

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

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CONSERVATION LAW FOUNDATION, INC.)
62 Summer Street)
Boston, MA 02110)
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Plaintiff)
)
v.)
)
	CA No.)
REBECCA M. BLANK, in her official capacity as)
Acting Secretary of the Department of Commerce,)
Room 5851)
14 th Street and Constitution Avenue, NW)
Washington, DC 20230)
)
NATIONAL OCEANIC AND ATMOSPHERIC)
ADMINISTRATION)
United States Department of Commerce)
Room 5128)
1401 Constitution Avenue, NW)
Washington, DC 20230)
)
NATIONAL MARINE FISHERIES SERVICE,)
Department of Commerce, Room 14555)
1315 East-West Highway)
Silver Spring, MD 20910)
)
Defendants.)
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Conservation Law Foundation, Inc. (“CLF” or “Plaintiff”) on behalf of its adversely affected members hereby challenges specified portions of a final rule by Defendants Commerce Acting Secretary Rebecca M. Blank, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (hereinafter “Defendants” or “NMFS” or “Fisheries Service”), entitled *Fisheries of the Northeastern United States; Northeast (NE)*

Multispecies Fishery; Framework Adjustment 48, 78 Fed. Reg. 26,118 (May 3, 2013) (“Framework 48 Final Rule”). The Framework 48 Final Rule violates the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), the National Environmental Policy Act (“NEPA”), and the Administrative Procedure Act (“APA”).

2. The Framework 48 Final Rule implements adjusted management measures to the Northeast Multispecies [Groundfish] Fishery Management Plan (“Groundfish FMP”), a federal fisheries plan that regulates the management of twenty stocks of so-called groundfish in New England, fish like cod, haddock, flounders, and hake that are primarily harvested on or close to the ocean floor. The Framework 48 Final Rule took effect for the 2013 fishing year, which runs from May 1, 2013 to April 30, 2014.

3. Defendants have declared the New England groundfish fishery to be a disaster because “several key fish stocks are not rebuilding.” http://www.nmfs.noaa.gov/sfa/sf3/disaster_determinations.htm. Some of these stocks include species like Atlantic cod that have been overfished chronically since at least the early 1990’s. From 1994 to 2004, Defendants closed five large areas of the ocean on a year-round basis because they determined these areas to be critical to groundfish recovery. Defendants now propose to re-open these groundfish closed areas through a hastily prepared administrative action, even though closed areas directly benefit the severely depleted groundfish stocks that gave rise to the fisheries disaster declaration.

4. The changes to 50 C.F.R. § 648.87(c)(2) implementing the Framework 48 measures are unlawful for several reasons. First, this “framework adjustment” to an existing fishery management plan purports to authorize fishermen to access approximately 5,000 square miles of ocean habitat that has been closed to groundfish vessels and nearly all other commercial

fishermen for many years. By so doing, Defendants have improperly and illegally undermined and contradicted that underlying fishery management plan with respect to measures that are subject to exemptions through a sector annual operations plan. This action is a violation of the Magnuson-Stevens Act.

5. Second, by creating a process whereby commercial fishermen can now apply through their fishing organizations for annual access to currently closed areas on a case-by-case basis, the Framework 48 Final Rule also violates NEPA and the Magnuson-Stevens Act in other critical respects. The authorization is being implemented without an Environmental Impact Statement (“EIS”) and intentionally short-circuits and undermines the Omnibus Habitat Amendment. The Omnibus Habitat Amendment is the multi-year NEPA and Magnuson-Stevens Act public process by which the New England Fishery Management Council (“New England Council”) and Defendants have been attempting to come into compliance with their long-overdue obligation to analyze and take all practicable steps to minimize adverse effects of fishing on essential fish habitat.

6. Third, the Framework 48 Final Rule amendments to 50 C.F.R. § 648.87(c)(2) also violate NEPA by improperly segmenting the environmental review of the groundfish fleet’s access to closed areas from the same set of issues in the environmental review process undertaken by the New England Council through the Omnibus Habitat Amendment. There is no “independent utility” for this action as claimed by the Defendants. This action during the current fishing year arises from Defendants’ own delays and failures to perform their obligatory functions to minimize adverse fishing impacts to the extent practicable in a timely manner.

7. Finally, the Framework 48 Final Rule amendments to 50 C.F.R. § 648.87(c)(2) violate NEPA by: 1) failing to consider a reasonable range of alternatives to the proposed action;

2) taking an action that was predetermined before the necessary environmental review; and 3) failing to look at the cumulative effects of the proposed action authorizing all sectors to seek exemptions from the closed area restrictions.

8. These actions fail to comply with the statutory requirements of the Magnuson-Stevens Act and NEPA and are arbitrary, capricious, and an abuse of discretion, in violation of the APA. These actions by the Defendants have harmed the Plaintiffs' interest in healthy and sustainable groundfish populations and in maintaining a healthy ocean ecosystem. This harm will continue in the absence of action by this Court.

9. Plaintiff requests that this matter be advanced for hearing at the earliest opportunity pursuant to 16 U.S.C. § 1855(f)(4) and will move accordingly.

APPLICABLE STATUTES, JURISDICTION, AND VENUE

10. This action arises under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1884; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

11. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act, which provides that "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under" the Magnuson-Stevens Act. 16 U.S.C. § 1861(d). The Magnuson-Stevens Act also provides that actions taken by the Secretary of Commerce under regulations implementing a fishery management plan ("FMP") shall be subject to judicial review "if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable." 16 U.S.C. § 1855(f). Defendants published the final rule implementing Framework 48 on May 3,

2013 in the Federal Register. Plaintiffs are filing this Complaint within thirty (30) days of publication of that final rule. This Court, further, has jurisdiction over this action pursuant to the APA, which provides that final agency action for which there is no other adequate remedy in a court is subject to judicial review. 5 U.S.C. §§ 701-706.

12. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States” and 28 U.S.C. § 1361, which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

13. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 – 2202, and may grant relief pursuant to the Magnuson-Stevens Act, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. §706.

14. Venue is properly vested in this judicial district under 28 U.S.C. § 1391 (b) & (e), where the Defendants are officers or employees of the United States and are located in this district.

THE PARTIES

15. Plaintiff, Conservation Law Foundation, Inc. is a private, not-for-profit organization incorporated in Boston, Massachusetts. CLF is dedicated on behalf of its members to protecting natural resources in New England, including marine wildlife and their habitats and coastal and ocean resources. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members’ interests, promotes public awareness, education, and citizen involvement in the conservation of marine wildlife and resources, and supports programs for the

conservation of marine wildlife and their habitats. CLF was the plaintiff in *Conservation Law Found. of New England v. Franklin*, 989 F.2d 54 (1st Cir.1993), a lawsuit brought in 1991 that resulted in a consent decree committing Defendants to the first schedule for developing a plan to rebuild overfished groundfish populations in New England. Since that time, CLF has been a party both as a plaintiff and as an intervenor-defendant in a number of lawsuits involving the application of the Magnuson-Stevens Act, NEPA, and the APA to fishery management issues in New England. CLF has 4,092 members, including 3,494 members in New England coastal states. CLF's members consume local commercially caught groundfish and use and enjoy fish and related marine resources off the New England coasts for recreational, commercial, educational, and scientific purposes. CLF and its members have a direct interest in healthy fisheries and a healthy marine ecosystem. Members of CLF include fishermen, divers, scientists, consumers of local commercially caught groundfish, and other concerned citizens who are directly and adversely affected by the failure of the Defendants to ensure full and proper compliance with the Magnuson-Stevens Act, NEPA and the APA by illegally reopening these groundfish closed areas. These interests have been adversely affected and—unless the relief sought in this complaint is granted—will continue to be adversely affected and irreparably injured by defendants' unlawful failure to perform their non-discretionary duties under the Magnuson-Stevens Act, NEPA, and the APA.

16. Defendant Rebecca M. Blank is Acting Secretary of the United States Department of Commerce (“Secretary”). She is sued in her official capacity as the chief officer of the Department charged with overseeing the proper administration and implementation of NEPA and the Magnuson-Stevens Act, including provisions of that Act that are at issue in this matter.

17. Defendant National Oceanic and Atmospheric Administration (“NOAA”) is an agency of the United States Department of Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary of the Department of Commerce has delegated responsibility to ensure compliance with the Magnuson-Stevens Act to NOAA, which in turn has sub-delegated that responsibility to the National Marine Fisheries Service.

18. Defendant National Marine Fisheries Service (“NMFS” or “Fisheries Service”) is an agency of the United States Department of Commerce that has been delegated the responsibility to review Fishery Management Plans (“FMPs”) and amendments to those plans and to issue implementing regulations. NMFS is the United States government agency with primary responsibility to ensure that the requirements of the Magnuson-Stevens Act are followed and enforced, including the requirements at issue in this matter.

STATUTORY AND REGULATORY BACKGROUND

MAGNUSON-STEVENSONS ACT

19. The Magnuson-Stevens Act is designed to conserve and manage fish populations in the United States territorial waters and in the exclusive economic zone, which extends from the boundaries of state waters (3 miles from shore) to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. § 1801(b)(1). The Magnuson-Stevens Act creates eight regional fishery management councils and requires them to prepare FMPs for all fisheries under their authority that require conservation and management. 16 U.S.C. § 1852(a) & (h)(1).

20. All FMPs and regulations implementing FMPs are subject to final review and approval by NMFS to ensure that they comply with the requirements of the Magnuson-Stevens Act and other applicable laws and requirements. 16 U.S.C. § 1854(a) & (b).

21. In enacting the Magnuson-Stevens Act, Congress found *inter alia* that:

(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.

* * * * *

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

16 U.S.C. § 1801(a)(2), (9).

22. The Magnuson-Stevens Act requires that FMPs, FMP amendments, and any regulations promulgated to implement such FMPs must be consistent with the “National Standards” for fishery conservation and management and other requirements. 16 U.S.C. § 1851(a).

23. National Standard 2 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

24. The Magnuson-Stevens Act also requires that any FMP “minimize to the extent practicable adverse effects on [essential fish] habitat caused by fishing....” 16 U.S.C. § 1853(a)(7). NMFS has produced Essential Fish Habitat Consultation Guidance that defines “adverse effects” to be:

[A]ny impact which reduces the quality and/or quantity of essential fish habitat. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species or their habitat, and other ecosystem

components, if such modifications reduce the quality and/or quantity of essential fish habitat (EFH).

National Marine Fisheries Service, Essential Fish Habitat Consultation Guidance, version 1.1, at iv (Apr. 2004).

NATIONAL ENVIRONMENTAL POLICY ACT

25. Congress enacted the National Environmental Policy Act (“NEPA”) to “promote efforts which will prevent or eliminate damage to the environment” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(C); 40 C.F.R. §§ 1501.2, 1502.5.

26. The cornerstone of NEPA is the environmental impact statement. An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4. It must provide a “full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

27. In an EIS, the federal agency must identify the direct, indirect, and cumulative impacts of the proposed action and consider alternative actions and their impacts. *See* 42 U.S.C. § 4332(C).

28. Agencies must consider “[c]onnected actions,” “[c]umulative actions,” and “[s]imilar actions” together in one environmental impact statement. 40 C.F.R. § 1508.25(a)(1)-(3). Actions are “connected actions” if they: a. “[a]utomatically trigger other actions which may require environmental impact statements,” b. “[c]annot or will not proceed unless other actions are taken previously or simultaneously;” or c. “[a]re interdependent parts of a larger action and

depend on the larger action for their justification.” *Id.* § 1508.25(a)(1)(i)-(iii).

29. The APA confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C. § 702. The APA provides that the reviewing court “shall ... hold unlawful and set aside agency action, findings, and conclusions found to be — arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706.

30. NMFS’s issuance of its Final Rule implementing the measures in Framework 48 to the Groundfish FMP and its associated environmental analysis (“EA”) is an “agency action” subject to judicial review under the APA.

HISTORY OF ESSENTIAL FISH HABITAT PROTECTION IN NEW ENGLAND

31. The groundfish fishery in New England has historically been viewed as the region's most iconic fishery and has played a critical role in the coastal economies from Maine to Connecticut for hundreds of years. The New England groundfish fishery is dominated by vessels that drag heavy nets called bottom or "otter" trawls on or near the bottom of the ocean. Other significant gear types in the fishery include gillnets that ensnare fish and hook and line gear that catch groundfish with baited hooks.

32. In the late 20th century, several groundfish populations collapsed under the pressure of overfishing from the U.S. fleet and from habitat damage from fishing gear. Fishery managers have struggled since that time to end overfishing and rebuild depleted fish populations.

33. In response to litigation by CLF and others, attempts to end overfishing and protect critical habitat began in 1994, and formal rebuilding plans for many groundfish populations were implemented in 2004. The five year-round groundfish closures that are the

focus of this challenge were created by various Groundfish FMP amendments between 1994 and 2004.

34. The Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996), partially in response to the New England groundfish problems, created new legal requirements for fishery management councils and Defendants to identify and minimize to the extent practicable the impacts of fishing gears on the areas in the ocean that were particularly important to the productivity and health of managed stocks, referred to as their “essential fish habitat” (“EFH”). The New England Council and the Fisheries Service approved an “Omnibus EFH Plan” for all the fisheries under the council’s jurisdiction in 1998.

35. Conservation groups challenged that approval. The reviewing court held that the Fisheries Service had not adequately met their NEPA obligations with respect to the protection of essential fish habitat: “Defendants’ EAs are insufficient, and violate the mandates and principles underlying NEPA. Consequently, Plaintiffs’ Motion shall be granted, and Federal Defendants’ Motion denied, as to this claim. Furthermore, Defendants are ordered to perform a new and thorough EA or EIS as to each EFH Amendment, in compliance with the requirements of NEPA.” *American Oceans Campaign v. Daley*, 183 F.Supp.2d 1, 21 (D.D.C. 2000). The court issued an injunction against implementation of any of the EFH Amendments approved by the Defendants until a full NEPA-compliant environmental review took place. *Id.*

36. The *AOC v. Daley* Defendants negotiated a Joint Stipulation and Proposed Order setting forth the schedule by which Defendants would come into compliance with the 1996 Sustainable Fisheries Act requirements to minimize impacts on EFH, which was entered as an

order of the Court on December 17, 2001. No. 99–00982 (D.D.C).¹ The relevant terms of that Order required the Fisheries Service to undertake and complete a full environmental impact statement on Essential Fish Habitat related to the groundfish fishery by May 31, 2004 with a record of decision issuing by July 1, 2004. *Id.* A true and correct copy of the Joint Stipulation and Order is attached hereto as Attachment 1 and incorporated herein.

37. The New England Council and the Fisheries Service responded to the *AOC v. Daley* decision in two ways. First, they incorporated management actions they believed to be responsive to the decision into the EFH analysis for Amendment 13 to the Groundfish FMP. *See, e.g.*, Preamble to Final Rule Approving Amendment 13 to the Northeast Multispecies FMP at 69 Fed. Reg. 22,906, 29,223 (Apr. 27, 2004). Second, they commenced work on the analysis and environmental review of an amendment called Amendment 2 to the Omnibus EFH Amendment (“Omnibus EFH Amendment 2”).

38. The two actions were closely related and overlapping in time. In fact, the Fisheries Service’s approval of the EFH portions of Amendment 13 specifically referred to the additional EFH work that was just commencing under Amendment 2 of the Omnibus EFH Plan. *Preamble to Amendment 13 Final Rule*, 69 Fed. Reg. 22,923.

39. Omnibus EFH Amendment 2 and its programmatic Environmental Impact Statement being prepared concurrently under NEPA, were first publicly noticed and scoped in the Federal Register on February 24, 2004. The purpose of Omnibus EFH Amendment 2 was to “develop a comprehensive EFH Management Plan that will minimize adverse effects on EFH to the extent practicable, through actions that will apply to all Council managed fisheries.” 69 Fed. Reg. 8367, 8368 (Feb. 24, 2004). This amendment was designed to comprehensively look at the

¹ The Joint Stipulation and Order were later amended in 2003 but not in ways that affect the obligations set up in the primary document with respect to groundfish EFH.

individual and cumulative effects of all fishing gears on all EFH with an objective of minimizing the impacts on those fishing gears on that EFH to the extent practicable as required by law.

40. Omnibus EFH Amendment 2 is still under development today, more than nine years later. The Fisheries Service has delayed the environment review process through several changes in the approach as well as a number of expansions to the scope of the amendment. The scope of Omnibus EFH Amendment 2 was expanded most recently in 2011 when the New England Council and the Fisheries Service decided to explicitly integrate the consideration of any changes to the areas in New England waters that were then closed to multispecies groundfishing gears under the Groundfish FMP with its analytical process to protect EFH comprehensively through Omnibus EFH Amendment 2. *See* 76 Fed. Reg. 35,408, 35,408-09 (June 17, 2011).

41. Under the Groundfish FMP, a number of areas in the ocean off New England have been closed to groundfishing fishing and damaging bottom-tending fishing gear. In some cases, closures are temporary and seasonal. In other cases, including the five large areas affected by the rule challenged here, closures are year-round and permanent. *See* <http://www.nero.noaa.gov/nero/regs/infodocs/MultsClosedAreas.pdf>. Some of these areas have been partially or entirely closed to gears capable of catching groundfish for nearly 20 years and more natural conditions have begun to return. All of these closed areas are identified as EFH and are important for many of the groundfish stocks that continue to be overfished or are subject to overfishing.

42. The 2011 decision of the New England Council and the Fisheries Service integrated any decisions about modifying or changing those existing closed areas, including the underlying environmental reviews that would support those decisions, into the more

comprehensive and scientific evaluation of minimizing fishing gear impacts on essential fish habitat throughout the New England Council's fishery jurisdiction. It is those year-round, existing groundfish closed areas that were just integrated into Omnibus EFH Amendment 2 that Defendants now propose to break off once more through the challenged action. CLF formally commented in support of this integrated environmental and management review of any decisions about changes to the current closed areas with the decisions in Omnibus EFH Amendment 2 in a letter to the New England Council dated July 18, 2011.

43. The New England Council and Fisheries Service staff are continuing to work and collect available data and scientific information for purposes of Omnibus EFH Amendment 2 and they expect to have a draft environment review available finally for public review and comment later this year that will provide a comprehensive and integrated analysis of various alternatives to protect essential fish habitat within and outside the current set of closed areas.

44. Management measures designed to implement the Magnuson-Stevens Act with respect to "minimiz[ing] to the extent practicable adverse effects on [essential fish] habitat caused by fishing, and identify[ing] other actions to encourage the conservation and enhancement of such habitat[,]" 16 U.S.C. § 1853(a)(7), are required to be specified through a fishery management plan amendment.

FRAMEWORK 48 TO THE NORTHEAST GROUND FISH FMP

45. Under the regulations promulgated to manage the groundfish fishery (as in most other fisheries), the Fisheries Service has established procedures, known as "framework adjustments," that are used to make minor adjustments necessary to implement the FMP between amendments. 50 C.F.R. § 648.90. The purpose of a framework adjustment is to advance management options into regulations that achieve the FMP's goals and objectives without having

to observe the full procedural requirements that otherwise apply to the adoption of new or significantly modified management measures that fundamentally alter the management regime.

46. Framework 48 makes a number of management adjustments to existing regulations for implementation in the groundfish fishing year effective May 1, 2013. Relevant to this judicial review, Framework 48 fundamentally changes the Groundfish FMP by creating a process by which groups of fishermen, formally recognized by the Groundfish FMP as a “sector,” can gain access to fish in the groundfish closed areas where access would otherwise be prohibited by the Groundfish FMP. 50 C.F.R. § 648.87(c)(2)(i). All of the area within the groundfish closed areas that sectors may now gain access to is designated as essential fish habitat. Best available science shows that fishing in these areas with groundfish gear will have adverse effects on this essential fish habitat.

CAUSES OF ACTION

COUNT I: THE MAGNUSON-STEVENSON ACT REQUIRES THAT MEASURES AUTHORIZING SECTOR VESSEL ACCESS TO THE GROUND FISH YEAR ROUND CLOSED AREAS MUST BE IMPLEMENTED THROUGH AN FMP AMENDMENT.

47. Plaintiff realleges and incorporates by reference paragraphs 1 through 46 of the Complaint in this First Cause of Action.

48. The Magnuson-Stevens Act prescribes that federal fisheries be managed through fishery management plans and amendments to those plans. *E.g.*, 16 U.S.C. §§ 1801(b)(4), 1852(h)(1). These plans and amendments come with important procedural requirements that ensure the adequacy of public participation in the management of these public resources, including 60-day public comment periods. *E.g.*, 16 U.S.C. § 1854(a)(1)(B).

49. In the regulation challenged here, Defendants are changing the rules that are associated with protection of essential fish habitat in New England waters as well as the rules

applicable to the existing groundfish closed areas themselves. While actions involving closed areas are included in the general list of management measures that can be taken through a framework action, 50 C.F.R. § 648.90(a)(2)(ii), a framework action cannot be inconsistent with or fundamental alter the underlying FMP. Prior to the promulgation of the regulation that is being challenged here, the Groundfish FMP prohibited groundfish vessels participating in sectors from seeking exemption from the year-round closed areas. 50 C.F.R. § 648.87(c)(2)(i)(prior to amendment).

50. The effect of the rule change is to now allow participating vessels in sectors, which comprise some 99 percent of the total annual groundfishing effort in New England, to receive approval to fish in areas greater than 5,000 square miles, roughly the size of the State of Connecticut. There are seventeen sectors with seventeen annual operating plans that are currently seeking immediate access to the closed areas for the current fishing year under this new procedure. The Fisheries Service is actively considering those seventeen exemption requests.

51. Eliminating the prohibition on sector access to closed areas through an exemption in their annual operating plans is inconsistent with and undermines the underlying FMP, which specifies that the Fisheries Service cannot exempt sectors from these provisions. Such a change is not incidental or implementing in nature; it is substantial and in direct conflict with the Groundfish FMP's objectives and explicit provisions. Moreover, the change is directly related to provisions in the Groundfish FMP that were directed in order to comply with the Magnuson-Stevens Act's requirement to minimize fishing gear impacts to essential fish habitat, which *must* be analyzed and implemented in the FMP in the first instance. 16 U.S.C. § 1853(a)(7).

52. Such a change to a fishery management plan must be effected through an amendment, not a framework adjustment. By approving the Final Rule implementing the

elimination of the current sector access prohibition, Defendants have violated the Magnuson-Stevens Act and the APA.

COUNT II: THE SECTOR CLOSED AREA ACCESS RULE VIOLATES NEPA

53. Plaintiff realleges and incorporates by reference paragraphs 1 through 52 of the Complaint in this Second Cause of Action.

A. Approval of 50 C.F.R. § 648.87(c)(2)(i) eliminating the prohibition on groundfish fishing vessel access to the groundfish closed areas was a major federal action requiring an environmental impact statement.

54. NEPA requires all federal agencies to prepare an environmental impact statement for all major federal actions significantly affecting the quality of the human environment. *See* 42 U.S.C. § 4332(C).

55. Opening up 5,000 square miles of closed groundfish fishing areas, some of which have not been disturbed by mobile fishing gears for years, is a major federal action that will significantly affect the quality of the human environment in New England. This action was specifically prohibited by the underlying fishery management plan. The proposed rule generated more than 75,000 public comments critical of the proposal to open the closed areas in that manner.

56. NEPA requires that an agency must consider connected actions, alternatives, and impacts, including the cumulative impacts, together as part of a single EIS. *See* 40 C.F.R. § 1508.25.

57. 50 C.F.R. § 648.87(c)(2)(i) authorizes closed area access exemptions to be considered on a case-by-case manner each year with their own environmental reviews in a way that makes a cumulative environmental analysis required by NEPA impossible.

58. Accordingly, Defendants were required to prepare a comprehensive and cumulative EIS for Framework 48. The failure to prepare an EIS is a violation of NEPA and the APA.

B. The Rule Improperly Segments Environmental Review of Sector Vessel Access To The Closed Areas From the Omnibus EFH Amendment 2.

59. The New England Council and Fisheries Service have been engaged in a nine-year process seeking to come into compliance with obligations to analyze and minimize the impacts of fishing gears to the extent practicable on EFH through the Omnibus EFH Amendment 2. The New England Council substantially approved aspects of the first phase of Omnibus EFH Amendment 2 in June 2007. Subsequently, the New England Council and the Fisheries Service expanded the scope of Omnibus EFH Amendment 2 to explicitly integrate the consideration of any new actions with respect to the minimization of fishing gear impacts with any changes to the current groundfish closed areas. 76 Fed. Reg. 35,408-09.

60. The groundfish closed areas were established to perform a variety of management functions from reducing groundfish mortality to protection of essential groundfish habitats to the protection of various productivity factors that were believed to be served by certain areas based on the best available science. That integrated analysis is almost complete, but new technical analysis on the benefits of various areas under consideration for EFH management action continues to be developed by the New England Council's technical team developing Omnibus EFH Amendment 2 and the Fisheries Service's associated NEPA review team. *See, e.g.*, Preamble to Framework 48 Final Rule, 78 Fed. Reg. at 26,145. The New England Council and Fisheries Service are currently in the process in Omnibus EFH Amendment 2 of identifying a range of various management alternatives related to protecting EFH in the groundfish closed areas that are the focus of this challenge.

61. Draft environmental review documents with specific management alternatives—including a “no action” (status quo) option that maintains current closed areas as year-round closed areas without sector access—are expected to be approved for review by the public in late 2013 for Omnibus EFH Amendment 2. This will be the first formal opportunity for public comment on a draft NEPA environmental review document in the nine-year process.

62. By this action approving 50 C.F.R. § 648.87(c)(2)(i), Defendants allow access to closed areas that will foreclose opportunities and alternatives in the Omnibus EFH Amendment 2 that would have secured the full spectrum of ecological benefits accrued in those areas. Sector exemptions will allow damaging groundfish gears into areas that have not been subjected to gear impacts and that have recovered aspects of their natural ecological productivity because of its closure.

63. The action approving 50 C.F.R. § 648.87(c)(2)(i) lacks independent utility. Defendants have already taken a position that the analysis of opening of the existing groundfish closed areas should be merged with the EFH analysis underway through Omnibus EFH Amendment 2 by approving the New England Council’s decision to merge those analyses in its 2011 Notice of Intent to consolidate the environmental reviews. The technical staff’s economic analysis only suggests neutral to small positive economic benefits associated with the approval of 50 C.F.R. § 648.87(c)(2)(i), thereby further marginalizing any arguments of independent utility of this decision.

64. Segmenting a federal action for purposes of NEPA review in this fashion violates NEPA and the APA.

C. The Environmental analysis of the challenged rule fails to consider a reasonable range of alternatives.

65. NEPA requires all federal agencies to analyze a reasonable range of alternatives related to the action opening the groundfish closed areas to sector vessels through the annual operating plans. *See* 42 U.S.C. 4332(C); 40 C.F.R. 1502.14. Defendants have failed to do so here.

66. In the public comments submitted in response to the announcement of the proposed rule, a number of alternatives were identified, from delaying access until the conclusion of Omnibus EFH Amendment 2 to the use of other existing programs such as the Exempted Fisheries Permits Program. *See* 50 C.F.R. § 600.745(b)(1). Despite the fact that this rule opens groundfish closed areas to the impacts of groundfish fishing gear for the first time in nearly 20 years, that these areas will be immediately altered by such gear, and despite the high degree of public controversy over this particular action, the environmental review is insufficient and ineffectual. Only two alternatives were considered (and insufficiently analyzed): A.) no action, and B.) the approved rule.

67. The Fisheries Service specifically states that other presumably reasonable alternatives to the rule that were identified in the environmental review process were rejected for further analysis because they would have either required a full environmental impact statement or could not be done through a framework adjustment. *See, e.g.*, Framework Adjustment 48 to Northeast Groundfish FMP, at 78 (submitted February 26, 2013), available at: <http://www.nefmc.org/nemulti/index.html>.

68. The scope of the potential environmental consequences of the proposed federal action was clearly known to the Fisheries Service prior to issuance of the rule. The seventeen sectors had all previously submitted specific requests to the Fisheries Service for groundfish vessel access to the closed areas in the annual operating plans for the May 2013-April 2014 fishing year. *See* 2013 Sector Operations Plans and Contracts and Allocation of Northeast

Multispecies Annual Catch Entitlements, Interim Final Rule, 78 Fed. Reg. 25,591, 25,602-03 (May 2, 2013). Various ranges of alternatives could and should have been developed based on those specific requests, including cumulative effects analyses.

69. Plaintiff CLF as well as numerous other members of the public raised these NEPA objections with the Fisheries Service in formal comments submitted on the proposed rule.

70. The APA requires that courts “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that are “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) & (D).

71. By approving 50 C.F.R. § 648.87(c)(2)(i), the Fisheries Service violated NEPA and the APA by failing to complete an environmental impact statement, by improperly segmenting the federal action to avoid environmental review, and by failing to analyze a reasonable range of alternatives prior to reaching the decision to remove the prohibition in the Groundfish FMP.

72. These actions by Defendants are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and are causing irreparable injury to the Plaintiffs, for which they have no adequate remedy at law.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court to enter the following relief:

1. Declare that the Defendants have violated the Magnuson-Stevens Act and the APA as described above because the rule they approved, 50 C.F.R. § 648.87(c)(2)(i), cannot be approved as a framework adjustment to the Groundfish FMP under the terms of the Groundfish FMP itself.

2. Declare that the Defendants have violated NEPA and the APA as described above by failing to prepare an EIS to accompany the approval of 50 C.F.R. § 648.87(c)(2)(i), segmenting the federal action to avoid environmental review, by failing to consider a reasonable range of alternatives to the proposed action, and by failing to consider the cumulative impacts of its actions, including the impacts on Omnibus EFH Amendment 2.

3. Vacate the EA and the Final Rule implementing 50 C.F.R. § 648.87(c)(2)(i) for Framework Adjustment 48 to the Groundfish FMP.

4. Maintain jurisdiction over this action until the Defendants are in compliance with the Magnuson-Stevens Act, NEPA, the APA, and every order of this Court;


5. Award Plaintiff its reasonable attorneys' fees and costs; and

6. Provide such additional and further relief as to which Plaintiff may justly be entitled.

DATED: May 31, 2013

Respectfully submitted,

FOR THE PLAINTIFF CONSERVATION LAW FOUNDATION, INC.


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