

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

PENNY PRITZKER, et al.,

Defendants.

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

Intervenor-Plaintiff.

CIVIL ACTION  
NO. 13-cv-11301-RGS

**MOTION OF THE PLAINTIFF,  
COMMONWEALTH OF MASSACHUSETTS,  
FOR SUMMARY JUDGMENT**

The Commonwealth of Massachusetts (the “Commonwealth”), plaintiff in the above-captioned action, hereby moves, pursuant to Fed. R. Civ. P. 56(b), for summary judgment in its favor, and against all named defendants, on Counts II and III of its Complaint.<sup>1</sup>

In support of its motion, and as grounds therefor, the Commonwealth relies upon its Memorandum of Law, filed simultaneously herewith.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

By its attorney,

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<sup>1</sup> The Commonwealth makes no argument in its accompanying memorandum of law regarding Count I of the Complaint (challenging Frameworks 48 and 50 under National Standard 1 of the Magnuson-Stevens Act). It does, however, adopt by reference the arguments in support of Count I advanced by the intervenor-plaintiff State of New Hampshire in its filing.

MARTHA COAKLEY  
ATTORNEY GENERAL

/s/ Daniel J. Hammond

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DATED: December 3, 2013

**CERTIFICATE OF SERVICE**

I, Daniel J. Hammond, hereby certify that, this 3rd day of December, 2013, I filed 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).

/s/ Daniel J. Hammond

Daniel J. Hammond  
Assistant Attorney General

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**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorney,

MARTHA COAKLEY  
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## INTRODUCTION

By necessity, commercial fishing is among the most heavily regulated commercial enterprises in America. Nowhere is that more true than in New England’s Groundfish Fishery. That intermingled mass of 20 stocks of bottom-feeding fish—including multiple stocks of cod, haddock and flounder, among others—once teetered on the brink of collapse and has been subject to increasingly restrictive commercial fishing limits since the 1980s.

Those limits have been imposed by the Secretary of Commerce (the “Secretary”) under the Magnuson-Stevens Act.<sup>1</sup> That legislation empowers the Secretary to take a broad array of actions—up to and including outright closure of a fishery—in order to promote the Act’s goal of conserving fish stocks and preserving the sustainability of the fishery.

But the Act also makes clear that the Secretary cannot make conservation decisions in a vacuum. She must make all determinations—both factual decisions about the status of a fishery and normative decisions about how landings should be rationed and allocated—based on the best available science. And, critically, she must consider the social and economic impacts that her contemplated actions will have upon fishing communities and mitigate harm to those communities wherever possible.

As set forth more fully below, the Secretary failed to follow these mandates in setting catch limits for the groundfish fishery for the next three years. When stock assessments for two stocks of cod suggested a steep and unforeseen drop in those populations—even though New England fishermen had complied with all prior catch limits set by the Secretary—she resisted entreaties to test or corroborate those highly questionable data by other means, or to delay regu-

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<sup>1</sup> As explained more fully below, most aspects of fishery regulation are delegated by the Secretary to the National Oceanographic and Atmospheric Administration (“NOAA”) and, by NOAA, to the National Marine Fisheries Service (“NMFS”). The Secretary, NOAA, and NMFS have all been named as defendants in this action. Because it is the Secretary who retains the ultimate responsibility for promulgating fishery management plans and alterations thereto, this memorandum will generally refer to the defendants, collectively, as the Secretary.

latory action until the assessments could be confirmed. She also failed to consider viable alternatives to her lone initial proposal: mechanistically cutting catch limits for cod and other groundfish by two-thirds or more.

The Secretary's own Environmental Assessment blandly conceded that the impact of these cuts on fishing communities in Massachusetts and surrounding states would be "drastic." Not surprisingly, this has proven an understatement: Facing allocation cuts of up to 83% for Gulf of Maine cod and 85% for one flounder stock, many Massachusetts fishermen are not fishing in 2013. Given the economics of this fishery—involving multiple small vessels, with razor-thin profit margins and quotas set by reference to previous years' landings—the prospect for their eventual return is in serious doubt. The ripple effect on shoreside businesses—from processors to distributors to retail stores and restaurants—has already been felt and is sure to worsen.

In short, the cuts imposed by the Secretary pose an existential threat to this 400-year-old industry, through no fault of its participants. While the Secretary may impose restrictions necessary to meet the Magnuson-Stevens Act's objectives, she may not do so on this record, or with as little attention to mitigating the harm wrought upon fishing communities.

## **BACKGROUND**

### **I. The Magnuson-Stevens Act**

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "Act"), 16 U.S.C. §§ 1801–1891d, established a national program for the conservation and management of U.S. fishery resources. *Id.* § 1801(a)(6). Balancing both state and federal interests in managing fisheries, see *C&W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1557 (D.C. Cir. 1991), the Act created eight Regional Fishery Management Councils composed of state officials, federal officials, and private individuals appointed by the Secretary. 16 U.S.C. § 1852(a)–(c).

The New England Fishery Management Council (“Council”) manages fish that inhabit the ocean waters between three and 200 nautical miles off the coast of the New England states. *Id.* § 1852(a); *Massachusetts v. Daley*, 170 F.3d 23, 25 (1st Cir. 1999).

Regional councils are charged with developing a fishery management plan for each fishery they oversee. 16 U.S.C. § 1852(h)(1).<sup>2</sup> These plans specify, among other things, conservation and management measures targeted to prevent overfishing and promote the long-term sustainability of the fishery. *Id.* § 1853(a)(1)(A). They must also set forth a “mechanism for specifying annual catch limits . . . or annual specifications[] at a level such that overfishing does not occur in the fishery.” *Id.* § 1853(a)(15).

Once a council completes a draft fishery management plan or plan amendment, it submits the plan to NMFS, as designee of the Secretary, for review. *Id.* §§ 1853(c), 1854(a)(1)(A). NMFS, in turn, publishes a notice of the plan in the Federal Register. *Id.* § 1854(a)(1)(B). After a period of public comment, NMFS must approve, disapprove, or partially approve the plan through a final rulemaking. *Id.* §§ 1854(a)(2)–(a)(3).<sup>3</sup>

As part of its review of a proposed plan, NMFS must determine whether the plan comports with the Magnuson-Stevens Act and “any other applicable law,” including the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370h, and the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601–612. 16 U.S.C. § 1854(a)(1)(A).<sup>4</sup> Key to NMFS’s review is its

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<sup>2</sup> A “fishery” is “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics.” 16 U.S.C. § 1802(13)(A). Management plans for the fisheries overseen by the New England Council are codified at 50 C.F.R. part 648.

<sup>3</sup> The Magnuson-Stevens Act provides a cause of action to challenge “actions that are taken by the Secretary under regulations which implement a fishery management plan.” 16 U.S.C. § 1855(f)(1)–(2). A petition filed pursuant to § 1855(f) is reviewed under the standards set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)–(D). 16 U.S.C. § 1855(f)(1)(B). Those standards govern the Court’s review of this action.

<sup>4</sup> NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In some circumstances, however, the agency may prepare a less comprehensive document, known as an environmental assessment

assessment of the plan’s compliance with the ten “National Standards” that serve as the guiding principles of the Magnuson-Stevens Act. *Id.* §§ 1851, 1854(a)(1)(A). Two of those standards are of particular importance in this case. They provide:

- National Standard 2: “Conservation and management measures shall be based upon the best scientific information available.”
- National Standard 8: “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 by utilizing economic and social data that meet the requirements of [National Standard 2], 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.”

*Id.* § 1851(a)(2), (8). NMFS may not approve plan provisions that are inconsistent with these and the other National Standards. *Id.* § 1854(a)(1), (a)(3).

## **II. The Northeast Multispecies Fishery**

The Council manages several fisheries through distinct fishery management plans. The Northeast Multispecies Fishery, also called the Groundfish Fishery (“Fishery”), is principally at issue in this case. The plan for that Fishery (hereinafter “the FMP”) regulates the harvest of 16 bottom-dwelling groundfish species, which are further subdivided into 20 groundfish stocks.<sup>5</sup>

Since its implementation in 1986, the FMP has been updated through a series of amendments and framework adjustments that imposed a host of regulatory constraints on the groundfish industry. Among other measures, the FMP has closed off swaths of ocean to fishing, limited the days fishing vessels may spend at sea, and placed stringent restrictions on gear, fish size, and

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(“EA”), without preparing an EIS. 40 C.F.R. §§ 1501.3, 1508.9(a). The RFA requires federal agencies to prepare, under certain circumstances, initial and final regulatory flexibility act analyses (“IRFAs” and “FRFAs”) that consider the impact of proposed regulations on small business entities. 5 U.S.C. §§ 603–604.

<sup>5</sup> A “stock” is a “species, subspecies, geographical grouping, or other category of fish capable of management as a unit.” 16 U.S.C. § 1802(42). The 20 stocks in the Fishery are: Georges Bank (“GB”) cod, Gulf of Maine (“GOM”) cod, GB haddock, GOM haddock, GB yellowtail flounder, Southern New England/Mid-Atlantic (“SNE/MA”) yellowtail flounder, Cape Cod (“CC”)/GOM yellowtail flounder, American plaice, witch flounder, GB winter flounder, GOM winter flounder, SNE/MA winter flounder, redfish, white hake, pollock, Northern windowpane flounder, Southern windowpane flounder, ocean pout, Atlantic halibut, and Atlantic wolffish.

the availability of permits for vessels. *See Lovgren v. Locke*, 701 F.3d 5, 14–16 (1st Cir. 2012) (recounting history of management tactics). In 2004, NMFS approved a “sector allocation” program that allows self-selected groups of permitted vessels to voluntarily submit to an overall catch allocation for each stock. *See* 69 Fed. Reg. 22906, 22914–15 (2004); 50 C.F.R. § 648.2.

The most recent amendment to the FMP—Amendment 16—introduced three significant changes to the plan.<sup>6</sup> First, it updated the “status determination criteria” for the stocks in the Fishery. 75 Fed. Reg. at 18263–64. Stocks may be classified as “overfished” or “subject to overfishing.” A stock is overfished if the total mass of the stock has declined below a level that threatens its ability to produce the maximum sustainable yield (“MSY”)<sup>7</sup> on a continuing basis. 50 C.F.R. § 600.310(e)(2)(i)(E). A stock experiences overfishing if it is “subjected to a level of fishing mortality or annual total catch that jeopardizes [its] capacity . . . to produce MSY on a continuing basis.” *Id.* § 600.310(e)(2)(i)(B). In Amendment 16, the Council determined that certain stocks previously overfished and/or subject to overfishing no longer were, and that other stocks remained overfished and/or subject to overfishing. 75 Fed. Reg. at 18262.

Second, Amendment 16 significantly expanded and clarified the sector management program, so that by April 2010, vessels responsible for 98% of the catch over the prior decade had joined sectors. *Lovgren*, 701 F.3d at 19 (citing 75 Fed. Reg. at 18114–15, tbl. 1). Fishermen who did not join a sector were allowed to fish in a “common pool” that, like each sector, is subject to catch allocations and penalties (known as “accountability measures,” or “AMs”) for exceeding the allocations. *See* 75 Fed. Reg. at 18267.

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<sup>6</sup> The term “Amendment 16” refers here to three parallel rulemakings published simultaneously at 75 Fed. Reg. 18113 (2010), 75 Fed. Reg. 18262 (2010), and 75 Fed. Reg. 18356 (2010) (Framework Adjustment 44).

<sup>7</sup> The “maximum sustainable yield” is “the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental considerations and fishery technological characteristics.” 50 C.F.R. § 600.310(e)(1)(i)(A).



Third, and in response to the congressional mandate in the Magnuson-Stevens Reauthorization Act of 2006 to establish annual catch limits (“ACLs”) for fisheries subject to overfishing, see Pub. Law No. 109–479, §§ 103(c)(3), 104(a)(10), 120 Stat. 3575, 3581, 3584 (2007), Amendment 16 established specifications for each stock for fishing years (“FYs”) 2010–2012. 75 Fed. Reg. at 18357–58. The term “specifications” refers to three catch levels: the overfishing limit (“OFL”), the acceptable biological catch (“ABC”), and the ACL. In setting an ACL for a stock, the Council first determines the OFL, or “an estimate of the catch level above which overfishing is occurring,” typically expressed in metric tons (“mt”). 50 C.F.R. § 600.310(e)(2)(i)(D). It next sets the ABC, or the “level of a stock[’s] . . . annual catch that accounts for the scientific uncertainty in the estimate of OFL.” *Id.* § 600.310(f)(2)(ii). ABC usually is lower than OFL, but in some circumstances, “ABC is allowed to equal OFL.” *Id.* § 600.310(f)(3). Working from the ABC, the Council then sets the ACL for each stock. *Id.* § 600.310(f)(5). Typically the Council leaves a second buffer between the ABC and ACL for management uncertainty, but in some circumstances, the total ACL may equal the ABC. *Id.*<sup>8</sup> Once the ACL for a stock is set, the Council further subdivides the total permissible catch among the sectors, common pool of fishing vessels, recreational fishermen, and vessels fishing in state waters. Each subdivision of the ACL is known as a “sub-ACL.” Each sector’s yearly allocation, called its annual catch entitlement (“ACE”), is calculated based on the sector vessels’ catch history.

Amendment 16 did not set specifications beyond FYs 2010–2012. However, in Framework 47, adopted in 2012, NMFS established specifications for FYs 2013–2014 for ten of the stocks in the Fishery. 77 Fed. Reg. 26104, 26107–08 (2012). The task of setting specifications for FYs 2013–2014 for the remaining stocks was to be undertaken by the Council and NMFS in the frameworks at issue in this case, Frameworks 48 and 50.

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<sup>8</sup> Expressed mathematically,  $OFL \geq ABC \geq ACL$ .

### **III. Frameworks 48 and 50**

The Council’s consideration of the new suite of specifications and management measures began in earnest in June 2012. Its evaluation of stock abundance in the Fishery was based principally on assessments conducted in June and December 2012. Eventually, the Council placed the core of the proposed measures—the slate of revised OFLs, ABCs, and ACLs for fishing years 2013 to 2015—in Framework 50 and most remaining measures in Framework 48.

NMFS published its proposed rule for Framework 48 in March 2013, 78 Fed. Reg. 18188 (2013), and its interim final rule on May 3, 2013, two days after the start of the 2013 fishing year, 78 Fed. Reg. 26118 (2013). Framework 48 imposed a range of measures, both favorable and unfavorable to Massachusetts fishermen. First, it changed the status of GOM and GB cod to “overfished” and “subject to overfishing,” which paved the way for lower catch limits. It also revised the status of SNE/MA yellowtail flounder and white hake to “not overfished” and “not subject to overfishing.” Second, it established sub-ACLs for other fisheries (*i.e.*, not the Groundfish Fishery) for SNE/MA windowpane flounder and GB yellowtail flounder. Third, it added some accountability measures, revised others, and changed the timing for enforcement of accountability measures against fishermen who exceed sub-ACLs. Fourth, it reduced the minimum fish size that may be kept, so that fewer fish are discarded. Fifth, it recalibrated the goals for federal monitors overseeing vessels’ compliance with catch limits at sea, eliminated dockside monitoring, and reduced the amount of monkfish trips requiring at-sea monitoring. Finally, it allowed sectors to apply for exemptions from previously-imposed year-round closure areas. *See* 78 Fed. Reg. at 26122–31.

NMFS published its proposed rule for Framework 50 four days after Framework 48. *See* 78 Fed. Reg. 19368 (2013). Around the same time, NMFS issued a document that included vari-

ous analyses required by the Magnuson-Stevens Act, NEPA, and the RFA (hereinafter the “EA/IRFA”). Administrative Record (“A.R.”) 22294–22627. In that document, the agency evaluated alternatives to its proposed actions. With respect to the proposed ACLs, the agency discussed the environmental and economic effects of the slate of ACLs it favored, as well as a “No Action Alternative” that would have set no catch limits at all for nine groundfish stocks in FYs 2013–2015, precluding any harvest of those stocks. A.R. 22297–99; 22325–38.

After a period of public comment, NMFS prepared its final Framework 50 regulations, as well as an EA/final RFA analysis (“EA/FRFA”), for publication. *See* 78 Fed. Reg. 26172 (2013); A.R. 27257–27599. The centerpiece of Framework 50 was the slate of annual catch limits for the 2013–2015 fishing years. For many stocks, NMFS imposed staggering reductions in annual catch limits. To take just a few examples: For GOM cod, the FY 2013 ACL was 1,470 mt, as compared with 6,700 mt in FY 2012 and 8,545 mt in FY 2011. That represents an 83% reduction in allowable catch from FY 2011 to FY 2013. For GB cod, the FY 2013 ACL was 1,907 mt, as compared with 4,861 mt in FY 2012 and 4,540 mt in FY 2011—a 58% reduction in the same period. GOM haddock saw a 76% reduction from FY 2011 to FY 2013: Its FY 2013 ACL was 274 mt, as compared with 958 mt in FY 2012 and 1,141 mt in FY 2011. American plaice witnessed a 55% reduction: Its FY 2013 ACL was 1,482 mt, as compared with 3,459 mt in FY 2012 and 3,280 mt in FY 2011. GB yellowtail flounder catch limits were cut by 85%, falling from 1,416 mt in FY 2011 to 548 mt in FY 2012 and 208.5 mt in FY 2013. The list goes on. *See* 78 Fed. Reg. at 26181 (FY 2013 ACLs); A.R. 6110 (ACLs for FYs 2011–2012).

Framework 50 also decreased the percentage of sectors’ ACEs that may be “carried over” from FY 2012 to FY 2013. 78 Fed. Reg. at 26188–90. Amendment 16 had previously permitted sector vessels to defer catching up to 10% of their ACE to the subsequent fishing year for all

stocks except GB yellowtail flounder. This gave sector vessels more flexibility in deciding when to fish and it promoted safety by eliminating the incentive to remain at sea in dangerous conditions in order to maximize use of ACE. But in Framework 50, NMFS determined, by emergency rule and without the Council’s input, to reduce the permissible carryover for GOM cod to 1.85% ACE. *Id.* at 26189. And despite disagreement from the Council, NMFS changed the carryover accounting method for FYs 2014–2015. *Id.* at 26189–90, 26201. Lastly, Framework 50 modified the rebuilding strategy for SNE/MA winter flounder, allocated an ACE for the stock to sectors, and established accountability measures for exceeding the ACE. *Id.* at 26174–75.

## **ARGUMENT**

The Magnuson-Stevens Act requires NMFS to consider, in light of the best available information, both the need to conserve fishery resources and the well-being of fishing communities when formulating catch limits. In Frameworks 48 and 50, NMFS fell short of these demands. Relying on outdated and unreliable sampling methods, the agency failed to incorporate the best available science into its decisionmaking. And in evaluating alternatives to the annual catch limits it wished to set, NMFS did not analyze reasonable alternative approaches that might have landed a softer blow on Massachusetts’ fishing communities. For both reasons, the annual catch limits specified in Framework 50 should be set aside.<sup>9</sup>

### **I. The Secretary Violated National Standard 2 By Failing to Base the Revised Catch Limits in Framework 50 Upon the Best Scientific Information Available.**

National Standard 2 requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). “Scientific information includes, but is not limited to, information of a biological, ecological, economic, or

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<sup>9</sup> This Court has jurisdiction under 16 U.S.C. §§ 1855(f) and 1861(d) and 28 U.S.C. § 1331. The Commonwealth’s standing to challenge regulations that implement a fishery management plan is well established. *See Connecticut v. Dept. of Commerce*, 204 F.3d 413, 415 n.2 (2d Cir. 2000); *Louisiana v. Baldrige*, 538 F. Supp. 625, 628–29 (E.D. La. 1982).

social nature.” 50 C.F.R. § 600.315(b)(1). NMFS’s regulations recognize that “[s]uccessful fishery management depends, in part, on the timely availability, quality, and quantity of scientific information.” *Id.* Federal courts have interpreted the “best scientific information available” requirement as a “practical” one requiring that “fishery regulations be diligently researched and based on sound science.” *North Carolina Fisheries Ass’n v. Gutierrez*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007) (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)).

As recently as the 2006 Reauthorization of the Magnuson-Stevens Act, Congress reaffirmed its commitment to science-driven rulemaking by tethering the requirement that ACLs be set for all stocks to “a number of provisions in the bill that respond to calls for strengthening the role of science in Council decision-making.” S. Rep. No. 109–229, at 7 (2006). In particular, Congress expanded the role of each Council’s Science and Statistical Committee (“SSC”); required Councils to make management decisions based upon the findings of their SSCs; and increased appropriations to fund “projects to collect data to improve, supplement or enhance stock assessments, including the use of fishing vessels or acoustic or other marine technology.” *Id.* at 3, 7 (citing Pub. L. No. 109–476, § 318(c)(1) (codified at 16 U.S.C. § 1867)).

While the Secretary is generally afforded considerable deference in selecting the scientific models and data upon which she opts to rely, a reviewing court need not, and should not, defer when the administrative record lacks support for her regulatory choices. *See Parravano v. Babbitt*, 837 F. Supp. 1034, 1046 (N.D. Cal. 1993) (where alternative methodologies have been proposed, basis for choosing among them must be clear from the administrative record, “such that the Secretary may reasonably conclude that his chosen method is consistent with the . . . Na-

tional Standards, including National Standard Two”); *see also Daley*, 170 F.3d at 32; *Hall v. Evans*, 165 F. Supp. 2d 114, 128 (D.R.I. 2001).

For Massachusetts and its Groundfish Fishery, by far the gravest consequence of Frameworks 48 and 50 is the precipitous reduction in groundfish ACLs for the 2013–2015 fishing years. Those cuts flow directly from NMFS’s determination in early 2013 that GOM and GB cod had become overfished and that significant reductions in fishing mortality for those two stocks were necessary to bring them in line with previously established recovery schedules. *See generally* 78 Fed. Reg. at 26122 & Tbls. 1 and 2. The new status determinations for GOM and GB cod, in turn, rest almost entirely upon new stock assessments for those two stocks that were completed in December 2012 and upon models that NMFS constructed to analyze those stock assessments and translate them into new catch limits. *Id.*<sup>10</sup>

The 2012 stock assessment essentially corroborated data that NMFS compiled during the course of a more limited December 2011 stock assessment, suggesting that the biomass for both cod stocks had dropped sharply since the previous stock assessment conducted in 2008—a startling conclusion given that neither stock had been previously classified as overfished, nor had fishermen exceeded the catch limits set by the Secretary.<sup>11</sup> A.R. 15926. Because that assessment represented a dramatic departure, both from previous cod stock assessments and from the

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<sup>10</sup> The Stock Assessment Review Committee’s summary of its findings appears in the Administrative Record starting at 15480.

<sup>11</sup> There appears to be uniform consensus among all stakeholders, including the Secretary, that if a precipitous drop in GOM and GB cod populations occurred, it was not traceable to fishermen exceeding their allocated landings. *See* A.R. 8841 (Sept. 13, 2012 Letter from Acting Secretary Rebecca Blank to Governor Deval Patrick) (“Despite fishermen’s adherence to catch limits over the past few years, recent data shows that several key fish stocks are not rebuilding.”); A.R. 13308 (Dec. 12, 2012 Letter from Northeast Seafood Coalition to Council Chairman) (“Somehow [groundfish fishermen] have succeeded in fishing within exceedingly precautionary Annual Catch Limits (ACLs) for an array of interrelated stocks in an ecosystem so dynamic that the agency says it cannot understand it.”).

empirical experience of fishermen and other observers,<sup>12</sup> its validity was immediately and widely called into question.

For one thing, the efficacy of the surveys themselves—*i.e.*, the fishing expeditions conducted by NMFS to sample the abundance of groundfish stocks—was widely doubted. Numerous commenters challenged NMFS’s use of a new trawling vessel, the *FSV Henry B. Bigelow*, to conduct groundfish surveys. In an April 2012 letter to the Secretary, six members of the Massachusetts congressional delegation, including both Senators, observed that:

[W]e have been told by many within the industry that the use of a four seam bottom trawl equipped with a rockhopper sweep is not the most efficient means of catching groundfish for a truly accurate sampling. In fact, the initial use of the NMFS’s survey vessel the *Bigelow* coincides directly with a significant decrease in the U.S. share of Georges Bank yellowtail [flounder] from 77% in 2009 when the *Bigelow* data was first used to 49% in 2012.

A.R. 4590. The legislators urged NMFS to “implement side-by-side trawl survey tows using a commercial vessel to compare data and provide a more reliable assessment of this species,” *id.*, a suggestion that NMFS rejected in carrying out its subsequent cod survey in December 2012.<sup>13</sup>

Federal regulators themselves voiced doubts about the new vessel’s suitability to conduct groundfish surveys. Given the deeper draft of the *Bigelow* than its predecessor vessel (*i.e.*, its depth below the waterline), NOAA’s Fisheries Science Center noted that “inshore strata with depths [less than or equal to] 18 meters can no longer be sampled.” A.R. 3122. A Council member acknowledged that, for reasons that were unclear, surveys conducted by the new vessel routinely under-sampled cod that were seven or more years old, thereby artificially depressing

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<sup>12</sup> Indeed, the Senior Counsel for the Conservation Law Foundation observed in a May 2012 letter to NOAA, referencing the December 2011 stock assessment, that “[t]here are significant differences of opinion between the picture that the assessment science is painting of the estimated abundance of a number of stocks—Gulf of Maine cod for example—and the anecdotal knowledge of some fishermen based on their observations.” A.R. 4591.

<sup>13</sup> Citing the “virtually unanimous opinion that there is something wrong with the stock assessment,” Dr. Brian Rothschild, a professor at the School for Marine Science and Technology and Marine Fisheries Institute at the University of Massachusetts Dartmouth, likewise urged NMFS to “obtain additional data from a survey using industry boats and gear” and informed NMFS that “the industry [wa]s willing to contribute boats.” A.R. 15547–48.

estimates of cod biomass. A.R. 1911. That Council member also observed that models based on such surveys led to instances where “area swept estimates of stock biomass approach model estimates of biomass for the entire stock.” *Id.* More fundamentally, biologists reiterated that cod are especially difficult to measure via trawler surveys because they tend to congregate in complexes that migrate over large sectors of the ocean in search of food, rather than in geographically-defined stocks. *See, e.g.*, Rothschild, Brian J., “Coherence of Atlantic Cod Stock Dynamics in the Northwest Atlantic Ocean,” *Transactions of the American Fisheries Society*, 136:858–874 (2007), and studies cited therein.

Given the widespread lack of confidence in the data produced by the trawler surveys, numerous commenters proposed employing other methods of stock sampling, if only to confirm the plunge in GOM and GB cod biomass detected by the surveys. The Conservation Law Foundation urged NOAA to implement a “proof of concept demonstration” of a particular “new low-frequency sonar technology” which, if used to map the Groundfish Fishery, would “significantly benefit the understanding of stock size and structure as well as fish behavior at an extremely low cost and ecosystem-scaled analytical level.” A.R. 4591–92. A number of stakeholders asked that the Secretary refrain from making drastic cuts to groundfish ACLs, and instead adopt interim measures for the 2013 fishing year, so that survey results could be corroborated before irreversible damage was done to the fishery. A.R. 18416 (request of Massachusetts congressional delegation); A.R. 18418 (request of New Hampshire’s United States Senators); A.R. 19622 (request of Northeast Seafood Coalition). The Secretary rejected this alternative, even though it had originated with the Council itself.

Nor were contemporaneous critiques of the Secretary’s science limited to the reliability of the survey data. Even assuming that the trawler surveys generated data that accurately reflect-



ed the abundance of the GOM and GB cod stocks, the Council’s SSC (and, ultimately, the Secretary) had to make numerous assumptions in creating a model that would translate the stock assessment data into ABCs and ACLs. Certain of those assumptions were widely criticized, but the Secretary used them anyway. For instance, the authors of Framework 50 persisted in using proxy values for both the target mortality rate and the target biomass within a given fish stock, even though literature in the field strongly suggested that the use of such proxies had become obsolete and that statistical tools had been developed to allow the calculation of “actual” target mortality rates and biomass that would result in attaining the MSY for a stock. *See, e.g.*, Rothschild, Brian J. and Jiao, Yue, “Comparison Between Maximum Sustained Yield Proxies and Maximum Sustained Yield,” *The Open Fish Science Journal*, 2013, v. 6 at 1-2 (Proxy statistics and “actual,” or “production-model” statistics “do not approximate one another. . . . In fact, under the [proxy] calculation the stocks generally appear to be overfished; while under the [production-model] calculation the stocks generally appear to be underfished.”). Critics, including a Council member, further noted that nothing in the SSC’s model accounted for a documented southward migration of GOM cod into the Southern New England region, a phenomenon which, if further studied, tended to suggest that that stock had not in fact declined, but simply relocated. A.R. 1909 (“This suggests that the Gulf of Maine cod stock is actually expanding and contradicts the stock contraction hypothesis being presented by the NEFSC.”).

Concededly, courts interpreting National Standard 2 have deferred to the Secretary’s judgment and resisted pleas to adopt *post hoc* critiques of methodological choices made by NMFS, particularly in the course of time-sensitive proceedings. As the First Circuit noted in *Daley*, if a plaintiff cannot point to better alternatives that were proposed in real time, then any claim under National Standard 2 is forfeited. 170 F.3d at 30. On a record like this, however,

where (a) the data relied upon by the Secretary purported to show a momentous shift from past trends; (b) numerous credible commenters pointed out the anomalous results *at the time* and proposed concrete alternatives for generating more reliable data; and (c) the consequence of going forward without corroboration would be catastrophic to the Fishery, even this forgiving standard of review under National Standard 2 cannot save Framework 50.

**II. Framework 50 Violates National Standard 8 Because the Only Alternative to the Preferred Slate of Annual Catch Limits that NMFS Considered—Taking “No Action” on Annual Catch Limits—Was Unlawful.**

On top of its failure to incorporate the best available science, NMFS also failed to consider alternative ACLs less damaging to fishing communities. National Standard 8 requires NMFS to “take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . 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). As a practical matter, this means that NMFS, by and with the Council, has a “basic obligation,” subject to a rule of reason, to “examin[e] the impacts of, and alternatives to, the plan [it] ultimately adopts.” *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 470 (1st Cir. 2003); *accord Lovgren*, 701 F.3d at 36. Far from an empty procedural formality, this obligation ensures that NMFS does not overlook or disregard the well-being of fishing communities before it regulates. *See N.C. Fisheries Ass’n, Inc. v. Daley*, 27 F. Supp. 2d 650, 665–66 (E.D. Va. 1998).

NMFS’s obligation under National Standard 8 tracks its obligations under NEPA and the RFA, which likewise require the agency to study a range of alternatives to its preferred course of action. *See Little Bay Lobster*, 352 F.3d at 470–71 (drawing upon *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 110–11, 116 (1st Cir. 1997) (RFA), and *Roosevelt Compobello Int’l*

*Park Comm'n v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (NEPA) in construing National Standard 8). In each instance, so long as the agency has “made a reasonable, good-faith effort to canvass major options and weigh their probable effects,” its duties are satisfied. *Associated Fisheries*, 127 F.3d at 116 (RFA); accord *Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996) (“What is required [by NEPA] is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned.” (internal quotation marks and alteration omitted)).

In setting ACLs for fishing years 2013–2015, the Council studied the economic and social impacts of only two potential courses of action: the “Preferred Alternative,” which contained the agency’s preferred slate of ACLs, and the “No Action Alternative.” A.R. 27260–63, 27288–22301, 27470–87; see also 78 Fed. Reg. at 26197 (“There were only two alternatives for the FYs 2013–2015 specifications.”).<sup>14</sup> In the No Action Alternative, the Council proposed setting no specifications at all—that is, no OFL, no ABC, and no ACL—for nine of the Fishery’s 20 stocks in FYs 2013–2015. A.R. 27288–92.<sup>15</sup> And the Council took the position that, if no ACL was specified for these “critical stocks,” “fishing would not be permitted for the species with undefined ACLs, nor would fishing be allowed in these species’ broad stock areas.” A.R. 27470.

There was one conspicuous problem with the Council’s No Action Alternative: It was unlawful. Under the Act, the Council must “develop annual catch limits for each of its managed fisheries,” 16 U.S.C. § 1852(h)(6), and the FMP must contain “a mechanism for specifying annual catch limits.” *Id.* § 1853(a)(15). NMFS’s regulations reinforce this statutory obligation, 50

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<sup>14</sup> In its “Preferred Alternative” analysis, the Council considered three “scenarios” that involved slightly different ACLs for GOM cod, GB yellowtail flounder, and white hake. A.R. 27475–84. As NMFS recognized, however, “[a]ll of th[e] scenarios ha[d] similar estimated groundfish gross revenues for FY 2013,” 78 Fed. Reg. at 26205, and so were not meaningful economic alternatives. The Council did not consider scenarios for the six remaining stocks.

<sup>15</sup> “The No Action alternative would not adopt new specifications for GOM cod, GOM haddock, GB cod, GB haddock, GB yellowtail flounder, witch flounder, white hake, plaice, [and] CC/GOM yellowtail flounder.” A.R. 27263.

C.F.R. §§ 600.310(f), (h), as does Framework 50 itself, which explains that “[u]nder the Northeast Multispecies FMP the NMFS Regional Administrator, in consultation with the Council, is required to determine the specifications for the groundfish fishery.” A.R. 27284; *see also* 78 Fed. Reg. at 19389 (citing NMFS’s “statutory obligation to propose catch limits” for FY 2013).

In the face of the Act’s mandate to set specifications, NMFS’s proposal *not* to set specifications for FYs 2013–2015 was not a legally permissible alternative to its preferred slate of ACLs. And when “taking no action would result in a plain violation of the [Act’s] ACL . . . requirements,” the “‘no action’ alternative is in fact no alternative at all.” *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 72–73 (D.D.C. 2012). In those circumstances, relying on the No Action option as the sole alternative to the Preferred ACLs is unreasonable; NMFS must examine the economic impacts of at least one viable alternative to its preferred slate of specifications.

No reasonable alternative to the specifications was considered in developing Framework 50. *See* A.R. 27308 (“No alternatives were considered and rejected for this action.”). NMFS treated the “severe and negative” consequences of the preferred catch limits as inevitable, 78 Fed. Reg. at 26204, and did not pause to consider how a less draconian slate of ACLs might allow for the “sustained participation of fishing communities,” 16 U.S.C. § 1851(a)(8). As a matter of law, this was inadequate. National Standard 8 does not permit NMFS to consider only the economic impacts of specifications it wants to impose and, in a No Action Alternative, specifications it is legally forbidden to impose. *See Little Bay Lobster*, 352 F.3d at 470; *cf. Flaherty*, 850 F. Supp. 2d at 72–73 (it was arbitrary and capricious under NEPA for NMFS to consider a legally impermissible option as the only alternative to its preferred ABC control rule and AMs); *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 128–31 (D.D.C. 2011) (NMFS’s consideration of only two ABC control rules was reasonable under NEPA because the case was not one in which the

“‘no action’ alternative meant doing nothing in response to a statutory mandate for action”); *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 19–20 (D.D.C. 2000) (NMFS violated NEPA when its EAs did “not even consider any alternatives besides the status quo (which would violate the [Magnuson-Stevens Act]), and the adoption of [its preferred Amendment].”).

Worse still, NMFS’s failure to consider the economic impact of a viable alternative to its preferred ACLs violated its own regulations. Under those regulations, when “the preferred alternative negatively affects the sustained participation of fishing communities, the FMP should discuss the rationale for selecting this alternative over another with a lesser impact on fishing communities.” 50 C.F.R. § 600.345(b)(1). This directive plainly anticipates that NMFS will consider at least one alternative slate of ACLs less damaging to fishing communities. But here, the only alternative under consideration—the No Action Alternative—would have been *more* damaging to fishing communities, as it was “unlikely to provide for any fishing opportunities or generate any revenue from groundfish fishing for Sector or Common Pool vessels.” A.R. 27471.<sup>16</sup> Departing from its regulations in this way rendered NMFS’s economic and social impacts analysis doubly unreasonable.

NMFS’s failure to consider an alternative slate of ACLs was particularly egregious in light of the economic consequences of its preferred ACLs. Under those preferred ACLs, the Council forecast, “nominal groundfish fishing revenues in FY 2013 are likely to be lower than the groundfish fishing revenues in any year since at least 1994.” A.R. 27262. Concretely, the Council expected that Massachusetts fishing vessels would earn between \$39,816,244 and \$44,034,809 in gross revenue in FY 2013, as compared with \$52,731,815 in FY 2012 and

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<sup>16</sup> The Council recognized that the No Action Alternative would wipe out the groundfish industry, which cannot selectively target single stocks within the commingled groundfish stocks. A.R. 27471. “Gross fishing vessel revenues on groundfish fishing trips,” it projected, “could be as low as \$3-4 million, and in any case would probably be less than \$10 million.” A.R. 27264.

\$64,605,304 in FY 2011. A.R. 27477, 27481. That represents a 32%–38% decrease from FY 2011 to FY 2013. *Id.* Fishing vessels in Chatham, Massachusetts, were projected to suffer more than vessels in any other port: In FY 2013, they were expected to earn between \$1,080,915 and \$1,231,053, as compared with \$2,582,201 in FY 2011—a 52%–58% reduction. *Id.* Of course, the crippling effects of these reductions—homes lost, bankruptcies filed, social institutions unraveled—would not be felt only by fishermen and women and their families, but would sweep in many in Massachusetts’ fishing communities.

One might expect that, in the face of data portending economic harm of historic magnitude, NMFS would take special care in setting specifications. But the agency did just the opposite. Rather than explore reasonable alternative catch limits, NMFS and the Council declined to conduct an economic analysis of ACLs other than the preferred slate. NMFS recognized that the proposed reductions in catch limits were “drastic,” but then went no further. 78 Fed. Reg. at 26201–02; *id.* at 26203 (discussing the “unforeseen circumstances related to FY 2013 catch levels and the drastic quota reductions”). Its effort with respect to catch limits can hardly be characterized as a “good-faith effort to canvass major options and weigh their probable effects.” *Associated Fisheries*, 127 F.3d at 116.

Nor were the Council and NMFS unaware of viable alternative approaches to the FY 2013–2015 catch limits. The Council considered, for example, shrinking or eliminating the management uncertainty buffers between each stock’s ABC and ACL so as to increase ACLs while ensuring that no overfishing occurred. A.R. 18434, 18437.<sup>17</sup> But the final ACLs nevertheless maintained a typical buffer of 3% to 7% ABC. 78 Fed. Reg. at 26177, 26181. The Council also considered adjusting the FY 2013 catch limits upward based on stock growth that resulted from substantial under-harvesting of allocated catch in FY 2012. A.R. 18436. Although this op-

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<sup>17</sup> For all stocks except Gulf of Maine cod, ACLs for FY 2013 are between 58% and 74% OFL. A.R. 18425.

tion was consistent with national guidance, scientifically justified, and would not have exceeded OFLs, the Council and NMFS did not use it as a basis for an alternative slate of ACLs and an accompanying economic impacts analysis. A.R. 18436–37.

Participants in the administrative process likewise suggested alternative options for setting ACLs. The Mayors of Gloucester and New Bedford, Massachusetts urged that, in light of the widespread lack of confidence in the reliability of the stock assessments, *see supra*, at 9–15, NMFS should maintain the FY 2012 ACLs while it reviews its assessment methods. A.R. 6765–67. Members of Massachusetts’ congressional delegation and industry representatives joined the Council in urging NMFS to consider allowing up to a 50% carryover for GOM cod from FY 2012 to FY 2013, which would enable fishermen and sectors to distribute their ACLs and ACEs more evenly between the fishing years. A.R. 5062, 6008–09, 6059. But notwithstanding the Council’s recognition that the Fishery faced “an unusual situation and unusual measures may be needed to address it,” the proposal to allow a 50% carryover of GOM cod was not included as an alternative in the EA/FRFA. A.R. 6008.

Ultimately, NMFS and the Council evaluated the economic and social effects of a single, unlawful alternative to the preferred ACLs. They did not discharge their obligation under National Standard 8 to consider Massachusetts’ fishing communities and the human toll of Framework 50. Accordingly, the Court should vacate the specifications adopted in Framework 50 as arbitrary and capricious.<sup>18</sup>

## CONCLUSION

For the foregoing reasons, the Commonwealth of Massachusetts respectfully requests that the Court grant its motion for summary judgment.

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<sup>18</sup> If the Court agrees and determines that Framework 48 and/or 50 must be vacated, the Commonwealth respectfully requests that the Court afford the parties an opportunity to submit additional briefing on the question of an appropriate remedy.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorney,

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DATED: December 3, 2013

**CERTIFICATE OF SERVICE**

I, Daniel J. Hammond, hereby certify that, this 3rd day of December, 2013, I filed 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).

/s/ Daniel J. Hammond

Daniel J. Hammond

Assistant Attorney General



**CERTIFICATE PURSUANT TO LOCAL RULE 7.1(A)(2)**

I certify that I conferred with Jeremy Hessler, counsel for the Federal defendants, prior to the filing of this motion. He indicated that the Federal defendants reserve all rights, including the right to oppose this motion.

/s/ Daniel J. Hammond  
Daniel J. Hammond  
Assistant Attorney General