

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

NORTHWEST ATLANTIC MARINE ALLIANCE)
200 Main Street, Suite A)
Saco, Maine 04072)

MIDCOAST FISHERMEN’S ASSOCIATION)
450 Glenmere Road)
Port Clyde, Maine 04855)

Plaintiffs)

v.)

No. _____)

CARLOS M. GUTIERREZ, in his official capacity as)
Secretary of the United States Department of Commerce)
Department of Commerce, Room 5851)
14th Street and Constitution Avenue, NW)
Washington, DC 20230)

NATIONAL OCEANIC AND ATMOSPHERIC)
ADMINISTRATION)
United States Department of Commerce)
Room 5128)
1401 Constitution Avenue, N.W.)
Washington, D.C. 20230)

NATIONAL MARINE FISHERIES SERVICE,)
Department of Commerce, Room 14555)
1315 East-West Highway)
Silver Spring, MD 20910)

Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The plaintiffs Northwest Atlantic Marine Alliance (“NAMA”) and Midcoast Fishermen’s Association (“MFA”) hereby challenge the failure on the part of the defendants Secretary of Commerce Carlos M. Gutierrez, the National Oceanic and Atmospheric

Administration, and the National Marine Fisheries Service (hereinafter collectively referred to as “defendants” or as “Fisheries Service” or as “NMFS”) to comply with the overfishing, rebuilding, and bycatch requirements of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), as amended in 1996 by the Sustainable Fisheries Act (“SFA”) and by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (“MSRA”). Specifically, the plaintiffs challenge defendants’ arbitrary and capricious rejection of plaintiffs’ October 12, 2007 petition (Exhibit A) that requested defendants to exclude certain fishing vessels from areas of the ocean in New England waters that have been closed to virtually all fishing in order to protect depleted populations of groundfish. This illegal action by the defendants allows these fishing vessels to kill thousands of pounds of depleted groundfish and thereby to perpetuate the overfished condition of the groundfish in New England.

2. Many New England groundfish populations have been severely depleted and have teetered on the brink of collapse for decades. The June 2007 National Marine Fisheries Service (“NMFS” or “Fisheries Service”) Status of the U.S. Fisheries Report concludes that despite changes to the groundfish management plan over the past several years that were predicted to end overfishing and rebuild stocks, overfishing continues on 8 of 19 groundfish stocks, and that there are still 13 groundfish stocks that remain overfished. NATIONAL MARINE FISHERIES SERVICE, *Report on the Status of the U.S. Fisheries for 2006*, 7, 19 (June 22, 2007).

3. Despite the precarious status of groundfish, and in clear violation of the MSA and the Administrative Procedure Act (“APA”), the Fisheries Service has refused to provide meaningful protection to groundfish spawning grounds critical to groundfish recovery efforts. In particular, the Fisheries Service ignored the best available science and rejected the October 12, 2007 petition filed by the plaintiffs asking NMFS to prohibit herring fishermen using midwater

trawl gear – gear now known to catch significant amounts of adult and juvenile groundfish – from fishing within the groundfish closed areas where they kill adult and juvenile groundfish as “bycatch.” This decision by the Fisheries Service rejected specific practicable fishery management measures supported by the best available science that would help prevent continued overfishing of New England groundfish, help to rebuild the severely depleted groundfish populations, and minimize groundfish bycatch.

APPLICABLE STATUTES, JURISDICTION, AND VENUE

4. This action arises under the MSA, 16 U.S.C. §§ 1801-1883 and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

5. This Court has jurisdiction over this action pursuant to the MSA. That statute provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under” the MSA. 16 U.S.C. § 1861(d). The MSA also provides that actions taken by the Secretary of Commerce under regulations that implement a fishery management plan 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). In this case, defendants denied the plaintiffs’ October 12, 2007 petition by issuing an undated letter that was received electronically by counsel for the plaintiffs on November 29, 2007. (Exhibit B). Plaintiffs are filing this Complaint within thirty (30) days after electronic receipt of that undated letter.

6. This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331, 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.”

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because the Fisheries Service defendants are located in this district and a substantial part of the events or omissions giving rise to the claim occurred here.

8. This Court may issue a declaratory judgment in this case pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and may grant relief pursuant to the MSA, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. § 706.

DESCRIPTION OF THE PARTIES

9. Plaintiff Northwest Atlantic Marine Alliance (“NAMA”) is a non-profit organization of New England coastal communities, family owned fishing businesses, regulators, researchers, conservation organizations, and recreational groups headquartered in Saco, Maine. NAMA is dedicated to restoring and enhancing an enduring Northwest Atlantic marine system that supports a healthy diversity and abundance of marine life and human uses. NAMA’s objective is to establish a public voice and institutional presence that is centered on ecological and economic stability, personal responsibility and accountability, resource protection and distributed power and authority. NAMA and its member organizations, including the Midcoast Fishermen’s Association, the Stonington Fisheries Alliance, and the New Hampshire Marine Coalition, collectively represent over 100 commercial fishermen and community members. Over the past 10 years, NAMA has been looked to and counted on by the family owned small boat inshore fishing fleet for leadership and hope for restoring New England’s fisheries and preserving their livelihood. This underrepresented “silent majority” is being displaced and has faced a disproportionate burden of the groundfish recovery efforts in New England. NAMA’s

work includes efforts to develop alternative fisheries management approaches that would restore and conserve fish populations. NAMA pursues its work through various means, including convening diverse stakeholders around solutions to complex marine resource problems and by working with fishermen, conservation organizations, researchers, management entities, businesses, and community members who have a stake in the future of the conservation and sustainable management of the Northwest Atlantic Ocean. The interests and work of NAMA and its members are directly and adversely affected by the failure of the Fisheries Service to prevent overfishing of groundfish, rebuild depleted groundfish populations, and to prevent and/or minimize the bycatch of groundfish by midwater trawl vessels fishing for herring in groundfish closed areas. Moreover, unless the relief sought in this complaint is granted, those interests will continue to be adversely affected and irreparably injured by the Fisheries Service's unlawful failure to perform its non-discretionary duties under the MSA and the APA.

10. Plaintiff Midcoast Fishermen's Association ("MFA") is a non-profit organization of over 40 fishermen and other members of their community located in Port Clyde, Maine. Due to the loss of many small family fishing businesses as a result of the decline of New England's groundfish fishery, Port Clyde today is considered the easternmost groundfish port remaining in New England. The MFA was formed in response to the view shared by Port Clyde fishermen that poor decision-making by fishery managers is slowly eliminating New England's fleet of small and mid-size vessels in favor of a much smaller fleet of larger vessels. MFA believes that this trend provides less conservation and destroys the opportunity for traditional fishing families to earn a living through fishing. As a result, this trend harms the MFA and its members by making it more difficult for them to preserve the way of life they have enjoyed for decades. Hence, the MFA is dedicated to developing practical solutions to groundfish management

problems that will restore and conserve groundfish in order to create fishing opportunities for its members and for other current and future Maine fishermen. The MFA's work includes a proposal currently before the New England Fishery Management Council known as "area management" that would change the scale of management and shift some of the management responsibility closer to local fishermen and other stakeholders in order to increase conservation and improve fishermen's flexibility to operate their businesses. An important part of the proposal is the introduction of rules that would result in the use of gear and fishing practices that limit bycatch and the ecological impacts of fishing in order to restore the annual migration of fish to the inshore areas and spawning grounds that sustained the fishery for centuries. Related to this concept is the MFA's view that the practice of herring midwater trawling in groundfish closed areas is having a negative impact on the recovery of fish along the coast of Maine. Several areas have been set aside as sanctuaries for groundfish and are intended to be seed areas where fish stocks can recover unmolested and help with the groundfish recovery throughout the region. However, because midwater trawlers catch significant amounts of depleted groundfish in these areas, the MFA supports closing these areas to all fishing, with the exception of fisheries like lobstering that have a very small impact on the groundfish resource. The interests and work of the MFA are directly and adversely affected by the failure of the Fisheries Service to prevent overfishing of groundfish, to accomplish the rebuilding goals for groundfish, and to prevent and/or minimize the bycatch of groundfish by herring midwater trawl vessels in groundfish closed areas. Moreover, unless the relief sought in this complaint is granted, those interests will continue to be adversely affected and irreparably injured by the Fisheries Service's unlawful failure to perform its non-discretionary duties under the MSA and the APA.

11. Defendant Carlos M. Gutierrez is Secretary of the United States Department of Commerce. He is sued in his official capacity as the chief officer of the Department charged with overseeing the proper administration and implementation of the MSA, including those MSA, SFA, and MSRA provisions that require an end to overfishing and that mandate the 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 MSA, the SFA, and the MSRA 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 MSA, SFA, and MSRA are followed and enforced, including the requirements to end overfishing, to rebuild overfished populations of fish, and to minimize bycatch.

LEGAL AND FACTUAL BACKGROUND

Legal and Regulatory Framework for Management of New England Groundfish

14. The MSA, as amended by the SFA and MSRA, establishes a system for conserving and managing fish populations in the exclusive economic zone of the United States, which generally extends from the boundaries of state waters to 200 miles offshore. The MSA

requires the Fisheries Service to conserve and manage fish populations pursuant to a number of “National Standards” and certain other requirements.

15 The MSA creates eight regional fishery management councils and requires them to prepare fishery management plans (“FMPs”) for all fisheries under their authority that require conservation and management. 16 U.S.C. §1852(h)(1). All FMPs and regulations implementing FMPs are subject to final review and approval of the Fisheries Service to ensure that they comply with the requirements of the MSA, as well as with other applicable laws and requirements. 16 U.S.C. § 1854(a), (b).

16. In enacting the MSA, 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. National Standard One of the MSA 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).

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

19. The MSA requires that the Fisheries Service 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(28)(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).

20. The MSA also requires that, prior to 2010, fishery management councils must develop annual catch limits for all fisheries where overfishing is occurring. Such annual catch limits: (i) cannot exceed the recommendations of the councils’ science and statistical committees; (ii) must be set at a level such that overfishing does not occur in the fishery; and (iii) must include measures to ensure accountability. 16 U.S.C. §1852(h)(6); §1853(a)(10); §1853 (note establishing effective dates).

21. National Standard Nine of the MSA requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

22. The MSA also requires that FMPs must

establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority --
(A) minimize bycatch; and
(B) minimize the mortality of bycatch which cannot be avoided[.]

16 U.S.C. § 1853(a)(11).

23. “Maximum sustainable yield” (“MSY”) means “the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.” 50 C.F.R. § 600.310(c)(1)(i).

24. Fish stock size is measured in terms of biomass (“B”), the aggregate mass of the fish in the stock.

25. The biomass “consistent with producing the maximum sustainable yield on a continuing basis,” 16 U.S.C. § 1802(28)(C) (optimum yield for a rebuilding stock), is referred to as “Bmsy” and is the target biomass for New England’s groundfish rebuilding plan.

26. The National Marine Fisheries Service through its Northeast Multispecies FMP (hereinafter “New England Groundfish FMP” or “Groundfish FMP”) seeks to manage nineteen different groundfish stocks. Due to persistent overfishing and the continually depleted status of the groundfish stocks, the New England Fishery Management Council (NEFMC) and NMFS have designed and implemented an increasingly complex suite of conservation and management measures over the years. These measures are designed to limit groundfish mortality and protect juvenile and spawning fish by reducing the fishing effort of groundfish fishermen in the multispecies fishery and reducing the bycatch of groundfish in other fisheries. The New England Groundfish FMP, and in particular the 2004 amendment and 2006 framework adjustment, is intended to end overfishing, rebuild overfished stocks, and minimize bycatch and minimize bycatch mortality where it cannot be avoided. *See* Amendment 13 to the Northeast Multispecies FMP, I-6, (December 18, 2003); Framework Adjustment 42 to the Northeast Multispecies FMP, 41 (April 21, 2006); *see also* NMFS Final Rule Northeast Multispecies Framework Adjustment 42, 71 Fed Reg 62156 (Oct. 23, 2006).

27. In the Groundfish FMP, permanent and seasonal closed areas have been established beginning in 1994 in order to help end overfishing and to rebuild depleted groundfish stocks. Through these closures, groundfish fishing vessels and other fishing vessels capable of catching groundfish are excluded from fishing in the closed areas in order to reduce groundfish

mortality and to protect juvenile and spawning fish. *See, e.g.*, 59 Fed. Reg. 63,926, 63,928 (Dec. 12, 1994); 63 Fed. Reg. 15,326, 15,327 (Mar. 31, 1998); 64 Fed. Reg. 2601, 2601 (Jan. 15, 1999); 50 C.F.R. § 648.81.

28. Rules promulgated by the Secretary of Commerce in 1998 allowed pelagic midwater trawl fishing vessels to fish in the groundfish closed areas based on the assumption that midwater trawl vessels either do not catch groundfish, or catch only “negligible” amounts of groundfish. 63 Fed. Reg. 7727, 7728-29 (Feb. 17, 1998).

29. The Secretary of Commerce has a responsibility to carry out any fishery management plan or amendment approved or prepared by him in accordance with the MSA. 16 U.S.C. § 1855(d). The Secretary may promulgate such regulations, pursuant to APA rulemaking procedures, that may be necessary to carry out this responsibility or to carry out any other provisions of the MSA. *Id.*

30. Additionally, the Secretary is authorized to promulgate emergency regulations or interim measures to reduce overfishing or if an emergency situation exists within a given fishery. *Id.* § 1855(c)(1).

31. An emergency rule or an interim measure is treated as an amendment to a fishery plan for the period it is in effect. *Id.* § 1855(c)(3). NMFS policy guidelines explain that an emergency situation in a given fishery:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants. 62 Fed. Reg. 44,421-44,422 (Aug. 21, 1997).

Emergency rulemaking may be initiated if notice and comment rulemaking “would result in substantial damage or loss to a living marine resource” and immediate action is necessary to “prevent overfishing” or “other serious damage to the fishery resource or habitat.” *Id.*

32. The APA provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Agencies must respond to petitions within a reasonable time, to “proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). If such petitions are denied the agency must provide “a brief statement of the grounds for denial.” *Id.* § 555(e).

33. The APA requires courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law,” and to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706.

Overfishing and Bycatch of Groundfish in New England

34. Many New England groundfish populations have been severely depleted or fished to the point of near collapse for many years. Principal New England groundfish include species such as cod, haddock, and yellowtail flounder and today are managed as 19 different stocks in a “multispecies” fishery. Management of the New England groundfish fishery is complicated by the use of non-selective fishing gear, so that even if limits are placed on targeted fishing on one species, such as cod, fishing for another species of groundfish or other fish may result in large amounts of bycatch and bycatch mortality of the non-targeted species. Hence, to restore depleted groundfish populations to healthy levels, strict conservation measures are required to control both targeted fishing and bycatch.

35. The New England groundfish fishery has long been a national symbol of the failure of our nation’s fishery policy. The fishery has suffered three dramatic recent collapses.

From 1966-1970, overfishing by international fleets of factory-based trawlers devastated the fishery. *See* Steven A. Murawski, et al., *New England Groundfish in Our Living Oceans* 71, 76-77 (United States Dep't of Commerce 1999). This collapse was one of the main reasons Congress enacted the Magnuson Fishery Conservation and Management Act (FCMA) in 1976. *See id.* at 77; *see also* 142 Cong. Rec. 10910 (daily ed. Sept. 19, 1996) (statement of Sen. Chafee).

36. FCMA's ban on foreign factory trawlers did not succeed in resuscitating the New England groundfish fisheries – instead, defendants' mismanagement allowed American fishermen to severely overfish the resource. As a result, by the mid-1980s, the groundfish stocks had crashed again. *See* Murawski at 78; *see also* 142 Cong. Rec. at 10910.

37. Defendants were sued in 1991 to redress their failure to prevent overfishing in the groundfish fishery and a consent decree established a timetable for the Fishery Service to develop a plan to rebuild the overfished groundfish to a healthy population size. *See Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992).

38. Notwithstanding these developments, defendants' efforts proved inadequate. It took three years for defendants to propose stronger conservation measures in response to the 1991 lawsuit, yet these measures were insufficient to prevent further collapses of groundfish stocks in the mid-1990s. *See* 142 Cong. Rec. at 10910; National Marine Fishery Service, NOAA, Report of the 18th Northeast Regional Stock Assessment Workshop (18th SAW): The Plenary 42, 53 (1994). Because Congress judged, in large part from the crisis in New England, that FCMA's conservation requirements were not strict enough, it enacted the Sustainable Fisheries Act in 1996 (SFA). *See, e.g., id.*; 142 Cong. Rec. 10794 (daily ed. Sept. 18, 1996) (statement of Sen. Kerry).

39. In fact, over half of the New England groundfish stocks whose stock size was known were listed as overfished following passage of the SFA. *See* National Marine Fisheries Service, *Report to Congress: Status of Fisheries of the United States* 9-10 (October 1999) (13 of 21 stocks whose size is known are overfished).

40. The Fisheries Service was taken to court again, and on December 28, 2001, the United States District Court for the District of Columbia (Kessler, J.) entered summary judgment in favor of the plaintiff conservation groups and ordered defendants to promulgate and implement an amendment to the Groundfish FMP not later than May 1, 2004 that complied with the overfishing, rebuilding, and bycatch requirements of the SFA. *Conservation Law Foundation v. Evans*, 209 F. Supp. 2d 1 (D.D.C. 2001).

41. On April 27, 2004 the defendants published a final rule implementing “Amendment 13” to the Groundfish FMP. 69 Federal Register 22906 (April 27, 2004). The measures contained in Amendment 13 and in the final rule implementing that Amendment were again challenged as not in compliance with the MSA and SFA’s overfishing, rebuilding, and bycatch provisions. Specifically, the measures contained in the Amendment 13 rebuilding plan allowed fishing at rates for some of the most depleted stocks significantly above the recommended levels that were based on the best available science as necessary to stop overfishing and rebuild depleted stocks. Moreover, it was alleged that nothing in Amendment 13 demonstrated that the new measures were sufficient to ensure that even those excessive fishing rates are not exceeded. Amendment 13 was also challenged because it did not include any standardized bycatch reporting methodology (“SBRM”) for assessing the amount and type of bycatch occurring in the New England groundfish fishery.

42. While the conservation groups again won on the SBRM claim, the court did not accept the conservation groups challenges to the overfishing and rebuilding provisions in Amendment 13. *Oceana v. Evans*, 2005 WL 555416 (D.D.C.). In turn, Congress again looked to the New England groundfish crisis in enacting MSRA provisions that make even more clear that overfishing must be stopped immediately, even for rebuilding stocks, 16 U.S.C. § 1854(e)(3)(A), and that all FMPs must contain science-based annual catch limits and accountability measures that ensure overfishing is prevented. *See* 16 U.S.C. §§ 1852(h)(6), 1853(a)(15).

43. Beginning in 1994, in response to the collapse of haddock, flounder, and cod stocks, areas of the ocean off New England were closed on a permanent and seasonal basis to groundfishermen and other fishermen using gear capable of catching groundfish in order to reduce groundfish mortality and to protect juvenile and spawning fish to aid in recovery efforts. *See, e.g.*, 59 Fed. Reg. 63,926, 63,928 (Dec. 12, 1994); 63 Fed. Reg. 15,326, 15,327 (Mar. 31, 1998); 64 Fed. Reg. 2601, 2601 (Jan. 15, 1999); 50 C.F.R. § 648.81.

44. Rules promulgated by the Secretary in 1998 (implementing “Framework Adjustment 18” to the Groundfish FMP) allowed pelagic midwater trawl fishing vessels into the closed areas based on the assumption that midwater trawl fishing gear either does not catch groundfish, or catches only “negligible” amounts of groundfish. 63 Fed. Reg. 7727, 7728-29 (Feb. 17, 1998).

45. In view of this history and additional new information, the plaintiffs filed a Petition for Rulemaking with the defendant Secretary of Commerce on October 12, 2007 seeking to exclude midwater trawl ships from groundfish closed areas (Exhibit A).

46. “Midwater” trawl vessels fish by dragging very large nets behind their vessels, and at times operate in pairs as “pair trawls” so they can drag even larger nets behind them. These nets have small mesh so they can capture herring and other small fish like mackerel. The fishing gear is characterized as “midwater” trawl gear because it was originally intended to be fished in the middle of the water column where pelagic species like herring are commonly found, especially at night. However, the gear is often fished at the bottom of the water column where herring often can be found during the day and where the nets capture juvenile and adult groundfish as bycatch, along with various types of marine debris and rocks.

47. Contrary to the premise contained in Framework Adjustment 18, recent data show that midwater trawl vessels catch juvenile and adult groundfish, often in significant amounts. For example, observer data from 46 observed midwater trawl trips in 2006 showed bycatch of haddock totaling over 18,000 pounds, redfish totaling nearly 7,000 pounds, and Pollock, cod, plaice, and flounder totaling 70 pounds.

48. In addition, in 2004, NMFS took enforcement action against herring midwater trawl vessels that were found illegally attempting to land thousands of pounds of juvenile haddock and hake bycatch in Maine and Massachusetts. One of these vessels alone was estimated to have as much as 30,000-48,000 pounds of juvenile haddock on board, which can reasonably be estimated to be the equivalent of three to five times that amount of haddock had it been allowed to grow to maturity. When groundfish are allowed to grow to maturity they also have the opportunity to spawn, thus aiding in groundfish rebuilding efforts.

49. After these well publicized enforcement actions, the midwater trawl industry acknowledged the fact it was catching significant amounts of groundfish as bycatch, and stated that if, and when, groundfish populations rebuild, midwater trawls vessels will not be able to

avoid catching increasing amounts of groundfish as bycatch. See Final Rule Implementing Framework Adjustment 43 to the Northeastern Multispecies FMP, 71 Fed. Reg. 46871, 46874 (April 16, 2006).

50. The Fisheries Service does not attempt to estimate the amount of bycatch occurring in the fishery, and instead simply records the amount that is actually observed in its current program. However, as described in the plaintiffs' October 12, 2007 petition and in an additional letter submitted by the plaintiffs to the Fisheries Service dated November 20, 2007 (Exhibit C), based on current information it is reasonable to develop better estimates of the levels of groundfish bycatch occurring in the herring midwater trawl fishery through extrapolation. For example, if available data from 2004 to 2006 are extrapolated based on the levels of observer coverage (and on the assumption that most of the observed bycatch of groundfish were juveniles that if allowed to grow to maturity would have weighed 3-5 times their captured weight), the amount of groundfish bycatch would be even more significant, approximately:

<u>by weight</u>	<u>equivalent adult weight of juveniles (4x)</u>
○ 2004 over 500,000 pounds	2 million pounds
○ 2005 over 200,000 pounds	800,000 pounds
○ 2006 over 800,000 pounds	3.2 million pounds

51. The June 2007 National Marine Fisheries Service (NMFS) report on the status of U.S. fisheries shows that the changes to the groundfish management plan over the past several years have not ended overfishing on 8 of 19 groundfish stocks, and that there are still 13 of 19 groundfish stocks that remain overfished. NATIONAL MARINE FISHERIES SERVICE, *Report on the Status of the U.S. Fisheries for 2006*, 7, 19 (June 22, 2007).

52. The situation is dire for stocks like Georges Bank cod and Gulf of Maine cod, which are estimated to be at only 10 and 23 percent, respectively, of target biomass levels. 2005

GROUND FISH ASSESSMENT REVIEW MEETING at 2-4, 2-156. (“2005 GARM”). Biomass estimates for white hake show that it is at less than 50 percent of its target biomass level, while the three stocks of yellowtail flounder, along with Georges Bank winter flounder, are dismally low. *Id.* at viii; 2-83, 2-104, 2-129, 2-327, 2-342. Remarkably, all of these stocks continue to suffer from overfishing. *Report on the Status of the U.S. Fisheries for 2006* at 19. Gulf of Maine and Georges Bank haddock continue to be considered overfished, as are American plaice, Southern New England windowpane flounder, ocean pout, and Atlantic halibut. *Id.* The 2005 GARM report also shows that none of the 19 stocks of groundfish have been rebuilt to their target biomass levels, which would produce MSY on a continuing basis.

53. In addition, as part of their petition plaintiffs showed that a 2007 scientific review concluded that the use of closed areas to reduce groundfish mortality and to protect spawning and juvenile groundfish holds promise as a method for reducing overfishing of groundfish and rebuilding overfished stocks. The review found an increase in biomass of several species of groundfish within closed areas and in surrounding areas when they are implemented. Fogarty, Mike, *Efficacy of Fishery Closures in the Gulf of Maine*, in WESTERN GULF OF MAINE CLOSURE AREA SYMPOSIUM, 23-25 (2007).

54. The best available science indicates that bycatch in the herring midwater trawl fishery is likely underestimated due to existing deficiencies in the monitoring program for these vessels, including insufficient levels of observer coverage.

55. Recent scientific analysis of the bycatch monitoring program for the midwater trawl fishery demonstrates that the program does not meet NMFS’ own standards. As a result, the full impact of the midwater trawl fishery on groundfish is not known. Moreover, the level of certainty demanded by the existing rule is unlikely to be met in the immediate future under the

existing bycatch monitoring program because of low levels of observer coverage in the fishery and flawed sampling protocols that fail to reliably account for bycatch.

56. In response to prior court orders, NMFS recently proposed a new SBRM that shows that there are currently insufficient levels of observer coverage on the midwater trawl fleet. Final Draft Northeast Region Standardized Bycatch Reporting Methodology, C-44 (June 2007). An independent peer review of the proposed SBRM indicates that the current bycatch monitoring program does not reliably estimate the amount of bycatch occurring and the gap between actual and needed observer coverage is even greater than previously believed.

57. In response to the plaintiffs' petition, on November 29, 2007 the Fisheries Service sent an undated one page letter to counsel for the plaintiffs by electronic mail in which it declined to take immediate action to exclude midwater trawlers from groundfish closed areas. (Exhibit B). This letter appears to also decline the plaintiffs' request that the Fishery Service initiate both emergency and permanent rulemaking to exclude midwater trawl ships from the closed areas.

58. As a result of the Fisheries Service decision to deny the plaintiffs' petition, midwater trawl fishing vessels will continue to operate in areas of the ocean off New England that are otherwise closed to fishing with gear capable of catching groundfish and will continue to kill significant amounts of groundfish in those areas.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: THE DEFENDANTS' DECISION TO DENY PLAINTIFFS' PETITION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

59. The plaintiffs reallege and incorporate by reference paragraphs 1 - 58 of this Complaint in this First Claim for Relief.

60. The APA mandates that a “reviewing court shall hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or that is taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

61. The defendants’ premise for allowing fishing vessels using midwater trawl gear into groundfish closed areas was that they caught no, or only negligible amounts, of groundfish. This erroneous factual premise formed the basis for the regulation that currently allows midwater trawl vessels into the groundfish closed areas – areas closed to fishing gear capable of catching groundfish in order to decrease groundfish mortality and protect groundfish spawning grounds.

62. In fact, as was demonstrated in the plaintiffs’ petition and reinforced in a follow-up letter to the Fisheries Service, midwater trawl ships catch significant amounts of groundfish.

63. The Fisheries Service’s November 29, 2007 letter denying plaintiffs’ petition asserts that NMFS has considered prohibiting midwater trawl fishing gear in the closed areas before, and has determined the bycatch of New England multispecies was not sufficient to justify such action. However, these are conclusory statements and the Fisheries Service provides no supporting evidence.

64. The Fisheries Service also claims that the “observer data available continue to suggest that bycatch levels are within the range considered acceptable by the Council.” Again, the Fisheries Service letter makes no effort to support this statement either factually or legally.

65. The remainder of the Fisheries Service’s response to the plaintiffs’ petition focuses only on whether or not the information presented in the petition is “significant new information” that would justify an emergency response, and thus does not discuss the larger question of whether permanent rulemaking should have been initiated. The Fisheries Service

also provides no discussion of its determination that all of the recent information described in detail in the plaintiffs' petition does not constitute significant new information.

66. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

67. These violations of the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

**SECOND CLAIM FOR RELIEF:
THE DEFENDANTS' DECISION TO DENY PLAINTIFFS' PETITION FAILS TO
PREVENT OVERFISHING AND REBUILD DEPLETED GROUND FISH
POPULATIONS**

68. The plaintiffs reallege and incorporate by reference paragraphs 1 - 58 of this Complaint in this Second Claim for Relief.

69. National Standard 1 of the MSA requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1).

70. The MSA requires the Fisheries Service to promulgate and implement a fishery management plan for groundfish that prevents overfishing and rebuilds overfished fish populations. 16 U.S.C. § 1854(e).

71. A fishery management plan for groundfish has existed for several years and the Fisheries Service has issued several fishery management plan amendments seeking to address overfishing and the depleted condition of groundfish stocks. In 2004, the Fishery Service took action that was intended, once again, to end overfishing. It also finally established a rebuilding plan for overfished groundfish stocks. Notwithstanding these actions, eight of nineteen managed

groundfish stocks continue to suffer from overfishing, 13 remain overfished, and all 19 are below their target biomass levels.

72. In their November 29, 2007 letter denying the plaintiffs' petition, the Fisheries Service refused to take action to exclude midwater trawl vessels from the groundfish closed areas in order to minimize groundfish bycatch or avoid the killing of groundfish as bycatch. This source of mortality for juvenile and mature groundfish was not addressed in the amendment to the Groundfish FMP or any subsequent adjustments to the rebuilding plan because of the original incorrect premise that midwater trawl vessels do not catch groundfish.

73. The Fisheries Service's November 29, 2007 decision, which leaves in place regulations permitting midwater trawl vessels to fish in groundfish closed areas, fails to prevent overfishing and promote rebuilding of overfished groundfish populations, notwithstanding the requirements contained in the MSA.

74. These actions and failures to act by the Fisheries Service violate the MSA.

75. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

76. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

**THIRD CLAIM FOR RELIEF:
THE DEFENDANTS' DECISION TO DENY PLAINTIFFS' PETITION FAILS TO
AVOID OR MINIMIZE BYCATCH OF GROUND FISH**

77. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 - 58 of this Complaint in this Third Claim for Relief.

78. National Standard Nine of the MSA requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

79. The MSA also requires that FMPs must “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery” and include practicable measures to minimize bycatch and bycatch mortality. 16 U.S.C. § 1853(a)(11).

80. In their November 29, 2007 letter denying the plaintiffs’ petition, the Fisheries Service refused to take action necessary to minimize or avoid bycatch of groundfish in the groundfish fishery, and instead left in place regulations that violate the MSA’s mandate to minimize bycatch and bycatch mortality. In that decision, the Fisheries Service refused to take the practicable step of prohibiting fishing vessels using midwater fishing trawl gear from fishing in the groundfish closed areas despite clear evidence that such gear catches significant amounts of groundfish as bycatch.

81. The Fisheries Service’s decision is contrary to the premise for the regulation that allowed the use of midwater trawl gear in groundfish closed areas and ignores the fact that the fishing vessels in question are capable of fishing with other fishing gear, such as purse seine gear, that have lower levels of bycatch and bycatch mortality.

82. The Fisheries Service’s decision also demonstrates that it failed to establish a standardized reporting methodology for reliably monitoring and assessing the amount of groundfish bycatch occurring in the herring midwater trawl fishery.

83. The defendants’ November 29, 2007 denial of the plaintiffs’ petition therefore does not comply with the requirements of National Standard Nine and the bycatch reporting requirements of the MSA.

84. These actions and failures to act by the Fisheries Service violate the MSA.

85. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

86. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

**FOURTH CLAIM FOR RELIEF:
THE DEFENDANTS' DECISION TO DENY PLAINTIFFS' PETITION FAILS TO
RELY UPON THE BEST SCIENTIFIC INFORMATION AVAILABLE**

87. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 - 58 of this Complaint in this Fourth Claim for Relief.

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

89. The best scientific information available demonstrates that: (i) overfishing is occurring in the groundfish fishery and that several stocks of groundfish remain overfished despite recent management efforts to end overfishing and rebuild stocks; (ii) closing areas of high groundfish abundance and spawning areas to fishing with gear capable of catching groundfish reduces mortality of groundfish and helps groundfish stocks to recover from depleted levels; (iii) herring midwater trawl vessels kill significant amounts of juvenile and mature groundfish in the New England closed areas; and (iv) the groundfish bycatch problem in the herring midwater trawl fishery is likely much more severe than currently described and that significant improvements in the bycatch monitoring program are needed to establish a scientifically sound program that would provide reliable estimates of the amount of bycatch actually occurring in the fishery.

90. In their November 29, 2007 letter rejecting plaintiffs' petition, the Fisheries Service disregarded the best scientific information available and refused to exclude midwater trawl fishing vessels from groundfish closed areas.

91. The Fisheries Service's November 29, 2007 decision that leaves in place current regulations that allow midwater trawl vessels into groundfish closed areas therefore is not based upon the best scientific information available.

92. These actions and failures to act by the Fisheries Service violate the MSA.

93. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

94. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

**FIFTH CLAIM FOR RELIEF:
THE DEFENDANTS' DECISION FAILS TO COMPLY WITH
THE MAGNUSON-STEVENSON ACT'S PROVISIONS FOR EMERGENCY
REGULATIONS OR INTERIM MEASURES**

95. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 - 58 of this Complaint in this Fifth Claim for Relief.

96. Under the Magnuson-Stevens Act and existing regulations, the Secretary may issue emergency regulations or establish interim measures to address overfishing or an emergency. 16 U.S.C. § 1855(c)(1).

97. Fisheries Service policy guidelines define emergency situations as those resulting from recent, unforeseen events or recently discovered circumstances and that present a serious conservation or management problem in the fishery that can be addressed through emergency

regulations, for which the immediate benefits outweigh the need for more deliberative consideration. 62 Fed. Reg. at 44,422.

98. Fisheries Service policy guidelines further state that emergency regulations may be initiated if notice and comment rulemaking “would result in substantial damage or loss to a living marine resource” and immediate action is necessary to “prevent overfishing” or “other serious damage to the fishery resource or habitat.” *Id.*

99. The Fisheries Service’s June 2007 report on the status of U.S. fisheries confirms that overfishing is occurring on several New England groundfish stocks.

100. The June 2007 report represents the most recent and best available scientific data on the overfishing of New England’s groundfish stocks, and further confirms that several groundfish stocks remain depleted – despite the most recent set of management actions taken in the Groundfish FMP that were predicted to solve these problems.

101. A recent 2007 scientific review of the existing closed areas in New England shows that they hold significant promise for rebuilding depleted groundfish stocks.

102. The most recent observer data released in 2007 shows that this promise is undermined by the mounting evidence that, contrary to the premise of the original rulemaking justifying the decision to allow midwater trawl vessels into closed areas, midwater trawl vessels catch significant amounts of juvenile and mature groundfish.

103. Finally, recent 2007 analysis by NFMS of its bycatch monitoring program, and an even more recent independent peer review of that analysis, shows that the groundfish bycatch problem in the herring midwater trawl fishery is likely much more severe than currently estimated and that significant improvements in the program are needed to establish a

scientifically sound bycatch monitoring program that would provide reliable estimates of the amount of bycatch actually occurring in the fishery.

104. The November 29, 2007 letter prepared by the Fisheries Service in response to plaintiffs' petition fails to demonstrate that NMFS gave reasoned consideration to the fact that overfishing is occurring on several groundfish stocks as a cause for issuing emergency regulations and interim measures to exclude midwater trawl ships from the groundfish closed areas, and that the amount of groundfish, including juvenile groundfish, caught by midwater trawl ship is contributing to the illegal overfishing that is occurring in New England.

105. The letter prepared by the Fisheries Service in response to plaintiffs' petition also fails to demonstrate that NMFS carefully consider all of the recent information brought forward by the plaintiffs and undertook a reasoned evaluation of all the relevant factors for determining whether an emergency situation exists with regard to the groundfish fishery and management of groundfish closed areas.

106. The failure by the Fisheries Service to adequately analyze the substantial damage and loss to groundfish populations and their spawning areas and to consider new information showing that immediate action is necessary to prevent overfishing or other serious damage to the groundfish resource as a result of midwater trawl ships operating in groundfish closed areas violates the MSA and constitutes an arbitrary and capricious action that violates the APA.

107. These violations of the MSA and APA by the Fisheries Service threaten the plaintiffs with irreparable injury 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 Fisheries Service's rejection of the plaintiffs' October 12, 2007 petition is arbitrary, capricious, and contrary to law, in violation of the APA.
2. Declare that the Fisheries Service has violated the MSA by rejecting the plaintiffs' October 12, 2007 petition, thereby failing to halt overfishing of groundfish stocks, rebuild depleted stocks, and minimize bycatch of groundfish.
3. Order the Fisheries Service to initiate rulemaking proceedings designed to permanently prohibit vessels from fishing with midwater trawl fishing gear in New England groundfish closed areas.
4. Further order the Fisheries Service to reconsider its decision not to take immediate action to issue emergency regulations and interim measures to prohibit the use of midwater trawl fishing gear in New England groundfish closed areas.
5. Provide plaintiffs all their reasonable costs, fees, and attorney fees.
6. Provide such other and further relief as the Court deems just and proper.

DATED this 28th day of December, 2007.

Respectfully submitted,

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