depleted"] and take the necessary steps to see that they receive proper management" to rebuild such fisheries. H.R. Rep. No. 94-445 at *20; *see also* S. Conf. Rep. No. 94-711, at 3 (1976) (emphasizing conservation and management).

In describing the purpose of the 1996 Amendments, the Senate said that the Amendments would "require action to prevent overfishing and rebuild depleted fisheries." S. Rep. No. 104-276, at 1 (1996). The House echoed that among the "key areas of concern to be addressed in this legislation" were "identification and protection of stocks nearing an overfished condition, [and] the rebuilding of overfished stocks." H.R. Rep. 104-171, at 20 (1995).

In short, the express, enacted purposes and legislative history show that the Magnuson-Stevens Act exists to protect and rebuild fisheries, both for their own sake and to preserve them as valuable resources for fishermen and end users. The plain language of the statute and the legislative history show that the councils and the Secretary have a duty to act in furtherance of these goals. In fact, the Magnuson-Stevens Act expressly authorizes the Secretary to prepare an FMP himself when the council fails to act in a "reasonable period of time" when a fishery "requires conservation and management." 16 U.S.C. § 1854(c)(1)(A).[5] Reading the text of the

[5] The statute says the Secretary "may" do so. *Id.* § 1854(c)(1). This does not, however, mean that the Secretary is completely at his discretion in deciding not to act to protect a vulnerable fishery and fishing industry. Here, it is plain that Congress was merely providing a second way for the Secretary to carry out his mandatory duty in the event the councils failed to deliver a legally compliant plan to the Secretary. The use of "may" does not render the failure to act unreviewable, for it "does not mean the matter is *committed* exclusively to agency discretion." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (emphasis in original). As the Supreme Court has held, "while 'may' suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous." *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). That is, "'may' can sometimes express the language of command." *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1090 (D.C. Cir. 1987) (en banc); *cf.* FSD Mem. at 21-22 (arguing that use of "shall" in statute does not necessarily connote a mandatory duty). Moreover, "discerning Congress's intent to bestow or withhold discretion . . . is not a simple matter of tallying the 'shalls' and 'mays' and finding that the 'mays' have it." *Pennsylvania v. Lynn*, 501 F.2d 848, 854 (D.C. Cir. 1974). Instead, especially in the context of a "program of indefinite duration requiring annual appropriations," "courts have almost uniformly eschewed a mechanical reliance on one or two discretionary terms in an act in favor of a careful examination of the statute as a whole in the light of its purposes and legislative history." *United States v. Garner*, 767 F.2d 104, 111-12 (5th Cir. 1985). As discussed, the purposes and legislative history of the Magnuson-Stevens Act are unmistakable—to develop FMPs that protect and rebuild threatened fisheries. Thus, in this circumstance, it would fly in the face of the purpose and intention of the Act to allow the Secretary to avoid his charge to take action

Magnuson-Stevens Act in light of this background leads to the inexorable conclusion that Fisheries Service Defendants were under at least one discrete duty with respect to river herring and shad: to adopt a plan containing conservation and management measures sufficient for their protection.

The courts recognize that "[t]he Magnuson-Stevens Act's main thrust is to conserve the fisheries as a continuing resource." *Massachusetts ex rel. Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 27 (1st Cir. 1999). The District Court for the District of Columbia has agreed with this reading, concluding that the "traditional tools of statutory construction point inexorably to the conclusion that Congress has unambiguously spoken to the scenario in which a species is undergoing overfishing and has also been designated as overfished." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 100.[6] In such a circumstance, the Secretary must act to stop overfishing and to rebuild the fishery. *Id.* at 100-01. While the posture of that case differs slightly from this one in that the Fisheries Service had actually carried out its statutory mandate to determine the status of the fishery at issue, *North Carolina Fisheries Association* is a powerful illustration of the emphasis the Magnuson-Stevens Act places on rebuilding fish stocks. Where, as here, the facts show an unabated population collapse in a fishery, there is no doubt that the Magnuson-Stevens Act mandates action.[7]

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when confronted with unlawful inaction by his fishery management councils that perpetuates historical overfishing and depletion of fisheries.

[6] It arriving at this conclusion, the case construes § 1854(e)'s text, structure, purpose, and legislative history. *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 97-98, 100.

[7] As discussed further below, it would be untenable and contrary to the plain language of the Magnuson-Stevens Act for the Fisheries Service to argue that it can somehow avoid its statutory requirement to develop an FMP by simply refusing to make an official status determination, especially in the face of its own unequivocal data and that from the ASMFC. Doing so would render the Magnuson-Stevens Act's protections a nullity, which cannot be what Congress intended. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (holding that agency cannot interpret statute "to maximize its own discretion" when such interpretation would contravene Congress's intent).

Further, the facts strongly indicate that if the Fisheries Service were to take seriously its obligation to adequately classify river herring and shad, it would find that they are overfished or approaching overfishing.[8] As Fisheries Service and ASMFC data, as well as state actions and other facts, attest, river herring and shad are severely depleted and overfished. *See* Amended Compl. ¶¶ 18-33, 36. The Fisheries Service's own Protected Species Division's designation of river herring as a "species of concern"; the ASMFC's assessments of severely depleted stocks of both river herring and shad, including its conclusion that several river-specific stocks are overfished and that recruitment failure is apparent; Atlantic Coast states' imposition of moratoria on harvesting river herring or shad; and the tremendous decline, of over 90 percent, illustrated in Figure 1 above, in the amount of river herring and shad harvested—all demonstrate that river herring and shad stocks are in dire straits. *See* pp. 4-7, *supra*.

It is clear that these stocks "require[ ] conservation and management." Thus, the Secretary, through the fishery management councils he controls, is under a duty to develop FMPs for the river herring and shad, and other mandatory actions under the Magnuson-Stevens Act are also implicated. The specificity of the duty distinguishes this case from *Montanans for Multiple Use v. Barbouletos*, where the D.C. Circuit held that the plaintiffs had failed to "identify a legally

[8] The MSA imposes on Fisheries Service Defendants the duty to make an annual report on the status of fisheries and to identify those that are overfished or approaching being overfished. *Id.* § 1854(e); *see also* Amended Compl. ¶¶ 82, 100 (citing provision). "The Secretary shall report annually to the Congress and the Councils on the status of fisheries within each Council's geographical area of authority and identify those fisheries that are overfished or are approaching a condition of being overfished." 16 U.S.C. § 1854(e)(1); *see also id.* (defining "approaching a condition of being overfished"); *id.* § 1802(34) (defining "overfished"). When Fisheries Service Defendants identify any such fishery, a cascade of duties is triggered, requiring (1) that the responsible fishery management council prepare a fishery management plan within two years, *id.* § 1854(e)(2)-(3); (2) that, for a fishery is overfished, the plan rebuild the fishery as quickly as possible, *id.* § 1854(e)(4), and, for a fishery that is only approaching being overfished, the plan prevent overfishing, *id.* § 1854(e)(3)(B); and (3) that if the responsible council fails to meet the statutory deadline for preparing a plan, "the Secretary shall prepare" it instead, within nine months, *id.* § 1854(e)(5). Thus, the duty to report and to take statutorily mandated follow-up action also constitutes a duty imposed on the Secretary. *See N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 100-01. At present, the Secretary has only officially designated the status of river herring and shad as "unknown" despite the data available to him. NMFS, *2009 Report to Congress: The Status of U.S. Fisheries*, at ST-39 tbl.C (May 2010), *available at* www.nmfs.noaa.gov/sfa/statusoffisheries/SOSmain.htm.

required, discrete act that [the defendants] failed to perform." 568 F.3d 225, 227 (D.C. Cir. 2009) (citing *Norton v. S. Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 64 (2004)). Unlike the situation in that case, where the plaintiffs alleged "general" mismanagement and failure to provide for multiple uses of a forest, *id.*, here, Plaintiffs have identified and taken aim at a discrete action—issuance of an FMP—that the Secretary must take. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (APA requires plaintiff to "direct its attack against some particular 'agency action' that causes it harm."). Nor do Fisheries Service Defendants properly characterize Plaintiffs' claim as an "attempt to challenge NMFS' ongoing program of daily operations with respect to river herring and shad." FSD Mem. at 16. Instead, this case mirrors the scenario described in *SUWA*, where an agency is under an obligation to issue regulations; in that circumstance, a court has the power to "compel the agency to act," even though the final form of the regulations is not known. 542 U.S. at 65.[9]

The cases Fisheries Service Defendants cite as supporting their other arguments about Plaintiffs' Magnuson-Stevens Act claim are similarly inapposite. *See* FSD Mem. at 16-19. Fisheries Service Defendants incorrectly imply that Plaintiffs' challenge to the Secretary's failure to manage river herring and shad in accordance with his statutory responsibility is limited to his decision not to use emergency authority. *Id.* at 18. Their argument leaps from the fact that there is no legal requirement to issue emergency regulations to the broad claim that "the APA

[9] For the same reasons discussed in this paragraph, the instant case is distinguished also from the others that Federal Defendants cite. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 890 (rejecting challenge to a "program" that encompassed thousands of ongoing and ill-specified discrete agency actions); *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 86 (D.C. Cir. 1991) (same); *Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 20 (D.C. Cir. 2006); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001); *Am. Farm Bureau v. Envtl. Prot. Agency*, 121 F. Supp. 2d 84, 102 (D.D.C. 2000). *Lujan* also should be discounted because it did not rule on a motion to dismiss, but on a summary judgment motion, where greater specificity is required. 497 U.S. at 881; *see also San Juan Audubon Soc'y v. Veneman*, 153 F. Supp. 2d 1, 5-6 (D.D.C. 2001) (distinguishing *Lujan* in denying motion to dismiss on grounds that plaintiff failed to identify particular agency action because *Lujan* was decided on summary judgment). *Fund for Animals* and *Independent Petroleum Association of America* failed to find final action, too, 460 F.3d at 20-21; 235 F.3d at 594-95, which further distinguish them from this case, where, as shown below, failure to act has accrued into a cause of action.

does not provide a cause of action for Plaintiffs to compel [Fisheries Service] Defendants to issue regulations for river herring and shad." *Id.* But there is no logical connection between the fact and the conclusion. Further, the conclusion is incorrect, for, as shown above, the Secretary has a duty to issue regulations pursuant to the requirements of section 302(h)(1) and related provisions of the Magnuson-Stevens Act. The APA, through 5 U.S.C. § 702(1), thus provides Plaintiffs an avenue to protect their Magnuson-Stevens Act-protected rights to a river herring and shad population that can support their livelihood.

2. Under the Atlantic Coastal Fisheries Act, the Fisheries Service's Failure to Support the ASMFC Is Reviewable, and It Has a Mandatory Duty to Issue Federal Regulations.

With regard to the Second Claim for Relief, Fisheries Service Defendants concede that they have a duty to support the ASMFC's efforts to manage river herring and shad. FSD Mem. at 21. But they argue that the Secretary's failure to support the ASMFC is unreviewable as a matter of law. *Id.* at 20. This argument has no merit.

Fisheries Service Defendants bear a heavy burden to overcome the general rule that agency decisions are reviewable. *E.g.*, *Kucana v. Holder*, 130 S. Ct. 827, 839 (U.S. 2010). Outside the context of an enforcement decision, as in *Heckler v. Chaney*, 470 U.S. 821 (1985),[10] a court starts "with a presumption of reviewability, which is only rebutted by an affirmative showing that the statute's allocation of discretion is so broad that the courts simply have no standards to apply." *Robbins*, 780 F.2d at 47; *see also, e.g.*, *Kucana*, 130 S. Ct. at 839 (reiterating presumption of reviewability). An agency refusal to engage in rulemaking, for example, is generally reviewable. *See Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993) ("[A]

[10] Fisheries Service Defendants' reliance on *Heckler*, FSD Mem. at 21, for support of its request that this Court hold that this case falls into the "very narrow exception" to the presumption of reviewability is misplaced in this non-enforcement setting. *See Heckler*, 470 U.S. at 830.

refusal to engage in rulemaking is, of course, reviewable under the [APA] . . . ."). Even if standards are not perfectly clear, the default assumption is always that review is in order.

The strong presumption that the Fisheries Service's failure to support the ASMFC's management of river herring and shad is reviewable can be overcome only if the Atlantic Coastal Fisheries Act provides the Fisheries Service with "broad discretion" and "the statutory scheme, taken together with other relevant materials, provides *absolutely no guidance* as to how that discretion is to be exercised." *Robbins*, 780 F.2d at 45 (emphasis added). The issue thus is whether the Atlantic Coastal Fisheries Act is devoid of law to apply. *E.g.*, *id.* Here, the answer is equally clear. Contrary to Fisheries Service Defendants' assertion, the Atlantic Coastal Fisheries Act provides sufficient law to apply. It states

> The Secretary in cooperation with the Secretary of the Interior shall develop and implement a program to support the interstate fishery management efforts of the Commission. 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.

16 U.S.C. § 5103(a). Notably, both these sentences employ the mandatory "shall." Moreover, nothing in the legislative history undercuts the conclusion that both these sentences are mandatory. *See* S. Rep. No. 103-201, at 5 (1993). To the contrary, the legislative history emphasizes that this subsection "directs the Secretary" to act to support the ASMFC. *Id.*

Further, the statute's express findings and purposes strongly support reading both sentences as restricting the Secretary's discretion. Congress stated that the Atlantic Coastal Fisheries Act's purpose is to foster "the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. § 5101(b). Finding it to be "in the national interest" to increase the efficacy of "Atlantic State fishery resource conservation and management," *id.* § 5101(a)(6), Congress sought to end

the problem of "disparate, inconsistent, and intermittent State and Federal regulation," *id.* § 5101(a)(3). Coordinated action, with *both* the federal government and the states doing their part, was necessary. *See id.* "It is the responsibility of the Federal Government to support [the ASMFC's] management of coastal fishery resources." *Id.* § 5101(a)(4).

Compare this statutory backdrop with Fisheries Service Defendants' argument that the elements the Atlantic Coastal Fisheries Act requires the Secretary to include in supporting the ASMFC are not in fact mandatory. FSD Mem. at 21-23. Fisheries Service Defendants seem to argue that the list of support activities is merely illustrative because "shall" can sometimes mean "may" and the Atlantic Coastal Fisheries Act leaves them with uncabined discretion, thus destroying the elements' value as a source of law to apply. *See id.* But Fisheries Service Defendants do not and cannot point to any language in the statute or its legislative history that supports their assumption that this list constitutes merely meaningless "examples." Instead, their argument that "shall" means "may" in section 5103(a) is circular.[11]

D.C. Circuit law like *Marshall County Health Care Authority* further supports the conclusion that Fisheries Service Defendants' inaction under the Atlantic Coastal Fisheries Act is reviewable. The statute in *Marshall County* mandated "that the Secretary [of Health and Human Services ("HHS")] 'shall provide . . . for such other exceptions and adjustments to such

[11] Fisheries Service Defendants start from the premise they seek to demonstrate—that the duty to "support" implies that Fisheries Service Defendants have unreviewable discretion in determining how to provide that support—and use it to "demonstrate" that the actions that Congress required are in fact non-mandatory, thus rendering the Fisheries Service Defendants' method of supporting the ASMFC entirely discretionary. They invoke *Orlov v. Howard*, but that case involved a subject matter—immigration—in which the government is generally given deference, 523 F. Supp. 2d 30, 36 (D.D.C. 2007) (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)), and a statute that by its terms authorized the Attorney General to act "*in his discretion*," *Id.* at 34 (quoting 8 U.S.C. § 1255(a)) (emphasis in original). This case is entirely distinguishable from *Orlov* because it involves an environmental statute and a provision that uses no language hinting at discretion. In any event, *Orlov* is hardly definitive. Courts have split on their resolution of the issue presented there—whether judicial review is precluded. *See Villa v. U.S. Dep't of Homeland Security*, 607 F. Supp. 2d 359, 362 (N.D.N.Y. 2009) (collecting cases).

Further, the argument that primary responsibility for conserving and managing Atlantic coastal fisheries falls on the ASMFC, *see* FSD Mem. at 22, is entirely irrelevant to the issue of federal discretion as to how Fisheries Service Defendants support the ASMFC. A requirement is a requirement, regardless of what entity has primary responsibility in that general field.

[prospective] payment amounts . . . as the Secretary deems appropriate.'" 988 F.2d at 1223 (citing 42 U.S.C. § 1395ww(d)(5)(C)(iii)) (alterations in original). The Secretary of HHS had not done so. *Id.* The D.C. Circuit rejected the government's argument that the statute gave sufficient discretion to the Secretary of HHS to render her decision unreviewable. Instead, it found that "Congress ha[d] provided a rather specific norm . . . to guide the Secretary's judgment" for making the decision. *Id.* at 1224.

The conclusion of the D.C. Circuit in *Marshall County* closely parallels this case. The Atlantic Coastal Fisheries Act uses even more mandatory language in section 5103(a); unlike the statute at issue in *Marshall County*, there is no language here to suggest that the Secretary has *any* discretion not to act, or not to include one of the listed elements of the support program. In *Marshall County*, the statute directed the Secretary of HHS to grant exceptions as she "deems appropriate." *Id.* at 1223 (citation omitted). Here, the Atlantic Coastal Fisheries Act states that the Secretary "*shall* develop and implement a program to support" the ASMFC and that "[t]he program *shall* include [various] activities," 16 U.S.C. § 5103(a) (emphasis added); it makes no qualifications. The action has not been committed to agency discretion by law.[12] And, even if the statute had explicitly called on the Secretary to exercise discretion—which it plainly does not—it would not give him unfettered discretion. *Massachusetts v. EPA*, 549 U.S. at 533 ("[T]he use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits."). Thus, Fisheries Service Defendants reach far too broadly in their attempt to escape their duty to support the ASMFC.

[12] In this regard, the case is entirely distinct from others Fisheries Service Defendants cited that found no law to apply. For example, in *Drake v. FAA*, cited in FSD Mem. at 21, the D.C. Circuit found that the statute gave the agency "virtually unbridled discretion" because "[t]he only statutory reference point is the Administrator's own beliefs. Therefore, a court has no meaningful standard against which to judge the agency's exercise of discretion." 291 F.3d 59, 72 (D.C. Cir. 2002).

Further, just as in *Marshall County*, there are benchmarks against which the Court can compare the Secretary's actions or inactions in supporting the ASMFC's efforts. In the statute, Congress listed the elements that the support "shall include." 16 U.S.C. § 5103(a). Even if the Court accepted Fisheries Service Defendants' meritless argument that they are only "examples," these would provide legal standards against which the Court can judge the adequacy of the Secretary's action or inaction in supporting the ASMFC's efforts.[13] *Cf. Sierra Club*, 156 F.3d at 617 (holding that there is law to apply under section 7(a)(1) of the Endangered Species Act, rendering agency inaction reviewable).

It is also baseless for Fisheries Service Defendants to claim that judicial review is somehow unavailable in this case because "judicial review of [Fisheries Service Defendants'] decisions regarding how to 'support' the efforts of the ASMFC would interfere with the Secretary's discretion." FSD Mem. at 23. In *Safe Extensions, Inc. v. FAA*, this Circuit rejected the Federal Aviation Administration's argument that "allowing judicial review of issuances like [the one at issue in the case] would be very disruptive to the agency's operations." 509 F.3d 593, 602 (D.C. Cir. 2007) (internal quotation marks omitted). The court found that the FAA's argument "ignores the APA's very purpose: to subject agency decisions to judicial scrutiny." *Id.* While in some cases onerous for an agency, judicial review is vital for the public. *Id.* After explaining why the cases the government cited were inapposite, the court firmly rejected the agency's position as "ludicrous." *Id.* The Fisheries Service Defendants' assertion here is similarly groundless.

[13] At this point in the litigation, it is not necessary or appropriate to discuss whether the actions and failures to act by Fisheries Service Defendants have been adequate, as these questions will be briefed fully at the merits stage. The issue now before the Court deals only with Fisheries Service Defendants' claim that they have unbridled discretion to take no action of any kind.

Further, the fact that the ASMFC has issued an Interstate FMP for river herring and shad, Amended Compl. ¶ 63, brings into play a third approach[14] the Fisheries Service may take to meet its mandatory Magnuson-Stevens Act requirement to implement an FMP for river herring and shad in federal waters. The Atlantic Coastal Fisheries Act provides that the Fisheries Service may "implement regulations to govern fishing in the exclusive economic zone" that are compatible with effective implementation of the interstate FMP and the Magnuson-Stevens Act's National Standards. 16 U.S.C. § 5103(b)(1). The Atlantic Coastal Fisheries Act provides the Secretary the power to issue such regulations when, as here, there is no "approved and implemented [FMP] under the [Magnuson-Stevens Act]." *Id.*

Fisheries Service Defendants argue that the Atlantic Coastal Fisheries Act imposes no mandatory duty on the Secretary to issue regulations in federal waters because the Act states that the Secretary "may" do so when certain conditions exist. FSD Mem. at 20. This assertion, however, misunderstands the careful and intentional action of the Congress to weave together the national directive to conserve and manage fish populations set out in section 302(h)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1852(h)(1), with the Atlantic Coastal Fisheries Act. Congress was aware of the Magnuson-Stevens Act and its purposes when it passed the Atlantic Coastal Fisheries Act. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *see also* 16 U.S.C. § 5103(b) (cross-referencing Magnuson-Stevens Act provisions). These two statutes must be read together in a factual situation such as this. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (explaining that, in construing statutes, court "must, to the extent possible, ensure that the statutory scheme is coherent").

[14] As discussed *supra* at 17, 21 & n.5, the first two ways the Fisheries Service Defendants may meet their duty to implement an FMP for any fishery in need of conservation and management are to approve a plan submitted by a regional council or to prepare a Secretarial Plan.

The Fisheries Service's duty under 16 U.S.C. § 1852(h)(1) to implement FMPs that conserve and manage fish stocks in federal waters originally arises under the Magnuson-Stevens Act, which provided two ways for this duty to be met – by approving a Council plan or by developing a Secretarial plan when the Council fails to do so. *See supra* at 17, 21 & n.5**.** The Atlantic Coastal Fisheries Act, passed in 1993 out of frustration with the failure of the ASMFC and the Fisheries Service to adequately manage coastal fish populations throughout their range (i.e., including when they pass into federal waters), not only established federal standards and requirements for the ASMFC's IFMP, but added a third way for the Fisheries Service to meet its obligations to implement plans for managing fish in federal waters in accordance with the Magnuson-Stevens Act—through regulations compatible with the IFMP and the National Standards. 16 U.S.C. § 5103(b)(1). This third method is an equivalent to implementing plans through the regional council process, the difference being that the Fisheries Service issues regulations and takes other actions to implement a plan originally drafted by the ASMFC. *Id.* Thus, both statutes must be read together, and the provisions of the Atlantic Coastal Fisheries Act relating to the Secretary's issuance of regulations must be reviewable in a factual situation such as this in order to determine whether the Fisheries Service Defendants have met their mandatory duty to develop and implement an FMP in federal waters in accordance with all statutory requirements.[15]

[15] The section says that "the Secretary may implement regulations." While this connotes some level of discretion, for the reasons discussed in note 5, *supra*, it does not foreclose reading the statutory scheme as a unit, leading to the conclusion that the duty is mandatory, and does not render the Secretary's failure to act unreviewable, for it "does not mean the matter is *committed* exclusively to agency discretion." *Dickson*, 68 F.3d at 1401 (emphasis in original). As the Supreme Court has held, "while 'may' suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous." *Zadvydas*, 533 U.S. at 697. Thus, the Fisheries Service's decision not to prepare regulations is reviewable.

Plaintiffs' Standing Under the Atlantic Coastal Fisheries Act

In a final footnote, Fisheries Service Defendants challenge Plaintiffs' standing under the Atlantic Coastal Fisheries Act to bring their Second Claim for Relief to the extent it alleges they have failed to support the ASMFC as required by law. They first argue that the Claim fails the causation prong of constitutional standing. FSD Mem. at 24 n.10; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (laying out the three elements of constitutional standing). They further claim that Plaintiffs' injury falls outside the zone of interests protected by the Atlantic Coastal Fisheries Act and thus fails a prudential test for standing. FSD Mem. at 24 n.10 (citing *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005)). Neither argument withstands scrutiny.

Plaintiffs' injuries are "fairly traceable," *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted), to Fisheries Service Defendants' failures to act. An agency failure to take an "incremental step," *Massachusetts v. EPA*, 549 U.S. at 524, to remedy even just part of a problem satisfies the causation inquiry, *id.* ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."). Fisheries Service Defendants overlook Plaintiffs' well-pleaded allegation that the Martha's Vineyard/Dukes County Fishermen's Association has an economic interest in river herring and shad stocks' vitality that is harmed by Fisheries Service Defendants' failure to take action required under the Atlantic Coastal Fisheries Act, including to support programs to collect and analyze necessary data, conserve habitat, and develop fishery management plans that conserve these stocks throughout their range. *See* Amended Compl. ¶ 10; 16 U.S.C. § 5103(a). Similarly, Michael S. Flaherty has a recreational interest in these stocks' vitality that is harmed by Fisheries Service Defendants' failures. They further gloss over the fact that Congress's unmistakable purpose in enacting the Atlantic Coastal Fisheries Act was to support fisheries by fostering better "interstate conservation and

management." 16 U.S.C. § 5101(b); *accord* S. Rep. No. 103-201, at 1 (stating that purpose of bill is to "improve the conservation of Atlantic coastal fisheries"). Congress passed the Act because of harms to fishery resources. *See id.* § 5101(a)(2)-(3); H.R. Rep. No. 103-202 (1993), at 7 (describing drastic decline of Atlantic coastal fishery resources and explaining that Act seeks to remediate problem through improved management). Thus, when Fisheries Service Defendants fail to support the ASMFC, Amended Compl. ¶ 117, they contribute to the continued collapse of the river herring and shad fisheries that harms Plaintiffs.

Plaintiffs' suit is not outside the zone of interests protected by the Atlantic Coastal Fisheries Act. To begin with, Fisheries Service Defendants overstate the stringency of the zone of interests inquiry. As the D.C. Circuit has made clear, "[t]he test is not a particularly demanding one," *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987); "a plaintiff's grievance must *arguably* fall within the zone of interests protected or regulated by the statutory provision," *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1006 (D.C. Cir. 2008) (internal quotation mark omitted; emphasis in original). "The zone-of-interest test . . . is intended to 'exclude only those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) (quoting *Clarke*, 479 U.S. at 399).[16] The discussion in the preceding paragraph of the purposes of the Atlantic Coastal Fisheries Act demonstrates that Plaintiffs' interests lie at the core of the statute's purpose. Further, section 5103(a), the provision that Fisheries Service Defendants claim fails to include

[16] The D.C. Circuit here misquotes *Clarke*, which actually reads, "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit," 479 U.S. at 399, but it makes no difference, since the paraphrased version the D.C. Circuit used does not appreciably change the test.

Plaintiffs in its zone of interests, demonstrates that Congress intended Fisheries Service Defendants to support "fishery management planning." 16 U.S.C. § 5103(a). This suggests an interest in effectively managing fisheries. Thus, an entity harmed by fishery mismanagement failures falls squarely in the zone of interests protected by this provision. *Cf. Bennett*, 520 U.S. at 176-77 (holding that petitioners had standing to challenge determination under Endangered Species Act because anti-environmental interests are within zone of interests protected by provision of Act that manifests purpose, "at least in part, to prevent uneconomic (because erroneous) jeopardy determinations"). At the very least, Plaintiffs' interests cannot rationally be seen as "marginally related to or inconsistent" with the Atlantic Coastal Fisheries Act, and, thus, Plaintiffs fall within the zone of interests protected by section 5103 and the Act more broadly.

3. The Magnuson-Stevens Act's 30-Day Statute of Limitations Does Not Apply

Fisheries Service Defendants assert that Plaintiffs' First and Second Claims for Relief are time-barred under the Magnuson-Stevens Act because "Plaintiffs failed to file their suit within 30 days of promulgation of the challenged rules." FSD Mem. at 8. But Plaintiffs are not challenging any rules that Fisheries Service Defendants have promulgated. Plaintiffs are challenging Fisheries Service Defendants' failure to implement an FMP for river herring and shad, as required by the Magnuson-Stevens Act and Atlantic Coastal Fisheries Act. Fisheries Service Defendants only arrive at the (mistaken) conclusion that Plaintiffs challenge existing regulations by miscasting the Amended Complaint. As the Amended Complaint makes clear, Plaintiffs challenge the Fisheries Service's failure to act, and the APA creates the cause of action.

Thus, the Magnuson-Stevens Act's statute of limitations does not apply here because (1) Plaintiffs are not challenging the substance of a regulation or published agency action

implemented under the authority of the Magnuson-Stevens Act, and (2) Plaintiffs' suit is not filed under the Magnuson-Stevens Act's judicial review provision. Fisheries Service Defendants' argument that the statute of limitations bars consideration of Plaintiffs' First and Second Claims for Relief should therefore be rejected.

In enacting the Magnuson-Stevens Act, Congress intended that action be taken to conserve and manage fishery resources 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); Amended Compl. ¶ 97. As discussed above, the Magnuson-Stevens Act requires fishery management councils to prepare a plan for each fishery that requires conservation and management, 16 U.S.C. § 1852(h)(1); Amended Compl. ¶ 98, and the Secretary is authorized to prepare an FMP for a fishery if the councils fail to develop a plan and the fishery requires conservation and management, 16 U.S.C. § 1854(c); Amended Compl. ¶ 98. Further, under the Atlantic Coastal Fisheries Act, the Secretary is required to support the ASMFC's efforts and, in the absence of a federal FMP, authorized to issue regulations in the EEZ compatible with the effective implementation of the interstate FMP and consistent with the Magnuson-Stevens Act's National Standards, after consultation with the councils. 16 U.S.C. § 5103; Amended Compl. ¶¶ 114-15.

The Amended Complaint makes clear that its claims against Fisheries Service Defendants are for their specific failures to take these discrete and required actions. Foremost is their foundational failure to take any action with regard to the river herring and shad fisheries to create an FMP or to implement conservation and management measures compatible with the ASMFC's own, inadequate measures. As a result, Fisheries Service Defendants have also failed to take other discrete and required actions that flow from this fundamental failure, including, among

others, their failure to develop specific and measurable criteria for identifying when river herring and shad are overfished, prevent overfishing and rebuild river herring and shad populations, minimize bycatch in the river herring and shad fisheries, establish science-based annual catch limits and accountability measures, and develop and implement programs to support the interstate fishery management efforts of the ASMFC. *See* Amended Compl. ¶¶ 99-106, 115.

The Amended Complaint recites these failures and relates them to Plaintiffs' Claims for Relief. For their first count, arising under the Magnuson-Stevens Act, Plaintiffs explained that the Act imposed duties on Fisheries Service Defendants, Amended Compl. ¶¶ 98, 100, and charged Fisheries Service Defendants with failing to carry them out, *id.* ¶ 108 ("The Fisheries Service has failed to prepare or implement an FMP 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.").[17] For their second count, arising under the Atlantic Coastal Fisheries Act, Plaintiffs laid out the duties the Atlantic Coastal Fisheries Act places on the Secretary, Amended Compl. ¶¶ 114-15, and, again, charged him with failing to meet them, *id.* ¶¶ 116-17 ("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 . . . [and] 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 consistent with the interstate plan, the national standards, and as requested by the ASMFC.").

[17] Plaintiffs also noted that Fisheries Service Defendants' "failures include a failure to monitor the fisheries that kill river herring and shad." Amended Compl. ¶ 108. But this addition does not render their other contentions nugatory, as Fisheries Service Defendants would have the Court conclude. It is only by ignoring "the face of the[ ] Amended Complaint" that they can allege that Plaintiffs' "claims are, at bottom, a challenge to the FMPs for the Atlantic herring and the squid, mackerel, and butterfish fisheries." FSD Mem. at 8-9.

In short, Fisheries Service Defendants have *never* issued *any* regulations to approve or to implement an FMP, whether established through the councils or directly by the Secretary, or to support the ASMFC's efforts with respect to river herring and shad. Plaintiffs do not challenge any federal regulations currently in existence. Instead, they seek to compel Fisheries Service Defendants to fulfill their statutory obligations. Thus, the Magnuson-Stevens Act's 30-day statute of limitations does not apply. *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 948-49 (9th Cir. 2006) (holding that Magnuson-Stevens Act's statute of limitations "applies only to a very specific class of claims" and explaining that there are "many claims left untouched by [it]").

Although Fisheries Service Defendants admit that Plaintiffs pleaded their case in terms of a failure to take required actions to conserve and manage river herring, FSD Mem. at 11, and acknowledge that Plaintiffs do not invoke the judicial review provisions of the Magnuson-Stevens Act, *id.* at 8, they attempt to twist Plaintiffs' case into a challenge to existing regulations. Their argument is based on several unfounded assumptions that are demonstrably incorrect. First, they miscast examples that Plaintiffs provided as demonstrations of the scope of Fisheries Service Defendants' failure to act. Second, they assume that river herring and shad can be regulated solely as bycatch.

In first mischaracterizing the Amended Complaint, Fisheries Service Defendants point to language in paragraph 4 of the Amended Complaint about the Atlantic Herring and Squid Mackerel Butterfish FMPs and assert that the Complaint is about the failure to implement measures in those fisheries. *Id.* at 9. But they neglect to mention the rest of that paragraph, which is, in any event, an introductory paragraph that states "in violation of the Magnuson-Stevens Act, the Fisheries Service has failed to implement a river herring and shad [FMP] that

conserves and manages these species in accordance with the Act and its national standard requirements." Amended Compl. ¶ 4. Plaintiffs further asserted that, "in violation of the Atlantic Coastal Fisheries Act, the Fisheries Service has failed to implement regulations in the [EEZ] to manage river herring and shad consistent with an ASMFC FMP and the National Standards, or to provide the statutorily required support to the ASMFC necessary to meet management obligations." *Id.* The same flaw holds for Fisheries Service Defendants' citation of ¶ 108, which they characterize as "alleging, *inter alia*, that NMFS has failed to 'monitor the fisheries that kill river herring and shad.'" FSD Mem. at 11. Unmentioned in that "*inter alia*" is Plaintiffs' clear, well-pleaded preceding statement: "The Fisheries Service has failed to prepare or implement an FMP 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." Amended Compl. ¶ 108. Fisheries Service Defendants' characterization would render that core element of the Amended Complaint a nullity.

Similarly, Fisheries Service Defendants quote out of context material from paragraph 86 of the Amended Complaint. *See* FSD Mem. at 9-10. This part of the Amended Complaint merely provides an illustrative example of how Fisheries Service Defendants have done nothing else that they can point to as a "plan," or that otherwise meets one or more of their statutory requirements. *See* Amended Compl. ¶¶ 85-86. Plaintiffs' claims have as their central concern Fisheries Service Defendants' failure to prepare or implement *any* plan for river herring and shad. Fisheries Service Defendants have not developed or acted upon any FMP for river herring and shad. Plaintiffs' claims do not relate to existing regulations, but to Fisheries Service

Defendants' failure to implement a plan meeting the Magnuson-Stevens Act and Atlantic Coastal Fisheries Act's requirements.[18]

Another flaw with Fisheries Service Defendants' argument that river herring and shad need only be regulated as bycatch through other fishery management plans is that it implies that so long as a fish is caught as bycatch in another fishery for which there exists an FMP, they *never* have the obligation to establish an FMP for that particular fish. This makes no sense for fish stocks in need of conservation and management because bycatch is only one of several adverse impacts affecting fish populations.[19] In fact, the Fisheries Service does simultaneously regulate certain fish species as bycatch in one FMP while managing that same fish species pursuant to a separate FMP. For example, the Atlantic Herring FMP includes a cap on the amount of haddock that can be taken as bycatch and other monitoring regulations designed to document and minimize the bycatch of haddock. *See, e.g.*, New England Fishery Mgmt. Council, *Atlantic Herring Specifications for the 2010-2012 Fishing Years* 103-04 (2010); New England Fishery Mgmt. Council, *Final Amendment 1 to the Atlantic Herring Fishery Management Plan* 33-34 (2006); 50 C.F.R. §§ 648.202-.203. But haddock is primarily managed as one of 20 stocks in the New England Groundfish FMP that addresses all of the Magnuson-Stevens Act's statutory requirements. *See, e.g.*, New England Fishery Mgmt. Council, *Final Amendment 16 to the Northeast Multispecies Fishery Management Plan* 60 (2009)

Thus, it is the APA's judicial review provision, not the Magnuson-Stevens Act's, that applies to the Amended Complaint. The Magnuson-Stevens Act contains its own judicial review

[18] Fisheries Service Defendants' similar efforts with respect to a paragraph giving information about river herring stocks' dire straits fail for the same reasons as those given in this paragraph. *See* FSD Mem. at 9 (citing Amended Compl. ¶ 36).

[19] For this reason, Fisheries Service Defendants' attack against ¶ 116—the Fisheries Service's failure to promulgate regulations under the Atlantic Coastal Fisheries Act for the river herring and shad fisheries, FSD Mem. at 11-12, also fails.

provision that sets out a sharply limited statute of limitations. The scope of the judicial review provision, and thus of the statute of limitations, is very narrow, however: "Section 1855(f) applies only to a very specific class of claims—those that clearly challenge regulations promulgated under the Magnuson Act." *Turtle Island Restoration Network*, 438 F.3d at 948;[20] *see also* 16 U.S.C. § 1855(f)(1)-(2) (limiting judicial review provision to review of "[r]egulations promulgated by the Secretary under this Act and actions" "that are taken by the Secretary under regulations which implement a fishery management plan"). As demonstrated above, Plaintiffs' challenge does not aim at regulations that have been promulgated, but complains of actions that have *not* been taken. Thus, this challenge is actually governed by the APA's judicial review provision, and the Magnuson-Stevens Act's statute of limitations does not apply. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (finding Secretary's alleged failure to act under Magnuson-Stevens Act, 16 U.S.C. § 1821, reviewable under APA).[21]

Fisheries Service Defendants' invocation of *Turtle Island* and *Sea Hawk* fails because they are inapposite. In *Turtle Island*, the Ninth Circuit analyzed the applicability of the Magnuson-Stevens Act's statute of limitations. The court agreed with the defendants that a challenge alleging violations of various other statutes stemming from the promulgation of regulations was time-barred because the suit was filed five months after the regulations were issued. *Turtle Island Restoration Network*, 438 F.3d at 939. Although the plaintiffs asserted the

[20] The Ninth Circuit added that there are "many claims left untouched by § 1855(f)." *Turtle Island Restoration Network*, 438 F.3d at 949.

[21] As for the question of the date this duty to act accrued, it is settled that "where an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (internal quotation marks omitted). Even if a statute, like the MSA and Atlantic Coastal Fisheries Act, does not give an agency a timetable for carrying out all its duties, the agency does not have "carte blanche to ignore [its] legal obligations." *Id.* at 1096. "[A] reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Here, where more than 20 years ago the Fisheries Service identified overfishing of stocks and signs of their failure to rebuild, and, in 2006, designated river herring a "species of concern," Amended Compl. ¶ 18, and the ASMFC noted the similar situation of American shad in 2007, *id.* ¶ 27, that standard is well satisfied. *See also In re Am. Rivers*, 372 F.3d at 419 n.12 (noting that D.C. Circuit has also found delays of three, four, and five years unreasonable).

APA as the jurisdictional basis for the suit, *id.* at 942, the Circuit Court agreed that the substance of the suit was actually a challenge to the fishery regulation, subject to the Magnuson-Stevens Act's statute of limitations. *Id.* at 944. Here, however, Plaintiffs raise a claim under the Magnuson-Stevens Act, but the issue is that *no* regulations have been promulgated, thus violating the statute. *Turtle Island* simply does not apply.

Sea Hawk Seafoods, which Fisheries Service Defendants attached to their Motion to Dismiss, is similarly inapplicable. There, the district court succinctly stated that the issue at hand was "a narrow question: whether the *challenged regulations* were promulgated under (1) [the Magnuson-Stevens Act] or (2) the American Fisheries Act." FSD Mem., Exhibit 1, at 2-3 (*Sea Hawk Seafoods, Inc. v. Gutierrez*, No. C06-1616, slip op. at 2-3 (W.D. Wash. Aug. 14, 2007)) (emphasis added). The plaintiffs in that case *admitted* they were challenging regulations. *See id.* at 2 (*Sea Hawk Seafoods*, No. C06-1616, slip op. at 2). Here, Plaintiffs are not doing any such thing. They are doing the opposite: they are challenging Fisheries Service Defendants' *failure* to issue regulations. Accordingly, the Magnuson-Stevens Act's statute of limitations does not apply.

C. Plaintiffs' Claims Against the ASMFC and Its Commissioner Defendants Are Properly Before This Court

The ASMFC asserts that it cannot be subject to this Court's jurisdiction because, in its view, it is not a federal agency for purposes of the APA. ASMFC Mem. at 13-17. This assertion is manifestly incorrect. Congress intended that the ASMFC function as a federal agency with respect to its responsibilities under the Atlantic Coastal Fisheries Act and thus be subjected to suits by aggrieved stakeholders. That Act is replete with indications that Congress decided in 1993 to make the ASMFC an integral part of a federal program to limit the ability of the states to ignore fishery conservation. In particular, the Act expressly charged the ASMFC with the

responsibility of protecting national interests in such conservation. Thus, whatever the ASMFC's nature prior to the enactment of the Atlantic Coastal Fisheries Act, that Act made the ASMFC a federal agency for purposes of managing fish populations such as the river herring. Even if the ASMFC were not a full-fledged federal agency for these purposes, the level of federal interest and participation in the ASMFC's management of fisheries like river herring and shad renders the ASMFC a "quasi-federal agency" for these purposes, contrary to the ASMFC's claims, *see* ASMFC Mem. at 17-18.

Finally, the ASMFC's attempt to invoke sovereign immunity, *id.* at 27-30, fails because the ASMFC should be considered a federal agency for this case, and, thus, the APA has waived its sovereign immunity. Even if that were not the case, Plaintiffs' suit would still lie against the ASMFC, or against the ASMFC Commissioners under the well-settled *Ex parte Young* doctrine.

1. Plaintiffs Have a Cause of Action Against the ASMFC Under the Administrative Procedure Act.

The ASMFC Defendants claim that Plaintiffs do not have a private right of action because the ASMFC is not an "agency" as defined by the APA, ASMFC Mem. at 10, and thus, it is not subject to suit.[22] Yet the ASMFC meets the APA's definition of agency[23] for the purposes of reviewing its compliance with the federal legal obligations at issue. The federal nature of the ASMFC is apparent. It is charged with protecting national interests, it is profoundly intertwined with an unquestionably federal regulatory apparatus, it is predominantly federally funded, and it

[22] ASMFC apparently believes that it can avail itself of the federal courts for purposes of advancing its interests, while at the same time avoiding them with impunity where its actions are questioned. Thus, ASMFC Defendants take the position that although the ASMFC is not subject to suit due to the absence of a private right of action in the Atlantic Coastal Fisheries Act or the Compact, it may intervene or defend state action when it so chooses. *See R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 2008 WL 4467186 (D.R.I.) (ASMFC joined as intervenor-defendant); *Medeiros v. ASMFC*, 327 F. Supp. 2d 145 (D.R.I. 2004), *aff'd sub nom. Medeiros v. Vincent*, 431 F.3d 25 (1st Cir. 2005) (ASMFC joined as an intervenor defendant); *N.C. Fisheries Ass'n., Inc. v. Brown*, 917 F. Supp. 1108 (E.D. Va. 1996) (ASMFC attempted to intervene as party defendant but motion denied as untimely).

[23] "'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." 5 U.S.C. § 701(b)(1)

is imbued by Congress with federal agency-like powers. All these demonstrate that it operates for the purposes of implementing the Atlantic Coastal Fisheries Act as an "authority of the Government of the United States." 5 U.S.C. § 701(b)(1).

Alternatively, for similar reasons, at bare minimum the ASMFC is a "quasi-federal agency" for these purposes, and Plaintiffs' injury falls within the zone of interests Congress intended to protect with the Atlantic Coastal Fisheries Act. As a result, there should be a presumption of reviewability of the ASMFC's actions, and Plaintiffs have a cause of action against the ASMFC under the APA.

a. The ASMFC Is an Agency Under the APA for Purposes of Carrying Out the Duties Imposed by the Atlantic Coastal Fisheries Act.

"Agency" is defined broadly under the APA, and an entity may fall into that category when carrying out some of its functions, even if it does not when performing others. Interstate compact commissions such as the ASMFC meet the broad definition of agency contained in the APA. For the APA's judicial review provisions, "agency" means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 701(b)(1). Courts interpreting the application of this statutory definition have found it to be a complex task. *See McKinney v. Caldera*, 141 F. Supp. 2d 25, 31 (D.D.C. 2001) (stating the "law on the simple question of what is an agency is quite complex") (quoting *Lee Constr. Co., Inc. v. Fed. Reserve Bank*, 558 F. Supp. 165, 172 (D. Md. 1982)). The APA definition of "agency" is not self-revealing; "authority of the Government of the United States" must be interpreted. As outlined below, when acting under the Atlantic Coastal Fisheries Act, the ASMFC meets the broad definition of agency for purposes of judicial review under the APA.

Several threshold points are clear. First, notably, the definition of "agency" expressly excludes a number of entities, but it does not exclude interstate compact agencies. *See* 5 U.S.C. § 701(b)(1)(A)-(H) (excluding, among other things, Congress and the federal courts). Under the established canon of statutory construction *expressio unius est exclusio alterius*, this definition suggests that interstate compacts are eligible to be considered "agencies" for purposes of the APA. *See, e.g.*, *Caritas Med. Ctr. v. Johnson*, 603 F. Supp. 2d 81, 87 & n.4 (D.D.C. 2009). *But cf. Armstrong v. Bush*, 924 F.2d 282, 288-89 (D.C. Cir. 1991) (holding that despite absence from list of statutory exclusions, President is not an agency under APA). The ASMFC labors unconvincingly to avoid this construction with its assertion that "'[a]s a rule, [a] definition which declares what a term "means"' – as does the APA definition of 'agency' – 'excludes any meaning that is not stated.'" ASMFC Mem. at 15 (citation omitted; second alteration in original).

Second, it is clear that entities can be agencies for some purposes, while not for others. For example, the District Court for the District of Columbia declined to review under the APA a challenge to the Secretary of the Interior's decision not to overrule the High Court of American Samoa, which he oversees. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 637 F. Supp. 1398, 1416 (D.D.C. 1986). Notwithstanding the plain status of the Interior Department as a federal agency, the court explained that the plaintiff's claim under the APA was barred because the Secretary had been "sued in his capacity as overseer of the government of American Samoa," but "[t]he APA . . . is inapplicable to 'the governments of the territories or possessions of the United States.'" *Id.* (citing 5 U.S.C. § 706(b)(1)(C)). Other D.C. Circuit case law further illustrates this point. *See Pickus v. Bd. of Parole*, 507 F.2d 1107, 1111 & n.7 (D.C. Cir. 1974) (holding that actions of Board of Parole are reviewable under APA because "[s]uch functions as this case presents were not exempted"); *see also Ramer v. Saxbe*, 522 F.2d

695, 697 (D.C. Cir. 1975) ("[W]e recognize *in the context of this case* that the Bureau of Prisons is, indeed, an "agency" within the definition of the APA[.]" (emphasis added)); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 574 (1995) (holding that Amtrak is an agency for purposes of determining the constitutionality of its action although not for other purposes). This case law shows clearly that the ASMFC is in error when it suggests that holding it subject to judicial review under the APA in this case would subject it to the rest of the APA's provisions, ASMFC Mem. at 16.

Third, this Circuit has correctly held the APA's definition of agency should be read broadly. *See, e.g.*, *Armstrong*, 924 F.2d at 289 (stating that "[t]he legislative history of the APA indicates that Congress wanted to avoid a formalistic definition of 'agency'" and noting that "Congress used the broader term" "authority" to ensure that APA did not inappropriately exclude entities); *see also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 16 (1974) (the term "agency" is broadly defined to mean "each authority of the Government of the United States"); *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge panel) ("The term 'agency' is defined broadly."). Further, the Circuit has pointed out that the APA accomplishes this broad sweep by defining agency as a matter of its function, drawing in those entities that carry out "particular types of functions in which agencies of the Executive Branch generally engage." *Pickus*, 507 F.2d at 1111; *accord Armstrong*, 924 F.2d at 289.

Returning, then, to the plain language of the APA, which defines "agency" as "each authority of the Government of the United States," 5 U.S.C. § 701(b)(1), it is evident that there are two key questions to be answered to determine whether the ASMFC is an agency, for the purposes at issue in this suit, subject to judicial review under the APA. First, is the ASMFC an

"authority"? Second, is it "of the Government of the United States"? This inquiry requires close analysis of the particular facts of this case. *See Wash. Research Project, Inc. v. Dep't of Health, Educ., & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir. 1974) (discussing difficulty in determining whether "one of the myriad organizational arrangements for getting the business of the government done" is an agency for Freedom of Information Act ("FOIA") purposes and concluding that it is "unavoidable . . . that each new arrangement must be examined anew and in its own context"); *see also J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1157 (E.D. Va. 1995) (noting that FOIA cases often deal with question of definition of "agency" and that, while FOIA's definition is "a slight expansion" of the APA's, difference is not material to elucidating meaning of APA's definitions).

The answer to the first question is that the ASMFC is an authority. To be an "authority," an entity must be able to "*exercise* some governmental authority" that is substantial, independent, and final and binding. *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) (emphasis in original); *see also J.H. Miles & Co.*, 910 F. Supp. at 1157-58 (reviewing D.C. Circuit case law). "The important consideration is whether it has any authority in law to make decisions." *Wash. Research Project*, 504 F.2d at 248. The ASMFC plainly has the power to take binding, final action, and, as such, must be deemed to be an authority. 16 U.S.C. § 5104 (requiring states to "implement and enforce the measures of [an ASMFC-prepared and adopted IFMP] within the timeframe established in the [IFMP]"); *see also* ASMFC Mem. at 4-5 (describing this provision). The ASMFC Defendants do not appear to dispute that the ASMFC "*exercise*[*s*] some governmental authority," *see id.*; they do not argue that they are powerless. Instead, in line with the Second Circuit, *see New York v. ASMFC ("United Boatmen")*, 609 F.3d 524, 533 (2d Cir. 2010) ("The authority exercised by ASMFC under the Compact is not federal

in nature."), they contend that the ASMFC is not part of "the Government of the United States," *see, e.g.*, ASMFC Mem. at 15.

The answer to the second question is that, in carrying out (or illegally failing to carry out) the duties imposed on it by the Atlantic Coastal Fisheries Act and, in doing so, using (or illegally failing to use) the powers granted to it there by Congress, the ASMFC is an entity "of the Government of the United States."[24] This is not a phrase that has seen significant judicial elucidation; cases have tended to include only conclusory statements, *e.g.*, *Gibson & Perin Co. v. City of Cincinnati*, 480 F.2d 936, 941 (6th Cir. 1973). A case the ASMFC cites, however, *Ritter v. Cecil County*, 33 F.3d 323 (4th Cir. 1994), *cited in* ASMFC Mem. at 15 n.7, holds that a county housing authority was not an agency under the APA because "it was neither created nor maintained or controlled by the United States." *Ritter*, 33 F.3d at 327. This standard—creation and maintenance and control—supports a finding that the ASMFC is an agency for purposes of reviewing actions and inactions under the Atlantic Coastal Fisheries Act. The ASMFC was of course created, in part, by Congress's consenting to an interstate compact. *See, e.g.*, *United Boatmen*, 609 F.3d at 528. It has also been federally maintained and controlled. Five factors buttress this conclusion: (1) the Atlantic Coastal Fisheries Act provides an entirely new wellspring of powers for the ASMFC, a federal delegation of power unmatched by any state law delegation of power; (2) the Atlantic Coastal Fisheries Act imposes new duties on the ASMFC and weaves it deeply into the federal regulatory system; (3) the federal government has a say in the Interstate Fisheries Management Program and can participate in management of an individual IFMP-regulated fishery; (4) the purposes of the Atlantic Coastal Fisheries Act are to protect

[24] Notably, the U.S. Commission on Ocean Policy, a federal commission established by the Oceans Act of 2000, Pub. L. 106-256, § 3, 114 Stat. 644, 645-48 (2000), regarded the ASMFC as a federal entity. *See* U.S. Comm'n on Ocean Pol'y, *An Ocean Blueprint for the 21st Century* app. D, at D5 (final report, 2004), *available at* www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

national interests; and (5) some 90% of the ASMFC's annual funding comes from the federal government.

Finally, as the First Circuit has emphasized, "there is a substantial federal interest in ensuring that actions taken in pursuance of the [Atlantic Coastal Fisheries Act] receive the uniformity of interpretation that a federal forum offers." *R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 51 (1st Cir. 2009). This point is thrown into stark relief here. Under the ASMFC theory, it is not clear whether it could be held accountable in any court, federal or state. Such a result would not be consistent with the intention of the Compact and the Atlantic Coastal Fisheries Act, and would be unwise both as a matter of jurisprudence and public policy.

(1) The ASMFC's authority flows from the Atlantic Coastal Fisheries Act. Inaccurately, the Commission insinuates that its powers flow solely from the states and that it is merely using state police powers to protect fisheries. *See, e.g.*, ASMFC Mem. at 15 (implying that the ASMFC is "exercising police power delegated by the member States"); *id.* at 16 (claiming that Plaintiffs seek review of actions that "involve the coordinated exercise of State *police powers*" (emphasis in original)). But a review of state and federal codes reveals that this is not the case with regard to the ASMFC's actions under the Atlantic Coastal Fisheries Act. It was that Act that gave the ASMFC "teeth" by "ma[king] state compliance with fishery management plans compulsory"; before its enactment, a state's "participation in any given fishery management plan was voluntary." *R.I. Fishermen's Alliance*, 585 F.3d at 46; *accord United Boatmen*, 609 F.3d at 528-29.

Different from its Compact-granted powers, *all* of the ASMFC's powers under the Atlantic Coastal Fisheries Act flow solely from federal law. *Cf. Old Town Trolley Tours of*

Wash., Inc. v. Wash. Metro. Area Transit Comm'n, 129 F.3d 201, 203 (D.C. Cir. 1997) (noting, in case in which court held that compact-created agency is not an authority of the federal government, that "the signatories amended the Compact"). With one exception, the states that comprise the ASMFC all enacted the Compact,[25] along with other provisions relating to appointing commissioners to it and its finances, into state law. Conn. Gen. Stat. §§ 26-295 to -301; 7 Del. Code Ann. §§ 1501-1505; Fla. Stat. Ann. § 379.2253; Ga. Code Ann. §§ 27-4-210 to -216; 12 Me. Rev. Stat. Ann. §§ 4601-4613, 4651-4656; Md. Code Ann., Nat. Res. §§ 4-301 to -305; Mass. Gen. Laws Ann. ch. 130 app. §§ 1-1 to -5; N.H. Rev. Stat. Ann. §§ 213:1 to :6; N.J. Stat. Ann. §§ 32:21-1 to -11; N.Y. Envtl. Conserv. Law § 13-0371; R.I. Gen. Laws §§ 20-8-1 to -12; Va. Code Ann. § 28.2-1000. Critically, however, none of these states grants the ASMFC the powers that the Atlantic Coastal Fisheries Act grants it. That is, there is no state analogue for 16 U.S.C. § 5104's command that the ASMFC must "identify each State that is required to implement and enforce [an IFMP]" and that each such state *must* be bound by it. 16 U.S.C. § 5104(a)(1), (b)(1). Thus, significantly, the ASMFC's power to require—not to "recommend," *e.g.*, ASMFC Compact art. IV—states to follow its IFMPs comes solely from Congress. *See, e.g.*, *United Boatmen*, 609 F.3d at 528-29; Va. Op. Att'y Gen. 06-002, 2006 WL 304012, at *2 (2006). Similarly, the ASMFC's power to inform the Secretary of a state's noncompliance and to monitor the state's noncompliance with an IFMP flows from the Atlantic Coastal Fisheries Act and only the Atlantic Coastal Fisheries Act. 16 U.S.C. § 5105(b), (c). Importantly, it is this purely federal mechanism that triggers the fishing moratorium process—some of the bite to the teeth that the Atlantic Coastal Fisheries Act gives the ASMFC.

[25] South Carolina has not enacted the Compact, but it has enacted provisions, one of which states that it has signed the Compact, relating to appointing commissioners and other Compact-related issues. S.C. Code Ann. §§ 50-5-2700 to -2720.

The ASMFC may argue that the powers flowing from the Atlantic Coastal Fisheries Act sound in state powers. But this is not credible. The Compact as enacted only gives the ASMFC the power to *recommend* actions that the states should take.[26] ASMFC Compact art. IV. It explicitly provides that "[n]othing in this compact shall be construed to limit the powers of any signatory state." *Id.* art. IX. Yet the Atlantic Coastal Fisheries Act does precisely that: it imposes a limit on a state's ability to ignore fishery conservation and management. When there is a floor on a state's discretion about the level of regulation on a fishery, its power has certainly been limited.[27] Thus, the Compact cannot be plausibly claimed as a source for the ASMFC's new-found federal authority set out in the Atlantic Coastal Fisheries Act.

The ASMFC is therefore unlike a state or county housing authority, whose powers are established by state law. *E.g.*, Md. Code Ann. art. 24, § 6-203; N.Y. Pub. Hous. Law § 37 (granting to municipal housing authorities power "to . . . cooperate with the federal government

[26] The amendment enacted in 1950 permits states to "designate [ASMFC] as a joint regulatory agency with such powers as they may jointly confer" to regulate "specific fisheries in which such States have a common interest," ASMFC Compact amend. No. 1, but, on information and belief, no states have done so with respect to river herring or shad. *See, e.g.*, ASMFC, *Amendment 3 to the Interstate Fishery Management Plan for Shad and River Herring (American Shad Management)* 1, 50 (February 2010), *available at* www.asmfc.org/speciesDocuments/shad/fmps/Amendment3_FINALshad.pdf (stating that amendment is adopted "under the authority of the [Atlantic Coastal Fisheries Act]" and that *federal law* requires states and other jurisdictions to comply with amendment); *see also id.* at 2 (stating that when original IFMP for shad and river herring was adopted, in 1985, "the implementation of its recommendations was at the discretion of the individual states, because [ASMFC] did not have direct regulatory authority over individual state fisheries"); Va. Op. Att'y Gen. 06-002, 2006 WL 304012, at *2 (2006) ("The Commonwealth has never designated the Commission as a regulatory agency.").

[27] Several states enacted, contemporaneously with the Compact or its amendment, provisions that grant to ASMFC and its commissioners "all the powers necessary or incidental to the carrying out of the Compact in every particular" and declare it to be "the policy of the State to perform and carry out the said Compact and to accomplish the purposes thereof." *E.g.*, 7 Del. Code Ann. § 1503. Given that before the Atlantic Coastal Fisheries Act was enacted to give ASMFC actual power, states apparently flouted ASMFC's plans, *see, e.g.*, *Medeiros v. Vincent*, 431 F.3d 25, 27 (1st Cir. 2005) (stating that before 1993, "the decision to participate in any IFMP was entirely voluntary" and "compliance was spotty"), it strains credulity to read this as granting ASMFC its Atlantic Coastal Fisheries Act powers. Further, the provision that several states also enacted, in the same period, stating that "[a]ny powers granted to [ASMFC] shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said Commission by other laws of the State [or by laws of other signatories] or by the Congress or the terms of the Compact," *e.g.*, 7 Del. Code Ann. § 1504, also cannot be seen as a grant of power to ASMFC to regulate as it does pursuant to the powers granted by the Atlantic Coastal Fisheries Act. To read it that way reads article IX of the Compact, (which states that "[n]othing in this compact shall be construed to limit the powers of any signatory state,") out of the Compact entirely.

in connection with a federal or municipal project, or any federally-aided program to provide dwelling accommodations for persons of low income"). The sole source for the ASMFC's power under the Atlantic Coastal Fisheries Act is that very Act, supporting a reading that the ASMFC is a federal entity when it exercises (or illegally fails to exercise) its Atlantic Coastal Fisheries Act powers and responsibilities.

(2) With respect to its essential connection to federal authority, the Atlantic Coastal Fisheries Act places requirements on the ASMFC that the Commission previously did not bear. These duties inextricably intertwine it in the federal regulatory system and, as such, render the ASMFC federal for its performance (or illegal nonperformance) of Atlantic Coastal Fisheries Act duties.[28] Indeed, the ASMFC recognizes this fact. *See* ISFMP Charter, preface (stating that Interstate Fisheries Management Program Charter "was first developed in response to passage of the [Atlantic Coastal Fisheries Act], which provided the Commission with responsibilities to ensure member state compliance with [IFMPs]").

The Atlantic Coastal Fisheries Act requires the Commission to "prepare and adopt [IFMPs] to provide for the conservation of coastal fishery resources." 16 U.S.C. § 5104(a)(1). In so doing, the ASMFC must consult with relevant federal fishery management councils so that its plans "may complement" federal FMPs. *Id.* The IFMPs must meet certain requirements, such as establishing timeframes. *Id.*; *see id.* § 5104(b)(1). The Act further requires the ASMFC to "establish standards and procedures to govern the preparation of [IFMPs], including standards

[28] Contrary to ASMFC's claim that Plaintiffs "fail to identify any legally required discrete act [ASMFC] is required to perform," ASMFC Mem. at 18 n.10 (internal quotation marks and citation omitted), Plaintiffs have identified a host of required, discrete actions that ASMFC has not carried out. For example, they identify the requirement, in the Atlantic Coastal Fisheries Act, ASMFC Rules and Regulations, and ISFMP Charter, that IFMPs use the best scientific information available. Amended Compl. ¶¶ 121, 124, 126 (citing 16 U.S.C. § 5104(a)(2)(A); ASMFC Compact [should have been Rules & Regs.] art. VI, sec. 3; ISFMP Charter § 6(a)(2)). Plaintiffs make the well-pled claim that ASMFC Defendants have failed to carry out this duty. Amended Compl. ¶¶ 4, 135. Plaintiffs also identify the legal requirement that IFMPs "restor[e], rebuild[ ], and maintain[ ]," 16 U.S.C. § 5102(4) (defining "conservation") the fishery they manage, *id.* ¶ 51 (citing 16 U.S.C. § 5104(a)(1)), and aver that the ASMFC has failed to satisfy this duty, *id.* ¶ 137. Plaintiffs thus satisfy their pleading requirements. *See* pp. 23-25, ***supra***.

and procedures to ensure that" IFMPs "promote the conservation of fish stocks throughout their ranges and are based on the best scientific information available" and that the ASMFC's process for developing a plan allow "adequate opportunity for public participation . . ., including at least four public hearings." *Id.* § 5104(a)(2); *see also* ISFMP Charter § 6(a) ("These standards [for IFMPs] are adopted pursuant to Section 805 of the [Atlantic Coastal Fisheries Act] and serve as the guiding principles for the conservation and management programs set forth in the Commission's FMPs.").

The ASMFC's duties under the Act weave it tightly into the federal government. It must report "at least annually" to the Secretary on whether states are "effectively implementing and enforcing each [IFMP]." 16 U.S.C. § 5104(c). It *must* inform the Secretary if a state has failed to comply with an IFMP (if, in other words, the state fails to meet deadlines in carrying it out), and it must keep monitoring state compliance after making such a finding. *Id.* § 5105. Any notification must meet certain standards. *Id.* § 5105(b). This notification is the necessary trigger for the Secretary's review of the state's noncompliance, which culminates in the imposition of a federally enforced "moratorium on fishing in the fishery in question within the waters of the noncomplying State." *See id.* § 5106.

Moreover, both the ISFMP Charter and the ASMFC Rules and Regulations pertaining to the ISFMP Program draw on federal law terms of art, further emphasizing the federal character of this aspect of the ASMFC. For example, the Rules and Regulations and ISFMP Charter use the term "conservation and management," ASMFC Rules & Regs. art. I, sec. 2 ("Through the Interstate Fishery Management Program . . ., the Commission provides for the conservation and management of coastal fisheries"); ISFMP Charter § 6(a) ("Above all, an FMP must include conservation and management measures . . . ."), which is never used in the ASMFC Compact,

but which is defined by the Magnuson-Stevens Act, 16 U.S.C. § 1802(5), and used in the Atlantic Coastal Fisheries Act, *id.* § 5102(1)(B). These documents also use the term "fishery management plan," *e.g.*, ASMFC Rules & Regs. art. VI, sec. 4; ISFMP Charter § 6(a), which is, again, not used in the Compact, but lies at the heart of the Magnuson-Stevens Act's regulatory structure, *e.g.*, 16 U.S.C. § 1852(h)(1) (requiring each federal fishery management council to develop, "for each fishery under its authority that requires conservation and management . . . a fishery management plan"), and is defined in the Atlantic Coastal Fisheries Act, *id.* § 5102(1) (defining "coastal fishery management plan"). These duties and ties, flowing only from a federal statute that is not a compact, again separate the ASMFC from, for example, a public housing authority that is a state creature, with state-imposed obligations and links to other levels of government. The ASMFC's borrowing of exclusively federal terms of art only reinforces the logical conclusion: when the ASMFC acts under the Atlantic Coastal Fisheries Act, it is acting as a federal agency.

(3) Unlike the case with an obviously non-federal entity, the (unquestionably) federal government plays an active role in the Interstate Fisheries Management Program. The ASMFC's management of interjurisdictional fisheries is marked by formal federal participation—two representatives of federal agencies sit on the ISFMP Policy Board and have voting rights. ISFMP Charter § 3(a)(2). This Policy Board is "responsible for the overall administration and management of [the ASMFC's] fishery management programs," *id.* § 3(d)—the core of its Atlantic Coastal Fisheries Act-imposed duties. Further, NFMS and the U.S. Fish and Wildlife Service have the option to participate in and vote in the board that manages each fishery for which there is an IFMP. *Id.* § 4(b)(3).

In this regard, the ASMFC is similar to the federal fishery management councils that the Magnuson-Stevens Act creates. 16 U.S.C. § 1852(a). The federal councils consist of a set number of voting members, some of whom are appointed by the Secretary (from a list provided by state governors) or serve by virtue of holding a position in the federal government, others of whom serve by virtue of holding a position in state government. *See id.* § 1852(b). The voting membership of the ISFMP Policy Board consists of the ASMFC commissioners, the two federal agency representatives, a representative from the Potomac River Fisheries Commission, and a representative from the District of Columbia's government. ISFMP Charter § 3(a)(1)-(3). A fishery management board's voting membership consists of the ASMFC commissioners from the states that have an interest in the fishery that board oversees, a representative of the Potomac River Fisheries Commission and a representative of the District of Columbia's government (if they choose to participate and they have an interest in the fishery or may be affected by regulations), the two federal agency representatives (if they choose to serve), and a head of a federal fishery management council (if the management board "determines that such [participation] would advance the interjurisdictional management of the specific species"). *Id.* § 4(b). Like the ASMFC's management boards, each federal council has the duty, established by federal law, to prepare an FMP "for each fishery under its authority that requires conservation and management." 16 U.S.C. § 1852(h)(1).

The federal fishery management councils unquestionably carry out a federal function. *See J.H. Miles & Co.*, 910 F. Supp. at 1159; 17 Op. Off. Legal Counsel 150, 155 (1993). The ASMFC, insofar as it and its components have similar responsibilities as and voting membership like the federal councils, also takes on a strongly federal character.

(4) Moreover, Congress's purpose in enacting the Atlantic Coastal Fisheries Act was to serve *national* interests, taking the ASMFC's regulations of interjurisdictional fisheries outside the ambit of traditional state police powers, in which category the ASMFC claims all its powers falls, *see, e.g.*, ASMFC Mem. at 2 n.1, 16, 17. The statute's findings make pellucid Congress's intent to serve national interests. Congress began by finding that "[c]oastal fishery resources that migrate . . . 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 reach and *the Nation*." 16 U.S.C. § 5101(a)(1) (emphasis added). It added that the "disparate, inconsistent, and intermittent regulation" that was then present was harmful "to the interests of fishermen and *the Nation* as a whole." *Id.* § 5101(a)(3) (emphasis added). Congress concluded: "It is in *the national interest* to provide for more effective Atlantic State fishery resource conservation and management. *Id.* § 5101(a)(6) (emphasis added). Compare this repeated language, and the ample set of powers and duties Congress, and only Congress, provided for the ASMFC in the Atlantic Coastal Fisheries Act with the single finding that "responsibility for managing Atlantic coastal fisheries rests with the States," *id.* § 5101(a)(4). To give only that one sentence meaning in interpreting the statute while ignore the other findings and delegations of the Atlantic Coastal Fisheries Act, *see United Boatmen*, 609 F.3d at 533, improperly reads those nationally focused elements out of the statute, *see, e.g.*, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998) (rejecting interpretation of statute that "essentially deprives one provision of its meaning and effect so that another provision can be read as broadly as its language will permit").

This language also demonstrates that the ASMFC's argument that it merely exercises state police powers does not hold water. Most tellingly, protecting these national interests is beyond

the powers of any one state. *Cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."). This undeniable truth vitiates the ASMFC's police powers argument. As a result, the ASMFC's argument that Congress had to make an "extraordinarily 'clear statement'" to permit Plaintiffs the right to judicial review of the ASMFC's actions and inactions on river herring and shad, ASMFC Mem. at 16, also collapses because when the ASMFC exercises its power under the Atlantic Coastal Fisheries Act, it cannot be using state police power, so no heightened standard is needed to allow for judicial review. Thus, Congress's purposes in enacting the Atlantic Coastal Fisheries Act support the conclusion that the ASMFC is a federal agency for some purposes and weaken the ASMFC's arguments to the contrary.

(5) As for federal monetary support, it is notable that about 90% of the ASMFC's funding comes from the federal government. ASMFC, *2009 Annual Report* 56-57 (2010), *available at* www.asmfc.org/publications/09AnnualReport.pdf (stating that total state contributions to the ASMFC from July 1, 2008, to June 30, 2009, totaled $501,594, while total federal expenditures on the ASMFC in same period totaled $5,664,191); *New York v. Gutierrez*, 623 F. Supp. 2d 301, 310 (E.D.N.Y. 2009) (citing Declaration of Philip L. Curcio, dated February 2, 2009, Ex. 1), *rev'd United Boatmen*, 609 F.3d 524. This fact tends to make its protestations that its actions are not reviewable here ring even more hollow.

Finally, as the First Circuit has noted, "there is a substantial federal interest" in having federal court review of "actions taken in pursuance of the [Atlantic Coastal Fisheries Act]." *R.I. Fishermen's Alliance*, 585 F.3d at 51. While this interest could not override a clear statutory bar on federal court review, we have shown that no such bar exists. Moreover, if a case like this one, which cuts across many states and into federal areas, could not be heard in federal court, the risk

of many disparate and conflicting state court judgments would be significant. *E.g.*, *F.T.C. v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 29 (D.D.C. 2008) (noting "grave risk of inconsistent judgments deriving from the same conduct"). Therefore, for both jurisprudential and public policy reasons, this Court should find that Plaintiffs have a cause of action and can have their grievance heard here.

In sum, the ASMFC was created in part by the federal government and has since been controlled and maintained by the federal government's actions. The federal government's control and maintenance of the ASMFC is well evidenced by the Atlantic Coastal Fisheries Act's grant of new powers to and imposition of new duties on it, the federal government's active involvement in the ASMFC's activities under the Atlantic Coastal Fisheries Act, the purposes of the Act, and the fact that the federal government is by far the largest funder of the Commission. These facts demonstrate the high level of federal interest in and ongoing federal involvement in and support for the ASMFC's interjurisdictional fishery management programs. Plaintiffs in this case seek relief from the ASMFC's failures to carry out its responsibilities with respect to river herring and shad, prototypical interjurisdictional fisheries. Thus, the ASMFC is an "authority of the Government of the United States," 5 U.S.C. § 701(b)(1), for the purposes of this case.[29]

[29] Further, the failure of Congress to specify that ASMFC is not a federal agency "most logically and comfortably means" that the APA should apply to the ASMFC. The courts' role is to provide coherence to the body of the law. "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *W. Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991). "We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*." *Id.*

Where Congress intends that the APA should not apply to an interstate compact agency, it has expressly excluded the interstate compact entity from the APA definition of "agency." *See, e.g.*, 16 U.S.C. § 839b(a)(2)(A) (declaring that the Pacific Northwest Electric Power and Conservation Planning Council "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law"); *see also* The Delaware River Basin Compact, Pub. L. No. 87-328, § 15.1(m), 75 Stat. 688 (1961) (stating that the Delaware River Basin Commission "shall not be considered a Federal agency" for purposes of certain statutes, among which is the Act of June 11, 1946, 60 Stat. 237, as amended, the predecessor statute to the APA); The Susquehanna River Basin

b. Alternatively, the ASMFC Is a Quasi-Federal Agency for Certain Purposes, Including Its Actions and Inactions with Respect to River Herring and Shad Under the Atlantic Coastal Fisheries Act

When a non-federal entity is involved in a matter with a high degree of federal interest and participation, it can be a "quasi-federal agency" for that purpose. *See, e.g.*, *Coal. for Safe Transit, Inc. v. Bi-State Dev. Agency*, 778 F. Supp. 464, 467 (E.D. Mo. 1991) (degree of federal interest and participation in the project warranted a conclusion that it was a 'quasi-federal agency'") (citing *Union Switch & Signal, Inc. v. Bi-State Dev. Agency*, No. 91-1401C(7), at 7 (E.D. Mo. Oct. 23, 1991) (unpublished memorandum)); *Seal & Co. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1155-56 (E.D. Va. 1991) (summarizing D.C. District Court case law as holding "that because of the strong 'federal interest' in the WMATA Compact, WMATA should be treated as a federal agency subject to the APA"). The APA is applicable to "quasi-federal agencies." *See, e.g.*, *Coal. for Safe Transit*, 778 F. Supp. at 467 (holding that a bi-state agency was a quasi-federal agency and subject to APA) (citing *Union Switch & Signal*, No. 91-1401C(7), at 7); *Seal & Co.*, 768 F. Supp. at 1155-56 (applying APA test for standing to quasi-federal agency).

The quasi-federal agency doctrine has its roots in this Circuit. In *The Bootery, Inc. v. Washington Area Metropolitan Transit Authority*, 326 F. Supp. 794 (D.D.C. 1971), the D.C. District Court granted summary judgment to taxpaying business operators in their suit against the

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Compact, Pub. L. No. 91-575, § 2(l), 84 Stat. 1509 (1970) (stating **"**[f]or the purposes of . . . the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), as amended (5 U.S.C. 551-558, 701-706), the commission shall not be considered a Federal agency"). While the ASMFC's originating compact was promulgated prior to the APA, in passing the Atlantic Coastal Fisheries Act, Congress subsequently expanded the federal role in the ASMFC without disclaiming the applicability of the APA to the ASMFC.

Congress knows how to state an entity does not constitute an APA agency and failed to do so here. *Ali*, 552 U.S. at 227 (making counterfactual text argument in noting that "[h]ad Congress intended to limit [Federal Tort Claims Act provision's] reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity*'" (emphasis in original)). Given the presumption of judicial review of administrative action and the relevant body of case law, the ASMFC should be considered an agency under the APA.

Washington Area Metropolitan Transit Authority (an interstate compact agency) for violating the terms of its compact—a compact that provided for federal court jurisdiction but no private right of action. The court found there was a strong federal interest in the Compact, and, as such, it used the standard federal test for determining standing. *The Bootery*, 326 F. Supp. at 798-99. The first case actually to use the term "quasi-federal agency" mirrored the reasoning in *The Bootery* and reached the same result. *Seal & Co.*, 768 F. Supp. at 1156-57. Other cases have similarly relied on *The Bootery's* holding. *Otis Elevator Co. v. Wash. Metro. Area Transit Auth.*, 432 F. Supp. 1089, 1093-94 (D.D.C. 1976) (adopting *The Bootery*'s discussion and result); *see also Elcon Enterprises v. WMATA*, 977 F.2d 1472 (D.C. Cir. 1992) (assuming for the sake of argument that WMATA is federal agency and neither upholding or rejecting the quasi-federal agency doctrine) (citing *The Bootery*, 326 F. Supp. 794; *Otis Elevator Co.*, 432 F. Supp. 1089; *Seal & Co.*, 768 F. Supp. 1150).

The Eighth Circuit has adopted quasi-federal agency analysis. *See Heard Commc'ns v. Bi-State Dev. Agency*, 18 F. App'x 438, 439-40 (8th Cir. 2001) (per curiam) (unpublished opinion) ("We have considered the standard [for finding a quasi-federal agency] articulated by the district courts in both *Union Switch* and *Seal*. We agree with the district courts and adopt the test and underlying analysis."). The Third Circuit has also acknowledged the doctrine. *Am. Trucking Ass'n v. Del. River Joint Toll Bridge Comm'n*, 458 F.3d 291, 304 n.10 (3d Cir. 2006) (dicta). While arguing that the quasi-federal cases above do not apply, the ASMFC has failed to provide a case that precludes Plaintiffs' claims. As the quasi-federal agency doctrine has been established in this Circuit for nearly 40 years, it should be upheld by this Court in its specific application under the facts of this case.

Courts have identified three factors relevant to whether a compact authority warrants the quasi-federal agency classification: "(1) whether the originating compact is governed (either explicitly or implicitly), by federal procurement regulations; (2) whether a private right of action is available under the compact; and (3) the level of federal participation." *New York v. Gutierrez*, 623 F. Supp. 2d 301, 308-309 (2009), *rev'd on other grounds United Boatmen*, 609 F.3d 524.[30] Without connections to federal procurement regulations or a private right of action in the ASMFC Compact, the analysis here depends on the level of federal interest and participation in the ASMFC.

For the reasons stated above, including congressional authorization of the ASMFC Compact, the strong federal interest in the ASMFC, as demonstrated in the Atlantic Coastal Fisheries Act's delegation of powers and imposition of responsibility to it, the federal government's involvement in the actual management of interjurisdictional fisheries, the national interests the ASMFC serves under the Atlantic Coastal Fisheries Act, and the predominance of federal funding, the Court should find that, for the purposes of its actions and inactions under the Atlantic Coastal Fisheries Act, the ASMFC is a quasi-federal agency subject to judicial review here under the APA and, thus, that Plaintiffs are entitled to judicial review. Accordingly, the ASMFC's Defendants motion to dismiss should be denied.

c. <u>Plaintiffs Are Presumptively Entitled to Review of Their Claims.</u>

Especially in a case like this, where there is no other adequate remedy in law, Plaintiffs are entitled to APA review. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). Judicial review lies near the heart of our system of law, *see United States v. Nourse*,

[30] The Second Circuit did not express a holding on the validity of quasi-federal agency doctrine. It stated that it was "skeptical," *United Boatmen*, 609 F.3d at 534, and ultimately rejected the lower court's application of the test it had laid out, *id.* at 534-35.

34 U.S. (9 Pet.) 8, 28-29 (1835) (Marshall, C.J.) ("It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."), and courts "begin with the strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *see also Kucana*, 130 S. Ct. at 839 ("Because the presumption favoring interpretations of statutes to allow judicial review of administrative action is well-settled, the Court assumes that Congress legislates with knowledge of the presumption." (citations, internal quotation marks, and alteration removed)). *See generally* pp. 25-26, *supra* (discussing presumption of judicial review). "Clear and convincing evidence" is required to overcome this fundamental presumption of reviewability. *Kucana*, 130 S. Ct. at 839. Defendants do not, and cannot, provide *any* evidence of intent to preclude judicial review, and without clear and convincing evidence to dislodge this presumption of review Plaintiffs are entitled to it.

The ASMFC Defendants compare the Atlantic Coastal Fisheries Act to the Magnuson-Stevens Act and imply that, if Congress had intended to provide a right of review, it could have used or explicitly applied this model with its strict time limitations on judicial review and prohibitions on injunctive relief, ASMFC Mem. at 22-23. This line of reasoning ignores the presumption *in favor of* judicial review and the alternative scenario that Congress, frustrated by ineffective state and federal fisheries management for interjurisdictional species, chose not to

limit the right of judicial review as per the Magnuson-Stevens Act, and intentionally allowed for broader judicial review from the APA. *See, e.g.*, 16 U.S.C. § 5101(a). Further, the ASMFC internal appeals process[31] is limited in scope and inadequate to protect the interests of the public. *See* ISFMP Charter §§ 3(d)(9), 4(h) (allowing state that is "aggrieved by an action of the management board" to have appeal heard and decided by ISFMP Policy Board). In fact, the ASMFC's appeals process is available only to member states and would give plaintiffs like the fishermen of Martha's Vineyard/Dukes County and Michael S. Flaherty absolutely no meaningful review of management measures that have a direct effect on their livelihoods or other interests. This cannot be what Congress intended, and if it did so intend, the law required it to plainly state that intention.

d. <u>This Court Should Not Follow the Second Circuit's *United Boatmen* Decision.</u>

The ASMFC Defendants rely on a Second Circuit interlocutory appeal that is not binding on this Court, *United Boatmen*, 609 F.3d 524, as support for their assertion that the ASMFC is not an APA agency and that Plaintiffs thus are not entitled to the right of review afforded to parties aggrieved by agency action. ASMFC Mem. at 10, 14-15. But *United Boatmen* conflicts with this Circuit's broad definition of agency and fails to adequately address the ramifications of the Atlantic Coastal Fisheries Act on the Commission. In addition, it bears noting that the Second Circuit was careful to limit its holding about quasi-federal agencies to the particular facts: "*in this case*, the 'quasi-federal' agency doctrine should not be used." *United Boatmen*, 609 F.3d at 527 (emphasis added).

The Second Circuit, naturally, applied its own case law about statutory interpretation and, with some D.C. Circuit case law supplementation, the definition of "agency" under the APA.

[31] Under the ISFMP Charter a member state may appeal any action of a Management Board to the ISFMP Policy Board under §§ 3(d)(9) and 4(h).

E.g., *United Boatmen*, 609 F.3d at 532 (citing Second Circuit case for proposition that court "should not give the definition of 'agency'" a broad reading). In doing so, it started from an entirely different basis from the D.C. Circuit. The Second Circuit gave "agency" a narrow reading, and failed to acknowledge that an entity may be an agency under the APA for one purpose, but not for another. *See id.* at 532-533 (holding that "agency" should be defined narrowly under APA and looking at the ASMFC in general). But, as discussed above, in the D.C. Circuit, the opposite presumptions hold: "agency" is read broadly, *see, e.g.*, *Armstrong*, 924 F.2d at 289, and an entity can be an agency for some purposes under the APA, while not functioning as an agency for others, *e.g.*, *Pickus*, 507 F.2d at 1111 & n.7. Here, it is the *challenged function* the entity carries out that matters. *Compare Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 637 F. Supp at 1416 (holding that when Secretary of the Interior is "sued in his capacity as overseer of the government of American Samoa," APA bars review), *with Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (accepting jurisdiction over challenge to Secretary of the Interior's management of public lands and rejecting claim on the merits).

As well as starting with different premises, from those applicable in this Circuit, the Second Circuit also failed to adequately take into account the Atlantic Coastal Fisheries Act. It never acknowledged the strong national interest, discussed above, that Congress explicitly stated motivated its decision to pass the Act. *See United Boatmen*, 609 F.3d at 529 (discussing only limited parts of 16 U.S.C. § 5101). Moreover, the Second Circuit's approach conflicts with the First Circuit's well-reasoned interpretation of the Atlantic Coastal Fisheries Act in *R.I. Fishermen's Alliance*: that the Act serves federal interests, especially promoting increased consistency in fishery regulation, and is served by federal courts' interpreting it. 585 F.3d at 51

("[T]here is a substantial federal interest in ensuring that actions taken in pursuance of the [Atlantic Coastal Fisheries Act] receive the uniformity of interpretation that a federal forum offers. This interest is underscored by the fact that Congress adopted the [Atlantic Coastal Fisheries] Act, in part, to achieve greater consistency in the regulation of fisheries."). Beyond these failings, the Second Circuit also neglected to include in its analysis that the Atlantic Coastal Fisheries Act limits state sovereignty, *see United Boatmen*, 609 F.3d at 532-33 (discussing Magnuson-Stevens Act, but not the Atlantic Coastal Fisheries Act or its preemption provision, in insinuating that "regulation of the territorial sea" is left to states, with one exception), and grants significant powers and responsibilities to the ASMFC, *see id.*at 535 (assuming incorrectly and without analysis of relevant statutory language that the ASMFC's regulatory powers flow solely from states and that Congress's involvement was limited to mere "endorse[ment]"). These interpretative omissions are, as shown above, incorrect, and make it harder to achieve consistency in regulation of fisheries. In sum, the Second Circuit's analysis of the Atlantic Coastal Fisheries Act was not well reasoned. *See, e.g.*, *id.* at 533. Thus, its holding that "[t]he authority exercised by the ASMFC *under the Compact* is not federal in nature," *United Boatmen*, 609 F.3d at 533 (emphasis added), is both irrelevant and incomplete, for it does not examine the nature of the "authority exercised by the ASMFC under *the Atlantic Coastal Fisheries Act*" (italicized text replacing Second Circuit's), which is the proper question here.

For these two reasons, this Court should not follow the Second Circuit's erroneous judgment. The Second Circuit started from different, improper premises and did not sufficiently address how the Atlantic Coastal Fisheries Act changed the nature of the ASMFC (when the ASMFC acts pursuant to it).

2. The ASMFC and Its Commissioner Defendants Are Not Entitled to Immunity from Suit

The ASMFC appears to argue that even if this Court finds that there is a cause of action against the ASMFC under the APA, it is nonetheless entitled to sovereign immunity. ASMFC Mem. at 27-30. This argument fails for a variety of reasons. First, should the Court hold that the ASMFC is indeed a federal agency subject to judicial review under the APA for the purposes of this case, then the APA has already waived any sovereign immunity the ASMFC may possess. 5 U.S.C. § 702; *see also* ASMFC Mem. at 29 (acknowledging APA's "express waiver" of sovereign immunity). Second, while the Court does not need to reach this question, under a long line of Supreme Court and D.C. Circuit precedent, the ASMFC has simply not shown it is the type of entity that can be found to enjoy sovereign immunity as if it were itself a state. Finally, should the Court hold that the APA's waiver of sovereign immunity does not apply, and that the ASMFC is entitled to sovereign immunity, the *Ex parte Young* doctrine permits suit against the ASMFC's Commissioners in their official capacity.

a. **The ASMFC Is Not the Kind of Entity Protected Against Suit by Sovereign Immunity.**

Sovereign immunity protects states against having either their "dignity" affronted or their treasury depleted by suit. 13 Wright & Miller et al., *Federal Practice and Procedure* § 3524 (3d ed. 2007). However, as the Supreme Court has explained, Compact Clause entities like the ASMFC "occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. [Compact Clause] entities in contrast, typically are creations of [several] discrete sovereigns: [the] States [involved] and the Federal Government." *Hess v. Port Auth. Trans-Hudson Corp*, 513 U.S. 30, 40 (1994) (rejecting an interstate compact entity's claim of sovereign immunity).

The Court explained that this difference between Compact Clause entities and the states eliminates one of the concerns motivating sovereign immunity:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court.

Id. at 41. When a suit, like Plaintiffs', arises under federal law, the absence of "affront" is "all the more apparent." *Id.* at 42.

Thus, contrary to the ASMFC's Memorandum, *see* ASMFC Mem. at 28-30 (claiming that "'unmistakable' statutory language" is required to overcome sovereign immunity),[32] compact entities are presumed *not* to be shielded from suit by sovereign immunity. *P.R. Ports Auth. v. Fed. Maritime Comm'n*, 531 F.3d 868, 872 (D.C. Cir. 2008) ("[T]he Supreme Court has recognized a presumption against sovereign immunity for Compact Clause entities . . . .") (citing *Hess*, 513 U.S. at 42); *Hess*, 513 U.S. at 43-44 ("We then set out a general approach: We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity '[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose.'") (citing *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979)) (alteration in original); *see also Alabama v. North Carolina*, 130 S. Ct. 2295, 2314 n.5 (2010) (describing holding of *Hess* as being "that an entity created through a valid exercise of the Interstate Compact Clause is not entitled to immunity from suit under the Eleventh Amendment"). This presumption is powerful: to possess sovereign immunity, "both

[32] The ASMFC's argument that its claimed sovereign immunity can be abrogated only by a clear statement suffers from the same flaw that the Supreme Court has expressly rejected: its "reasoning . . . would extend Eleventh Amendment immunity to every [multi]state agency unless that immunity were expressly waived." *Lake Country Estate, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400 (1979). It should thus be rejected.

the states' and Congress' intention to confer immunity must be manifest and, in addition, the structure of the [entity]" must be one that clearly puts it in the place of a state, with respect to sovereign immunity. *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 224 (D.C. Cir. 1986); *accord Lake Country Estates*, 440 U.S. at 401.

The D.C. Circuit recently placed a gloss on this test, interpreting *Hess* as requiring a three-factor balancing inquiry. The factors that determine whether an entity is an "arm" of the state are: "(1) the State[s'] intent as to the status of the entity, including the functions performed by the entity; (2) the State[s'] control over the entity; and (3) the entity's overall effects on the state[s'] treasury." *P.R. Ports Auth.*, 531 F.3d at 873 (citing *Hess*, 513 U.S. at 43-46). If the factors are "sufficiently mixed," the presumption against sovereign immunity is not overcome. *Id.* at 874.

Though this Court need not reach this argument due to the APA's waiver of any sovereign immunity the ASMFC may possess, 5 U.S.C. § 702, the ASMFC fails the *Hess* three-factor test. On the first factor, New York State provides the clearest demonstration that the states did not intend to immunize the ASMFC from suit: it sued the ASMFC. *United Boatmen*, 609 F.3d at 527 n.1 (noting that in 2009, New York State sued "both the federal defendants and the ASMFC" over their management measures for summer flounder) (citing *New York v. Locke*, 09 Civ. 3196(NG)(RLM), 2009 WL 2496089 (E.D.N.Y. July 24, 2009); *see also Lake Country Estates*, 440 U.S. at 402 ("Indeed, that [the compact entity at issue] is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on [the compact entity]."). In addition, the Compact indicates that the ASMFC should be a separate entity from the states, referring to it as "a body corporate." ASMFC Compact art. III; *see also Hess*, 513 U.S. at 44

(noting that compact does not put entity into category of "state agency," instead using term like "body corporate and politic").

Hess makes clear that the second part of the inquiry, state control, is not dispositive and, for a multi-state body, like the ASMFC, difficult to ascertain where "no one State alone can control the course of a Compact entity." *Hess*, 513 U.S. at 47-48. The *Hess* Court pointed out that cities and counties do not possess sovereign immunity, but are entirely at the mercy of, and thus under the "ultimate control of . . . the State." *Id.* at 47. The Court did not look further into the question of "actual control" because, in the context of a body with several "creator-controllers," it "c[ould] be a 'perilous inquiry,' 'an uncertain and unreliable exercise.'" *Id.* (citations omitted). The ASMFC claims that it is entitled to sovereign immunity because it is exercising its core police powers, ASMFC Mem. at 27; however, this claim is without merit. It is federal law, the Atlantic Coast Fisheries Act, that directs the ASMFC through its Commissioners to develop coastal fisheries management plans that provide for the conservation of resources such as shad and river herring, 16 U.S.C. § 5104(a)(1), and imposes federal obligations. In the case of shad and river herring, all 15 states as well as the federal government have Commissioners who vote on the Shad and River Herring Board. *See* ASMFC, Shad & River Herring Board (July 6, 2010), *available at* www.asmfc.org (click on "Managed Species," then "Shad and River Herring," then "Management Board"). And it is the ASMFC that monitors state compliance and reports back to the Secretary in case of non-compliance. 16 U.S.C. § 5104(b)(1). Where the states agree to power sharing, coordination and unified action, it is simply not the case that one state could control the compact entity.

The final factor, the impact on states' treasuries, provides little support for the ASMFC's sovereign immunity claim. In analyzing this factor, the relevant issue is the states' overall

responsibility for funding the entity and paying debts or judgments. *P.R. Ports Auth.*, 531 F.3d at 878 (citing *Hess*, 513 U.S. at 45-46). As outlined above, some 90 percent of the ASMFC's funding comes from federal sources, while the states, as a whole, provide less than 10 percent of the funding. This averages well under $40,000 annually per state—a minimal effect on state treasuries. Further, the ASMFC has no proprietary functions; thus, the risk of judgments burdening state treasuries is minimized. Finally, the Compact allows states to withdraw from the ASMFC for any reason so long as they give six month's notice. ASMFC Compact art. XII. This unhindered right of withdrawal means that no state's treasury could ever be burdened without the state's implicit consent. Thus, the realities of the situation, *cf. Hess*, 513 U.S. at 406 (calling for examination of "legal[ ] and practical[ ]" inquiry into sovereign immunity issue) reveal little chance of any real impact on state resources.

The results of the three-factor inquiry above must be weighed against the presumption that compact entities are not shielded from suit by sovereign immunity. *P.R. Ports Auth.*, 531 F.3d at 874. Here, where there is no evidence of intent to provide the ASMFC with immunity, a lack of state control, and, practically speaking, the ASMFC is a minor burden on each state's treasury, the presumption that the ASMFC is not entitled to claim sovereign immunity should hold, and the ASMFC's claim of such immunity should be rejected.

b. Plaintiff's Third Claim for Relief Stands Against the Commissioner Defendants Because They Are Not Entitled to Sovereign Immunity Under the *Ex parte Young* Doctrine.

Even if an entity is entitled to sovereign immunity, plaintiffs "may proceed against the individual commissioners, pursuant to the doctrine of *Ex parte Young*," *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citing *Ex parte Young*, 209 U.S. 123 (1908)), provided that two conditions are satisfied: the complaint must "'allege[ ] an ongoing violation of

federal law and seek[ ] relief properly characterized as prospective,'" *id.* (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) and citing *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting)); *accord Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008).

The Amended Complaint satisfies both conditions – it alleges ongoing violations of federal law and it seeks prospective relief. As an initial matter, the Atlantic Coast Fisheries Act is federal law, and Supreme Court precedent makes clear also that the Compact is also federal law, *e.g.*, *Cuyler v. Adams*, 449 U.S. 433, 438 n.7 (1981) (reviewing "'law of the Union' doctrine," which provides that compacts are federal law). Plaintiffs also allege ongoing violations of federal law. *E.g.*, Amended Compl. ¶¶ 128, 130, 135 (alleging that ASMFC Defendants are violating the Atlantic Coastal Fisheries Act by failing to prepare and adopt a coastal fishery management plan for river herring and shad that promotes the conservation of these stocks throughout their ranges based on the best scientific information available and to consult with regional fishery management councils about coordinating state and federal management of the river herring and shad fisheries). Plaintiffs therefore satisfy the first prong of the *Ex parte Young* doctrine, for they allege ongoing violations of federal law.

Plaintiffs also satisfy the second prong—they request forward-looking relief. The requirement that the relief requested "be properly characterized as prospective" prevents states from having to pay damages solely for wholly past violations of federal law. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). The relief requested can be either to enjoin unlawful governmental conduct, *e.g.*, *Verizon Md.*, 535 U.S. at 645, or to mandate future government action to meet the requirements of federal law, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (upholding district court order that requires state officials "to eliminate a *de*

jure segregated school system," even if it requires an expenditure of funds). *See generally Vann*, 534 F.3d at 751-55 (rejecting argument that *Ex parte Young* doctrine does not permit request of "affirmative action" as relief).[33] A prayer for declaratory relief that does not expose the state's financial resources to claims for wholly past violations makes no difference as to the prospective nature of the relief sought. *See Verizon Md.*, 535 U.S. at 646. Here, Plaintiffs' requests are "properly characterized as prospective," for they do not seek money damages but rather request that the court enjoin the ASMFC's unlawful behavior and order it to "prepare and implement an FMP" that accords with the requirements that apply to that body. Amended Compl., Prayer for Relief, ¶¶ 9-11.

The ASMFC Defendants have also argued that the Commissioners cannot be sued in their official capacities because the ASMFC is so legislature-like that they qualify for legislative immunity. ASMFC Mem. at 24-25; *see also id.* at 16-17 (seizing on same citation to argue that the ASMFC is not federal in form and thus not federal in function). The argument should be rejected. First, it makes a mountain out of a molehill of a dictum in the Second Circuit's *United Boatmen* opinion. The Second Circuit's statement was made in the context of a gratuitous discussion of the ASMFC's accountability in the absence of a right to judicial review under the APA. *See* 609 F.3d at 536. The Second Circuit did not suggest that legislative immunity should be applied to the ASMFC, and neither has any other court.

[33] The ASMFC claims that Plaintiffs cannot recover attorneys' fees. ASMFC Mem. at 29 n.20. This is incorrect. Under the Equal Access to Justice Act, 28 U.S.C. § 2412, a successful challenger under the APA to federal governmental action may recover costs and attorneys' fees. *E.g.*, *Summer Hill Nursing Home LLC v. Sebelius*, 677 F. Supp. 2d 181 (D.D.C. 2010) (analyzing claim of prevailing party for attorneys' fees in APA review case). Thus, if the Court finds that ASMFC is an agency for this case, Plaintiffs' request for attorneys' fees remains viable. If the Court somehow denies ASMFC's Motion to Dismiss, but does not find the ASMFC encompassed by 28 U.S.C. § 2412's provisions, Plaintiffs' request for attorneys' fees is still not completely barred. As leading commentators have noted, the precise limits of a court's power to grant a prevailing party attorneys' fees in a suit proceeding under the *Ex parte Young* doctrine remain unclear. *See* 13 Wright & Miller et al., *Federal Practice and Procedure* § 3524.3 (3d ed. 2007) ("The *Hutto* decision, however, left unanswered an important question: Are attorney's fees, absent the presence of bad faith or congressional authorization under the Fourteenth Amendment, merely ancillary to a suit seeking prospective relief and therefore permissible under *Edelman*?"). It is clear, however, that attorneys' fees may be granted in some circumstances. *E.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978).

Legislative immunity extends to a legislator's "legislative acts." *United States v, Helstoski*, 442 U.S. 477 (1979). "Legislative acts" include such conduct as introducing a bill, *Helstoski*; writing headnotes and footnotes into a bill, *Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991), and voting for a bill or resolution, *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Lattaker v. Rendell*, 2008 WL 723978 (3rd Cir. 2008) (drafting, debating, and voting on a bill). The ASMFC Defendants cannot show, given the discussion of the regulatory responsibilities imposed on ASMFC, that the Commissioners are acting in some sort of legislative capacity for the purposes of this suit. Here, the ASMFC's policy determinations and fishery management plans are implemented through rule-making by the individual states as state law, not by the ASMFC. Furthermore, the ASMFC is not the type of entity where legislative immunity is provided.[34] Thus, the Commissioners cannot claim it here. Finally, the ASMFC calls itself an "agency" in its pleadings, ASMFC Mem. at 15, 27, belying ASMFC's half-hearted attempt to claim that it is really legislative, *id.* at 16-17, 24. Thus, in this suit, the Commissioners lack legislative immunity.

ASMFC Defendants' further argument that suit should not be permitted against the Commissioners because it "would impose significant new burdens" on them, ASMFC Mem. at 26, should be rejected because of the importance of judicial review. *See, e.g., Safe Extensions, Inc.*, 509 F.3d at 602 (rejecting argument that agency should not be subject to judicial review

[34] *See, e.g., Acierno v.* Cloutier, 40 F.3d 597 (3rd Cir. 1994) (county council voting to rezone a single parcel of property); *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) (local zoning board adopting construction moratorium); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) (denial of request for zoning variance); *Reed v. Vill. of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983) (municipal legislators voting to reduce number of liquor licenses); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976) (voting for committee report and urging passage of bill on the floor); *Burnette v. Bredesen*, 566 F. Supp.2d 738 (E.D. Tenn. 2008) (state legislators voting for smoking ban and increased cigarette taxes); *Children A & B v. Florida*, 355 F. Supp.2d 1298 (N.D. Fla. 2004) (voting for current system of aid to education); *Jenkel v. 77 U.S. Senators*, 2003 WL 22016788 (N.D. Cal. 2003) (voting for joint resolution authorizing use of military force in Iraq); *Warden v. Pataki*, 35 F. Supp.2d 354 (S.D.N.Y. 1999) (state legislators' role in enacting legislation to change governance of New York City schools); *2BD Assocs. Ltd. P'ship v. County Comm'rs*, 896 F. Supp. 528 (D. Md. 1995) (municipal legislators drafting and passing amendment to zoning ordinance); *Rateree v. Rockett*, 630 F. Supp. 763, 769-72 (N.D. Ill. 1986) (municipal legislators voting to reduce budget and eliminate positions).

because of burdens judicial review imposes). "No one pretends that judicial review of agency action is a pleasant day at the beach for agencies, and although escaping judicial review would of course be less [burdensome], it would also leave" the subjects of regulations, and the public that benefits from "solid, well supported [agency] decisionmaking[,] unprotected from arbitrary and capricious agency action." *Id.* Thus, the ASMFC's final attempt to avoid judicial review should be rejected.

CONCLUSION

For the foregoing reasons, both the Fisheries Service Defendants' Motion to Dismiss Counts 1 and 2 and the ASMFC Defendants' Motion to Dismiss Count 3 should be denied. Plaintiffs respectfully request an oral hearing on these motions.

DATED: February 16, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2011, I caused a copy of the foregoing Plaintiffs' Combined Memorandum of Law in Opposition to Fisheries Service Defendants' Motion to Dismiss Counts One and Two and Atlantic States Marine Fisheries Commission Defendants' Motion to Dismiss Count Three to be served on counsel of record via the Court's CM/ECF system.

/s/ Stephen E. Roady