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New England Fishery Management Council

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## **Documents for the Mixed Stock Exception Discussion**



**DRAFT**

**Consideration and Analysis of the Application of the  
Mixed-Stock Exception to Ending Overfishing and its  
Applicability to Framework 42 to the Northeast  
Multispecies Fishery Management Plan**

**January 2009**

ATTACHMENT A TO SECOND  
DECLARATION OF PATRICIA KURKUL

This analysis has been prepared in response to a Memorandum and Order, issued on January 26, 2009, by Judge Edward F. Harrington of the U.S. District Court, District of Massachusetts, in the matter of Civil Action No. 06-12110-EFH. It is intended to seriously consider and analyze the applicability of a provision in the National Standard 1 Guidelines known as the “mixed-stock exception,” as it relates to Framework 42 (FW 42) to the Fishery Management Plan for the Northeast Multispecies Fishery (FMP). FW 42 was developed by the New England Fishery Management Council (Council) in 2005, and approved and implemented by NOAA’s National Marine Fisheries Service (NMFS) in 2006, primarily to implement biennial adjustments to the FMP. Such adjustments were required by a previous Council amendment to the FMP (Amendment 13) to adjust fishing mortality rates as necessary to keep the rebuilding of stocks of overfished multispecies (also known as groundfish) on their statutorily based schedules. The following analysis considers the mixed-stock exception’s provisions, its relation to statutory provisions, and its potential applicability as an alternative that could have lessened negative economic and community impacts of the measures developed and adopted in FW 42.

## Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary statute providing authority for fisheries management in the U.S. Exclusive Economic Zone (EEZ). The MSA, in section 301, established 10 national standards for fishery conservation and management, including National Standard 1 (MSA section 301(a)(1)) which requires that “conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield [OY] from each fishery for the United States fishing industry.” In addition, section 301(b) requires that “The Secretary [of Commerce] shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.” As required by statute, NMFS established such guidelines on behalf of the Secretary and has periodically amended them, as necessary, to address changes to the MSA and to provide the public with further information and opportunity to comment on the agency’s interpretation of the national standards and their practical application. The national standard guidelines (guidelines), though not having the force and effect of law, are codified in subpart D of 50 CFR part 600, which contains general provisions for management of fisheries under MSA authority.

In addition to the National Standard Guidelines, the MSA includes other specific mandates concerning ending overfishing and rebuilding overfished fish stocks. MSA Section 303(a)(1) (A), contained in the Required Provisions Section of the MSA, requires that any fishery management plan must contain measures that are “necessary and appropriate to prevent overfishing and rebuild overfished stocks . . . .” In 1996, Congress substantially amended the MSA and added MSA Section 304(e) which mandates the rebuilding of overfished stocks in most cases within 10 years.

## 1998 Guidelines on Mixed-Stock Exception

The Sustainable Fisheries Act (SFA), which was passed in 1996, made numerous and substantive amendments to the MSA. A key change was that if a fish stock was determined to be overfished (a stock is overfished if its overall biomass, or, stock size, is too low), the Council and NMFS were put under time constraints to implement measures to prevent or (i.e., fishing at too high a rate) and to rebuild the fish stock in no less than 10 years in most cases. As a result of the passage of the SFA, NMFS implemented major revisions to the guidelines in 1998, including revisions to the guidelines for National Standards 1 which deals with optimum yield and prevention of overfishing. NMFS also made revisions to guidelines for National Standards 2 (scientific information), 4 (allocations), 5 (efficiency), and 7 (costs and benefits); and added guidelines for newly established National Standards 8 (communities), 9 (bycatch), and 10 (safety of life at sea).

Changes to the National Standard 1 guidelines reflected the SFA's new and more stringent requirements to end overfishing and rebuild fish stocks within specified, statutory timeframes. The SFA did not change National Standard 1 which requires that any fishery management plan must prevent overfishing, while achieving optimum yield on a continuing basis, with no mention of rebuilding fish stocks. But, the SFA added a separate section, 304 (e), that stated if a fish stock were determined to be overfished, the Council and NMFS were required to develop and adopt a plan to not only prevent or end the overfishing of that stock but, also to rebuild the stock within the timeframe mandated by the SFA. One of the changes to the National Standard 1 guidelines was the addition of a provision, known as the mixed-stock exception found at 50 CFR 600.310(d)(6), that was intended to maintain some flexibility in managing mixed-stock fisheries (i.e., fisheries that catch and land several stocks of fish using the same gear types and in the same general areas) by allowing a limited exception to the requirement of National Standard 1 regarding preventing overfishing as follows:

(6) Exceptions. There are certain limited exceptions to the requirement to prevent overfishing. Harvesting one species of a mixed-stock complex at its optimum level may result in the overfishing of another stock component in the complex. A Council may decide to permit this type of overfishing only if all of the following conditions are satisfied:

(i) It is demonstrated by analysis (paragraph (f)(6) of this section) that such action will result in long-term net benefits to the Nation.

(ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.

(iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA [Endangered Species Act].

By its plain terms, then, the mixed stock exception applies only to overfishing requirements, not rebuilding requirements. Accordingly, the applicability of the mixed-stock exception is necessarily constrained by the overriding measures, as described above, requiring overfished stocks to be rebuilt within statutory timeframes. The revised National Standard 1 guidelines explicitly recognize this at 50 CFR 600.310(e)(3)(ii) which requires that ,if a stock is

overfished, the purpose of an action must be to rebuild the stock within the appropriate timeframe. When the mixed-stock exception is interpreted in the context of these overarching rebuilding requirements, as it must be, it is clear that the exception is not applicable to stocks determined to be overfished if the application of the exception jeopardizes the requirement to rebuild such stocks within the statutorily mandated timeframes. NMFS consistently provided this guidance as it applied to overfished stocks during the development of FW 42. Therefore, a threshold requirement to even considering the applicability of the mixed-stock exception to an overfished stock is whether such stock could still be rebuilt in the timeframe mandated by the MSA. If not, then the mixed-stock exception is not applicable and there is no justification to consider it further, and, therefore, no purpose would be served in considering the three conditions specified in the National Standard 1 Guidelines

Further, there is no requirement in statute, or in the guidelines, that a Fishery Management Council (Council) must consider or analyze the mixed-stock exception for any of their management actions--it was provided as one tool that a Council, at its discretion, may consider, under special circumstances, if it chooses to be more flexible in its response to ending overfishing of one or more stocks in a mixed-stock fishery. But, under the 1998 guidelines, the mixed-stock exception is justified for overfished stocks only if it can demonstrate that the exception would not be inconsistent with rebuilding requirements and, then, only if the three conditions provided in the guidelines are satisfied.

#### 2009 Guidelines on Mixed-Stock Exception

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), was signed into law on January 12, 2007. The MSRA included new requirements for preventing and ending overfishing and rebuilding fisheries. Notably, the MSRA revised the requirement concerning ending overfishing by mandating that, for stocks that are overfished, the Council and NMFS must develop a plan to end overfishing “immediately.” This provision contrasts to the SFA provision which did not include the term “immediately” in the context of ending overfishing. As a result, NMFS proposed additional revisions to the National Standard 1 guidelines on June 9, 2008 (73 FR 32526), to integrate this new requirement and other new requirements with existing provisions related to overfishing, rebuilding overfished stocks, and achieving OY. The new National Standard 1 guidelines include revisions to the mixed-stock exception language which more clearly articulate that rebuilding mandates cannot be jeopardized by the mixed-stock exception. The guidelines on the mixed-stock exception, with the pertinent language underlined, as contained in the final rule published on January 16, 2009, and scheduled to become effective on February 17, 2009 (74 FR 3178; Jan. 16, 2009), now read as follows:

(m) Exceptions to requirements to prevent overfishing. Exceptions to the requirement to prevent overfishing could apply under certain limited circumstances. Harvesting one stock at its optimum level may result in overfishing of another stock when the two stocks tend to be caught together (This can occur when the two stocks are part of the same fishery or if one is bycatch in the other's fishery). Before a Council may decide to allow this type of overfishing, an analysis must be performed and the analysis must contain a justification in terms of overall benefits, including a comparison of benefits under alternative management measures, and an analysis of the risk of any stock or stock complex falling below

its MSST. The Council may decide to allow this type of overfishing if the fishery is not overfished and the analysis demonstrates that all of the following conditions are satisfied:

- (1) Such action will result in long-term net benefits to the Nation;
- (2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur; and
- (3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its Bmsy more than 50 percent of the time in the long term

Thus, the newly revised mixed-stock exception explicitly reflects, at section 600.310(m)(3), NMFS' interpretation that it does not exempt fish stocks from rebuilding requirements. In the response to comments found in NMFS's 2009 guideline amendments, NMFS further clarified that "if any stock, including those under the mixed-stock exception, were to drop below its Minimum Stock Size Threshold (referring to a level helping to define when a fish stock is overfished), it would be subject to the rebuilding requirements of the MSA, which require that overfishing be ended immediately and that the stock be rebuilt . . ." (see, response to Comment 89). That is, if a stock is overfished, it is not eligible for the mixed-stock exception.

Thus, neither the May 1, 1998, guidelines, nor the January 16, 2009, guidelines, provide any exception to the rebuilding of overfished stocks within statutory timeframe requirements. To provide such an exception would imply that the guidelines, which do not have the force and effect of law, supersede statutory requirements, which do have the force and effect of law. In short, a threshold criterion for applying the mixed-stock exception that must be satisfied under the 1998 and 2009 guidelines is that the rebuilding of a stock targeted for the mixed-stock exception may not be jeopardized by allowing continued overfishing on such stock.

#### History of Northeast Multispecies Management Leading to Framework 42

To understand the applicability of the mixed-stock exception to any particular stock managed under FW 42, it is necessary first to summarize the history of Northeast multispecies management leading to FW 42.

As previously established, Northeast groundfish are managed by the Council and NMFS, under the authority of the MSA, through the FMP. The original FMP was approved on July 17, 1986, and implemented on September 19, 1986. It has since been amended numerous times, both through FMP amendments and framework adjustments, such as FW 42.

There are 19 stocks of groundfish managed under the FMP: Gulf of Maine (GOM) cod, Georges Bank (GB) cod, GOM haddock, GB haddock, pollock, white hake, redfish, Atlantic halibut, ocean pout, windowpane flounder north, windowpane flounder south, American plaice, witch flounder, GOM winter flounder, GB winter flounder, Southern New England (SNE)/Mid-Atlantic (MA) winter flounder, GOM/Cape Cod (CC) yellowtail flounder, GB yellowtail flounder, and SNE/MA yellowtail flounder. A stock is a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

The management of Northeast groundfish in recent years has largely built upon the Council's Amendment 13 to the FMP, which was initiated by the Council in 1999, partially approved by NMFS on behalf of the Secretary on March 18, 2004, and implemented on May 1, 2004, through a final rule (April 27, 2004; 69 FR 22906). Amendment 13 was a major revision of the management program for groundfish and was intended to end overfishing on all groundfish stocks and to rebuild all groundfish stocks that were at that time considered overfished. It also contained a variety of measures applicable to commercial and recreational fishing that were intended to address impacts of the fishery on Essential Fish Habitat, minimize bycatch, implement improved reporting and recordkeeping requirements, and address other conservation and management issues.

The focal point of Amendment 13 was to end overfishing and rebuild those stocks that were overfished, within the statutory timeframes established by the MSA. The analysis prepared by the Council and its advisors in the development of Amendment 13 (Final Supplemental Environmental Impact Statement and Initial Regulatory Flexibility Analysis) listed the overfished stocks that required formal rebuilding programs to be the following: GOM cod, GB cod, GOM haddock, GB haddock, CC/GOM yellowtail flounder, SNE/MA yellowtail flounder, American plaice, white hake, SNE/MA winter flounder, redfish, windowpane flounder south, ocean pout, and Atlantic halibut. Section 3.2 of the document, Proposed Rebuilding Programs for Overfished Stocks, described the Council's approach in rebuilding the overfished stocks through the measures in Amendment 13, as follows:

The M-S Act and NSGs [National Standard Guidelines] require the Council to define formal rebuilding programs or plans for stocks that are below the minimum biomass threshold (overfished). These programs define how the Council will rebuild those stocks to the target biomass within the statutory time frame. The Council has approached this issue in two steps. The first step, described in this section, is to identify the fishing mortality strategy that the Council will use as the basis for management measures that will rebuild the stock. The second step is to adopt management measures to achieve these strategies. The formal rebuilding program consists of both elements – they should not be viewed independently. Once a stock is defined as overfished, a rebuilding program must be continued until the stock reaches the target biomass. During the rebuilding programs, adjustments can be made through the annual adjustment process based on the condition of the stock and consistent with this Amendment, as long as statutory requirements are met.

The Council thus clearly distinguished between the statutory requirements to rebuild overfished stocks until the target biomass is reached, and the fishing mortality rate decisions relative to ending overfishing. The Amendment 13 analysis goes on to state, in section 3.2.1, Formal Rebuilding Programs, the following:

The lack of a defined formal rebuilding program for stocks that are not overfished should not be construed as meaning that the Council is ignoring these stocks. The Council will insure fishing mortality remains below the fishing mortality threshold for these stocks. In all cases, these thresholds are defined as  $F_{MSY}$  or a suitable proxy for  $F_{MSY}$ . As noted by Restrepo *et al.* (1998), " $F_{MSY}$  is the fishing mortality rate that maximizes long-term yield under a constant-F [constant fishing mortality rate] policy, and  $B_{MSY}$  is the equilibrium biomass expected when fishing constantly at  $F_{MSY}$ ." Controlling fishing mortality below the threshold should result in stock size fluctuating around the estimate of  $B_{MSY}$  over the long term. This is



clearly shown in the age-based projections for stocks that are not under formal rebuilding programs (see section 5.2.3). This approach is consistent with both the M-S Act and the National Standard 1 Guidelines.

The Council thus clearly articulated in its analysis that it intended to implement rebuilding plans for all of the overfished groundfish stocks, in conformance with provisions of the MSA and the guidelines, and consistent with the statutorily mandated rebuilding deadlines. It also recognized that even stocks that are not overfished need to have controls on fishing mortality to ensure that their stock levels are increased to, and/or maintained at, levels that can provide long-term yields approximating MSY.

The Council's analysis then goes on to address the related, but somewhat different issue of ending overfishing. Section 3.2.3.1.1, Phased fishing mortality reduction, explains the Council's rationale in applying different approaches to ending overfishing (as opposed to rebuilding) of stocks in the multispecies fishery, as follows:

This strategy [the phased approach] steadily reduces fishing mortality during the rebuilding period in order to achieve the target biomass with a median probability. When the stock achieves its target biomass, the formal rebuilding program adopted because the stock was overfished will be completed. Once the stock achieves the target biomass, fishing mortality targets will be based on the status determination criteria and MSY control rule. The fishing mortality for the rebuilding program may be adjusted if there are substantial changes in stock status and recruitment from those used in the long-term projections used to estimate this fishing mortality. Stock condition should be evaluated over at least a two-year period to smooth fluctuations that are the result of variability rather than true trends. A wide variety of variables will be considered to determine stock condition: fishing mortality and biomass (including the uncertainty around the estimates), recruitment patterns, environmental conditions, etc. The phase reduction strategy will be used for the following stocks:

- GB cod
- American plaice
- CC/GOM yellowtail flounder
- SNE/MA yellowtail flounder
- White hake

Thus, the Council chose to use the flexibility in the MSA and the guidelines to end overfishing of different groundfish stocks at different rates in this mixed-stock fishery. It did not, however, compromise the rebuilding requirements or deadlines in doing so. In essence, this approach achieves the same results as the mixed-stock exception approach by ramping-down fishing mortality (rather than ending it immediately) for certain stocks in the fishery, to avoid having to implement even more stringent measures in the short term.

Importantly, Amendment 13 also established a biennial FMP adjustment process that requires the Council to review the fishery periodically, using the most current scientific information available, recommend target total allowable catches (TACs), and recommend to NMFS any changes to the management measures necessary to achieve the goals and objectives of the FMP.

To satisfy the biennial adjustment requirement of Amendment 13, the Council initiated development of FW 42. In support of FW 42, a peer reviewed stock assessment update, by the Groundfish Assessment Review Meeting (GARM) II, was completed for all 19 stocks managed under the FMP, in August 2005. GARM II evaluated each managed stock relative to the

applicable Amendment 13 biological reference points, to determine overfishing and overfished status ( $F_{msy}$  and  $B_{msy}$ , respectively). The Council's Groundfish Plan Development Team (PDT) then performed an evaluation of the fishery based upon the results of GARM II and other available information to determine the stocks for which an adjustment in management measures was required to ensure that the fishing mortality rate levels were consistent with those required under the rebuilding plans established under Amendment 13.

This analysis indicated that the fishing mortality rates of five groundfish stocks were higher than the targets required by the rebuilding programs and fishing mortality on GB winter flounder was higher than  $F_{msy}$ , thereby necessitating a reduction in fishing mortality to prevent overfishing. As a result, FW 42 addressed Amendment 13 objectives by reducing fishing mortality on six groundfish stocks: GOM cod, CC/GOM yellowtail flounder, SNE/MA yellowtail flounder, SNE/MA winter flounder, GB winter flounder, and white hake.

In the development of FW 42, the Council strove to address a broad range of issues, including new reporting requirements, greater flexibility in using and leasing days-at-sea (DAS), special programs to allow targeting of healthy stocks, and gear modifications and exemptions for their use. Specifically, FW 42 maintained the Amendment 13 default DAS reductions for the 2006 fishing year; specified target TACs and Incidental Catch TACs for the 2006, 2007, and 2008 fishing years; implemented additional Vessel Monitoring System (VMS) requirements for NE multispecies DAS vessels; implemented differential DAS counting in specific areas of the GOM and SNE; implemented new commercial trip limits for several NE multispecies; renewed and modified the Regular B DAS Program, including the rules pertaining to monkfish vessels; renewed and modified the Eastern U.S./Canada Haddock Special Access Program (SAP); renewed the DAS Leasing Program; modified the Closed Area (CA) I Hook Gear Haddock SAP; implemented the GB Cod Fixed Gear Sector; provided flexibility for vessels to fish inside and outside of the Eastern U.S./Canada Management Area on the same trip; modified reporting requirements for Special Management Programs (U.S./Canada Management Area; Regular B DAS Program; CA I Hook Gear Haddock SAP; CA II Yellowtail Flounder SAP, and the Eastern U.S./Canada Haddock SAP Pilot Program); modified the DAS Transfer Program; modified the trawl codend mesh size requirement in the SNE Regulated Mesh Area; modified NMFS's authority to adjust certain possession limits; and modified the recreational possession restrictions and size limits for GOM cod.

#### Consideration of Measures to Reduce Fishing Mortality Rates and Applicability of the Mixed-Stock Exception to Fish Stocks Addressed by FW 42

The issue at the basis of this analysis is the response of the Council in FW 42 to the necessary reductions of fishing mortality rates for the six stocks listed above, which were determined, on the basis of best available scientific information, to need such reductions to accomplish rebuilding required by the MSA and Amendment 13. The Council considered a range of effort controls to achieve the fishing mortality rate reductions, including simple, large DAS reductions (up to 40%); and combinations of DAS reductions, trip limits, and either differential DAS counting or a minimum DAS charge of 12 or 24 hours. After deliberation, the primary measure

the Council proposed in FW 42 to achieve the necessary reductions on those stocks most in need were differential DAS counting areas in the GOM and SNE. The GOM area was designed to provide the necessary mortality reductions for GOM cod, CC/GOM yellowtail flounder, and white hake; and the SNE area was designed to do the same for SNE/MA yellowtail flounder, SNE/MA winter flounder, and white hake (white hake occurs over a broad geographic area, and thus was provided benefits from both differential DAS areas). Because the majority of the landings for the six stocks in need of reductions came from the proposed differential DAS counting areas, this is where the reduction efforts were focused.

Five of the stocks that FW 42 was designed to address were, at the time the framework was developed, considered overfished, and were (and continue to be) under rebuilding programs established by Amendment 13 (GARM II indicated that GB winter flounder was not overfished, but was subject to overfishing; the most recent assessment GARM III indicated that GB winter flounder is now overfished and subject to overfishing). They also were (and continue to be) bound by the MSA requirements to rebuild within the statutory timeframes, which means, for most stocks, they must be rebuilt by 2014. The following table provides the fishing mortality rate reductions for these five stocks that were determined to be necessary in FW 42, and the current size of those stocks (i.e., their biomass), relative to their rebuilt levels, as calculated by GARM II, for FW 42, and most recently by GARM III for the Council’s Amendment 16, which is still under development.

Mortality Reduction Targets and Biomass Levels for Stocks Affected by the Differential DAS Counting Areas Established by FW 42

Stock	FW 42 Mortality Reduction Targets	Biomass Status (% B <sub>MSY</sub> )**	
		GARM II (2004)	GARM III (2007)
GOM Cod	32%	24.8%	58.2%
CC/GOM yellowtail flounder	46%	8.7%	24.7%
SNE/MA yellowtail flounder	55%	1.0%	12.8%
SNE/MA winter flounder	8%	13.1%	8.7%
White hake*	13%	39.1%	35.2%

\*White hake biomass was estimated using an index-based assessment in 2004.

\*\*B<sub>MSY</sub> is the level of a rebuilt stock, and the target of a stock’s rebuilding program.

As reflected in the table above, since the implementation of FW 42, GARM III was conducted (August 2008) to update the status of all of the managed groundfish stocks, and concluded that the majority of groundfish stocks continue to require substantial reductions in fishing mortality in order to be rebuilt in the timeframes mandated by Amendment 13 and the MSA. At least 13 of the 19 stocks are considered to be overfished: GB cod, GB yellowtail flounder, SNE/MA yellowtail flounder, GOM/CC yellowtail flounder, SNE/MA winter flounder, white hake, witch flounder, GB winter flounder, windowpane flounder north, ocean pout, white hake, pollock and

Atlantic halibut. In addition, at least 12 of the 19 stocks are experiencing overfishing: GB cod, GB yellowtail flounder, SNE/MA yellowtail flounder, CC/GOM yellowtail flounder, SNE/MA winter flounder, white hake, witch flounder, GB winter flounder, windowpane flounder north, GOM cod, windowpane flounder south, and pollock. Based on uncertainty in the results of GARM III, GOM winter flounder may or may not be experiencing overfishing. Additional actions will be necessary, as a result, and the Council is finishing its development of Amendment 16 to implement the necessary measures.

Based on the analysis in FW 42, all of the targeted stocks were significantly below their overfished thresholds and required very restrictive measures to ensure they would be rebuilt by 2014. Because all of these stocks are unavoidably harvested together to a greater or lesser extent, to have allowed overfishing, at a level above that determined to be necessary to rebuild under Amendment 13, on any one of these stocks to justify a less restrictive measure would have meant that none of them would likely be rebuilt by 2014. Thus, under either the 1998 or 2009 guidelines, the mixed-stock exception was not applicable because neither the Council nor NMFS could show that the threshold criterion regarding rebuilding requirements could have been satisfied. Under best scientific information currently available as reflected in GARM III, all of these stocks but GOM cod remain overfished. Therefore, for the same reason, it is not possible for the threshold criterion regarding rebuilding requirements to be satisfied even under current conditions. If this threshold criterion cannot be met there is no purpose served in examining any of the other criteria for applying the mixed-stock exception.

#### Summary and Conclusions of Analysis

Based on the above analysis, the findings can be summarized as follows:

- The mixed-stock exception, under the 1998 and 2009 guidelines, creates an exception, based on strict criteria, only for ending overfishing, but not for rebuilding requirements. The MSA mandates rebuilding of overfished stocks in most cases within 10 years. There is a difference between the requirements of the statute (MSA) to rebuild overfished stocks (i.e., those with too low a stock size) within explicitly defined deadlines, and the statutory provisions to end overfishing (i.e., those with excessive fishing mortality), which do not specify defined timelines for doing so. In the latter case, NMFS's guidelines provide some limited flexibility as to when overfishing must be ended. This is the "mixed-stock exception."
- The statutory requirements to rebuild overfished stocks are necessarily constraining on the mixed-stock exception. Therefore, the mixed-stock exception, as defined in the 1998 guidelines, is justified for overfished stocks only if it can be demonstrated that the exception would not be inconsistent with rebuilding requirements and, then, only if the three conditions provided in the guidelines are satisfied. The explicit intent of the 2009 guidelines is that any stock that is overfished is not eligible for the mixed-stock exception.
- Given the requirement regarding rebuilding overfished stocks by 2014, applicability of the mixed-stock exception is subject to the threshold criterion that allowing overfishing to

continue on any stock will not jeopardize meeting such rebuilding requirements for that stock.

- To have allowed overfishing, at a level above that determined to be necessary to rebuild under Amendment 13, on any one of these stocks to justify a less restrictive measure would have meant that none of them would likely be rebuilt by 2014.
- Thus, under either the 1998 or 2009 guidelines, the mixed-stock exception was not a viable alternative for the Council or NMFS to consider or to implement in FW 42 to mitigate impacts of fishing regulations because neither the Council nor NMFS could have shown that the threshold criterion regarding rebuilding requirements would have been met.



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

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COMMONWEALTH OF	)	
MASSACHUSETTS, by its DIVISION OF	)	
MARINE FISHERIES,	)	
	)	Case No. 06-cv-12110 (EFH)
and,	)	
	)	
STATE OF NEW HAMPSHIRE, by its	)	
FISH & GAME DEPARTMENT,	)	
DIVISION OF MARINE FISHERIES,	)	<b>SECOND DECLARATION</b>
	)	<b>OF PATRICIA A. KURKUL</b>
v.	)	
	)	
CARLOS GUTIERREZ, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

I, PATRICIA A. KURKUL, declare as follows:

1. I am the Northeast Regional Administrator of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (“NOAA Fisheries”), Gloucester, Massachusetts. In this capacity, I am responsible for the development of policy and the implementation of management programs for the living marine resources of the northeastern United States. I represent the Secretary of Commerce on the New England Fishery Management Council (“Council”) and in other regional activities and am familiar with all activities undertaken by the Council and my staff in preparation and implementation of management measures regarding fisheries of the northeastern United States, including all multispecies (more commonly referred to as “groundfish”) under the Northeast Multispecies Fishery Management Plan (“FMP”). I supervise the personnel in the Region who are charged with the implementation of fishery management plans and who are involved with Council staff in developing and analyzing management measures under the multispecies FMP.

2. The purpose of this declaration is to explain the context and background to the preparation of the report, being submitted to the court, entitled, “Further Consideration and Analysis of the Mixed-Stock Exception to Ending Overfishing and Its Applicability to Framework 42 to the Northeast Multispecies Fishery Management Plan.”

3. The Court’s Order on January 26, 2009 required the defendants in this lawsuit to conduct a review process consisting of a “serious consideration and analysis of the Mixed-Stock Exception.” In footnote 4 to the Order, the court went on to say that, “[t]he New England fishery Management Council shall conduct this review process under the supervision of NMFS and Commerce.” Because neither NMFS nor Commerce “supervise” the New England Fishery Management Council (Council) (see, Defendants’ Memorandum in support of their Motion to Alter or Amend Judgment, pp 4-5, and, the Notice accompanying this declaration), it was determined that the only practical way to comply with the Order, at least in spirit if not the letter



of the Order, was for the Defendants to conduct the review process themselves, prepare a draft report of the conclusions of the review process and present the draft report to the Council for its endorsement. The only meeting scheduled by the Council within the 60-day window in which the court ordered the review process to be completed, was at the Council's meeting scheduled for February 9-11, 2009 (the next scheduled meeting is April 7-9, 2009, which is beyond the 60 day due date). Therefore, I directed my staff to conduct the review process and complete a draft report of its conclusions in time for the Council to review it at its February meeting. The initial version of the draft report was e-mailed to the Council chairman, John Pappalardo and to the Executive Director of the Council, Paul Howard, for their review and comments on February 2, 2009. The Executive Director e-mailed back comments later that day. Taking into account these comments and others from NOAA/NMFS, another draft of the report was prepared. This version of the draft report was sent, on February 4, 2009, to the Council's Executive Director with a request to distribute the draft report to all Council members for discussion at the February Council meeting. The version of the draft that was distributed to the Council for its consideration and endorsement is attached hereto as Attachment A.

5. The Council set aside part of the morning of February 10 for consideration of discussion about the Court Order and the draft report. On that day, Gene Martin, of the Office of General Counsel, NOAA, summarized the contents and conclusions of the draft report and explained that NMFS was requesting an adoption of the draft report by the Council so that it could be submitted to the Court in compliance with the Court Order.

6. At the conclusion of the summary of the draft report, David Preble, Council member from Rhode Island moved "that the Council adopt the draft the analysis of the mixed-stock exception as is analysis under the summary judgment of January 26, 2009." Subsequently, Dr. David Pierce, the Commonwealth of Massachusetts' representative and Deputy Director of the

Division of Marine Fisheries for Massachusetts, moved to substitute the original motion with the following:

that the Council disagree with the conclusions of the NMFS report to the court that the mixed stock exception cannot be applied to the northeast multispecies fishery and request NMFS reconsider its position and make it consistent with congressional intent that: 1) optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt.

7. In introductory comments leading up to his motion, Dr. Pierce indicated that Congressional intent regarding achieving optimum yield and the use of the mixed-stock exception could be found on page 1 of the Magnuson-Stevens Conservation and Management Act as compiled and published by NMFS. See, Attachment B. This page sets out some of the findings by Congress regarding the need for the Act. Dr. Pierce's justification for this motion can be heard by listening to the tape of the meeting found at the Council's website through the following link: <http://www.nefmc.org/actions/index.html>.<sup>1</sup> An extensive discussion was held on this substitute motion. No other specific example of Congressional intent was offered by the Council. Dr. Pierce's motion was eventually passed on an 11-6 vote.

8. Subsequent to the motion passing, the Council discussed whether it should undertake any further analysis of the mixed-stock exception in light of the Court's Order. The Council decided that given time constraints on completing other actions, it would not undertake any further analysis and, instead, should send a letter to NMFS indicating the outcome of the substitute motion. This letter is attached as Attachment C. In the letter, the Council requests that NMFS should consider the motion in finalizing the report required by the Court.

9. Because the Council has indicated that it will not conduct any further analysis of the mixed-stock exception, it was decided that the only way NMFS could fulfill the Order's mandate

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<sup>1</sup> To access: a) scroll down to Council Meeting Audio; b) click on the February 9-11, 2009 meeting; c) click on #7 Framework 42 Lawsuit Discussion,; and d) move the control button to just before the halfway point of the taped segment.

for a review of the exception in a timely manner was to revise the draft report taking into account the Council's motion, as requested by the Council in its letter. This revised report is attached as Attachment D.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gloucester, Massachusetts, on this 19<sup>th</sup> day of February,  
2009.



---

Patricia A. Kurkul  
Regional Administrator, Northeast Region, NMFS



JOHN C. CRUDEN, Acting Assistant Attorney General  
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Attorneys for Federal Defendants

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

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COMMONWEALTH OF  
 MASSACHUSETTS, by its DIVISION OF  
 MARINE FISHERIES,  
  
 and,  
  
 STATE OF NEW HAMPSHIRE, by its  
 FISH & GAME DEPARTMENT,  
 DIVISION OF MARINE FISHERIES,  
  
 Plaintiffs,  
  
 v.  
  
 OTTO WOLFF, Acting Secretary of  
 Commerce, et al.,  
  
 Defendants.

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Case No. 06-cv-12110 (EFH)

**FEDERAL DEFENDANTS’  
 NOTICE OF CONSIDERATION OF  
 MIXED-STOCK EXCEPTION**

Federal Defendants hereby notify the Court and the parties of the status of the National Marine Fisheries Service's ("NMFS") consideration of the mixed-stock exception, set forth in the guidelines for National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"). As Federal Defendants' have complied with the Court's Order, Federal Defendants also respectfully request that the Court lift the injunction suspending the 2:1 DAS counting as specified in the Court's February 17, 2009 Order.

Pursuant to the Court's January 26, 2009 Memorandum and Order, Dkt. No. 38 ("Order"), Federal Defendants are required to analyze the applicability of the mixed-stock exception and file a report of their findings with the Court no later than March 27, 2009. Id. at 7. The Court ordered the New England Fishery Management Council ("Council") to conduct the review of the mixed-stock exception "under the supervision of NMFS and Commerce." See id., n. 4.

As explained in the attached Second Declaration of Patricia A. Kurkul, NMFS Northeast Regional Administrator, ("Second Kurkul Declaration"), shortly after the Court issued its Order, NMFS prepared a draft report analyzing the applicability of the mixed-stock exception to Framework 42. See id. at ¶ 4. NMFS presented its draft report to the Council at a February 10, 2009 meeting, and asked the Council to endorse the report. See id. at ¶ 5. After discussion, the majority of Council members voted to pass a motion that disagreed with NMFS' determination that the mixed-stock exception cannot be applied to the northeast multispecies fishery, and which requested that NMFS reconsider its position in light of the Council's view of congressional intent. See id. at ¶¶ 6-7. The Council decided that, in light of time constraints, it would not undertake any further analysis of the mixed stock exception. Id. at ¶ 8.

NMFS reconsidered the conclusions of the draft report, as the Council requested, and has prepared a revised report, filed herewith as Attachment D to the Second Kurkul Declaration. In the revised report, NMFS prepared an Addendum specifically to address the passage of the Council's motion that disagreed with the draft NMFS report. In the Addendum NMFS concluded that the premise of the Council's motion – *i.e.* the Council's interpretation of Congressional intent – was not correct and that the analysis contained in the revised report justified NMFS' conclusion that the mixed-stock exception cannot apply to this fishery.

As the Addendum explains, the mixed-stock exception applies only to the Magnuson-Stevens Act requirement for ending overfishing, and not to the requirement to rebuild overfished stocks. See Second Kurkul Decl., Attachment D at 11. Thus, the mixed-stock exception may only be applied to overfished stocks if: (a) the exception would be consistent with rebuilding requirements; and (b) the conditions stated in the guidelines are satisfied. See id.<sup>1/</sup> Therefore, as

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<sup>1/</sup> Under the version of the Magnuson-Stevens Act National Standard 1 Guidelines ("Guidelines") implemented in 1998, the Council could permit overfishing of one stock in a multispecies fishery in order to permit harvest of another species at its optimum level only if:

- (I) It is demonstrated by analysis . . . that such action will result in long-term net benefits to the Nation.
- (ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.
- (iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA.

50 C.F.R. § 600.310(d)(6). On January 16, 2009, NMFS published new Guidelines that became effective on February 17, 2009. See 74 Fed. Reg. 3178 (Jan. 16, 2009). The 2009 Guidelines contain a revised mixed-stock exception, which clarifies that the exception cannot be employed to exempt stocks from rebuilding requirements:

Before a Council may decide to allow this type of overfishing, an analysis must be performed and the analysis must contain a justification in terms of overall benefits,

communicated to the Council, NMFS has determined that because neither the Council nor NMFS could make the required threshold showing that rebuilding requirements could be met if the mixed-stock exception were employed, under either the 1998 Guidelines or the 2009 Guidelines, applying the mixed stock exception was not a viable alternative for Framework 42. See id. at 10-12. As further support for its position that the mixed-stock exception could not be used to the detriment of the existing rebuilding targets, the revised report cites to many judicial opinions issued in Magnuson Act cases which support the principle that if measures designed to mitigate impacts on the fishing industry would jeopardize a fishery's ability to meet conservation objectives, such as rebuilding requirements, then conservation measures must dictate the outcome. See, Attachment D to Second Kurkul Declaration, at 4 n.2.

As explained above, after noting its disagreement with the NMFS draft report, the Council did not undertake an independent consideration of the applicability of the mixed-stock

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including a comparison of benefits under alternative management measures, and an analysis of the risk of any stock or stock complex falling below its [Minimum Stock Size Threshold ("MSST")]. The Council may decide to allow this type of overfishing if the fishery is not overfished and the analysis demonstrates that all of the following conditions are satisfied:

- (1) Such action will result in long-term net benefits to the Nation;
- (2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur; and
- (3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its Bmsy more than 50 percent of the time in the long term.

Id. at 3213.



exception at its February 10, 2009 meeting. See Second Kurkul Decl. at ¶ 9. Although NMFS has reconsidered its report, as requested by the Council, the Council will not have an opportunity to consider the revised report prior to the Court’s March 27, 2009 deadline, because the Council’s next scheduled meeting is April 7-9, 2009. See id. at ¶ 4. Nor can NMFS order the Council to undertake a review of the revised report. As Federal Defendants have previously explained, NMFS has no authority to require the Council to take action, but may only request that the Council take its report into consideration. See Federal Defendants’ Memorandum in Support of Federal Defendants’ Motion to Alter or Amend the Court’s Order and in Support of Motion for Stay Pending Resolution of Motion, Dkt. No. 40 (February 2, 2009) (“Memorandum”), at 4-5.

No provision of the Magnuson-Stevens Act gives NMFS the authority to compel the Council to consider particular measures. Through the Magnuson-Stevens Act, Congress delegated to the Secretary of Commerce “broad authority to manage and conserve coastal fisheries,” and created independent regional fishery management councils to assist the Secretary in carrying out specific management and conservation duties. Kramer v. Mosbacher, 878 F.2d 134, 135 (4th Cir. 1989). A council’s “principal task is to prepare fishery management plans [“FMPs”] for its area, which must ‘assess and specify the present and probable future condition of, and the maximum sustainable yield’ of a fishery.” Id. (quoting 16 U.S.C. §§ 1852, 1853). Pursuant to the Magnuson-Stevens Act, NMFS approves, partially approves, or disapproves FMPs developed by a council and implements the plans through regulations. See 16 U.S.C. § 1854(a), (b). The council submits the FMP to NMFS along with proposed regulations that the council “deems necessary or appropriate” to implement the FMP or FMP amendment. See id. §

1853(c). Both the FMP or amendment and any necessary implementing regulations are subject to public review and comment. See id. § 1854(a)(1),(b)(1).

NMFS may disapprove a FMP or amendment, in whole or in part, only to the extent it is inconsistent with applicable law, and may not substantially modify plans submitted by the Council. See id. § 1854(a)(3). Only under certain limited circumstances may the Secretary take the lead in preparing a plan or plan amendment. See 16 U.S.C. § 1854(c)(1) (Secretary may prepare plan or amendment where: (a) the council fails to develop and submit a necessary amendment; (b) the Secretary disapproves or partially approves an amendment, and the council fails to submit a revised amendment; or (c) the Magnuson-Stevens Act expressly grants to the Secretary authority to prepare a plan amendment). This reflects Congress' intent that the councils – which include federal, state and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery conservation and management – have the primary responsibility for preparing fishery management plans. See id. § 1852(b). See also Commonwealth of Mass. ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999) (“The [MSA’s] main thrust is to conserve the fisheries as a continuing resource through a mixed federal-state regime; the [fishery management plans] are proposed by state Councils but the final regulations are promulgated by the Secretary through the Fisheries Service.”).

The statute does not establish a supervisory role for NMFS or the U.S. Department of Commerce over the actions of the Council. Rather, NMFS may only request that the Council take action. For example, if NMFS identifies a species as overfished, the agency must notify the appropriate council and “request that action be taken to end overfishing in the fishery and to

implement conservation and management measures to rebuild affected stocks of fish.” 16 U.S.C. § 1854(e)(2). NMFS has no authority to order the Council to implement particular measures. If a Council declines to act on a measure proposed by NMFS, NMFS’ recourse would be to propose its own FMP, amendment or regulation. See 16 U.S.C. § 1854(e)(5). Here, NMFS has complied with the terms of the Court’s Order within the confines of its authority under the Magnuson-Stevens Act by undertaking a serious consideration of the mixed-stock exception, and requesting that the Council consider the issue.

Nor does the Court have jurisdiction to order the Council to review the mixed-stock exception, because the Council is not a party to this lawsuit and could not have been sued under the Magnuson-Stevens Act. The judicial review provisions of the Magnuson-Stevens Act cannot give rise to a claim to challenge actions of the Council, because they apply only to regulations promulgated by the Secretary of Commerce. See 16 U.S.C. § 1855(f) (authorizing suit to challenge only regulations or actions implementing a fishery management plan). As the judicial review provisions of the Magnuson Act constitute a waiver of sovereign immunity, these provisions must be interpreted narrowly. See United States v. Nordic Village, 503 U.S. 30, 37 (1995). The limited nature of a waiver extends to the formulation of relief. “The Government’s consent to a particular remedy must be unambiguous.” Army v. FLRA, 56 F.3d 273, 277 (D.C. Cir. 1995). The relevant judicial review provision at 16 U.S.C. § 1855(f)(1) allows a reviewing court only to set aside regulations *issued by the Secretary* in accordance with the review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2). Because waiver of sovereign immunity under the Act in Section 1855(f) applies only to challenges to regulations promulgated under the Act, it does not authorize suits raising claims related to the councils. See, e.g., Delta

Commercial Fisheries Association v. Gulf of Mexico Fishery Management Council, 364 F.3d 269, 273-274 (5th Cir. 2004) (partial waiver of sovereign immunity under Section 1855(f) does not permit challenge to composition of council).

When Congress intended to create a private right of action in the Magnuson-Stevens Act, it did so expressly and was precise in delineating the actions that could be challenged. The absence of a similar right of action to challenge actions taken by the councils strongly indicates that Congress did not intend such actions to be challenged. Russello v. United States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Thus, since Plaintiffs would not have a claim directly against the Council for failure to undertake a review of the mixed-stock exception, it follows that no judicial remedy may be issued to achieve such a result.

In sum, NMFS submits this report to notify the Court that it has taken the actions the Magnuson Act allows to put before the Council its consideration of the mixed-stock exception. As required by the Court’s order, NMFS seriously considered and analyzed the exception, then concluded it was not an appropriate or viable alternative for Framework 42.

### **CONCLUSION**

For the foregoing reasons, Federal Defendants respectfully request that the Court determine that they have complied with the terms of the Court’s January 26, 2009 Order, and enter judgment in Federal Defendants’ favor on Count II of Plaintiffs’ Complaint. In light of NMFS’ consideration of this alternative, Federal Defendants further request that the Court lift

the injunction suspending the 2:1 DAS counting that is required by the Court's February 17, 2009 Order.

Dated: February 19, 2009

Respectfully submitted,

JOHN C. CRUDEN, Acting Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division  
JEAN E. WILLIAMS, Chief  
LISA L. RUSSELL, Assistant Chief

/s/ Kristen Byrnes Floom  
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Attorneys for Federal Defendants

## CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non registered participants on February 19, 2009.

/s/ Kristen Byrnes Floom



New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116  
John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

February 13, 2009

Ms. Patricia Kurkul  
Regional Administrator  
NOAA/NMFS  
55 Great Republic Drive  
Gloucester, MA 01930

Dear Pat:

I want to inform you of two recent Council actions related to the Northeast Multispecies fishery.

First, on February 10, 2009, the Council passed the following motion:

*“that the Council reinforce its recommendation for the interim rule and ask that NMFS give further consideration to its recommendation.”*

The Council’s recommendations for the interim rule were developed in September, 2008 and forwarded to you by my letter dated September 19, 2008. I attached a copy of that letter for your reference.

On February 10, 2009, the Council considered a document presented by NOAA General Counsel titled “Draft Consideration and Analysis of the Application of the Mixed-Stock Exception to Ending Overfishing and its Applicability to Framework 42 to the Northeast Multispecies Fishery Management Plan.” After discussion of this document the Council passed the following motion:

*“that the Council disagree with the conclusions of the NMFS report to the court that the mixed stock exception cannot be applied to the northeast multispecies fishery and request NMFS reconsider its position and make it consistent with congressional intent that: 1) optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt.”*

Please consider this motion as you finish preparation of this document. Please contact me if you have any questions.

Sincerely,

Paul J. Howard  
Executive Director

attachment

cc: The Honorable Edward F. Harrington  
U.S. District Court, District of Massachusetts  
Civil Action No.: 06-12110-EFH

ATTACHMENT C TO SECOND  
DECLARATION OF PATRICIA  
KURKUL



## New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116  
John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

September 19, 2008

Ms. Patricia Kurkul, Regional Administrator  
National Marine Fisheries Service  
One Blackburn Drive  
Gloucester, MA 01930

Dear Pat:

I am writing to convey the New England Fishery Management Council's strong support for groundfish interim action by NMFS pending the completion and implementation of Amendment 16 to the Northeast Multispecies FMP. The Council also appreciates the chance to provide its input on any interim action. At its September 3-4, 2008 meeting, the Council passed a motion to recommend the following measures for an interim rule:

### Management Measures:

1. that the TACs for FY 2009 for Georges Bank yellowtail, SNE/Mid-Atlantic yellowtail flounder, Cape Cod/GOM yellowtail, American plaice, witch flounder, Georges Bank winter flounder, GOM winter flounder, redfish, white hake and pollock are the TACs associated with F-rebuild;
2. that the TACs for FY 2009 for Georges Bank cod and GOM cod are the TACs associated with  $F_{msy}$ ;
3. a 1,000/5,000 pound day/trip limit on witch flounder;
4. a 5,000 pound trip limit on SNE/Mid-Atlantic winter flounder and that the TAC should be less than that associated with  $F_{msy}$ ;
5. implementation of the Amendment 13 default 18% DAS reduction.

### Accountability Measures

1. to the extent that the actual catches in FY 2009 exceed the TACs for any stock, such overage shall be deducted from the FY 2010 TACs; except that for Georges Bank cod such deductions in FY 2010 will not apply to the TACs allocated in FY 2010 to existing sectors for overages they were not responsible for in FY 2009;
2. the Council will incorporate a payback method in Amendment.16 to reconcile in FY 2010 any TAC overages that occur in FY 2009.

### Mitigation Measures

1. an 18-inch haddock minimum size, extension of the US/CA haddock SAP, expansion of the Closed Area I hook SAP and removal of the tax on DAS transfers.



Also, the Council strongly recommends that interim rule provisions for DAS allocations remain in effect for the duration of FY 2009 and that current members of groundfish sectors be allowed to lease any multispecies days within the length, horsepower baseline requirements.

If you have any questions about the NEFMC's recommendations, please contact me.

Sincerely,

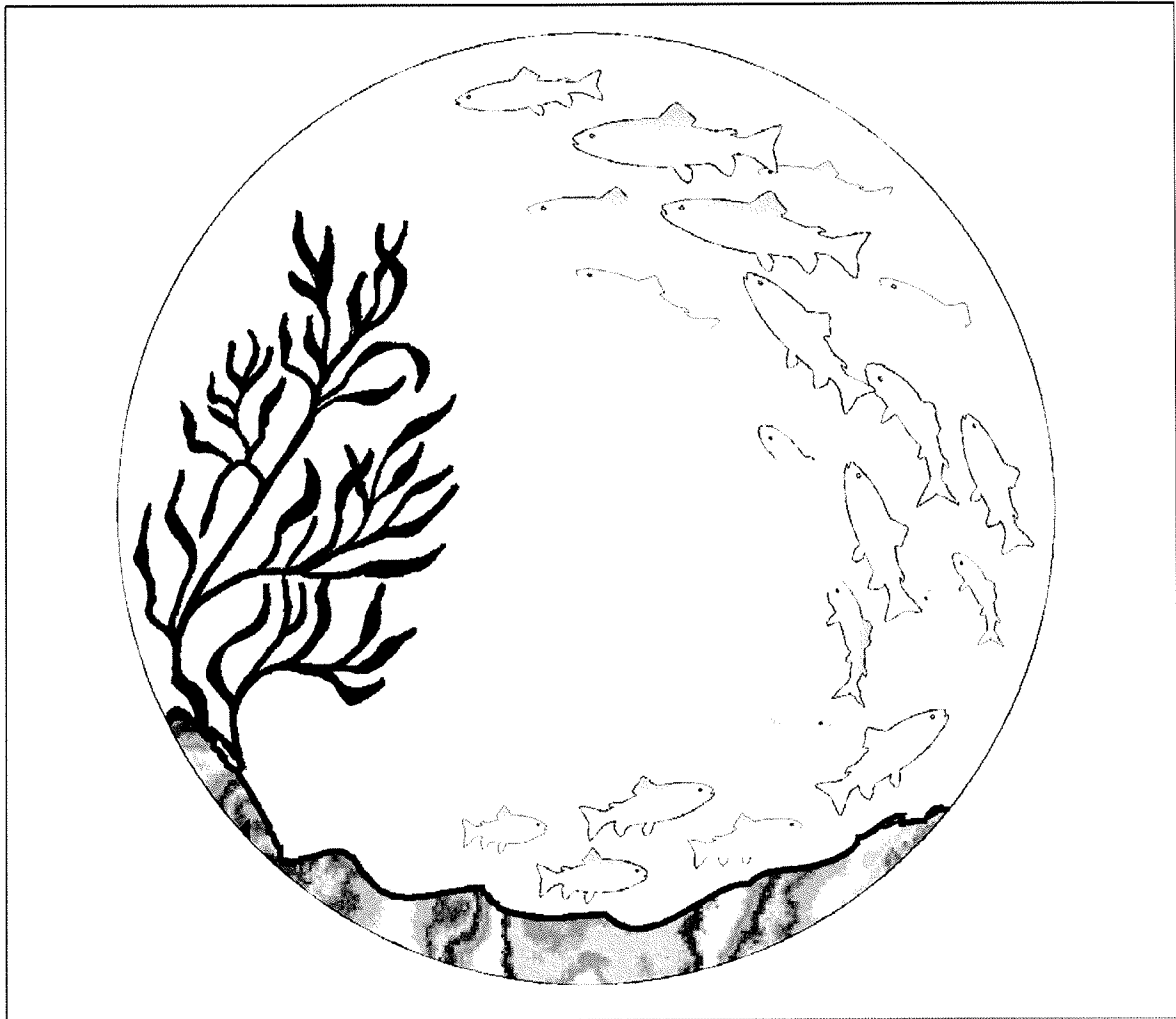
A handwritten signature in black ink, appearing to read "Paul J. Howard". The signature is written in a cursive, slightly slanted style.

Paul J. Howard  
Executive Director





# Magnuson-Stevens Fishery Conservation and Management Act



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
National Marine Fisheries Service

ATTACHMENT B TO SECOND  
DECLARATION OF PATRICIA  
KURKUL





# **Magnuson-Stevens Fishery Conservation and Management Act**

As Amended Through January 12, 2007

**May 2007  
Second Printing**

U.S. Department of Commerce  
Carlos M. Gutiérrez, Secretary

National Oceanic and Atmospheric Administration  
Vice Admiral Conrad C. Lautenbacher, Jr., USN (Ret.)  
Under Secretary for Oceans and Atmosphere

National Marine Fisheries Service  
William T. Hogarth, Assistant Administrator for Fisheries



**MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT**

**Public Law 94-265**

**As amended by the Magnuson-Stevens Fishery Conservation and Management  
Reauthorization Act (P.L. 109-479)**

**AN ACT**

**To provide for the conservation and management of the fisheries,  
and for other purposes.**





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Numbers in boldface indicate the number of the Public Law that amended the following provision.

\*Bracketed material with an asterisk is text that is added, or replaces underlined language, and will be effective on the date the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary enters into force for the United States. See P.L. 102-251 and P.L. 104-297.

(a) FINDINGS.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

**104-297**

(2) Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls, or (C) direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

**104-297**

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources.

**95-354**

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

16 U.S.C. 1801  
MSA § 2

**101-627**

(8) The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.

**104-297**

(9) One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.

**104-297**

(10) Pacific Insular Areas contain unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth.

**109-479**

(11) A number of the Fishery Management Councils have demonstrated significant progress in integrating ecosystem considerations in fisheries management using the existing authorities provided under this Act.

**109-479**

(12) International cooperation is necessary to address illegal, unreported, and unregulated fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry.

(b) PURPOSES.—It is therefore declared to be the purposes of the Congress in this Act—

**99-659, 101-627, 102-251**

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, and (B) exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources[, and fishery resources in the special areas]\*;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

**104-297**

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

**101-627**

(5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States;

**95-354, 96-561, 104-297**

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development in a non-wasteful manner; and

**104-297**

(7) to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.

(c) POLICY.—It is further declared to be the policy of the Congress in this Act—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;

**101-627, 104-297**

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; considers efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this Act;

16 U.S.C. 1801-1802  
MSA §§ 2-3

**99-659, 101-627**

(5) to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation;

**101-627**

(6) to foster and maintain the diversity of fisheries in the United States; and

**104-297**

(7) to ensure that the fishery resources adjacent to a Pacific Insular Area, including resident or migratory stocks within the exclusive economic zone adjacent to such areas, be explored, developed, conserved, and managed for the benefit of the people of such area and of the United States.

**SEC. 3. DEFINITIONS**

**16 U.S.C. 1802**

As used in this Act, unless the context otherwise requires—

(1) The term "anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.

**104-297**

(2) The term "bycatch" means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.

**104-297**

(3) The term "charter fishing" means fishing from a vessel carrying a passenger for hire (as defined in section 2101(21a) of title 46, United States Code) who is engaged in recreational fishing.

**104-297**

(4) The term "commercial fishing" means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.

**ATTACHMENT D**

**Further Consideration and Analysis of the Application of  
the Mixed-Stock Exception to Ending Overfishing and its  
Applicability to Framework 42 to the Northeast  
Multispecies Fishery Management Plan**

**February 2009**

ATTACHMENT D TO SECOND DECLARATION  
OF PATRICIA KURKUL

This report has been prepared in response to a Memorandum and Order, issued on January 26, 2009, by Judge Edward F. Harrington of the U.S. District Court, District of Massachusetts, in the matter of Civil Action No. 06-12110-EFH. It is intended to comply with the Court's Order to seriously consider and analyze the applicability of a provision in the National Standard 1 Guidelines known as the "mixed-stock exception," as it relates to Framework 42 (FW 42) to the Fishery Management Plan for the Northeast Multispecies Fishery (FMP). This report revises the Draft report submitted to the New England Fishery Management Council (Council) for its review and consideration, after taking into account Council discussion on the draft report and the Council motion adopted by the Council, as more fully explained in the Addendum at the end of this report.

FW 42 was developed by the New England Fishery Management Council (Council) in 2005, and approved and implemented by NOAA's National Marine Fisheries Service (NMFS) in 2006, primarily to implement biennial adjustments to the FMP. Such adjustments were required by a previous Council amendment to the FMP (Amendment 13) to adjust fishing mortality rates as necessary to keep the rebuilding of stocks of overfished multispecies (also known as groundfish) on their statutorily based schedules. The following analysis considers the mixed-stock exception's provisions as they existed at the time of FW 42's implementation, and, now, under the newly revised mixed-stock exception, their relation to statutory provisions then and now, and their potential applicability as an alternative that could have lessened negative economic and community impacts of the measures developed and adopted in FW 42.

## Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary statute providing authority for fisheries management in the U.S. Exclusive Economic Zone (EEZ). The MSA, in section 301, established 10 national standards for fishery conservation and management, including National Standard 1 (MSA section 301(a)(1)) which requires that "conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield [OY] from each fishery for the United States fishing industry." In addition, section 301(b) requires that "The Secretary [of Commerce] shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans." As required by statute, NMFS established such guidelines on behalf of the Secretary and has periodically amended them, as necessary, to address changes to the MSA and to provide the public with further information and opportunity to comment on the agency's interpretation of the national standards and their practical application. The national standard guidelines (guidelines), though not having the force and effect of law, are codified in subpart D of 50 CFR part 600, which contains general provisions for management of fisheries under MSA authority.

In addition to the National Standard Guidelines, the MSA includes other specific mandates concerning ending overfishing and rebuilding overfished fish stocks. MSA Section 303(a)(1) (A), contained in the Required Provisions Section of the MSA, requires that any fishery management plan must contain measures that are "necessary and appropriate to prevent



overfishing and rebuild overfished stocks . . . .” In 1996, Congress substantially amended the MSA and added MSA Section 304(e) which mandates the rebuilding of overfished stocks in most cases within 10 years.

#### 1998 Guidelines on Mixed-Stock Exception

This section examines the mixed-stock exception to FW 42 as it existed at the time FW 42 was developed, adopted and implemented. The next section examines the mixed-stock exception as revised in the final rule which became effective on February 17, 2009.

The Sustainable Fisheries Act (SFA), which was passed in 1996, made numerous and substantive amendments to the MSA. A key change was that if a fish stock was determined to be overfished (a stock is overfished if its overall biomass, or, stock size, is too low), the Council and NMFS were put under time constraints to implement measures to prevent or end (i.e., fishing at too high a rate) and to rebuild the fish stock in no less than 10 years in most cases. As a result of the passage of the SFA, NMFS implemented major revisions to the guidelines in 1998, including revisions to the guidelines for National Standards 1 which deals with optimum yield and prevention of overfishing. NMFS also made revisions to guidelines for National Standards 2 (scientific information), 4 (allocations), 5 (efficiency), and 7 (costs and benefits); and added guidelines for newly established National Standards 8 (communities), 9 (bycatch), and 10 (safety of life at sea).

Changes to the National Standard 1 guidelines reflected the SFA’s new and more stringent requirements to end overfishing and rebuild fish stocks within specified, statutory timeframes. The SFA did not change National Standard 1 which requires that any fishery management plan must prevent overfishing, while achieving, on a continuing basis, optimum yield from each fishery.<sup>1</sup> But, the SFA added a separate section, 304 (e), that stated if a fishery were determined to be overfished, the Council and NMFS were required to develop and adopt a plan to prevent or end the overfishing of the fishery , and to rebuild affected stocks of fish within the timeframe mandated by the SFA. One of the changes to the National Standard 1 guidelines was the addition of a provision, known as the mixed-stock exception found at 50 CFR 600.310(d)(6), that was intended to maintain some flexibility in managing mixed-stock fisheries (i.e., fisheries that catch and land several stocks of fish using the same gear types and in the same general areas) by allowing a limited exception to the requirement of National Standard 1 regarding preventing overfishing as follows:

(6) Exceptions. There are certain limited exceptions to the requirement to prevent overfishing. Harvesting one species of a mixed-stock complex at its optimum level may result in the overfishing of another stock component in the complex. A Council may decide to permit this type of overfishing only if all of the following conditions are satisfied:

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<sup>1</sup> OY refers to optimum yield which is defined to mean the amount of fish which “in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.” 16 USC §1802 (33)(C). “Fishery” is defined to mean “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical recreational, and economic characteristics.” 16 U.S.C. §1802(13).

(i) It is demonstrated by analysis (paragraph (f)(6) of this section) that such action will result in long-term net benefits to the Nation.

(ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.

(iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA [Endangered Species Act].

By its plain terms, then, the mixed stock exception applied only to overfishing requirements, not rebuilding requirements. Accordingly, the applicability of the mixed-stock exception was necessarily constrained by the overarching statutory requirements, as described above, that require affected overfished stocks to be rebuilt within statutory timeframes. The revised National Standard 1 guidelines, in a subsequent section to the mixed-stock exception, explicitly recognized this at 50 CFR 600.310(e)(3)(ii) which required that, if a stock is overfished, the purpose of an action must be to rebuild the stock within the appropriate timeframe.

This conclusion that more restrictive conservation measures, such as rebuilding requirements, must prevail over measures to mitigate impacts on the fishing industry, such as the mixed-stock exception, is reinforced in National Standard 8, quoted below, which recognizes the importance of considering socio-economic concerns but only to the extent that they do not interfere with conservation requirements:

Conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (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 are based upon the best scientific information available in order to: (1) Provide for the sustained participation of such communities; and (2) To the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. §301(a)(8) (Emphasis added)

The National Standard 8 guidelines further expound on the priority of conservation measures as follows: “Deliberations regarding the importance of fishery resources to affected fishing communities, therefore, must not compromise the achievement of conservation requirements and goals of the FMP.” (50 CFR § 600.345 (b)(2).

When the mixed-stock exception is interpreted in the context of the overarching statutory rebuilding requirements and other National Standard Guidelines, it is clear that the exception was not applicable to stocks determined to be overfished if the application of the exception jeopardizes the requirement to rebuild such stocks within the statutorily mandated timeframes. NMFS consistently provided this guidance as it applied to overfished stocks during the development of FW 42. Moreover, federal courts have repeatedly found that conservation

measures take priority over mitigation of impact measures.<sup>2</sup> Therefore, a threshold requirement to even considering the applicability of the mixed-stock exception to an overfished stock was whether such stock could still be rebuilt in the timeframe mandated by the MSA. If not, then the mixed-stock exception was not applicable and there was no justification to consider it further, and, therefore, no purpose would be served in considering the three conditions specified in the National Standard 1 Guidelines at this time.

Further, there was no requirement in statute, nor in the guidelines, that a Fishery Management Council (Council) must consider or analyze the mixed-stock exception for any of their management actions--it was provided as one tool that a Council, at its discretion, may consider, under special circumstances, if it chooses to be more flexible in its response to ending overfishing of one or more stocks in a mixed-stock fishery. But, under the 1998 guidelines, the mixed-stock exception was justified for overfished stocks only if it could have been demonstrated that the exception would not have been inconsistent with rebuilding requirements and, then, only if the three conditions provided in the guidelines could have been satisfied.

#### 2009 Guidelines on Mixed-Stock Exception

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), was signed into law on January 12, 2007. The MSRA included new requirements for preventing and ending overfishing and rebuilding fisheries. Notably, the MSRA revised the section 304(e) requirement concerning ending overfishing by mandating that, for stocks that are overfished, the Council and NMFS must develop a plan to end overfishing “immediately.” This provision contrasts to the SFA section 304(e) provision which did not include the term “immediately” in the context of ending overfishing. As a result, NMFS proposed additional revisions to the National Standard 1 guidelines on June 9, 2008 (73 FR 32526), to integrate this new requirement and other new requirements with existing provisions related to overfishing, rebuilding overfished stocks, and achieving OY. The new National Standard 1 guidelines

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<sup>2</sup> For example, see, Natural Resources Defense Council, Inc. v. Daly, 209 F.3d 747,753 (D.C. Cir. 2000) (“... we reject the District Court's suggestion that there is a conflict between the Fishery Act's expressed commitments to conservation and to mitigating adverse economic impacts. Compare 16 U.S.C. § 1851(a)(1) (directing agency to “prevent overfishing” and ensure “the optimum yield from each fishery”); with *id.* § 1851(a)(8) (directing agency to “minimize adverse economic impacts” on fishing communities). The Government concedes, and we agree, that, under the Fishery Act, the Service must give priority to conservation measures.”); City of Gloucester, Massachusetts v. Mineta, No. 00-11019REK (D.Mass. Nov. 15, 2000), 2000 U.S. Dist. LEXIS 22080, \*29 (which cites the previous opinion and endorses the National Standard 8 guideline cited above); National Coalition for Marine Conservation v. Evans, 231 F.Supp.2d 119,133 (D.D.C 2002) (which also recognizes and endorses the priority of conservation measures over minimizing adverse economic as stated in the National Standard 8 guidelines); Natural Resources Defense Council, Inc. v. National Marine Fisheries Service, 421 F.3d 872,879 (9th Cir. 2005) (“[t]he purpose of the [Magnuson-Stevens] Act is clearly to give conservation of the fisheries priority over short-term economic interests. The Act sets this priority in part because the longer-term economic interests of fishing communities are aligned with the conservation goals set forth in the Act.”). Even more relevant, the D.C. federal district court, in a challenge to Amendment 13 of the Northeast multispecies FMP, in considering virtually the same fact scenario as presented by the applicability of the mixed-stock exception, held that overfishing may be allowed on an overfished stock in order to mitigate impacts on the fishing industry, but only if, the overfishing does not jeopardize rebuilding requirements. See, Oceana, Inc. v. Evans, 2005 WL 555416, at \*12-15.

include revisions to the mixed-stock exception language which more clearly articulate that rebuilding mandates cannot be jeopardized by the mixed-stock exception. The guidelines on the mixed-stock exception, with the pertinent language underlined, as contained in the final rule published on January 16, 2009, and which became effective on February 17, 2009 (74 FR 3178; Jan. 16, 2009), now read as follows:

(m) Exceptions to requirements to prevent overfishing. Exceptions to the requirement to prevent overfishing could apply under certain limited circumstances. Harvesting one stock at its optimum level may result in overfishing of another stock when the two stocks tend to be caught together (This can occur when the two stocks are part of the same fishery or if one is bycatch in the other's fishery). Before a Council may decide to allow this type of overfishing, an analysis must be performed and the analysis must contain a justification in terms of overall benefits, including a comparison of benefits under alternative management measures, and an analysis of the risk of any stock or stock complex falling below its MSST. The Council may decide to allow this type of overfishing if the fishery is not overfished and the analysis demonstrates that all of the following conditions are satisfied:

- (1) Such action will result in long-term net benefits to the Nation;
- (2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur; and
- (3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its Bmsy more than 50 percent of the time in the long term<sup>3</sup>

Thus, the newly revised mixed-stock exception explicitly reflects, in the underscored portions above, NMFS' long-time interpretation and guidance that it does not exempt fish stocks from rebuilding requirements. The revised guidelines go a step further by disqualifying the use of the mixed-stock exception for a fishery that is overfished

Therefore, neither the May 1, 1998, guidelines, nor the January 16, 2009, guidelines, provide any exception to the rebuilding of overfished stocks within statutory timeframe requirements. To provide such an exception would imply that the guidelines, which do not have the force and effect of law, supersede clear statutory requirements, which do have the force and effect of law. In short, a threshold criterion for applying the mixed-stock exception that must be satisfied under the 1998 and 2009 guidelines is that the rebuilding of a stock targeted for the mixed-stock exception may not be jeopardized by allowing continued overfishing on such stock.

#### History of Northeast Multispecies Management Leading to Framework 42

To understand the applicability of the mixed-stock exception to any particular stock managed under FW 42, it is necessary first to summarize the history of Northeast multispecies management leading to FW 42.

As previously established, Northeast groundfish are managed by the Council and NMFS, under the authority of the MSA, through the FMP. The original FMP was approved on July 17, 1986,

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<sup>3</sup> MSST refers to the minimum stock size threshold which is the minimum stock size level that determines when a fish stock is considered to be overfished.

and implemented on September 19, 1986. It has since been amended numerous times, both through FMP amendments and framework adjustments, such as FW 42.

There are 19 stocks of groundfish managed under the FMP: Gulf of Maine (GOM) cod, Georges Bank (GB) cod, GOM haddock, GB haddock, pollock, white hake, redfish, Atlantic halibut, ocean pout, windowpane flounder north, windowpane flounder south, American plaice, witch flounder, GOM winter flounder, GB winter flounder, Southern New England (SNE)/Mid-Atlantic (MA) winter flounder, GOM/Cape Cod (CC) yellowtail flounder, GB yellowtail flounder, and SNE/MA yellowtail flounder. A stock is a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

The management of Northeast groundfish in recent years has largely built upon the Council's Amendment 13 to the FMP, which was initiated by the Council in 1999, partially approved by NMFS on behalf of the Secretary on March 18, 2004, and implemented on May 1, 2004, through a final rule (April 27, 2004; 69 FR 22906). Amendment 13 was a major revision of the management program for groundfish and was intended to end overfishing on all groundfish stocks and to rebuild all groundfish stocks that were at that time considered overfished. It also contained a variety of measures applicable to commercial and recreational fishing that were intended to address impacts of the fishery on Essential Fish Habitat, minimize bycatch, implement improved reporting and recordkeeping requirements, and address other conservation and management issues.

The focal point of Amendment 13 was to end overfishing and rebuild those stocks that were overfished, within the statutory timeframes established by the MSA. The analysis prepared by the Council and its advisors in the development of Amendment 13 (Final Supplemental Environmental Impact Statement and Initial Regulatory Flexibility Analysis) listed the overfished stocks that required formal rebuilding programs to be the following: GOM cod, GB cod, GOM haddock, GB haddock, CC/GOM yellowtail flounder, SNE/MA yellowtail flounder, American plaice, white hake, SNE/MA winter flounder, redfish, windowpane flounder south, ocean pout, and Atlantic halibut. Section 3.2 of the document, Proposed Rebuilding Programs for Overfished Stocks, described the Council's approach in rebuilding the overfished stocks through the measures in Amendment 13, as follows:

The M-S Act and NSGs [National Standard Guidelines] require the Council to define formal rebuilding programs or plans for stocks that are below the minimum biomass threshold (overfished). These programs define how the Council will rebuild those stocks to the target biomass within the statutory time frame. The Council has approached this issue in two steps. The first step, described in this section, is to identify the fishing mortality strategy that the Council will use as the basis for management measures that will rebuild the stock. The second step is to adopt management measures to achieve these strategies. The formal rebuilding program consists of both elements – they should not be viewed independently. Once a stock is defined as overfished, a rebuilding program must be continued until the stock reaches the target biomass. During the rebuilding programs, adjustments can be made through the annual adjustment process based on the condition of the stock and consistent with this Amendment, as long as statutory requirements are met.

The Council thus clearly distinguished between the statutory requirements to rebuild overfished stocks until the target biomass is reached, and the fishing mortality rate decisions relative to ending overfishing. The Amendment 13 analysis goes on to state, in section 3.2.1, Formal Rebuilding Programs, the following:

The lack of a defined formal rebuilding program for stocks that are not overfished should not be construed as meaning that the Council is ignoring these stocks. The Council will insure fishing mortality remains below the fishing mortality threshold for these stocks. In all cases, these thresholds are defined as  $F_{MSY}$  or a suitable proxy for  $F_{MSY}$ . As noted by Restrepo *et al.* (1998), " $F_{MSY}$  is the fishing mortality rate that maximizes long-term yield under a constant-F [constant fishing mortality rate] policy, and  $B_{MSY}$  is the equilibrium biomass expected when fishing constantly at  $F_{MSY}$ ." Controlling fishing mortality below the threshold should result in stock size fluctuating around the estimate of  $B_{MSY}$  over the long term. This is clearly shown in the age-based projections for stocks that are not under formal rebuilding programs (see section 5.2.3). This approach is consistent with both the M-S Act and the National Standard 1 Guidelines.

The Council thus clearly articulated in its analysis that it intended to implement rebuilding plans for all of the overfished groundfish stocks, in conformance with provisions of the MSA and the guidelines, and consistent with the statutorily mandated rebuilding deadlines. It also recognized that even stocks that are not overfished need to have controls on fishing mortality to ensure that their stock levels are increased to, and/or maintained at, levels that can provide long-term yields approximating MSY.

The Council's analysis then goes on to address the related, but somewhat different issue of ending overfishing. Section 3.2.3.1.1, Phased fishing mortality reduction, explains the Council's rationale in applying different approaches to ending overfishing (as opposed to rebuilding) of stocks in the multispecies fishery, as follows:

This strategy [the phased approach] steadily reduces fishing mortality during the rebuilding period in order to achieve the target biomass with a median probability. When the stock achieves its target biomass, the formal rebuilding program adopted because the stock was overfished will be completed. Once the stock achieves the target biomass, fishing mortality targets will be based on the status determination criteria and MSY control rule. The fishing mortality for the rebuilding program may be adjusted if there are substantial changes in stock status and recruitment from those used in the long-term projections used to estimate this fishing mortality. Stock condition should be evaluated over at least a two-year period to smooth fluctuations that are the result of variability rather than true trends. A wide variety of variables will be considered to determine stock condition: fishing mortality and biomass (including the uncertainty around the estimates), recruitment patterns, environmental conditions, etc. The phase reduction strategy will be used for the following stocks:

- GB cod
- American plaice
- CC/GOM yellowtail flounder
- SNE/MA yellowtail flounder
- White hake

Thus, the Council chose to use the flexibility in the MSA and the guidelines to end overfishing of different groundfish stocks at different rates in this mixed-stock fishery. It did not, however, compromise the rebuilding requirements or deadlines in doing so. In essence, this approach achieves the same results as the mixed-stock exception approach by ramping-down fishing

mortality (rather than ending it immediately) for certain stocks in the fishery, to avoid having to implement even more stringent measures in the short term.<sup>4</sup>

Importantly, Amendment 13 also established a biennial FMP adjustment process that requires the Council to review the fishery periodically, using the most current scientific information available, recommend target total allowable catches (TACs), and recommend to NMFS any changes to the management measures necessary to achieve the goals and objectives of the FMP.

To satisfy the biennial adjustment requirement of Amendment 13, the Council initiated development of FW 42. In support of FW 42, a peer reviewed stock assessment update, by the Groundfish Assessment Review Meeting (GARM) II, was completed for all 19 stocks managed under the FMP, in August 2005. GARM II evaluated each managed stock relative to the applicable Amendment 13 biological reference points, to determine overfishing and overfished status ( $F_{msy}$  and  $B_{msy}$ , respectively). The Council's Groundfish Plan Development Team (PDT) then performed an evaluation of the fishery based upon the results of GARM II and other available information to determine the stocks for which an adjustment in management measures was required to ensure that the fishing mortality rate levels were consistent with those required under the rebuilding plans established under Amendment 13.

This analysis indicated that the fishing mortality rates of five groundfish stocks were higher than the targets required by the rebuilding programs and fishing mortality on GB winter flounder was higher than  $F_{msy}$ , thereby necessitating a reduction in fishing mortality to prevent overfishing. As a result, FW 42 addressed Amendment 13 objectives by reducing fishing mortality on six groundfish stocks: GOM cod, CC/GOM yellowtail flounder, SNE/MA yellowtail flounder, SNE/MA winter flounder, GB winter flounder, and white hake.

In the development of FW 42, the Council strove to address a broad range of issues, including new reporting requirements, greater flexibility in using and leasing days-at-sea (DAS), special programs to allow targeting of healthy stocks, and gear modifications and exemptions for their use. Specifically, FW 42 maintained the Amendment 13 default DAS reductions for the 2006 fishing year; specified target TACs and Incidental Catch TACs for the 2006, 2007, and 2008 fishing years; implemented additional Vessel Monitoring System (VMS) requirements for NE multispecies DAS vessels; implemented differential DAS counting in specific areas of the GOM and SNE; implemented new commercial trip limits for several NE multispecies; renewed and modified the Regular B DAS Program, including the rules pertaining to monkfish vessels; renewed and modified the Eastern U.S./Canada Haddock Special Access Program (SAP); renewed the DAS Leasing Program; modified the Closed Area (CA) I Hook Gear Haddock SAP; implemented the GB Cod Fixed Gear Sector; provided flexibility for vessels to fish inside and outside of the Eastern U.S./Canada Management Area on the same trip; modified reporting

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<sup>4</sup> As discussed in footnote 1, this approach, which is the equivalent of applying the mixed-stock exception, was upheld by the Court in *Oceana, Inc. v. Evans*, 2005 WL 555416, at \*13: "The Secretary's construction of the statute, *i.e.*, "the ending of overfishing can be achieved at any time during the prescribed rebuilding schedule, as long as the ability to rebuild is not jeopardized," is thus reasonable, particularly in light of the need to avoid "severe economic consequences." "

requirements for Special Management Programs (U.S./Canada Management Area; Regular B DAS Program; CA I Hook Gear Haddock SAP; CA II Yellowtail Flounder SAP, and the Eastern U.S./Canada Haddock SAP Pilot Program); modified the DAS Transfer Program; modified the trawl codend mesh size requirement in the SNE Regulated Mesh Area; modified NMFS's authority to adjust certain possession limits; and modified the recreational possession restrictions and size limits for GOM cod.

Consideration of Measures to Reduce Fishing Mortality Rates and Applicability of the Mixed-Stock Exception to Fish Stocks Addressed by FW 42

The issue at the basis of this analysis is the response of the Council in FW 42 to the necessary reductions of fishing mortality rates for the six stocks listed above, which were determined, on the basis of best available scientific information, to need such reductions to accomplish rebuilding required by the MSA and Amendment 13. The Council considered a range of effort controls to achieve the fishing mortality rate reductions, including simple, large DAS reductions (up to 40%); and combinations of DAS reductions, trip limits, and either differential DAS counting or a minimum DAS charge of 12 or 24 hours. After deliberation, the primary measure the Council proposed in FW 42 to achieve the necessary reductions on those stocks most in need were differential DAS counting areas in the GOM and SNE. The GOM area was designed to provide the necessary mortality reductions for GOM cod, CC/GOM yellowtail flounder, and white hake; and the SNE area was designed to do the same for SNE/MA yellowtail flounder, SNE/MA winter flounder, and white hake (white hake occurs over a broad geographic area, and thus was provided benefits from both differential DAS areas). Because the majority of the landings for the six stocks in need of reductions came from the proposed differential DAS counting areas, this is where the reduction efforts were focused.

Five of the stocks that FW 42 was designed to address were, at the time the framework was developed, considered overfished, and were (and continue to be) under rebuilding programs established by Amendment 13 (GARM II indicated that GB winter flounder was not overfished, but was subject to overfishing; the most recent assessment GARM III indicated that GB winter flounder is now overfished and subject to overfishing). They also were (and continue to be) bound by the MSA requirements to rebuild within the statutory timeframes, which means, for most stocks, they must be rebuilt by 2014. The following table provides the fishing mortality rate reductions for these five stocks that were determined to be necessary in FW 42, and the current size of those stocks (i.e., their biomass), relative to their rebuilt levels, as calculated by GARM II, for FW 42, and most recently by GARM III for the Council's Amendment 16, which is still under development.

Mortality Reduction Targets and Biomass Levels for Stocks Affected by the Differential DAS Counting Areas Established by FW 42

Stock	FW 42 Mortality Reduction Targets	Biomass Status (% B <sub>MSY</sub> )**	
		GARM II	GARM III



		(2004)	(2007)
GOM Cod	32%	24.8%	58.2%
CC/GOM yellowtail flounder	46%	8.7%	24.7%
SNE/MA yellowtail flounder	55%	1.0%	12.8%
SNE/MA winter flounder	8%	13.1%	8.7%
White hake*	13%	39.1%	35.2%

\*White hake biomass was estimated using an index-based assessment in 2004.

\*\*B<sub>MSY</sub> is the level of a rebuilt stock, and the target of a stock's rebuilding program.

As reflected in the table above, since the implementation of FW 42, GARM III was conducted (August 2008) to update the status of all of the managed groundfish stocks, and concluded that the majority of groundfish stocks continue to require substantial reductions in fishing mortality in order to be rebuilt in the timeframes mandated by Amendment 13 and the MSA. At least 13 of the 19 stocks are considered to be overfished: GB cod, GB yellowtail flounder, SNE/MA yellowtail flounder, GOM/CC yellowtail flounder, SNE/MA winter flounder, white hake, witch flounder, GB winter flounder, windowpane flounder north, ocean pout, white hake, pollock and Atlantic halibut. In addition, at least 12 of the 19 stocks are experiencing overfishing: GB cod, GB yellowtail flounder, SNE/MA yellowtail flounder, CC/GOM yellowtail flounder, SNE/MA winter flounder, white hake, witch flounder, GB winter flounder, windowpane flounder north, GOM cod, windowpane flounder south, and pollock. Based on uncertainty in the results of GARM III, GOM winter flounder may or may not be experiencing overfishing. Additional actions will be necessary, as a result, and the Council is finishing its development of Amendment 16 to implement the necessary measures.

Based on the analysis in FW 42, all of the targeted stocks were significantly below their overfished thresholds (50% of B<sub>msy</sub>) and required very restrictive measures to ensure they would be rebuilt by 2014. Because all of these stocks are unavoidably harvested together to a greater or lesser extent, to have allowed overfishing, at a fishing mortality rate above that determined to be necessary to rebuild under Amendment 13, on any one of these stocks, to justify less restrictive measures, would have meant that none of them would likely be rebuilt by 2014. Thus, under either the 1998 or 2009 guidelines, the mixed-stock exception was not applicable because neither the Council nor NMFS could show that the threshold criterion regarding rebuilding requirements could have been satisfied. Under best scientific information currently available as reflected in GARM III, all of these stocks but GOM cod remain overfished.<sup>5</sup> Therefore, for the same reason, it is not possible for the threshold criterion regarding rebuilding requirements to be satisfied even under current conditions. If this threshold criterion cannot be met there is no purpose served in examining any of the other criteria for applying the mixed-stock exception.

### Summary and Conclusions of Analysis

<sup>5</sup> GOM cod is not now considered to be overfished because its stock size is above 50% of B<sub>msy</sub> (which is the threshold level for determining when a stock is overfished. However, the stock size of GOM cod is still only 58% of its fully rebuilt level.

Based on the above analysis, the findings can be summarized as follows:

- The mixed-stock exception, under the 1998 and 2009 guidelines, creates an exception, based on strict criteria, only for ending overfishing, but not for rebuilding requirements. The MSA mandates rebuilding of overfished stocks in most cases within 10 years. There is a difference between the requirements of the statute (MSA) to rebuild overfished stocks (i.e., those with too low a stock size) within explicitly defined deadlines, and the statutory provisions to end overfishing (i.e., those with excessive fishing mortality), which do not specify defined timelines for doing so. In the latter case, NMFS's guidelines provide some limited flexibility as to when overfishing must be ended. This is the "mixed-stock exception."
- The statutory requirements to rebuild overfished stocks are necessarily constraining on the mixed-stock exception. Therefore, the mixed-stock exception, as defined in the 1998 guidelines, was justified for overfished stocks only if it could have been demonstrated that, as a threshold matter, the exception would be consistent with rebuilding requirements and, then, only if the three conditions provided in the guidelines could have been satisfied. The 2009 guidelines explicitly disallow the application of the mixed-stock exception to any stock that is overfished.
- Given the requirement regarding rebuilding overfished stocks by 2014, applicability of the mixed-stock exception was and is subject to the threshold criterion that allowing overfishing to continue on any stock will not jeopardize meeting such rebuilding requirements for that stock.
- To have allowed overfishing, at a fishing mortality rate above that determined to be necessary to rebuild under Amendment 13, on any one of these stocks, to justify less restrictive measures, would have meant that none of them would likely meet rebuilding requirements to be rebuilt by 2014.
- Thus, under either the 1998 or 2009 guidelines, the mixed-stock exception would not have been a viable alternative for the Council or NMFS to consider or to implement in FW 42 to mitigate impacts of fishing regulations because neither the Council nor NMFS could have shown that the threshold criterion regarding rebuilding requirements would have been met. Further, under the 2009 guidelines the mixed-stock exception is not a viable alternative for the Council or NMFS to consider or implement for overfished stocks in any future conservation or management measure.

## ADDENDUM

This Addendum has been prepared to consider and respond to the New England Fishery Management Council's motion disagreeing with the conclusions of the draft report entitled "Consideration and Analysis of the Application of the Mixed-stock Exception to Ending Overfishing and Its Applicability to Framework 42 to the Northeast Multispecies Fishery Management Plan."

On February 10, 2009, the Council considered the Court's Order and a Draft of this report concluding that the mixed-stock exception was not a viable alternative for the Council or NOAA's National Marine Fisheries Service (NMFS) to implement in Framework 42, as its threshold criterion for applicability could not be met. The Council was asked to consider adopting the report as its own findings. After some discussion, Council member Dr. David Pierce, the Commonwealth of Massachusetts's representative and Deputy Director of the Division of Marine Fisheries for Massachusetts, introduced the following motion:

that the Council disagree with the conclusions of the NMFS report to the court that the mixed stock exception cannot be applied to the northeast multispecies fishery and request NMFS reconsider its position and make it consistent with congressional intent that: 1) optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt.

The Council passed the foregoing motion by a vote of 11-6

To address the issues raised in the Council's motion, it is necessary first to examine the only explicit reference made to "congressional intent" during the discussion of the motion. In his introductory remarks leading up to the motion, Dr. Pierce made reference to "page 1" of the Magnuson-Stevens Fishery Conservation and Management Act (Act) as expressing "congressional intent that: 1) Optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt." Dr. Pierce was apparently referring to page 1 of the document compiled by NMFS that sets out, in a standalone fashion, the Act "As amended by the Magnuson-Stevens Fishery Conservation and Reauthorization Management Act (P.L. 109-497)." Page 1 of this document consists of the first seven findings of Congress contained in Sec. 2(a) ("Findings") (16 U.S.C. § 1801(a)) of the Act. (A copy of this document is attached to the Second Declaration of Patricia A. Kurkul as Attachment B.) Of the first seven findings, only Sec 2(a)(5) makes any reference to overfishing and achieving optimum yield. The reference, if anything, suggests that overfishing must be prevented so that optimum yield (which is defined in terms of harvesting fish from a rebuilt stock as more fully discussed in the revised report) is achieved on a continuing basis. In addition, Sec. 2(a)(6) refers to the need for a national program to prevent overfishing and rebuild fish stocks, without any suggestion that rebuilding of an overfished

stock can be exempted. Therefore, neither of these sections, nor any others in Sec. 2(a), reflect or even allude to any Congressional intent that optimum yield should be from a fishery as a whole, not from a particular fish stock within a mixed-stock fishery; nor, do these sections suggest that one stock should not dictate constraints on the fishery as a whole while that stock is being rebuilt.<sup>6</sup> Further, Section 304(e) of the Act requires that rebuilding requirements apply to each “affected fish stock[,]” not the fishery as a whole which may be made up of numerous individual fish stocks. Even if there were an implied notion of Congressional intent in the Findings section, as suggested by the Council’s motion, it cannot be construed to override or take priority over clear provisions to the contrary found elsewhere in the Act as more fully discussed in this revised report.

To further consider the Council’s motion, we also conducted a review of the legislative history for the 1996 Sustainable Fisheries Act (SFA), amending the Magnuson-Stevens Act, and, the 2006 Magnuson-Stevens Fisheries Conservation and Management Reauthorization Act (MSRA) (P.L.109-479) to determine whether there were any other expressions of “Congressional intent” regarding the mixed-stock exception. The legislative history for the SFA contains no references to the mixed-stock exception concept. Instead, the SFA legislative history states that one of the primary purposes for the amendments enacted by the SFA was to prevent overfishing and provide for rebuilding overfished stocks. See, Senate Committee on Commerce, Science and Technology (Committee), Senate Report 104-276 (May 23, 1994) (S.R. 104-276) at p. 8.

The following comprehensive statement from the Senate Report on the purposes of the SFA contains no suggestion of interpreting the mixed-stock exception as suggested by the Council motion, but, instead, fully supports the conclusion that rebuilding objectives within specified timeframes must be met:

Under revised section 304(e), the Secretary would be required to report annually to Congress and the Councils on the status of fisheries and to identify fisheries that are overfished or approaching a condition of being overfished. The Secretary would be required to notify immediately the appropriate Council upon determining that a fishery is overfished. A Council . . . would be required to prepare a plan, plan amendment or regulations within one year to end overfishing, rebuild affected stocks of fish, and prevent overfishing from occurring in fisheries approaching that condition. The plan, amendment or regulation would be required to specify a time period for ending overfishing and rebuilding the fishery that could not exceed 10 years, except where the biology or the stock of fish or environmental conditions prevent this maximum time frame from being met. This subsection of the reported bill also would amend the

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<sup>6</sup> The D.C. Circuit Court in Natural Resources Defense Council, Inc. v. National Marine Fisheries Service, 421 F.3d 872,879 (9<sup>th</sup> Cir. 2005) actually conducted its own analysis of the meaning and intent of Section 2, including the Findings (Sec. 2(a)) and Purposes (Sec. 2 (b) of the Act and reached a conclusion at odds with the Council’s interpretation of Sec. 2. After considering several of the Findings and Purposes, the court held that, “[t]he purpose of the Act is clearly to give conservation of fisheries priority over short-term economic interests. See Daley, 209 F.3d at 753(“[U]nder the[Act], the [Agency] must give priority to conservation measures.”).”*Id.*

Magnuson Act to require the Secretary to prepare a fishery management plan or amendment to stop overfishing and rebuild affected stocks if a Council does not submit a plan, amendment or regulations within one year of being notified that a fishery is overfished. The Councils could request the Secretary to implement interim measures to reduce overfishing during the development of a plan, amendment or regulations. The Secretary would be required to review plans, amendments and regulations designed to end overfishing and rebuild affected fish stocks at least every two years. If the Secretary finds that adequate progress towards rebuilding the fishery has not resulted, the Secretary would be required to immediately make necessary revisions to achieve adequate progress . . . would be required to immediately notify the appropriate Council with respect to all other fisheries.

Id at 58

In the most authoritative legislative history available for the MSRA, Senate Report 109-229 (S.R. 109-229), issued by the Senate Committee on Commerce, Science and Transportation (Committee), the Committee expressed a continuing urgent need to end overfishing and rebuild overfished stocks of fish. (S.R. 109-229 at p. 7) It recognized that the amendments to the Act enacted through the SFA had established a framework for achieving that objective, but after 10 years of implementation it had not been effective in doing so.<sup>7</sup> (S.R. 109-229 at p. 21) For that reason, Congress introduced through MSRA the requirement for each FMP to establish a mechanism to specify, on a sound scientific basis, annual catch limits (ACLs) at or below MSY and an obligation to implement assurance measures to ensure ACLs would not be exceeded. See S.R. 109-229 at pp. 22-23. Moreover, the Committee expressly “recognize[ed] that almost every Council implements multi-year plans or multi-species FMPs, and believes the annual catch limit can be met in these types of plans [and] . . .the annual catch limit mechanism could apply to the overall catch limit for all species under a multi-species FMP.” S.R. 109-229 at p. 23. Thus, the legislative history underlying MSRA evidences a strong intent for the amendments to the Act in 1996, coupled with those in 2006, to put an end to overfishing in order to ensure the achievement of rebuilding targets for overfished stocks in all fisheries, including multi-species fisheries.

Neither Section 2 of the Magnuson-Stevens Act, nor the legislative histories for the SFA and MSRA, exhibit any “Congressional intent” that supports the premise of the Council’s motion that 1) optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt. Indeed,

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<sup>7</sup> See S.R. 109-229 at p. 21 (“...a full 10 years after passage of the SFA, recent evaluations of Stock status have revealed that overfishing is still occurring in a number of fisheries, even those fisheries under a rebuilding plan or determined to be overfished during the early phase of SFA implementation. In many cases, this has resulted from failure of a plan to require adherence to scientifically-established mortality limits from one year to the next. As a result, the Committee determined that it needed to include a new mechanism in FMPs for ensuring compliance with the existing conservation requirements.”)

Congressional intent, to the extent it can be determined through the plain reading of the Magnuson-Stevens Act and its legislative history, is entirely consistent with the analysis and conclusions in the revised report concerning the applicability of the mixed-stock exception to fish stocks addressed in Framework 42. Therefore, NMFS concludes that the premise for the Council's motion concerning Congressional intent is incorrect and there is no need or justification to change the analysis or conclusions contained in this revised report.