

April 13, 2015

Dr. Christopher M. Moore
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Mid-Atlantic Fishery Management Council
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Mr. Richard B. Robins
Chairman
Mid-Atlantic Fishery Management Council
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Dear Dr. Moore and Mr. Robins,

We are writing on behalf of the Herring Alliance to express our support for the staff recommendation to provide a regulatory mechanism that protects unmanaged forage species.¹ Adding these species to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (MSB FMP) as Ecosystem Component (EC) species under Option 2, with management measures to prohibit new or expanded harvest of these species until there is a sound scientific basis that promotes ecosystem sustainability, is the most effective and efficient option for accomplishing this goal. Below we offer our comments as well as specific recommendations for the Mid-Atlantic Fishery Management Council (Council) as it moves forward:

- Formally initiate a Fishery Management Plan (FMP) amendment process to protect unmanaged forage species;
- Clarify exactly what species will be managed under the FMP;
- Conduct a periodic review of the list of species classified so that additional species, once identified, will be added to the MSB FMP as EC species;
- Extend the prohibition language developed in the amendment to the MSB FMP to the Council's other FMPs, if and when it becomes appropriate;
- Ensure that the legal authority to conserve and manage these non-target species, including the prohibition on new and expanded fisheries, is fully documented in the amendment; and
- Specify an uncomplicated process for the transition of any identified EC species to a stock "in the fishery," once there is sufficient data to specify reference points or their proxies.

¹ See April 1, 2015 Memorandum entitled *Regulatory alternatives to protect unmanaged forage species* (describing option 2 on pages 2-3).

The Council's vote to "initiate a regulatory action to prohibit the development of new, or expansion of existing, directed fisheries on unmanaged forage species until adequate scientific information is available to promote ecosystem sustainability,"² is an important step towards protection of the region's forage base. As the Council's White Paper on managing forage fisheries states: "None of these forage species has been assessed and there are no biomass or abundance estimates. Some are species of concern since they may be at low population levels and/or occur as bycatch in fisheries for managed species...."³ The motions' prohibition does not mean that a fishery could not be developed in the future - only that it cannot be developed or expanded until the ecological health of the stock and its predators are adequately assessed and reviewed.

The staff recommendation to add these species to the Atlantic Mackerel, Squid, and Butterfish FMP is appropriate.⁴ All of the species currently managed in this FMP, and those contemplated by an alternative in Amendment 14 (river herring and shad), are forage species and thus, this is the most efficient and effective FMP to manage other forage species in the short term.⁵ New forage species should be protected by the highest taxonomical grouping for ease of management and to reduce workload. Species should be considered unmanaged unless actively managed, and all forage species that occur in the Exclusive Economic Zone (EEZ) should be added to the MSB FMP. If new information becomes available that indicates that these forage species should also be added to another FMP, in order to ensure management objectives, then the Council should take that additional action as well. By formally initiating an amendment to add these species to the MSB FMP, the Council will fulfill the intent of its motion to limit the impacts to existing fisheries and to ensure that any new directed fishing on unmanaged forage species only occurs after appropriate review of the ecological impacts of such fishing.

There is ample authority to add forage species to an FMP and prohibit the development or expansion of directed fisheries. Under the Magnuson-Stevens Act, once managers determine that forage stocks are in need of conservation and management they must be explicitly included in an FMP as stocks in the fishery,⁶ and prohibiting their capture and retention provides the most effective means for preventing the development of new forage fisheries. In the absence of making such a determination, as here at this time, there is also discretionary authority under the

² See Council Motions December 2014.

³ See November 2014 (draft) entitled *Managing Forage Fishes in the Mid-Atlantic Region* ("[White Paper](#)"), p. 26.

⁴ "The management unit is currently all northwest Atlantic mackerel (*Scomber scombrus*), longfin squid, *Illex illecebrosus*, and butterfish (*Peprilus triacanthus*) under U.S. jurisdiction though an alternative in the amendment could effectively extend the management unit to include RH/Ss." See Amendment 14 FEIS at p. 109/526.

⁵ Maintaining an adequate forage base for dependent species is an important goal of ecosystem based fisheries management. Although we support the addition of these species to the MSB FMP, the choice of an FMP is less significant to the protection of the ecosystem than the specific conservation measures enacted to protect qualifying forage species. If the Council decided to consider allowing a new fishery on one of these species, it would have to amend the MSB or other appropriate FMP to add them as stocks in the fishery. This process is subject to NEPA and would require environmental review before such a federal action could be implemented. This would also provide the Council with the opportunity to conduct its own scientific review and apply its own criteria in considering the new fishery.

⁶ 16 U.S.C. § 1852(h)(1). In addition, any FMP "shall" contain the conservation and management measures which are "necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A).

Act to “include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations.”⁷ The legal authority for adding these species to the MSB FMP as EC species and prohibiting the development or expansion of directed fisheries should be clearly stated in the amendment in order to help protect the integrity of this important decision.

If the Council decides to add these species to an FMP as EC species,⁸ establishing status determination criteria (SDC) is unnecessary until a new fishery is proposed, however, given the Council’s prohibitive motion, conservation and management measures should be enacted even though these species are not technically “in the fishery.”⁹ For example the Arctic FMP recently enacted management measures to prohibit commercial fishing on all species, including EC species, until information is available to support sustainable management of any future authorized fishery.¹⁰ To accommodate the potential for future fisheries, the Arctic FMP provides a process by which a species can be moved from the ecosystem component category into the actively managed category. Similarly here, the Council should develop a process and criteria by which a forage species could be moved into the actively managed category as a stock in the fishery, should it wish to consider authorizing a sustainable fishery on that stock. Through an established set of scientific criteria, the Council should be provided with the opportunity to review the science and deliberate on the merits of each new fishery proposal before allowing it to proceed.

We agree with Council staff that simply updating the list of approved fisheries is not an effective way to address the intent of the December 2014 motion. Gear restrictions alone cannot protect and conserve the forage base by prohibiting the development of new forage fisheries. Currently, unmanaged forage species are open to unmanaged fishing with no notice to or approval by the Council required, because this list includes a broad approval to target any “non-FMP” species with almost any gear including trawl or seine.¹¹ Removing non-FMP fisheries for low trophic level species from the list would mean that a prospective fisherman would only need to provide notice to the Council and then proceed with fishing after 90 days unless the Council has taken emergency action. Therefore, it is critical that there be rigorous, ecosystem-based scientific standards and criteria in place with which to evaluate any new fishery proposal before amending an FMP as described above.

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⁷ 16 U.S.C. § 1853(b)(12).

⁸ An EC species determination is based upon association that the species has with the stocks in the fishery, as well as the description of EC species provided in the National Standard guidelines. *See* 50 CFR 600.310(d)(5) (to be considered, the species should be a non-target species, no subject to overfishing, approaching overfished, or overfished, not likely to become overfished in the absence of conservation and management measures, and not generally retained for sale or personal use).

⁹ NOAA/NMFS. 2011. Annual Catch Limits and National Standard 1 Q & A’s, available at: http://www.nmfs.noaa.gov/msa2007/docs/acl_faq_may27_2011.pdf.

¹⁰ NPFMC. 2009. Arctic FMP, p. ES-4, available at: <http://www.npfmc.org/>. The Pacific Council is also taking action to protect unmanaged forage species in an Omnibus Amendment that amends all appropriate FMPs to include a list of forage species as EC species and prohibit directed commercial fisheries until a sound scientific basis that ensures sustainability exists.

¹¹ 50 C.F.R. 600.725.

Given what we know about the critical ecological and economic importance of forage species, action is necessary to protect them from unregulated new or expanded fisheries that could develop in the absence of adequate scientific information. In order to ensure their ecological role, permanent protections must be implemented in an FMP with the regulatory authority to enact conservation and management measures. The MSB FMP is the quickest and most effective way to bring these species under the Council's jurisdiction, thereby ensuring that before any new fisheries begin, the appropriate science is conducted to make certain that any such fishery would be sustainable and to avoid harm to the target forage species, the marine ecosystem, or other valuable fisheries.

Thank you for your commitment to this issue and for considering these comments.

Sincerely,

Erica Fuller
Roger Fleming
Attorneys
Earthjustice

On behalf of the *Herring Alliance*

Cc: Ms. Julia Beaty, MAFMC Assistant Plan Coordinator (via Email)