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

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rules 7(h) and 56.1, the plaintiffs Midcoast Fishermen's Association and Curt Rice respectfully move this Court for an order entering summary judgment against defendants, declaring unlawful defendants' rejection of the October 12, 2007 Petition by the plaintiffs that requested both immediate and permanent rulemaking to exclude herring fishing vessels from trawling inside several "closed areas" of the ocean off the coast of New England.

This case is a challenge to ongoing federal action – the continuing failure by defendants to protect overfished groundfish in New England ocean waters. This ongoing failure will continue to cause harm during the pendency of this case by allowing herring trawlers to kill groundfish in these closed areas. In recognition of the urgency of cases like this one, Congress

has provided that courts “shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.” 16 U.S.C. § 1855(f)(4). Accordingly, the plaintiffs respectfully request this Court to expedite its consideration of this Motion for Summary Judgment, and to schedule oral argument on this Motion as promptly as possible.

DATED this 11th day of May, 2009.

Respectfully submitted,

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

**MIDCOAST FISHERMEN'S
ASSOCIATION, et al.,**

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

Civil Action 07-02336 (HHK)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

This case challenges the decision by the defendants Secretary of Commerce Gary Locke, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service¹ (hereinafter collectively referred to as "defendants" or "Fisheries Service" or "NMFS") to deny the plaintiffs' October 12, 2007 Petition that requested both immediate and permanent rulemaking to exclude herring fishing vessels from trawling inside several "closed areas" of the ocean off the coast of New England. The defendants' decision is arbitrary and capricious and violates the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").

Designed as a fundamental part of efforts by the Fisheries Service to restore cod and other groundfish² populations, these particular areas have been closed for nearly 15 years to virtually all types of fishing in order to reduce groundfish mortality and protect juvenile and

¹ Pursuant to Federal Rule of Civil Procedure 25(d), current Secretary of Commerce Locke is substituted for the original named defendant, former Secretary of Commerce Gutierrez.

² In New England, the term "groundfish" refers to a "multispecies" complex of 12 species and 19 sub-species (stocks) of fish that live on or very near the ocean floor. These species include cod, haddock, and flounder.

spawning fish. In 1998, however, the defendants decided to allow fishing vessels that use “midwater” trawl nets to fish for herring in these closed areas. They based this 1998 decision on a crucial factual assumption – that trawling for herring would not harm groundfish – an assumption that has proven to be wrong. In fact, during the past decade this decision to allow herring trawlers to fish in these closed areas has resulted in the death of thousands of pounds of adult and juvenile groundfish as “bycatch”³ in the herring trawl net fishery. Nonetheless, the defendants rejected the plaintiffs’ Petition to reverse this decision without bothering to look at the relevant data that have accumulated over the past ten years – and without explaining why they refused to consider such data. As a result of this arbitrary decision, the defendants are unlawfully perpetuating the overfished condition of New England cod and other groundfish.

FACTUAL BACKGROUND

A. The New England Groundfish Fishery and the Impacts of Herring Trawlers

Groundfish are historically the target of New England’s most important fishery. They include 19 different stocks of species such as cod, haddock, and flounder managed in a fishery management plan as a “multispecies” fishery (“Groundfish FMP”). Today, due to years of overfishing, waste from bycatch, and habitat destruction, New England’s groundfish fishery provides only a fraction of its historic economic benefit to regional fishing communities. In fact, a fully rebuilt groundfish fishery would provide more than twice the current landings and nearly triple the current revenues generated by this fishery. See New England Fishery Mgmt. Council, U.S. Dep’t of Commerce, Final Amendment 13 to the Northwest Multispecies Fishery

³ The term “bycatch” means fish caught incidentally while fishermen are targeting a different species. In this case, fishing vessels targeting herring are killing groundfish as bycatch. Bycatch “kills fish that would otherwise contribute toward the well-being of the fishery or the nation’s seafood consumption needs.” *CLF v. Evans*, 209 F. Supp. 1, 12 (D.D.C. 2001) (footnote omitted).

Management Plan I-568-70 (2003), available at

http://www.nefmc.org/nemulti/planamen/final_amend13_dec03_section_22.pdf.

The Fisheries Service's efforts to restore groundfish populations through the New England Groundfish FMP have not yet succeeded. *See* National Marine Fisheries Service, Report on the Status of the U.S. Fisheries for 2006, 7, 19 (2007), available at http://www.nmfs.noaa.gov/sfa/domes_fish/StatusofFisheries/2006/2006RTCFinal_Report.pdf. The June 2007 NMFS Status of the U.S. Fisheries Report concludes that despite changes to the Groundfish FMP 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. *See id.*⁴ Many of the same groundfish stocks that suffer from overfishing are also considered overfished (depleted) and continue to struggle on the brink of collapse. *Id.* at 19. *See generally* Northeast Fisheries Science Center, Assessment of 19 Northeast Groundfish Stocks Through 2004: 2005 Groundfish Assessment Review Meeting ("2005 GARM"), available at <http://www.nefsc.noaa.gov/nefsc/publications/crd/crd0513/>.⁵

In an effort to protect groundfish, NMFS closed several areas to groundfish fishing in 1994 after the groundfish populations collapsed. *See* 59 Fed. Reg. 63,926, 63,928 (Dec. 12, 1994). These closures remain in place. However, a rule promulgated by defendants in 1998 allowed "midwater" trawl fishing vessels to conduct fishing operations in the closed areas based on the assumption that midwater trawl vessels either do not catch groundfish, or catch only

⁴ A June 2008 Report prepared by defendants also reflects that many New England groundfish stocks remain overfished. *See* National Marine Fisheries Service, Report on the Status of U.S. Fisheries for 2007, 16-17 (2008), available at http://www.nmfs.noaa.gov/sfa/domes_fish/StatusofUSFisheries_Report_to_Congress.pdf.

⁵ The most recent and best available science reflected in the 2008 GARM again showed that many groundfish stocks continued to struggle with little or no improvement. In all, 13 stocks are now overfished, 13 are suffering from overfishing, and 11 are both overfished and suffering from overfishing. Northeast Fisheries Science Center, *Assessment of 19 Northeast Groundfish Stocks Through 2007: Report of the 3rd Groundfish Assessment Review Meeting*, pp. vii-x ("2008 GARM"), available at <http://www.nefsc.noaa.gov/nefsc/publications/crd/crd0815/>.

“negligible” amounts of groundfish “due to the spatial separation of pelagic and demersal species in the water column.” *See* 63 Fed. Reg. 7727 (Feb. 17, 1998), AR 30-34.⁶ The defendants stated that the intent of this rule was to provide “greater economic opportunity” to herring fishing vessels “while maintaining the conservation benefits” of the closed areas. *Id.* They stated further that their intent was to “allow pelagic midwater trawling in the ... closed areas only if it does not adversely impact current efforts to rebuild depleted groundfish stocks.” *Id.* at 7728. In addition, they stated that they would monitor the results of the rule and take “appropriate action” (presumably reconsidering allowing herring trawlers into the closed areas) if they deemed the effects of the rule to prove harmful to groundfish, noting that “[s]ince many of the vessels operating in these fisheries will be reporting their landings under the mackerel and multispecies fishery management plans, *data will be available.*” *Id.* at 7729, AR 32-33 (emphasis added).

The defendants’ crucial assumption about the lack of impact of herring trawlers on groundfish was based on scant scientific data. *See* AR at 702-03; Framework Adjustment 18 to the Northeast Multispecies Fishery Management Plan (AR at 13) (relying on data from 7 tows (hauls of their net) by trawlers targeting herring and 6 tows by trawlers targeting mackerel (a fish similar to herring)). *See* Framework 18: Northeast Multispecies FMP, 11-12 (July 23, 1997), AR 11-13. These tows were conducted under observer protocols that allowed fish to be dumped unobserved, even when an observer was on board. *See* A. Van Atten, Operations Coordinator, Northeast Fisheries Observer Program [NEFOP], NMFS, Presentation to Herring Oversight Committee of New England Fisheries Management Council, (May 22, 2008) (“NEFOP Observer Presentation”) (Exhibit A), *also available at* www.nefmc.org/herring/index.html (slide at p. 28 titled “Results from Haul Questions on Being Able to See the Codend” *listing* the results of a survey of fisheries observers showing that nearly one-half of the time the observer never sees the

⁶ Throughout this Memorandum, plaintiffs will reference administrative record materials as “AR [page number].”

end of the net containing the fish). Further, based on the indicated location of the statistical areas where the tows took place, at least six of these tows, and possibly more, clearly did not take place in groundfish closed areas. *Compare* Framework 18 at 11-12, AR 12-13 *with* AR 717-18.

Moreover, although the monitoring and data collection for this fishery remains woefully inadequate and despite the fact that these data are difficult for the public to obtain, the data that are available demonstrate that this central assumption – that herring trawl vessels do not catch groundfish – is simply incorrect. In fact, contrary to the underlying premise for the 1998 rule, the data available to the plaintiffs at the time of the Petition that had been generated during the decade since that rule was promulgated show that midwater trawl vessels often catch groundfish in significant amounts. For example, in 2005 over 35,000 pounds of groundfish were observed caught as bycatch, while observer data from 46 midwater trawl trips in 2006 showed bycatch of haddock totaling over 25,000 pounds. See AR 703, 918; *see also* Memorandum from Lori Steele, Herring Plan Development Team Chairman, Atlantic Herring Stock/Fishery Update 15-16 (September 7, 2007) (summarizing NEFOP data)(“Steele Memo”), Exhibit B. Due to the low level of fishing that is actually observed by the Fisheries Service, these totals represent only a small fraction of the actual groundfish bycatch, *see* NEFOP Observer Presentation at 14 (slide showing observer coverage rates in the fishery from 2005-2007 totaling 9 to 13 percent).

In addition, in a 2004 enforcement action against herring midwater trawl vessels, the defendants prosecuted herring vessels that were found illegally attempting to land thousands of pounds of juvenile haddock and hake bycatch in Maine and Massachusetts. See AR 136, 722-27. 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. See AR 703-04 (juvenile herring are 3-5 times smaller than sexually mature herring).

After the enforcement action in 2004, the midwater trawl industry acknowledged in 2006 that it was catching significant amounts of groundfish as bycatch. See Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 43. Final Rule, 71 Fed. Reg. 46,871, 46,874 (Aug. 15, 2006), AR 136, . The industry further stated that midwater trawl vessels will not be able to avoid catching increasing amounts of groundfish as bycatch in the event groundfish populations are rebuilt. See *id.*; see also AR 704 (referencing letter from Peter Moore to Lori Steele, New England Fishery Management Council, dated August 12, 2004).

In short, the record demonstrates that there is no question that data developed during the period of time from 1998 to 2007 demonstrate that the central factual premise for the defendants' decision to allow herring fishing in closed areas was wrong. Contrary to that premise, herring trawl vessels kill significant amounts of groundfish. See also Declarations of Glen Libby and Curt Rice, attached as Exhibits C and D (two New England fishermen explaining how herring trawl gear kills groundfish).

B. The Petition to Remove Herring Trawlers from Protected Groundfish Areas

In view of this history and additional new information, the plaintiffs sought to protect these depleted groundfish populations by filing a Petition for Immediate and Permanent Rulemaking with the defendant Secretary of Commerce on October 12, 2007, seeking to exclude herring midwater trawl vessels from groundfish closed areas on both an emergency and permanent basis (the "Petition"). See AR at 694-768. The Petition referenced the history of the 1998 rule and cited instances of events occurring in the ten-year period since 1998 that

demonstrated that herring trawlers were catching significant amounts of groundfish. *See* AR 702-706 (presenting Fisheries Service observer program and enforcement reports from 2004 to 2007 showing that midwater trawl fishing vessels catch juvenile and adult groundfish, often in significant amounts).

Herring is a pelagic fish species with diurnal behavioral patterns that is active primarily at night. This means that herring typically are found swimming in the water column well above the ocean floor at nighttime. However, herring are usually found near the seafloor during the day. H.B. Bigelow & W.C. Schroeder, *Fishes of the Gulf of Maine* 142 (Bruce B. Collette & Grace Klein-MacPhee, eds., 3d ed. 2002). Like most pelagic species, herring are typically targeted with “midwater” fishing gear – usually nets. “Midwater” trawl ships fish for herring by dragging nets that are as wide as a football field and as high as a five-story building behind their vessels, and at times they operate in pairs as “pair trawls” so they can drag even larger nets strung between both vessels. These nets have small mesh so they can capture herring and other small fish like mackerel; the nets also catch any other fish that are the same size as herring or larger.

This herring 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 deliberately fished at the bottom of the water column (where herring commonly can be found during the day) where the nets capture juvenile and adult groundfish as bycatch, along with various types of marine debris like old fishing gear and metal.. *See e.g.*, AR 703, 774, 822; *see also* Steele Memo (Exhibit B) at 17-18 (observer reports showing that the gear often makes contact with the bottom and catches debris too heavy to float); NEFOP Observer Presentation (Exhibit A) (slide at 29 titled “Haul Timing on Herring Trips 2005-2007” showing that midwater trawl vessels fish

almost exclusively during the daylight hours when herring are naturally at the bottom of the ocean); *also available at* <http://www.nefmc.org/herring/index.html>. *See also* Rice Declaration at ¶ 8.

The plaintiffs' October 2007 Petition demonstrated that – contrary to the factual premise on which the defendants' 1998 rule was based – herring trawl ships kill significant amounts of adult and juvenile groundfish as bycatch while targeting herring. AR 702-710. The reason for this is straightforward: the linchpin regulatory assumption – that herring fishing nets will not be deployed and operated in such a way that they catch fish on or near the ocean floor – simply is wrong. Herring “midwater” trawl nets are not always towed entirely in the middle of the water column, but in fact are towed in the bottom of the water column where they strike the ocean floor and capture and kill significant amounts of groundfish. *See id.*; Rice Declaration at ¶ 8; Libby Declaration at ¶¶ 6-7. This wasteful killing of groundfish as bycatch further depletes groundfish populations, especially when juveniles are killed because they are unable to grow to maturity and spawn. *See* AR 705-06. Further, this practice undermines the potential for the groundfish closed areas to help rebuild depleted groundfish populations to healthy levels. Accordingly, the Petition expressly requested the Fisheries Service to take two actions: (1) to take emergency action to exclude herring trawlers from fishing in the groundfish closed areas, and (2) to initiate formal rulemaking procedures to permanently exclude midwater trawl vessels from groundfish closed areas. AR 695-96.

In response to the plaintiffs' Petition, the Fisheries Service sent an undated one page letter to counsel for the plaintiffs by electronic mail on November 29, 2007. In that letter, the defendants declined to take emergency action to exclude herring midwater trawl ships from groundfish closed areas. AR at 915. This letter is notable in several respects. First, it addresses

only the plaintiffs' request for emergency rulemaking and makes no reference of any kind to the plaintiffs' request for permanent rulemaking. *Id.* Second, it states that the agency has reviewed only "the most recent scientific information" in reaching a decision. *Id.* Third, it justifies the agency decision to deny the request for emergency rulemaking on two grounds: (1) that "observer data available continue to suggest that bycatch levels are within the range considered acceptable" and (2) that the Petition lacks information that suggests an emergency. *Id.* A subsequent letter sent by NMFS in response to plaintiffs' inquiries about the nature of the decision does not clearly state whether the initial letter was also intended to deny the plaintiffs' request for rulemaking to permanently exclude midwater trawl ships from the closed areas. *See* AR at 924.

C. The Limited Nature of the Data Reviewed by Defendants in Response to the Petition

The key administrative record document reflecting the determination by defendants to reject the Petition is a November 1, 2007 "Decision Memorandum" from the Regional Administrator of the Northeast Region of NMFS that recommends that defendants deny the Petition. AR 911-12. In pertinent part, this Decision Memorandum states that:

(1) "this issue [of groundfish bycatch by herring trawlers in the closed areas] *has been ongoing since the New England Fishery Management Council (Council) established the NE multispecies closed areas* and made the decision to allow midwater vessels continued access;"

(2) "reports have not indicated an increase in bycatch in this fishery over levels previously considered;"

(3) "we have reviewed *the most recent observer data* and found no cause for concern or belief that an emergency exists;"

(4) "Despite the estimation based on observer data that bycatch of regulated groundfish by midwater trawl vessels is minimal, some members of the industry will contend that NMFS has underestimated this bycatch." *Id.* (emphasis added).

The administrative record does not contain sufficient facts, information, or data to properly support or to explain any of these statements in the Decision Memorandum. Although the Decision Memorandum does frankly acknowledge that the issue of herring trawlers killing groundfish in the closed areas has been “ongoing” from the time those trawlers were allowed into those areas (in 1998), it does not contain any “reports” that indicate bycatch levels in the herring trawl fishery over that period of time. Nor does it contain any documentation that the defendants reviewed “the most recent observer data.” Nor does it contain any estimate “based on observer data that bycatch of regulated groundfish by midwater trawl vessels is minimal.” Indeed, despite the fact that the relevant time period extends from February 17, 1998 (the date the defendants allowed herring trawlers to commence fishing in the closed areas) to October 12, 2007 (the date of the Petition), the only data or information in the record that is relevant to these statements in the Decision Memorandum is a mixture of observer and landings data from parts of 2006-2007 – and even those data are incomplete. See AR at 417-48, 770-74; 818-27, 903-10. These data reflect only snippets of raw reports of miscellaneous observer data and landings, some of which appear to be redundant forms of the same data, stretching from May 2006 to November 2007, while others stretch from (apparently) January 2006 to May 2007 and August 2006-October 2007, and still others stretch from May to July 2007.

The paucity of the data reviewed by the defendants in response to the Petition stands in stark contrast to their statement in the 1998 rule that they would “determine the percent bycatch of [groundfish] based on sea sampling and other credible information for the fishery” and that such data “will be available” in order to reopen the closed areas in a “cautious manner” and ensure that the bycatch of groundfish is “minimal.” 63 Fed. Reg. at 7729-30, AR 32-33. With the limited exception of information from 2006-2007, no such data appear anywhere in the

record and there is no indication that NMFS looked at any such data in deciding to reject the Petition.

In point of fact, far from including any relevant “reports” or “estimations,” the gaps in the record far outweigh the relevant information which could be used to support the Decision Memorandum. In addition to the sea sampling data, the information needed for defendants to justify their conclusion that “bycatch of regulated groundfish by midwater trawl vessels is minimal” would include, at a minimum, the following information for the entire period between 1998 and 2007: (1) federal observer data on groundfish bycatch in the midwater trawl fishery; (2) observer coverage levels in the midwater trawl fishery; (3) data from the Office of Enforcement on bycatch in the midwater trawl fishery; (4) federal dealer reports for midwater trawl catch; (5) midwater trawl vessel trip reports; and (6) any other data on catch and bycatch that might go into making the “estimation” referenced by the Fisheries Service in its Decision Memorandum. With the single exception of the incomplete observer and landings data from 2006-2007, none of this information appears in the record.

Finally, the record contains nothing suggesting that NMFS devoted any time whatsoever to considering the permanent rulemaking requested by plaintiffs. The Decision Memorandum and letter to plaintiffs’ counsel transmitting its decision only addresses the emergency rulemaking request. *See* AR at 911-12, 915. A subsequent letter sent in response to plaintiffs’ inquiries leaves unclear the question whether NMFS considered and rejected the permanent rulemaking request as well, *see* AR at 924; however, there is nothing in the record suggesting that consideration of the permanent rulemaking actually occurred. Indeed, the missing reports, data, and other information referenced above would be essential to such consideration.

In an earlier proceeding in this case, the plaintiffs moved to require the defendants to add these materials to the record. In response to that motion, the defendants did not deny that these materials are missing. Instead, they argued simply that it was appropriate for them to limit their review to only the past several months. 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 a particular adjustment to the groundfish FMP in 2006. *See* Federal Defendants Opposition to Motion to Compel Completion of the Administrative Record, Aug. 29, 2008 (“Def. Opp.”) at 6 (Document # 23). But that adjustment took place fully eight years after the original decision to allow herring trawlers to fish in the closed areas – and it did not address the 1998 rule or the specific issue of groundfish bycatch occurring in closed areas. Under the defendants’ approach, rather than carefully reviewing the data from the ten year period from 1998 to 2007, it was sufficient for them merely to come up with a “general sense” estimation of groundfish bycatch taking place in closed areas based on information starting in 2006. *Id.* at 5-6.

Magistrate Judge Facciola recognized 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.

D. The Current Situation With Respect to Herring Trawlers and Groundfish

As a result of the defendants' decision to deny the plaintiffs' Petition, herring trawlers continue to fish in the closed areas and to kill significant amounts of groundfish. Rice Declaration at ¶¶ 7-11; Libby Declaration at ¶¶ 6-9. Reports of particularly excessive bycatch of groundfish by these trawlers in one closed area surfaced in the fall of 2008. In response to a December 5, 2008 request from the NEFMC, the Fisheries Service reviewed observer data spanning the period from May 2004-October 2008. Although the NMFS analysis focused solely on haddock bycatch, it showed that based on just 16 observed trips over 57,000 pounds of haddock bycatch were observed, and that the amount of haddock bycatch on some tows approached 10 percent of the total catch of herring. *See* Letter from Paul Howard, NEFMC to Patricia Kurkul, NMFS (December 5, 2008) and "Observed Haddock Bycatch in the Closed Areas in the Midwater Trawl Herring Fishery," National Marine Fishery Service, March 2009, (available at <http://www.nefmc.org/herring/index.html>. follow links to April 7-9, 2009 Council Meeting Discussion Documents and Information Re. Haddock Bycatch in Closed Area I *last visited* May 11, 2009)). *See also*, Rice Declaration at ¶ 8; Libby Declaration at ¶ 7.

The plaintiffs have continued efforts to convince the New England Fishery Management Council that it should reconsider the rule granting access to midwater trawl vessels into groundfish closed areas. *See e.g.* AR at 921 (letter from plaintiffs' counsel to the NEFMC dated December 11, 2007 requesting that the Council consider such rulemaking as part of an Amendment to the groundfish FMP). To date, however, the Council has not initiated any such rulemaking.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the movants establish that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see Taylor v. Federal Deposit Ins. Corp.*, 132 F. 3d 753, 762 (D.C. Cir. 1997). Defendants cannot avoid entry of summary judgment merely by relying on unsupported assertions in their briefs. *See* Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Under the Administrative Procedure Act (“APA”), “[t]he reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. The MSA explicitly imports the APA standard of review. *See* 16 U.S. C. § 1855(f)(1)(B).

The Supreme Court has famously noted that:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfg. Ass’n v. State Farm Mut. Ins., 463 U.S. 29, 43 (1983) (emphasis added). To uphold an agency’s decision under the APA, a court must also find that the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The APA’s standard of review “requires the reviewing court to engage in a substantial inquiry” and subjects the agency action to a “thorough, probing, in-depth review” of the question whether the agency has considered “relevant factors.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

In this Circuit, agency decisions are deemed arbitrary and capricious where they are not supported by substantial evidence. *Ass'n of Data Processing Service Orgs. v. Board of Governors*, 745 F. 2d 677, 683-84 (D.C. Cir. 1984) (the substantial evidence test and the arbitrary and capricious test “are one and the same” with respect to factual support for agency actions). Evidence is deemed “substantial” when it affords “a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Morall v. Drug Enforcement Administration*, 412 F. 3d 165, 177 (D.C. Cir. 2005) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939)). Among other things, in order to withstand substantial evidence review, an agency must “present its reasons for rejecting significant contrary evidence.” *Carpenters and Millwrights v. NLRB*, 481 F. 3d 804, 809 (D.C. Cir. 2007) (quotation omitted).

In addition, to pass muster under the APA, an agency’s decision must be supported by record evidence. See *Taylor*, 132 F.3d at 762 (court “[does] not accept bare conclusory allegations as fact”); *Missouri Public Service Comm. v. FERC*, 337 F.3d 1066, 1073 (D.C. Cir. 2003) (agency must fully explain predictions or extrapolations from the record). Mere conclusory statements in the record are not enough to support the agency’s position. See, e.g., *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 664 (D.C. Cir. 1996); *Chem. Mfrs. Ass’n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994). To the contrary, “[a]n agency is required ‘to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.’” *American Radio Relay League, Inc. v FCC*, 525 F. 3d 227, 242 (D.D. Cir. 2008) (quotation omitted).

Although courts ordinarily afford some degree of deference to the agency’s scientific expertise, this Circuit has made clear that such deference is not unlimited and that the APA requires the courts to examine agency actions closely: “we do not hear cases merely to rubber

stamp agency actions. To play that role would be ‘tantamount to abdicating the judiciary’s responsibility under the [APA].’” *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F. 3d 1484, 1491 (D.C. Cir. 1995)) (rejecting NMFS argument that court should defer to fishing quota that had less than a 20% chance of success). “The [Fisheries] Service cannot rely on reminders that its scientific determinations are entitled to deference in the absence of reasoned analysis to cogently explain why its [decisions]” satisfy statutory requirements. *Id.* at 755-56 (quotations and citations omitted).

STANDING

The declarations of two New England fishermen, Glen Libby (President of the plaintiff Midcoast Fishermen’s Association), and plaintiff Curt Rice, are attached to this memorandum as Exhibits C and D. Mr. Libby’s declaration shows that defendants’ decision to reject the Petition to close groundfish closed areas to herring trawlers directly injures both himself and the Midcoast Fishermen’s Association in several ways. For example, contrary to the stated intent of their 1998 rule, the defendants’ rejection of the plaintiffs’ petition has allowed additional spawning groundfish to be killed in New England waters, thereby contributing to the continued depletion of the groundfish populations. Libby Declaration at ¶ 8. Similarly, the declaration of Mr. Rice shows that defendants’ rejection of the Petition harms him by adversely affecting the ability of groundfish populations to recover from their current state of being overfished and depleted; in turn, this prevents him from catching groundfish. Rice Declaration at ¶ 10. These declarations make clear that the actions of the defendants have directly injured the environmental, recreational, aesthetic, business and professional interests of the plaintiffs, and that the relief they seek here will remedy those injuries. The plaintiffs therefore enjoy standing

to maintain this action. *See Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-185 (2000); *Natural Resources Defense Council v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007).

ARGUMENT

This is an administrative record case in which no material facts are in dispute, and the plaintiffs are entitled to judgment as a matter of law. This memorandum establishes that the defendants' refusal to grant plaintiffs' Petition to exclude herring trawlers from groundfish spawning grounds in New England ocean waters is arbitrary and capricious in violation of the APA, and that it also is unlawful because it contravenes the requirements of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") to prevent overfishing, minimize or avoid bycatch, and rely upon the best available scientific information. Accordingly, this Court should enter summary judgment in favor of the plaintiffs.

I. DEFENDANTS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT BY DENYING THE PETITION WITHOUT CONSIDERING RELEVANT EVIDENCE AND WITHOUT EXPLAINING THEIR DECISION TO IGNORE THAT EVIDENCE

The defendants based their decision to reject the plaintiffs' Petition for rulemaking on three arbitrary and capricious choices. First, they sharply limited their evaluation of the relevant and available data – including data brought to their attention by plaintiffs in the Petition – to a fraction of the relevant ten-year period, and failed to perform even the most rudimentary analysis of the data they did examine. Second, they ignored other existing scientific information about how herring and groundfish interact in the ocean and the way the herring fishery is being prosecuted which supported the existing data on groundfish bycatch and showed that core assumptions underlying the 1998 rule are false. Third, they simply ignored the Petition's request that the agency initiate "permanent" rulemaking pursuant to the APA and its authority under the

Magnuson-Stevens Act. Instead, they focused only on the “emergency” rulemaking request provided for under the special provisions of the Magnuson-Stevens Act.

In short, the defendants failed to respond on the merits to the Petition, ignored the basic truth that the factual predicate for the 1998 rule has changed, and provided no explanation of how their rejection of the Petition can be squared with relevant data generated in the ensuing decade. In so doing, they trampled the requirements of the MSA to prevent overfishing, address bycatch, and rely upon the best available science. By refusing to look at data drawn from the relevant period of time covered by their 1998 rule, they have “entirely failed to consider an important aspect of the problem” and thereby acted in an arbitrary and capricious manner. *Motor Vehicle Mfg. Ass’n*, 463 U.S. at 43 (1983). And by failing to “articulate a satisfactory explanation” for their refusal to look at the relevant data, they also violated the APA. *Id.* Moreover, their failure to examine these data constitutes a failure to look at “relevant factors” in violation of Supreme Court precedent. *Citizens to Preserve Overton*, 401 U.S. at 415 (1971).

This Circuit has overturned agency refusals to change rules, notwithstanding that agencies tend to receive a high level of deference with respect to such decisions, in situations similar to those presented here. *See, e.g., American Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 4-8 (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). Similarly, these actions by the defendants run afoul of settled law in numerous respects and provide ample basis for this Court to find their rejection of the plaintiffs’ Petition to be in violation of the APA.

A. The Fisheries Service Ignored Key Data and Failed to Apply Basic Analytical Methods, Thereby Failing to Recognize that the Most Significant Factual Predicates For the Existing Rule Have Changed

It is settled law that “the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition.” *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-16 (D.D.C. 1995). Thus, agency actions that fail to respond to the “basic concept” of petitioners will be reversed. *SBC Communications, Inc. v. FCC*, 407 F. 3d 1223, 1232 (D.C. Cir. 2005). In this case, the defendants manifestly did not respond on the merits to the Petition, and ignored the central thrust of that Petition. Indeed, the defendants completely ignored data presented by the plaintiffs, did not bother to examine other data from the relevant period of time addressed by the Petition, and did not adequately analyze the limited data they actually chose to review.

1. The Fisheries Service Reviewed Less than Two Years of Observer Data, Even Though The Rule Under Question Had Been in Place for Ten Years, and Failed to Conduct the Simplest Analysis of the Data it Did Review

The defendants rejected the plaintiffs’ Petition to protect groundfish closed areas from midwater trawling without considering vital information about the groundfish bycatch occurring during the 10 years since the 1998 regulation had been in place. Moreover, they failed to explain their decision – and in so doing they failed to perform even the most rudimentary analysis of the limited data they did review.

The plaintiffs filed their Petition in recognition of the evidence indicating that a radical change had occurred in the factual premise for the 1998 regulation that allowed herring midwater trawlers to access the groundfish sanctuaries. The Petition alleged that in the decade between the defendant’s decision to allow herring trawlers to fish in closed areas and 2007, data and related other scientific information had proven the assumptions upon which that decision was based to be false. AR at 703-04 (presenting Fisheries Service data showing that the 1998 rule was based

on mere assumptions that groundfish bycatch would be negligible, instead of scientifically reliable data and analysis, and that in fact since that time those assumptions have been proven false due to the documentation of midwater trawl vessels' bycatch of juvenile and adult groundfish). Thus, a meaningful response to the merits of the Petition would have involved a review by defendants of the data regarding the effects of such fishing on groundfish during that entire span of that decade. As part of the regulations implementing the 1998 rule, the Fisheries Service was required 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).

But in response to the Petition the defendants – as they freely concede – 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* Defendants' Opposition to Motion to Compel at 5-6 (Document # 23). The 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. The defendants' narrow focus utterly failed to address the substance of the Petition and ignored evidence contrary to their conclusion that the 1998 rule should remain in place. Their decision therefore fails the substantial evidence test, and it is plainly arbitrary and capricious. *See Carpenters and Millwrights*, 481 F. 3d at 808-809 (rejecting agency decision that failed to present reasons for rejecting significant contrary evidence); *SBC Communications, Inc.*, 407 F. 3d at 1232 (rejecting agency decision that failed to respond to the "basic concept" presented by petitioning parties).

That the defendants failed to address the substance of the Petition and did not respond to evidence contrary to their conclusion is obvious. It is equally clear that they failed to present substantial evidence to support their rejection of the Petition. Evidence is deemed “substantial” when it affords “a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Morall*, 412 F. 3d at 177 (quoting *Columbian Enameling & Stamping Co.*, 306 U.S. at 299-300 (1939)). Here, however, the defendants decided to reject the Petition by looking at less than two years of limited data out of the relevant decade of time during which the herring trawlers had been allowed to fish in the closed areas. Moreover, the Fisheries Service never examined the information from the enforcement program, or the evidence presented on the scientific integrity of the current data collected under the observer program, all of which would go into an adequate analysis. See AR 911 (Decision Document notes that defendants have reviewed only “the most recent observer data”); AR 903-908 (data only from 2006 and 2007 reflecting bycatch of groundfish by herring trawlers); Magistrate Opinion at 7 (Document # 30) (concluding that the defendants looked at bycatch data only “for the period August 15, 2006 to the date of the decision”). Far from providing a “substantial basis of fact,” this arbitrarily constricted data set affords only the very thinnest of reeds upon which to rest the defendants’ conclusion that the effects of fishing by herring trawlers in closed areas has not significantly and adversely affected groundfish.

Finally, an agency must fully explain its predictions or extrapolations from the record. See *American Radio Relay League*, 524 F. 3d at 240-42 (agency must explain extrapolations); *Missouri Public Service Comm*, 337 F.3d at 1073 (agency must fully explain predictions or extrapolations from the record). Here, however, the defendants assumed without any explanation that they could reject the plaintiffs’ Petition by looking only at data from a small

portion of the relevant time period and deciding that limited data was sufficient. They extrapolated a supposed level of groundfish bycatch by herring trawlers over a ten-year period from a very limited data set from 2006-2007, ignored evidence of bycatch in other years, and jumped to the unexplained conclusion that – in their “estimation” – this bycatch in the herring fishery is not a problem. *See* AR 911-12. Their unexplained assumption cannot stand.

2. The Fisheries Service Ignored Key Facts About the Life History of the Atlantic Herring and the Nature of the Herring Fishery That Defeat Fundamental Premises of the Existing Rule

The fact that herring midwater trawlers do catch groundfish as bycatch is not surprising because a fundamental assumption underlying the 1998 decision to allow midwater trawl access to groundfish closed area – the assumption that midwater trawlers fish would fish in the middle of the water column instead of the bottom of the water column – has proven false.

Herring is considered a pelagic species with diurnal behavioral patterns. This means that herring are typically found swimming in the water column at nighttime. In contrast, herring are usually found near the seafloor during the day. H.B. Bigelow & W. C. Schroeder, *Fishes of the Gulf of Maine* 142 (Bruce B. Collette & Grace Klein-MacPhee, eds ,3d ed. 2002). In 1998, the Fisheries Service accepted the midwater trawl industry’s claim that their fisheries capture negligible amounts of regulated groundfish “due to the spatial separation of pelagic and demersal species in the water column.” *See* 63 Fed. Reg. 7727, 7728 (February 17, 1998), AR 31. The Fisheries Service’s own data and information, however, show that these vessels often deliberately fish during daylight hours when the herring are found in the bottom of the water column and there is no spatial separation between groundfish and herring. *See e.g.*, NEFOP Observer Presentation (Exhibit A) (slide at p. 29 titled “Haul Timing on Herring Trips, 2005-

2007” showing that single and paired midwater trawl fishing occurs almost exclusively during the daylight hours); *see also* Rice Declaration at ¶ 8.

Other Northeast Fisheries Observer Program data confirm that midwater trawlers fish at the bottom of the water column. For example, bycatch reports from the NEFOP show that midwater trawl gear often makes contact with the bottom of the ocean and catches various types of marine debris like old fishing gear and metal, materials that do not float in the middle of the water column. *See e.g.*, AR 703; 774, 822; *see also* Steele Memorandum, Exhibit B at 16-18 (September 7, 2007) (summarizing NEFOP data). Of course, some of the best evidence that herring trawlers fish at the bottom of the water column is simply the significant amounts of groundfish that are in fact caught by herring midwater trawl vessels. *See* AR 10-11, 703, 774, 818-827, 918; *see also* Framework Adjustment 43: Final Rule, 71 Fed. Reg. at 46,874 (Aug. 15, 2006), AR 136 (noting that industry is catching groundfish as bycatch). By not considering these key facts about the life history of Atlantic herring and how the herring fishery is prosecuted by the midwater trawl industry, the Fisheries Service failed to consider credible and relevant information for this fishery as required by its own regulations, and acted arbitrarily and capriciously.

Similarly, the Fisheries Service completely ignored other credible scientific information submitted as part of the Petition showing it is likely that the amount of groundfish caught by midwater trawl gear in the groundfish closed areas is underestimated. AR 706-710, 728-768. Specifically, the plaintiffs’ Petition included reference to a recently-proposed NMFS standardized bycatch reporting methodology (SBRM) showing that there are currently insufficient levels of observer coverage on the midwater trawl fleet. AR 707-08. The Petition also included an independent peer review of that proposed SBRM that supported the plaintiffs’

contention in its Petition 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. AR 706-710; McAllister, Murdoch K., Review of the Northeast Region Standardized Bycatch Reporting Methodology, 4. Lenfest Ocean Program (September 2007), AR 728-768. The MSA requires that the Fisheries Service consider the best available science when making fishery management decisions, 16 U.S.C. 1851(a)(2), and the Fisheries Service's failure to do so in view of all of the other credible information presented by the plaintiffs and the technical matters at issue violated the APA. *See, e.g., American Horse Protection*, 812 F.2d at 4-8 (rejecting agency refusal to reconsider a rule where agency was overlooking a central purpose of its statutory mandate).

B. The Fisheries Service Utterly Failed to Consider the Plaintiffs' Request for Permanent Rulemaking or to Offer a Reasonable Explanation of its Decision to Deny the Permanent Rulemaking Petition

The record shows that the Fisheries Service completely failed to consider the plaintiffs' request for permanent rulemaking, or to offer a reasonable explanation for denial of the plaintiffs' Petition for permanent action. This total failure to respond on the merits to a fundamental part of the Petition is sufficient grounds, by itself, for this Court to reverse the defendants' decision.

The plaintiffs requested the Fisheries Service to undertake both a "permanent" rulemaking under the APA and to institute an "emergency" rule on a temporary basis under the Magnuson-Stevens Act. *See* AR 695-696 ("[T]he petitioners request that the Secretary take the following related actions: (1) exercise his authority under 16 U.S.C. § 1855(c) to promulgate emergency regulations and interim measures necessary to exclude midwater trawl vessels from

all year round and seasonal groundfish closed areas implemented beginning in 1994 to reduce groundfish mortality and protect juvenile and spawning groundfish; and (2) exercise his authority under 16 U.S.C. § 1855(d) to initiate rulemaking designed to make such protections permanent.”) The plaintiffs’ Petition demonstrated that its request for rulemaking was squarely intended to help bring the Fisheries Service into compliance with its statutory mandates to end overfishing, rebuild depleted populations of groundfish, and minimize bycatch, all pursuant to the best available science. AR 694-715.

In response, the Fisheries Service completed a decision document that concluded that the Petition should be denied because an “emergency action” was not justified at that time, and that based “on the most recent observer data” it did not believe that an “emergency exists.” AR 911-12. The document never referred to the permanent rulemaking request or its examination of any information other than different parts of some of the most recent observer and landings data. *Id.* Similarly, the one page letter to plaintiffs advising them that the Petition was being denied referenced consideration of the emergency rulemaking request only. AR at 915 (characterizing the petition as requesting that the Secretary take emergency action for the Northeast (NE) multispecies fishery under the Magnuson-Stevens Fishery Conservation and Management Act” and concluding that “After consulting with my staff and following agency review of the most recent scientific information, I have concluded that the petition lacks sufficient information to justify emergency rulemaking under the APA or the Magnuson-Stevens Act.”).

The Fisheries Service’s failure to examine the permanent rulemaking request, and as a result its examination of only the most recent data, despite the Plaintiffs’ submission and reference to data and other information available to the agency that spanned the 10 year time period from 1998 to 2007, was arbitrary and capricious. *See, e.g., SBC Communications, Inc. v.*

FCC, 407 F. 3d 1223, 1232 9D.C. Cir. 2005) (agency must respond to the “basic concept” of a petition); *Fund for Animals v. Babbitt*, 903 F. Supp. at 115-16 (agency must respond to the merits of a petition). Because the Fisheries Service failed to consider the permanent rulemaking request, it offered no reasonable explanation for its denial of that request for permanent rulemaking. This, too, violated the APA. *See, e.g., Carpenters and Millwrights*, 481 F. 3d at 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. DEFENDANTS VIOLATED THE MSA REQUIREMENTS TO PREVENT OVERFISHING, MINIMIZE OR AVOID BYCATCH, AND RELY UPON THE BEST AVAILABLE SCIENCE

In reviewing defendants’ interpretation of the MSA, courts follow the analysis established in *Chevron, USA v. NRDC*, 467 U.S. 837 (1984). The first question is whether Congress has spoken directly to the precise matter at issue. *Id.* at 842-43. No agency deference is afforded on the question whether the statute is ambiguous. *Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). “If a court, employing the traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 843, n.9.

If the statute is “silent or ambiguous with respect to the specific issue,” the analysis proceeds to the second step. *Id.* at 843-44. There, the question is whether the agency’s interpretation is “reasonable.” *Id.* at 845; *United States v. Mead Corp.*, 533 U.S. 218 (2001). Reviewing courts “must reject administrative constructions ... that are inconsistent with the statutory mandate.” *Securities Industry Ass’n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143 (1984)(citations omitted). *See also NRDC v. Daley*, 209 F.3d at 753-54 (NMFS interpretation of the MSA held unreasonable under Chevron Step Two). Courts do

not grant Chevron Step Two deference to agency statements that lack the force of law. *Mead Corp.*, 533 U.S. at 227-231.

In this case, the defendants have violated the plain language of the MSA. The Fisheries Service is responsible for ensuring that Fishery Management Plans are carried out consistent with the requirements of the MSA. *See* 16 U.S.C. § 1855(d). In violation of National Standard One, however, by denying the plaintiffs' Petition the Fisheries Service has failed to prevent overfishing of New England groundfish and failed to assure optimum yield for those groundfish. Additionally, its denial of the Petition has rendered meaningless the requirement of National Standard Nine to avoid or minimize bycatch of groundfish. Finally, because its denial ignored the best scientific information available with respect to the adverse effects of herring trawlers on groundfish in the closed areas, it has violated National Standard Two.

A. The Fisheries Service Violated National Standard One By Failing to Prevent Overfishing and Rebuild Depleted Groundfish Populations

National Standard One of the MSA (the "overfishing prohibition" standard) states that fishery management plans must contain conservation and management measures that "shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1851(a)(1); *see also* § 1853(10) (plans must "...contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery"). As one court explained: "[t]he ultimate goal, therefore, of any fishery management plan is to establish measures which achieve a rate or level of fishing mortality that allows the fishery to produce the maximum sustainable yield on a continuing basis." *A.M.L. Int'l v. Daley*, 107 F. Supp. 2d 90, 94 and n.6 (D. Mass. 2000). In other words, the defendants must control the amount of New England groundfish caught in a manner that is sufficient to ensure that the groundfish population is not reduced below a sustainable level.

For fish populations that are already reduced “below a sustainable level,” as is the case with New England groundfish, the MSA requires that NMFS promulgate a rebuilding plan that will rebuild the population back to sustainable levels. 16 U.S.C. § 1854(e). The law requires that the rebuilding time periods be “as short as possible” and “not exceed 10 years,” 16 U.S.C. § 1854(e)(4).

The Fisheries Service implemented a fishery management plan for groundfish several years ago and has since issued several fishery management plan amendments seeking to address overfishing and the depleted condition of groundfish stocks. In 2004, the Fisheries Service approved an amendment that was intended, once again, to end overfishing and finally established a rebuilding plan for overfished groundfish stocks. Notwithstanding these actions, at the time of the Petition eight of nineteen managed groundfish stocks suffered from overfishing, 13 remained overfished, and all 19 were below their target biomass levels. AR 146, 158; 2005 GARM at viii.⁷

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 and thereby failed to minimize groundfish bycatch or avoid the killing of groundfish as bycatch. This source of mortality for juvenile and mature groundfish was not accounted for in the 2004 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 in any significant amount. *See* 63 Fed. Reg. at 7728-29, AR 31-32.

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

⁷ The 2008 GARM shows that now the number of stocks suffering from overfishing has risen to 13. *See* 2008 GARM at vii-x.

and promote rebuilding of overfished groundfish populations, notwithstanding the requirements of National Standard One and the MSA's rebuilding requirements. It does not ensure that the groundfish population is being fished in a sustainable manner. For these reasons, the defendants' decision to reject the Petition and proceed with the current regulations that lack adequate protection for groundfish violates the intent of Congress as reflected in the plain language of the MSA, and is unreasonable.

When a fish population is fished excessively (i.e., is fished at a rate that threatens the ability of the population to produce the maximum sustainable yield), that excessive fishing effort is deemed overfishing. Under the stress of overfishing, a fish population suffers mortality at a rate that does not allow it to be fished sustainably – in such a circumstance, that population is considered to be overfished. Continuing to kill fish whose population is already overfished delays the population's ability to rebuild to a sustainable level and could also push the population closer to population collapse, where the species could prove unable to recover to a healthy level. The fact that – far from recovering – “overfishing” is still occurring for most groundfish stocks, and most groundfish stocks are still considered “overfished,” demonstrates that the decision to continue with the status quo simply perpetuates overfishing and the overfished status of groundfish stock, in violation of the MSA.

In addition, the defendants' decision does nothing to achieve “optimum yield” from the groundfish fishery. The MSA defines “optimum yield” as the amount of fish that (i) constitutes maximum sustainable yield as reduced by certain factors and (ii) “in the case of an overfished fishery” provides for “rebuilding to a level consistent with producing the maximum sustainable yield.” 16 U.S.C. ¶ 1802(33). Since rejecting the plaintiffs' petition and remaining with the *status quo* contributes to groundfish remaining in an overfished condition, the defendants' action

runs afoul of the first requisite for “optimum yield” – clearly it is not a decision that allows the fishery to attain maximum sustainable yield. Moreover, the decision allows a management regime to move forward unchanged despite the fact that it has not successfully rebuilt groundfish populations. Thus, it runs afoul of the second requirement that “optimum yield” provide for rebuilding of an “overfished fishery.”

Finally, the defendants’ decision allows the killing of groundfish in amounts greater than contemplated in the rebuilding plans and thereby violates the plain language of the statute requiring them to rebuild the overfished groundfish population in a time period that is “as short as possible.” 16 U.S.C. § 1854(e)(4)(A)(i). Plainly, allowing continued and unaccounted killing of groundfish does nothing to accomplish rebuilding of overfished groundfish populations as quickly as possible – by destroying those populations, it achieves the opposite.

As data presented by plaintiff in their Petition show, closed areas are important to reducing overfishing and rebuilding depleted fish stocks. *See* AR 701, 719-721. And contrary to the original bases for the current Groundfish FMP, recent data show that herring midwater trawlers catch significant amounts of groundfish as bycatch. AR 702-706. Additionally, data presented by plaintiffs in their Petition demonstrated that the effects of groundfish bycatch are underestimated due to the inadequate levels of observer data collection. *See* AR 706-710, 728-768. Taking into account this information, the effectiveness of the closed fishing areas in reducing overfishing and rebuilding overfished stocks are diminished by the current Groundfish FMP and by the defendants’ decision to deny the Petition.

In short, defendants’ decision to deny the plaintiffs’ Petition plainly violates National Standard One. It allows overfishing to continue and perpetuates the overfished condition of groundfish. In addition, the decision fails to ensure that optimum yield of groundfish is

achieved. Moreover, it fails to ensure that groundfish populations are rebuilt as quickly as possible. Manifestly, it does not ensure that the groundfish population is being fished in a sustainable manner. The decision is therefore unlawful. *See, e.g., Natural Resources Defense Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 881 (9th Cir. 2005).

B. The Fisheries Service Violated National Standard Nine by Failing to Avoid or Minimize the Bycatch of Groundfish in the Closed Areas

National Standard Nine of the MSA (the “bycatch” standard) 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). This provision is echoed in a separate section of the MSA, which states that FMPs must 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). In addition, the MSA requires defendants to “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” *Id.*

The bycatch provision does not exist in a vacuum. Bycatch minimization is an integral part of the MSA’s program for management of fish populations. As one court has noted:

[The Fisheries Service] themselves recognize the threat posed by bycatch: ‘[B]ycatch can increase substantially the uncertainty concerning total fishing-related mortality’, and thus complicates efforts to achieve the [MSA] . . . goals to protect and rebuild threatened fish species.
Conservation Law Foundation v. Evans, 209 F. Supp. 2d 1, 12 (D.D.C. 2001) (quoting 50 C.F.R. § 600.350(b)).

In the November 29, 2007 letter denying the plaintiffs’ Petition, the Fisheries Service refused to take the practicable step of prohibiting herring fishing vessels from fishing in the groundfish closed areas despite clear evidence that such gear catches significant amounts of groundfish as bycatch. *See* AR 702-06. The Fisheries Service’s decision ignores relevant data,

is contrary to the premise for the 1998 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. *See* AR 31-32; AR 710 n. 6. The Fisheries Service has unlawfully 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. *See Conservation Law Foundation*, 209 F. Supp. 2d at 15 (failure to minimize bycatch and bycatch mortality violates the MSA). The record and decision also demonstrate that the Fisheries Service failed to establish the monitoring and reporting management measures necessary for reliably monitoring and assessing the amount of groundfish bycatch occurring in the herring midwater trawl fishery, as required under the MSA's standardized reporting methodology and other provisions. *See Pacific Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002); *Oceana v. Evans*, 2005 WL 555416 at *40-43 (D.D.C. March 9, 2005).

Plaintiffs' Petition simply asked defendants to comply with the requirements of National Standard Nine with respect to a particularly important kind of bycatch – bycatch of groundfish in the most vital areas of the ocean for groundfish spawning and rebuilding. AR at 700-701. In refusing that request, the defendants did not engage in a meaningful analysis of practicable steps to minimize groundfish bycatch, and failed to establish the requisite bycatch reporting methodology. Instead, they reached a conclusory decision based on only very limited recent bycatch data, refused to conduct any substantive analysis of that data, and refused to even examine the years of data and information pointed to by petitioners. AR at 911-12.

At the time they were presented with the plaintiffs' Petition, defendants had access to data and reports from their own observer and enforcement programs demonstrating that groundfish bycatch was a problem in groundfish closed areas. The Petition provided publicly available examples of these data showing that midwater trawl vessels catch juvenile and adult groundfish, often in significant amounts. For example, in 2005 over 35,000 pounds of groundfish were observed caught as bycatch, while observer data from 46 midwater trawl trips in 2006 showed bycatch of haddock totaling over 25,000 pounds. *See* AR 701, 703-04, 918; *see also* Steele Memo, Exhibit B at 15-16. Only 14 midwater trawl trips were observed in 2007, but these showed a total observed bycatch of about 400 pounds. *See id.* at 16-17.

These amounts of bycatch reflect only the actual observed amount of bycatch, and do not reflect any sort of estimation, such as a simple extrapolation based on observer coverage levels. Thus, the actual amount of bycatch assuredly is, in fact, much higher. The level of observer coverage for herring vessels using midwater trawl gear was 16 percent in 2005. AR 706-707. However, 2005 was the only year in which coverage has been over 10 percent in this fishery. AR 707. In 2004 less than 9 percent of trips were observed, while in prior years coverage levels did not exceed 1 percent. *Id.* At the time of the Petition in 2007, observer coverage in the herring midwater trawl fishery was approximately 3 percent. *Id.* These levels of observer coverage are less than the 20 percent coverage recommended fishery-wide in a recent amendment to the Groundfish FMP. AR 64. Further, NMFS recently proposed an omnibus standardized bycatch reporting methodology ("SBRM") that shows that the observer coverage levels in the midwater trawl fleet were too low to provide reliable estimates of bycatch. Final Draft Northeast Region Standardized Bycatch Reporting Methodology, C-44 (June 2007); AR 708.

The level of certainty in bycatch estimates demanded by the existing closed area rule was also unlikely to be met because of flawed sampling protocols that allow catch by midwater trawlers to go unobserved, even when an observer is on board a vessel. *See* AR 707-10. The effectiveness of the Groundfish FMP's bycatch monitoring of the herring trawl vessels in the groundfish closed area is largely dependant upon the accuracy of observer data. *See e.g.*, AR 133-139. Plaintiffs' Petition points out that the best available science, including an independent peer review of the SBRM, indicates bycatch in the herring midwater trawl fishery is likely underestimated due to existing deficiencies in observer coverage and other aspects of the monitoring program. AR 706-710, 728-68.

Underscoring the importance of observer coverage levels, a federal court reviewing the New England Groundfish FMP has observed that "there is no dispute that, given the inadequacy of other reporting methods, live observers are an essential component of an adequate bycatch reporting methodology." *Oceana*, 2005 WL 555416 at *40. That court recognized that the Fisheries Service has concluded that "[n]on-biased observer data collection in the majority of instances is the most effective way to monitor bycatch," *id.* (*citing* 68 Fed. Reg. at 11,505, 11,509) and that "[o]bservers provide the most reliable source of high quality, objective, fishery-dependent data." *Id.* Therefore, "[f]or fisheries where observer coverage is needed to monitor bycatch... a level of coverage should be deployed that provides statistically reliable bycatch estimates." *Id.* (*citing* 68 Fed. Reg. at 11,504).

Plaintiffs' Petition presented recent data showing that groundfish bycatch by herring trawlers is much more significant than previously thought, and is being monitored less accurately than is required by the Groundfish FMP, the Fisheries Services' own standards, and levels recommended by other scientists. AR 705-710, 728-768. Given this information, National

Standard Nine requires defendants – at minimum – to consider whether the closure was “practical” – for it clearly would have avoided, minimized, and reduced groundfish bycatch.

The defendants did not comply with National Standard Nine. Even though the available evidence contradicted the factual predicates for originally granting midwater trawlers access to closed areas, they declined to exclude herring trawlers from groundfish closed areas on the basis that in their view the most recent snapshot of observer data did not constitute an “emergency.” AR at 911, 915. In their direct response to plaintiffs, defendants also suggested that plaintiffs should look to the New England Council to address their concerns through a forthcoming fishery management plan amendment. AR at 915. This suggestion ignores defendants’ responsibility to issue any regulation necessary to meet the MSA’s or an FMP’s requirements, 16 U.S.C. § 1855(d), especially in view of evidence that the factual predicate for a prior regulation issued to comply with the MSA and the fishery management plan has proven to be false. Defendants cannot rely on future actions to relieve themselves of their existing duties under the current FMP to minimize bycatch to the extent practicable. *Cf. Conservation Law Foundation*, 209 F. Supp. 2d at 9 (rejecting argument that future agency rulemaking would remedy legal inadequacies in current regulation).

Defendants’ refusal to examine the appropriate data spanning the decade from 1998 to 2007 and their effort to shunt petition requests off to the New England Council robs National Standard Nine of any meaning. Their concurrent failure to establish an adequate standardized bycatch reporting methodology, including appropriate levels of observer coverage, to monitor and reliably estimate groundfish bycatch in the herring trawl fishery exacerbates the problem by allowing their approach to avoid close scrutiny. All of this is unlawful. *See American Fed’n of Government Employees v. Federal Labor Relations Auth.*, 798 F. 2d 1525, 1528 (D.C. Cir. 1986)

(agency interpretation should not “deprive a statutory provision of virtually all effect”); *see also Oceana, Inc. v. Evans*, 2005 WL 555416 at *37-43; *Pac. Marine Conservation Council, Inc.*, 200 F. Supp. 2d at 1200. In short, the Fisheries Service’s excuses do not mask the fact that its decision to deny the Petition violated National Standard Nine.

C. The Fisheries Service Violated National Standard Two By Failing to Rely on the Best Scientific Information Available Concerning the Effects of Herring Trawlers

National Standard Two of the MSA requires that conservation and management measures for ending overfishing, rebuilding groundfish populations, and minimizing bycatch “shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). *See also* 50 C.F.R. § 600.315(b)(2). “Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature.” 50 C.F.R. § 600.315(b)(1). *See Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1432 (M.D. Fla. 1998) (“Under the ‘best scientific information available’ standard, the Secretary must derive his determinations from the sum of pertinent and available information.”).

This requirement to use the best scientific information available imposes a strict burden on the defendants. Their decision “must be based on concrete analysis that permits the Secretary to ‘rationally conclude that his approach would accomplish his legitimate objectives.’” *The Fishing Co. of Alaska v. United States*, 195 F. Supp. 2d 1239, 1248 (W.D. Wa. 2002) (*quoting Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993)). Moreover, “[c]onclusory statements regarding the consideration of scientific data are not sufficient-the FMP must inform its audience of the actual scientific basis supporting it.” *Hadaja v. Evans*, 263 F. Supp. 2d 346, 354 (D.R.I. 2003). The Fisheries Service’s decision to deny the plaintiffs’ Petition is based on a series of conclusory statements and ignores the best available science. Therefore, that decision does not comport with National Standard Two.

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, AR 158, 701-702; 2005 GARM at viii; (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, AR 701, 719-721 (study by a Fisheries Service scientist demonstrating the efficacy of fishery closures for groundfish); (iii) herring midwater trawl vessels kill significant amounts of juvenile and mature groundfish in the New England closed areas, AR 701, 703-05, 918; *see also* Steele Memo, Exhibit B at 17-18; 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. AR 706-710, 728-68.

The Fisheries Service's Decision Document and the November 29, 2007 letter rejecting plaintiffs' Petition indicate that the Fisheries Service disregarded the best scientific information available when it refused to exclude herring trawl fishing vessels from groundfish closed areas. The defendants' decision not to consider a rule closing the groundfish closed areas to herring midwater trawl vessels was based on a number of conclusory statements, such as their conclusion that they had previously considered banning trawls from the groundfish closed areas and decided against it because the levels of groundfish bycatch was insufficient to justify the action. AR at 915. In fact, the Fisheries Service later clarified that this conclusion was merely a reference to a determination it had made when it originally decided to grant the trawlers' access in 1998. *See* AR 924. The circularity of this analysis by the Fisheries Service makes a mockery

of its duty to consider the plaintiffs' Petition and the new scientific information plaintiffs presented to the agency, and clearly demonstrates the Fisheries Service's arbitrary and capricious approach to this decision.

In the end, the Fisheries Service concluded that the groundfish bycatch by herring trawlers was within acceptable levels and that in its estimation bycatch of groundfish is minimal. AR 911-12, 915. But the data developed over the past decade show that the scientific assumptions underlying the defendants' provisions dealing with bycatch from the herring fishery were erroneous, and have proven ineffective in eliminating bycatch, reducing overfishing, and rebuilding overfished stocks. Moreover, there is nothing in the record to indicate that the Fisheries Service looked at more than a few isolated snippets of observer and landings data from 2006-2007 or considered the most recent scientific information developed by its own scientists in the SBRM or in the closed area study. Nor does the record show that the defendants considered data provided by the plaintiffs in the Petition and SBRM peer review. *See supra* Section I.A.3. Thus, even with evidence of significant observer and enforcement program data spanning the entire ten years of the existing rule, and its own and other scientific information that would inform a reasonable analysis of that data, the Fisheries Service simply reached a conclusory decision based on its "estimation" that groundfish bycatch was minimal. It did so without ever stating what that estimation was or explaining its reasoning for disregarding the scientific information before it. AR 911-912, 915. This plainly violates the MSA. *See The Fishing Co. of Alaska*, 195 F. Supp. 2d at 1248 (W.D. Wa. 2002) (NMFS decisions must be based on concrete analysis of the information) (*quoting Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993); *Hadaja v. Evans*, 263 F. Supp. 2d 346, 354 (D.R.I. 2003) (conclusory statements violate the duty to use the best scientific information available).

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 the accompanying motion.

DATED this 11th day of May, 2009.

Respectfully submitted,

/s/ Stephen E. Roady
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NOAA, National Marine Fisheries Service
Northeast Fisheries Science Center
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www.nefsc.noaa.gov/femad/fsb/

Amy Van Atten, Operations Coordinator & Acting
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Brian Gervelis

Herring Committee Meeting, Portland Maine, May 22, 2008

Presentation Outline

- Program overview
 - Program Structure
 - Costs
 - Seaday allocation
 - Information collected
 - Training and certification
 - Observer retention
 - Data reporting and processing
- The Herring Fishery
 - Number of trips observed
 - Coverage levels and location by gear and season
 - Incidental take summary
 - Sampling protocols
 - Released bags
 - Timing of day
 - Catch composition
 - Basket sampling
 - Size of catch (herring, mackerel, and haddock)

Number of Observed Herring Trips 2005 - 2007

	Bottom Trawl	Paired Mid- Water	Single Mid- Water	Purse Seine	Totals
2005	1	117	46	46	210
2006	5	25	12	0	42
2007	9	17	11	11	48
Totals	15	159	69	57	300

Does not include aborted trips, which comprised 29% of the trips in 2007.

Observer Coverage Rate in the Herring Fishery, 2005 - 2007

% coverage by trips				% coverage by lbs			
Winter (January - April)				Winter (January - April)			
	#obs trips	#total trips	%cov	lbs observed	total lbs landed	%cov	
2005	26	103	25.243	4,142,640	25,797,931.60	16.058	
2006	37	187	19.786	4,364,941	37,157,651.20	11.747	
2007	28	303	9.2409	1,623,436	45,106,116.00	3.5991	
Summer (May - August)				Summer (May - August)			
2005	108	372	29.032	16,058,434	84,473,217.30	19.01	
2006	11	340	3.2353	2,754,334	107,492,107.30	2.5624	
2007	9	410	2.1951	1,672,989	62,939,588.40	2.6581	
Fall (September - December)				Fall (September - December)			
2005	82	337	24.332	16,498,303	94,378,705.50	17.481	
2006	7	220	3.1818	2,445,782	79,143,596.80	3.0903	
2007	17	252	6.746	4,062,293	66,178,785.10	6.1384	




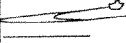

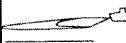






Average based on trips = 13%

Average based on catch = 9%

Results from Haul Questions on Being Able to See the Codend (n=387)

- Was the observer able to see the codend?
 - Mid-water: 49% = No; 28% = Yes; 23% = NA
 - Purse seine: 26% = No; 34% = Yes; 52% = NA
- Were there fish in the codend at the end of the pump?
 - Mid-water: 28% = No; 15% = Yes; 34% = Couldn't see; 23% = NA
 - Purse seine: 36% = No; 24% = Yes; 4% = Couldn't see; 38% = NA
- When the codend was emptied where was it located?
 - Mid-water: 14% = Off Stern; 32% = Side of Vessel; 9% = On Deck; 45% = NA
 - Purse seine: 1% = Off Stern; 43% = Side of Vessel; 4% = On Deck; 52% = NA

Summary of Observed Herring Trips, 2005 - 2007

		# trips	Days (total)	Area fished (most)	# hauls (total)	Haul duration (avg hours)	Bottom depth (avg fathoms)	Headrope depth (avg fathoms)
	Bottom Trawl							
	Port Land							
	GLOUCESTER, MA	1	1	514	2	1.6	42	
	NEWPORT, RI	8	11	539	51	12	20	
	Purse Seine							
	POINT JUDITH, RI	6	6	539	25	1.0	28	
	GLOUCESTER, MA	2	8	511	5		39	
	PORT CLYDE, ME	15	33	513	28		38	
	Paired Midwater Trawl							
	PORTLAND, ME	4	9	512	8		59	
	PORTSMOUTH, NH	3	7	514	4		27	
	PROSPECT HARBOR, ME	5	10	512	9		46	
	Single Midwater Trawl							
	ROCKLAND, ME	27	56	513	75		38	
	VINALHAVEN, ME	1	2	511	1		46	
	CAPE MAY, NJ	1	4	616	2	4.4	44	19 - 44
	Paired Midwater Trawl							
	FALL RIVER, MA	2	6	513	2	5.0	35	6 - 9
	GLOUCESTER, MA	56	168	514	181	4.0	43	18 - 24
	NEW BEDFORD, MA	22	92	521	75	4.1	35	15 - 20
	Single Midwater Trawl							
	NEWINGTON, NH	8	35	522	32	3.6	46	20 - 25
	POINT JUDITH, RI	1	2	539	1	2.6	20	
	PORTLAND, ME	23	57	513	39	4.3	58	10 - 25
	Paired Midwater Trawl							
	PORTSMOUTH, NH	2	7	522	6	5.1	38	20 - 27
	PROSPECT HARBOR, ME	3	8	513	7	4.7	59	8 - 22
	PROVIDENCE, RI	17	31	539	32	3.1	19	
	Single Midwater Trawl							
	ROCKLAND, ME	12	30	513	24	3.4	53	19 - 24
	ROCKPORT, MA	1	2	539	2	2.4	17	
	VINALHAVEN, ME	11	32	513	24	3.6	52	17 - 23
	Paired Midwater Trawl							
	BOOTHBAY HARBOR, ME	1	2	513	1	2.5	35	
	FALL RIVER, MA	4	15	514	5	3.4	28	10 - 15
	GLOUCESTER, MA	19	64	522	63	4.0	48	
	Single Midwater Trawl							
	NEW BEDFORD, MA	4	19	613	22	3.9	33	
	NEWINGTON, NH	1	3	513	1	8.7	66	
	OTHER PROVIDENCE, RI	1	4	537	6	1.0	22	
	Paired Midwater Trawl							
	OTHER WASHINGTON, RI	1	2	539	7	0.6	18	
	POINT JUDITH, RI	7	17	537	16	3.5	30	
	PORTLAND, ME	29	80	513	57	4.0	50	25 - 39
	Single Midwater Trawl							
	PORTSMOUTH, NH	2	8	513	7	4.5	65	

Partial or Total “Dumps” in 2007 (releasing catch in the water without pumping)

- 10.7% (11/103) of tows were totally dumped
 - Fish quality was poor
 - Not the desired species
 - Not enough to be pumped onboard
 - Not enough fish to be landed
- 5.8% (6/103) of tows were partially dumped
 - Not the desired species

Haul Timing on Herring Trips, 2005 - 2007

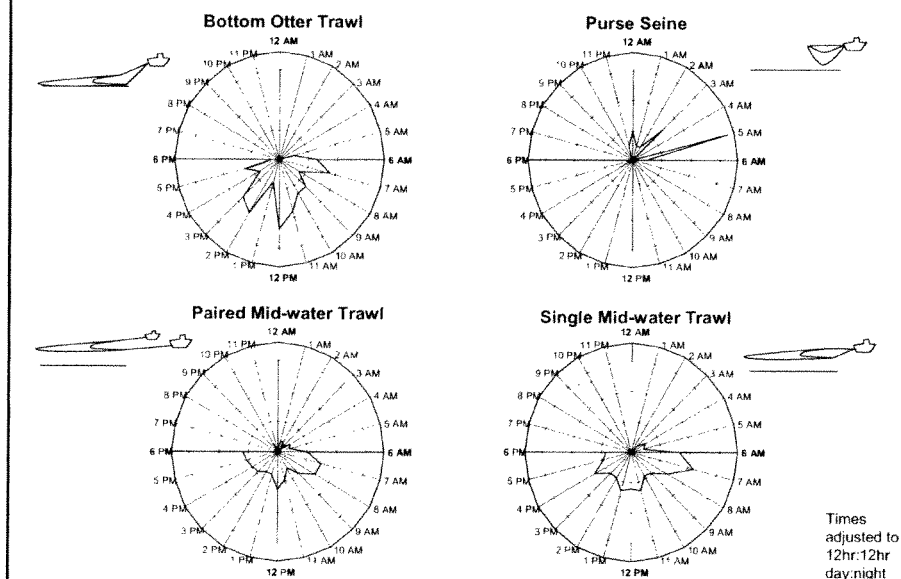


Exhibit B



#2

New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116
John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

MEMORANDUM

DATE: September 7, 2007
TO: Council Members
FROM: Lori Steele, Herring Plan Development Team Chairman
SUBJECT: Atlantic Herring Stock/Fishery Update

This memo provides general herring stock and fishery information through the 2006 fishing year and updates the Council on the implementation of the Amendment 1 management measures.

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3.1.3 Landings from State Waters

The majority of Atlantic herring landings from State waters occurs in the State of Maine. A review of the ASMFC's State Compliance Reports for 2006 indicates that about 31,000 pounds (14 mt) of Atlantic herring were landed in CT from state waters only permit holders. With the exception of Maine, no other states reported landings of herring from state waters fisheries.

Table 8 reports Atlantic herring landings in Maine from state waters only permit holders, provided by ME DMR. State only herring harvesters are required to report their landings to ME DMR on a monthly basis through a paper form. In total, about 532 mt of herring were landed in the State of Maine by state waters permit holders. The majority of these landings came from fixed gear fisheries – primarily weirs and stop seines. This represents an increase in fixed gear fishing activity from previous recent years.

Table 8 2006 Atlantic Herring Landings from Maine State Waters

Gear	Pounds	Metric Tons
Gillnet, anchored-floating	379	0.17
Gillnet, fixed or anchored, sink	25	0.01
Gillnet, other	9,034	4.1
Hooks	35	0.01
Pound Net	5,209	2.36
Stop Seine	180,453	81.85
Weir	979,150	444.14
Grand Total	1,174,285	532.65

3.2 BYCATCH – OBSERVER DATA FOR 2006 AND 2007 YEAR TO DATE (YTD)

Bycatch is defined in the Magnuson-Stevens Fishery Conservation and Management Act as “fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.” Consistent with the Magnuson-Stevens Act, this document defines *bycatch* as any fish which are **discarded**.

A decline in funding for the NMFS Sea Sampling (Observer) Program limited coverage in the herring fishery during the 2006 fishing year. A total of 18 midwater trawl trips and 28 pair trawl trips were observed in the herring fishery during 2006 (46 trips total, no trips observed for purse seine gear). Available catch/bycatch data collected on the 2006 observed trips are summarized in the following tables.

Table 9 summarizes catch and bycatch observed on the 18 midwater trawl trips that were observed by NMFS sea samplers during 2006. Spiny dogfish, haddock, Atlantic herring, redfish, and Atlantic mackerel were the species with the highest amounts of bycatch observed (98.3% of total observed bycatch). Other than haddock, regulated multispecies bycatch that was observed on these trips totaled less than 100 pounds. All haddock bycatch that was observed on these trips was counted against the bycatch cap established in Framework 43 to the Multispecies FMP. Note that a significant amount of blueback herring and shad was reported as “kept” on these trips (and therefore not considered bycatch).

Table 10 summarizes catch and bycatch observed on the 28 pair trawl trips that were observed by NMFS sea samplers during 2006. Atlantic herring, spiny dogfish, scup, and haddock were the species with the highest amounts of bycatch observed (99.7% of total observed bycatch). Other than haddock, regulated multispecies bycatch that was observed on these trips was minimal and totaled less than 50 pounds. All haddock bycatch that was observed on these trips was counted against the bycatch cap established in Framework 43 to the Multispecies FMP. Note that blueback herring and a significant amount of shad was reported as "kept" on these trips (and therefore not considered bycatch).

Table 9 Catch and Discards (Lbs.) of All Species on 18 Observed Midwater Trawl Trips in 2006

SPECIES	DISCARD	KEPT	TOTAL
DOGFISH, SPINY	31,585	5,000	36,585
HADDOCK	17,686		17,686
HERRING, ATLANTIC	7,586	2,435,616	2,443,202
REDFISH, NK (OCEAN PERCH)	6,922		6,922
MACKEREL, ATLANTIC	1,266	4,105,453	4,106,719
BASS, STRIPED	584	12	596
LUMPFISH	293		293
HAKE, SILVER (WHITING)	100	99	199
BUTTERFISH	56	392	448
MONKFISH	24	5	29
SHRIMP, NK	16		16
POLLOCK	15	10	25
BLUEFISH	14		14
SQUID, SHORT-FIN	13	992	1,005
COD, ATLANTIC	9		9
MENHADEN, ATLANTIC	5		5
SCULPIN, LONGHORN	3		3
CRAB, HORSESHOE	2		2
AMERICAN PLAICE	1		1
LAMPREY, NK			
SQUID, ATL LONG-FIN		435	435
ALEWIFE		4,027	4,027
HAKE, RED (LING)		16	16
HERRING, BLUEBACK		43,832	43,832
HERRING, NK (SHAD)		15,000	15,000
SHAD, AMERICAN		1,075	1,075
SHAD, HICKORY		22	22
GRAND TOTAL	66,180	6,611,986	6,678,166

Table 10 Catch and Discards (Lbs.) of All Species on 28 Observed Pair Trawl Trips in 2006

SPECIES	DISCARD	KEPT	TOTAL
HERRING, ATLANTIC	51,703	11,395,652	11,447,355
DOGFISH, SPINY	43,505	500	44,005
SCUP	40,000		40,000
HADDOCK	404		404
SQUID, SHORT-FIN	187	140	327
BUTTERFISH	98	5,485	5,583
POLLOCK	25		25
MACKEREL, ATLANTIC	24	2,956,669	2,956,693
DOGFISH, NK	18		18
REDFISH, NK (OCEAN PERCH)	16		16
SHAD, AMERICAN	15	25	40
COD, ATLANTIC	8		8
BLUEFISH	6		6
HAKE, SILVER (WHITING)	5	367	372
SQUID, NK	3	93	96
DEBRIS, FISHING GEAR	2		2
FLOUNDER, NK	2		2
SHRIMP, NK	2		2
DEBRIS, PLASTIC	1		1
FLOUNDER, AMERICAN PLAICE	1		1
ALEWIFE		592	592
HERRING, BLUEBACK		2,230	2,230
HERRING, NK (SHAD)		408,000	408,000
GRAND TOTAL	136,023	14,769,753	14,905,776

2007 Year to Date (YTD)

According to the Northeast Fisheries Observer Program Sea Day Schedule, 198 sea days have been allocated to the NMFS Sea Sampling Program for the Atlantic herring fishery for 2007. An additional 50 "discovery days" are available to observe U.S. at-sea processing (USAP) operations in the fishery if they occur during 2007. Table 11 and Table 12 summarize available observer data for 2007 YTD, including catch/bycatch on 5 midwater trawl trips and 9 pair trawl trips. At this time, no trips have been observed on purse seine vessels during the 2007 fishing year.

Only some observer data for 2007 are available at this time, as observed trips occurring in the more recent months (May, June, July) may not have been entered into the database yet. As a result, the available observer data for 2007, summarized below, primarily characterize the Area 2 winter fishery (southern New England), as very little fishing activity occurred in other areas during the early part of the 2007 fishing year. The data provided in Table 11 and Table 12 are generally consistent with observer reports

from previous years in that spiny dogfish, Atlantic mackerel, and Atlantic herring are the primary bycatch species observed. Some scup bycatch was observed on the midwater trawl trips, which occurred in the southern New England region. A significant amount of debris was observed on the pair trawl trips. Regulated species bycatch was very low, probably due to the area where the fishing activity occurred. No regulated species bycatch was observed on the midwater trawl trips, and a small amount of cod was reported on the pair trawl trips. No haddock bycatch was observed on these trips.

Table 11 Catch and Discards (Lbs.) of All Species on 5 Observed Midwater Trawl Trips in 2007 YTD

SPECIES	DISCARD	KEPT	TOTAL
DOGFISH, SPINY	7,413		7,413
MACKEREL, ATLANTIC	4,048	136,044	140,092
SCUP	3,369		3,369
HERRING, ATLANTIC	1,413	296,011	297,424
BUTTERFISH	180		180
ALEWIFE	115	60,227	60,342
DEBRIS, FISHING GEAR	100		100
SEA BASS, BLACK	97		97
WHITING, BLACK (HAKE, OFFSHORE)	90		90
SQUID, ATL LONG-FIN	78		78
HAKE, SILVER (WHITING)	45	3	48
LUMPFISH	10		10
MONKFISH (ANGLER, GOOSEFISH)	10		10
DOGFISH, SMOOTH	7		7
FLOUNDER, FOURSPOT	5		5
SKATE, LITTLE	5		5
SCULPIN, LONGHORN	3		3
WEAKFISH (SQUETEAGUE SEA TROUT)	3		3
LOBSTER, AMERICAN	2		2
FLOUNDER, SUMMER (FLUKE)	1		1
HAKE, SPOTTED	1		1
SCALLOP, SEA	1		1
SEA ROBIN, NORTHERN	1		1
SHAD, AMERICAN	1		1
HERRING, BLUEBACK		44,790	44,790
GRAND TOTAL	16,998	537,075	554,073

Table 12 Catch and Discards (Lbs.) of All Species on 9 Observed Pair Trawl Trips in 2007 YTD

SPECIES	DISCARD	KEPT	TOTAL
HERRING, ATLANTIC	2,060	1,612,290	1,614,350
DOGFISH, SPINY	1,804	168	1,972
DEBRIS, FISHING GEAR	1,000		1,000
HADDOCK	331	12	343
DEBRIS, METAL	200		200
SHRIMP, NK	64		64
COD, ATLANTIC	43		43
BASS, STRIPED	41		41
FISH, NK	15		15
DEBRIS, WOOD	5		5
HERRING, NK (SHAD)	3		3
WHITING, BLACK (HAKE, OFFSHORE)	1		1
SQUID, SHORT-FIN	0		0
ALEWIFE		11,282	11,282
HERRING, BLUEBACK		4,832	4,832
MACKEREL, ATLANTIC		455,336	455,336
SHAD, AMERICAN		900	900
SQUID, ATL LONG-FIN		220	220
GRAND TOTAL	5,567	2,085,040	2,090,607

3.3 CANADA – NEW BRUNSWICK WEIR FISHERY LANDINGS

Catch of the Atlantic herring stock complex in Canadian waters consists primarily of fish caught in the New Brunswick (NB) weir fishery. Currently, the Herring FMP assumes that 20,000 mt of fish from the inshore component of the Atlantic herring resource will be taken annually in the NB weir fishery. This assumed catch is subtracted from the available yield from the inshore component of the resource before TACs are determined for management areas in the U.S. EEZ.

Table 13 summarizes landings from the New Brunswick (NB) weir fishery by month from 1978-2006. Landings for 2005 have been updated, and 2006 data are preliminary. Landings from the NB weir fishery during 2006 appear to have been similar to those during 2005. A total of 11,641 mt of herring were landed from this fishery during 2005, the majority of which occurred from July – October. The most recent five-year average of landings from this fishery (2002-2006) is 13, 142 mt.

3. The 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. Members of the MFA fish for groundfish in New England ocean waters. 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. Although we fish primarily in the Gulf of Maine, some of our members travel south and east to fish from other ports that access Georges Bank and Southern New England.

4. 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. The 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.

5. 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.

6. 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 "closed 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. As fishermen, we understand how midwater trawling works and the impacts it is having on groundfish recovery because we are always out on the water observing fisheries other than our own. Therefore, we know that midwater trawlers catch significant amounts of depleted groundfish in the groundfish sanctuaries and the MFA supports closing these areas to all fishing, including fishing by our own members, with the exception of fisheries like lobstering that truly have a very small impact on the groundfish resource.

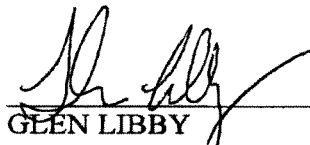
7. We also know that midwater trawlers catch groundfish as bycatch because many of our fishermen are also lobster fishermen who buy herring caught by midwater trawlers to use as bait in lobster traps. This bait often contains groundfish. For example, in October 2008 MFA members picked over 1000 pounds of groundfish from a deliver of approximately 35,000 pounds of herring bait that was caught by midwater trawlers inside Groundfish Closed Area 1. This coincided with the widely publicized reports by the National Marine Fisheries Service of high levels of observed groundfish bycatch by midwater trawlers in Closed Area 1.

8. The defendants' decision to reject our Petition to close groundfish closed areas to herring trawlers directly injures both me and the MFA in several ways. Contrary to the assumptions made in the 1998 rule that midwater trawlers would not catch groundfish if they were allowed into groundfish sanctuaries, the defendants' rejection of the plaintiffs' petition has allowed additional adult, spawning, and juvenile groundfish to be killed in groundfish sanctuaries by midwater trawlers, thereby contributing to the continued depletion of the groundfish populations.

9. This adversely affects my interests and those interests of the MFA in seeing an end to the overfishing of groundfish, the rebuilding of groundfish populations, and the reduction or elimination of 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 Magnuson-Stevens Fishery Conservation and Management Act and the Administrative Procedure Act.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of May, 2009.



GLEN LIBBY
Chairman, Midcoast Fishermen's Association

Exhibit D

**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.)	
)	

DECLARATION OF PLAINTIFF CURT RICE

I, Curt Rice, pursuant to the provisions of 28 U.S.C. § 1746, declare as follows:

1. I reside in Cumberland, Maine and have been a commercial fishermen for 37 years. As a fisherman, I have fished primarily for multi-species groundfish, such as cod, haddock, and flounder, but I have also fished for other stocks including Atlantic sea scallops, shrimp, and whiting.
2. For eight years, I captained the State of Maine's collaborative research vessel for Maine's Inshore Trawl Survey, designed to assist in quantifying the health of inshore fish populations.
3. I am a member of the New England Fishery Management Council's Research Steering Committee and the Maine Sea Grant Policy Advisory Committee.

4. I am also an active contributor to the work of the Northeast Consortium, which encourages and funds cooperative research and monitoring projects in the Gulf of Maine and Georges Bank, and participate as a member of their Research Proposal Review Team.

5. I am also Chairman of the Board for the non-profit Northwest Atlantic Marine Alliance (NAMA), an organization of New England coastal communities, family owned fishing businesses, regulators, researchers, conservation organizations, and recreational groups headquartered in Saco, Maine. This organization is dedicated to restoring and enhancing an enduring Northwest Atlantic marine system in order to support a healthy diversity and abundance of marine life and human uses, including fishing opportunities for commercial fishermen.

6. As a groundfisherman and active participant in NAMA, the State of Maine's Inshore Trawl Survey, various fisheries advisory panels, and the Northeast Consortium, I have a direct interest in a healthy marine ecosystem, abundant populations of groundfish, and in seeing a reduction in the wasteful bycatch of adult and juvenile groundfish by industrial herring trawl ships.

7. As a result of the defendants' decision to deny the plaintiffs' Petition, herring trawlers continue to fish in areas of the ocean closed to nearly all fishing in order to help restore depleted groundfish, and these vessels kill significant amounts of groundfish.

8. As a fishermen who has fished with and researched many different gears and fishing vessels, I understand how midwater trawling works and the impacts it is having on groundfish recovery. For example, I know that midwater trawl vessel captains often and intentionally fish with their nets very close to the bottom and that this could be prevented if they chose to do so. When fishing, I have seen dead groundfish that were dumped by midwater

trawlers and in my estimation midwater trawlers catch significant amounts of depleted groundfish in the groundfish closed areas established to protect groundfish, including spawning and juvenile groundfish. For example, I am aware of the widely publicized reports of the large amounts of bycatch caught by midwater trawlers in Closed Area 1 last October, of the NOAA enforcement actions taken against midwater trawlers for catching and attempting to land juvenile groundfish in 2004, and I am aware of many unreported similar incidents.

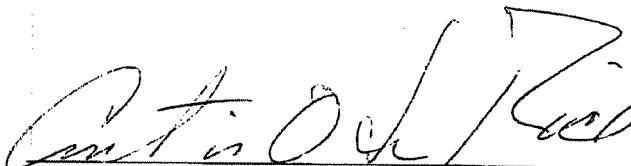
9. I support closing groundfish closed areas to all fishing, including herring fishing, with the exception of fisheries like lobstering that truly have a very small impact on the groundfish resource.

10. Defendants' decision to reject the Petition to close groundfish closed areas to herring trawlers directly injures me in several ways. Contrary to the stated assumption of their 1998 rule, the defendants' rejection of the plaintiffs' petition has allowed additional adult, spawning, and juvenile groundfish to be killed in groundfish closed areas, thereby contributing to the continued depletion of the groundfish populations. This adversely affects the ability of groundfish populations to recover from their current overfished and depleted status; and in turn, this prevents me from pursuing my catching groundfish, participating in groundfish research, and my interest in a healthy ocean ecosystem supporting thriving fishing communities.

11. 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 Magnuson-Stevens Fishery Conservation and Management Act and the Administrative Procedure Act.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of May, 2009.


CURT RICE

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

**MIDCOAST FISHERMEN'S
ASSOCIATION, et al.,**

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

Civil Action 07-02336 (HHK)

[PROPOSED] ORDER

Upon consideration of plaintiffs' motion for summary judgment, as well as defendants' opposition to that motion, and for good cause shown, it is hereby ORDERED that the plaintiffs' motion is GRANTED.

It is FURTHER ORDERED that, within fifteen (15) days after entry of this Order, defendants shall promulgate an emergency rule excluding all herring fishing vessels from fishing for herring in any of the areas that are closed to groundfish fishing in the ocean waters off New England in the manner requested by plaintiffs in their October 12, 2007 "Petition for Immediate and Permanent Rulemaking to Protect Groundfish from Midwater Trawl Fishing in Northeastern Groundfish Closed Areas."

And it is FURTHER ORDERED that, within thirty (30) days after entry of this Order, defendants shall initiate a rulemaking process to establish a permanent rule that excludes all herring fishing vessels from fishing for herring in any of the areas that are closed to groundfish fishing in ocean waters off New England.

SO ORDERED this _____ day of _____, 2009.

HENRY H. KENNEDY, JR.
UNITED STATES DISTRICT JUDGE