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April 2, 2009

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

Re: Comments on the Analysis of the Mixed Stock Exception

Dear Chairman Pappalardo:

I hereby submit comments on the Mixed Stock Exception that I believe the Council may find helpful in its discussions and in formulating a response to Judge Harrington.

Issues Considered

The question has been posed to the New England Fishery Management Council (NEFMC) by US District Judge Edward Harrington of whether the Council may manage the Northeast Multispecies Fishery under the so-called Mixed Stock Exception contained in the 1998 Guidelines for interpretation of National Standard One of the Magnuson-Stevens Fishery Conservation Management Act (the Act). It has been argued by the states in the case before Judge Harrington that under this so-called "Mixed Stock Exception," managers have the flexibility to allow continued overfishing, or delayed rebuilding, on weaker stocks to allow Optimum Yield to be harvested from other, healthier stocks in a mixed stock fishery. The National Marine Fisheries Service (NMFS) disagrees and contends that the mixed stock exception could never be applied to stocks that were deemed overfished, and that changes to Section 304 establishing new mandatory rebuilding requirements in the 2006 Reauthorization of the Act specifically preclude such flexibility. For the following reasons, it is my opinion that the plain language of the Magnuson Act allows for flexibility in addressing overfishing and rebuilding requirements for overfished stocks for one or more interrelated stocks in a management unit such as the Northeast Multispecies Fishery. The Act provides not only that managers can, but are under an affirmative statutory obligation to, develop measures to allow optimum yield to be harvested from a fishery on an ongoing basis, even if it results in overfishing on weaker stocks or causes those stocks to remain overfished, as long as

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-2-

consideration is given to the elements raised in the mixed stock exception in the former National Standard One Guideline.¹

The Council should reinforce its position before Judge Harrington, and further should undertake an immediate analysis to determine if the current measures to rebuild certain weaker stocks are preventing achievement of optimum yield on larger, more abundant and healthier stocks. In the interim, the Council should ask the state Plaintiffs to seek and order prohibiting further limitations based on individual stock considerations until the Council develops a comprehensive adjustment to the Fisheries Management Plan (FMP) to ensure that individual stock considerations do not continue to prevent harvest of Optimum Yield from the fishery as a whole.

Summary/Contents

1. The plain language of the Act requires interrelated stocks to be managed as a unit, defined as a fishery, and the Mixed Stock Exception is a reasonable interpretation of an interrelated stock rule to achieve the Act's purpose of achieving optimum yield from a fishery on an ongoing basis despite interaction with weaker stocks.
2. The Mixed Stock Exception as set forth in the 1998 Guidelines by its own language applied to overfished stock.
3. The Agency has mis-stated the current statutory language by basing its argument to Judge Harrington, in part, on prospective amendments to Section 304 that will be in effect on July 12, 2009.
4. The language of Section 304 governs responses to overfished fisheries, not overfished stocks, and the Agency's interpretation is contrary to Congressional intent.
5. A clear statement of intent in the Congressional Record indicates that the prospective 2006 changes in Section 304 do not require sacrifice of optimum yield on a wide range of stocks in a multispecies fishery based on an overfished condition of one of its components.
6. The Agency's interpretation of the statute, elevating single stock consideration in a fishery of interrelated stocks is contrary to the plain language of the statute, violates the judicial doctrine of absurd result, and should be rejected by the Court.
7. Conclusion.
8. Suggested Council Action.

¹ While this Guideline has now been replaced, prematurely, it can still serve as guidance to the Council.

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-3-

1. The Mixed Stock Exception flows from The Plain Language of the Act.

The plain language Magnusson Act requires interrelated stocks to be managed as a unit, which constitutes a *fishery*, as defined under the Act. As such, the goal of the Act is to obtain Optimum Yield from each *fishery* and to rebuild *fisheries*. As noted in the various preambles to the Magnusson Act, as Amended, the primary purpose of the Act is:

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
16 USC Sec. 1801 (b)(3)

Notably, the Act refers to optimum yield from each fishery, and does not refer to individual stocks. The Act defines the term fishery as:

(13) The term "fishery" means—
(A) 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; and
(B) any fishing for such stocks.
16 USC Sec. 1801(b)(13)

Of additional assistance in defining the intent of Congress in crafting the act are the definitions that NMFS uses to argue the Mixed Stock Exception does not exist, those being the distinctions between *overfished* and *overfishing*. These definitions are also provided in the Magnuson Act as follow:

(34) The terms "overfishing" and "overfished" mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.
16 USC Sec. 1801 (b)(34)

The Magnuson Act specifies various standards which govern all fishery management plans. The first of these provides that:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
16 USC Sec. 1851 (a)(3).

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-4-

The term optimum yield is defined in the Act as:

- (33) The term "optimum", with respect to the yield from a fishery, means the amount of fish which—
- (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;
 - (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and
 - (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

Also instructive is the requirement of National Standard three that:

- (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
- 16 USC Sec. 1851 (a)(3).

NMFS guidelines further endorses this holistic approach to management, by stating:

- (b) *General*. The purpose of this standard is to induce a comprehensive approach to fishery management. The geographic scope of the fishery, for planning purposes, should cover the entire range of the stock(s) of fish, and not be overly constrained by political boundaries. Wherever practicable, an FMP should seek to manage interrelated stocks of fish.

There is nothing to indicate Congress intended weaker stocks in a multispecies complex to be separately managed or to preclude harvesting optimum yield from a fishery as a whole based on one weak stock, as the focus is on a *fishery* as a whole and NMFS recognized this in its 1998 Guidelines. Although achieving maximum sustainable yield (MSY) on each stock in a multispecies complex is desired, it is not required, and is probably impossible. The "mixed stock exception" is a practical approach to balance the issues surrounding stocks at different stages within a multispecies complex, and preventing measures to protect one weak stock from overly restricting fishing to avoid loss of optimum yield. It applies when "harvesting one species of a mixed-stock complex at its optimum level may result in the overfishing of another stock component in the complex." 50 C.F.R. § 600.310(d)(6). Before permitting overfishing of this type – that is, by permitting a level of fishing mortality that will not require protection under the Endangered Species Act (ESA) — the Secretary must analyze the conditions in a given fishery and determine that all of the following conditions are satisfied:

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-5-

(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.

50 C.F.R. § 600.310(d)(6).

National Standard Guideline One reflects a plain reading of the intent of the Act, in light of the practical difficulty of achieving optimum yield from a mixed stock fishery where different component stocks are at different states of health. It reflects a reasonable interpretation of the Act's purpose to achieve optimum yield from a *fishery* on a continuing basis, even where some stocks remain challenged.

2. The Mixed Stock Exception applies to overfished fisheries.

NMFS argues inapplicability of the mixed stock exception to an overfished stock within a multispecies complex, invoking circular logic. This is a change in NMFS policy. There is nothing in the Guideline that indicates any intent to limit this language to a fish stock subject to overfishing, as opposed to being overfished, and this is consistent with the concept that NMFS is to manage based on optimum yield in fisheries, not on individual stocks in a mixed fishery. That NMFS contemplated the exception to apply to overfished stocks is clear from the limitation referencing the ESA. A stock approaching ESA listing would be well beyond any definition of overfished.

NMFS also argues 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 time frame mandated by the MSA." NMFS January Analysis at Page 4. One has to ask why, if the exception could never be applied to an *overfished* stock, one would need to consider the applicability of MSA rebuilding requirements, which in NMFS's statements, apply only to overfished stocks. (Although, by NMFS' language they actually apply to overfished *fisheries*).

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-6-

3. **The Agency relies on prospective changes to Section 304 that are not yet in effect.**

In its arguments to Judge Harrington, NMFS relies on changes to Section 304 contained in the 2006 Magnuson Reauthorization Act, including a requirement that Congress has mandated that overfishing shall cease immediately, and rebuilding plans shall be implemented within two years-as opposed to developed within one year, and that this need for immediacy somehow elevates priority of rebuilding each individual stock over obtaining optimum yield from *fisheries*. Before examining NMFS rationale for this assertion, **the Council should be aware that NMFS has mis-stated the statutory language.** The Magnuson Reauthorization Act specifically delayed the amendments to Section 304 for thirty months, until July 17, 2009, see both Westlaw printout and copy of the Congressional Record, annexed hereto as Attachment A & B. As such, NMFS' opinion, and revised Guideline, is premature and misleading.²

4. **Section 304 does not indicate intent to elevate concerns of weaker stocks over the requirement to obtain optimum yield from a fishery on an ongoing basis.**

In its analysis, NMFS argues that the language of Section 304 overrides National Standards, and requires immediate rebuilding of any stock determined to be overfished. I note that the Agency pleadings are replete with statements that the Sustainable Fisheries Act (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. NMFS January 9, 2009 Filing With Judge Harrington at Page 3.

Review of Section 304(e), 16USCS1854 (set forth in part below) reveals that the trigger is an overfished *fishery*, not "an overfished stock" within a *fishery*. The Agency interpretation contained in its 1998 guidelines recognized that practically speaking weaker stocks could, as the ratios of interrelated stocks changed, resulted in temporary overfishing, or overfished status of a stock, without causing an overfished condition in the fishery which would trigger a rebuilding requirement.³ A reading of the section does not support NMFS' interpretation, as the Section only requires rebuilding of affected stocks once a *fishery* is determined to be overfished. [see note below explaining referenced language added to section for ease of reading]:

² See Addendum 1 at end of this document for Section 304 with prospective changes. See also Attachment B, NMFS Red Book of SFA, at page 92, Section 304 with prospective changes incorporated, and note on Page 96 as to delayed implementation of changes.

³ NMFS seems to confuse the Magnuson Act with the Endangered Species Act.

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-7-

(3) Within one year of an identification under paragraph (1) *“fisheries that are overfished or are approaching a condition of being overfished”* or notification under paragraphs (2) *“fishery is overfished”* or (7) *“plan, amendment, or regulations have not resulted in adequate progress toward ending overfishing and rebuilding affected fish stocks”*, the appropriate Council (or the Secretary, for fisheries under section 302(a)(3) 16 USCS Sec. 1853(a)(3) shall prepare a fishery management plan, plan amendment, or proposed regulations for the fishery to which the identification or notice applies

(A) to end overfishing in the fishery and to rebuild affected stocks of fish;
or

(B) to prevent overfishing from occurring in the fishery whenever such fishery is identified as approaching an overfished condition.

(4) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations prepared pursuant to paragraph (3) or paragraph (5) for such fishery shall

(A) Specify a time period for ending overfishing and rebuilding the fishery that shall

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;

16 USC Sec. 1854

NOTE: *{Italicized bracketed bold language}* is quoted and inserted from referenced language in other subparts of Section 304 for the reader's ease. The actual text and prospective Amendments are set forth in Attachment A.

The plain language refers to *fishery* status, not individual *stock* status. To argue the contrary precludes the stated intent of the Act, which is to conserve *fisheries* and obtain maximum optimum yield, and the maximum benefit to the nation, and instead define the Act as potentially prohibiting fishing whenever any stock, however minor in comparison to total fishery yield, appears to be weak. The reference to stocks is to rebuild “affected stocks” once a *fishery* has been determined to be overfished, 16 USC Sec. 1854 (e) (7). This appears to require

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-8-

monitoring of those stocks in an overfished fishery that must be rebuilt-presumably to prevent the *fishery* from remaining in an overfished condition. Nothing elevates the needs of a weaker and perhaps insignificant individual stock over the requirement to obtain optimum yield from the fishery as a whole.

5. The Agency Interpretation conflicts with statements of intent contained in the Congressional Record.

The Mixed Stock Exception is really an expression of the interrelated stock rule contained within the Magnuson Act, and the 1998 NMFS Guideline was appropriate and accurately reflected the flexibility, and in fact, obligation, to balance the need to achieve optimum yield from a mixed stock fishery, with the need to stop overfishing on weaker stocks. There has been no statutory change which justifies NMFS's shift in policy, either in Section 304 as it currently exists, or under the prospective Amendment which will become effective in July of this year, and it is directly contrary to a statement in the Congressional Record by Congressman Young of Alaska, before the House vote approving the Magnuson Reauthorization of 2006.

I am also concerned that the provision requiring that harvest levels be set to prevent overfishing not be interpreted to shut down entire fisheries if one stock of a multi-species complex is experiencing overfishing. The purpose of the act is to provide a healthy fishery resource, but it is also to promote commercial and recreational fishing and support communities dependent on the fishery resources. The act should not be used as a tool for stopping all fishing activities in U.S. waters. The keys to achieving these goals are balance, flexibility, and common sense by the fishery managers. The provisions dealing with ending overfishing, rebuilding overfished fisheries, and setting harvest levels to prevent overfishing all need to be taken in the context of the National Standards and need to be viewed with an eye toward balance, flexibility, and common sense.

Excerpted from the Congressional Record, Attachment C at Page 104
Statement by Representative Young

While NMFS does not reference this statement, the United States Supreme Court does look to such statements in the Congressional Record to aid in interpretation of a statute, *see John W. Atherton, Jr., Petitioner v. Federal Deposit Insurance Corporation, as Receiver for City Savings, F. S. B.*, 519 US 213 (1997) citing statements on Congressional Record for interpretation of statute. Congressman Young's statements were made to the House, without response or disagreement, and should be given considerable weight, to reach the conclusion that Congress is

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-9-

seeking the best result for the nation, including its hard working fishermen and the many Americans dependent on their catch for wholesome and healthy food products.

6. The Agency's stated interpretation of the Act violates the absurd result doctrine and should not withstand judicial scrutiny.

A general rule of statutory interpretation is that the interpretation by an agency charged with implementing an act is generally given great deference, but Courts will reverse an agency regulation based on an interpretation that is arbitrary, capricious, or manifestly contrary to the statute, Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., et al., 467US837 (1984). Courts abhor absurd results and will look to the plain language of a statute, and if necessary construe it to avoid an absurd result, United States v. X-Citement Video, Inc., 513 U.S. 64, 68-71 (1994); United States v. Ron Pair Enters, 489 U.S. 235, 242 (1989); United States v. Brown, 333 U.S. 18, 27 (1948); Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). In this case, the Agency has changed its interpretation of the Act without justification, from the reasonable to the absurd, and prevents the statute from achieving its stated goal of rebuilding *fisheries* and returning optimum yield to the nation on an ongoing basis. NMFS' deviation from the plain language of the statute causes an absurd result, and is thus arbitrary and capricious and manifestly contrary to the statute.

NMFS interpretation already has proven that regulatory changes based on fluctuations in weaker stocks have a disastrous effect on the ability of the fishery to harvest optimum yield on healthy stocks. Under Framework 42, one stock, Cape Cod Gulf of Maine yellowtail flounder, is expected to constitute less than one percent of landings of a rebuilt Northeast Multispecies Fishery, yet is forcing severe reductions in overall landings to hasten its rebuilding through the two for one Days at Sea counting in inshore areas, and in turn has prevented the fleet from harvesting a significant portion of available Total Allowable Catch (TAC) on other, healthy stocks. Much more is being foregone in terms of yield to rebuild these difficult, weaker components of the mixed stock fishery, than will ever be regained once these stocks are rebuilt. This is preventing achievement of optimum yield on a continuing basis, and indicates that each time one stock in a complex falls below an overfished definition, the Nation will lose significant benefits for extended periods of time, resulting in constant regulatory adjustments and closures based on stocks that may represent an insignificant portion of overall yield in a *fishery*. This type of constant upheaval in the fishery, with its negative impact on the fishing industry, fishing communities, infrastructure and consumers, makes it a virtual certainty that the Act can NEVER achieve its purpose of returning optimum yield from any mixed stock fishery - a truly absurd result.

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-10-

In short, it is not only appropriate for fishery managers to manage based on the Mixed Stock Exception, it is mandated by the Act if the fishery is ever to return optimum yield to the nation on an ongoing basis. While NMFS *desires* optimum yield from each stock, Congress does not *require* it. Congress expressed its intent to rebuild and manage *fisheries*, and not to manage on a stock by stock basis. NMFS substitutes the word *stock* for *fishery* repeatedly when it paraphrases the Act is an attempt to rewrite the statute when it is clear on its face and would result in an absurdity.

7. Conclusion

The Council should affirm its statement that the Northeast Multispecies Fishery falls within the definition and concept of interrelated stocks, subject to management as a Mixed Stock, and that as long as the fishery as a whole can be rebuilt within the statutory time frame of ten years, or longer depending on the status of component stocks that require extended rebuilding, weaker stocks may be rebuilt at a slower rate as long as they do not threaten to result in overfishing or an overfished condition in the entire *fishery*.

8. Council Action

In order to comply with the Judge's Order, the Council should take the following actions:

1. Vote to reaffirm the Council's prior vote that the Mixed Stock Exception should have been applied in Framework 42, and would have eliminated the necessity of, *inter alia*, the two for one Days at Sea counting in the Gulf of Maine.
2. Vote to develop an Amendment to the Multispecies FMP to permit the Council to apply the Mixed Stock Exception (or interrelated Stock Rule) to other species to determine if regulatory restrictions required by weaker stocks can be relaxed to achieve optimum yield on healthier stocks, without affecting the ability of the *fishery* to achieve rebuilding goals.
3. Vote to request the Plaintiff states to request a Ruling from the Court affirming the Mixed Stock Exception (or the Interrelated Stock Rule) and requiring NMFS to implement it in the Northeast Multispecies FMP.
4. Vote to request the Plaintiff states to request an order prohibiting NMFS from further restricting effort in the Northeast Multispecies Fishery for a reasonable time until the Council can develop and implement an Amendment to the FMP to incorporate prospective changes from the analysis set forth in paragraph 2, above.

I submit these comments as my own. I live and work in a fishing community, in large part because of the rich heritage of the fishing industry and my love for the ocean and respect for

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-11-

those who venture out on it to feed our Nation. As such, I have a vested interest in seeing that the intent of the Act is achieved. Only through a reasoned, balanced approach to fisheries management can we return the maximum benefit from our fisheries to the Nation as Congress intended. This is to the benefit of not only those in the fishing industry or fishing communities, but to all those who still value the true spirit of hard work and dedication, or who depend on commercial fishermen for their access to fishery resources. Unless we act quickly and restore balance and reason to our management of the resource, another resource is threatened; that of our hard working fishing industry, to the detriment of our culture and our economy at a time when we can least afford such a loss.

Thank you for the opportunity to comment.

Very truly yours,

/s/ Stephen M. Ouellette

Stephen M. Ouellette, Esq.

OUELLETTE & SMITH

John Pappalardo, Chairman

April 2, 2009

-12-

ADDENDUM 1

Relevant Portions of Section 304 with prospective changes contained in the Magnuson Reauthorization Act of 2006, effective July 12, 2009:

(3) Within one year of [**2 years after**] an identification under paragraph (1) or notification under paragraphs (2) or (7), the appropriate Council (or the Secretary, for fisheries under section 302(a)(3), 16 USCS Sec. 1853(a)(3) shall prepare [**and implement**] a fishery management plan, plan amendment, or proposed regulations for the fishery to which the identification or notice applies

(A) to end overfishing [**immediately**] in the fishery and to rebuild affected stocks of fish; or

(B) to prevent overfishing from occurring in the fishery whenever such fishery is identified as approaching an overfished condition.

(4) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations prepared pursuant to paragraph (3) or paragraph (5) for such fishery shall

(A) specify a time period for ending overfishing and [**remove “ending overfishing and”**] rebuilding the fishery that shall

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;

16 USC Sec. 1854(e)(3)