

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

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| COMMONWEALTH OF |) | |
| MASSACHUSETTS, |) | |
| |) | |
| Plaintiff, |) | Civil Action No. 13-CV-11301-RGS |
| |) | |
| and |) | |
| |) | |
| STATE OF NEW HAMPSHIRE by its |) | |
| Attorney General Joseph A. Foster |) | |
| |) | |
| Intervenor-Plaintiff. |) | |
| |) | |
| v. |) | |
| |) | |
| PENNY PRITZKER, in her official |) | |
| capacity as Secretary of the United States |) | |
| Department of Commerce, et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |

**Federal Defendants' Memorandum of Points and Authorities in
Support of Defendants' Cross-Motion for Summary Judgment and
Consolidated Opposition to Plaintiffs' Motions for Summary Judgment**

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GLOSSARY

| | |
|----------------|---|
| ABC | Acceptable Biological Catch |
| ACE | Annual Catch Entitlement |
| ACL | Annual Catch Limits |
| AM | Accountability Measure |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| F | Fishing Mortality Rate |
| FMP | Northeast Multispecies Fishery Management Plan |
| FY | Fishing Year (May 1 – April 30) |
| FW | Framework |
| GOM cod | Gulf of Maine cod |
| GB | Georges Bank cod |
| MSY | Maximum Sustainable Yield |
| NEFSC | Northeast Fisheries Science Center |
| NOAA | National Oceanic and Atmospheric Administration |
| NMFS | National Marine Fisheries Service |
| NS | National Standard |
| OFL | Overfishing Limit |
| OY | Optimum Yield |
| SSC | Scientific and Statistical Committee |

Memorandum of Points and Authorities

I. Introduction

Despite years of careful management and ever-tightening restrictions on fishing, many of the stocks that make up the Northeast multispecies fishery are still overfished. As a result, this fishery—whose abundant groundfish have been important to the people of New England and the United States for hundreds of years—now produces less than one-tenth the amount of fish that it did as recently as the 1960s. Through the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”), Congress mandated that overfished stocks be rebuilt and that fishery management plans include annual catch limit mechanisms to put an end to unsustainable overfishing. In response, the New England Fishery Management Council (“NEFMC” or “the Council”) and the National Marine Fisheries Service (“NMFS”) implemented Amendment 16, which made sweeping changes to the Northeast Multispecies Fishery Management Plan (“FMP”) to meet the strict requirements and deadlines set by Congress. Most recently, in accordance with Amendment 16, the Council and NMFS developed Frameworks 48 and 50 (“Frameworks” or “FW”) to ensure that this fishery stays on course with achieving the goals of Amendment 16 and the Magnuson-Stevens Act.¹

This case involves a challenge to NMFS’ approval of Frameworks 48 and 50 to the FMP. Among other measures, the Frameworks incorporated the results of new stock assessments, which informed the Council’s decision to further reduce annual catch limits (“ACLs”) to prevent overfishing and to rebuild overfished stocks consistent with Amendment 16. These new catch

¹ Once stocks within a fishery are identified as overfished, the Act requires the Council to develop appropriate measures within two years that will “end overfishing immediately” and rebuild overfished stocks in a time period “as short as possible” but, no longer than ten years unless the biology of the stock, other environmental conditions, or management measures under an international agreement dictate otherwise. 16 U.S.C. §§ 1854(e)(3), (4).

limits are being challenged in this case. The Council and NMFS both recognized that the economic effects of the Frameworks on fishers and fishing communities are likely to be severe in the short term. To mitigate the economic impacts on fishing communities from the reduced ACLs, NMFS and the Council approved a set of measures also contained in the Frameworks, some of which are being challenged in three cases currently pending in the District of Columbia. *See Conservation Law Found. v. Pritzker*, 13-cv-821-JEB (D.D.C.); *Conservation Law Found. v. Pritzker*, 13-cv-820-JEB (D.D.C.); *Oceana Inc. v. Pritzker*, 1:13-cv-770-JEB (D.D.C.).

In approving these updated ACLs, the Council and NMFS recognized that in the long-term, the economic health of these fishing communities is inextricably linked to the health of this fishery, and the only way to protect these communities is to end the unsustainable overfishing that has brought us to this point and to rebuild these stocks so that they will once again produce their “maximum sustainable yield” (“MSY”). AR Doc. 495 at 27370-71. Because NMFS rationally concluded that the Frameworks would meet the goals set by Congress, and in turn those set forth in Amendment 16, and because that conclusion is fully supported by the administrative record, the Plaintiffs’ claims under the Magnuson-Stevens Act fail.

II. Background

A. Statutory Background

1. The Magnuson-Stevens Act

The Magnuson-Stevens Act requires that the stocks that make up a fishery are managed to “prevent overfishing and rebuild fish overfished fish stocks, and to protect, restore, and promote the long term health and stability of the fishery.” 16 U.S.C. § 1853(a)(1)(A). The Act requires that once stocks within a fishery are identified as overfished, the Council must develop a fishery management plan (or an amendment to an existing plan) within one year that specifies a time period for rebuilding the fishery that shall be as short as possible and shall not exceed 10

years with certain limited exceptions. 16 U.S.C. § 1854(e)(4). In 2007, the Act was amended to allow a Council up to 2 years to prepare and implement a plan or amendment to rebuild stocks and “end overfishing immediately.” *Id.* § 1854(e)(3). Congress strengthened the overfishing provisions of the Act to require, in relevant part, that each FMP “establish a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.” *See* P.L. 109-479, § 104(a)(10), 120 Stat. 3575 (2007); 16 U.S.C. § 1853(a)(15).

To carry out these requirements, the Act creates eight regional fishery management councils, 16 U.S.C. § 1852(a), which develop fishery management plans (“FMPs”) to conserve and manage the nation’s fisheries, *id.* § 1852(h)(1). The Councils generally are made up of state and federal fishery management officials, commercial and recreational fishers, and others with relevant experience and training. *Id.* § 1852(b). The relevant Council here is the New England Fishery Management Council. *Id.* § 1852(a)(1)(A). The Act also requires that a Council’s scientific and statistical committee (“SSC”) provide acceptable biological catch (“ABC”) recommendations and other scientific advice. *Id.* 1852(g)(1)(B).²

NMFS reviews a Council’s FMP or plan amendment, and then approves, partially approves, or disapproves it. *Id.* § 1854(a). NMFS may disapprove a plan or amendment, in whole or in part, only to the extent that it is inconsistent with applicable law, and NMFS may not substantively modify a plan or amendment submitted by the Council. *Id.* § 1854(a)(3). NMFS also reviews proposed regulations which the Council “deems necessary or appropriate” for implementing a plan or amendment and then publishes proposed and final regulations. *Id.* §§

² The SSC is required to “provide its Council ongoing scientific advice for fishery management decisions, . . .” 16 U.S.C. § 1852(g)(1)(B). Members are appointed by the Council and must “have strong scientific or technical credentials and experience.” *Id.* § 1852(g)(1)(C).

1853(c), 1854(b). In addition, the Secretary has authority to promulgate regulations “as may be necessary to discharge [her] responsibility” to “carry out any fishery management plan or amendment” or “to carry out any other provision of this chapter.” *Id.* § 1855(d).

In addition to plans and amendments, the Council and NMFS have created an expedited regulatory process known as a “framework adjustment” that applies to all Northeast fisheries. A framework adjustment is an abbreviated administrative procedure, validated by the courts, that allows the Council and NMFS to quickly and efficiently respond to changing conditions in the fishery. 50 C.F.R. § 648.90; *see, e.g., Gulf of Maine Fisherman’s Alliance v. Daley*, 292 F.3d 84, 86 (1st Cir. 2002); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 252 (D.D.C. 2005). Through amendments and framework adjustments, the Council and NMFS continually incorporate the latest scientific information into the management of the fishery. *See, e.g.,* 50 C.F.R. § 648.90(a)(2). The actions at issue here are the latest in a series of framework adjustments to the FMP, and the Council is currently at work on Amendment 18 and Framework 51.

2. The National Standards

Measures designed to achieve the conservation and management requirements of the Act, among other statutory requirements, must be consistent with ten National Standards (“NS”). *Id.* §§ 1851(a)(1)-(10); *see also id.* §§ 1853(a), 1854(e). The National Standards require the Council and NMFS to balance many competing interests in managing fisheries, while making clear that the Act’s overarching conservation goals must be given priority in all actions. *See, e.g., Lovgren v. Locke*, 701 F.3d 5, 33-35 (1st Cir. 2012); *W. Sea Fishing Co., Inc. v. Locke*, 722 F. Supp. 2d 126, 131 (D. Mass. 2010); *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462, 467 (1st Cir. 2003) (“the new restrictions would cause short-term harm to fishermen—harm that would be counterbalanced in the Secretary’s view by the long-term benefits to everyone of rebuilding lobster fisheries for the future”). But, ultimately, if there is a conflict between measures

necessary to achieve the Magnuson-Stevens Act’s conservation objectives (i.e., ending overfishing and rebuilding overfished stocks) and measures to address other interests such as mitigating socio-economic impacts, the conservation measures must prevail. *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 753-54 (D.C. Cir. 2000) (finding that NMFS “must give priority to conservation measures”); *Lovgren*, 701 F.3d at 35. NMFS has published guidelines that describe the agency’s interpretation of the National Standards. 50 C.F.R. § 600.305-600.355. Although the National Standards guidelines lack the force and effect of law, they provide valuable guidance in how Councils and NMFS can meet the requirements of the Act. 16 U.S.C. § 1851(b). This case challenges whether Framework Adjustments 48 and 50 are consistent with National Standards 1, 2, and 8, as well as certain related advisory guidelines.

a. National Standard 1

National Standard 1 provides that “[c]onservation 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).³ The NS 1 guidelines provide extensive guidance on factors to be considered in specifying optimal yield (“OY”), including whether “overfishing” is occurring and/or if a stock is “overfished.” Both of these terms are defined in relation to the MSY: overfishing occurs whenever a stock is subject to fishing mortality so great that it “jeopardizes” its capacity to “produce [MSY] on a continuing basis.” 50 C.F.R. § 600.310(e)(2)(i)(B). Similarly, a stock is “overfished” when its biomass has fallen “below a level that jeopardizes the capacity of the stock . . . to produce [MSY] on a continuing

³ Optimum yield (“OY”) is defined as the amount of fish that “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; is prescribed . . . on the basis of the maximum sustainable yield [“MSY”] as reduced by any relevant economic, social, or ecological factor; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.” 16 U.S.C. § 1802(33).

basis.” *Id.* § 600.310(e)(2)(i)(E). Therefore, OY incorporates reductions from the MSY based on “any relevant social, economic, or ecological factor,” and “in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.” 16 U.S.C. § 1802(33)(B)-(C). The guidelines further provide that FMPs must “contain conservation and management measures, including ACLs and accountability measures (“AM”), to achieve OY on a continuing basis.” 50 C.F.R. § 600.310(e)(3)(ii).

In response to the Act’s 2007 amendment, NMFS revised its National Standard 1 advisory guidelines to “provide guidance on how to comply with new ACLs and AM requirements for ending overfishing.” AR Doc. 6 at 345-81; 74 Fed. Reg. 3178 (Jan. 16, 2009). The revised guidelines provide that a FMP should develop mechanisms for each stock or stock complex in the fishery to identify an overfishing limit (“OFL”), 50 C.F.R. § 600.310(e)(2)(i)(D); as well as develop an ABC that is recommended by the Council’s SSC and accounts for uncertainty in the overfishing limit, *id.* § 600.310(f)(2)(ii)-(iii). An ACL cannot exceed the ABC. *Id.* § 600.310(f)(2)(ii); 16 U.S.C. 1852(h)(6).⁴

b. National Standard 2

National Standard 2 provides that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). Such a requirement means that an agency must “utilize the ‘best scientific data available,’ not the best scientific data possible.” *Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 226 F. Supp. 2d 330, 338 (D. Mass. 2002) (citations omitted). The National Standard 2 guidelines provide that “FMPs must take into account the best scientific information available at the time of preparation.” 50 C.F.R. § 600.315(b)(2). Courts give great deference to the Secretary in

⁴ In other words, $OFL \geq ABC \geq ACL$. AR Doc. 6 at 347; 74 Fed. Reg. at 3180.

reviewing the agency's determination of the best science. *Com. of Mass by Div. of Marine Fisheries v. Daley*, 10 F.Supp.2d 74, 77 (D. Mass. 1998), *aff'd*, 170 F.3d 23 (1st Cir. 1999). This Court has held that "deference appears to have even found its way into the language of the statute" since it includes the term "available" and therefore "shows that determining the science to be relied on is not a matter of absolutes, but instead is a matter of judgment." *Massachusetts ex rel. Div. of Marine Fisheries v. Gutierrez*, 594 F. Supp. 2d 127, 131-32 (D. Mass. 2009). This requirement "has been interpreted so broadly as to allow Commerce to use incomplete information as the basis for a regulation." *Id.* (citing *Com. of Mass by Div. of Marine Fisheries*, 10 F. Supp. 2d at 77 (D. Mass. 1998)).

c. National Standard 8

National Standard 8 provides that "[c]onservation 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." 16 U.S.C. § 1851(a)(8) (emphasis added). While impacts to fishing communities must be taken into account, the National Standard 8 guidelines explain that: "Deliberations regarding the importance of fishery resources to affected fishing communities . . . must not compromise the achievement of conservation requirements and goals of the FMP." 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." *Id.*

B. Factual Background

1. The Northeast Multispecies Fishery

The New England multispecies fishery is a mixed stock fishery that includes thirteen species of groundfish, divided into twenty stocks,⁵ that live in the waters off of New England and the mid-Atlantic states. AR Doc. 480 at 26195. A multispecies fishery means that in fishing for any one stock, other stocks are unavoidably taken at the same time. The multispecies fishery here includes iconic New England species like cod and haddock. *Id.* These once abundant groundfish stocks have been important to the people of New England (and the United States) for hundreds of years. AR Doc. 495 at 27370. But in the last century, the fishery has faced new challenges as technology has transformed the fishing industry. Where fishers once had only sails and simple hook-and-line gear, they now have diesel engines, trawl nets, and GPS, and they are able to catch fish with greater efficiency than ever before. AR Doc. 495 at 27370. The result has been a series of “boom-and-bust” cycles for this fishery. *See, e.g.*, AR Doc. 495 at 27370-72. As many of the most productive stocks have collapsed in the wake of ever-advancing harvesting technology, fishers have moved on to target new stocks, over-exploited them, and then moved on again. AR Doc. 495 at 27371. But that strategy could not be sustained, and the fishery has been declining since it reached its peak in the 1960s, when about 650,000 tons of the principal groundfish stocks were landed. AR Doc. 495 at 27370. By the 1970s, landings had

⁵ The Magnuson-Stevens Act defines a “stock of fish” to mean “a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.” 16 U.S.C. § 1802(42). The NEFMC manages the following groundfish species off the New England and Mid-Atlantic coasts: cod, haddock, yellowtail flounder, pollock, plaice, witch flounder, white hake, windowpane flounder, Atlantic halibut, winter flounder, yellowtail flounder, ocean pout, and Atlantic wolffish. For an overview of each species’ status see AR Doc. 495 at 27338, 27511.

already dropped sharply to between 200,000 and 300,000 tons. AR Doc. 495 at 27370-71. They fell to about 100,000 tons in the mid-1980s and finally leveled off at a roughly-stable 40,000 tons in the mid-1990s. AR Doc. 495 at 27371.

Faced with unsustainable overfishing and dwindling landings nationwide, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act of 1976 to provide for management of fish in the U.S. exclusive economic zone. In 1977, the Council and NMFS began to manage through its first fishery management plan to try to return these groundfish stocks to their maximum sustainable yield. *See* AR Doc. 8 at 1292.

2. Amendment 16 background

This fishery's management plan has been amended repeatedly over the years to end overfishing, achieve rebuilding and other goals set out in the Act. The most recent amendment, Amendment 16, stands out as especially significant. In 2009, the Council adopted Amendment 16 to establish a mechanism for specifying ACLs and AMs for the fishery, and NMFS approved it. AR Docs. 7 at 382; 8 at 1433.⁶ Amendment 16 also expanded the "sector" program, a new approach to fishery management of the multispecies fishery established by a previous FMP amendment. AR Doc. 8 at 1447–50. A sector is essentially a cooperative group of fishing vessel owners that are exempt from "days-at-sea" restrictions, and can request to be exempt from many of the other complex restrictions imposed under the old management system. AR Doc. 8 at 1447–8. In exchange for being exempt from those restrictions, each sector is subject to a limit on

⁶ Amendment 16 refers to three related rulemakings: Amendment 16, and two implementing frameworks. *See* 75 Fed. Reg. 18113 (April 9, 2010); 75 Fed. Reg. 18262 (April 9, 2010); 75 Fed. Reg. 18356 (April 9, 2010). The Frameworks' catch limits, at issue in this case, were promulgated under the Amendment 16 revisions to the FMP. Amendment 16 was validated by this Court and the First Circuit. *City of New Bedford v. Locke*, 10-cv-10789-RWZ, 2011 WL 2636863 (D. Mass. June 30, 2011) (affirming agency's approval of Amendment 16 despite a "multitude" of challenges by plaintiffs) *aff'd sub nom. Lovgren v. Locke*, 701 F.3d 5 (1st Cir. 2012) (same).

the total amount of each stock of fish that it may catch (its “annual catch entitlement” or “ACE”), which is based on the stock’s overall ACL. This limit is called a “hard” limit because if the limit is exceeded, AMs automatically go into effect, such as a closure of the area in which the subject stock occurs. *Id.* By exempting fishermen in sectors from many of the previous management measures, they now have much greater flexibility on how, when, and where they fish, which the Council concluded would increase efficiency, reduce discards, promote selective fishing, and ultimately be more effective in preventing overfishing and rebuilding overfished stocks. AR Doc. 8 at 1479–80.⁷ This flexibility is crucial in a fishery where it is very difficult, if not impossible, to conserve one unhealthy stock through management measures without affecting other healthy stocks in the same area and the ability to catch them.

The optimum yield for the Northeast multispecies fishery is not specified annually or in each quota-setting action; instead a general formula was set and revised through a series of amendments, culminating in the acceptable biological catch (“ABC”) control rule adopted in Amendment 16. AR Doc. 7 at 458-60. The ABC control rule has four parameters:

- a. ABC should be determined as the catch associated with 75% of F_{MSY}.⁸
- b. If fishing at 75% of F_{MSY} does not achieve the mandated rebuilding requirements for overfished stocks, ABC should be determined as the catch associated with the fishing mortality that meets rebuilding requirements (F_{rebuild}).
- c. For stocks that cannot rebuild to B_{MSY} in the specified rebuilding period, even with no fishing, the ABC should be based on incidental bycatch, including a reduction in bycatch rate (i.e., the proportion of the stock caught as bycatch).⁹

⁷ A key to efficiently administering the catch share programs is the ability to jointly decide how a sector will harvest its ACE through redistribution within a sector and the ability to transfer ACE between sectors to account for inactive vessels. AR Doc. 495 at 27373.

⁸ F refers to the “fishing mortality rate.”

⁹ Bycatch refers to fish which are harvested in a fishery, but are discarded and not sold or kept for personal use. AR Doc. 495 at 27339.

- d. Interim ABCs should be determined for stocks with unknown status according to case-by case recommendations from the SSC.

AR Doc. 7 at 458-59. The ABC control rule is intended to guide the SSC when setting ABCs, and was adopted because of the difficulty in quantifying scientific uncertainty for groundfish stocks. AR Doc. 7 at 867-68. The fundamental idea of these rules is that fishing mortality should not exceed 75 percent of F_{MSY} at any time, regardless of stock size. AR Doc. 7 at 867. This creates a consistent difference between the overfishing level (fishing at F_{MSY}) and the ABC. *Id.*; see also *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 130 (D.D.C. 2011) (explaining the ABC control rule in Amendment 16).

But while some stocks have improved under these controls, others have not, and some have even deteriorated. See AR Doc. 43 at 2573 (comparison of 2008 and 2012 stock assessments). In 2012, when the latest assessment was completed, ten groundfish stocks in this fishery were still overfished, meaning that their populations were at less than half of the biomass necessary to support the maximum sustainable yield.¹⁰ AR Docs. 43 at 2573; 263 at 15965, 17084; 139 at 8859-60; see also 50 C.F.R. § 600.310(e)(2)(i)(E) (defining “overfished”). And seven of these stocks were still subject to overfishing, meaning that they were being caught at a rate greater than the rate that would produce the maximum sustainable yield. AR Docs. 43 at 2573; 263 at 15965; see also 50 C.F.R. § 600.310(e)(2)(i)(B) (defining “overfishing”).¹¹

¹⁰ As explained in greater detail below, “maximum sustainable yield” is the goal of a fishery, since it is the level of fishing that will produce the largest possible yield that can be sustained in the long run from all of the stocks that collectively make up this fishery, while still meeting overfishing and rebuilding objectives. 50 C.F.R. § 600.310(b)(2)(i); 50 C.F.R. § 600.310(e)(1)(i) (defining MSY).

¹¹ For more on the current and past statuses of each stock, see generally the stock status maps available at <http://www.nmfs.noaa.gov/sfa/statusoffisheries/SOSmain.htm> (last visited Feb. 12, 2014).

3. Frameworks 48 and 50 background

Pursuant to Amendment 16, the Council adopted Frameworks 48 and 50 to adjust Amendment 16 measures, including severe reductions in several ACLs, to ensure that overfishing would end for stocks that were not responding to the previous catch limits, and to make sure overfished stocks were on their rebuilding trajectory. AR Doc. 495 27284-85 (FW 50 purposes). The Council and NMFS also added or adjusted measures to help mitigate the negative economic effects resulting from these adjustments on the affected fishing communities. AR Docs. 531 at 28340 (FW 50); 405 at 22883 (FW 48). Frameworks 48 and 50 were recommended by the Council and approved (in part) by NMFS in 2013. AR Docs. 531 at 28312 (Final Rule for FW 48); 548 at 29935 (Final Rule for FW 50); *see also* 78 Fed. Reg. 26118 (May 3, 2013) (FW 48); 78 Fed. Reg. 26172 (May 3, 2013) (FW 50). Specifically, Framework 50 made “severe cutbacks in catch limits” for this fishery to prevent overfishing and rebuild overfished stocks. AR Docs. 531 at 28340; 405 at 22883. The primary purpose of Framework 48 is to “mitigate [the] negative economic impacts” of those cutbacks, by proposing several measures “to increase fishing opportunities and improve profitability.”¹² AR Doc. 405 at 22883.

Plaintiff-Intervenor New Hampshire challenges the optimum yield analysis in both Frameworks under National Standard 1; Plaintiff Massachusetts challenges the benchmark assessments NMFS relied upon for the revised ACLs under National Standard 2; and finally Plaintiff Massachusetts, joined by both New Hampshire and Rhode Island as an *amicus curiae*, challenges the alternatives considered in Framework 50 under National Standard 8.

¹² While Framework 48 primarily contains mitigation measures, it also adopted reductions to the sub-ACLs for GB yellowtail flounder and SNE/MAB windowpane flounder. AR Doc. 480 at 26047.

III. Standard of Review

Plaintiffs' claims under the Magnuson-Stevens Act are to be evaluated pursuant to the "arbitrary and capricious" standard of review of the Administrative Procedure Act ("APA"). 16 U.S.C. § 1855(f)(1); 5 U.S.C. § 706(2)(A). As the First Circuit has explained, the only question for the Court under the Magnuson-Stevens Act is whether NMFS has exercised its discretion in "an irrational, mindless, or whimsical manner." *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 110 (1st Cir. 1997); *see also Conservation Law Found. v. Evans*, 360 F.3d 21, 27 (1st Cir. 2004). Thus, when the Court reviews the claims that the Frameworks are not consistent with the Act's National Standards, the Court's task is not to review "*de novo* whether the amendment complies with these standards," but only to "determine whether [NMFS's] conclusion that the standards have been satisfied is rational" *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007) (citations omitted); *see also Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1119 (9th Cir. 2006) (same). Accordingly, judicial review of the Secretary's actions under the Magnuson Act should be "most deferential" since these decisions involve "difficult scientific predictions in its area of special expertise." *City of New Bedford v. Locke*, 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); *see also Oceana, Inc. v. Evans*, No. 04-811, 2005 WL 555416, at *19 (D.D.C. Mar. 9, 2005) (finding judicial review under the Magnuson-Stevens Act is "especially deferential" because "there is still much that is unknown about fisheries management" and the agency is "making predictions, within its area of special expertise, at the frontiers of science.") (citing *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)).

IV. Argument

A. NMFS's approval of Frameworks 48 and 50 is consistent with the National Standards

Although Plaintiffs argue that Frameworks 48 and 50 are inconsistent with National Standards 1, 2, and 8, as well as certain related advisory guidelines, their arguments are wholly without merit. To the contrary, NMFS appropriately evaluated the Frameworks under the National Standards and appropriately concluded that they were, in fact, consistent with these guidelines. These determinations were reasonable and are amply supported by the record.

Here, Plaintiffs attempt to flyspeck NMFS's determinations in establishing revised ACLs and attempt to call them into question using as their vehicle alleged noncompliance with several of the National Standards. However, as set forth below, NMFS appropriately considered all relevant factors in issuing Frameworks 48 and 50, and appropriately found that the Frameworks were, in fact, consistent with the National Standards. The agency's determination was reasonable and should be upheld.

1. Plaintiff's National Standard 1 arguments must fail

a. New Hampshire's facial challenge to how NMFS makes optimum yield determinations is time-barred

New Hampshire argues that the Frameworks are not consistent with National Standard 1 because they do not adequately consider optimum yield ("OY") for each stock and the fishery as a whole. As discussed above, NS 1 provides that "[c]onservation 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). As a threshold matter, New Hampshire's challenges to optimum yield are properly viewed not as a challenge to the specific actions in Frameworks 48 and 50, but as an attack on the ACL mechanisms previously established in Amendment 16. *See* Memorandum of Law of...New Hampshire at 6-9 ("NH

Memo”). The Framework actions merely apply the Amendment 16 mechanisms to the most recent information about the fishery to generate catch levels for the 2013 fishing year (“FY”); any dispute with the methodology applied is in fact a dispute with the methodology adopted in Amendment 16.

The regulations implementing Amendment 16 were promulgated in 2009, litigated, and upheld by this Court and the First Circuit. *City of New Bedford v. Locke*, 10-cv-10789-RWZ, 2011 WL 2636863 (D. Mass. June 30, 2011) (upholding Amendment 16) *aff’d Lovgren v. Locke*, 701 F.3d 5 (1st Cir. 2012) (same). New Hampshire’s claim is time-barred because the judicial review provisions of the Magnuson-Stevens Act only permit challenges to regulations or certain actions implementing a FMP if they are filed within *thirty days* after the publication of the regulation or an action by the Secretary implementing an FMP. 16 U.S.C. § 1855(f). Therefore, New Hampshire is time-barred from, in substance, retroactively challenging Amendment 16’s ACL and AM mechanisms. *See Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 438 F.3d 937 (9th Cir. 2006) (concluding that the court lacked jurisdiction over challenges to agency actions that are in substance challenges to prior regulations); *Sea Hawk Seafoods v. Locke*, 568 F.3d 757, 765 (9th Cir.2009); *Martha's Vineyard/Dukes Cnty. Fishermen's Ass'n v. Locke*, 811 F. Supp. 2d 302, 307-08 (D.D.C. 2011).

Indeed, despite New Hampshire’s protestations to the contrary, the First Circuit directly addressed the claims raised here, and explicitly rejected the argument that the ABC/ACL mechanisms adopted in Amendment 16 “improperly sacrific[e] optimum yield to prevent overfishing within the Fishery’s weakest stocks.” *Lovgren*, 701 F.3d at 33. After a lengthy analysis of the MSA as a whole, the court concluded that Amendment 16’s ACL mechanisms struck the appropriate balance between National Standard 1’s objectives, *including* the

achievement of optimum yield. *Id.* at 34. Frameworks 48 and 50 merely applied that mechanism, which New Hampshire attempts to relitigate before this Court. Because the Court lacks jurisdiction over New Hampshire's challenge to Amendment 16's consideration of optimum yield, Defendants are entitled to summary judgment on this claim.

b. NMFS properly considered Optimum Yield in the Frameworks

Even if the Court were to consider New Hampshire's claim under National Standard 1, that claim is without merit. New Hampshire alleges that NMFS "paid little attention to optimum yield" in violation of National Standard 1, legal precedent, and the National Standard guidelines. NH Memo at 5-6. In balancing conservation and management measures under National Standard 1, NMFS must take on the inherently difficult task of preventing overfishing by limiting the harvest of fish while also achieving, on a continuing basis, optimum yield. AR Doc. 6 at 349; 74 Fed. Reg. at 3182. This is particularly difficult in a mixed stock fishery such as the Northeast Multispecies fishery because fish stocks are often intermixed, and therefore unavoidably caught together. This means that management measures must focus on the unhealthy stocks that are found in the same stock area and caught along with the healthy stocks even if this results in healthy stocks being caught at a level below their OY. *See* AR Doc. 495 at 27472-87 (analyzing the economic impacts of how the quota for an "unhealthy" stock may limit vessels from catching their entire quota for "healthier" stocks).

NMFS complied with National Standard 1 by adopting status determination criteria and ACLs that set controls on catch to ensure that the appropriate fishing mortality rates are implemented, thus achieving optimum yield for each stock. AR Doc. 480 at 26614 (FW 48); AR Doc 495 at 27520 (FW 50). While New Hampshire would apparently prefer the agency simply use the term "optimum yield" more frequently throughout the Frameworks, the agency has fully complied with the statute's requirements to carefully balance the competing concerns embodied

by optimum yield both through the mechanisms established in Amendment 16 and in the challenged actions under Frameworks 48 and 50. *See* NH Memo at 5 (“One is hard pressed to find the concept of optimum yield even mentioned”).

Appendix I to Framework 50 contains the results of the SSC’s analysis in support of its ABC recommendations. AR Doc. 496 at 27600. The SSC reviewed the available stock assessment data, as well as the results of other scientific committees’ research, such as the Plan Development Team (“PDT”)¹³ to determine the appropriate ABCs that complied with National Standard 1. AR Doc. 496 at 27610-15 (summary of SSC ABC recommendations); *see also* AR Doc. 42 at 2550-57 (Memo from PDT to SSC regarding FY 2013-2014 ABCs). The PDT and SSC independently and rigorously applied the ABC control rule to ensure OY complied with NS 1 for each stock. AR Docs. 42 at 2550 (“ABCs are based on the current default ABC control rule that was proposed by the SSC and adopted in Amendment 16”); 496 at 27606 (Table summarizing the recommended OFL and ABC for each stock). The Council and NMFS’s determination of the optimum yield is based on “the appropriate balance between National Standard 1’s objectives” which “is a judgment Congress both authorized and entrusted to the N.E. Council and the NMFS.” *Lovgren v. Locke*, 701 F.3d at 33-34, n.33. As discussed above, the record amply discusses the method for determining each catch limit, and the implementation of optimum yield for each stock.¹⁴

¹³ Plan Development Teams (“PDTs”) provide an expanded pool of expertise for the purpose of conducting data analyses and providing information to the Council. The PDTs also help ensure that Council FMPs, amendments and framework adjustments meet scientific, legal and technical requirements for review and approval. The Council’s Executive Director appoints all PDT members. *See* AR Doc. 7 at 389, 446, 459.

¹⁴ New Hampshire also challenges the Secretary’s NS 1 guidelines, arguing that they afford her too much discretion to apply National Standard 1. NH Memo at 7-8. The NS guidelines are advisory, and therefore not judiciable. 16 U.S.C. 1851(b); *Tutein v. Daley*, 43 F. Supp. 2d 113, 122 (D. Mass. 1999) (“Congress did not intend the advisory guidelines...to be subject to judicial

2. Framework 50 is consistent with National Standard 2 since NMFS relied on the best scientific information available

Massachusetts challenges two stock assessments that formed the basis of the revised ACLs, arguing these assessments did not constitute the best scientific information available. National Standard 2 provides that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). However, as Massachusetts concedes, “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.” Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 14 (“Mass Memo”). This Court should reject Massachusetts’s plea to depart from well-established precedent interpreting this requirement and defer to NMFS’s well-supported scientific determinations.

The catch limits in Framework 50 are based on two stock assessments. The first assessment, conducted in December 2011, found that the stock of Gulf of Maine cod (“GOM cod”) had declined dramatically (“2011 assessment”). AR Docs 32 at 1948-50. The SSC and Council reviewed the 2011 assessment and recommended a number of topics for further investigation, as did Massachusetts. AR Docs. 32 at 1948 (results of first assessment); 34 at

review”). Also, New Hampshire seems to argue that NMFS should not be permitted to impose emergency rules without Council participation. NH Memo at 6. This issue, in the context of NMFS’s emergency rule that reduced available carryover for Gulf of Maine cod (“GOM cod”) from 10% to 1.85%, was raised in the Framework 50 comments, although not by New Hampshire, and responded to in the final rule. *See* AR Doc. 548 at 29961 (see response to comment 23); 78 Fed. Reg. 26197 (May 3, 2013). The Secretary is obligated to ensure that the total potential GOM cod catch in FY 2013 does not exceed the overfishing limit under National Standard 1 and 16 U.S.C. 1854(e)(3)(A). Because the Council did not recommend measures to address the GOM cod carryover issue in Framework 50, NMFS was obligated to take action to reduce the total potential catch to a level below the overfishing limit, to ensure that overfishing of GOM cod does not occur under its emergency rulemaking authority, set forth in 16 U.S.C. 1855(c).

1965-68 (SSC recommendations); 48 at 4287-90 (Massachusetts's recommendations); 54 at 4593 (NMFS's response to Massachusetts); 58 at 4892 (Council's requests). Due to these multiple recommendations, as well as at the request of the Council, industry, and the SSC; a second revised assessment was conducted in December 2012 focusing on both GOM cod and Georges Bank cod ("GB cod") stocks ("2012 assessment"). AR Doc 263 at 15949-55 (SSC incorporating second assessment into ABC recommendations for GOM cod and GB cod). An independent peer review panel¹⁵ unanimously found that the 2012 assessment for GOM cod and GB cod represents the "best available science." AR Doc. 263 at 15969. The 2011 and 2012 assessments clearly demonstrate that both GOM cod and GB cod are overfished and overfishing is occurring for these vulnerable stocks. AR Doc. 263 at 15978 (GOM cod), 15591 (GB cod).

Massachusetts challenges these stock assessments, arguing that they are not based on the best available science and therefore NMFS's approval of management measures based upon these assessments was contrary to National Standard 2. Mass Memo at 11-15. However, Massachusetts does not point to any superior science that was disregarded, but instead simply offers a series of criticisms that are based on mistaken presumptions and conclusions. On this basis alone, Massachusetts's claim must fail. *See, e.g., North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62 (D.D.C. 2007) ("Absent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency's collection of and reliance on scientific information will fail."). Massachusetts cites negative

¹⁵ The Northeast Regional Stock Assessment Workshop ("SAW") is a formal scientific peer-review process for evaluating and presenting stock assessment results to managers. The SAW protocol is used to prepare and review assessments for fish stocks in the offshore US waters of the northwest Atlantic. Assessments are prepared by SAW working groups (federally led assessments) or technical assessment committees (state led assessments) and reviewed by a panel of stock assessment experts called the Stock Assessment Review Committee ("SARC"). AR Doc. 1 at 1.

comments by some facets of the fishing industry and concludes that the assessments were allegedly “widely criticized.” Mass Memo at 11-12. However, “difficulties with the data and the nature of the scientific method are expected in managing a resource as elusive as a fishery.” *Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1432 (M.D. Fla. 1998) (citing *Assoc. Fisheries of Maine, Inc. v. Daley*, 954 F. Supp. 383, 389 (D. Me. 1997)). The fact that the assessments were “widely criticized” does not refute their scientific merit in the absence of some other assessments or scientific information that is considered better. *Ctr. for Biological Diversity v. Blank*, 933 F.Supp.2d 125, 149-150 (D.D.C. 2013) (stating, in response to a National Standard 2 challenge, that “it is well established that NMFS ‘may choose’ between ‘conflicting facts and opinions,’ so long as it ‘justif[ies] the choice’”) (citing *Fishermen’s Finest, Inc. v. Locke*, 593 F.3d 886, 890 (9th Cir. 2010)).

Moreover, the record reflects that NMFS carefully considered and addressed criticisms raised. See *Ctr. for Biological Diversity v. Blank*, 933 F.Supp.2d at 150 (referring to “high hurdle” of proving that NMFS ignored “superior or contrary” scientific information) (citing *N.C. Fisheries Ass’n*, 518 F.Supp.2d at 85). Massachusetts alleges NMFS’s use of its trawling vessel, the *FSV Henry B. Bigelow*, to gather the assessment data resulted in inaccurate stock assessments. *Id.* In support of this contention, Massachusetts cites NOAA’s Northeast Fisheries Science Center (“NEFSC”)’s¹⁶ statement that “inshore strata with depths [less than or equal to] 18 meters can no longer be sampled.” Mass Memo at 12 (citing AR Doc. 43 at 3122).

¹⁶ Northeast Fisheries Science Center is the research arm of the NMFS’s Northeast Region, and supports the NMFS mission by “conducting ecosystem-based research and assessments of living marine resources, with a focus on the Northeast Shelf, to promote the recovery and long-term sustainability of these resources and to generate social and economic opportunities and benefits from their use.” AR Doc. 4 at 236. The results of NEFSC’s research are largely reported in primary scientific media (*e.g.*, anonymously-peer-reviewed scientific journals). *Id.* However, to assist itself in providing data, information, and advice to its constituents, the NEFSC occasionally releases its results in its own media. *Id.*

Massachusetts selectively reads this statement out of context. In the very next paragraph, NEFSC determined that such an omission would have “little effect on the annual biomass indices” and therefore NEFSC upheld the results of the stock assessments gathered by the *Bigelow*.¹⁷ AR Doc. 43 at 3122. Next, Massachusetts cites the comments of a Council member who disagreed with the results of the assessment, arguing it could result in under-sampling older cod and thus result in inaccurate assessments for the entire stock. Mass Memo at 12-13. These comments were fully considered by the agency, and a detailed response was prepared by NEFSC, and both the comments and response were submitted to the SSC for review. AR Doc. at 2210-29.¹⁸ Massachusetts also cites other commenters who suggested using a “new low-frequency sonar technology,” or adopting interim measures. Mass Memo at 13. The administrative record is clear: NMFS fully responded and considered these requests and determined that they did not represent better scientific information. AR Doc. 64 at 5263 (explaining there is ongoing work and testing for whether or not to use sonar in future stock

¹⁷ Massachusetts cites to a suggestion by Dr. Brian Rothschild, who urges NMFS to obtain additional data using the fishing industry’s boats and gear. Mass Memo at n.13. NMFS relied on the best scientific information available for the Frameworks, but continues to engage with those in the fishing industry who agree with Dr. Rothschild, and has recently completed the first leg of the Industry-Based Yellowtail Flounder Survey. This is an effort to see how an industry-based survey could be used to augment other data being used in stock assessments. *Available at* http://www.nefsc.noaa.gov/news/features/2013_ytf_pilot.

¹⁸ Massachusetts cites to the same Council member for the argument that the SSC’s model may not have accounted for a possible GOM cod migration, suggesting the stock did not decline, but simply migrated. Mass Memo at 14 (citing AR Doc. 27 at 1909). As noted above, the Council fully responded to these alleged criticisms by the Council member. *See* AR Doc. at 2210-29. Also, the preliminary explorations show that cod were absent from historically abundant locations, not because of migration, but due to an overall decline of the stock. AR Doc. 35 at 2222-23 (“In the Gulf of Maine, cod are not showing up in areas where they have been historically abundant...Fishermen are now reporting cod in high densities in certain areas of southern New England. However, preliminary explorations of biomass trends in the southern New England waters suggest that...overall biomass in these areas has declined over the past forty years.”).

surveys); AR Doc. 265 at 18108 (explaining that interim measures would have resulted in keeping the 2012 catch limits, which were far too high based on the 2012 stock assessment and would result in more overfishing and jeopardize vulnerable stocks).

Challenging the use of proxy values to translate the stock assessment data into ABCs and ACLs, Massachusetts cites to an article from *The Open Fish Science Journal*. Mass Memo at 13-14. As an initial matter, this article should be disregarded by the Court because it is not a part of the administrative record. Massachusetts fails to provide any citation that this document was submitted to the agency at any time during the decision-making process and does not argue that it falls under any exception to APA record-review principle. *Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing Court.”).¹⁹ Therefore, the Court should disregard Massachusetts’s attempt to supplement its argument with *post hoc* rationales in documents that were not before the agency or part of the decision-making process.

Even if the article was part of the record, it does not demonstrate that NMFS failed to rely on the best scientific information available. Massachusetts provides nothing to suggest the article documented that Framework 50 failed to rely on the best scientific information available, or that the use of proxies is unsupportable. Many other external papers discussing proxy values were submitted and reviewed by the SSC during the stock assessment process. AR Docs. 44 at 3392-95; 49 at 4303-08. The record also contains analysis by the PDT that actually shows the opposite: by using proxies, the catch projections for groundfish *overestimate* stock size and

¹⁹ Nor did Massachusetts seek to supplement the record with this document under the Court’s case management schedule. Minute Order (Aug. 27, 2013) Dkt. No. 13 (“By 9/3/13 the Commonwealth shall notify the Government of any documents that in the Commonwealth’s view should have been (but were not) included in the administrative record”).

underestimate fishing mortality. AR Docs. 40 at 2425-34; 43 at 3340-48. These biases lead to catch levels that, in the PDT's view, are set too high and result in rebuilding overfished stocks at a slower pace. AR Docs. 40 at 2425-34, 42 at 2550-57 ("Extensive analyses based on [a past] assessment showed that in most instances projections were biased high"); 43 at 3340-48. The PDT has recommended careful consideration of this trend. AR Docs. 44 at 3795-3803; 45 at 4094. However, in promulgating Framework 50, the Council and NMFS fully considered the PDT's recommendations and the degree of unavoidable scientific uncertainty when setting catch limits that would provide some benefit to the fishing community and satisfy the required conservation goals of the Magnuson-Stevens Act.

As demonstrated above, NMFS has fully complied with National Standard 2. The agency conducted two stock assessments to collect the necessary data on which to base the revised ACLs. In addition, the 2012 assessment was peer reviewed by an independent panel, and unanimously found to be based on the best available science. *See Ace Lobster Co., Inc. v. Evans*, 165 F. Supp. 2d 148, 177 (D.R.I. 2001) (finding *inter alia* that NMFS relied on SAW assessments, as well as independent peer review of those assessments, and therefore acted on the best science available). While disputing the validity of these assessments, Massachusetts does not and cannot point to any other stock assessments that were not incorporated into the revised ACLs. Therefore, NMFS utilized the best scientific information available, and Framework 50 should be upheld under National Standard 2. *See Blue Water Fishermen's Ass'n.*, 226 F. Supp. 2d at 338 (holding that since "NMFS's conclusions plausibly follow from the data before it, I must defer to the agency's findings"); *Ctr. for Biological Diversity v. Blank*, 933 F.Supp.2d at 150 (finding that even if NMFS's relied upon a report that "contained some inaccuracies, this would not render NMFS's reliance on the Report violative of National Standard Two"); *see also*

Com. of Mass by Div. of Marine Fisheries, 10 F.Supp. 2d 74 at 77 (rejecting Massachusetts’s argument that the Secretary has an “affirmative obligation” to collect new data under National Standard 2).

3. Frameworks 48 and 50 are fully consistent with National Standard 8 under the Act.

Contrary to Plaintiffs’ assertion, the Frameworks are consistent with National Standard 8, and the record reflects NMFS’s careful consideration of ways to minimize economic impacts to the extent practicable and of the importance of fishery resources to communities. National Standard 8 provides that “[c]onservation and management measures shall, “*consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks*” NMFS must “take into account the importance of fishery resources to fishing communities” by using “economic and social data” to “provide for the sustained participation of such communities” and also, “*to the extent practicable, [to] minimize adverse economic impacts on such communities.*” *Id.* § 1851(a)(8) (emphasis added).

For example, in *National Coalition for Marine Conservation v. Evans*, plaintiffs claimed that NMFS violated National Standard 8 when it implemented a fishery area closure that “would mean the economic elimination of many pelagic longline fishermen’s livelihoods in Florida, as well as the elimination of [dependent] shore-side businesses.” 231 F.Supp.2d 119, 133 (D.D.C. 2002). The court upheld NMFS’s action, finding that the agency recognized the negative economic impacts and analyzed alternatives that would achieve conservation requirements while minimizing impacts “to the extent practicable.” *Id.* (citing to 50 C.F.R. § 600.345(b)(1); *see also Natural Res. Def. Council v. Daley*, 209 F.3d at 753 (holding that NMFS “must give priority to conservation measures” when balancing the tension between the MSA’s National Standards).

Consistent with National Standard 8 and case law, NMFS looked at the ACLs that would meet conservation objectives – preventing overfishing and rebuilding overfished stocks – as well as minimize economic impacts to the extent practicable. The only ACLs that met all of these requirements were those included in the preferred alternative. AR Doc. 495 at 27260-61 (summary of preferred alternatives). The SSC²⁰ provided two ABC recommendations for each of the revised ACL stocks. AR Doc. 496 at 27611-15 (Appendix I: summary of SSC’s ABC recommendations). The Council and NMFS chose as the preferred alternative the *higher* of the two ABC recommendations to (1) mitigate the socio-economic impact, (2) meet the Act’s conservation mandate, (3) and incorporate the best scientific information available. AR Doc. 495 at 27522.²¹ Plaintiffs and *amicus* argue that the Council and NMFS should have considered a host of alternative (and higher) ACLs that would result in greater economic benefit for fishing communities. Mass Memo 15-20; *see also* NH Memo at 9-11 (joining Massachusetts’s NS 8 argument); Brief of Amicus Curiae (“RI Brief”) at 3-6 (same). However, in developing ACLs, the Council “may not exceed the fishing level recommendations of its scientific and statistical committee,” which includes the SSC’s ABC recommendations, and must base its catch limits on the “best scientific information available.” 16 U.S.C. §§ 1852(h)(6), 1852(g)(1)(B) and 1851(a)(2) and 50 C.F.R. §§ 600.310(b)(2)(v), 600.310(l)(1) and 600.315(a)-(b); *see also* AR

²⁰ As discussed above, the Magnuson-Stevens Act requires that each Regional Fishery Management Council appoint a SSC to, among other things, “provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets...” 16 U.S.C. § 1852(g)(1)(B).

²¹ The decision to adopt the higher of the two ABC recommendations is currently being challenged in the District Court for the District of Columbia for not being conservative enough. *See Conservation Law Found. v. Pritzker*, 13-cv-821-JEB (D.D.C.).

Doc. 8 at 458 (Amendment 16 ABC control rule). The revised ACLs in the preferred alternative complied with these statutory mandates.

Massachusetts mistakenly cites to documents that analyzed carryover of unused catch from sectors in support of its argument that there were other ACL alternatives. Mass Memo at 19 (citing AR Doc. 275 at 18434, 18436-37). Sector carryover catch refers to the provisions of Amendment 16 that allow for the carryover of up to ten percent of the previous years' (here FY 2012) allowable catch because it was not caught. AR Doc. 548 at 29935. In FY 2013, NMFS continued to account for carryover as it has for the past several years in part to further minimize the economic impacts of the revised ACLs by allowing for the carryover into FY 2013 of up to ten percent of the FY 2012 allowable catch that was not caught. AR Doc. 548 at 29935. The carryover possibilities that were considered did not change, and were not intended to change, the revised ACLs in Framework 50. AR Doc. 85 at 66103-04 ("Our projections for the fishing levels in 2013 are based on the assumption that all available fish will be harvested in 2012. If they are not harvested, those fish will exist in 2013.").²² In challenging an action under National Standard 8, the "burden lies on the contestant to show why a particular gap or omission is unreasonable." *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462, 470 (1st Cir. 2003). The "best a court can do is to ask whether the Secretary has examined the impacts of, and alternatives to, the plan he ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable, taking account of the usual considerations (*e.g.*, whether information is available and whether the further analysis is likely to be determinative)." *Id.* Massachusetts has

²² Massachusetts also complains that NMFS did not consider a 50% carryover as an alternative in the EA. Mass Memo at 20. NMFS fully considered and responded to a 50% carryover, finding that substantially increasing the carryover allowance while also decreasing the catch allowance would increase the risk of overfishing. AR Doc. 85 at 66104.

failed to meet the burden of identifying other reasonable ACLs that would have met the Act's conservation requirements.

The record reflects that NMFS took careful account of the economic and social importance of fishery resources to fishing communities. There are over 271 pages of analysis of the social and economic impacts of these Frameworks. AR Docs. 480 at 26195-413 (FW 48); 495 at 27370-419 (FW 50). Massachusetts's assertion that NMFS "went no further" than stating that the ACLs were drastic cuts ignores the extraordinary lengths that NMFS and the Council have gone through – leading up to, in the development of, and beyond the Frameworks – to mitigate the economic impacts associated with rebuilding the fishery. AR Docs. 548 at 29936 ("Framework 48 also includes measures to... modify sector management and groundfish fishery accountability measures, and help mitigate anticipated impacts of the FY 2013 catch limits.); 137 at 8841 (declaring a fishery disaster pursuant to MSA fisheries disaster relief provision); 91 at 6416 (providing 100% funding for at-sea monitoring for 2013 as opposed to industry-funded monitoring). Moreover, at the request of the Council, NMFS took emergency action for 2013 to set white hake catch limits based on a new assessment completed in March 2013 ("2013 assessment"). AR Doc. 526 at 28283. Since this assessment was completed after the Council took final action on Framework 50, it normally would not have included revised ACLs based on the 2013 assessment. However, the emergency action allowed NMFS to increase the white hake quota by 15% compared to the Council's preferred alternative in Framework 50. AR Doc. 548 at 29935-42. NMFS also took emergency action to temporarily increase monkfish trip limits to increase landings and revenues. AR Doc. 527 at 28286-97. NMFS approved 23 exemptions from multiple regulations at the request of sectors. AR Docs. 552 at 30010; 549 at 29975. These represent significant measures that NMFS has taken to mitigate economic impacts from the

revised ACLs. *See also* AR Docs. 68 at 5301 (industry request for mitigation measures); 480 at 26037 (FW 48 reduced minimum fish size for most groundfish stocks to reduce waste and turn regulatory discards into landings); 531 at 28312 (same); 553 at 30012 (interim rule to allow additional fishing opportunities for dogfish, while reducing amount of groundfish discards charged to vessels).

As a point of clarification, neither Massachusetts nor New Hampshire has pled a violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, or the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601 *et seq.* Massachusetts’s Petition for Review ¶¶ 54-69 (Dkt. No. 1). Thus, the Court’s consideration of the above arguments should be constrained to whether NMFS’s analysis satisfies its obligation under National Standard 8. Although Massachusetts asserts that National Standard 8 “tracks...obligations under NEPA and the RFA, which likewise require the agency to study a range of alternatives,” Mass Memo at 15, the purposes and requirements of these statutes are very different. *E.g. see Little Bay Lobster*, 352 F.3d at 470 (addressing, *inter alia*, National Standard 8 and RFA claims and describing RFA as “a quite different statute” from the Magnuson-Stevens Act that “creates procedural obligations” but “does not alter the substantive mission of the agencies under their own statutes”).²³ NMFS and the Council may consolidate or integrate their Magnuson-Stevens Act, NEPA and RFA analyses in the same documents, and thus NMFS may cite to a NEPA environmental impact statement (“EIS”) or environmental assessment (“EA”) to provide factual

²³ Also, *Associated Fisheries of Me. v. Daley*, 127 F.3d 104 (1st Cir. 1997), cited in Mass Memo at 16, did not involve a National Standard 8 claim. At the time, there were only seven National Standards. *Id.* at 107. The case addressed RFA and National Standard 7, which requires that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” *Id.* at 110 (citing 16 U.S.C. § 1851(a)(7)).

support for how it addressed and analyzed Magnuson-Stevens Act requirements. However, this does not mean that the legal requirements of these separate statutes should be conflated.

National Standard 8 on its face requires that conservation and management measures minimize economic impacts “to the extent practicable.” As reflected in the record and discussed above, NMFS was well aware of, and took into account, the economic and social impacts of Framework 50 on fishing communities. AR Doc 495 at 27370-419. NMFS analyzed and approved revised ACLs that were based on the best available science, consistent with the Magnuson-Stevens Act’s conservation requirements, and minimized economic impacts to the extent practicable.

B. Plaintiffs’ Proposed Remedy Would Halt All Fishing

Finally, Massachusetts and New Hampshire ask the Court to “vacate” the Frameworks and the specifications contained in them. Mass Memo at 20; NH Memo. at 9, 11. As Massachusetts correctly indicates in its brief, under the Act, the Council has a statutory obligation to propose catch limits. 16 U.S.C. §§ 1852(h)(6); 1853(a)(15). If the Court vacates the catch limits in these Frameworks, fishing would not be permitted for a species with undefined ACLs, nor would fishing be allowed in these species’ broad stock areas, thereby, in addition to causing chaos, this drastic remedy would halt all fishing for the fishery. *See* 50 C.F.R. § 648.87(b)(ii).

V. Conclusion

For the reasons set out above, NMFS’s approval of Frameworks 48 and 50 should be upheld and summary judgment on all of the Plaintiffs’ claims should be entered on behalf of the Federal Defendants.

Respectfully submitted this 14th day of February 2014,

CARMEN M. ORTIZ
United States Attorney

Christine J. Wichers
Assistant U.S. Attorney
One Courthouse Way
Boston, MA 02210
(617) 748-3278
Christine.wichers@usdoj.gov

ROBERT G. DREHER,
Acting Assistant Attorney General
SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief

/s/ Jeremy Hessler
JEREMY HESSLER
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
(202) 305-0431 | (202) 305-0275 (fax)
Email: Jeremy.hessler@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that, this 14th day of February 2014, I electronically filed the foregoing documents with the Clerk of the Court via CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Jeremy Hessler
JEREMY HESSLER

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

I certify that I conferred with Daniel Hammond, counsel for the Commonwealth of Massachusetts, prior to the filing of this motion. He indicated that Massachusetts reserves all rights, including the right to oppose this cross-motion for summary judgment.

/s/ Jeremy Hessler
JEREMY HESSLER