

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

Civil Action No. 13-cv-11301-RGS

v.

PENNY PRITZKER, et al.

BRIEF OF AMICUS CURIAE
(Leave to File Granted on 4/1/14)

Defendants.

STATE OF NEW HAMPSHIRE
By its ATTORNEY GENERAL
JOSEPH A. FOSTER,

Intervenor

BRIEF OF AMICUS CURIAE, CENTER FOR SUSTAINABLE FISHERIES, IN SUPPORT
OF PLAINTIFF AND INTERVENOR

Respectfully Submitted,

CENTER FOR SUSTAINABLE FISHERIES

/s/ Catherine B. Kramer

Catherine B. Kramer (BBO # 684876)

Julie K. Peterson (BBO # 564874)

Scott W. Lang (BBO # 285720)

Center for Sustainable Fisheries

115 Orchard Street

New Bedford, Massachusetts 02740

(508) 992-1170

kkramer@centerforsustainablefisheries.org

juliepetersonlaw@hotmail.com

swlang@lxblaw.com

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I. INTEREST OF AMICUS CURIAE

The Center for Sustainable Fisheries (“CSF”) is a non-profit organization devoted to the use of science to conserve our Nation’s fisheries resources and to promote the economic development of our fishing communities. CSF’s mission is to develop and promote greater scientific and socio-economic understanding of the Northeast fisheries and fishing industry, leading to more effective fishery management, healthy fisheries and thriving fishing communities both now and in the future. CSF is based in New Bedford, Massachusetts and has members throughout New England, including participants in the Groundfish Fishery.

This case involves important issues regarding the data collection and scientific, both biological and socio-economic, methods used to set Annual Catch Limits (“ACLs”) for the New England Groundfish Fishery. CSF’s President and Chief Executive Officer, Dr. Brian J. Rothschild, is a distinguished professor from the University of Massachusetts, School for Marine Science and Technology (“SMAST”) and a world renowned fisheries scientist. Dr. Rothschild has published over 100 peer-reviewed articles, several of which are on science and management of the New England Groundfish fishery, edited eight books on the topic of fisheries management, and is the author of “Dynamics of Marine Fish Populations.” Dr. Rothschild’s published works were cited in both the Plaintiff’s memorandum supporting summary judgment and the State of Rhode Island’s Amicus brief. Dr. Rothschild and several members of CSF’s board of directors have a history of participating in legislative actions and regulatory rulemaking about scientific methods through both Congressional testimony and public comments. CSF’s views and scientific knowledge and expertise regarding the Groundfish Fishery will assist the Court in its understanding and consideration of the issues raised in this motion for summary judgment.

II. BACKGROUND

The Center for Sustainable Fisheries adopts and incorporates the “Background Section” of Massachusetts’ Memorandum in Support of Plaintiff’s Motion for Summary Judgment.

III. SUMMARY OF ARGUMENT

Amicus CSF supports and reaffirms the arguments set forth by Plaintiff, the Commonwealth of Massachusetts, and Plaintiff-Intervenor, the State of New Hampshire, that the Defendant violated National Standards 1, 2, and 8 when it failed to obtain optimum yield, did not utilize “the best scientific information available,” and did not take into account the economic impacts of Frameworks 48 and 50 (“Frameworks”) on the fishing communities. Argument herein explains basic scientific principles with which the defendant fails to comply and the practical effects of the Frameworks on the fishing communities and their continued sustainability.

The issue of what constitutes the “best scientific information available” under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA” or “Act”), 16 U.S.C. §§ 1801–1891d (2007), has been made unnecessarily complex. Particularly in fisheries management, where the judiciary affords great deference to the agency’s “expertise,” *City of New Bedford v. Lovgren*, 10-cv-10789-RWZ, 2011 WL 2636863 (D. Mass. June 30, 2011), *aff’d sub nom. Lovgren v. Locke*, 701 F. 3d 5 (1st Cir 2012), care must be taken to prevent the “arrogation of power,” *Decker v. Northwest Environmental Defense Center*, 131 S.Ct. 1326, 1341 (2013) (Scalia, J., concurring in part, dissenting in part). The Defendant in this case attempts to arrogate such power by ignoring Congressional intent and redefining the meaning of the phrase “best scientific information available.” 16 U.S.C. § 1851(a)(2).

The Defendant has violated the MSA and the MultiSpecies Fisheries Management Plan (“Multispecies FMP” or “FMP”) by not utilizing the “best scientific information available” and

not looking at the broader socio-economic implications of the Frameworks on fishing community sustainability. The Defendant agency's claim to unearned deference must be curtailed to ensure that the MSA's requirements are meaningfully applied. The Defendant must be required to truly use "the best available science" by using modern techniques, collaborating with outside scientific sources, and acknowledging that the universe of "best available science" is not necessarily contained solely within its own walls.

Timeliness, inclusiveness, transparency, and an unbiased approach are elementary principles of good science. In violation of these principles, the agency "cherry picked" the science that supported its agenda, isolated itself from quality collaborative research, merely compiled a list of economic statistics and classified these lists as "analysis," robotically collected data without regard to accuracy or relevance, and used out-dated survey and stock assessment methods to set ACLS and justify its actions. The Defendant, expecting the courts to defer to its "expertise," has become lackadaisical in its actions, management measures, and standards for quality fisheries science - so much so that the Defendant failed to conduct an essential and meaningful analysis of the least restrictive means to achieve the MSA's goals of both conservation and management. The Defendant's actions substantiate concerns about the "arrogation of power" that results from affording essentially unlimited deference and allowing agencies to exert excessive power. *Decker*, 131 S.Ct. at 1341 (Scalia, J., concurring in part, dissenting in part). *See also, Talk Am. v. Mich. Bell Tele. Co.*, 564 U.S. 2254, 2266 (2011) (Scalia, J., concurring).

IV. ARGUMENT

"For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of "defer[ring] to an agency's interpretation.'" *Decker*, 131 S.Ct. at 1339 (Scalia, J., concurring in part, dissenting in part)

(quoting, *Talk Am.*, 564 U.S. at 2266 (Scalia, J., concurring)). The Supreme Court, in dicta, has begun a conversation about the level of deference afforded an agency. *Decker*, 131 S.Ct. at 1338-39 (Scalia, J., concurring in part, dissenting in part); *Talk Am.*, 564 U.S. at 2266 (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Court has expressed concern over whether an unnecessarily high level of deference violates the Separation of Powers doctrine and is “a dangerous permission slip for the arrogation of power.” *Decker*, 131 S.Ct. at 1339, 1341 (Scalia, J., concurring in part, dissenting in part).

“Making regulatory programs effective is the purpose of rulemaking, in which the agency uses its ‘special expertise’ to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule - to ‘say what the law is.’” *Id.* at 1340 (Scalia, J., concurring in part, dissenting in part) (quoting, *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Unlimited deference can easily lead to “arbitrary government” and permit an agency to “expand the statute beyond its text.” *Talk Am.*, 131 S.Ct. at 2266 (Scalia, J. concurring).

Here, the Court’s concerns are validated in the practical effect of the great deference afforded a defendant which has created a regulatory system favoring form over substance. The MSA requires that the agency’s regulations be “based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected . . . citizens; . . . draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; . . . and is workable and effective.” 16 U.S.C. § 1801(c)(3). In contrast to this mandate, the Defendant’s actions in developing Frameworks 48 and 50 and the science supporting them were cursory and lacked substance. Because these Frameworks were not supported by the best available science, they promoted an agency agenda that had disastrous and unnecessary economic consequences for fishermen, their families, and fishing communities.

As a result, the groundfish fishery has been declared an economic disaster by the Secretary of Commerce. Letter, dated Sept 13, 2012, available at http://www.nmfs/noaa.gov/stories/2012/09/docs/blank_patrick_9_13_12.pdf. The number of fishing vessels and crew positions are decreasing yearly. *See* A.R. 26198, 26209. This Court should refuse to accept the agency's demand that the court defer to its "expertise" because its alleged "expertise" conflicts here with multiple, published scientific studies that utilize modern, unbiased, and reliable science. *See* A.R. 15537; Rothschild, *Failure to eliminate overfishing and attain optimum yield in the New England groundfish fishery*, ICES Journal of Marine Science, 3 (Aug. 4, 2013). The fishery management plan was not based upon the "best available science" that Congress intended.

Biological science and socio-economic impacts cannot be easily divided. The quality and reliability of the science affects the ACL, the ACL affects the economic impacts to and the sustainability of fishing communities. The defendant should be required to look beyond its singular focus on only developing a program "to prevent overfishing, to rebuild overfished stocks, to insure conservation . . ." 16 U.S.C. § 1801(a)(6). Instead, the defendant should be required to fulfill the balanced approach mandated by the MSA, to develop "a program for conservation and management of the fishery resources . . . to realize the full potential of the Nation's fishery resources." *Id.* The agency's lack of scientific rigor and failure to fully adhere to the MSA's mandates is causing harm to fishing communities which will only deepen more rapidly if this Court does not check this agency.

A. Deferring to the Defendant's biological science in this matter requires an inappropriate degree of deference, permits an arrogation of power, and allows agency action that violates the plain language of the MSA.

The MSA was originally passed as a means to protect domestic resources exclusively for the U.S. fishing industry. 16 U.S.C. § 1801 (1976). Management was to be based on reputable,

unbiased science, regardless of the source of the scientific data or analysis, including three key attributes to good science: timeliness, inclusiveness, and transparency. 16 U.S.C. § 1801(a)(2). The absence of these scientific vanguards leads to a monopoly on science and the suppression of alternative findings. Despite these seemingly clear statutory mandates, what constitutes the “best scientific information available” is one of the most controversial components of the MSA. *Id.* § 1851(a)(2). Much of the controversy over something so objective as the “best available science” stems from the agency’s insistence on using outdated survey data and stock assessments to set ACLs; inaccuracy of survey data due to the frequency and methods by which that survey data is collected and assessed; and failure to seriously consider the economic impacts and sustainability of fishing communities when setting ACLs.

There is much at stake when the biological science, economics, and social science used to set ACLs are not based on “the best.” Consequences include underfishing in New England that has needlessly left hundreds of millions of dollars in value of fish stocks in the ocean, and has adversely affected the livelihoods of the many that depend on the fishery economy. *See* Rothschild, B., Emily Keiley, and Yue Jiao at 3 (Estimating that underfishing equals \$100 million per year in lost revenue). In addition, not using “the best” leads to the financial decline of fishing communities that depend on the fishing economy. *See Id.*

i. The history and development of fisheries science shows that the Defendant’s data collection and scientific methodology do not reflect an evolution of ideas and concepts as mandated by the MSA and Multispecies FMP.

The evolution of fisheries science is important to understanding why the defendant is in violation of the MSA and FMP. In the 1950s, fisheries management was driven by very simplistic management rules or equations developed for that time period. *See* Rothschild, Brian, J., *The Overfishing Metaphor*, American Institute of Fishery Research Biologists (Jan/Feb 2011),

and studies cited therein. To complete these models, the data was obtained through relatively simple data collection schemes, placed heavy emphasis on fishing boats, actual performance and these assessments were generally computed on calculating machines or graphical approximations. *See generally*, Rozwadowski, Helen M., *The Sea Knows No Boundaries: A Century of Marine Science Under ICES*, Seattle and London: University of Washington Press and ICES (2002). Assessments were used as guidelines by fisheries managers, not as rigid facts.

As technology developed, fisheries science also developed. Data collection drifted away from collecting actual data on fishing boats towards what are called “proxies.” Proxies are “generally arbitrary substitutes . . . contrived to replace the optimization target.” *See* Rothschild, *The Overfishing Metaphor*. With more advanced computers, came more complex “estimations” regarding stock assessments. One would mostly likely conclude that with advanced technology stock assessments would become more reliable. However, the opposite occurred. Due to the generally sparse data collection that amounts to one or two weeks a year of surveys for this groundfish fishery, and as a result new inferences and assumptions that had to be made, stock assessments became more and more unreliable and moved further and further away from being “the best.” *See e.g.*, Cadrin, Steve X., *Unintended Consequences of MSY Proxies for Defining Overfishing*, International Council for the Exploration of the Sea (ICES 2012/L:23).

It is clear that several alternatives and more reliable methods developed by the scientific community and the industry, have been developed that are less complex and would presumably be less time consuming, thus increasing agency efficiency and stock assessment reliability and faith in the science. *See* Rothschild, Brian J. and Yue Jiao, *Comparison Between Maximum Sustainable Yield Proxies and Maximum Sustained Yield*, *Open Fish Journal*, 6 (2013).

However, the defendant refuses to utilize such models and refuses to collaborate with scientific

experts and the fishing industry offering little to no scientific explanation as to why.

The defendant's actions not only violated the MSA, but also violated the FMP principles meant to carry out the MSA mandates. The FMP tasks the agency with ensuring that scientific findings "reflect an evolution of ideas and concepts." § 1.1, available at <http://www.nefmc.org/nemulti/index.html> (1986).¹ The tenet of "best scientific information available" was violated when the Defendant ignored modern, highly relevant analysis and scientific literature. *See e.g.*, A.R. 1966 (list of scientific assessment considerations); 4287-4290 (Letter from MFI challenging the effectiveness of the cod stock assessment); 15537 (Agency's Regional Administrator discussing a split series model).

ii. The Defendant has refused to consider information provided by those scientists most knowledgeable in the industry and therefore was neither inclusive nor transparent and disregarded timely, accurate and reliable data in violation of the MSA and APA.

National Standard 2 states that, "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). The MSA tasks the agency with studying "biological, economic, social and other scientific information" relevant to making fishery management decisions. *Id.* § 1852 (g)(1)(A). Furthermore, the FMP requires agency analysis to "reflect[] an evolution of ideas and concepts" and to take into account the "economic realities of the multi-species fishery." § 1.1.

Despite the MSA and FMP mandates, the agency routinely takes the narrow position that National Standard 2's phrase "best scientific information available" refers only to data collection and analysis from its own staff, as this is the only source for reliable data. 16 U.S.C. § 1851(a)(2). Such an approach in science is archaic and incestuous. It results in tunnel vision and

¹ "The New England Fishery Management Council has developed nine [FMPs] to date." New England Fisheries Management Council Home Page (<http://nefmc.org>; then select "Fishery Management Plans"). "All [FMPs] have been implemented by the National Marine Fisheries Service and many have been amended a number of times." *Id.* The general goals and purpose of the FMP and the required rigorous scientific standards have not been redefined nor invalidated. *See generally*, 50 C.F.R. § 648.90(a)(2)(ACLs must "achieve the FMP goals and objectives").

bad science. In fact, one of the goals of the Act is to “draw[] upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement.” *Id.* § 1801(c)(3). Congress meant the process of collecting data and completing stock assessments to be timely, collaborative, unbiased, and not bureaucratically, agenda-driven. The agency’s provincial interpretation of the “best available scientific information” has led to management measures that are based on far less than the “best available” and in effect, redefined National Standard 2 to say “[c]onservation and management measures shall be based upon the [agency’s] (best) scientific information (available).” *Id.* § 1851(a)(2). To date the Defendant’s groundfish fishery management plans have failed. “Administrative discretion is not a license to engage in Einstein’s definition of folly – doing the same thing over and over again and expecting a different result.” *Guindon v. Pritzker*, 1:13-cv-00988-BJR, 36 (D.D.C. 2014).

a. To meet the National Standard requirements, the Defendant must complete a thorough review of all the relevant information, cannot disregard superior or contrary data, and must acknowledge when its current strategy is not working.

Recently, the *Guindon* court articulated that National Standard 2’s “best scientific information available” requirement is not limited to the agency’s own, failed insular efforts. *Id.* at 42. Deference to an agency does not mean that a court should “merely rubber stamp agency actions.” *Id.* at 22. “The court should evaluate ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,’ but “need not specify the precise moment at which an agency’s past failures to accomplish a statutory mandate make continuing with the status quo arbitrary and capricious.” *Id.*; n.14 at 36.

To satisfy the National Standard 2 requirement, the agency “‘may choose between conflicting facts and opinions, so long as it justifies the choice.’” *Id.* at 41 (*quoting, Ctr. for Biological Diversity v. BP*, 933 F. Supp. 2d 125, 149 (D.D.C. 2013)). However, to meet the

minimum National Standard 2 requirements the agency may not “disregard[] accurate and reliable data.” *Id.* at 42. “Challenges brought under National Standard 2 will normally fail, unless there is ‘some indication that superior data or contrary data was available and that the agency ignored such information.’” *Id.* at 40 (*quoting, N.C. Fisheries Ass’n*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007)). Such was the case in the matter recently of *Guidon v. Pritzker*.

In *Guindon*, the court found an agency action to be arbitrary and capricious in violation of the Administrative Procedure Act (“APA”) and National Standard 2 where the agency “disregard[ed] accurate and reliable information” because “at a certain point [the agency] was obligated to acknowledge that its [current data collection] strategy . . . was not working; and therefore, failed to “undergo[] a ‘thorough, probing, in-depth review.’” *Id.* at 22, 36, 39 (*quoting, Flaherty v. Bryson*, 850 F.Supp. 2d 38, 47 (D.D.C. 2012)). *See also*, 5 U.S.C. § 706. Despite the agency’s assertion, in *Guindon*, that it merely tabled the data and did not ignore it, the court there found that the agency “disregarded [the alternative estimates] not because they were inaccurate but because [the alternatives] raised the possibility that [the agency inaccurately] set the prior quotas.” *Id.* at 39. The agency did not promulgate regulations based on “more accurate and less biased” data, and “chose to adopt a landings estimate that it knew to be inaccurate” and therefore, “disregarded the [alternative] entirely.” *Id.* at 36, 39-40.

b. The Defendant here does not meet the standard articulated in Guindon.

The Defendant here did not complete “a thorough review of all the relevant information available at the time” and “disregard[ed] superior data in reaching its conclusion.” *Guindon*, 1:13-cv-00988-BJR at 39 (*quoting, Ctr. for Biological Diversity*, 933 F. Supp. 2d at 148). *See also generally*, A.R. 4590 (Letter sent from Massachusetts Senators and state legislators expressing concern over the use of the FSV Bigelow data); 9024 (Fisheries Survival Fund

representative stating: “The catch advice is based on a series of fixes to adjust an assessment that no one has confidence in. We should be using other methods for the catch advice. We should not use an assessment that we know is flawed. The model results do not match the survey results); 28312-64. Rather than utilizing “more accurate and less biased” data the Defendant chose to promulgate regulations based on “estimate[s] that it knew to be inaccurate.” *Guindon*, 1:13-cv-00988-BJR at 36, 39.

Even suggestions from the highly prestigious Massachusetts Fisheries Institute (MFI)² was dismissed without valid scientific reason, merely stating it was not the “best available.” A.R. 4593. The Defendant seemingly “expecting a different result” continues to utilize the same old methods, regardless of its questionable accuracy and reliability. *Guindon*, 1:13-cv-00988-BJR at 36. Furthermore, similar to *Guindon*, agency representatives here have themselves stated that the science has failed. *See e.g.*, Br. of Def. n. 17 at 21 (Stating the need to obtain additional data utilizing fishing vessels); Associated Press, *Regulator: Huge Cuts Coming to New England Fishing*, (Jan. 26, 2013), available at <http://bigstory.ap.org/article/regulator-huge-cuts-coming-new-england-fishing>. In a breath of fresh air, New England’s Regional Administrator John Bullard said,

[F]ailures by fishery managers are ultimately to blame for weak stocks that haven’t rebounded. ‘We set the rules and clearly the rules have failed,’ he said. ‘There’s no other conclusion.’

Id. In violation of National Standard 2 and the APA, the Defendant in the Frameworks has failed “to acknowledge that its [current] strateg[ies] . . . are not working.” *Id.* at 36, 39.

The agency’s dysfunctional “rubber stamping” its science as the “best scientific information available” has, similar to the failed management plan for Gulf red snapper, led to the failure of

² The MFI is chaired by the Massachusetts Department of Marine Fisheries’ Director and members include the most knowledgeable and respected fishermen, fisheries scientists, and other experts in New England.

the FMP. Interestingly, the Defendant should not be surprised that management measures lacking timeliness, inclusiveness, and collaboration are highly likely to not be based on the “best scientific information available.” Over the years several similar instances of inaccurate stock assessments have occurred in New England including with pollock, cod, and scallop fisheries.

c. The Defendant failed to learn from past fisheries management that its science is not always “the best” and that timeliness, inclusion and collaboration lead to management that is in fact based on the “best scientific information available.”

The New England scallop industry is a good example of how uniformly declaring the agency’s science to be the “best scientific information available” can have potentially disastrous effects on an industry. In 1998, agency data led to strict regulations for the scallop industry, including a closure on traditional scallop fishing grounds in Georges Banks. Stokesbury, Kevin D.E., *Fishery data collection, the example of the New Bedford scallop fishery*, 2, Testimony to the U.S. House of Representatives Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs (May 21, 2013). However, after the completion of an industry funded, independent survey and stock assessment by the University of Massachusetts SMAST, stocks were shown to be much healthier than the agency data represented and the agency’s data proved to be unreliable for several reasons, including inefficiencies in vessel gear and data collection and violations of assumptions made in the stock assessment. *Id.*

The agency however, refused to utilize the SMAST data and assessments and continued to classify only its own survey and assessment as the “best scientific information available.” *Id.* After much public debate and local and national attention, the SMAST data and techniques were finally utilized to set the regulatory measures for that and subsequent scallop fishing years.

The scallop industry, a Marine Steward Council certified sustainable fishery, is now one of the most lucrative fisheries in the nation, yielding approximately \$300 million at the dock each

year. Saving Seafood, *America's Most Valuable Fishery - Atlantic Scallops - Is Certified "Sustainable"* by Marine Stewardship Council (Dec. 19, 2013), available at <http://www.savingseafood.org/fishing-industry-alerts/americas-most-valuable-fishery-atlantic-scallops-is-certified-sustainable-by-marine-stewardship-cou-3.html>. This incident exemplifies the value of collaborating with all sources to truly find the “best scientific information available” and begs the question, “Would the scallop fishery be an example of a successful fishery management plan if the agency had continued to declare its science that falsely showed depleting stocks to be “the best” and dismiss conflicting outside sources of data and stock assessments?”

Similarly in the Atlantic pollock fishery, in 2008 the pollock stock assessment indicated that the stock was overfished. Gulf of Maine Research Institute, *Responsible Harvest Atlantic Pollock*, available at <http://www.gmri.org/upload/files/GBGOM%20Pollock%20Fact%20Sheet.pdf>. These low assessments had the potential of shutting down the entire groundfish fishery. This prompted the agency to reexamine its data and recognized that the assessment had been “conducted utilizing outdated modeling and analysis” the assessment was readjusted 6 fold. *Id.*

Unfortunately, the agency did not learn from the scallop and pollock examples. As discussed above, in the instant case the Defendant uniformly dismissed all sources of data collection and stock assessments, other than its own, with little to no scientific reasoning. Increasing timeliness, transparency and collaboration will not only strengthen the quality and timeliness of the stock assessment, which is a central problem in management, but also ensure that regulations are based on the “best science available” as the MSA requires.

iii. A direct consequence of the Defendant's arrogation of power and lack of thorough evaluation in compliance with National Standard 2 is that the public has no faith in the quality of defendant's biological science.

Fully sixty-eight percent of New England fishermen disagreed with the statement; “I have

faith in the quality of federal science.” *See* survey results at A.R. 26579 (citation omitted). *See also* A.R. 2012 (Richie Canastra, co-owner of the New Bedford Seafood Auction stating that “[s]peaking with New Bedford and Gloucester fishermen, there is no trust in the science. The survey calibration does not make sense; most of the fish are in places the survey vessel does not even go”). Faith in the agency’s science is reflective of the fishermen’s own expertise and knowledge about the health of fish stocks. It is in the fishermen’s best interest for surveys and assessments to be accurate for the long term because fishermen and their families have the most to lose. At the core of fishing culture is family. Members of the New England fishing industry come from past generations who also practiced the profession. Fishermen desire the tradition to be passed onto the next generations in perpetuity. Frameworks 48 and 50 are putting New England’s historic tradition in jeopardy without sound scientific reason and ironically without promoting the health of the fishery.

The agency’s “[current] strateg[ies] . . . are not working; it is not acknowledging its failed management; it is not utilizing “more accurate and less biased” data; and it continues to produce form over substance, expecting the court will automatically afford it a high level of deference. The agency has “arrogat[ed its] power” by prioritizing its bureaucratic agenda over substance, and in doing so has acted arbitrarily and capriciously in violation of National Standard 2 and the APA. *Decker*, 131 S.Ct. at 1341 (Scalia, J., concurring in part, dissenting in part). It is time to hold the Defendant to the high standard of rigorous scientific study that Congress intended and the dedicated fishermen and their communities deserve.

B. The Defendant’s failure to include socio-economics in the definition of “best scientific information available” and seriously take into account the economic impacts to fishing communities has caused widespread economic destruction and jeopardized the sustainability of fishing communities.

A cornerstone of fair and effective government regulation is completing a least restrictive

alternative analysis and then choosing the rule that will achieve statutory goals and be the least burdensome on the regulated community. *See* Tr. of Oral Argument at 62, 84, *Sebelius v. Hobby Lobby Stores*, No. 13-356 (*argued*, March 24, 2014) (Justice Breyer pointing out the importance of doing a least restrictive alternative analysis, a general principle of agency evaluation of regulatory alternatives, to determine which alternative will be both effective in meeting the government’s goal but not excessively burdensome on the regulated community). To be in compliance with the MSA and National Standard 8, the defendant here should have made a meaningful effort to identify and choose the alternative that would both conserve resources and be least economically detrimental to fishing communities so as to ensure sustainability.

Instead, the Defendant chose the alternative that would only conserve resources. The Defendant here also narrowly defined “the best scientific information available” to mean primarily biological science and not socio-economics. Such an interpretation of the MSA and FMP perverts the stated intent of Congress from balancing the National Standards, achieving optimum yield, and “realiz[ing] the full potential of the Nation's fishery resources.” 16 U.S.C. § 1801(a)(6) to a singular obsession with one goal and one goal only: “preventing overfishing.”

i. The Defendant’s narrowly defined “best scientific information available” fails to include socio-economic impacts as Congress intended.

The Defendant’s application of National Standard 2 and its interpretation of “science” to only mean biological is limiting and narrow. The text of the Multispecies FMP is unambiguous: the science should reflect “evolv[ing] ideas and concepts relating to the purpose and scope of management [including] . . . with the operational and economic realities of the multi-species fishery of which these stocks are an important part.” § 1.1. Several areas of impact are to be studied, including biological, economic, and socio-cultural (e.g. total employment effects and port specific impacts, both on and off shore). *See generally, id.* §§ 1.4; 7.

The Defendant's arbitrary interpretation and resulting actions have drastically decreased the importance of National Standard 8 and ignored the real-life economic consequences that its fishery management decisions have on the local fishing industry and communities. The end result is that the broader implications and adverse economic hardships an ACL might create is of no real concern to the Defendant, regardless of how devastating. The high level of deference afforded the agency has resulted in an "arrogation of power," *Decker*, 131 S.Ct. at 1341 (Scalia, J., concurring in part, dissenting in part), where the FMP is an underperforming system that is arbitrarily destroying the fishing industry and its communities for no legitimate legal purpose.

ii. The Defendant merely listed economic statistics, failed to analyze the statistics about the economic realities of the fishing industry, and did not seriously take into account the economic impacts and the sustainability of fishing communities.

The defendant has interpreted National Standard 8 to mean that as long as it merely "looks at" the socio-economic statistics, the standard is satisfied. National Standard 8 requires that management measures,

"take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of [the best available science mandate], 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.

16 U.S.C. § 1851(a)(8). The Multispecies FMP mandates that the agency, in carrying out the requirement of the National Standard 8, consider "the economic realities of the multi species fisheries of which these stocks are important." § 1.1. Under the FMP, economic research includes the "expansion of the collection of data . . . to estimate input of labor . . . [and] support [] complete [] data and research needs which are important to the effective implementation of the management program." § 8.2

a. The Defendant did not diligently research economic impacts. The majority of the information used by the defendant was not original economic statistics.

To satisfy the “best scientific information available” requirement, the agency must base regulations on “diligent[] research[] and . . . sound science.” *N.C. Fisheries Ass’n*, 518 F. Supp. 2d at 85 (relying on *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005), aff’d, 488 F.3d 1020 (D.C. Cir. 2007)). The defendant argues that there are 271 pages of economic review on the Administrative Record, and therefore it sufficiently considered the economic impacts of the management measures. Br. for Def. at 19.

That assertion is misleading and false. A closer look reveals that only 60 of the 271 pages cited by the defendant contain original economic statistics. A.R. 26195-255. 157 pages of the pages to which defendant points to are in fact a biological study of the “Closed Area Environment.” A.R. 26256-413. Furthermore, the economic review under Framework 50 is a replica of the pages from Framework 48. A.R. 27370-419. The defendant did no more than copy and paste old information. When one compares the volumes of paperwork the agency generated in considering the Frameworks, the result shows that the agency spent less than one percent of its time researching economic impacts; this fact further supports the conclusion that the defendant did not fully look at the broader implications the Frameworks would have on the fishing communities and put form over substance in considering socio-economic impacts. Spending less than one percent of its time on researching and analyzing the economic impacts and likelihood of community sustainability surely does not qualify as having “diligently researched” the economic impacts. *N.C. Fisheries Ass’n*, 518 F. Supp. 2d at 85.

b. The quality of the data compiled fell short of a rigorous and thorough study about the broad implications and economic realities Frameworks 48 and 50 would have on the sustainability of fishing communities.

In reality, the number of pages is not the true indicator of studying economic impacts; the

quality of the data and how it is analyzed and presented is what matters. In the final Environmental Assessments (“EAs”) the agency merely regurgitated past statistics and trends of such topics as number of vessels, both active and inactive, number of landings, annual revenue, effort, and crew positions. The Defendant did not analyze the data. The statistics show that each year as the ACL decreases, the number of vessels in the fishery and crew positions also continually decrease. *See generally*, A.R. 26197-256. However, an analysis of the statistics year over year was not completed. Similar to trend analyses that are completed for stock assessments, economic trends can be used to predict the effect different management measures will have on the businesses and people of the fishing community. Simulating economic trends would presumably be easy, accurate, and highly reliable because there is significantly more certainty about economic statistics, i.e. number of vessels in the fishery and number of crew positions, and impact on ancillary businesses than there is certainty in the FMP’s impact on the multispecies.

Perhaps economic trends were not presented because the performance statistics are not encouraging. Between 2007 and 2012, ACLs declined by about 50 percent and catch declined by 30 percent. Rothschild, Brian J., *Rewriting the Magnuson Stevens Act*, The Marine Pacific Expo (Nov. 4, 2013). Groundfish trips and the number of vessels have also both declined by about 30 percent. *See* statistics at A.R. 26198. Finally, crew positions also declined from 1,700 to 1,200 positions, or by approximately 30 percent. *See* statistics at A.R. 26209.

Another indicator of the catastrophic economic state of the fishing industry is apparent in a break-even analysis³ completed by the Massachusetts Department of Marine Fisheries in 2011. This analysis found that 227 vessels broke-even in 2009 and 204 vessels broke-even in 2010. A.R. 1683, 1707. If vessels continue to not break-even, they presumably will leave the fishery,

³ “Breaking-even means that the total vessel revenue equaled or surpassed costs paid. *See* A.R. 1686.

jeopardizing the sustainability of fishing communities. *See* A.R. 1708. It should be noted that the socio-economic impact was so severe that the fishery was declared an economic disaster by the Secretary of Commerce and rewarded in disaster aid being appropriated by Congress.

Interestingly, just about the only real socio-economic analysis the agency completed was after the fact, in an interview with the Associated Press when Regional Administrator John Bullard stated:

[K]ey fish populations are so weak, ‘draconian’ cuts in catch are needed. The cuts will have devastating impacts on the fleet, and on families, and on ports. . . That reality is here and we have to face it. . . The upheaval will be painful, but it's no different from what other industries face. . . A plant shuts down. A person who's worked there for 30 years all of the sudden goes to the factory door and it's closed. . . . You learn a new trade and you adapt. . . . People adapt and they survive.’

Associated Press, *Regulator: Huge Cuts Coming to New England Fishing*.

In its economic “review” the agency also failed to consider how the Frameworks will impact a vessel’s ability to break-even, and how this will impact the sustainability of fishing communities. The defendant did not look at other indicators of economic impacts and sustainability of fishing communities such as: unemployment access to employment outside of the industry,⁴ foreclosures, broken marriages, repossessed vehicles, and children’s educational plans being interrupted and the myriad of social problems that follow economic decline.

There are a few statements in Frameworks 48 and 50 that could be construed as analysis. However the statements are conclusory statements that offer no reasoning or rational basis for the conclusion stated. *See e.g.*, A.R. 26520 (stating “it is difficult to quantify the impacts”); 26522 (stating a management measure “would have negative economic impacts” with no reasoning); 26674 (stating there are “no economic impacts expected” and the management

⁴ As the FMP points out, large segments of the fishing community are employed by the industry, “access to employment outside the fishing industry is limited,” particularly when a regulation causes “large numbers of individuals . . . to seek alternative employment simultaneously.” § 3E1.

measures will “minimize costs” without providing reasoning for the conclusions).

By compiling a pro forma list of statistics in the EA with no analysis, and not completing a least restrictive analysis, the defendant failed to seriously “take into account . . . the sustained participation of [fishing] communities . . . [and the] economic impacts on such communities.” 16 U.S.C. § 1851(a)(8). The agency’s cut and paste, “check the box” approach to and lack of real socio-economic analysis is yet another example of how its expectation that this Court will automatically defer to its “expertise” has led to the “arrogation of power.” *Decker*, 131 S.Ct. at 1341 (Scalia, J., concurring in part, dissenting in part).

V. CONCLUSION

This Court is not being asked to set aside the ACL or strip the Defendant of the deference it should be afforded; it is being asked to hold the agency to the high rigorous, scientific standard that Congress intended when writing the MSA. Frameworks 48 and 50 do not carry out the mandates of the National Standards because they are not based on the “best scientific information available,” are not balanced and do not sustain the fishing industry. 16 U.S.C. § 1851(a)(2),(8). The defendant’s actions have led to an “arrogation of power” where basic principles of science and the law are ignored in order to further an agency agenda at the expense and livelihood of fishing communities. *Decker*, 131 S.Ct. at 1341 (Scalia, J., concurring in part, dissenting in part). For the reasons stated above, the Center for Sustainable Fisheries urges the Court to grant the Plaintiff and Intervenor’s prayer for Summary Judgment in this matter.

Respectfully Submitted,

CENTER FOR SUSTAINABLE FISHERIES

By its attorney,

/s/ Catherine B. Kramer

Catherine B. Kramer (BBO # 684876)

Julie K. Peterson (BBO # 564874)

Scott W. Lang (BBO # 285720)

Center for Sustainable Fisheries

115 Orchard Street

New Bedford, Massachusetts 02740

(508) 992-1170

kkramer@centerforsustainablefisheries.org

juliepetersonlaw@hotmail.com

swlang@lxblaw.com

DATED: April 1, 2014

CERTIFICATE OF SERVICE

I, Catherine B. Kramer, hereby certify that on the 1st day of April 2014, I served the foregoing documents through the Electronic Case Filing (ECF) system and thus copies of the foregoing will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: April 1, 2014

/s/ Catherine B. Kramer

Catherine B. Kramer