

UNITED STATES DISTRICT COURT
FOR THE 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,

Civil Action No. 13-cv-11301-RGS

MEMORANDUM OF LAW
OF THE STATE OF NEW HAMPSHIRE
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The State of New Hampshire respectfully submits this Memorandum of Law in support of its Motion for Summary Judgment under Fed. R. Civ. P. 56.

I. FACTUAL AND PROCEDURAL SETTING

On May 30, 2013, the Plaintiff Commonwealth of Massachusetts filed a lawsuit against the Secretary of Commerce and other U.S. officials, challenging Framework Adjustments 48 and 50 (the “Frameworks”) issued by the Secretary under the Magnuson-Stevens Fishery Conservation and Management Act

(Magnuson-Stevens Act or “MSA”), 16 U.S.C. § 1855(f) and 1861(d). On September 12, 2013, the Court granted the State of New Hampshire intervention of right in the case. The suit claims that the Frameworks will have a devastating impact on the groundfishing industry in New England and are unlawful, unreasonable, arbitrary and capricious. New Hampshire agrees, and intervenes because its groundfishing industry will be similarly impacted.

On March 3, 1614 Captain John Smith sailed from England bound for New England in search of fortune hoping for whales, gold and copper, but acknowledging that “if those failed, Fish and Fures was then our refuge.”¹ Fish has been the true wealth of New England, and New Hampshire has for hundreds of years supported a vibrant and important fishing industry and way of life.

New Hampshire is home to many involved in the fishing business. In the year 2012, New Hampshire fishermen landed 7.5 million pounds of finfish having a value of \$5.6 million. Of this catch, 3.2 million pounds, worth \$3.9 million, was groundfish that would be affected by any remedy in this case. In addition, in 2010, New Hampshire was home to 9 fish processing plants that employed 269 people.

Finally, in 2012, New Hampshire issued 326 saltwater commercial fishing licenses, 178 of whom indicated intent to target groundfish while only 41 vessels landed groundfish in that year.

¹ See Report of Tom C. Clark, Special Master, Supreme Court of the United States, *New Hampshire v. Maine*, No. 64, Orig., (Oct. 8, 1975) at 8 (quoting J. Smith, *A Description of New England* (Veazie reprint of the edition of 1616) at 19).

New Hampshire joins and supports the Motion for Summary Judgment made by Massachusetts and adopts its arguments and positions as though stated in full here. New Hampshire moves separately however, on two issues. First, New Hampshire separately moves for summary judgment on the claim that Frameworks 48 and 50 violate National Standard 1 of the MSA because they do not allow the achievement of maximum sustainable yield from species in the fishery that are not in need of new and draconian conservation measures. Secondly, New Hampshire adds its own perspective to the claim that Frameworks 48 and 50 violate the Magnuson Stevens Act by failing to give due regard to the criteria in National Standard number 8. National Standard 8 requires that conservation and management measures “take into account the importance of fishery resources to fishing communities” “in order to provide for the sustained participation” of the communities and to “minimize adverse economic impacts” on those communities. 16 U.S.C. § 1851(a)(8). The defendants did not attempt to minimize impacts.

II. ARGUMENT

A. The Frameworks Do Not Comply With National Standard One.

National Standard One embodies the bedrock principle of fishery management and conservation that “measures . . . 'shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” *Western Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 139-40 (D. Mass. 2010). It is intended to guarantee food production and recreational use for present and future purposes. *Id.* It is intended to be applied on

a stock by stock basis. *Newton v. Locke*, 701 F.3d 5, 32-34 (1st Cir. 2012); H.R. Rep. No. 94-445, at 48 (1975) (“maximum sustainable yield” refers to a scientific appraisal of “the safe upper limit of harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable.”); *see* 16 U.S.C. § 1802(13)(A) (“fishery” means 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.”).²

The MSA provides that,

Any fishery management plan prepared, and any regulation promulgated to implement any such plan ... shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

16 U.S.C. § 1851(a)(1). In the Framework 50 environmental assessment NMFS defines optimum yield as,

the amount of fish which A) will provide the greatest overall benefit to the nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; B) is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and C) in the case of an

² The emphasis on conservation in *Associated Fisheries v. Daley*, 127 F.3d 104 (1st Cir. 1997) should be taken in its appropriate context. In *Associated Fisheries*, the amendments in play involved virtually all of the major stocks that had collapsed or were near collapse. 127 F.3d at 108. The court in that case was not required to determine how to apply optimum yield in more complicated scenarios and did not do so.

overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

Rec. 27,577. “Optimum yield” is, in its simplest terms, the catch allowed fishermen that “will provide the greatest overall benefit to the Nation, particularly with seafood production and recreational opportunities, and taking into account marine ecosystems” while at the same time providing for rebuilding of overfished stocks. 50 C.F.R. § 600.310.

In approving Frameworks 48 and 50, NMFS paid little attention to optimum yield on the stocks it has determined are in peril and even less to those not in peril, such as haddock. One is hard pressed to find the concept of optimum yield even mentioned in these new and game changing rules and the analysis supporting them. Clearly NMFS has not done its job in balancing National Standard One where it has failed to consider it meaningfully. *See Newton v. Locke*, 701 F.3d at 32-34 (Amendment sixteen’s treatment of haddock optimum yield sacrifice upheld because balance appropriately explained in final rule). NMFS’ mechanistic and formula driven approach embodied in these new rules, by its own guidelines, does not take into account “a variety of factors, including social and economic factors, and the protection of marine ecosystems,” because they are not part of the ABC concept. National Standard One Guidelines, 74 Fed. Reg. 3178, 3189 (Jan. 16, 2009) (“*NS 1 Guidelines*”).

NMFS believes that optimum yield is always subservient to the conservation goals and as a consequence only the conservation issues merit consideration when “conservation and management measures for a fishery are not capable of achieving

optimum yield without overfishing occurring.” *NS 1 Guidelines*, at 3184; *see* 78 Fed. Reg. 26,134-35 (discussing optimum yield vs. conservation problem in respect of scallop fishery concluding “even at OY, management measures must still prevent overfishing”).³ There are two legal errors in this calculus. First, with respect to an imperiled stock, the fact that there are important conservation goals at stake does not make the concept of optimum yield disappear. It must still be considered and the record should at least explain how optimum yield was taken into account if only on the margins. *Newton*, 701 F.3d at 34.

The second flaw is that NMFS did not consider how new measures required to protect the cod stocks would dramatically affect the achievement of optimum yield on healthier stocks, most notably haddock. *Id.*⁴ At a minimum, NMFS should not be permitted to impose emergency rules, adopted with minimal Council participation, that stretch the conservation measures principally needed for one stock, cod, to incidentally cramp optimum yield on others, such as haddock. It would constitute legal error for NMFS to interpret the Magnuson-Stevens Act in

³ “In cases where the conservation and management measures for a fishery are not capable of achieving OY without overfishing occurring, overfishing must be ended even if it means the OY is not achieved in the short-term. Overfishing a stock in the short term to achieve OY jeopardizes the capacity of the stock to produce OY in the long term, and thus cannot be sustained. Preventing overfishing in a fishery on an annual basis is important to ensure that a fishery can continue to achieve OY on a continuing basis. The specification of OY and the associated conservation and management measures need to be improved so that OY can be achieved without overfishing occurring. In a fishery where the NS1 objectives are fully met, the OY specification will adequately account for the management uncertainty in the associated conservation and management measures. Overfishing will not occur, and the OY will be achieved.” *NS 1 Guidelines*, at 3184.

⁴ The fact that fishing on other healthier stocks such as haddock needed to be encouraged by the new regulations was raised by public comment at various times before the council and has been well-known since Amendment 16. *See Rec.* 5509, 8808, 9023, 10,105, 12,492 – 93, 12,503 – 04, 18,697-98.

such a way because such determinations must be made only with reference to particular stocks, not the fishery as a whole.

The First Circuit in *Newton v. Locke* did not decide this issue. While it appears that the court assumed that such a practice was viable if adequately considered and explained, it did not address how a lawful interpretation of the statute could occur where optimum yield is determined on a stock by stock basis but was nevertheless sacrificed in a stock not needing protection. Again, NMFS narrow focus on conservation requirements may have led it to this legal error. In *Newton* the First Circuit assumed, without analysis or decision, that it was a lawful interpretation of the statute. Now NMFS appears to presume from that assumption that the issue no longer needs elucidation.

In addition, the interpretation that NMFS gives to optimum yield renders it surplusage. Its use of acceptable biological catch (ABC) and singular reliance on that as the cornerstone for the measure for stocks by pre-*Newton* guidelines defines the statutory concept of optimum yield into obsolescence. *See* 74 Fed. Reg. 3178, 3189 (1/16/2009) (explaining that ABC does not utilize any of the other statutory elements of optimum yield). NMFS can always determine with respect to a given stock or a fishery that “conservation and management measures for a fishery are not capable of achieving OY without overfishing occurring.” *NS 1 Guidelines*, at 3184. This leaves the application of optimum yield and whether to apply National Standard One completely within the discretion of NMFS. But the Secretary cannot by regulation or guidelines define and interpret her way out of a statutory

conundrum by rendering one provision a nullity in favor of others. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (“The rulemaking power of an administrative agency charged with administration of a federal statute is not the power to make law. Rather, it is ‘the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’”); *Manhattan Gen’l Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (“A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”) The scope of NMFS’ Frameworks impermissibly exceeds the power granted NMFS by the MSA by taking optimum yield out of consideration.

New Hampshire recognizes that Congress put the Government in something of a bind – on the one hand saying “achieve optimum yield” and on the other hand saying “end overfishing.” NMFS claims throughout its proposals that “scientific uncertainty” and “management uncertainty” in the most closely regulated and fine-tuned industry of its kind require measures that reduce regulatory risk far beyond what is necessary and which have the result of creating far greater economic harms than are appropriate under the National Standards and fail to take into account its bedrock objective. It works by pushing optimum yield aside in favor of more blunt fishing restrictions that are not so much “conservation and management measures” or regulation of the stock, but instead a formula, which when applied, ends overfishing by ending fishing. Moreover, with respect to stocks, such as haddock, for which NMFS has not determined to end optimum yield because conservation and management measures do not work, it goes beyond even NMFS’ own

interpretive constructs to sacrifice optimum yield on those stocks with these Frameworks. At bottom, if NMFS is to abide by *Newton's* law that National Standard 1 is to be applied on a stock by stock basis, it must also apply optimum yield on that basis. It cannot, as it has here, apply optimum yield on an ecosystem basis while applying the ABC/ACL on a stock by stock basis.

New Hampshire urges the Court to find that the two Frameworks do not comply with National Standard 1 because they do not address or provide for optimum yield and therefore should be vacated.

B. The Frameworks Violate National Standard 8.

New Hampshire joins in and supports the arguments made by Massachusetts with respect to National Standard 8. New Hampshire writes separately on this issue to highlight the grave consequences that the centuries old fishing industry here will experience and has experienced under a long series of failed fisheries management efforts by NMFS. New Hampshire also argues that National Standard 8 is not met by these framework adjustments because no effort was made to minimize the adverse economic impacts on the communities.

NMFS proceeded with the only proposal before it aware that there would be drastic negative economic consequences but acknowledging that there was only “limited quantitative socio-economic data upon which to evaluate the community specific importance of the multispecies fishery.” Rec. 20,689. Employment on vessels home-ported in New Hampshire have seen the highest percentage declines –

28 % since 2007—compared to other ports. Rec. 20,690. From the new limits, groundfish revenues in New Hampshire are predicted to plunge.

	2010	2011	2012	2013
Scenario 1	3,347,576	4,673,318	5,245,415	2,883,624
Scenario 2	3,347,576	4,673,318	5,245,415	3,174,342

Rec. 27477, 27481. NMFS notes that the effects of these decreases will have corresponding effects on employment and personal income. Rec. 27,466. No specific information on these effects was provided. Second only to Connecticut, the harm to New Hampshire’s economy from the new suite of controls is the greatest.

National Standard 8 requires that new management and conservation measures “consistent with” the need to prevent overfishing and rebuilding stocks, “shall ... take into account the importance of fishery resources to fishing communities” to “provide for the sustained participation of such communities, and ...to the extent practicable, minimize the adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8). As Massachusetts argues persuasively in its memorandum of law, the frameworks do not comply with National Standard 8. It is clear that some efforts were made to “mitigate” the economic damage caused by the most recent emergency measures. But mitigation is not the same as minimization. Mitigation is compensatory of a harm that cannot be avoided altogether or at least minimized. Minimization means to reduce the effect of an impact that cannot be avoided altogether.

Given that of the two alternatives one was unlawful, the record does not show that practicable steps were taken to *minimize* the adverse economic impacts to the

communities. *See* 50 C.F.R. 600.345 (b)(1) (“All other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative”). Instead, the measures appear to rely upon *mitigation* of various forms to offset or compensate in small ways for some of the consequences. These mitigation steps should be taken by NMFS as a matter of course to provide optimum yield, not as some form of compensation for economic harms caused by these hastily implemented framework adjustments and certainly not as a substitute for compliance with National Standard 8’s minimization requirement. Where Frameworks 48 and 50 do not purport to minimize the adverse economic impacts on New Hampshire’s communities caused by the frameworks by selecting the least onerous and harmful alternative, national Standard 8 is not met and the frameworks should be vacated.

Conclusion

For the reasons stated above, New Hampshire prays that the Court grant it summary judgment and vacate the Secretary’s approval of Frameworks 48 and 50, and grant such other and further relief as may be just.

Dated: December 3, 2013

Respectfully submitted,

STATE OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2013, I served the above memorandum by ECF upon the parties receiving service through the Court's ECF system

Dated: December 3, 2013

/s/ Peter C.L. Roth
Peter C.L. Roth