IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIDCOAST FISHERMEN'S ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action 07-02336 (HHK)**
GARY LOCKE, et al.,	)	
Defendants.	)	

REPLY MEMORANDUM OF
PLAINTIFFS MIDCOAST FISHERMEN'S ASSOCIATION AND CURT RICE
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

STEPHEN E. ROADY
D.C. Bar No. 926477
ROGER FLEMING
Maine Bar No. 8905
Earthjustice
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-667-4500 Telephone

Attorneys for the Plaintiffs

July 10, 2009

TABLE OF CONTENTS

INTRODUCTION

In their opening Memorandum, Plaintiffs Midcoast Fishermen's Association and Curt Rice ("Plaintiffs" or "MFA") demonstrated that the decision by the Defendants Secretary of Commerce Gary Locke, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service ("Defendants" or "Fisheries Service" or "NMFS") to deny the Plaintiffs' October 12, 2007 Petition for Immediate and Permanent Rulemaking to Protect Groundfish From Midwater Trawl Fishing In Northeastern Groundfish Closed Areas ("Petition") was arbitrary and capricious and violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"). The MFA Petition requested both immediate and permanent rulemaking to exclude herring "midwater" trawl ships from fishing inside several "closed areas" of the ocean off the coast of New England, which NMFS established in 1994 to protect critical spawning grounds for 14 different species comprising 19 different stocks of cod, haddock, flounder and other bottom dwelling "groundfish."

The Petition was based on the fact that data and other scientific information show that NMFS made a fundamental error in its 1998 rule ("Framework 18") allowing midwater trawl fishing vessels to conduct their fishing operations inside the closed areas. Specifically, that rule was based on an incorrect premise advanced by the midwater trawl industry: that the midwater vessels catch either "no bycatch of groundfish," or at most only "negligible," amounts of groundfish "due to the spatial separation of pelagic and demersal species [like herring] in the water column." See 63 Fed. Reg. 7728 (Feb. 17, 1998) (AR 30-34).[1]

Plaintiffs' Memorandum in Support of Its Motion for Summary Judgment ("Plaintiffs' Memorandum" or "Pl. Mem.") showed that in denying the Petition, NMFS arbitrarily and capriciously failed to consider the MFA's request for permanent rulemaking, and that NMFS

[1] Throughout this Memorandum, plaintiffs will reference administrative record materials as "AR [page number]."

also failed to consider the relevant data and related scientific information collected since 1998 showing that herring midwater trawl vessels indeed do catch groundfish, often in significant amounts, and operate their gear in ways and at times when there is no spatial separation of herring and groundfish. Pl. Mem. at 22-24. NMFS also violated National Standards and related legal requirements for national fisheries management contained in the Magnuson-Stevens Act , including standards mandating that it prevent overfishing and rebuild depleted fish stocks, avoid or minimize bycatch, and base conservation and management decisions on the best scientific information available. 16 U.S.C. §§1851(a)(1)-(2), (9); 1853(a)(11); 1853(10); 1854(e)(4); 1855(d); Pl. Mem. at 26-38.

The NMFS opposition fails to overcome these legal defects. NMFS grounds its argument most centrally on a premise that is simply not credible and that is demonstrably incorrect – it now contends that it actually considered the full range (roughly ten years) of data relevant to the Plaintiffs' Petition. This argument is not credible because it flatly contradicts the assertion NMFS advanced earlier in this very case, when it defended the propriety of the administrative record before Magistrate Judge Facciola. In that context, NMFS expressly warranted that it had not, in fact, examined any data other than data available for part of the years 2006 and 2007. Defendants' Opposition to Motion to Compel at 5-6 (Document #23).

But even assuming that the new NMFS position is more accurate than the one it presented to the Magistrate, its contention is demonstrably incorrect because it is completely disproven by the record itself. In suggesting now that it actually did review data relevant to the MFA petition stretching back 10 years, NMFS alleges that "Framework 43," an amendment to the groundfish fishery management plan, completely addressed the key issues raised in the Petition. But that allegation is totally at odds with the express purpose, the contents, and the

results of Framework 43. As detailed in this Reply, Framework 43 did not purport to examine the central question presented by the Petition – bycatch of groundfish in the closed areas.

For these and other reasons set out in this Reply, the Plaintiffs respectfully request that this Court deny the Defendants' cross motion for summary judgment and grant the Plaintiffs' motion for summary judgment.

BACKGROUND AND CONTEXT

A reasoned response to the MFA Petition would have adequately considered the data and related scientific information on all fourteen species of groundfish, covering the full 10 year time period the contested rule had been in effect, with specific attention to that groundfish bycatch occurring inside groundfish closed areas. After representing to the Magistrate that it had not looked at data other than a few snippets from 2006-2007, NMFS now takes a different – but equally surprising and unpersuasive – tack. Its latest argument is that it could properly ignore both (1) the specific data and scientific information referenced or provided in the MFA Petition and (2) the groundfish bycatch specifically occurring *inside* of the groundfish closed areas (as opposed to that bycatch occurring in the entire Northeastern ocean waters).

In seeking to justify its extremely crabbed review of the Petition, NMFS relies almost entirely on a 2006 rulemaking known as Framework 43, in which NMFS claims it had already compiled and analyzed all but the most recent data relevant to making a decision on the Petition. (NMFS Opp.[2] at 10). But the NMFS characterization of Framework 43 is wildly in error. That document simply does not address the key issues raised in the plaintiffs' Petition. Therefore, reliance on that document by NMFS is misplaced, and undermines its entire argument.

[2] Federal Defendants' Combined Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment ("NMFS Opp.").

First, Framework 43 plainly indicates it was never intended to consider issues related to groundfish closed areas, including the specific regulations related to midwater trawl vessel access to groundfish closed areas. In fact the Federal Register notices related to this proposed and final rule do not include a single reference to the groundfish closed areas. AR 126-139.

Second, the combined environmental assessment and management plan amendment upon which the Framework 43 rule was based, and which Defendants assert include a "comprehensive analysis" of the relevant bycatch data from 1994-2005, make only two passing references to groundfish closed areas, both as part of the explanation that the action did not address such areas and that the closed area rules would be unaffected by the change and remain in place unchanged. (AR 60, 101) (explaining that "[c]urrent access to groundfish closed areas for these fisheries will not change as a result of this action" and that many groundfishermen are likely to view the measures contained in Framework 43 "as an unjustified reward for illegal fishing activity."). As a result, Framework 43 and its supporting materials contain no bycatch data or analysis specific to the amount of groundfish bycatch occurring *inside* groundfish closed areas – the precise issue that is the centerpiece of the Petition itself.

Under these circumstances, when defendants suggest that "[t]his case turns on [the] simple question" whether NMFS was justified in relying on the Framework 43 analysis in considering the MFA Petition, NMFS Opp. at 10, the inescapable answer is that any such reliance would have been misplaced and essentially irrelevant. Moreover, there is precious little evidence in the record to support the suggestion by counsel for NMFS that the agency ever actually relied upon Framework 43 – or any other substantial evidence – in determining to reject the Petition. This evidence includes the agency's own earlier statement to the Magistrate that it

had – in fact – not looked at data dating earlier than 2006. Def. Opp. to Motion to Compel (Document #23) at 5-6.

Finally, in direct contradiction to the plain language of the MSA, the Defendants argue that in implementing the Act they have no obligation to follow the ten foundational National Standards for fisheries management and do not have the authority to issue regulations necessary to carry out its responsibilities under that Act. NMFS Opp. at 17-20. This argument is without any legal basis.

The contortions reflected in these newly-minted *post hoc* arguments by NMFS flow from a simple fact easily demonstrated by the record: NMFS simply failed to consider the MFA's permanent rulemaking request and as a result have been attempting to paper over this failure ever since they notified MFA of their denial of the Petition on November 29, 2007. This is reflected not just in the failure of NMFS to consider closed area bycatch data over the full span of the existing rule (from 1998 to the date of the petition in 2007), but even more plainly by the fact that in both of the key record documents where NMFS sought to explain its decision – NMFS's Decision Memorandum to Deny Petition For Rulemaking ("NMFS Decision Memo," AR 911-12) and its Letter From William Hogarth to Deny Plaintiffs' Petition Request ("NMFS Denial Letter," AR 915), NMFS repeatedly refers to the Petition solely as a request for "emergency" rulemaking and refers only to its "emergency authority."[3] AR 911-12, 915. NMFS later conceded this point in a post-decision letter to MFA's counsel in which it stated it would only consider a permanent rulemaking if it was part of an FMP amendment prepared by the New England Fishery Management Council. AR 924.

[3] In the first paragraph of its decision memorandum NMFS includes the full title of the Petition – "Petition for Immediate and Permanent Rulemaking to Protect Groundfish from Midwater Trawl Fishing in Northeastern Groundfish Closed Areas" – but then immediately characterizes it as request for emergency regulatory action.

At bottom, NMFS simply argues that this Court should validate its decision to deny the Petition because it is owed a high level of deference by the Court. NMFS Opp. at 8-10, 15. But this Circuit has overturned agency refusals to change rules on many occasions, including in situations similar to those presented here. *See, e.g., American Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C.Cir.1987) (rejecting agency refusal to reconsider a rule where the factual predicate for the rule had radically changed and agency was overlooking a central purpose of its statutory mandate); *Geller v. FCC*, 610 F.2d 973, 978-79 (D.C.Cir.1979) (reversing agency refusal to initiate rulemaking when a new law removed the basis for the original rule). No amount of *post hoc* gyrations can mask the record, which shows simply and conclusively that Defendants failed to adequately consider the MFA's rulemaking request that defendants exclude herring midwater trawl ships from groundfish closed areas, and in so doing violated the Administrative Procedure Act and the Magnuson-Stevens Act.

ARGUMENT

Defendants do not dispute that populations of most New England groundfish stocks remain severely depleted after years of various management efforts intended to spur their recovery. Nor do they dispute that overfishing continues on most groundfish stocks, and that the groundfish closed areas were established as an important measure designed to spur and sustain groundfish recovery through protection of their most important spawning grounds. In all, 13 of 19 groundfish stocks continue to suffer from overfishing; 13 of 19 groundfish stocks continue to be characterized as overfished, and; 11 of 19 groundfish stocks are both overfished and suffer from overfishing. Pl. Mem. at 3. Further, Defendants do not dispute that the rule known as "Framework 18" which allowed herring midwater trawl vessels to access groundfish closed areas was based on scant scientific data, Pl. Mem. at 4-5, nor that the existing data and scientific

information now show that midwater trawl vessels do in fact catch groundfish in more than negligible amounts. Pl. Mem. at 5-6; NMFS Opp. at 16 (noting that Framework 43 was necessary to redefine herring midwater trawl gear from "exempted gear" because it could no longer be considered as "not capable of catching" groundfish).

Rather than challenging these facts, NMFS strives to obscure them by repeatedly directing the focus of its memorandum to a single groundfish species (haddock), and a single regulatory action taken in 2006, Framework 43. *See* NMFS Opp. at 6-7, 10-16. However, this regulatory action addressed bycatch of haddock by midwater trawlers, and only as applied generally to the total amount of bycatch in the entire Northeastern ocean fished by herring midwater trawlers. Tellingly, it did not address or contain any data or other scientific information pertaining to the subject of MFA's Petition – the bycatch of all species of groundfish occurring inside groundfish closed areas. Instead, Framework 43 re-designated midwater trawling as an exempted fishery and established a "bycatch cap" that only set a limit on the total amount of haddock that could be caught by the entire fishery throughout the entire Northeastern region of the Atlantic ocean. AR 133, 136. *See* map of Northeast Multispecies Year Round Closed Areas at AR 717 (*compare* three large areas bordered by dotted lines and U.S. Coast representing open areas *with* five smaller shaded areas representing the groundfish closed areas); *see also* maps at 718 showing short temporal groundfish closures.

Further, NMFS repeatedly mischaracterizes several of Plaintiffs' most important arguments and other materials contained in the record. In response, Plaintiffs clarify several of these mischaracterizations and inaccuracies in the arguments that follow.[4]

[4] The amicus memorandum filed by the "Sustainable Fisheries Coalition," four corporations with midwater trawl vessel investments (hereinafter "Trawler Memorandum") does not make any arguments notably different from those of the Defendants. Amici do, however, include numerous unsupported statements. The thrust of the Trawler Memorandum is to make the Court aware of their economic interests in the outcome of this case. In this regard, the

I. THE FISHERIES SERVICE FAILED TO CONSIDER RELEVANT DATA AND INFORMATION NECESSARY TO A REASONED DECISION AND IGNORED THE REQUEST FOR PERMANENT RULEMAKING

The NMFS argument that it relied on Framework 43 and the data contained therein to decide plaintiffs' Petition is a thinly veiled *post hoc* rationalization for its failure to appropriately consider the relevant scientific information related to deciding the merits of the MFA Petition. The record clearly indicates that NMFS, consistent with its prior statement to this Court (during briefing on the administrative record), did not in fact review any of the data or analysis that pre-dated Framework 43. Plaintiffs established in their Summary Judgment Memorandum that this failure was unlawful, arbitrary, and capricious. Pl. Mem. at 17-38. Moreover, even if it had considered the data and analysis contained in Framework 43, such a review would not have informed the NMFS decision on the Petition because – as noted earlier in this Reply –

Memorandum dramatically overstates the potential impacts to the Atlantic herring fishery of the rule sought by the Petition. *See e.g.*, Trawler Mem. at 1, 4, 22-23. In fact, midwater trawl gear is only one of several methods of catching herring and the proposed rule would not close groundfish closed areas to the entire herring fishery, nor would it prevent the Trawlers from continuing to access the overwhelming majority of the Northeast's ocean waters on a year-round basis. AR 717. The proposed rule would also not affect the ability of herring fishermen who use traditional herring gear such as purse seines from fishing inside of groundfish closed areas, nor would it prevent vessels currently fishing with midwater trawl gear from switching to purse seine gear in order to access groundfish closed areas. Moreover, the Trawler Memorandum incorrectly states that their gear is the only fishing gear that can be fished during the fall and winter months. Trawler Mem. at 9-10. As even the Trawlers point out, fishing for Atlantic herring has occurred in Atlantic waters since at least colonial times, Trawler Mem. at 9, and fishing with purse seines continues to occur year-round. *See* National Marine Fisheries Service, Characterization of Fishing Practices and Marine Benthic Ecosystems of the Northeast Shelf, (2004) at 52, http://www.nefsc.noaa.gov/publications/tm/tm181/3.pdf. The Trawlers also fail to substantiate their bait shortage claim. However, the largest association of lobstermen in New England, the Maine Lobstermen's Association, wrote to plaintiffs in full support of their rulemaking efforts and noted that the purse seine fleet provided a steady supply of bait when midwater trawling was banned during summer months from the inshore Gulf of Maine.

If a final rule prohibiting midwater trawlers from groundfish closed areas were implemented it would affect those who choose to fish for herring with midwater trawl gear. It is also true that groundfish closed areas affect groundfishermen – but Plaintiffs consider the closures as critical to help recover and sustain New England's once legendary groundfish populations and fisheries, and they are committed to seeing them work. *See* Pl. Mem. At 2-3; Exhibits C-D (declarations of fishermen plaintiffs). The MFA Petition was carefully crafted to specifically address the one type of herring fishing gear that, through a special rule now recognized as based on a false predicate, was granted access to the most critical groundfish spawning grounds and threatens groundfish recovery. AR at 695-696. Courts have consistently recognized that in implementing the Magnuson-Stevens Act, NMFS "must give priority to conservation measures. It is only when two different plans achieve similar conservation measures that the [Department] takes into consideration adverse economic consequences." *Blue Ocean Institute v. Gutierrez*, 585 F.Supp. 2d, 36, 44 (D.D.C. Nov 12, 2008) (quoting *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C.Cir. 2000)).

Framework 43 never considered, let alone directly addressed, the matter of midwater trawl access to groundfish closed areas. As a result, Framework 43 substantively lacked data or analysis relevant to the NMFS decision.

NMFS has also failed to rebut Plaintiffs' arguments that it simply never considered Plaintiffs' request for permanent rulemaking. Defendants' extremely narrow review of the scientific information available and its failure to undertake even the most basic analysis of that information violates both the APA and the MSA requirements that agency decisions be based on consideration of the relevant factors and the best scientific information available.

A. The Record and Prior Admissions by NMFS Demonstrate that Its Newly-Claimed Reliance on Framework 43 is a *Post Hoc* Rationalization Designed to Justify Its Narrow Review of the Plaintiffs' Petition

Defendants plainly identify their view of the crux of the disagreement for the court:

> This case turns on a simple question – whether, when it considered Plaintiffs' petition, NMFS was justified in relying on the comprehensive analysis of haddock bycatch data contained in Framework 43, and whether its analysis of this data, coupled with the data available since the finalization of Framework 43, was correct.

NMFS Opp. at 10. This new-found reliance on Framework 43, however, is a mere *post hoc* rationalization seeking to cover the fact that Defendants did not consider Plaintiffs' request for permanent rulemaking or the relevant information for making such a decision. In fact, this reliance is not supported by the record and squarely contradicts their prior statement to this Court that they did not consider any data at all prior to 2006 – exactly the opposite of what they now extensively argue they accomplished through reliance on Framework 43. NMFS Opp. at 10-16. Courts do not accept such *post hoc* rationalizations by agency lawyers to justify agency decisions. *See Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 204 n. 4 (D.C. Cir. 2007) ("Whatever the merits of the agency's averaging

methodology, we cannot affirm on the basis of a post-hoc explanation by agency counsel."). *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218 (D.C. Cir. 2004).

Defendants do not respond directly to the MFA's showing that they failed to consider the relevant scientific data and related information, apply even basic methods of data analysis, and failed to explain their decision to ignore that evidence. *See* Pl. Mem. at 19-26. This is not surprising: no such reviews or explanation appears in the Decision Memorandum, Denial Letter, or any other place in the record. AR 911-912, 915. Instead, they argue for the first time that they did in fact consider data dating back further than the months just prior to the Petition through reliance upon the data and analysis contained Framework 43[5] – and resort to mischaracterizing the plaintiff's arguments in several instances. Among other things, they suggest that Plaintiffs have somehow argued that "NMFS should have discarded the available data and acted on the basis of no evidence . . .." NMFS Opp. at 10. To the contrary Plaintiffs made eminently clear that NMFS not only should not discard the available data, but in fact should use it as a basis for initiating rulemaking. *See* Pl. Mem. at 33-34 (stating that "[a]t the time they were presented with the plaintiffs' Petition, defendants had access to data and reports from their own observer and enforcement programs [along with examples provided with the Petition] showing that midwater trawl vessels catch juvenile and adult groundfish, often in significant amounts." Further, Plaintiffs' Memorandum referenced the Petition at 705-710 and 728-68, to state that "bycatch in the herring midwater trawl fishery is likely underestimated due

[5] Defendants inaccurately state that the Framework 43 action was taken "to address the very concerns that are the basis of the Plaintiffs' petition for rulemaking." NMFS Opp. at 6. The concerns that are the basis for the Plaintiffs' Petition are the concerns that center on the amount of groundfish bycatch by herring midwater trawlers occurring inside of groundfish closed areas. AR 694-768 (Petition). Defendants also wrongly assert that Framework 43 "did alter previous measures that permitted midwater trawl vessels to fish in groundfish closed area subject to catch limits. AR 60." NMFS Opp. at 7. This characterization is demonstrably in error. In fact, page AR 60 specifically states that "[c]urrent access to groundfish closed areas for these fisheries will not change as a result of this action." The record plainly shows that the regulations related to groundfish closed areas were never proposed to be changed and in fact were not altered in any way. AR 126-132, 133-139.

to existing deficiencies in observer coverage and other aspects of the monitoring program."); *see also* AR 715 (Petition urging NMFS to take immediate and permanent action based on available data and scientific information indicating bycatch of groundfish is likely significantly worse.).

This change in position by the Defendants is dramatic. They could not have been clearer in advising the Magistrate that they did not examine data from the period prior to 2006. *See* Federal Defendants Opposition to Motion to Compel Completion of the Administrative Record, Aug. 29, 2008 ("Def. Opp. to Motion to Compel") at 6 (Document # 23). In fact – remarkably – they stated that the "only relevant time period" to consider in making their decision to reject the Petition was the period starting after implementation of Framework 43 in 2006. *See id*.

Indeed, in reliance upon this express representation, Magistrate Judge Facciola ruled that "it is clear beyond all question that the agency considered only one chronological portion of all the data" and concluded that "the agency only considered the bycatch data for the period from August 15, 2006 to the date of the decision." Memorandum Opinion dated December 30, 2008 at 7 (Document # 30). In his ruling denying the Plaintiffs' motion to compel completion of the record, Magistrate Judge Facciola opined that"[l]imiting the record to what the agency considered does not impede the prosecution of plaintiffs' complaint about the agency's action; it advances it" by clearly framing the Plaintiffs' claim that "failing to consider anything but the most recent data rendered the agency's conclusion arbitrary and capricious." *Id.* at 8. These findings by the Magistrate Judge are not lightly to be disturbed. *Page v. Pension Benefit Guaranty Corporation,* 498 F.Supp.2d 223, 225 (D.D.C. 2007); *Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F. Supp. 2d 1, 59-60 (D.D.C. 2006); *Collett v. Socialist Peoples' Libyan Arab Jamahiriya,* 448 F. Supp. 2d 92, 95 (D.D.C. 2006)..

But now in their Opposition Memorandum Defendants completely contradict their earlier statement, arguing for the first time that they relied on the "comprehensive analysis" contained in Framework 43 because it "gathered and analyzed all available data on bycatch by in [sic] the herring fishery from 1994 to 2005." NMFS Opp. at 10-11. Defendants cite to tables in Framework 43 that summarize fishery-wide observed bycatch data and reference several notes contained in the Framework 43 analysis. NMFS Opp. at 11-12. This *post hoc* exercise is not persuasive; as discussed below, these data and analysis are neither comprehensive nor particularly relevant to deciding the Petition since it does not include any information on the actual amounts of bycatch occurring inside groundfish closed areas. Indeed, just prior to the Framework 43 pages cited to by defendants, Framework 43 includes a comprehensive list of sources for bycatch in the Atlantic herring fishery, six of seven of which are expressly identified as not included in the Framework 43 document. AR 78.

In a similar vein, Defendants provide additional *post hoc* analysis of the 2006-2007 raw data included in the record. But again this analysis is not relevant to deciding the Petition because the data were also not specific to groundfish closed areas, and were largely focused on only haddock. Moreover, the discussion mistakenly compares the levels of bycatch to the bycatch cap established in Framework 43 which, as discussed above, does not pertain to groundfish closed areas. Def. Opp. at 12-16.

Further, the fact remains none of this analysis was included in the Decision Memorandum, Denial Letter, or anywhere else in the record thus there is no evidence that it was considered when denying the Petition. AR 911-912, 915. Moreover, there is no explanation as to why NMFS did not look at other bycatch data from the six additional sources listed in Framework 43 (AR 78), the data provided by the Plaintiffs, or the scientific information NMFS is required by regulation to collect and analyze in order to "determine the percent bycatch of

[groundfish] on the basis of sea sampling data and other credible information for the fishery." *See* 63 Fed. Reg. at 7729; 50 C.F.R. § 648.81(a)(iii).

In summary, Defendants explicitly advised the Magistrate that they did not look at any data on bycatch of groundfish by herring trawlers in closed areas other than a mixture of some raw observer and landings data that spanned a period of several months during 2006-2007. *See* Def. Opp. to Motion to Compel at 5-6 (Document # 23). Defendants also conceded that they failed to make any calculations of the levels of bycatch occurring, in violation of 50 C.F.R. §648.81(a)(iii), or to undertake any other substantive analysis of the sea sampling or other credible information in the fishery. *See id.* at 6-7. Additionally, the data that they now claim to have review was not at all comprehensive or specific to groundfish closed areas. Thus the *post hoc* rationalization set forth in their Opposition is simply incorrect as a factual matter, and in any event cannot substitute for the gaps in the Defendants' decision-making itself. *See Public Citizen*, 374 F.3d at 1218 (expertise of the agency, not its lawyers, must be brought to bear on this issue in the first instance); *Florida Power & Light Co. v. F.E.R.C.*, 85 F.3d 684, 689 (D.C. Cir. 1996) (rejecting "post hoc salvage operations of counsel").

B. The Record and Prior Admissions by NMFS Demonstrate that NMFS Never Considered the Plaintiffs' request for Permanent Rulemaking

Defendants did not rebut Plaintiffs' showing in their Memorandum that NMFS never considered the MFA's permanent rulemaking request, nor offered a reasonable explanation for that failure. Pl. Mem. at 24-26. Instead, Defendants first seek to re-characterize Plaintiff's permanent rulemaking request as a request for rulemaking under 50 C.F.R. § 648.81(a)(2)(iii) in order to make their claim that they denied plaintiffs' Petition to the "full extent of NMFS's rulemaking power." NMFS Opp. at 16-17. NMFS did briefly allude to the closed area bycatch threshold for discretionary action contained in 50 C.F.R. § 648.81(a)(2)(iii) in a post-decision

letter to Plaintiffs' counsel. NMFS Opp. at 17. This was also the same post-decision communication in which NMFS conceded their failure to consider the permanent rulemaking request. AR 924.

However, the regulatory provision cited by NMFS was established as part of the 1998 rule allowing midwater trawlers access to the groundfish closed areas. The only reference to this provision in the Petition was of a critical nature, because it suffered from the same weak scientific foundation as the overall rule and established a baseless threshold for discretionary action that would be nearly impossible to trigger.[6] Under this provision, for example, midwater trawl vessels would now have the potential to catch and waste millions of pounds of adult and juvenile groundfish – many times more than MFA's entire association of ten groundfish vessels can catch in a year – from inside the otherwise protected spawning grounds before NMFS can even consider taking action. AR 707. Simply put, Plaintiffs' Petition in no way indicated that it sought relief under this provision.

Instead, as was clear from their Petition, Plaintiffs sought permanent and comprehensive rulemaking relief under 16 U.S.C. §§ 1855(d) of the Magnuson-Stevens Act and under the APA, 5 U.S.C. § 553(e), which grants every interested person the right to petition an agency for the issuance, amendment, or repeal of a rule. AR 695-696, 698-699. As discussed further below, the plain language of the Magnuson-Stevens Act provides NMFS the authority to issue regulations necessary to carry out a fishery management plan or amendment, or any other provision of the Act. 16 U.S.C. § 1855(d). Defendants' failure to consider the MFA's permanent rulemaking request, or to offer a reasonable explanation for its failure to do so was arbitrary and capricious.

[6] The documented bycatch of groundfish inside closed areas recently became so egregious that NMFS was able to determine through its observer data that on at least a few recent occasions individual midwater trawl vessels have crossed the 1 percent threshold. Pl. Mem. at 13. While, as NMFS notes, the Council has recently requested that NMFS implement 100 percent observer coverage in one groundfish closed area, NMFS has not taken such action and in any event would not provide the comprehensive solution to the bycatch problem Plaintiffs seek.

See, e.g., SBC Communications, Inc. v. FCC, 407 F. 3d 1223, 1232 (D.C. Cir. 2005)(agency must respond to the "basic concept of a petition"); *Fund for Animals v. Babbitt*, 903 F.Supp.at 115-116 (agency must respond to the merits of the petition); *Carpenters and Millrights v NLRB*, 481 F.3d. 804, 808-809 (agency must "provide a logical explanation for what it has done" in order to avoid a determination that it has acted arbitrarily (quotation omitted)).

II. THE MAGNUSON-STEVENS ACT IMPOSES A CLEAR STATUTORY OBLIGATION ON THE FISHERIES SERVICE TO FOLLOW THE NATIONAL STANDARDS AND OTHER REQUIREMENTS WHEN EVALUATING THE PLAINTIFFS' PETITION

The Defendants argue that the National Standards set out in the MSA do not apply to their consideration of the Petition. NMFS Opp. at 17. This argument not only is wrong – it ignores the central thrust of the MSA.[7]

One of the main purposes of the MSA is "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery" 16 U.S.C. § 1801(b)(4). Further, in the National Standards section of the MSA Congress stated that "[a]ny fishery management plan prepared . . . pursuant to this title shall be consistent with" the National Standards. 16 U.S.C. § 1851(a) (2007). Finally, in the MSA the responsibility for compliance with national standards falls squarely on Defendants. 16 U.S.C. § 1855(d) ("The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act."). Thus, it is clear that NMFS has a duty to abide by the National Standards when taking actions related to preparing or carrying out fishery management plans, and the regulations required by the Act.

[7] Defendants also ignore the fact that they violated other provisions of the MSA that are directly related to implementation of the National Standards, though not specifically included in the section of the Act with the language to which they cling . *See* 16 U.S.C. §1853(a)(11); §1853(10); §1854(e)(4); §1855(d). Pl. Mem. at 26-38.

Accordingly, when NMFS considered the MFA Petition it was obliged to follow the National Standards. Indeed, to say that refusing Plaintiffs' petition for rulemaking does not implicate the National Standards is to ignore the will of Congress to have these standards apply to any amendments to a management plan. Contrary to the NMFS argument, NMFS Opp. at 17-18, there is no language in the MSA that relieves the NMFS of this duty when it rejects a proposed rule.

In keeping with this principle, the courts flatly disagree with Defendants' notion that the National Standards do not apply here. Several courts, including this one, have recognized that the National Standards apply when a petition for rulemaking is considered (and as in this case, rejected). This point is explained most clearly by *Connecticut v. Daley*, 53 F. Supp. 2d 147 (D.Conn. 1999), *aff'd*, 204 F. 3d 413 (2d Cir. 2000):

> If the Secretary had approved Connecticut's petition for rule making, he would need to amend the summer flounder FMP and promulgate regulations to enforce the amendment. The National Standards would apply to such action. *See* 16 U.S.C. § 1851(a). Similarly, the Secretary's denial of Connecticut's petition for rule making is reviewable to see if the state-by-state quota system he decided to maintain is in accordance with the Magnuson-Stevens Act and the National Standards.

Id. at 158 n. 9 (citing *Southeastern Fisheries Ass'n, Inc.*, 773 F.Supp. 435, 439-40 (D.D.C.1991)) (emphasis added). This Court also applies the National Standards in like circumstances. In *Blue Ocean Institute v. Gutierrez* the court reviewed a petition for immediate rulemaking protecting spawning Atlantic Bluefin tuna. 585 F. Supp. 2d 36 (D.D.C. 2008). The Court stated: "The dispute here concerns whether the Department's decision to reject the proposed closure [(the petition)] is consistent with the MSA's mandate [under National Standard One] that it prevent overfishing." Id. at 45. *See also id.* at 46-47 (applying National Standard Two to the specific scientific methodology the government used in assessing and rejecting the petition); *id.* at 48

(applying National Standard Nine to existing FMP bycatch practices in order to reject the petitioners' proposal of a total ban on fishing to stop all bycatch). Thus, *Blue Ocean* clearly applied the National Standards to the government's rejection of a petition for rulemaking. *Blue Ocean* is indistinguishable from the instant case on this point. In short, the Defendants' argument that the National Standards do not apply contravenes settled precedent.

Once the Defendants turn to the question of compliance with the National Standards, they invoke the wrong standard of review, claiming that they should only have to prove that they were not blind to, or unaware of, their duties to follow them. The evidence in this case shows that the Defendants, in fact, have been blind to their duty under the MSA to prevent overfishing of groundfish in New England. But in any event, this Circuit has made it plain that challenges also can be successfully brought to rejections of petitions where – as here – facts change during the course of applying the rule in question. Therefore, the "blind to their duty" standard of review need not apply to this case. *See*, *Defenders of Wildlife v. Gutierrez*, 532 F. 3d 913, 921 (D.C. Cir. 2008); *American Horse Prot. Ass'n v. Lyng*, 812 F. 2d 1, 5 (D.C. Cir. 1987). Indeed, it would misread the law of this Circuit to allow Defendants to operate under the highly permissive standard they suggest. In fact, the Defendants' approach is unfaithful to the seminal case *Geller v. Federal Communications Commission*. As addressed in the following section, the *Geller* precedent is closely analogous to this case and invalidates the permissive standards of review and strict statute of limitations proposed by the Defendants.

Finally, recognizing that the National Standards apply when Defendants consider petitions for rulemaking would not, as Defendants suggest, set a precedent "requiring NMFS to accept every petition for rulemaking that would arguably further the National Standards…" NMFS Opp at 19. Instead, Defendants would simply be held to task in cases such as this where

new factual information contradicts the basis for the existing rules and demonstrates that new rules should be considered in order for NMFS to fulfill its duty to prepare and carry out the fishery management plan in compliance with the MSA. *See RSR Corp. v. E.P.A.*, 102 F.3d 1266, 1270 (D.C. Cir. 1997) (discussing the appropriateness of judicial review of denied rulemaking petitions based on "new information studies").

III. THE STATUTE OF LIMITATIONS FOR REVIEW OF REGULATIONS UNDER THE MAGNUSON-STEVENS ACT DOES NOT LIMIT REVIEW WHERE THE CHALLENGE IS BASED UPON CHANGED FACTS THAT UNDERMINE THE BASIC PREMISE OF THOSE REGULATIONS

Defendants argue that implicit in Plaintiffs' argument is an impermissible back-door challenge to the groundfish FMP or Framework 43, which is barred by the MSA's 30-day limit on judicial review of regulations (NMFS Opp. at 10-11, 18) Since Framework 43 purportedly examined all prior groundfish bycatch from the herring fishery,[8] Defendants claim that the Court can only look to information gathered since that Framework was adopted, and can only look to see whether the recent bycatch levels are within the limits proscribed by Framework 43. *Id.* As an initial matter, Plaintiffs are not challenging any of the regulations implemented through Framework 43, nor are they challenging the original decision to allow midwater trawlers access to the groundfish closed areas instituted by Framework 18. Instead, Plaintiffs are arguing that NMFS failed to consider the relevant data and scientific information when it made its decision to deny Plaintiffs' rulemaking petition, which shows the underlying factual assumptions made by NMFS in implementing Framework 18 are demonstrably invalid.[9]

[8] As discussed above, Defendants' reliance on the factual determinations found in Framework 43 is misplaced, because: (1) the issue of banning midwater trawlers from the groundfish closed areas was not considered by the Council when it enacted Framework 43; (2) the bycatch data compiled in Framework 43 was focused on only one of 14 species of regulated groundfish in the fishery (i.e., haddock); and (3) the bycatch data was not geographically relevant or specific to the groundfish closed areas.

[9] Additionally, while it is not essential to a ruling in their favor, as noted above, Plaintiffs are of the view that the NMFS refusal of Plaintiffs' rulemaking petition shows the agency was "blind to the nature of [its] mandate from Congress." *See Defenders of Wildlife*, 532 F.3d at 921.

Since this lawsuit is brought under the APA for review of NMFS denial of a rulemaking petition, Defendants presumably are arguing for preclusion of judicial review under the APA. 5 U.S.C. § 701(a)(1). *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). But judicial review of agency action is the rule, and the burden is on the party claiming preclusion to demonstrate by "clear and convincing evidence" Congressional intent to preclude review. *Id.*; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Block v. Community Nutrition Institute*, 467 U.S. 340, 350 (1984); *Japan Whaling Ass'n v. Cetacean Soc'y*, 478 U.S. 221, 230 n. 4 (1986) ("A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review.").

Because this is a challenge to the denial by NMFS of a petition that was based upon a fundamental change in the underlying factual premise for the 1998 rule, judicial review is not barred by the MSA's 30-day limitation. The Ninth Circuit found that the statute of limitations did apply in *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F. 3d 937, 944 (2006), but emphasized that its ruling would not affect situations where new information arose after the expiration of the limitations period. *Id.* at 948-49. This analysis is in keeping with the D.C. Circuits reasoning in *Geller:*

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

610 F. 2d at 978 (citing *Functional Music, Inc. v. FCC*, 107 U.S. App. D.C. 34, 37 (1958)).

Since the fundamental premise of the original regulation (no-bycatch or negligible-bycatch of groundfish with midwater herring fishing in closed areas) proved to be untrue based on data generated in ensuing years there is no basis to impose the MSA's 30-day bar on judicial review. To the contrary, the factual shift in the justification for the 1998 rule requires judicial review and action. The D.C. Circuit has stated in several cases that "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed." *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (clarifying the holding of *Geller*); *American Horse*, 812 F. 2d at 5; *RSR Corp.* 102 F. 3d at 1270 ("On the other hand, if the new studies in fact remove the factual premise on which the HTF value is based, we do not see how EPA could ignore this information."). Plaintiffs provided and referenced data and related scientific information showing that many species of groundfish in the protected areas are being caught as bycatch in significant numbers; the "no-bycatch" assumption of the 1998 rule has certainly been proven false by clear science. Denying review in this case would create a situation where there is no judicial review available for the denial of a proposed rule that would update outdated regulations based on new scientific understanding. That is not what Congress or the D.C. Circuit intended. Thus, it is in the interest of justice that this Court would hear this kind of case and not apply the MSA statute of limitations.

IV. THE MAGNUSON-STEVENS ACT IMPOSES A DUTY UPON THE FISHERIES SERVICE TO USE ITS GENERAL RULEMAKING AUTHORITY TO PROMULGATE PERMANENT REGULATIONS NECESSARY TO IMPLEMENT THE ACT

Defendants argue that they did not consider Plaintiffs' permanent rulemaking request because they only have the authority to issue emergency or interim regulations – unless they are

acting in response to an action by a fishery management council. NMFS Opp. at 16-17. This argument is at odds with the plain language of the Act.

The Magnuson-Stevens Act places responsibility squarely in the hands of the Defendants for ensuring that any fishery management plan or amendment is being carried out consistent with its requirements. 16 U.S.C. § 1855(d) ("The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. . . ."). Along with this responsibility, the agency is given general authority to promulgate regulations (in accordance with the APA and the MSA) as may be necessary to carry out any fishery management plan or amendment or as may be necessary to carry out any other provision of the MSA. 16 U.S.C. § 1855(d). ("The Secretary may promulgate such regulations . . . as may be necessary to discharge such responsibility or to carry out any other provision of this Act.").[10]

Statutory interpretation "begins with [the] text and the presumption that Congress 'says in a statute what it means and means in a statute what it says there.'" *Nuclear Energy Inst. v. EPA*, 373 F.3d. 1251, 1309 (D.C.Cir. 2004)(quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Thus, under the plain language of the Act, the Secretary not only has the responsibility to issue regulations once he approves a plan or amendment submitted to him by a fishery council, but the Secretary also the duty to take any and all actions necessary to comply with that statute.

This general rulemaking authority operates independently from and is not limited by the Act's specific emergency rulemaking power described by defendants, 16 U.S.C. § 1855(c)(3);

[10] Defendants inaccurately characterize 16 U.S.C. § 18 1855(d) by stating that it says only that "NMFS may prepare regulations to implement an FMP," NMFS Opp. at 4, and omit the language "or to carry out any other provision of this Act." (Emphasis added).

NMFS Opp. at 17, and further is not limited by the Secretary's specific rulemaking powers flowing from his responsibilities to review plans submitted by councils and to issue regulations implementing either those plans or, as appropriate, those plans prepared by the Secretary. 16 U.S.C. 1854(a)-(c); *see In re Permanent Surface Min. Regulation Litigation,* 653 F.2d 514, 523-24 (D.C. Cir.1981)(*citing E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 132, (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, (1973) for the proposition that a specific grant of rulemaking power does not diminish a general grant of rulemaking power.).

Moreover, although the agency's general power to promulgate any regulations necessary is framed as permissive language ("may"), when read together with the duty "to discharge" a fishery management plan or amendment or "to carry out" the provisions of Act, this general power to promulgate regulations must become mandatory, especially in cases such as this where continuing with the plan *status quo* is shown to be inconsistent with the requirements of the Act. *See* 16 U.S.C. § 1855(d). The duty to "carry out" a fishery management plan consistently with the MSA must be a *continuing* duty if the language of § 1855(d) is to be given its ordinary meaning. It follows then that the Fisheries Service has a continuing duty to promulgate regulations necessary to ensure that a plan is being carried out consistently with the requirements of the MSA. *See* 16 U.S.C. § 1855(d).

Accordingly, when information is presented in a rulemaking petition that provides information indicating that a plan is not being carried out consistently with the Act, NMFS must evaluate the petition and exercise its general regulatory power to the degree necessary to bring the plan into compliance. To allow a fishery management plan to continue unchanged without regard to the requirements of the Magnuson-Stevens Act, merely because it was thought to be

consistent with the Act at one time, would fly in the face of the responsibilities bestowed upon the Secretary by Congress. *See* 16 U.S.C. §§ 1801(b), 1855(d).

Moreover, Defendants' letter to Plaintiffs clarifying the petition denial demonstrates that, counter to the plain language of the Act, it did not understand it had the general duty or even the authority to institute permanent rulemaking necessary to ensure that a fishery management plan is being carried out consistent with the MSA. AR at 924. The Defendants' emasculated view of its general regulatory power under the MSA in this case "strongly" suggests that the agency was "blind to the nature of his mandate from Congress" when it made the decision to deny Plaintiffs' Petition. *See Defenders of Wildlife*, 532 F.2d at 921 (quoting *American Horse*, 812 F.2d at 7). Therefore, the denial of Plaintiffs' rulemaking petition should be reversed.

CONCLUSION

For each of the foregoing reasons, the Plaintiffs respectfully request this Court to enter an order granting summary judgment against Defendants in accordance with Plaintiffs' motion.

DATED this 10th day of July, 2009.

Respectfully submitted,

/s/ STEPHEN E. ROADY
STEPHEN E. ROADY
D.C. Bar No. 926477
ROGER FLEMING
Maine Bar No. 8905
Earthjustice
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-667-4500 Telephone

Attorneys for the Plaintiffs