



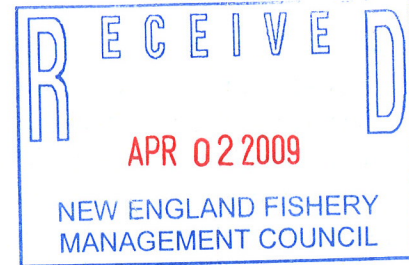
# CONSERVATION LAW FOUNDATION

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April 2, 2009

*Via electronic mail*

John W. Pappalardo, Chair  
New England Fishery Management Council  
50 Water Street  
Newburyport, Massachusetts 01950



RE: Mixed Stock Exception Discussion, *Massachusetts et al. v. Wolff et al.*, 06-CV-12110 (EFH)

Dear Chairman Pappalardo and Council members:

I am writing on behalf of the Conservation Law Foundation regarding the applicability of the so-called “mixed stock exception” in the National Standard 1 Guidance to the New England multispecies groundfish fishery. We understand that this issue will be discussed at the Council’s April 7, 2009 meeting in response to the federal district court’s request for input from the New England Council on the matter. We would like to provide the Council with our perspective.

For the reasons stated below, the “mixed stock exception” cannot and should not be used to allow overfishing on the “weak” stocks in the groundfish complex in order to increase yields on the more abundant stocks. We urge the Council to support the position of the National Marine Fisheries Service before the court that the policy is not available or appropriate in the context of either Framework 42 or any other aspect of the New England Multispecies Fishery Management Plan with respect to any fish species that is identified in either the “overfished” or the “experiencing overfishing” stock status.

First and most importantly, we strongly disagree with the legality of using this provision to authorize continued overfishing on these species of fish. The Magnuson Stevens Reauthorization Act does not provide for exceptions to the strict statutory prohibition on overfishing. *See* 16 U.S.C. §§ 1851(a)(1), 1853(a)(15). That change was made to the Act after a thorough and extensive Congressional process and completely resolves the issue legally. As far as we have been able to determine, no fishery management council in the country has tried to argue for using this provision in such a perverse way and counterproductive manner. In fact, as far as we can tell, the guidance has never been used in any fishery management plan. It would be a shame for the New England Council, who

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has worked so diligently in recent years to step up its management efforts and professionalism, to be the only council to endorse such an unfounded and ultimately unsustainable legal position.

Second, we strongly disagree with the policy arguments that are implicit in the efforts by Massachusetts and New Hampshire to use this guideline to authorize continued overfishing of some species: since strict, science-based controls on fishing on these “weak” stocks prevents achieving the full economic benefit of harvesting the optimum yield of the healthy stocks, the proper option is to ignore the impacts of those higher fishing rates on the weaker species. Such a management approach, if adopted, would create a massive loophole to the Council’s important goal to end overfishing on all managed species of groundfish and to rebuild all managed species as expeditiously as practicable. By endorsing such an approach, the Council would be taking a large management step backward in meeting the significant challenges it faces.

Behind the “mixed stock exception” euphemism is the blunt truth that this mechanism is being promoted to argue for continued overfishing on fish populations that are already struggling with recovery. These are not marginal fish with little commercial value. These are the fish that the New England fisheries and fishing communities were built on: Atlantic cod, yellowtail flounder and others.

It is particularly discouraging that some of the Council’s state fishery directors have been in the forefront of such retrograde arguments. Similar short-sighted positions have been routinely made to justify systemic overfishing in New England since Amendment 4 to the Multispecies Plan: continue overfishing because doing otherwise would impact fishermen too much. Fishermen up and down the coast have paid the price for New England managers ignoring or only taking half measures in response to scientific advice they didn’t like and the recovery for many regional fish species is still crippled after more than 15 years of this sort of ineffective management. Yet some still argue that a strategy that concentrates on short-term economics rather than long-term stewardship should continue to be applied, albeit now just to the “weak” stocks. Today, the exception is said to be necessary to prevent cod and flounder rebuilding from interfering with high landings of haddock; tomorrow who knows which the weak stock may be. This precedent would be a slippery slope that leads to management failure, not to a future.

While it is true that the presence of differential rebuilding rates of the various groundfish species in a multispecies fishery presents challenges to the fishing community and the Council, we believe the answer lies in re-doubled efforts to improve the selectivity of the fishing gear, not in sacrificing the rebuilding of one of the fish species in favor of another. In the space of less than a decade, important new gear technologies have been invented, driven by necessity: the need to avoid less abundant species. Moreover, CLF believes New England has just seen a small fraction of the ingenuity that regional fishermen are capable of in this regard. If the “mixed stock exception” is used to tolerate continued overfishing, that necessity disappears.

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Finally, as NMFS has fully documented in its analysis, the need for flexibility is not a legitimate justification here. The Council has already used various flexibility mechanisms in its rebuilding strategies, and the reproductive biology of the various species has already been taken into account through the development of the rebuilding dates, in some cases very extended rebuilding schedules. In the years ahead, if there are additional changes in environmental or biological factors for a particular species that suggest that rebuilding projections are no longer biologically tenable, further adjustments can be made based on an appropriate record. That is not the case presently.

CLF strongly recommends that the Council vote to support the analysis developed by NMFS and previously submitted to Judge Harrington in the above-referenced matter and to communicate that position to the court.

Thank you for your attention to this important matter.

Sincerely yours,

Peter Shelley  
Vice President

