

#6

Correspondence



August 14, 2014

John K. Bullard
Regional Administrator
NOAA Fisheries, Greater Atlantic Region
55 Great Republic Drive
Gloucester, MA 01930



Chris Moore
Executive Director
Mid-Atlantic Fishery Management Council
800 N. State St., Suite 201
Dover, DE 19901

Thomas Nies
Executive Director
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, Massachusetts 01950

Dear Mr. Bullard, Mr. Moore, and Mr. Nies,

We are writing on behalf of the Herring Alliance¹ to urge expedient completion and implementation of the Industry-Funded Monitoring Omnibus Amendment. The New England and Mid-Atlantic Fishery Management Councils have taken significant actions to increase monitoring and other types of data collection in the Atlantic Herring FMP and the Squid, Mackerel, and Butterfish FMP in order to accurately track catch, including bycatch, in these high volume fisheries. The disapproval of the 100-percent observer coverage requirement, at the core of the fishery reforms in both Amendment 5 to the Atlantic Herring FMP and Amendment 14 to the Mackerel, Squid, and Butterfish FMP, was inconsistent with the council's intent and prompted the need for the Omnibus Amendment.

¹ The Herring Alliance includes 90 organizations representing nearly 2.5 million individuals. We are concerned about the Atlantic coast's forage fish, including the stocks managed in the Atlantic Herring FMP and the Mackerel, Mackerel, Squid, and Butterfish FMP, and the impacts of forage fish fisheries on the ecosystem through food web depletion and bycatch of non-target species such as river herring and shad. A complete list of Herring Alliance members can be found on our website: <http://www.herringalliance.org/alliance-members>. The Herring Alliance has previously commented on the need for industry funded observer programs and the requirement for one hundred percent observer coverage in these fisheries. See Herring Alliance (June 4, 2012) [Letter to Dr. Chris Moore, Executive Director, Mid-Atlantic Fisheries Management Council \(MAFMC\)](#); and Herring Alliance (June 4, 2012) [Letter to Mr. Paul Howard, Executive Director, New England Fishery Management Council \(NEFMC\)](#).

LS - 8/14/14

Specifically, the Herring Alliance urges the National Oceanic and Atmospheric Administration (NOAA Fisheries) and the councils take the following actions in this amendment:

- 1) Implement the Omnibus Amendment by January 1, 2015 in time for commencement of the 2015 Atlantic mackerel and Atlantic herring fishing seasons;
- 2) Take a “hard look” at the environmental impacts of the Amendment by considering a full range of observer coverage alternatives for the herring and mackerel fisheries, **including at least one alternative in each fishery with 100-percent observer coverage and no waivers**; and
- 3) Ensure that the recently adopted catch caps for river herring and shad are effective regulatory measures that help prevent these species from being listed under the Endangered Species Act (ESA) and support rebuilding by requiring 100-percent observer coverage with no waivers in the herring and mackerel fisheries.

Delay Violates the Magnuson-Stevens Act

The Councils took final action in June of 2012 and March of 2013 to improve catch monitoring and accountability of the industrial herring and mackerel fleets in Amendments 14 and 5 respectively.² Specifically, the Councils voted to adopt the requirements for 100-percent observer coverage on all Category A and B midwater trawl herring trips (Amendment 5), and all limited access midwater trawl and Tier 1 small-mesh bottom trawl mackerel trips (Amendment 14), coupled with industry contributions to the cost of observer coverage.³ Amendment 5 even provided for a one-year lag in implementation of this measure so that the agency could develop a cost-sharing mechanism between industry and the federal government. Rather than develop this mechanism in the year provided, NOAA Fisheries deliberated and disapproved the measures based on its view that the measures established an unfunded mandate and conflicted with the Anti-Deficiency Act and the Miscellaneous Receipts Act. This was despite the fact that industry was identified as providing the necessary additional funding for coverage and diverse solutions for third party service providers and cost-sharing mechanisms exist in other similar high volume fisheries.

In September 2013, NOAA Fisheries announced its intent to take the technical lead on the Omnibus Amendment (to develop a legal mechanism for cost sharing) and present an initial range of alternatives for council consideration at the January and February 2014 New England and Mid Atlantic Council meetings,⁴ with final action scheduled for June of 2014.⁵ This initial timeline allowed for implementation of the reforms prior to commencement of the 2015 Atlantic herring and Atlantic mackerel fishing seasons. An early delay was announced, however, in April

² See [MAFMC \(Apr. 2013\). Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish \(MSB\) Fishery Management Plan](#), Final Environmental Impact Statement (FEIS); [NEFMC \(Mar. 2013\); Amendment 5 to the Fisheries Management Plan \(FMP\) for Atlantic Herring](#), FEIS.

³ *Id.*

⁴ [NOAA \(Sept. 20, 2013\). Letter from John K. Bullard, Regional Administrator, and William A. Karp, Ph.D., Science and Research Director](#), to Chris Moore, Executive Director, MAFMC, and Thomas Nies, Executive Director, NEFMC.

⁵ NOAA/NMFS (Jan. 2014). [Draft Discussion Document: Industry Funded Monitoring Omnibus Amendment](#), p. 3.

2014.⁶ The new timeline stated that a draft environmental assessment (EA) would be available in August (MAFMC) or September (NEFMC) of 2014 and final action would be taken in November (NEFMC) or December (MAFMC) of 2014.⁷ Even with this delay, implementation by the January 2015 fishing season was feasible. In July 2014, NOAA Fisheries revealed another delay. This additional delay will prevent implementation of the amendment before the 2015 fishing season, thereby ensuring another season of approximately 10-percent observer coverage in the Atlantic mackerel fishery and 30-percent in the Atlantic herring fishery, resulting in only minimal information about catch of river herring and shad in these fisheries.

Further delay is unacceptable. The Magnuson-Stevens Act (MSA) requires that any fishery management plan shall establish a mechanism for specifying annual catch limits at such a level that overfishing does not occur in the fishery,⁸ including measures to ensure accountability.⁹ National Standard 9 of the MSA requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality.¹⁰ The Atlantic States Marine Fisheries Commission (with jurisdiction over river herring and shad in state waters), and both regional councils, have all stated on the record that current levels of observer coverage do not provide accurate estimates of river herring and shad bycatch.¹¹ Thus, to improve the collection of accurate catch information and prevent overfishing, and comply with the law, the councils developed alternatives in Amendment 5 and Amendment 14 that would have required 100-percent observer coverage on the vessels responsible for the majority of the bycatch of river herring and shad.¹²

In the last year, the councils have worked diligently to adopt catch caps for river herring and shad in the Atlantic herring and Atlantic mackerel fisheries.¹³ River herring and shad are depleted to near historic lows¹⁴ and subject to overfishing.¹⁵ Ocean-intercept small mesh fisheries have been identified as a significant threat to their ability to rebuild depleted populations.¹⁶ As a result of NOAA Fisheries disapprovals and recent delays in this amendment, the monitoring program cannot provide reliable estimates of catch in the herring and mackerel fisheries, and these caps will not achieve the intended goals.

⁶ NOAA (Apr. 22-24, 2014). [Letter from John K. Bullard, Regional Administrator, and William A. Karp, Ph.D., Science and Research Director](#), to Chris Moore, Executive Director, MAFMC, and Thomas Nies, Executive Director, NEFMC.

⁷ *Id.*

⁸ 16 U.S.C. § 1853(a)(15).

⁹ 16 U.S.C. § 1853(a)(11).

¹⁰ 16 U.S.C. § 1853(a)(9).

¹¹ See [ASMFC \(May 27, 2009\) Letter from Executive Director John V. O'Shea](#) to U.S. Secretary of Commerce Secretary Locke ; [MAFMC \(June 24, 2009\) and NEFMC \(June 26, 2009\) Letters](#) to the U.S. Secretary of Commerce in support of the ASMFC's request for emergency action.

¹² See *supra* at fn 2.

¹³ Proposed Rule FW 3 to the Atlantic Herring FMP, 79 Fed. Reg. 33879 (Jun. 13, 2014); Final Rule 2014 MSB Specifications, 79 Fed. Reg. 18834 (Apr. 4, 2014).

¹⁴ ASMFC (May 2012). [River Herring Benchmark Stock Assessment](#), Section C – River Herring Stock Assessment Report for Peer Review, Vol. 1; p. 58;

¹⁵ ASMFC (Aug. 2007). [Terms of Reference and Advisory Report to the American Shad Stock Assessment Peer Review](#), p. 19.

¹⁶ 78 Fed. Reg. 48944, 48978 (Aug. 12, 2013).

Further delay of this Amendment prevents effective monitoring of the annual catch limits and the catch caps in the Atlantic herring and mackerel fisheries and violates the mandates of the MSA to prevent overfishing, ensure accountability, and avoid or minimize bycatch.¹⁷

NEPA Mandates that the Councils Consider a Full Range of Alternatives

The National Environmental Policy Act (NEPA) mandates that the councils consider a full range of alternatives in this amendment.¹⁸ NEPA's purpose is to ensure that policymakers and citizens are informed about the environmental consequences of any federally proposed action before the action is taken, and are alerted to the availability of less environmentally damaging alternatives.¹⁹ It requires that an agency "to the fullest extent possible" provide an environmental impact statement (EIS) whenever they undertake any major federal action significantly affecting the human environment.²⁰ The Act also imposes a duty to take a "hard look at environmental consequences."²¹ The Council on Environmental Quality (CEQ) regulations that govern the implementation of NEPA and reinforce the requirement that the agency rigorously explore and objectively evaluate all reasonable alternatives in its EIS,²² calling the alternatives analysis the "heart of the EIS."²³ In any evaluation, the agency must assess each alternative in such detail as to provide enough information for viewers to evaluate their comparative merits and impacts.²⁴ Further, "[t]he information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."²⁵ To be consistent with NEPA's hard look requirement, the amendment must include a full range of alternatives for rigorous evaluation.

Inclusion of the 100-percent observer coverage with no waiver alternatives (Alternative Set M3 and H3 in the Draft Discussion Document (January 2014)²⁶, and Herring Alternative 2.2 and Atlantic Mackerel Alternative 2.2 in NOAA's Draft Industry-Funded Monitoring Omnibus Amendment (August, 2014)²⁷ and the Councils' Action Plan Alternatives M3 and H3²⁸) is

¹⁷ See *Flaherty v. Bryson*, 850 F.Supp.2d 38, 57, 63 (D.D.C. 2012); see also *Oceana v. Locke*, 670 F.3d 1238, 1240-1242 (D.C. Cir. 2011).

¹⁸ See 40 C.F.R. § 1502.14. "The phrase 'range of alternatives' ...includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case." NEPA See [NEPA's Forty Most Asked Questions](#), Nos. 1a. -1b. Council on Environmental Quality, 46 Fed. Reg. 18026 (1981). *Ed. Note.* (March 16, 1981).

¹⁹ NEPA § 102(2)(C); 42 U.S.C. § 4332 (1988).

²⁰ *Id.*

²¹ *Natural Resources Defense Council v. Morton*, 458 F.2d. 827, 838 (D.C. Cir., 1972).

²² 40 CFR 1502.14 (a) (2011).

²³ 40 C.F.R. §1502.14 (2011).

²⁴ 40 CFR 1502.14 (b) (2011).

²⁵ 40 CFR § 1500.1 (2011).

²⁶ See *supra* at fn 5.

²⁷ [NOAA Draft Industry-Funded Monitoring Omnibus Amendment \(August 2014\)](#).

essential to ensuring consideration of the necessary spectrum of alternatives. These alternatives, if selected, will result in the most accurate and precise estimates of bycatch and they are the only alternatives that are consistent with the council's intent at the time they adopted Amendment 5 and 14. In addition, the councils and NOAA Fisheries created an expectation in the public that the 100-percent observer coverage with no waivers alternative will be available when the Councils choose the preferred alternative. These alternatives were included in the Draft Discussion Document²⁹ posted on both the MAFMC and NEFMC websites, were reviewed by both Councils in their January and February 2014 meetings, and remain in both NOAA's current Draft Industry-Funded Monitoring Omnibus Amendment³⁰ and the MAFMC and NEFMC Action Plan³¹ that are both posted on the MAFMC and NEFMC websites. To ensure that the Councils and Agencies take a "hard look" at environmental impacts and consider a full range of alternatives as required by NEPA, the amendment must include the 100-percent observer coverage with no waiver alternatives.

Inclusion of the 100-percent observer coverage with no waiver alternatives also best fits the purpose and need of the Omnibus Amendment, which includes implementation of industry-funded monitoring coverage that increases coverage in order to assess the amount and type of catch, monitor catch limits, and provide other information for management.³² The Amendment "would establish monitoring coverage targets for the Atlantic herring FMP and Atlantic mackerel, Squid, Butterfish FMP which are anticipated to enhance the monitoring of at-sea catch of herring, mackerel, river herring, shad, haddock, and other species harvested in the herring and mackerel fisheries."³³ Based on the Amendment's statement of purpose and need, these alternatives are both reasonable and required.

NOAA Fisheries ESA Listing Determination for River Herring Relied on the Catch Caps in the Herring and Mackerel Fisheries as Regulatory Mechanisms

In 2011, NOAA Fisheries determined that listing alewife and blueback herring (collectively river herring) as threatened species under the Endangered Species Act (ESA) may be warranted and initiated a status review.³⁴ In determining whether to list river herring the Services considered (among other things): 1) present or threatened destruction, modification, or curtailment of habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) inadequacy of existing regulatory mechanisms; and 5) other natural or man-made factors affecting the species' continued existence, as required by the ESA.³⁵ A year ago, after considering these factors, NOAA Fisheries determined that listing river herring under the ESA was "not warranted" at this time.³⁶ In support of its decision to deny listing river herring, the Service outlined the threats to the species, the degree of these threats, and the regulatory mechanisms in place to minimize them.

²⁸ See [NEFMC and MAFMC Action Plan, pp. 3-4](#).

²⁹ See *supra* at fn 5.

³⁰ See *supra* at fn 27.

³¹ See *supra* at fn 28.

³² NOAA/NMFS (Jan. 2014). [Draft Discussion Document: Industry Funded Monitoring Omnibus Amendment](#), p. 2.

³³ *Id.*

³⁴ 90-day Petition finding, 76 Fed. Reg. 67652 (Nov. 2, 2011).

³⁵ 78 Fed. Reg. 48944, 48944 (Aug. 12, 2013).

³⁶ *Id.*

In its denial decision, NOAA Fisheries concluded that incidental catch is one of the most significant threats to extinction facing these species.³⁷ Incidental catch is highest in federal waters where catch in small mesh fisheries such as the Atlantic herring and mackerel fisheries, remains a “substantial source of fishing mortality.”³⁸ Although estimated to be a significant threat, the “true degree of incidental catch cannot be fully quantified.”³⁹ The denial also notes that the ASMFC and both councils have requested increased monitoring in these small mesh fisheries,⁴⁰ and that both councils “have recommended management measures under the MSA that are expected to decrease incidental catch and bycatch of river herring.”⁴¹ However, these measures (catch caps) are ineffective without adequate monitoring and enforcement. Acknowledging this fact, NOAA Fisheries stated that one of the top research needs is to “[f]urther assess human impacts on river herring (e.g. quantifying bycatch through expanded observer and port sampling coverage to quantify fishing impact in the ocean environment....)”⁴²

Given the extended delay in the development and implementation of the Industry-Funded Monitoring Omnibus Amendment, NOAA Fisheries unreasonably relied on the catch caps in the Atlantic herring and Atlantic mackerel fisheries as regulatory measures that will help minimize the threat of incidental catch to the extinction to these species. Catch caps, along with any other bycatch minimization measures in these fisheries, are ineffective without accurate and precise data generated by increased observer coverage.

* * *

NOAA Fisheries and the councils should take immediate actions necessary to implement 100-percent observer coverage with no waivers in the herring and mackerel fisheries, at least until coast-wide stock assessments of river herring and shad are completed and the qualitative threats to these species are quantified.

Thank you for considering these comments.

Sincerely,

Roger Fleming
Erica Fuller
Attorneys
Earthjustice

On behalf of the Herring Alliance

³⁷ 78 Fed. Reg. at 48970-972, 977- 979, 992.

³⁸ 78 Fed. Reg. at 48968.

³⁹ *Id.*

⁴⁰ 78 Fed. Reg. at 48993.

⁴¹ 78 Fed. Reg. at 48968.

⁴² *See supra* at fn 40.

cc:

Eileen Sobeck, NOAA, Assistant Administrator

Dr. Mark Schaefer, NOAA, Assistant Secretary of Commerce for Conservation and Management

Terry Stockwell, New England Fishery Management Council, Chairman

Rick Robins, Mid-Atlantic Fishery Management Council, Chairman

