

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,)	
by its DIVISION OF MARINE FISHERIES,)	
)	
and)	
)	
STATE OF NEW HAMPSHIRE,)	
by its FISH & GAME DEPARTMENT,)	
DIVISION OF MARINE FISHERIES,)	
)	
Plaintiffs,)	Civil Action
)	No.
v.)	
)	
CARLOS M. GUTIERREZ, in his official capacity)	
as Secretary of Commerce of the United States;)	
the UNITED STATES DEPARTMENT OF)	
COMMERCE; CONRAD C. LAUTENBACHER,)	
JR., in his official capacity as Undersecretary)	
and Administrator for the National Oceanic)	
and Atmospheric Administration; the)	
NATIONAL OCEANIC AND ATMOSPHERIC)	
ADMINISTRATION; WILLIAM HOGARTH,)	
in his official capacity as Assistant Administrator)	
for Fisheries of the National Marine)	
Fisheries Service; the)	
NATIONAL MARINE FISHERIES SERVICE;)	
and the UNITED STATES OF AMERICA,)	
)	
Defendants.)	

VERIFIED PETITION FOR JUDICIAL REVIEW

INTRODUCTION

1. In this action, the plaintiffs, the Commonwealth of Massachusetts (“Massachusetts”), by and through its Division of Marine Fisheries (the “Massachusetts DMF”),

and the State of New Hampshire (“New Hampshire”), by and through its Fish & Game Department, Division of Marine Fisheries (the “New Hampshire DMF”), challenge Framework 42 (“Framework 42”), a final rule issued by Secretary of Commerce Carlos M. Gutierrez (the “Secretary”) and promulgated as a regulatory amendment to 50 C.F.R. § 648 on October 23, 2006, with an effective date of November 22, 2006. Framework 42 amends and modifies Amendment 13 (“Amendment 13”) to the fishery management plan for the Northeast Multispecies Fishery (the “FMP”), promulgated under 16 U.S.C. § 1853, in sweeping ways. By counting their allocated Days at Sea (“DAS”) at the rate of 2:1 (that is, assessing two DAS for every one actually fished), Framework 42 will drive fishermen who participate in the multispecies, groundfish fishery in the “inshore,” southwestern portion of the Gulf of Maine (the “Differential Days at Sea Area”)-- including the vast majority of Massachusetts fishermen and virtually all New Hampshire fishermen who, by virtue of their geographic location and vessel size, can fish only in that area -- out of business. As described more fully below, Framework 42 lands this devastating blow to the Massachusetts and New Hampshire inshore fisheries without effecting meaningful conservation benefits, in derogation of many of the statutory safeguards enacted to balance the twin goals of environmental protection and sustainable access to the fisheries, and in spite of adequate safeguards to conservation imposed just 18 months ago. As such, Framework 42 should be vacated as contrary to applicable law.

BACKGROUND

2. The FMP regulates commercial fishing for a large variety of migratory groundfish species, which are generally intermingled throughout federal waters adjacent to the northeastern coastal states. Various stocks of flounder, haddock, cod, hake, and other commercially viable

groundfish are among the species governed by the FMP.

3. As part of its overall regime to address overfishing of various groundfish stocks, Amendment 13 to the FMP, adopted in May, 2004, allocated to each vessel participating in the fishery a limited number of DAS, to be used in pursuing one or more of the species covered by the FMP.

4. Amendment 13 also set fishing mortality reduction targets for each affected species, quantifying the extent to which the FMP sought to rebuild each fish stock in each subsequent year. The Secretary was also required to revisit these fishing-mortality-reduction targets on or before May 1, 2006, to determine if the targets for 2006 would be met, and, if not, to take further action in order to reduce overfishing in the affected fishery. Amendment 13 enumerated certain measures that would be automatically triggered by a 2006 finding that overfishing was still occurring (the “Default Measures”). It also permitted the Secretary, at his discretion, to implement additional measures in 2006 to address any such overfishing.

5. In August, 2005, the Secretary determined that fishing-mortality-reduction targets for 2006 would not be reached with respect to six fish stocks within the Northeast Multispecies Fishery: Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England/Mid-Atlantic yellowtail and winter flounder, white hake, and Georges Bank winter flounder. The remaining 13 stocks were at or below their fishing mortality targets.

6. As a consequence of this determination (and at the Secretary’s direction), the New England Fishery Management Council (the “Council”) revised the development of Framework 42, a wide-ranging supplement to the conservation regime set forth in Amendment 13. A proposed draft of Framework 42 was approved by the Council in March, 2006.

7. The Secretary concluded that Framework 42 would not be ready for implementation by the May 1, 2006, deadline set by Amendment 13. For that reason, he implemented an emergency rule (the “Emergency Rule”) on that date, pursuant to Section 1855(c) of the Magnuson-Stevens Act (the “Act”), 16 U.S.C. §§ 1851, *et seq.*, and regulations promulgated by the National Marine Fisheries Service (“NMFS”) at 62 C.F.R. 44421 (1997), in an effort to address what the Secretary concluded was a likelihood that the six stocks described above would fail to meet their 2006 fishing mortality reduction targets, as prescribed by Amendment 13.

8. Accordingly, the Secretary issued the Emergency Rule on or about April 13, 2006, with an effective date of May 1, 2006. By its terms, the Emergency Rule was to remain in effect for six months (with the possibility of a single, six-month extension), or until Framework 42 was promulgated in its final form, whichever came sooner.

9. The most salient feature of the Emergency Rule was that, in addition to an 8.3 percent reduction of the days at sea allotted to each fisherman to direct on the 19 groundfish species, it implemented, for the first time, a regime of “differential Days-at-Sea” (“differential DAS”). Under the differential DAS counting methodology, *all* fishing vessels holding permits to participate in the Northeast Multispecies Fishery in the Gulf of Maine, Southern New England/Mid-Atlantic, and a portion of Georges Bank regional management areas would expend 1.4 days for every allotted DAS actually used. For example, a groundfish trawl vessel fishing exclusively in the Gulf of Maine on a five-day (120-hour) trip would be deemed to have expended seven DAS (168 hours) from its annual DAS allotment.

10. Massachusetts timely filed suit in this Court on May 15, 2006, seeking to

invalidate the Emergency Rule on the grounds that it violated the Act and the National Environmental Protection Act of 1969, 42 U.S.C. § 4321, et seq. (“NEPA”). That suit, which was docketed as 06-cv-10864-RCL, remains pending before this Court.

11. While the Emergency Rule remained in effect, the Secretary continued working toward the promulgation of Framework 42. On July 26, 2006, the Secretary published in the Federal Register a proposed draft of Framework 42, which appeared at 71 Fed.Reg. 42522. Numerous affected individuals and entities, including both the Massachusetts DMF and the State of New Hampshire, submitted detailed written comments criticizing various aspects of the proposed rule, within the 30-day comment period.

12. On October 23, 2006, the Secretary promulgated the final rule embodying Framework 42, which appeared in the Federal Register at 71 Fed.Reg. 62156 (the “Final Rule”). By its terms, Framework 42 goes into effect at 12:02 a.m. on November 22, 2006, and will in all respects supersede the Emergency Rule, which expires at 12:01 a.m. on that date.

13. Among many other things, Framework 42 purports to reduce the fishing mortality levels of three of the six stocks listed in paragraph 5 above (Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, and white hake) by implementing a 2:1 differential DAS regime for *only* those vessels fishing in the inshore, southwestern portion of the Gulf of Maine. For example, under Framework 42, a groundfish trawl vessel fishing in this 2:1 differential DAS area on a five-day (120-hour) trip would be deemed to have expended ten DAS (240 hours) from its annual DAS allotment. Framework 42 has implemented this differential DAS regime even though the Secretary acknowledges, in Framework 42 itself, that of the nineteen commingled stocks in the Gulf of Maine groundfish fishery, thirteen have already achieved, or surpassed, the

targets set for them in the Amendment 13 recovery schedules.

14. The Secretary also purports to use the leasing of DAS allotments as a principal means of mitigating the economic impact upon fishermen and fishing communities caused by the 2:1 differential DAS regime. The Secretary expressly permitted the leasing of DAS despite his acknowledgment that DAS leasing was not “conservation-neutral,” insofar as the leasing market serves to ensure that allotted DAS will actually be used. The Secretary also conceded the likelihood that the Differential DAS Counting Area would depress the value of inshore fishermen’s DAS to the point that it may “negatively affect the ability of vessels that fish in the area to compete effectively in the DAS leasing market.”

15. In promulgating Framework 42, the Secretary arbitrarily refused to preserve reasonable access on the part of Massachusetts and New Hampshire fishermen to the thirteen fish stocks where overfishing is not occurring, *i.e.*, stocks whose projected fishing mortalities are at or below 2006 mortality targets; and failed to give meaningful consideration to the social and economic effects the proposed regime would have upon Massachusetts and New Hampshire fishermen and fishing communities. In this way, and in other ways described below, Framework 42 violates the “national standards” incorporated into the Act; violates the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (“NEPA”); arbitrarily and capriciously deprives Massachusetts and New Hampshire fishermen who fish primarily in the Differential DAS Counting Area of their ability to derive an optimum yield from the multispecies fishery as provided in the Act; and otherwise represents an abuse of the Secretary’s discretion.

JURISDICTION AND VENUE

16. This action arises under Art. 1, § 8, cl. 1, of the United States Constitution and 16

U.S.C. §§ 1855(f) and 1861(d). This Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1331; 16 U.S.C. §§1855(f) and 1861(d); and the Administrative Procedure Act, 5 U.S.C. § 702. Declaratory relief is proper under 28 U.S.C. § 2201. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

PARTIES

17. The Commonwealth of Massachusetts is a sovereign state of the United States. The Massachusetts DMF is an agency of the Commonwealth and has general oversight of the Commonwealth's marine resources.

18. The State of New Hampshire is a sovereign state of the United States. The New Hampshire DMF is an agency of the State and has general oversight of the State's marine resources.

19. The Secretary is sued solely in his official capacity. The Secretary is authorized under 16 U.S.C. §§ 1801, et seq., to approve FMPs, and amendments thereto, and to promulgate regulations implementing such plans or amendments. The Department of Commerce is an agency of the United States.

20. Conrad C. Lautenbacher, Jr., is the Undersecretary and Administrator of the National Oceanic and Atmospheric Administration and is sued solely in his official capacity. The National Oceanic and Atmospheric Administration ("NOAA") is an agency of the United States and has administrative responsibility for the implementation of FMPs.

21. William Hogarth is the Assistant Administrator for Fisheries of the National Marine Fisheries Service and is sued solely in his official capacity. The National Marine Fisheries Service ("NMFS") is an agency of the United States and has administrative

responsibility for the implementation of FMPs. NMFS's eight regional fishery management councils are tasked with the development of FMPs. The Council authored the FMP at issue in this case, pertaining to the Northeast Multispecies Fishery.

FACTS

22. The Act, 16 U.S.C. §§ 1801, et seq., was enacted by Congress to develop a national program for the conservation and management of the fishery resources of the United States in order to prevent overfishing, to facilitate long-term protection of certain threatened fish stocks, and to realize the full economic potential of the nation's fishery resources, as a food source and for other purposes.

23. The Council is charged with preparing and submitting FMPs that govern the Northeast Multispecies Fishery, a mixed-species fishery comprised of various commercially significant groundfish, including multiple species and stocks of haddock, cod and flounder. The Council also prepares, for review, approval, and implementation in federal regulations by the Secretary, any amendments, frameworks, or emergency rules that may periodically become necessary to supplement the Northeast Multispecies FMP.

24. In 2004, the Council prepared, and the Secretary ultimately implemented, Amendment 13 to the Northeast Multispecies FMP. Among many other things, Amendment 13 sought to ensure the long-term viability of the groundfish fishery by setting year-by-year fishing mortality reduction schedules for each species within the fishery; allocating DAS to each fishing vessel permit holder that could demonstrate its historical participation in the fishery; setting strict trip limits and total allowable catch limits with respect to certain species; and implementing a variety of area closures and gear restrictions in various parts of the fishery. Amendment 13,

which was implemented effective May 1, 2004, specifically required the Council to revisit the fishing mortality reduction schedules for each species on or before May 1, 2006, and, if the Council projected that one or more species would not meet its fishing mortality reduction target, to implement further specific Default Measures to reduce the overfishing of those particular species, including, among other things, a 1.5:1 differential DAS regime throughout the fishery. Amendment 13 also authorized the Council to promulgate additional rules in addition to, or in place of, the Default Measures.

25. The Council concluded that stock assessment data submitted by its plan development team in August, 2005, indicated that six of the 19 stocks covered by the FMP -- Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England/Mid-Atlantic yellowtail and winter flounder, white hake, and Georges Bank winter founder -- probably were not experiencing a sufficient reduction in fishing mortality so as to meet their projected targets for 2006. The stock assessment was conducted using fishing experience accrued between 2002 and 2004, therefore culling much of its data from a period when the regulatory measures implemented by Amendment 13 were not yet in effect.

26. As a result of this stock assessment, the Council began in the fall of 2005 to make extensive revisions to Framework 42, so as to bring the fishing mortality reduction projections for those six stocks within the targets set by Amendment 13. As described above, Framework 42 was originally to be implemented on May 1, 2006. However, because of the lateness of scientific advice regarding levels of fishing mortality for each stock, the Council could not keep to its timetable. Consequently, the Secretary implemented the Emergency Rule on that date, to allow himself additional time to formulate Framework 42. A draft of Framework 42 was

ultimately published in the Federal Register on July 25, 2006. Interested parties were given 30 days to submit comments regarding the terms of the proposed Framework 42.

27. The Secretary's own regulations direct him to consider alternative means of accomplishing the conservation goals set by the Council, including those that might mitigate the impact upon fishermen. Indeed, by way of example, the Secretary's regulations (National Standard Guidelines) allow him to permit overfishing of one stock if that stock is part of a mixed-stock complex, and if it is demonstrated by analysis that, among other things, allowing such overfishing will "result in long-term net benefits to the Nation" and achievement of optimum yield for the fishery as a whole (the "Mixed-Stock Exception"). See 50 C.F.R. § 600.310(d)(6)(i-ii).

28. Many commenters, including the Massachusetts DMF and the State of New Hampshire, specifically requested that the Secretary conduct the required analysis under 50 C.F.R. § 600.310(d)(6), to determine whether the proposed Framework 42 could be modified to permit overfishing of Cape Cod/Gulf of Maine yellowtail flounder in the interest of preserving an optimum yield of the numerous other healthy species. The Secretary failed even to conduct the necessary analysis to determine whether the Mixed-Stock Exception set forth in that regulation might be an appropriate tool to balance the interests recognized by the Act for application to the Northeast Multispecies Fishery. In his comments accompanying the final rule, the Secretary acknowledged that this exception was not seriously considered or analyzed because he was uncertain if criteria for using the exception could be met, and because time constraints made it impracticable to perform the analysis.

29. With few, if any, modifications, the proposed Framework 42 was adopted by the

Secretary as a final rule upon publication in the Federal Register on October 23, 2006.

Framework 42 will go into effect on November 22, 2006. By its terms, it supersedes the Emergency Rule, which expires on the same date.

30. In analyzing the environmental and economic effects of Framework 42, the Secretary did not consider any other proposed regulatory regimen, but rather measured all environmental, economic and social impacts against those projected under the so-called No-Action Alternative.

COUNT ONE
(Violation of the Magnuson-Stevens Act)
(National Standard 1 -- Prevention of Overfishing)

31. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 30 of this petition.

32. Section 1851(a) of the Act sets forth ten “national standards” with which all FMPs “shall” be consistent. Compliance with these national standards is the yardstick by which FMPs, and amendments thereto, are measured on judicial review.

33. National Standard One, set forth at 16 U.S.C. § 1851(a)(1), directs that: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”

34. Notwithstanding the directive of National Standard One, Framework 42 is not reasonably calculated to reduce overfishing of the three Gulf of Maine stocks found to have fallen short of their fishing mortality reduction targets (Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, and white hake).

35. Specifically, through its implementation of the 2:1 differential DAS regime in the

inshore, southwestern portion of the Gulf of Maine, Framework 42 reduces by 50 percent (in addition to the 8.3 percent reduction for all areas) the number of DAS that each fisherman may expend in that area, but places no further landings restrictions with respect to any given stock within that mixed fishery. As numerous commenters documented, this regulatory regime creates a strong incentive for fishermen to maximize their economic returns by using all or most of their scarce DAS allotments to pursue the stock(s) promising the highest economic return. Of the groundfish stocks in the Gulf of Maine, Gulf of Maine cod yields the highest sales price. The Gulf of Maine cod is one of two stocks for which 2006 mortality targets are farthest from being met.

36. Accordingly, by implementing the 2:1 differential DAS program for the Gulf of Maine, Framework 42 not only fails to reduce overfishing of Gulf of Maine cod, but rather exacerbates the overfishing of Gulf of Maine cod, in violation of National Standard One.

37. Because the Secretary intends to implement an FMP that violates National Standard One, his action is contrary to law and should be declared invalid and enjoined.

COUNT TWO
(Violation of Magnuson-Stevens Act)
(National Standard One -- Achieving Optimum Yield).

38. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 37 of this petition.

39. As quoted in paragraph 32 above, National Standard One, set forth at 16 U.S.C. § 1851(a)(1), directs that: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”

40. As a means of harmonizing the two dictates of National Standard One -- the prevention of overfishing and the achievement of optimum yield from each fishery -- the Secretary promulgated an advisory guideline with respect to FMPs for mixed-stock fisheries. This guideline, which appears at 50 C.F.R. § 600.310(d)(6)(i-ii), expressly permits the Secretary to construct an FMP such that optimum yields of healthy stocks can be obtained in a multi-stock fishery, where analysis suggests that doing so will result in net benefits to the nation, where alternatives have been considered, and where employing such a “Mixed-Stock Exception” will not critically endanger the weaker species in the complex.

41. Both in proceedings before the Council, and during the comment period with respect to the proposed final rule, numerous commenters, including the Massachusetts DMF and the State of New Hampshire, requested that the Secretary undertake the analysis necessary to determine whether the Mixed-Stock Exception could be applied to Cape Cod/Gulf of Maine yellowtail flounder under Framework 42, on the grounds that (1) effort reductions aimed at rebuilding the stocks of that one species were severely impeding fishermen’s ability to fish for the other, healthy stocks in the mixed-stock fishery; and (2) even without reducing 2006 fishing mortality for yellowtail flounder, that stock was already expected to reach its targets for 2007 and beyond.

42. Notwithstanding the explicit requests of at least four commenters, the Secretary declined even to undertake the requisite analysis to determine whether the Mixed-Stock Exception could be used for yellowtail flounder under Framework 42.

43. As a result, Framework 42 prevents fishermen in the Gulf of Maine from achieving the optimum yield of the healthy groundfish species in the groundfish fishery, while

resulting in no concomitant conservation benefits. As such, Framework 42 violates National Standard One, is contrary to law, and should be declared invalid and enjoined.

44. By failing to consider the Mixed-Stock Exception, the Secretary abused his discretion when promulgating Framework 42 by refusing to exercise that discretion in a way clearly authorized and contemplated by his own regulations. As such, Framework 42 should be declared invalid and enjoined.

COUNT THREE
(Violation of Magnuson-Stevens Act)
(National Standard Two -- Using Best Scientific Information Available)

45. Massachusetts and New Hampshire restate and incorporate by reference the allegations contained in paragraphs 1 through 44 of this petition.

46. National Standard Two, set forth at 16 U.S.C. § 1851(a)(2), directs that: “Conservation and management measures shall be based upon the best scientific information available.”

47. As a means of measuring the likely impacts of various alternative rules, and of ultimately selecting the suite of regulatory measures that would be incorporated into Framework 42, the NMFS relied upon a statistical model of its own design, called the Closed Area Model, or “CAM.” Despite numerous requests from prospective commenters, the NMFS declined to set forth the assumptions underlying the CAM and the mathematical computations of which the CAM is comprised. As a result, the CAM -- the chief analytical tool used by the NMFS to make judgments about the utility of proposed regulatory measures -- remains something of a black box, the contents of which are largely unknown to commenters, fishermen, and other interested parties.

48. Nonetheless, the School for Marine Science and Technology/UMass-Dartmouth (SMAST), representing the Massachusetts Fisheries Institute (a cooperative venture between the Massachusetts DMF and the University of Massachusetts-Dartmouth), evaluated the analytic soundness of the CAM, based upon features of the model selectively divulged by the NMFS during proceedings before the Council. A summary of this evaluation was provided to the Secretary as part of the comments submitted by the Massachusetts DMF in August, 2006. This study strongly suggested that the CAM failed, in critical ways, accurately to portray conditions in the Northeast Multispecies Fishery or to describe accurately the impact of various regulatory measures incorporated by Framework 42. Furthermore, due to invalid assumptions serving as a critical foundation for the CAM, the model was found to be unscientific. As summarized in the Massachusetts DMF's comments, the CAM was flawed in that, among other things, it:

- a. Rested upon numerous invalid assumptions. By way of example only, the CAM was predicated upon the assumption that a given vessel's Catch Per Unit of Effort (or "CPUE") first increased, then steadily decreased, over the course of any fishing trip. This assumption -- which leads inexorably to a conclusion that, in order to reduce landings, a regulation must disproportionately limit DAS -- was demonstrated by commenters to be false;
- b. Failed to account for the migratory nature of the fish stocks in question, instead treating the Gulf of Maine as a "closed" area where fishing mortality for the various species correlated exclusively with the fishing effort expended in that confined area;
- c. Failed to account for the foreseeable responses of fishermen who, when confronted with an onerous regulatory regime in one area of the sea, would predictably refocus their efforts in other areas not so restricted; and
- d. Was used to analyze data taken from vessel trip reports (submitted to the NMFS by fishermen only after a given fishing trip was completed), when much more detailed and reliable data (recorded contemporaneously by researchers documenting each tow) were available, but ignored. NMFS trip data were far less reliable and representative of actual size and

location of catches and catch trends.

49. Even though commenters repeatedly pointed out these fundamental flaws in the CAM's underlying assumptions and data inputs, neither the NMFS nor the Secretary modified the CAM in any meaningful way, nor did they make use of scientific studies presented to them by commenters as a vehicle to evaluate the predictive capacities of the CAM. Instead, the Secretary persisted in using the CAM as the sole scientific basis for the regulatory measures adopted in Framework 42, including the 2:1 differential DAS regime in the Gulf of Maine.

50. Additionally, the basis of the purported need for the stringent measures adopted in Framework 42 was the 2005 stock assessment. The data from which the 2005 stock assessment was derived were gathered between 2002 and 2004 -- a period which, for the most part, pre-dated the implementation of Amendment 13. The basis for Framework 42 was therefore stale and largely irrelevant scientific information, not the best available.

51. Accordingly, the Secretary violated National Standard Two by implementing a fishery management regime unsupported by the best available scientific information, and based on a mathematical treatment of catch data that lacked a scientific foundation.

52. The Secretary acted unlawfully and abused his discretion by approving an FMP that did not comply with National Standard Two.

COUNT FOUR
(Violation of Magnuson-Stevens Act)
(National Standard Four -- Non-Discrimination)

53. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 52 of this petition.

54. National Standard Four, set forth at 16 U.S.C. § 1851(a)(4), directs that:

“Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.”

55. Through its 2:1 differential DAS regime for fishermen fishing in the inshore, southwestern portion of the Gulf of Maine, Framework 42 purports to bring stocks within the Northeast Multi-Species Groundfish Fishery into line with their respective recovery schedules largely, if not exclusively, at the expense of fishermen who, by reason of the geographic locations of their homeports, pursue those species in that area. The Secretary candidly predicts that these fishermen and their communities will suffer adverse economic impacts of a magnitude two to three times more severe than those in the same fishery outside of the 2:1 Differential DAS Counting Area.

56. Unlike the Emergency Rule, which implemented a uniform, 1.4:1 differential DAS regime throughout most (but not all) of the federal waters adjacent to the New England states, and the Default Measures contained in Amendment 13, which would have imposed a uniform 1.5:1 DAS counting regime throughout the fishery, Framework 42 literally halves the DAS allotments for fishermen along the Massachusetts and New Hampshire shores of the Gulf of Maine, while restoring fishermen in other Gulf of Maine areas and many areas elsewhere to their full DAS allotments under Amendment 13 (minus the 8.3 percent reduction of DAS for all fishermen targeting groundfish).

57. Framework 42 imposes this widely disparate treatment, even though the fish

stocks in question are highly migratory, and targeted both inshore and offshore in the Gulf of Maine.

58. As numerous commenters pointed out, the fishermen most disproportionately affected by this disparate treatment include those fishermen whose homeports are located in Massachusetts (Cape Cod and north) and in New Hampshire. Those fishermen are limited, as a practical matter, to fishing in the Gulf of Maine, insofar as their fishing vessels are not large enough to permit them to fish safely in more distant, less heavily regulated waters.

59. Accordingly, Framework 42 allocates fishing privileges inequitably, discriminatorily, and without a valid conservation rationale for doing so, and therefore violates National Standard Four, and should be declared invalid and enjoined.

COUNT FIVE
(Violation of Magnuson-Stevens Act)
(National Standard Eight -- Sustained Participation of Fishing Communities)

60. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 59 of this petition.

61. National Standard Eight, set forth at 16 U.S.C. § 1851(a)(8), directs that: Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities; and (B) to the extent practicable, minimize adverse economic impacts on such communities.”

62. As described in Count Four above, the 2:1 differential DAS regime in the Gulf of Maine will have a disparate, and potentially devastating, effect upon fishermen who fish

exclusively or primarily in the inshore, southwestern portion of the Gulf of Maine adjacent to the coasts of Massachusetts and New Hampshire. Because of the accelerated expenditure of DAS allotments under the differential DAS regime, commenters have forecast that many, if not most, such fishermen will have too few DAS available for use in the Gulf of Maine to remain solvent, let alone to realize a profit. Most fishermen so affected are unable to circumvent the impact of the differential DAS regime because their vessels are too small to permit them safely to fish further offshore.

63. Most of the fishermen so affected fish out of small communities located adjacent to the 2:1 Differential DAS Counting Area in the southwestern portion of the Gulf of Maine, including most fishing communities in Massachusetts (Cape Cod and north) and all fishing communities in New Hampshire.

64. By the Secretary's own calculation, the impact of the 2:1 differential DAS regime on Massachusetts and New Hampshire fishing communities will range from severe to catastrophic. The Secretary estimates that the net economic impact of Framework 42 on New England ports will be a loss of \$98 million, including losses of \$14.4 million in New Bedford, \$13.5 million in Gloucester, and \$5.1 million in New Hampshire. The median impact on fishing vessels that fish predominantly in the Gulf of Maine is expected to be a 35 percent reduction in total fishing revenues (as compared to ten percent for vessels that fish elsewhere in the fishery). The Secretary forecasts that adoption of Framework 42 will result in the losses of 144 jobs in Gloucester; 120 in New Bedford; 78 in Boston; and 63 in New Hampshire. The reduction in landings will also destabilize shoreside businesses that depend on the fishery for their economic viability. In short, with diminished fishing opportunities, lack of infrastructure and

disinvestment in equipment due to revenue losses, the net effect of Framework 42 will be to render the inshore Gulf of Maine groundfish fishery unsustainable.

65. The Secretary purported to minimize the economic impacts of the 2:1 differential DAS regime for inshore, southwestern Gulf of Maine fishermen by retaining the DAS leasing program, whereby fishermen could lease DAS allotted to their colleagues and thereby expend sufficient DAS to break even and remain viable. However, by the Secretary's own admission, most of the inshore fishermen located in these fishing communities will be unable to benefit from this illusory mitigation measure, insofar as these fishermen traditionally have fished, by necessity, in the 2:1 Differential DAS Counting Area and will therefore have a difficult time acquiring sufficient DAS to cover overhead and crew expenses.

66. Accordingly, Framework 42 violates National Standard Eight, as it severely jeopardizes the sustained participation of such fishing communities in the groundfish fishery, and offers no meaningful mitigation of its economic impacts upon fishermen and their communities.

67. The Secretary's action in approving Framework 42 is therefore unlawful, arbitrary and capricious. It should be declared unlawful and enjoined.

COUNT SIX
(Violation of Magnuson-Stevens Act)
(National Standard Ten -- Promoting Safety of Human Life at Sea)

68. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 67 of this petition.

69. National Standard Ten, set forth at 16 U.S.C. § 1851(a)(10), directs that:
“Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”

70. As described above, the 2:1 differential DAS regime incorporated by Framework 42 severely limits the DAS available to inshore fishermen who have historically fished in the inshore, southwestern portion of the Gulf of Maine. For most such fishermen, if they chose to expend all of their allotted DAS in that portion of the Gulf of Maine where the 2:1 differential DAS count is in effect, they would have insufficient DAS available to break even.

71. As numerous commenters have noted, adoption of Framework 42 will strongly incentivize inshore fishermen, whose vessels are designed to fish safely only close to shore, to venture further offshore, into areas where the 2:1 differential DAS regime is not in effect. Many commenters have observed that this foreseeable consequence of Framework 42 will place inshore fishermen at risk of weather-related mishaps and further from the possibility of rescue.

72. As the Secretary has recognized, Framework 42 will also likely cause fishermen to cut expenses by reducing their crews and withholding capital improvements to their vessels, and by fishing longer hours in an effort to maximize their allotted DAS, all at the sacrifice of their personal safety.

73. Accordingly, Framework 42 violates National Standard Ten. Because it is contrary to law, Framework 42 should be declared invalid and enjoined.

COUNT SEVEN
(Violation of the National Environmental Protection Act)

74. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 73 of this petition.

75. The Secretary's Final Rule constitutes "a major Federal [action] affecting the quality of the human environment" within the meaning of NEPA, 42 U.S.C. § 4332(2)(C), and

the Council on Environmental Quality's implementing regulations, 40 C.F.R. Parts 1500 through 1508. In order to comply with NEPA, the Secretary must prepare an environmental impact statement ("EIS") for any proposed agency action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

76. The "human environment" is defined by 40 C.F.R. § 1508.14 as "including the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an EIS. However, when an EIS is prepared and economic or social and natural or physical environmental impacts are interrelated, the EIS must discuss all of these impacts on the quality of the human environment." NAO 216-6, § 4(.01)(l) (emphasis added).

77. In addition to NEPA and its implementing regulations, NOAA is subject to its own Order 216-6 ("NAO 216-6"), under which NOAA established procedures applicable to the Secretary's consideration of NEPA requirements for its fishery management actions including the promulgation of a final rule.

78. In order to comply with NEPA and NOAA's procedures, the Secretary initially is required to prepare an Environmental Assessment ("EA"), the purpose of which is "to determine whether significant environmental impacts could result from a proposed [agency] action." NAO 216-6, § 5(.03)(a). The Secretary is then required to prepare an EIS for any agency action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); Contrast NAO 216-6, § 5(.03)(a.) (noting that an EIS is required "[i]f the [EA] concludes that significant environmental impacts may be reasonably expected to occur.")

79. The Secretary can avoid the EIS requirement only when there is a "finding of no

significant impact” or a “FONSI.” NAO 216-6, § 5(.03)(a); 40 C.F.R. §§ 1501.4 and 1508.13.

The Secretary must set forth the reasons why the actions will not have a significant impact on the environment. See 40 C.F.R. §§ 1501.4 and 1508.13. NAO 216-6, § 5(.03)(c), explicitly states that “[w]hen a[n] EA results in a determination that there may be potential significant impacts to the quality of the human environment, a FONSI determination, by definition, is an impossibility.

...” Id. (emphasis added).

80. As part of the EA, the Secretary must consider the significance of the impact of NMFS’s proposed agency action, which includes the consideration of both context and intensity.

The Secretary must address the following 10 factors:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b); see also NAO 216-6, § 6(.01)(b).

81. In addition, NAO 216-6, § 6(.02)(b), expands the factors that the Secretary must consider whenever adverse impacts are possible:

- a. The proposed action may be reasonably expected to jeopardize the sustainability of any target species that may be affected by the action.
- b. The proposed action may be reasonably expected to jeopardize the sustainability of any non-target species.
- c. The proposed action may be reasonably expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in FMPs.
- d. The proposed action may be reasonably expected to have a substantial adverse impact on public health or safety.
- e. The proposed action may be reasonably expected to adversely affect endangered or threatened species, marine mammals, or critical habitat of these species.
- f. The proposed action may be reasonably expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species.
- g. The proposed action may be expected to have a substantial impact on biodiversity and ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc).
- h. If significant social or economic impacts are interrelated with significant natural or physical environmental effects, then an EIS should discuss all of the effects on the human environment.

- i. A final factor to be considered in any determination of significance is the degree to which the effects on the quality of the human environment are likely to be highly controversial. Although no action should be deemed to be significant based solely on its controversial nature, this aspect should be used in weighing the decision on the proper type of environmental review needed to ensure full compliance with NEPA. Socio-economic factors related to users of the resource should also be considered in determining controversy and significance.

82. Finally, NEPA requires that the Secretary consider reasonable alternatives to NMFS's proposed action, to allow state officials and the public to evaluate different ways of accomplishing NMFS's goals. See 42 U.S.C. § 4332(2)(E) (requiring alternatives analysis); 40 C.F.R. § 1508.9(b) (same). In conjunction with that requirement, NAO 216-6 also mandates that the NMFS "involve interested and affected agencies, governments, organizations and individuals early in the agency planning and decision making process when significant impacts are or may be expected to the quality of the human environment from implementation of proposed major Federal actions." See NAO 216-6, § 3(.01)(b).

83. In Section 8.2 of the Final Rule, the Secretary indicates that NMFS prepared an EA. Among the findings in the EA were: that Framework 42 would lead to the elimination of over 250 jobs in Massachusetts ports and 63 in New Hampshire ports; that the impact of Framework 42 upon the New England economy would be a loss of more than \$98 million; that Massachusetts and New Hampshire fishermen would be driven to engage in unsafe fishing practices as a means of alleviating the impact of Framework 42; and that the measures enacted in Framework 42 would have "profound social impacts on the future occupational viability of commercial fishing," leading to "the gradual loss of shore based services essential to a strong working waterfront."

84. As a result of this EA, and despite the Secretary's predictions relating to the impacts to be occasioned by Framework 42, the Secretary nonetheless made a FONSI, which, in the Secretary's view, completed NMFS' obligations under NEPA, and foreclosed the need to prepare an EIS. NMFS's FONSI Statement is unexecuted and undated. See Final Rule, § 8.2, at 592.

85. The FONSI determination is incorrect and unsupportable. The Secretary made the FONSI determination despite also recognizing that: "Individual measures proposed by this action may be somewhat controversial, as some members of the fishing industry believe that the benefits of effort reductions implemented by Amendment 13 are not yet evident and that further effort reductions are unnecessary at this time." Final Rule, § 8.2, at 589. Moreover, the Secretary acknowledges, that "[t]here is . . . an element of controversiality over the use of differential DAS counting areas to reduce fishing effort and mortality for certain stocks. Fishermen fishing in these areas - particularly smaller vessels that fish only in these areas - are concerned that the use of differential DAS in these areas will make it impossible for them to remain in business, and the economic analysis documents that . . . the economic impacts are significant." Id. In violation of NEPA, the Secretary justifies the admittedly significant adverse impacts on the human environment as necessary in order to achieve alleged environmental benefits that are unsupported even by the flawed CAM analysis.

86. Thus, in conducting the EA, the Secretary failed fully to address significant impacts of the Final Rule, including, but not limited to, the environmental, economic, and social implications of the 2:1 differential DAS counting. By effectively restricting access to the Northeast Multispecies Fishery, Framework 42 prevents Massachusetts and New Hampshire fishermen from deriving an optimal yield from numerous healthy stocks, which will result in significant adverse impacts upon these fishermen and their communities. See NAO 216-6, § 3 (.01)(b).

87. The Secretary also did not fully consider alternatives to the 2:1 differential DAS counting system that would have minimized the adverse environmental impacts on the fishery and economic and social impacts upon fishermen and their communities, including the Mixed-Stock Exception and the Default Measures. See 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

88. The Secretary failed to maintain meaningful contact with the Massachusetts DMF and the New Hampshire DMF to ensure that all of their concerns were addressed, as required by NAO 216-6, § 5(.02)(b).

89. Thus, in the following ways, among others, the Secretary violated NMFS's own procedures for ensuring that its fishery management actions comply with NEPA:

a. By relying on the CAM, the Secretary incompletely analyzed and reached flawed conclusions regarding the significant environmental impacts of its 2:1 differential DAS counting on the ultimate health of the fishery, including, but not limited to GOM cod, in violation of NAO 216-6, § 6 (.01)(b)(6), and (9)-(10) and (.02)(a), and (e)-(f).

b. The Secretary failed adequately to examine the interrelationship between the significant environmental impacts of its differential DAS counting on the economic and social well being of Massachusetts and New Hampshire fishermen and their communities, as required by NAO 216-6, § 6 (.01)(b)(1) and (.02)(h).

c. The Secretary did not consider the extent to which the significant environmental, economic and social impacts are highly uncertain or involve unique or unknown risks, as required by NAO 216-6, § 6 (.01)(b)(5).

d. The Secretary summarily dismissed the likelihood that the effects of the Final Rule on the quality of the human environment may be "highly controversial" to Massachusetts and New Hampshire fishermen and their communities, as that term is used in NAO 216-6, § 6 (.01)(b)(4) and (.02)(i).

e. The Secretary ignored the likelihood that the differential DAS counting implemented by the Final Rule may have substantial adverse impacts on Massachusetts and New Hampshire fishermen's public health and/or safety, by encouraging them to fish beyond the differential counting area and to put their lives, vessels and gear at risk, in violation of NAO 216-6, § 6 (.01)(b)(2) and (.02)(d).

90. In sum, the Secretary's failure to analyze, or to solicit from Massachusetts and New Hampshire officials and industry representatives, accurate data about the environmental, economic and social impacts of the proposed 2:1 differential DAS regime rendered the Secretary's FONSI a self-fulfilling prophecy. Had the Secretary given meaningful consideration to these impacts, NMFS at a minimum would have been compelled to prepare an EIS with respect to the proposed Final Rule and, in all likelihood, would ultimately have concluded that the adverse impacts of the Final Rule outweighed its purported conservation benefits.

91. The Secretary's promulgation of Framework 42 without an EIS is therefore unlawful, arbitrary and capricious. It should be declared invalid and enjoined.

COUNT EIGHT
(Violation of Executive Order 12866)

92. Massachusetts and New Hampshire hereby restate and incorporate by reference the allegations contained in paragraphs 1 through 91 of this petition.

93. Executive Order 12866 ("EO 12866") requires the federal Office of Management and Budget (the "OMB") to undertake an extensive review of any proposed "significant regulatory action" that would affect, in an adverse, material way, the economy or a sector thereof. EO 12866 leaves to the promulgating agency the threshold determination of whether a proposed regulatory action is "significant" for these purposes.

94. By his own estimate, the Secretary concludes that implementation of Framework 42, including the 2:1 differential DAS in the Gulf of Maine, will effect, on average, a 26 percent reduction in fishing revenues for vessels that rely heavily upon groundfish (i.e., 80 percent of whose total sales are generated by groundfish). The Secretary also concedes that revenue losses will be substantially higher for smaller vessels based primarily in Massachusetts and New Hampshire that are essentially limited to fishing in the inshore Gulf of Maine, and that lack the capacity to direct their fishing efforts elsewhere.

95. The Secretary concluded, however, that such economic impacts are offset by the conservation objectives of Framework 42. In Framework 42, the Secretary states that, notwithstanding the magnitude of the expected economic impacts, "[t]he principal point to be made here is that achieving the biological objectives in a multispecies fishery having different conservation needs in overlapping stock areas will mean that economic yield will be sacrificed to achieve biological requirements of the weakest stock. This problem is exacerbated by the fact

that effort controls (DAS, trip limits, closed areas, gear modifications) are blunt instruments that lack the precision to match vessel performance with conservation objectives.”

96. In other words, the Secretary circularly relies upon the alleged conservation benefits of Framework 42 as a rationale for finding that Framework 42 itself will not have a significant economic impact requiring OMB review.

97. Under EO 12866, this is not an appropriate analysis for the Secretary to perform. Weighing the substantive merits of a proposed regulatory action against its adverse economic impacts is a function reserved for the OMB. Framework 42's conclusory statement that it will not occasion significant economic impacts -- in the face of numerous concessions that it will do just that -- short-circuits the review process contemplated by EO 12866.

98. Accordingly, the promulgation of Framework 42 without a review of its significant economic impacts by the Office of Management and Budget constitutes a violation of Executive Order 12866.

WHEREFORE, Massachusetts and New Hampshire respectfully request that the Court, after a hearing on the merits:

1. Permanently enjoin the defendants from implementing Framework 42;
2. Enter a declaration that Framework 42 is invalid under the Act;
3. Enter a declaration that Framework 42 is invalid because it violates the NEPA;
4. Enter a declaration that Framework 42 is invalid because it violates EO 12866;
5. Enter an order directing the defendants to perform the necessary analysis for consideration of the Mixed-Stock Exception; and
6. Grant Massachusetts and New Hampshire such other relief as is proper.

COMMONWEALTH OF
MASSACHUSETTS, by its
DIVISION OF MARINE FISHERIES

By its attorneys,

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Dated: November 21, 2006

VERIFICATION

I, David E. Pierce, state:

1. I am a Deputy Director for the Massachusetts Division of Marine Fisheries. I have been employed by the Division of Marine Fisheries since 1972. I am also the official designee of the Director of the Division of Marine Fisheries, Paul J. Diodati, on the New England Fishery Management Council.
2. I have read the foregoing Verified Petition for Judicial Review.
3. The allegations in the Verified Petition are true of my personal knowledge or are based upon records maintained in the usual course of business by the Massachusetts Division of Marine Fisheries, which allegations I believe to be true.

David E. Pierce, Ph.D.

Signed and sworn to me this 21st day of November, 2006.

Notary Public
My commission expires: _____