

Correspondence



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

MAY 13 2009



Mr. Paul J. Howard, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

Dear Paul:

Thank you for your April 8, 2009, letter forwarding the New England Fishery Management Council's (Council) April motion to NOAA's National Marine Fisheries Service's (NMFS) revised analysis of the mixed-stock exception as it relates to measures implemented by Framework Adjustment 42 (FW 42) to the Northeast (NE) Multispecies Fishery Management Plan (FMP). As you know, NMFS prepared this revised analysis pursuant to a February 23, 2009, Court Order in the case of *Commonwealth of Massachusetts and State of New Hampshire v. Carlos M. Gutierrez*.

As you are aware, on April 10, 2009, the Court agreed that NMFS had complied with earlier Court Orders and seriously considered and analyzed the mixed-stock exception. As a result, all measures originally implemented under FW 42 and suspended by the Court were reinstated. Further, on April 14, 2009, the Court dismissed the remaining counts in the aforementioned lawsuit as moot based upon the publication of the interim final rule on April 13, 2009.

Sincerely,

Patricia A. Kurkul
Regional Administrator



cc: jmc 5/18/09

3



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*

April 8, 2009

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

Dear Pat:

I want to inform you of a recent Council action related to the Northeast Multispecies fishery.

On April 7, 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," and its attached addendum. This document was dated February 2009 and includes revisions to an earlier draft that were made after the February 2009 Council meeting. After discussion of this document the Council passed the following motion with a roll call vote of twelve in favor, four opposed, and one abstention:

"that the Council should: (1) disagree with the conclusions of the NMFS report dealing with further consideration of the application of the mixed stock exception and submitted to the Council for review as ordered by Judge Edward J. Harrington; and (2) inform Judge Harrington that NMFS has failed to perform the analyses for Council review; consequently, the Council is unable to provide the court with a review."

Council member, Sally McGee, will be submitting a dissenting opinion.

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

Sincerely,

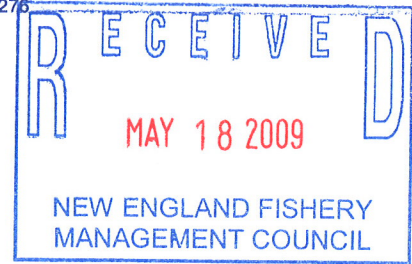
Paul J. Howard
Executive Director

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



UNITED STATES DEPARTMENT OF COMMERCE
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55 Great Republic Drive
Gloucester, MA 01930-2276

MAY 15 2009



Paul J. Howard, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

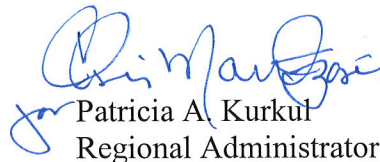
Dear Paul:

This letter is in response to your April 13, 2009, letter regarding the following April New England Fishery Management Council (Council) motion:

“that the Council send a letter to NMFS requesting they look at the trip limits described in the final interim rule as they relate to the increase in “F” rates that can be allowed for white hake and Georges Bank winter flounder and NMFS consider adjusting the trip limits accordingly.”

In response to this request, I have asked the Northeast Fisheries Science Center to analyze the biological impacts of possible trip limit adjustments for these two groundfish species. If warranted, based on this analysis, NMFS will consider implementing modifications to the interim final rule that revise the trip limits for Georges Bank winter flounder and white hake.

Sincerely,


Patricia A. Kurkul
Regional Administrator



cc: 4n-5/18/09



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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*

April 13, 2009

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

Dear Pat:

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

On April 9, 2009, the Council passed the following motion by a show of hands (12/1/1):

“that the Council send a letter to NMFS requesting they look at the trip limits described in the final interim rule as they relate to the increase in the “F” rates that can be allowed for white hake and Georges Bank winter flounder and NMFS consider adjusting the trip limits accordingly.”

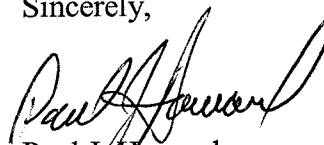
This motion was passed in anticipation of publication of an interim rule for the Northeast Multispecies Fishery. The rule is expected to maintain trip limits of 5,000 lbs./trip for Georges Bank winter flounder, and 1,000 lbs./DAS to a maximum of 10,000 lbs./trip for white hake. These trip limits were first adopted by Framework 42.

The Environmental Assessment (EA) for the interim rule includes an analysis of the changes in fishing mortality that will result from the proposed measures. As shown in the attached table (Table 3 from the EA), no reduction is needed for either GB winter flounder or white hake. The measures, however, will reduce mortality by 13% and 17%, respectively. What is not obvious from this table but can be determined from Table 6 in the EA is that the estimated 2008 fishing mortality for both of these stocks is below the fishing mortality targeted by the proposed action. GB winter flounder mortality could nearly double from 2008 to 2009, and white hake mortality could increase by 29 percent before the mortality targets would be exceeded.

It appears that the trip limits for these two stocks could increase without exceeding mortality targets. While the Council recognizes that changes in the trip limits for these stocks may affect the biological impacts for other stocks, we ask that you evaluate different trip limits and consider adjusting trip limits accordingly.

Thank you for considering this motion. We look forward to your reply.

Sincerely,


Paul J. Howard
Executive Director

attachment

Table 3 from the Environmental Assessment for a Secretarial Action to Implement Measures to Reduce Overfishing in the Northeast Multispecies Fishery Complex

Preferred Alternative (Alternative 4)				
Species	Stock	Goal	Objective (Reduction in F by Proposed Measures)	Estimated Reduction in F Achieved by Proposed Measures
Cod	GB	Fmsy*	40%	28%
	GOM	Fmsy	21%	18%
Haddock	GB	Fmsy	na	25%
	GOM	Fmsy	na	18%
Yellowtail Flounder	GB	Frebuild	16%	16%
	SNE/MA	Frebuild	38%	39%
	CC/GOM	Frebuild	18%	42%
American plaice		Fmsy	na	15%
Witch flounder		Fmsy	32%	17%
Winter flounder	GB	Fmsy	na	13%
	GOM	Fmsy	11%	16%
	SNE/MA	Frebuild	100%	62%
Redfish		Fmsy	na	13%
White hake		Frebuild	na	17%
Pollock		Fmsy **	51%	19%
Windowpane flounder	North	Fmsy**	83%	22%
	South	Fmsy**	29%	32%
Ocean pout		Fmsy	not calculated	not calculated
Atlantic halibut		Frebuild	27%	not calculated

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JAMES LOVGREN,

V.

SUMMONS IN A CIVIL CASE

GARY LOCKE, ET AL.,

CASE NUMBER: 3:09-CV-02148-FLW-LHG

TO: *(Name and address of Defendant):*

Gary Locke, Secretary
United States Department of Commerce
Washington, D.C. 20230

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY
(Name and address)

**Law Office of Patrick Flanigan
P.O. Box 42
Swarthmore, PA 19081-0042**

an answer to the complaint which is served on you with this summons, within **60** days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

WILLIAM T. WALSH

CLERK

Kim Korchick

(By) DEPUTY CLERK



ISSUED ON 2009-05-08 10:25:56.0, Clerk
USDC NJD

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

James Lovgren

(b) County of Residence of First Listed Plaintiff Ocean

(c) Attorney's (Firm Name, Address, Telephone Number and Email Address)

Patrick Flanigan, Esquire. Law Office of Patrick Flanigan. P.O. Box 42, Swarthmore, PA 19081-0042. Tel: (484) 904-7795 Email: info@lawofficepf.com

DEFENDANTS

Gary Locke, Secretary of U.S. Department of Commerce

County of Residence of First Listed Defendant Washington, D.C.

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 820 Copyrights	<input checked="" type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 650 Airtline Regs.	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability		<input type="checkbox"/> 690 Other	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract			<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act		<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 740 Railway Labor Act		<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 535 Death Penalty			<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 462 Naturalization Application		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 465 Other Immigration Actions		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
	<input type="checkbox"/> 440 Other Civil Rights				<input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity): Magnuson-Stevens Act, 16 USC section 1861(d) and others.

Brief description of cause: Complaint against federal fishing regulations.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S)

(See instructions): JUDGE

DOCKET NUMBER

Explanation:

DATE
07
05/08/2009

SIGNATURE OF ATTORNEY OF RECORD

Patrick Flanigan

Patrick Flanigan, Esquire
NJ Attorney No.: 016092004
239 Dickinson Avenue
P.O. Box 42, Swarthmore, PA 19081
Tel: (484) 904-775
Email: info@lawofficepf.com

Attorney for Plaintiffs

**UNITED STATES FEDERAL DISTRICT COURT
DISTRICT COURT OF TRENTON, NEW JERSEY**

JAMES LOVGREN, ET AL. :
AND :
OTHER SIMILARLY SITUATED INDIVIDUALS: :
Plaintiffs, :
v. :
GARY LOCKE, in official capacity as :
Secretary of the United States Department of :
Commerce; THE NATIONAL OCEANIC AND :
ATMOSPHERIC ADMINISTRATION; and :
THE NATIONAL MARINE FISHERIES :
SERVICE, :
Defendants. :

Civil Case No.: _____

**EXPEDITED CONSIDERATION
SOUGHT PER 16 U.S.C. § 1855(f)(4)**

**COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

The representative Plaintiff, James Lovgren, the named Plaintiffs herein and on behalf of all other similarly situated individuals (separately or collectively herein "Plaintiff(s)"), by and through the undersigned counsel, bring this action seeking declaratory and injunctive relief against Defendants Gary Locke, in official capacity as Secretary of the United States Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS). In support hereof, Plaintiffs aver as follows:

I. INTRODUCTION

1. This action for declaratory and injunctive relief arises under:
 - a. The Constitution of the United States;

- b. The Administrative Procedures Act, 5 U.S.C. §§701-706 (APA);
 - c. The Regulatory Flexibility Act (RFA), 5 U.S.C. §§601-612;
 - d. The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007 (MSA), 16 U.S.C. §§1801 et seq.;
 - e. The National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4347; and
 - f. Presidential Executive Orders and additional statutes that may be revealed during the pendency of this action.
2. Plaintiffs bring this action to challenge a temporary final rule, which was published in the Federal Register on April 13, 2009, at 74 Fed. Reg. 17030-17065 (Apr. 13, 2009). The temporary final rule is the Northeast Multispecies Fishery: Secretarial Interim Action (NESIR) implemented at 50 C.F.R. §§648 et seq.
 3. NESIR became effective on May 1, 2009, as published in the Federal Register on April 13, 2009, at 74 Fed. Reg. 17030 (Apr. 13, 2009).
 4. NESIR will have severe negative economic impacts on the Plaintiffs, their families, the commercial fishing industry and fishing communities.
 5. NESIR will eliminate jobs and income for Plaintiffs and others similarly situated.
 6. NESIR will further privatize and consolidate ownership of a public fishery resource.
 7. Pursuant to 16 U.S.C. §1855(f)(4) it is respectfully requested that the District Court assign this matter for a hearing at the earliest possible date and expedite the matter in every possible way.

II. STATUTES, JURISDICTION AND VENUE

8. This action arises under the U.S. Constitution, the APA, the MSA and other statutes that may be revealed during the pendency of this litigation.
9. This Court has jurisdiction over this action pursuant to the MSA, which provides that “[t]he District Courts of the United States shall have the exclusive jurisdiction over any case or

controversy arising under the provisions of [the MSA]. 16 U.S.C. §1861(d). The MSA further provides that regulations promulgated thereunder shall be subject to judicial review "if a petition for such review is filed within thirty (30) days after the date on which the regulations or action is published in the Federal Register, as applicable." 16 U.S.C. §1855(f)(1). In this matter, the regulation was published in the Federal Register on April 13, 2009. See 74 Fed. Reg. 17030-17065 (Apr. 13, 2009).

10. This Court also has original jurisdiction over this action pursuant to 28 U.S.C. §1331 (Federal Question); 28 U.S.C. §1346 (United States as Defendant); 28 U.S.C. §22-1 (Injunctive Relief); 28 U.S.C. §2202 (Declaratory Relief); and 5 U.S.C. §§701-706 (APA).

11. An actual and justiciable controversy exists between Plaintiffs and the Defendants. Accordingly, the relief requested herein is proper under 28 U.S.C. §2202 and 5 U.S.C. §§705 and 706.

12. Venue of this Court is proper under 28 U.S.C. §1391(e)(2) and (3). The Secretary of Commerce is an officer of the United States. Venue for Plaintiffs is set forth *infra*.

13. Attorney fees and costs are sought pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412, if Plaintiff(s) prevail in this matter.

14. Defendants' actions, which are effective on May 1, 2009, will cause immediate, severe and irreparable harm to Plaintiffs. Accordingly, resolution of the merits of this action should be expedited in every way possible pursuant to 16 U.S.C. §1855(f)(4).

15. Service of process is pursuant to Fed. R. Civ. P. 4(i)(1) and (2).

III. PARTIES

16. James Lovgren, the representative Plaintiff, and the named Plaintiffs. (Attached as Exhibit P-1).

17. The complaint is also filed on behalf of all other similarly situated individuals being holders of the NE Multispecies federal fishing permit and subject to regulations under the NESIR.

18. Defendant Gary Locke, in the official capacity as the Secretary of Commerce of the United States, is the federal official responsible for the operations of NOAA and NMFS. Secretary Locke is being sued in the capacity as the chief officer of the department charged with overseeing the proper administration and implementation of the APA, NEPA and the MSA.

19. Defendant NOAA is the agency of the United States Department of Commerce with supervisory responsibility for NMFS. The Secretary of Commerce has delegated responsibility to ensure compliance with the MSA, APA and NEPA, to the NOAA, which in turn sub-delegated that responsibility to NMFS.

20. Defendant NMFS is the federal agency with primary responsibility for administering the MSA and performing APA and NEPA compliance regarding MSA actions. NMFS is the federal agency that approved the final rule published within the Federal Register at 74 Fed. Reg. 17030-17065 (Apr. 13, 2009), which is the subject of this complaint.

IV. STATUTORY AND REGULATORY BACKGROUND

21. To manage the nation's fish stocks, the MSA created eight regional fishery management councils, each responsible for producing fishery management plans (FMPs) to regulate fishing within its region. 16 U.S.C. §1852(a). The Secretary establishes the "boundaries between the geographical areas of authority of adjacent [c]ouncils." 16 U.S.C. §1855(f)(2). Each council must "(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such (sic) plan that are necessary from time to time." 16 U.S.C. §1852(h)(1). If a fishery

extends beyond the geographical area of any single council, the Secretary has the authority to designate which council shall prepare the FMP or subsequent amendments for the fishery. 16 U.S.C. §1854(f)(1). All fishery management plans must balance the needs of the fishery users against conservation principles by reference to the ten national standards. 16 U.S.C. §1851(a) et seq. In the development of a FMP, or amendments thereto, the council must conduct public hearings at appropriate times and locations in all the geographical areas affected by the proposed regulations, even if the area is under the authority of another council. 16 U.S.C. §1852(h)(3).

22. The Secretary acting through the NMFS enacts fishery management plans. The NMFS solicits public comment and reviews the fishery management plan to ensure that they are consistent with the National Standards and other applicable laws. 16 U.S.C. §§1852(h)(3), 1854(a)(1)-(2) et seq.

23. Interim measures, when taken by the Secretary, are authorized pursuant to 16 U.S.C. §1855(c) et seq.

24. The Northeast Multispecies fishery is implemented by regulations at 50 C.F.R. Part 648, Fisheries of the Northeastern United States.

25. The APA provides that a “ person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial relief thereof.” 5 U.S.C. §702. In an APA suit, the reviewing court shall “hold unlawful and set aside agency actions, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law” 5 U.S.C. §706(2).

26. Unless this Court grants Plaintiffs' requested relief on an expedited basis, the Plaintiffs will sustain immediate and irreversible economic harm by Defendants' actions as promulgated under the final rule published at 74 Fed. Reg. 17030-17065 (Apr. 13, 2009), which Plaintiffs aver violates the Constitution of the United States of America, the APA, NEPA and the MSA.

27. Plaintiffs have no other remedy at law available.

VI. ALLEGATIONS OF PLAINTIFFS

COUNT I

Claim for Injunctive and Declaratory Relief - Due Process

NESIR violates the Constitution of the United States, Amendment V

28. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
29. Under the Constitution of the United States, "[n]o person shall . . . be deprived of . . . property, [a] without due process of law; . . ." U.S. CONST. Amend. V.
30. The final rule incorporates fishery regulations relying upon fishing harvesting data (landings) extracted from the NMFS database.
31. The NMFS database contains numerous errors and contains incomplete data.
32. Defendants know, or have reasonable basis to know, that the landing data is flawed, yet NMFS continues to promulgate fishery regulations based upon the NMFS database.
33. In addition, Plaintiffs were not represented during the development of NESIR and were denied opportunity to be heard on the issues.
34. Defendants' actions have caused Plaintiffs irreparable injury for which there is no other adequate remedy at law.
35. Plaintiffs are entitled to injunctive relief and a declaratory judgment in that Defendants have violated Plaintiffs' due process.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT II

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1851(a)(2)

36. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
37. Pursuant to 16 U.S.C. §1851(a)(2) any promulgation of regulations requires that “management measures shall be based upon the best scientific information available.”
38. Plaintiffs aver that the NMFS database, used for landings data among other purposes, is incomplete and contains numerous errors.
39. Defendants know, or have reasonable basis to know, that the database is flawed, yet NMFS continues to promulgate fishery regulations based upon the NMFS database.
40. Defendants’ actions have caused Plaintiffs irreparable injury for which there is no other adequate remedy at law.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT III

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1851(a)(4)

41. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
42. Pursuant to 16 U.S.C. §1851(a)(4), “[c]onservation and management measures shall not discriminate between residents of different states.”
43. Plaintiffs aver that the ground fishery advisory panel was not fairly comprised of fishermen affected by the NESIR.

44. Plaintiffs aver that their geographical area was not provided fair and equitable opportunity to participate in the process.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT IV

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1851(a)(6)

45. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.

46. Pursuant to 16 U.S.C. §1851(a)(6), “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.”

47. Plaintiffs aver that NESIR does not account for variations in fisheries, fishery resources and catches for the New Jersey and New York fishing communities.

48. Plaintiffs aver that their geographical area was not provided fair and equitable opportunity to participate in the process.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT V

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1851(a)(8)

49. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.

50. Pursuant to 16 U.S.C. §1851(a)(8), “[c]onservation and management measures shall, consistent with the conservation requirements . . . , take into account the importance of fishery

resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2)[best science], in order to (A) provide for sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.”

51. Plaintiffs aver the NESIR failed to provide for the sustained participation of New Jersey and New York fishing communities and did not minimize adverse economic impacts.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT VI

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1851(a)(9)

52. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.

53. Pursuant to 16 U.S.C. §1851(a)(9), “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.”

54. Plaintiffs aver that NESIR does not minimize bycatch of winter flounder or other species under NESIR and increases mortality of winter flounder and other species through regulatory discards for the New Jersey and New York fishing communities.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT VII

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1852 et seq.

55. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.

56. The Secretary failed to “ensure a fair and balanced apportionment . . . of the active participants (or their representatives) in the commercial and recreational fisheries.” 16 U.S.C. §1852(b)(2)(B).

57. The New England Fishery Management Council does not represent the interest of the New York or New Jersey fishing communities.

58. Advisory panel membership selection by the NEFMC’s executive committee creates a conflict of interest and violates MSA.

59. Under 16 U.S.C. §1852(b)(1)(B), Patricia Kurkul, NE Regional Administrator, is a voting member of the NEFMC. Ms. Kurkul is also a member of the Executive Committee, which selects members of the groundfish advisory panel. In addition, Ms. Kurkul is a member of the groundfish oversight committee thereby creating a conflict of interest and violates the purpose and intent of advisory panel functions, which in part, is to fairly represent the geographical range of interest in the NE multispecies fishery.

60. The NE Multispecies ground fishery advisory panel is not representative of the geographical migration of the multispecies under management.

61. Council and the advisory panel failed to adequately conduct meaningful public hearings in the geographical area affected fishermen or to provide an opportunity to be heard in the development of fishery management plans and amendments. 16 U.S.C. §§1852(h)(3), 1852(i)(2)(C).

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT VIII

Claim for Injunctive and Declaratory Relief

NESIR violates the MSA as set forth at 16 U.S.C. §1852 et seq.

62. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
63. The Mid-Atlantic Fishery Management Council (MAFMC) failed to comply with its statutory duties to represent the ground fishery interests within the geographical scope of its authority.
64. The MAFMC failed to represent its constituents by failing to ensure the groundfish advisory panel contained members from the mid-Atlantic region.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT IX

Claim for Injunctive and Declaratory Relief

NESIR violates NEPA, 42 U.S.C. §§4321-4347

65. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
66. Pursuant to 40 C.F.R. Part 1508.7, which requires assessment of direct and indirect cumulative impacts with respect to past, present and reasonably foreseeable future regulatory actions.
67. NESIR has significant present and reasonably foreseeable future effects on the economic and social communities of New York and New Jersey.
68. Plaintiffs aver that NESIR fails to fairly and equitably consider the cumulative impacts of fishing communities outside the geographical area of NEFMC.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT X

Claim for Injunctive and Declaratory Relief

NESIR violates the RFA, 5 U.S.C. §551 et seq.

69. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.
70. Defendants are subject to the requirements of 5 U.S.C. §553(a) et seq.
71. Pursuant to 5 U.S.C. §601(3), each Plaintiff qualifies as a “small business”.
72. Defendants failed to comply with 5 U.S.C. §602(a)(1-2) by not publishing as required in the Federal Register during the months of October and April each year the description and summary of the NESIR.
73. Defendants failed to comply with 5 U.S.C. §602(b) by not transmitting the NESIR to the Chief Counsel for the Advocacy of the Small Business Administration for comment.
74. Defendants failed to comply with 5 U.S.C. §602(c) by not providing direct notice to the small entities.
75. Defendants failed to certify or publish that there was not “significant economic impact on a substantial number of small entities” pursuant to 5 U.S.C. §605(b), which then would have compelled Defendants’ compliance with 5 U.S.C. §§603 and 609.
76. Defendants failed to comply with 5 U.S.C. §603(a) by not transmitting the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.
77. By failing to transmit the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration, the Defendants failed to comply with 5 U.S.C. §609 as follows:
 - a. Violation of 5 U.S.C. §609(a)(2), no general notice in publications likely to be obtained by the Plaintiffs;

- b. Violation of 5 U.S.C. §609(a)(3), no direct notice to Plaintiffs;
- c. Violation of 5 U.S.C. §609(a)(5), failing to modify procedural rules to reduce cost or complexity of participation by Plaintiffs;
- d. Violation of 5 U.S.C. §609(b)(1), failing to notify the Chief Counsel for Advocacy of the Small Business Administration;
- e. Violation of 5 U.S.C. §609(b)(2), interference with the obligations of the Chief Counsel, who was denied opportunity to fulfill duties of obtaining advice and recommendations from the Plaintiffs and other small entities similarly situated;
- f. Violation of 5 U.S.C. §609(b)(3-4), failing to convene a review panel or consult with the Chief Counsel, which also precluded collecting recommendations from small entities prior to publication of an initial regulatory flexibility analysis;
- g. Violation of 5 U.S.C. §609(b)(5), failing to report on the comments and findings within 60 days of convening a review panel, which also must be prior to publication of an initial regulatory flexibility analysis;

104. Defendants failed to comply with 5 U.S.C. §610(a) by failing to publish in the Federal Register a periodic plan for reviewing rules "which have or will have" economic impact of a substantial number of small entities under the NESIR.

105. Defendants failed to comply with 5 U.S.C. §610(c) by failing to annually publish in the Federal Register a "list of the rules" which have economic impact of a substantial number of small entities under the FMP prior to development of NESIR that would describe the rule and "shall invite public comment upon the rule."

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

COUNT XI

Claim for Injunctive and Declaratory Relief

NESIR exceeds the statutory authority of the NOAA Regional Administrator

106. Plaintiffs fully incorporate all allegations set forth above as if set forth herein.

107. Pursuant to 16 U.S.C. §1855(c)(1), if there is an interim measure taken by the Secretary, that interim measure may not promulgate regulations beyond the measures necessary, pertinent hereto, to address overfishing.

108. Plaintiffs aver that the NOAA Regional Administrator has exceeded statutory authority by promulgating regulations beyond those necessary, to the detriment of Plaintiffs, that violate statutory authority.

WHEREFORE, Plaintiffs seek the remedies set forth in the Prayer for Relief and further relief as the Court deems equitable, just and proper under the circumstances.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court expedite this matter in every possible way pursuant to 16 U.S.C. § 1855(f)(4) and enter the following relief:

1. An Order that the Secretary seriously evaluate whether negotiated rulemaking is appropriate pursuant to the Negotiated Rulemaking Act, 5 U.S.C. §§561-570a.
2. An Order that the Secretary seriously evaluate whether negotiated rulemaking is appropriate pursuant to the Fishery Negotiation Panel, 50 C.F.R. §600.750 et seq.
3. A declaratory judgment that Defendants have violated the Magnuson-Stevens Act, as Amended 2007, 16 U.S.C. §1801 et seq., as set forth in each count above.
4. An order awarding Plaintiffs their attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412 et seq.
5. An Order granting such other and further relief as the Court deems equitable, just and proper under the circumstances.

Date: May 7, 2009

Respectfully submitted,

**Patrick
Flanigan**

Digitally signed by Patrick Flanigan
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Patrick Flanigan, Esquire
Attorney for Plaintiffs

VERIFICATION

I, Patrick Flanigan, verify that I am the attorney for Plaintiffs in the above captioned matter and that the information contained in the foregoing **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** is true and correct to the best of my knowledge, information and belief after reasonable inquiry. The undersigned understands the verifications herein are made subject to 28 U.S.C. § 1746.

**Patrick
Flanigan**

Digitally signed by Patrick Flanigan
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Date: May 7, 2009

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on May 7, 2009, I electronically filed the foregoing document - **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** with the Clerk of the Court using the CM/ECF. I also certify that the foregoing document will be served on the following counsel of record in the manner specified after the Clerk of the Court returns the Summons and issues a Civil Action Number.

Certified Mail, Return Receipt (PS form 3811) No.:

Attorney General of the United States
Department of Justice, Room E-103
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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Christopher Christie
U.S. Attorney for the District of New Jersey
U.S. Attorney's Office
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7008 1300 0000 8031 3132

Gary Locke, Secretary
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PLAINTIFFS' EXHIBIT

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1. Mr. Thomas P. Anderson, who resides at 705 Tall Oaks Drive, Brick, NJ 08724.
2. Mr. Marvin Armstrong, who resides at 417 Bayview Avenue, Union Beach, NJ 07735.
3. Belford Seafood Co-op, operating business at 901 Port Monmouth Road, Belford, NJ 07718.
4. Mr. James Brindley, operating a business through P.O. Box 306, Barnegat Light, NJ 08006.
5. Michael Chanowich, who resides at 45 Irving Place, Belford, NJ 07718.
6. Mr. John Cole, who resides at 818 South Street, Point Pleasant, NJ 08742.
7. Mr. Roy Diehl, who resides at 554 Clark Avenue, Union Beach, NJ 07735.
8. Fishermen's Dock Cooperative, Inc., operating a business at 57 Channel Drive, Point Pleasant Beach, NJ 08742.
9. Mr. Denis Lovgren, who resides at 306 Sudbury Road, Point Pleasant, NJ 08742.
10. Mr. James Lovgren, who resides at 17 Laurelhurst Drive, Brick, NJ 08724.
11. Mr. Eric L. Lundvall, who resides at 400 Wood Street, Little Egg Harbor, NJ 08087.
12. Mr. Hans Myklebust, who resides at 6 Lynn Drive, Toms River, NJ 08753.
13. Mr. Nascimento J. Ruela, who resides at 215 Central Avenue, Point Pleasant Beach, NJ 08742.
14. Mr. Joseph Sciabarra, doing business through P.O. Box 268, Mt. Sinai, NY 11766.