



September 24, 2015

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

Terry Stockwell, Chairman
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950

RE: Comments on Atlantic herring 2016-2018 Specifications; Catch Caps for River
Herring and Shad

Dear Mr. Nies and Mr. Stockwell:

We are writing on behalf of the Herring Alliance and our 110 member organizations¹ regarding the Herring Committee's recommendation for setting 2016-2018 catch caps for river herring and shad (RH/S) in the Atlantic herring fishery. The Herring Alliance has commented extensively on the need to conserve and manage RH/S in federal waters, including the need for effective annual caps that limit and reduce catch and bycatch of these highly depleted species² and it supports the New England Fishery Management Council's (NEFMC) efforts to minimize interactions with RH/S. However, we do not support the Committee's recommendation to raise the caps for 2016-2018. The Committee's preferred alternative (weighted mean of 2008-2014 catch) may technically be more consistent with the current approach for setting the cap given the available (but insufficient) data, however, it will not reduce RH/S bycatch and associated mortality in the herring fishery. This recommendation runs counter to the Council's goals and objectives of Framework 3 to reduce RH/S bycatch in the herring fishery, it adds unnecessary risk to already depleted species, and it undermines ongoing efforts to restore RH/S to healthy levels. The Herring Alliance supports Alternative 1 (No Action) until a biological basis for these caps is established.

¹ The Herring Alliance includes 110 organizations representing nearly 2.5 million individuals concerned about the Atlantic coast's forage fish, including the stocks managed in the Atlantic Herring FMP, and the impacts of forage fish fisheries on the ecosystem through food web depletion and bycatch.

² Prior comment letters include the July 19, 2010 Letter to Doug Grout re Amendment 5; Aug. 5, 2010 Letter to Doug Grout re Amendment 5; Sept. 21, 2010 Letter to Paul Howard re Amendment 5; Jan. 1, 2011 Letter to Paul Howard re RH/S catch caps; Nov. 8, 2011 Letter from Herring Alliance to Rip Cunningham re RH/S catch caps; May 21, 2013 Letter from Herring Alliance to Jason Didden and Lori Steele re RH/S catch caps; Aug. 16, 2013 Letter to Doug Grout and Lori Steele re Framework 3 to the Atlantic Herring FMP; Feb. 10, 2014 Letter from Herring Alliance to John Bullard re Proposed Rule to establish RH/S catch cap in the mackerel fishery; July 14, 2014 Letter from Herring Alliance to John Bullard re Proposed Rule to establish RH/S catch caps in the Atlantic herring fishery.

The Herring Alliance urges the Council to consider the following information when making its final recommendation regarding the 2016-2018 RH/S catch caps and select Alternative 1 (No Action) at its September 29 meeting.

1. “Reducing” bycatch is required by the Magnuson-Stevens Act’s National Standard 9 and applicable case law.³
2. The objective of Framework 3 to the Atlantic Herring FMP is to reduce all catch of river herring and shad from recent levels in the Atlantic herring fishery to the extent practicable.⁴ This is consistent with the goals of Amendment 5 to the Atlantic Herring FMP⁵ and the Mid-Atlantic Fishery Management Council’s (MAFMC) RH/S catch cap, as adopted in Amendment 14 to the Mackerel, Squid, Butterfish (MSB) FMP.⁶
3. Alternative 1 is consistent with the course of action taken by the MAFMC in June (2015) when it lowered the RH/S cap for the mackerel fishery.⁷
4. The most recent stock assessments and peer reviews show that RH/S are depleted to near historic lows, current mortality rates are too high, and management actions to reduce total mortality in ocean intercept fisheries are needed.⁸ The caps should reduce total mortality, not allow more catch of these depleted stocks.
5. The Atlantic herring fishery has only operated under RH/S catch caps since December 2014. Not even a full year has passed since the caps were implemented, and the impacts of these caps are not yet evident.⁹ This is not the right time to be making any changes to the existing cap levels.
6. Observer coverage in the herring fishery has dropped dramatically since 2014 when 41-percent of all midwater trawl trips were observed.¹⁰ Preliminary analysis from January-June of 2015, demonstrates that less than six (6) percent of midwater trawl trips in this

³ 16 U.S.C. § 1851(9) (“Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.”); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 57 (D.D.C. 2012) (“to meet their responsibility to ensure compliance with the National Standards, Defendants must demonstrate that they have evaluated whether the FMP or amendment minimized bycatch to the extent practical”); *Conservation Law Foundation v. Evans*, 209 F. Supp. 2d 1, 17 (D.D.C. 2001) (“Finally, by keeping intact the status quo, Defendants refuse to give effect to the clear will of Congress, which expressly directed Defendants to more accurately measure and reduce bycatch.”).

⁴ See NEFMC, Final Framework 3 to the Atlantic Herring FMP, p. 6, available at <http://www.greateratlantic.fisheries.noaa.gov/regs/2014/June/14herfw3ea.pdf>.

⁵ See NEFMC, Final Supplemental Environmental Impact Statement for Amendment 5 to the Atlantic Herring FMP, p. 14, available at http://archive.nefmc.org/herring/planamen/final_a5/Volume_I_forfinalsubmission.pdf.

⁶ See MAFMC, Final Supplemental Environmental Impact Statement for Amendment 14 to the MSB FMP, p. 10, available at <http://www.greateratlantic.fisheries.noaa.gov/regs/2013/August/13smbamend14prfeis.pdf>.

⁷ See MAFMC, June 2015 Council Meeting Summary, available at <http://www.mafmc.org/newsfeed/2015/june-2015-meeting-summary>.

⁸ See ASMFC (May 2012). Stock Assessment Report No. 12-02 of the Atlantic States Marine Fisheries Commission: River Herring Benchmark Stock Assessment, Vol. 1, Section A Terms of Reference & Advisory Report of the River Herring Stock Assessment Peer Review, at pp. 10-12; Section C - River Herring Stock Assessment Report for Peer Review, at 8, 11, 12, 17-20, 56-58; see also ASMFC American Shad Stock Assessment Peer Review Panel. Stock Assessment Report No. 07-01 of the Atlantic States Marine Fisheries Commission, Terms of Reference & Advisory Report to the American Shad Stock Assessment Peer Review, at pp. 16, 18-20.

⁹ See NEFMC, Draft 2016-2018 Atlantic Herring Fishery Specifications Document (September 2015), at pp. 116, 127, available at

<http://s3.amazonaws.com/nefmc.org/150908.DRAFT.2016.2018.Herring.Specs.for.AP.Committee.Complete.pdf>

¹⁰ See Draft 2016-2018 Atlantic Herring Specifications (September 2015), at p. 48.

fishery were observed and less than 32 percent of small mesh bottom trawl trips targeting herring,¹¹ under current observer sea day allocations. Reduced coverage levels, particularly for midwater trawl, could lead to less robust estimation of RH/S catch and compromise monitoring of the caps. As such, catch caps should be set at precautionary levels due to the high levels of uncertainty associated with the continued inadequate monitoring of this fishery.

7. Among all of the alternatives under consideration, the Committee's preferred alternative (Alternative 3), allows for the highest annual removals of RH/S,¹² about 109,000 more pounds (49.5 mt) than what is currently allowed or approximately 545,600 more fish.
8. The cap that applies to bottom trawl vessels in the Southern New England Catch Cap Area will increase by 38 percent, allowing approximately 368,000 more fish to be caught than what's currently allowed. For comparison, that is more than 4.5 times the number of fish that were estimated to return to Rhode Island's major herring runs this year (Gilbert Stuart River: 11,135; Nonquit River: 32,330; Buckeye Brook: 15,333; Woonasquatucket River: 20,448).¹³
9. In 2015, river herring spawning runs in parts of southern New England were among the worst on record. In Connecticut, the largest alewife runs in the state saw alarmingly low returns this year compared to recent averages: Mianus River (90,000 to 18,642), Latimers Brook (20,000 to 4,926), and Bride Brook (300,000 to 218,076).¹⁴ Rhode Island also saw low returns this year compared to 2014: Gilbert Stuart Brook (102,408 to 11,135), Buckeye Brook (47,263 to 15,333), Nonquit River (71,501 to 32,330), Woonasquatucket River (31,518 to 20,448),¹⁵ and Saugatucket River (74,000 to 15,000).¹⁶
10. The Committee's recommendation more than doubles the midwater trawl cap on Cape Cod (going from 13.3 mt to 32.4 mt), despite the fact that 9 months into this first year of implementation only 14 percent of the cap has been caught,¹⁷ and thus will provide no incentive to minimize bycatch in this area.
11. The Committee's recommendation to increase cap amounts runs counter to the management protections in state waters to promote the recovery of these species, including river herring harvest bans that have been in place for a decade or longer in Connecticut, Rhode Island and Massachusetts.
12. Finally, communities throughout New England have spent countless hours working to restore habitat, monitor water quality, and clean waterways to help restore RH/S

¹¹ A recent increase in observer coverage in the small mesh bottom trawl fleet demonstrated that discards of river herring and shad are much higher than initially presumed. See *Id.* at Appendix 1, p. i ("... upon reviewing catch data from the most recent two years (2013-2014), it has become apparent that discards now constitute a much larger proportion of total RHS catch, particularly for SNE/MA bottom trawl (up to ~73% in 2014).").

¹² See Draft 2016-2018 Atlantic Herring Specifications (September 2015), at p. 126.

¹³ Personal communication, Phil Edwards, Rhode Island Department of Environmental Management, Division of Fish and Wildlife

¹⁴ CT Weekly Diadromous Fish Report, Report Date: April 6, 2015, Connecticut Department of Environmental Protection/ Inland Fisheries Division Diadromous Program, available at <http://www.ctriversalmon.org/river-runs>

¹⁵ Personal communication, Phil Edwards, Rhode Island Department of Environmental Management, Division of Fish and Wildlife

¹⁶ Bill McWha, personal communication, July 2015

¹⁷ See GARFO, Weekly Quota and Landing Reports, River Herring/Shad Catch Cap Monitoring. Data reported through September 9, 2015, available at: http://www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/reports_frame.htm

populations. State and local governments have invested millions of dollars towards restoring our coastal estuaries and rivers by regulating pollution, restoring habitat, and stocking rivers. Allowing more bycatch of depleted RH/S is unacceptable and represents a significant setback in these ongoing efforts to restore these fish.

The Herring Alliance strongly urges the Council to vote in favor of Alternative 1 (No Action) so that RH/S limits will continue to provide a strong incentive for the industry to avoid RH/S and reduce its overall catch.

We appreciate the opportunity to provide these comments.

Sincerely,

/s/ Roger Fleming
Roger Fleming
Erica Fuller
Attorneys
Earthjustice

On behalf of the Herring Alliance