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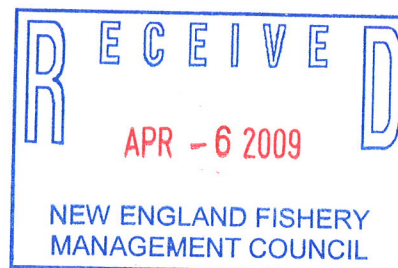
Deval Patrick
Governor

Ian A. Bowles
Secretary

Mary B. Griffin
Commissioner

April 2, 2009

John Pappalardo, Chairman
New England Fishery Management NEFMC
50 Water Street, Mill 2
Newburyport, MA 01950



Re: Comments on NMFS Revised MSE Analysis

Dear Mr. Pappalardo:

You have scheduled a review of and possible action on the National Marine Fisheries Service (NMFS) analysis of the "mixed stock exception" (MSE) at the April 7 New England Fishery Management Council (NEFMC) meeting. To help prepare for this review, I offer the following comments on NMFS' revised MSE "analysis" with regard to Congressional intent and the Council's role. I expect the NEFMC will formally request NMFS to do the required court-ordered analysis to determine Framework 42 measures that would have resulted from application of the MSE.

I believe NMFS has not complied with Judge Harrington's Order to perform the MSE analysis. In fact, at the last NEFMC meeting, the Regional Administrator indicated NMFS would not do the analysis. She passed that responsibility onto the NEFMC to be attempted by the Groundfish Plan Development Team (PDT). However, she indicated NMFS PDT members would not participate in that analysis, effectively preventing Council action.

I recommend the NEFMC not accept NMFS' revised findings because there is nothing new for the Council to review. NMFS still has not provided an analysis. The revised report seems to differ from the first only in that it has an addendum that references David Pierce's remarks and the NEFMC's decision to *"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."*

I will not rebut every point made by NMFS in its addendum; however, I will note a few points relevant to whether the NEFMC should at a minimum stand by its earlier decision to reject NMFS' findings. NMFS has done nothing more in its revised report than to say that its determination against application of the MSE is correct and the NEFMC is wrong.

Furthermore, NMFS said in its Addendum that the legislative history of the 1996 Sustainable Fisheries Act makes it clear Congress never intended use of the MSE concept. In fact, NMFS clearly stated in its National Standard #1 Guidelines that Congress was aware of mixed-stock fishery concerns and the need for some flexibility in dealing with those concerns. Specifically, NMFS stated: *“NMFS infers that Congress did not mean to eliminate entirely the longstanding practice of allowing a mixed stock fishery to continue... identification of a stock as overfished does not necessarily mean that the entire fishery in which it occurs must be severely constrained while that stock is being rebuilt...”*

NMFS indicated in 1998 that its interpretation of Congressional intent leading to the MSE was based on Congress' focus on “fisheries” and the fact that Congress did not amend National Standard 1 regarding achievement of optimum yield from each fishery. Nothing has changed. The Magnuson-Stevens Act as revised in 2006 still focuses on “fisheries” and achieving optimum yield. NMFS' argument that *“Congressional intent 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...”* is not supported.

I believe Congress' purpose(s) is clear. It is the policy of Congress that the “national fishery conservation and management program...involves, and is responsive to the needs of, interested and affected States and citizens...” Dr. Pierce rightly emphasized this Congressional intent and purpose during NEFMC discussion on his motion that was adopted on an 11:6 vote.

New England Congressional leaders have re-iterated Congress' intent, in the context of NMFS' proposed Interim Rule, that the MSE is a tool to be used to mitigate socio-economic impacts and balance them with rebuilding requirements. Senators Snowe, Collins, Kennedy, Kerry, Reed, Whitehouse and Shaheen, writing to Dr. James Balsiger (NMFS Acting Administrator) stated that NMFS's disregard of the MSE is tantamount to ignoring the law. Congressman Barney Frank and eight other Congressmen mirrored that sentiment when advocating to Dr. Balsiger a *“short-term application”* of the MSE as a *“more discretionary and prudent approach”* to maintain objectives for the overall fishery.

As long as the NEFMC is consistent with the Act, its decisions should be adopted. Similarly, this means National Standard guidelines must also be consistent with the Act and Congressional intent.

Judge Harrington emphasized that the Magnuson Stevens Act requires us to “achieve and maintain, on a continuing basis, the optimum yield from each fishery” and to “exercise sound judgment in the stewardship of fishery resources” by preparing, monitoring and revising plans “which take into account the social and economic needs of the States.” These are some of Congress' purposes declared in the Act. In other words, the NEFMC is not just another advisory body to NMFS.

Gene Martin during his February 9 report to the NEFMC indicated that the NEFMC *“ultimately is an advisory group that doesn't make final decisions regarding Magnuson Act actions.”* I disagree with NOAA General Counsel's perspective; it's too narrow. It diminishes the importance of the NEFMC and the critical role of states and is inconsistent with the views of the Court.

In conclusion, I emphasize that the MSE analysis is not moot. NMFS will implement on May 1 a new suite of measures for groundfish (temporary Secretarial interim action). I believe the MSE analysis is relevant to the Interim Rule and NMFS' intent to implement a SNE Closed Area "as a means to reduce fishing mortality on SNE winter flounder primarily."

The same MSE analysis using previous National Standard #1 guidelines for its application – the version the NEFMC supports – should now be performed for this area to mitigate the severe socioeconomic consequences of the proposed Interim Rule. New England Senators and Congressmen agree, and they are adamant.

The groundfish fishing industry's future and effective implementation of Amendment 16 will be in jeopardy if NMFS ignores New England Senators and Congressmen and continues to treat the NEFMC as an advisory body. I hope the newly appointed NOAA leadership will improve relations with the New England Fishery industry. A good first step will be adopting the Council's recommendation for the Interim Rule.

Sincerely,



Paul J. Diodati
Director

Cc: Senator Edward Kennedy
Senator John Kerry
Representative Barney Frank
Representative John Tierney
Secretary Ian Bowles, EEA
Commissioner Mary Griffin, DFG
MA Marine Fisheries Advisory Commission