



August 21, 2020

Dr. Jim Balsiger, Regional Administrator  
National Marine Fisheries Service, Alaska Regional Office  
P.O. Box 21668  
Juneau, AK 99802

Mr. Simon Kineen, Chair  
North Pacific Fishery Management Council  
605 West 4th Avenue, Suite 306  
Anchorage, AK 99501

Dear Dr. Balsiger and Chairman Kineen:

We submit this letter on behalf of Ocean Conservancy and the Alaska Marine Conservation Council. These groups, whose members include commercial and subsistence fishermen and others who depend on a healthy marine ecosystem, have a long history of advocating for sustainable fisheries management in the Bering Sea and Aleutian Islands. The National Marine Fisheries Service's (NMFS) recent decision to use its inseason management authority to reopen Herring Savings Area (HSA) 2 circumvents Amendment 16a to the Fishery Management Plan for Groundfish of the Bering Sea/Aleutian Islands, and creates a dangerous precedent for increasing bycatch without necessary public process or evaluation of potential impacts to the ocean ecosystem. By taking this action, NMFS has created unnecessary risk to important ocean resources and acted contrary to its reputation as a leader in the movement toward sustainable, ecosystem-based management. The agency should rescind the action, close HSA 2, and leave HSA 3 closed as required under Amendment 16a.<sup>1</sup>

Pacific herring is a keystone species that provides forage for commercial groundfish stocks as well as a significant prey base for seabirds and marine mammals. Herring is also a "cultural keystone" species, important for food security and culture for Alaska Native Tribes, and it supports directed commercial fisheries in Western Alaska. Herring is an energy- and oil-rich forage unit integral to Eastern Bering Sea productivity. Partially in recognition of the importance of the stock and threats to it, NMFS took action to reduce herring bycatch in the pollock fishery through Amendment 16a in 1991.

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<sup>1</sup> We understand that the At-Sea Processors Association (APA) has recently petitioned for an emergency action to suspend the closure of the Winter Herring Savings Area as well. Although APA requests emergency action under the Magnuson Stevens Act instead of the Administrative Procedures Act, the request raises similar issues and provides further evidence of the need for a full analysis and public process to properly address this issue.

In its recent action, NMFS bypassed Amendment 16a and reversed the required closure of HSA 2, explaining that the reopening is needed to allow the pollock fishery to catch its full TAC, avoid the possibility of additional costs for the pollock fleet resulting from fishing in less productive areas further from port, and avoid a possible increase in salmon bycatch that may result from fishing outside of HSA 2.<sup>2</sup> These reasons are plainly insufficient. First, the agency explicitly considered and acknowledged the potential for economic costs to the pollock fleet in its 1991 decision adopting Amendment 16a. The agency implemented Amendment 16a, in part, to meet its obligation under National Standard 9 to reduce bycatch and balance the interests of different user groups that, intentionally or unintentionally, harvest herring.<sup>3</sup> In that decision, NMFS recognized that closing HSAs would have increased costs for the pollock fishery, but acknowledged that those costs were saved by subsistence users and that the pollock fleet would likely be able to harvest its pollock TAC even if all three HSAs were closed.<sup>4</sup> The trigger for closing the HSAs was set as a percentage of biomass to ensure that the closures would be responsive to changes in herring abundance. Now, when herring bycatch is high—the very instance Amendment 16a addresses—NMFS has come to the conclusion that the interest of the pollock fleet in catching its full TAC takes priority over the interests of other user groups who depend on herring and the needs of the ecosystem.

Second, the only justification NMFS provided that is not related to facilitating the harvest of the pollock TAC is a concern that fishing outside of HSA 2 and later in the season may lead to increased salmon bycatch. While avoiding salmon bycatch is an important concern, NMFS does not explain why the salmon bycatch measures it has adopted in Amendment 91 and 110 are inadequate to limit salmon bycatch. Notably, nothing in the current decision to reopen HSA 2 addresses how NMFS will meet its National Standard 9 obligations with respect to herring.

Further, NMFS has not provided any National Environmental Policy Act analysis to evaluate the effects of this action on the Bering Sea ecosystem. If NMFS no longer believes herring bycatch reduction measures are necessary or that there have been changes in herring biomass or other factors that necessitate adjustments to management measures, NMFS should complete an environmental impact statement to analyze the effects of any proposed changes, consider alternatives that would better meet the needs of the pollock fishery and subsistence and

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<sup>2</sup> See 85 Fed. Reg. 36509, 36509-10 (June 17, 2020).

<sup>3</sup> See 56 FR 15063-01, 15064 (April 15, 1991).

<sup>4</sup> 56 Fed. Reg. 15,063-01, 15,064 (Apr. 15, 1991); Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Amendment 16a to the Fishery Management Plan for Groundfish of the Bering Sea/Aleutian Islands at 33 (March 1, 1991) (EA); *see also Record of Decision for Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement* at 24 (June 2004) (2004 PSEIS); Supplemental Information for NMFS's Temporary rule and modification of closure of the Summer Herring Savings Area 2 in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area [RTID 0648-XY108-X] at 6 *available at* <https://www.fisheries.noaa.gov/webdam/download/107796746>.

directed commercial herring fisheries, and disclose that information to the public.<sup>5</sup> Each time NMFS has analyzed the herring bycatch measures—in the 1991 EA, the 2004 PSEIS and the 2015 Supplemental Information Report—the agency has decided to retain the HSAs. In fact, in its 2004 PSEIS, NMFS projected that under at least one alternative in which bycatch limits would be weakened, herring bycatch could approach levels of bycatch in the 1990s, when the combined effect of bycatch and directed fisheries sometimes exceeded the state’s herring harvest policy.<sup>6</sup> None of these earlier documents support the current decision, and if circumstances have changed, those changes must be evaluated in new NEPA documents.

In fact, NMFS correctly identifies significant changes in the pollock fishery since Amendment 16a was adopted. The agency, however, has not provided an analysis of those changes in an environmental impact statement and does not acknowledge that other ecosystem-wide changes could result in increased threats to herring and the Bering Sea ecosystem. For example, sea ice extent in the Bering Sea in 2018 and 2019 were the lowest levels on record and exhibited warming trends not predicted to occur by climate models for another 10-15 years. Warming seas and shifts in species distributions are affecting coastal communities that rely on an intact ocean ecosystem for food security, economic wellbeing, and culture. These changes are also affecting fisheries.<sup>7</sup> The increasingly rapid rate of change demands precautionary management measures and a holistic analysis of the effects of, and alternatives to, actions like this one, that reduce species protections.

NMFS’ rush to reopen HSA 2 compounds these problems by eliminating an important public process. An agency may only waive the Administrative Procedure Act’s notice and comment requirements when complying with the requirements would do “real harm” or “interfere with the agency’s ability to carry out its mission.”<sup>8</sup> NMFS has not met that standard here. The reasons NMFS provided for waiving notice and comment mirror the reasons provided for the reopening itself, with the additional reason that relevant information was not available until June 3.<sup>9</sup> For the same reasons these justifications do not support the temporary rule, they do not show good cause for waiving notice and comment. Allowing public comment not only would

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<sup>5</sup> One of the factors an agency must consider in determining whether the effects of an action are significant is “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b).

<sup>6</sup> See 2004 PSEIS at 4.5-153 & 3.5-198. The PSEIS also expresses concern that bycatch models were underrepresenting likely bycatch.

<sup>7</sup> See Stevenson, D.E. and Lauth, R.R., 2019. Bottom trawl surveys in the northern Bering Sea indicate recent shifts in the distribution of marine species. *Polar Biology*, 42(2), pp.407-421; Yeung, C. and Cooper, D.W., 2020. Contrasting the variability in spatial distribution of two juvenile flatfishes in relation to thermal stanzas in the eastern Bering Sea. *ICES Journal of Marine Science*, 77(3), pp.953-963.

<sup>8</sup> *NRDC v. Evans*, 316 F. 3d 904, 911 (9th Cir. 2003) (quoting *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992)).

<sup>9</sup> See 85 Fed. Reg. 36509, 36510 (June 17, 2020).

not interfere with NMFS' ability to carry out its mission, it would help NMFS to better analyze the action and ensure that it not only allows the pollock fishery to catch its TAC, but also meets the obligation to reduce bycatch and minimize the adverse consequences that high bycatch rates have on other user groups. Moreover, the only information that was not available until June 3 is information showing that herring bycatch in the pollock sectors was unusually high this season. That information does not suggest that there is an urgent need to reopen the area NMFS has designated as a closure for reducing excessive bycatch. In rushing this action, NMFS has prioritized the interests of one user group over those of all others without allowing an opportunity for public participation that would provide a more complete picture of what is at stake.

In conclusion, the errors in the process NMFS followed result in a rule that neither serves to protect the ecosystem nor takes into account public input. The agency should rescind the temporary rule and take steps to ensure that, in the future, when NMFS takes action to increase bycatch allowances, it does so with a robust public process and transparent, comprehensive analysis of the effects of the action. Thank you for your attention to this matter.

Sincerely,



Kate Glover  
EARTHJUSTICE

cc Chris Oliver, Asst. Administrator for Fisheries, National Oceanic and Atmospheric Administration  
Glenn Merrill, Alaska Assistant Regional Administrator, National Marine Fisheries Service  
The Honorable Senator Lisa Murkowski  
The Honorable Senator Dan Sullivan