

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

Civil Action No. 13-cv-11301-RGS

v.

PENNY PRITZKER, et al.

BRIEF OF AMICUS CURIAE
(Leave to File granted 12/4/13)

Defendants.

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

Intervenor

**BRIEF OF AMICUS CURIAE, PETER F. KILMARTIN, ATTORNEY GENERAL FOR
THE STATE OF RHODE ISLAND, IN SUPPORT OF PLAINTIFF AND INTERVENOR**

Respectfully submitted,

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OTHER AUTHORITIES

ecoRI News, DEM: R.I. Fisheries Healthier Than They Seem (March 3, 2013),
available at [http://www.ecori.org/aquaculture/2013/3/3/
dem-ri-fisheries-healthier-than-they-seem.html](http://www.ecori.org/aquaculture/2013/3/3/dem-ri-fisheries-healthier-than-they-seem.html).....7,8

Letter from Janet Coit, Director Rhode Island Department of
Environmental Management & document entitled Principles and Policies
Governing Marine Fisheries Management in Rhode Island (Feb. 27, 2013),
available at <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/policy.pdf>.....9,10

National Research Council of the National Academies,
Evaluating the Effectiveness of Fish Stock Rebuilding Plans in the United State;
Committee on Evaluating the Effectiveness of Stock Rebuilding Plans of the 2008
Fishery Conservation and Management Reauthorization (2013)
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Rhode Island Commercial Fishing and Seafood Industries
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Cornell Cooperative Extension Marine Program et al. eds., (2011),
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Final-Reports/RI-Profile-Final-2nd-Print.pdf](http://ccesuffolk.org/assets/Marine-photos/Marine-Pdfs/Final-Reports/RI-Profile-Final-2nd-Print.pdf)8,10

Rhode Island Seafood Marketing Collaborative
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available at <http://www.dem.ri.gov/programs/bnatres/agricult/rismc/2012rep.pdf>.....7

Sector Management Plan for the Finfish fishery: Public Hearing Item #1: 2014
Rhode Island Department of Environmental Management,
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available at http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/prop_secff.pdf.....9

Testimony of Brian Rothschild, Improving the Magnuson Stevens Act
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I. INTEREST OF AMICUS CURIAE

The present case involves issues of great concern to the State of Rhode Island – “the Ocean State” and its commercial fishing industry which has long supported Rhode Island’s economy and provided its citizens with a good quality of life. Generations of fishermen have worked the waters off of Rhode Island. From our vast ports of shelter along the Rhode Island coast, to the waters off Block Island and Rhode Island sounds, commercial fishing has been a staple of Rhode Island’s economy and provided its citizens with food, employment and other social and cultural benefits.

Since colonial times, fishing in Rhode Island has been protected not only through our colonial charter but through our state constitution. Rhode Island fisheries have long benefited from the foresight of this State’s founding fathers to protect this invaluable resource by securing the rights of Rhode Islanders to “freely exercise all the rights of fishery” while providing the General Assembly with broad and plenary power to regulate the preservation, regeneration and restoration of the natural resources of our state. R.I. Const. art. I, § 17; See *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198, 206 (R.I. 2008); See also *Opinion to the Senate*, 87 R.I. 37, 40, 137 A.2d 525, 526 (1958) (the General Assembly’s power in this area “is plenary * * * and is no longer open to question.”).

The Rhode Island Department of Attorney General (“RIAG”), along with other state agencies, have a history of protecting the Rhode Island fisheries as they are one of the Ocean State’s most valuable natural asset and an important part of Rhode Island heritage and culture. See *Cherenzia v. Lynch*, 847 A.2d 818, 822-27 (R.I. 2004); See also *Windsor v. Coggeshall*, 169 A. 326, 327 (1933). As the Federal Frameworks that are at issue in this case impact Rhode Island’s natural resources, it is within the Attorney General’s responsibility to ensure the

protection, preservation and enhancement of natural resources so that present and future generations may enjoy them. R.I. Gen. Laws § 10-20-1.

Ultimately, the regulations at issue in this case could lead to the adoption of a new fisheries management plan that may have a substantial adverse impact on the conservation and enforcement programs that Rhode Island provides and supports through its research and educational institutions, industry organizations and advisory councils, which play a vital role in the regulatory scheme of the commercial fishing industry. The Attorney General's interest in filing an amicus in this matter is to assist the Court with a unique perspective of facts and data that may not be found in the parties' briefs and to provide the court with a complete and plenary presentation of the difficult issues before it. *See Opinion of the Justices to the Senate*, 370 Mass. 895,896-97 n.1, (1975); *See also Quinlan v. Clasby*, 71 Mass. App. Ct. 97, 101 n. 11, (2008).

II. BACKGROUND

The Rhode Island Department of Attorney General adopts and incorporates the information provided in the "Background Section" of Commonwealth's Memorandum in Support of Plaintiff's Motion for Summary Judgment.

III. SUMMARY OF ARGUMENT

Amicus supports the Plaintiff and Intervenor. Frameworks 48 and 50 ("the Frameworks"), interim final rules issued by the Secretary of Commerce ("the Secretary")¹ and promulgated as regulatory amendments to 50 C.F.R. 648, may not have as significant an impact on the Rhode Island fisheries now as on the Commonwealth. However, the Attorney General is keenly aware that continued failure by the Secretary, the National Oceanic and Atmospheric

¹The Secretary, NOAA and NMFS have all been named as defendants in this action. Since the Secretary retains the ultimate responsibility for promulgating fishery management plans and alterations thereto, this brief, will refer to the defendants, collectively, as the Secretary.

Administration (“NOAA”) and the National Marine Fisheries Service (“NMFS”) to balance the twin goals of environmental protection and sustainable access to fisheries through application of the National Standards of the Magnuson-Stevens Act (“MSA”), could negatively impact the Rhode Island Fisheries in the future. *See* 16 U.S.C § 1801. Specifically, Frameworks 50 violates National Standard 8 because the Secretary has failed to meaningfully take into account the importance of the fishery resources to the fishing communities and failed take requisite steps to minimize the adverse effects of inflexible federal regulations on those fishing communities. 16 USC §1851(a) (8). With the effects of climate change, the complex dynamics of marine ecosystems and the implementation and promulgation of inflexible regulations on commercial fisheries throughout the northeast, it is more important than ever for the Secretary to craft regulations that balance the need to conserve fishery resources with the well being of the fishing communities that it will impact. The Frameworks have failed to do this.

IV. ARGUMENT

A. Balancing of National Standards and Consideration of Economic Impact

The Rhode Island Attorney General supports the Commonwealth’s position that the Secretary did not discharge her obligations under National Standard 8 by failing to take into account the importance of fishery resources to the Massachusetts fishing community and failing to mitigate the adverse effects that the Frameworks will have on fishing communities in the Commonwealth. *See N.C. Fisheries Ass’n Inc. v. Daley*, 27 F. Supp. 2d 650,666 (E.D. Va. 1998).

The relevant council in this matter, the New England Fisheries Management Council (“Council”), manages numerous species of fish that inhabit the ocean waters between three and two hundred nautical miles off the coast of New England. *See* 16 U.S.C § 1852 (a); *See also Massachusetts v. Daley*, 170 F. 3d 23, 25, (1st Cir. 1999). In turn, the Council manages several

fisheries through separate and distinct fishery management plans that include the Northeast Multispecies Fishery (“Fishery”), which are at issue in this case. As part of its analysis of a proposed plan, NMFS must assess the plan’s compliance with the ten National Standards that serve as the guiding principles of the Magnuson Stevens Act. 16 U.S.C. §1851(a)(1)-(10); *See also* 16 U.S.C. §1854. Ultimately, NMFS may not approve plan provisions that are inconsistent with the National Standards 16 USC §1851(a) (8). Specifically at issue in this case is whether the Secretary, through Frameworks 50, violated National Standard 8 by failing to consider the social and economic impact that regulations will have upon fishing communities and failing to mitigate harm to those communities where ever possible.²

In the present situation, NFMS violated National Standard 8 and failed to comport with its own regulations by failing to consider at least one alternative slate of Allowable Catch limits (“ACL”) that would have less impact on the Commonwealth’s fishing communities. *See* 50 CFR 600.345(b)(1); *See also* A.R. 27380 (“No alternatives were considered and rejected for this action”). Instead, it failed to set specifications for nine of the Fishery’s twenty stocks in Fishing Years 2013-2015 and prohibited fishing of species with undefined ACLs. A.R. 27470. The current situation that the Massachusetts commercial fishing industry now faces, due to the drastic decrease in ground fish allotments proposed in the Frameworks combined with implementation of stricter, inflexible, federal regulations, will not only have a devastating impact on commercial ground fishermen in Massachusetts, but will also impact their families, businesses and

² 16 USC§1851(a)(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 paragraph (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.

surrounding communities, ensuring that said industry will no longer be at the core of the Commonwealth's economy.

In order to sustain the Commonwealth's fisheries resources, the Secretary should have developed and implemented the Frameworks by balancing all ten national standards rather than focusing on overfishing of ground fish. A.R. 27284. Although not part of the administrative record, this position is supported by the recent testimony on November 4, 2013, from Brian J. Rothschild, President of the Center for Sustainable Fisheries in New Bedford, before the U.S. Senate, Committee on Commerce, Science and Transportation. *See* testimony of Brian Rothschild, testimony on Improving the Magnuson Stevens Act at U.S. Senate Committee on Commerce, Science and Transportation, (Nov. 4, 2013), available at <http://centerforsustainablefisheries.org/wp-content/uploads/IMPROVING-THE-MAGNUSON-STEVENSON-ACT.-B.Rothschild-Testimony.pdf>. In his testimony, Mr. Rothschild noted that reauthorization of the Magnuson Stevens Act is critical to sustaining our nation's fisheries resources. One of Mr. Rothschild's many recommendations on balancing the implementation of the National Standards was to make the needs of the fishing communities "a centerpiece of the MSA" under National Standard number 8 by balancing the socio-economic considerations at the outset along with biological considerations. *Id.* at Rothschild 6. The balancing of these factors will enable fisheries management councils to adapt and innovate to the present environmental and economic situations rather than being bound by an extensive set of formulaic rules that cannot be reasonably implemented in a fisheries management setting. *Id.* at Rothschild 3-4.

In his testimony, Mr. Rothschild referenced a 2013 National Academy of Sciences National Research Council ("NRC") report on fisheries management and stock rebuilding plans. *Id.* at Rothschild 6. This independent, peer-reviewed panel of scientific experts found that "the

benefits and costs of introducing more flexibility in determining the time to rebuild should be considered by Congress when considering the reauthorization of the MSA.” *See* National Research Council of the National Academies, Evaluating the Effectiveness of Fish Stock Rebuilding Plans in the United States; Committee on Evaluating the Effectiveness of Stock Rebuilding Plans of the 2008 Fishery Conservation and Management Reauthorization Act at 190 (2013), pdf download available at http://www.nap.edu/catalog.php?record_id=18488. Many in the commercial fishing industry have praised this new study from the NRC that also found that current stock rebuilding plans proposed by the federal government are “not flexible enough to account for uncertainties in scientific data and environmental factors that are outside the control of fishermen and fisheries managers.” *Id.* In said study, the NRC recognized the “demonstrated success” that the federal government has had in identifying and rebuilding overfished stocks through their current implementation of the MSA. *Id.* at 196 However, it also noted that such a prescriptive approach fails to consider, the socio-economic factors in the design and rebuilding plans and are not adaptive enough to accommodate for the uncertainty and variability of complex marine ecosystems and fisheries dynamic, especially when the data and knowledge being used to establish those guidelines is limited. *Id.* at 190 Ultimately, the NRC recommended that the federal government should be factoring in the socio-economic terms in its design and rebuilding analysis rather than basing its success solely on biological terms. *Id.*

B. Rhode Island’s Perspective

Rhode Island’s diverse commercial fishing industry is characterized by the wide array of marine species harvested and distributed not only in Rhode Island but throughout the United States. This diversity and the fact that the Rhode Island fishing community is less dependent on ground fish for its overall fisheries revenues, as set forth more fully below, allows Rhode Island

to escape the devastating impact that the Frameworks will have on the Massachusetts fishing community. The geographic location of Rhode Island, located at the northern boundary of the Mid-Atlantic area and the southern portion of New England, has allowed the commercial fishing industry in Rhode Island to be more resilient to change and less vulnerable to impacts from various sources including more restrictive federal fishing regulations, climate change and rising fuel prices. Rhode Island commercial fishermen have utilized this advantageous geographic location to effectively target a broad range of species common to each region which include three sectors: Shellfish, Crustaceans and Finfish. In 2012, the top ten commercial landings for Rhode Island included: Long-fin Squid, American Lobster, Sea Scallop, Summer Flounder, Bay Quahogs, Scup, Monkfish, Oysters, Mackerel and Jonah Crabs. *See* ecoRI News, DEM: R.I. Fisheries Healthier Than They Seem (March 3, 2013), available at <http://www.ecori.org/aquaculture/2013/3/3/dem-ri-fisheries-healthier-than-they-seem.html>. *See also* Rhode Island Seafood Marketing Collaborative Annual Report to the General Assembly (April 2013), available at <http://www.dem.ri.gov/programs/bnatres/agricult/rismc/2012rep.pdf>.

These diverse species are managed by regional councils that are charged with developing fishery management plans for each fishery they oversee focusing on conservation and management measures to address over fishing and promote long term sustainability. 16 U.S.C. §1852(h). Although the Rhode Island fisheries benefit from its diverse species, ports and geographic location they are subject to increased levels of management at the state and federal level that could jeopardize Rhode Island's commercial fishing industry. A.R. 856.

Fishery management and public investment in Rhode Island's commercial fishing industry is extensive. At the forefront of fisheries management actions is the Marine Fisheries Section within the Division of Fish and Wildlife of the Rhode Island Department of

Environmental Management (“RIDEM”). The Marine Fisheries Division of RIDEM is responsible for managing these species and regions along with several other governmental and regulatory agencies including: NOAA, National Marine Fisheries Service (“NMFS”); New England Fisheries Management Council (“Council”); Mid-Atlantic Fisheries Management Council (“MAFMC”); and the Atlantic States Marine Fisheries Council (“ASMFC”). *See Rhode Island Commercial Fishing and Seafood Industries-The Development of an Industry Profile* at 96, Table 6.1 (Cornell Cooperative Extension Marine Program et al. eds., 2011) (available at <http://ccesuffolk.org/assets/Marine-photos/Marine-Pdfs/Final-Reports/RI-Profile-Final-2nd-Print.pdf>).

It is the Finfish sector managed by the Council, where Rhode Island will be impacted by the implementation of the Frameworks. In 2011, Point Judith, one of Rhode Island’s major commercial fishing ports, ranked as the fourth largest port in New England based on landings and third largest port based on value. *See* Cornell Cooperative Extension Marine Program, *Rhode Island Commercial Fishing and Seafood Industries- The Development of an Industry Profile* at 83 (2011). In the Fishing Year 2007, Point Judith had over \$2 million dollars in ground fish revenues, which represented 14% of this port’s total revenues from multispecies vessels. A.R. 855. Moreover, each year ground fish landings and revenues have increased in Rhode Island suggesting that Point Judith is becoming a more important port for landing multispecies vessels. A.R. 855. Although the Rhode Island fishing community is less dependent on ground fish revenues due its ability to offset losses with revenues from other fisheries, it has seen an increase in ground fish reliance in recent years and will continue to see an increase as a result of the opening of the Southern New England winter flounder stock. A.R. 856; *See* ecoRI News, DEM: R.I. Fisheries Healthier Than They Seem (March 3, 2013), available at <http://www>

.ecori.org/aquaculture/2013/3/3/dem-ri-fisheries-healthier-than-they-seem.html; *See also Sector Management Plan for the Finfish fishery*: Public Hearing Item #1: 2014, Rhode Island Department of Environmental Management, Division of Fish and Wildlife Marine Fisheries (Sept.18, 2013), available at http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/prop_secff.pdf. For now, it appears that Rhode Island will most likely escape the devastating impact that the Commonwealth is facing with the implementation of the Frameworks. However, it is clear that if the Secretary imposed the same draconian reductions upon Rhode Island's top commercial landings, the impact would be devastating to the Rhode Island Fishing community. This is why Rhode Island insists that the Secretary should take into consideration the economic and social effects of such reductions.

In closing, Rhode Island is well aware of the challenges and complexities associated with the management of our diverse marine fishery resources at both the state and federal level. As a result, Rhode Island has set forth a series of principles and policies that reflect the Ocean State's interest in balancing the conservation and management of its marine fisheries resources in conjunction with the socio-economic impact on its commercial fisheries industry. *See* Letter from Janet Coit, Director of Rhode Island Department of Environmental Management with attached document entitled Principles and Policies Governing Marine Fisheries Management in Rhode Island (Feb. 27, 2013) available at <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/policy.pdf>; *See also Rhode Island Commercial Fishing and Seafood Industries-The Development of an Industry Profile* at 3 (Cornell Cooperative Extension Marine Program et al. eds., 2011). Specifically, Rhode Island, has sought to maintain and support an economically strong and diverse fishing industry by enhancing flexibility and opportunity, promoting a stable fishery management regime, despite overlapping management regimes, implementing alternative

management strategies, minimizing regulatory constraints and enabling participants to fish in an efficient, cost effective, economically viable, environmentally ecologically sound manner. *See* Dir. Coit Ltr. with Principles & Policies, Sect. 5, Commercial Industry (Feb. 27, 2013). Rhode Island has consistently implemented these principles and policies by employing sound governance while at the same time balancing and supporting the interests of those who engage in the commercial fishing industry. *See* R.I. Gen. Laws § 20-2.1-9(2)(i)(C).³

Rhode Island has accomplished its success in the fishing regulatory efforts in compliance with the above by supporting and protecting industry related jobs while at the same time pursuing industry related employment opportunities associated with our diversified fisheries. *Id.* at Sect. 5. Rhode Island is therefore confident that the Secretary can achieve her regulatory responsibilities without denigrating her similar obligations under National Standards 16 U.S.C. 1851 (a) (8). Rhode Island will continue to promote sound governance by encouraging collaboration with our federal partners to improve existing regulations while at the same time urging the development of new flexible regulations that will balance the uncertain scientific data and environmental factors with socio-economic considerations.

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³ RIGL 20-2.1-9(2)(i)(C) When implementing a system for commercial fishing licenses...in complementing federal and regional management programs and the reciprocal arrangements with other states the Director (of RIDEM) shall consider the effect the impact of the limitation on persons engaged in commercial fishing on: Present participation in the fishery, including ranges and average levels of participation by different types of classes of participants; Historical fishing practices in, and dependence on, the fishery; The economics of the fishery; The potential effects on the safety of human life at sea; The cultural and social framework relevant to the fishery and any affected fishing communities; and any other relevant considerations that the Director finds in the rule making process.

V. CONCLUSION

Amicus urges the Court to grant the prayer for relief requested by the Plaintiff and Intervenor in this matter.

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Dated: December 3, 2013

CERTIFICATE OF SERVICE

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

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