

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

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CONSERVATION LAW FOUNDATION, INC.		)
62 Summer Street		)
Boston, MA 02110		)
		)
Plaintiff		)
		)
v.		)
		)
	CA No.	)
REBECCA M. BLANK, in her official capacity as		)
Acting Secretary of the Department of Commerce,		)
Room 5851		)
14 <sup>th</sup> 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 a final rule and parallel emergency action by Defendants Acting Commerce 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 50*, 78 Fed. Reg. 26,172 (May 3, 2013) (“Framework 50 Final Rule”). This Final Rule violates the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) and the Administrative Procedure Act (“APA”).

2. The Framework 50 Final Rule implements amendments to the Northeast Multispecies Fishery Management Plan (“Groundfish<sup>1</sup> FMP”) and is unlawful for several reasons. In violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) and its National Standards, including requirements to prevent overfishing and establish annual catch limits (“ACLs”) that do not exceed the fishing level recommendations of the region’s science and statistical committee (“SSC”), the Final Rule: 1) sets ACLs for 12 of 20 stocks of groundfish for 2013 that exceed the SSC’s recommended acceptable biological catch (“ABC”) by “carrying-over” uncaught 2012 quota; 2) sets the ACL for Gulf of Maine cod above the SSC’s recommended ABC by ignoring the SSC’s recommendation; and 3) extends the Magnuson-Stevens Act’s limit on the duration of interim measures by carrying-over an amount of Gulf of Maine cod quota from the 2012 fishing year.

3. Each of these actions fails to comply with the statutory requirements of the Magnuson-Stevens Act and is arbitrary, capricious, and an abuse of discretion in violation of the APA. These actions by the Defendants have harmed the Plaintiff’s members’ interests in healthy and sustainable groundfish populations and in maintaining a healthy ocean ecosystem. This harm to CLF’s members will continue in the absence of action by this Court.

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

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<sup>1</sup> Groundfish include 13 species, further divided into a total of 20 stocks, of bottom dwelling fish including Atlantic cod, haddock, and various flounder species.

**APPLICABLE STATUTES, JURISDICTION, AND VENUE**

5. This action arises under the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1884; and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

6. 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 the Framework 50 Final Rule on May 3, 2013 in the Federal Register. Plaintiffs are filing this Complaint within thirty (30) days of publication of the 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.

7. 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.”

8. 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.

9. 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 and where a substantial part of the events and omissions which gave rise to this action occurred in this district.

### **DESCRIPTION OF THE PARTIES**

10. Plaintiff Conservation Law Foundation, Inc. (“CLF”) 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 Foundation of New England, Inc. 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, of whom 3,494 live in coastal New England states. CLF’s members consume local commercially caught groundfish and use and enjoy groundfish species located within 200 miles of the New England coasts for recreational, educational, and

scientific purposes. CLF and its members have a direct interest in healthy groundfish fisheries and a healthy marine ecosystem. Members of CLF include recreational 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 and the APA in connection with the regulation being challenged in this action. These interests have been adversely affected and will continue to be adversely affected and irreparably injured by defendants' unlawful failure to perform their non-discretionary duties under the Magnuson-Stevens Act and the APA unless the relief sought in this complaint is granted.

11. 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 require implementation of ACLs, accountability measures, an end to overfishing, and minimization of bycatch.

12. 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.

13. 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 to end overfishing, to rebuild overfished populations of fish, and to minimize bycatch of non-target species in fisheries.

## **STATUTORY AND REGULATORY BACKGROUND**

### **MAGNUSON-STEVENSONS ACT**

14. 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, including the New England Fishery Management Council, and requires them to prepare FMPs for all fisheries under their authority that require conservation and management. 16 U.S.C. § 1852(a)(1).

15. 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, as well as with other applicable laws and requirements. 16 U.S.C. § 1854(a)(1)(A), (b)(1).

16. In enacting the Magnuson-Stevens Act, Congress found that:

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....

Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

16 U.S.C. § 1801(a)(2), (5).

17. 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 certain other requirements. 16 U.S.C. § 1851(a).

18. National Standard 1 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery . . . .” 16 U.S.C. § 1851(a)(1).

19. 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).

20. The Magnuson-Stevens Act requires the Fisheries Service to identify overfished fish populations and manage those populations by attaining the optimum yield that will rebuild them to a healthy population level. 16 U.S.C. § 1802(33)(C) (optimum yield for an overfished fishery provides for rebuilding the population); 16 U.S.C. § 1853(a)(10) (FMPs must “specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished” and “contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery”); 16 U.S.C. § 1854(e) (requirements to identify overfished fisheries, to end overfishing immediately, and to rebuild overfished fisheries as soon as possible).

21. The Magnuson-Stevens Act defines the terms “‘overfishing’ and ‘overfished’ [to] 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 U.S.C. § 1802(34).

22. The Magnuson-Stevens Act requires that any fishery management plan prepared by a Council or the Secretary shall specify annual catch limits at a level that prevents overfishing. 16 U.S.C. § 1853(a)(15).

23. Councils are required to establish science and statistical committees to provide ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, and achieving rebuilding targets. 16 U.S.C. § 1852(g)(1)(A)-(B).

24. Annual catch limits may not exceed the fishing level recommendations of the scientific and statistical committee. 16 U.S.C. § 1852(h)(6).

25. The Magnuson-Stevens Act requires that the relevant council specify the acceptable biological catch in a fishery taking into consideration scientific uncertainty, upon recommendation from the council's science and statistical committee ("SSC"). 16 U.S.C. § 1852(h)(6), (g)(1)(B); 50 CFR 600.310(f)(2)(ii)-(iii).

26. "The SSC recommendation that is the most relevant to ACLs is ABC, as both ACL and ABC are levels of annual catch." 50 C.F.R. § 600.310(b)(2)(v)(B), (D).

27. "Catch" is the total quantity of fish, measured in weight or numbers of fish, taken in a fishery. 50 C.F.R. § 600.310 (f)(2)(i). Catch includes fish that are retained for any purpose, as well as fish that are discarded. *Id.*

28. The ABC must account for all retained catch and all discard mortality. 50 C.F.R. § 600.310(f)(2)(i)-(ii).

29. The Magnuson-Stevens Act requires the Secretary (acting through NMFS) to establish guidelines for the National Standards. 16 U.S.C. § 1851(b). The guidelines reflect Secretarial interpretation of the National Standards. 50 C.F.R. § 600.305(a)(3).

30. NMFS revised its guidelines for National Standard 1 in 2009 in order to provide guidance for complying with the new ACL requirements in the recently reauthorized Magnuson-Stevens Act. The ACL requirements are associated with its continuing National Standard 1 duty to prevent overfishing. *Annual Catch Limits; National Standard Guidelines*, 74 Fed. Reg. 3178 (Jan. 16, 2009).

31. The National Standard 1 guidelines confirm that FMPs must include an ABC control rule for all stocks in a fishery in order to establish science-based ACLs. 50 C.F.R. § 600.310(c)(3).

32. The Magnuson-Stevens Act provides the Secretary with authority to promulgate interim measures to reduce (rather than end) overfishing for not more than 366 days. 16 U.S.C. § 1855(c).

33. The Secretary has the responsibility to carry out any FMP or amendment approved or prepared by him in accordance with the Magnuson-Stevens Act. 16 U.S.C. § 1855(d). The Secretary may promulgate such regulations, pursuant to APA rulemaking procedures, as may be necessary to carry out this responsibility or to carry out any other provisions of the Magnuson-Stevens Act. *Id.*

34. 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 actions, 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.

35. NMFS’s issuance of its Final Rule implementing measures in Framework 50 Groundfish FMP is an “agency action” subject to judicial review under the APA.

## **FACTUAL ALLEGATIONS**

### **I. OVERVIEW OF THE NEW ENGLAND GROUND FISH FISHERY**

36. The Northeast Multispecies Fishery Management Plan (“Groundfish FMP”) specifies the conservation and management measures for 13 species of groundfish in federal waters including cod, flounder, and haddock. These species are further divided into 20 stocks of fish found off the New England and Mid-Atlantic coasts.

37. The groundfish fishery is dominated by vessels that drag nets called bottom or “otter” trawls on or near the bottom of the ocean. Other significant gear types in the fishery include gillnets and hook and line gear that catch groundfish with baited hooks.

38. The 2013 fishing year for groundfish started May 1, 2013 and runs to April 30, 2014.

39. The groundfish fishery in New England is historically viewed as one of the region’s most iconic fisheries and has played a critical role in the coastal economies from Maine to Connecticut for hundreds of years.

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

41. In response to litigation by CLF and others, attempts to end overfishing in the Groundfish FMP and protect critical habitat began in 1991 and formal rebuilding plans for many groundfish populations were implemented in 2005.

42. Despite these efforts, overfishing continued in large part due to risky decision-making by the New England Council and NMFS, who failed to adequately account for scientific uncertainty in stock assessment models, and management uncertainty resulting largely from

insufficient and inaccurate monitoring of catch.

43. Persistent overfishing in New England was one of the primary reasons the Magnuson-Stevens Act was amended in 2006 in order to require science-based annual catch limits. *See* S. REP NO. 109-229, at 6 (2006).

44. In 2010, NMFS implemented Amendment 16 to the Groundfish FMP which significantly redesigned the groundfish fishery management system. Amendment 16 established a process for setting annual catch limits (ACLs) for regulated species and distributing available catch among various components of the groundfish fishery.

45. Under the new “sector” approach to managing the fishery established by Amendment 16, fishermen are authorized to organize themselves into self-selecting sectors, or groups of fishermen, and voluntarily enter into a legally binding agreement with NMFS to operate within a hard total allowable catch (hard-TAC), or quota of each stock of groundfish. Ninety-nine percent of the commercial fishing catch in the fishery is by sector vessels.

46. In exchange for this commitment, the fishermen in the sector receive relief from certain management measures that still apply to non-sector “common pool” vessels, such as limits on the number of days each vessel can fish.

47. In general, sectors are allocated a share of the total ACL available to all commercial fishing vessels for each groundfish stock in the form of an Annual Catch Entitlement (“ACE”). The ACE is the maximum amount of a particular stock that a sector can catch during a particular fishing year. The ACE represents the sum of all the potential sector contributions (“PSCs”) of each vessel participating in the sector. The PSC for each vessel is calculated based on its share of the total historical landings of each stock over a designated “baseline” time period.

48. Regulations implementing the Groundfish FMP state that “a sector may carry over an amount of ACE equal to up to 10-percent of its original ACE allocation for each stock that is unused at the end of one fishing year into the following fishing year.” 50 C.F.R. § 648.87 (b)(1)(i)(C).

49. Sector members are obligated to stop fishing once their sector ACE is reached, and thereby fish within the scientifically-determined catch limits.

50. Scientific uncertainty remains a significant problem for this fishery, with large “retrospective” patterns in stock assessment models that consistently overestimate fish population and underestimate catch. 78 Fed. Reg. at 26173.

51. Thus, despite the existence of rebuilding plans, some habitat protections, and a new system that is generally effective at preventing catch limits from being exceeded, nine of the 20 stocks of groundfish stocks remain overfished, including 5 stocks of flounder (Cape Cod/Gulf of Maine and Georges Bank yellow tail flounder, Southern New England/ Mid Atlantic winter flounder, Gulf of Maine/Georges Bank windowpane flounder and witch flounder), both stocks of cod (Gulf of Maine and Georges Bank), Atlantic halibut and Atlantic wolffish.

52. In September 2012, Acting Secretary Blank formally declared the groundfish fishery a “disaster” because “several key fish stocks are not rebuilding,” and the “low levels of these stocks are causing a significant loss of access to fishery resources with anticipated revenue declines that will greatly affect the commercial fishery.” *See* Letters to Governors of Maine, New Hampshire, Massachusetts, Connecticut, New York, and Rhode Island (Sept. 13, 2012), available at [http://www.nmfs.noaa.gov/sfa/sf3/disaster\\_determinations.htm](http://www.nmfs.noaa.gov/sfa/sf3/disaster_determinations.htm).

## **II. FRAMEWORK 50 AND THE FINAL RULE**

53. In response to the most recent stock assessments showing that several stocks of cod and flounder remain at or near all-time low population levels, Framework 50's 2013 annual catch limits are the lowest ever set for many stocks, in some cases requiring cuts up to 78-percent from the overly optimistic catch limits set for the 2012 fishing year. These cuts are necessary in order to end overfishing and rebuild the fish stocks.

54. At its January 2013 meeting, despite heavy industry pressure, the New England Council adopted 2013 ABCs and ACLs that were consistent with the scientific recommendations of its SSC and the Magnuson-Stevens Act.

**Carry-over Impacts on 12 Groundfish Stocks**

55. Following this January 2013 Council meeting, in a misguided and hasty effort to minimize the impacts of these necessary (and statutorily-required) catch reductions on fishermen, NMFS announced its intent to allow for the carryover of up to 10 percent of the 2012 allowable catch because it was not caught. This carryover had not been considered by the SSC in establishing its ABC recommendations and was not discussed by the New England Council.

56. Because the FY 2012 quotas were set so much higher than the new quotas for FY 2013, the 10-percent carryover of unused FY 2012 ACE results in Total ACLs that exceed the SSC's recommended ABC for 12 stocks of groundfish including GB cod (18%), GB haddock (5%), SNE/MA yellowtail flounder (4%), CC/GOM yellowtail flounder (14%), American Plaice (16%), witch flounder (14 %), SNE/MA yellowtail flounder (4%), GB winter flounder (4%), GOM winter flounder (3%), Acadian redfish (3%), white hake (3%), and Pollock (4%). *See* Framework Adjustment 50 Appendix V, Table 1, at 5 (column for "Total Potential Catch"), available at <http://www.nefmc.org/nemulti/index.html>; 78 Fed. Reg. at 26177 (Table 2, for "2013 ABCs" for values used to approximate percentages above); *see also* Framework

Adjustment 50 to the NE Multispecies FMP Draft Measures (submitted March 22, 2013), Table 62 at 191 (Impact of Maximum Carryover on FY 2013 available catches)(for earlier calculations), available at <http://www.nefmc.org/nemulti/index.html>.

57. NMFS previously decided that carryovers resulting in ACLs that exceeded the ABC recommendations of the SSC would be inconsistent with the Magnuson-Stevens Act and NMFS's National Standard 1 guidelines. *See* May 25, 2012 Letter from Acting Regional Administrator Daniel Morris to Captain Paul Howard at 1-2 (authorizing a carryover amount would only be legal "provided it does not result in exceeding the Annual Catch Limit (ACL) or ABC in the fishing year in which the carryover applies.").

58. In a transparent and illegal effort to get around its own legal precedent in the Framework 50 Proposed Rule and the Framework 50 Final Rule, NMFS invented a new total catch limit it refers to as the "Total Potential Catch," which is the sum of the ACL plus available carryover catch from the 2012 ACL. 78 Fed. Reg. at 26,188. The term "Total Potential Catch" does not appear in the Magnuson-Stevens Act, the National Standard 1 Guidelines, any previously existing regulation, or even in Framework Adjustment 50 and accompanying environmental assessment.

59. This new Total Potential Catch represents the revised and final annual limit on the amount of each stock of fish that can be caught in the fishery in 2013, 78 Fed. Reg. at 26,188. It consists of the ACL approved by the NEFMC *plus* an additional amount of fish that can also be caught in 2013. Nevertheless, NMFS asserts that it is not the "ACL" for the fishery. 78 Fed. Reg. at 26,200.

60. The Total Potential Catch is the *de facto* final ACL for each stock in the groundfish fishery even if NMFS chooses to call it something else. As a result, the final ACLs

for 12 of 20 groundfish stocks, (13 counting Gulf of Maine cod discussed separately below), exceed the SSC's recommended ABCs.

61. By unlawfully adopting ACLs that exceed the ABCs, NMFS has eliminated the reductions below the overfishing limit the SSC deemed necessary to account for the significant scientific uncertainty in this fishery.

62. By unlawfully adopting ACLs that exceed the ACLs recommended by the Council, NMFS has also eliminated the reductions in catch deemed necessary to account for management uncertainty in this fishery.

63. As a result of failing to adequately take into account scientific and management uncertainty in setting the ACLs for the fishery, NMFS has failed to take reasonable steps, as required by law and its own guidance, to prevent overfishing.

64. Proposed ACLs at the levels implemented by NMFS in the Framework 50 Final Rule threaten the potential recovery of groundfish stocks and must be rejected as being inconsistent with the Magnuson-Stevens Act.

#### **Gulf of Maine Cod**

65. In May 2012, NMFS notified the Council that based on the results from the most recent stock assessment for GOM cod, the stock was overfished, overfishing was occurring, and that inadequate progress in rebuilding had resulted in a significantly revised scientific understanding of the status of this stock. As a result, NMFS notified the Council that it must end overfishing within 1 year, or by May 1, 2013. For fishing year 2012, NMFS implemented interim measures to reduce (but not end overfishing) while the Council responded to the new assessment information and developed appropriate management measures to end overfishing and rebuild Gulf of Maine cod. 77 Fed. Reg. 25,623, 25,623 – 25,630 (May 1, 2012).

66. In January 2013, the SSC agreed with its Groundfish Plan Development Team and recommended that the Council adopt a GOM cod ABC of 1,249 metric tons (mt) to enhance the likelihood of rebuilding. This recommendation was derived from the base assessment model adopted for use in this fishery and the Council's formally adopted ABC control rule.

67. In response to requests to examine alternate approaches for deriving ABC, the SSC also included a higher ABC value of 1,550 mt that was derived from an alternative assessment model (M-ramp model) that used different (and highly uncertain) assumptions about natural mortality.

68. Despite the SSC's recommendation that the lower ABC be adopted, the Council chose the higher ABC value of 1,550 mt for the 2013 fishing year – thereby ignoring the SSC's advice and the value of an ABC based on the Council's own ABC control rule. See Framework Adjustment 50 Appendix I, January 29, 2013 SSC Memorandum to NEFMC, at 3-4.

69. In addition to unlawfully approving the higher ABC value, the Framework 50 Final Rule provides for a carryover of GOM Cod quota that was available only as a result of the 2012 interim emergency measure that NMFS implemented in order to allow for overfishing of cod for, at most, one year while the fishery transitioned to the legally required lower catch limit.

70. As stated by NMFS, the final ACL for GOM cod includes a carry-over in FY 2013 of 1.85 percent that is calculated based upon an allocation in FY 2012 that allowed for overfishing. *See* 78 Fed. Reg. 19,384 (Mar. 29, 2013).

71. Had the 2012 GOM cod ACL been set at a level equal to or below what would have been the 2012 ABC, there would have been no available carryover.

72. With the 1.85 percent GOM cod carryover included, the final ACL for GOM cod will exceed the SSCs recommended ABC by 18 percent. See Framework Adjustment 50, Table 62 at 191.

### **CAUSES OF ACTION**

#### **COUNT I: FRAMEWORK 50 VIOLATES THE MAGNUSON-STEVENS ACT BY SETTING ACLS FOR 12 STOCKS OF GROUND FISH THAT EXCEED THE SSC'S RECOMMENDED ABC AND THAT WILL NOT PREVENT OVERFISHING**

73. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 72 of the Complaint in this First Cause of Action.

74. National Standard 1 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing...” 16 U.S.C. § 1851(a)(1).

75. 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).

76. The Magnuson-Stevens Act requires that any fishery management plan prepared by a Council or the Secretary shall specify ACLs at a level that prevents overfishing. 16 U.S.C. §1853(a)(15).

77. The Magnuson-Stevens Act requires that the acceptable biological catch in a fishery take into consideration scientific uncertainty, upon recommendation from the council’s science and statistical committee. 16 U.S.C. § 1852(h)(6), (g)(1)(B); *see also* 50 C.F.R. § 600.310(f)(3), (5).

78. The Magnuson-Stevens Act requires that ACLs “not exceed the fishing level recommendations of [the SSC].” 16 U.S.C. § 1852(h)(6).

79. “The SSC recommendation that is the most relevant to ACLs is ABC, as both ACL and ABC are levels of annual catch.” 50 C.F.R. § 600.310(b)(2)(v)(D).

80. “Catch” is the total quantity of fish, measured in weight or numbers of fish, taken in a fishery. 50 C.F.R. § 600.310 (f)(2)(i). Catch includes fish that are retained for any purpose, as well as fish that are discarded, and must account for all retained catch and all discard mortality. 50 C.F.R. § 600.310(f)(2).

81. ACLs are also typically set at levels below the ABC in order to account for management uncertainty in the fishery. 50 C.F.R. § 600.310(f)(5)-(7).

82. The Framework 50 Final Rule establishes 2013 ACLs for the fishery that include a carryover of the amount of the 2012 ACL that was not caught by sectors, and that for 12 stocks results in ACLs that exceed the ABC recommendations of the SSC in violation of the Magnuson-Stevens Act and the National Standard 1 Guidelines. *See* 16 U.S.C. § 1852(h)(6); 50 C.F.R. § 600.310 (f)(5).

83. By exceeding the SSC’s ABC recommendations, the final ACLs for the 12 groundfish stocks do not account for scientific and management uncertainty in the fishery. As a result, the Framework 50 Final Rule is not based on the best available science and will not prevent overfishing as required by National Standard 1 in violation of the Magnuson-Stevens Act and the National Standard 1 Guidelines.

84. The Secretary is required to disapprove an FMP or FMP amendment to the extent it is inconsistent with the National Standards or other applicable law. 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), (a)(3).

85. By approving the Final Rule implementing Framework 50, Defendants violated the Magnuson-Stevens Act and the APA.

86. These actions by the Defendants are arbitrary and capricious and violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiffs for which they have no adequate remedy at law.

**COUNT II: FRAMEWORK 50 VIOLATES THE MAGNUSOM-STEVENSONS ACT BY SETTING THE ANNUAL CATCH LIMITS FOR GULF OF MAINE COD ABOVE THE ABC RECOMMENDED BY THE SSC, AND AS A RESULT IT IS NOT BASED ON THE BEST SCIENTIFIC INFORMATION AVAILABLE AND WILL NOT PREVENT OVERFISHING**

87. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 85 of the Complaint in this Second Cause of Action.

88. National Standard 1 of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing....” 16 U.S.C. § 1851(a)(1).

89. The Magnuson-Stevens Act requires that any fishery management plan shall establish a mechanism for specifying annual catch limits at such a level that overfishing does not occur in the fishery. 16 U.S.C. § 1853(a)(1)(A), (a)(15).

90. 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).

91. Although the SSC (and the Plan Development Team) recommended a Gulf of Maine cod ABC of 1,249 mt, the Council selected an ABC of 1,550 mt and an ACL of 1,470 mt for FY 2013.

92. ACLs (and ABCs) cannot exceed the ABCs recommended by the SSC. *See* 16 U.S.C. §1852(h)(6); 50 C.F.R. § 600.310 (f)(5). Therefore, the proposed GOM cod ABC and ACL violate the Magnuson-Stevens Act and the National Standard 1 Guidelines because they are not based on the recommendation of the SSC or best scientific information available, will not

prevent overfishing, and otherwise fail to meet the Magnuson-Stevens Act's ACL requirements.

93. The Secretary is required to disapprove an FMP, FMP amendment, or regulation to the extent it is inconsistent with National Standards or other applicable law. 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), (a)(3).

94. By approving the Final Rule that implements Framework 50, despite its inconsistencies with applicable law, Defendants violated the Magnuson-Stevens Act and the APA.

95. These actions by the Defendants are arbitrary and capricious and violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiffs for which they have no adequate remedy at law.

**COUNT III: FRAMEWORK 50 UNLAWFULLY EXTENDS THE MAGNUSON-STEVENSONS ACT'S LIMIT ON THE DURATION OF INTERIM MEASURES**

96. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 94 of the Complaint in this Third Cause of Action.

97. National Standard 1 of the Magnuson-Stevens Act requires that "[c]onservation and management measures shall prevent overfishing ...." 16 U.S.C. § 1851(a)(1).

98. The Magnuson-Stevens Act requires that any fishery management plan prepared by a Council or the Secretary shall specify ACLs at a level that prevents overfishing. 16 U.S.C. § 1853(a)(15).

99. The Magnuson-Stevens Act provides the Secretary with authority to promulgate interim measures to reduce overfishing for not more than 366 days. 16 U.S.C. § 1855(c).

100. By carrying-over an amount of Gulf of Maine cod that was only available to be caught in 2012, because of an interim rule that allowed overfishing during that year, Framework 50 unlawfully extended the Magnuson-Stevens Act's limit on the duration of interim measures.

101. The Secretary is required to disapprove an FMP, an FMP amendment, or a regulation to the extent it is inconsistent with National Standards or other applicable law. 16 U.S.C. §§ 1851(a), 1854(a)(1)(A), (a)(3).

102. By approving the Final Rule that implements Framework 50 despite its inconsistencies with applicable law, Defendants violated the Magnuson-Stevens Act, and its own regulations, as well as the APA.

103. These actions by the Defendants are arbitrary and capricious and violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiffs for which they have no adequate remedy at law.

#### **PRAYERS FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully request 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 their Final Rule 1) sets ACLs for 12 of 20 stocks of groundfish for 2013 that exceed the SSC's recommended acceptable biological catch; 2) sets the ACL for Gulf of Maine cod above the SSC's recommended acceptable biological catch; and 3) unlawfully extends the Magnuson-Stevens Act's limit on the duration of interim measures;
2. Vacate that part of the Framework 50 Final Rule that provides for the carryover of 2012 groundfish catch.
3. Vacate that part of the Framework 50 Final Rule that sets a Gulf of Maine cod ABC and ACL above the ABC recommended by the SSC, and order an ABC that does not exceed the SSC's recommended ABC, as required by the Magnuson-Stevens Act.

4. Remand the Framework 50 Final Rule to NMFS for preparation of a new carryover of 2012 catch that complies with the Magnuson-Stevens Act and the APA.
5. Maintain jurisdiction over this action until the Defendants are in compliance with the Magnuson-Stevens Act, the APA, and every order of this Court;
6. Award the Plaintiffs all their reasonable attorneys' fees and costs; and
7. Provide such additional and further relief as to which the Plaintiffs may justly be entitled.

DATED: May 31, 2013

  
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