

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE CITY OF NEW BEDFORD, et al.,)	
)	
Plaintiffs,)	1:10-cv-10789-RWZ
)	
v.)	
)	
GARY LOCKE, et al.,)	Federal Defendants'
)	Consolidated Reply in Support
Defendants.)	of Summary Judgment and in
)	Response to Oppositions by
)	Plaintiffs New Bedford and
)	Lovgren, Docket Nos. 83 and 84
)	
)	
LOVGREN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
GARY LOCKE, et al.,)	
)	
Defendants.)	
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I. ARGUMENT

A. NMFS's approval of Amendment 16 complies with the Magnuson-Stevens Act.

1. The agency reasonably concluded that the referendum requirement for IFQs and the LAPP provisions do not apply to Amendment 16's sectors.

Whether the Court examines the agency's interpretation of the provisions of the Magnuson-Stevens Act, at issue here, under either *Chevron* or *Skidmore*, the agency's interpretation of the law should be upheld. *See, e.g., R.I. Hosp. v. Leavitt*, 548 F.3d 29, 36 (1st Cir. 2008) (deferring to the Secretary's interpretation of an ambiguous regulation after the Court concluded that neither party's interpretation was "beyond the pale"); *see* AR 103; 75 Fed. Reg. at 18,292. In their replies, the parties reiterate arguments already addressed. Mr. Lovgren asserts that a sector's annual catch entitlement is "used exclusively by a person,"¹ but that entitlement is shared for the benefit of the sector, and an individual's ability to fish the entitlement is restricted by sector management plans, such that sectors are neither LAPPs nor IFQs. *See* Defs. Opp. at 13-14.² Amendment 16 allows sectors to reallocate annual catch entitlement among sector members such that each fisher does not have exclusive use of any amount of fish. *Cf.* Docket No. 84 (Feb. 14, 2011) ("NB Opp.") at 9. New Bedford reiterates its argument that the use of the term "permit" in the enforcement sections of the Magnuson-Stevens Act should be applied out of context, a construction that strains the statutory language. *See* Defs. Opp. at 17-18. And, regarding new arguments made by the parties that the potential sector contribution ("PSC") is

¹ Mr. Lovgren argues that Defendants misconstrue the term "person" as applying only to natural beings. Defendants' argument is, rather, that the agency reasonably concluded that sectors are not LAPPs because they do not receive a permit for the exclusive use of a quantity of fish as those terms are defined in the law. Defs. Opp. at 17 (sectors do not receive a permit), 19 (sector members do not receive a quantity of fish that they use "exclusively").

² The Technical Memorandum prepared by Anderson and Holliday does not call into question the agency's reasonable conclusion that Amendment 16 sectors are not LAPPs. That memorandum is the opinion of editors who acknowledge that their interpretations of the Magnuson-Stevens Act are not to be considered definitive or binding on the agency and, furthermore, the memo is a technical one, written by economists and scientists, that does not purport to provide the agency's formal, legal position.

tantamount to an IFQ, Mr. Lovgren highlights a point also made by Defendant-Intervenor Conservation Law Foundation that PSC is an attribute of the Northeast Multispecies permit reflecting historical landings that all limited access groundfish vessels receive, regardless of where they fish—in a sector or in the common pool. *See* Lov. Opp. at 4; CLF Mem., Dkt. 74 at 24. No one could argue that fishers have an exclusive right to the amount of fish represented by the PSC in the common pool, *cf.* 16 U.S.C. § 1802(23) and, consequently, it is difficult to maintain that PSC is tantamount to an IFQ since it is also an attribute of the groundfish permits issued to common-pool fishers.³ Because sectors are not LAPPs or IFQs, the LAPP provisions, including the referendum, do not apply.

Although the Court need not reach the following issue because sectors are not IFQs and the referendum requirement therefore does not apply, New Bedford tries to argue away the explicit statutory exemption to the referendum requirement for a “sector allocation.” *See* 16 U.S.C. 1853a(c)(7)(D)(vi); 50 C.F.R. § 648.87 (regulation about sectors in the groundfish fishery, which was, and is, entitled “sector allocation”). New Bedford concedes that “sector allocation” referred to the sectors in the groundfish fishery at the time the statute was enacted, *see* NB Opp. at 9 n.9, but suggests, without support, that “sector allocation” could not refer to any other sector allocations in fisheries managed by the New England Council. The agency reasonably interpreted “sector allocation” to encompass the sector allocation of the groundfish fishery, which was merely an extension of the sector allocation first approved in Amendment 13. *See* AR 103; 75 Fed. Reg. at 18,292 (concluding that none of the revisions in Amendment 16 changed the conclusions of the September 2007 letter, AR 103, that the sector allocation, as

³ As *amicus* Georges Bank Cod Hook Sector notes, no one claims that the groundfish permits are permits for purposes of an IFQ. *See* GB Mem., Dkt. 82, at 19.

implemented in Amendment 13, was exempt from the referendum requirement).⁴ The Court must defer to this reasonable interpretation.

2. This fishery is not rebuilt and current yields are not sustainable.

The Council and NMFS recognized that Amendment 16 could have “severe” economic effects in the short run, but they also concluded that it was necessary to rebuild this fishery so that it will sustain fishers and fishing communities in the long run. Docket No. 76 at 33-35. New Bedford now claims that Amendment 16 is “not necessary” because this fishery is already rebuilt. NB Opp. at 5. New Bedford concedes that many of the individual stocks are still overfished, but it argues that the fishery as a whole is “capable of producing 98% or more of its [maximum sustainable yield]” because the “overfishing levels” (“OFLs”) for FY 2010 fall only a few thousand metric tons short of the maximum sustainable yield (“MSY”) for these stocks. NB Opp. at 2, 5.

New Bedford’s argument is premised on the assumption that these stocks must be managed collectively (and the fishery “as a whole”) so that an increase in one stock may offset a decline in another and somehow relieve the Council and NMFS of their obligation to rebuild all overfished stocks in the fishery. But that assumption is not consistent with the plain language of the Magnuson-Stevens Act, which repeatedly directs the Council and NMFS to rebuild all overfished stocks. *See, generally*, Docket No. 76 at 22-28. Moreover, New Bedford’s argument is irrelevant because it is undisputed that this fishery—even taking the fishery as a whole—was

⁴ The agency in fact complied with many of the LAPP provisions, Section 303A, in developing Amendment 16. For example, LAPPs may not be provided to those other than a U.S. citizen or other entities formed under domestic law. 16 U.S.C. § 1853a(c)(1)(D). Amendment 16 necessarily complies with this provision because under the Magnuson-Stevens Act, foreign-owned vessels are not allowed in the Exclusive Economic Zone, *see* 16 U.S.C. § 1821(a); 46 U.S.C. § 8103(a), and sector participants must be vessel owners. And, as discussed in Defendants’ Opposition, the agency had procedures for considering fair and equitable initial allocations of fish, and the basic cultural and social framework of the fishery, including opportunities for the participation of “small owner-operated fishing vessels.” *See* 16 U.S.C. § 1853a(c)(5)(A)-(B); Defs. Opp. at 32-34, 35 n.12, 36-37, 39, 44-46, 48-50, 69.

severely overfished when the Council and NMFS adopted this rebuilding program in Amendment 13, and that rebuilding was not complete when the program was revised by Amendment 16. *Compare* AR 3 at 116-118 *with id.* at 1225 (showing that this fishery, as a whole, was overfished when Amendment 13 was adopted because the non-index stocks had a combined estimated biomass of 378,395 mt, less than half of their combined B_{msy} , 522,520 mt).

But even setting those issues aside, New Bedford is still telling only part of the story. It is true that, in a rebuilt fishery, the overfishing levels would be set, on average, at the maximum sustainable yield. *See, e.g.*, 73 Fed. Reg. 32,533 (June 9, 2008). And it is true that this year's overfishing levels for this fishery, when all of the stocks are combined, are close to the maximum sustainable yield. But the numbers only look this good because two stocks—Georges Bank haddock and pollock—have recently experienced unprecedented growth. Right now, both of these stocks are nearly twice as large as necessary to support long-term maximum sustainable yield. AR 320 at 18989, 18992, 18993; 75 Fed. Reg. 41,997 (July 20, 2010). In fact, this year's catch limits for these stocks are actually **higher** than their maximum sustainable yields.⁵ *Compare* AR 997 at 56488 *with* AR 1001 at 56717; *see* 75 Fed. Reg. 74,661 (Dec. 1, 2010).

But these high levels of fishing cannot be sustained, and the overfishing levels for Georges Bank haddock and pollock will drop sharply over the next two years. *See* AR 1001 at 56717. So while this year's overfishing levels actually exceed the overall combined maximum sustainable yield slightly, those levels will drop under Amendment 16 to only 89% of the maximum sustainable yield in FY 2011, and then to 86% in FY 2012. AR 1001 at 56717; 75

⁵ In general, the biological reference points for these stocks, including their overfishing levels, acceptable biological catch, and annual catch limits were set by Framework 44. AR 1001 at 56717-21. After Framework 44 was adopted, NMFS significantly increased the catch limits for pollock in light of new scientific information. 75 Fed. Reg. 41,996 (July 20, 2010); 75 Fed. Reg. 74,611 (Dec. 1, 2010). Although post-decisional with respect to Amendment 16, we incorporate those and other recent revisions to the biological reference points in this analysis solely to demonstrate the fallacy of New Bedford's argument. Amendment 16 stands on its own merit on the record that existed at the time and the court need not consider post-decisional actions to uphold the agency's action.

Fed. Reg. 74,661 (Dec. 1, 2010). And even these numbers overstate the health of the fishery because the huge numbers of Georges Bank haddock and pollock are masking declines in other stocks. Setting those two stocks aside, the overfishing levels for the remaining stocks are still less than 50% of their total maximum sustainable yield. *Compare* AR 1001 at 56717 *with* AR 997 at 56488.

Thus, when New Bedford claims that “currently available **sustainable** harvests are within a few percentage points of the expected MSY from the fishery as a whole,” it is wrong because this year’s overfishing levels are not sustainable, they apply only to this year, and they are only as high as they are because of the temporary surge in Georges Bank haddock and pollock. *See* NB Opp. at 2 (emphasis added). New Bedford is also wrong when it argues that the rebuilding program “will yield little, if any, additional yield” in the future. NB Opp. at 5. This fishery is being rebuilt: over the next two years, the overfishing levels for these stocks (setting aside Georges Bank haddock and pollock) will rise from 50% of their maximum sustainable yield this year, to 54% in 2011, and to 59% in 2012. AR 1001 at 56717; 75 Fed. Reg. 74,661 (Dec. 1, 2010); *see also* AR 773 at 48245-52 (graphs showing projected rebuilding of these stocks). When these stocks are rebuilt to their maximum sustainable yields, harvests in this fishery will return to levels that have not occurred since the early 1990s. *See* AR 320 at 19875.

3. NMFS is obligated to rebuild overfished stocks.

Next, New Bedford again argues that the Council and NMFS must manage this fishery “as a whole.” NB Opp. at 3. And because temporary surges in Georges Bank haddock and pollock are masking the declines in other stocks, New Bedford concludes that the Magnuson-Stevens Act actually prohibits NMFS from rebuilding the remaining overfished stocks. *See* NB Opp. at 4. New Bedford’s arguments cannot be reconciled with the plain language of the Act,

however, which unequivocally directs the Council and NMFS to “rebuild overfished stocks” (and not just the fishery “as a whole”). Docket No. 76 at 22-28; 16 U.S.C. § 1854(e)(4)(A).

Ignoring those clear statutory directives, New Bedford vaguely suggests that none of these rebuilding provisions apply here because they only apply when “a fishery is overfished” (that is, the fishery “as a whole”). NB Opp. at 4. This is simply not true: the Act expressly states that every fishery management plan—whether the fishery is overfished or not—“shall [] contain the conservation and management measures . . . which are [] necessary and appropriate . . . to . . . **rebuild overfished stocks . . .**” 16 U.S.C. § 1853(a)(1)(A) (emphasis added). The Act’s definition of “fishery” also recognizes that a fishery can be defined as “one” stock. 16 U.S.C. § 1802(13)(A). Moreover, all of the rebuilding provisions of the Act were triggered here because this fishery was severely overfished when the Council and NMFS adopted this rebuilding program in Amendment 13. *See discussion supra* at 4.

New Bedford also suggests that National Standard 3 requires the fishery to be managed “as a whole” because it “mandates management of interrelated stocks as a unit.” NB Opp. at 3. Actually, National Standard 3 states that, “interrelated stocks of fish shall be managed as a unit **or in close coordination.**” 16 U.S.C. § 1851(a)(3) (emphasis added). It is beyond serious dispute that these stocks are being managed “in close coordination.”

4. NMFS’s approval of Amendment 16 was not “politically motivated.”

The Council and NMFS both explained the basis for Amendment 16 at length, and the administrative record includes literally thousands of pages of analysis supporting their decisions, but New Bedford ignores all of that and insists instead that NMFS’s approval of Amendment 16 was “politically motivated” and that the agency’s secret goal is to “privatize American fisheries.” NB Opp. at 8. These claims are entirely untrue, and New Bedford fails to substantiate them,

relying instead on a meaningless farrago of wild speculation and extra-record evidence. It points to no record evidence to support these claims.

In fact, New Bedford's claims cannot be true because it was the Council, not NMFS, that designed Amendment 16, including its expansion of the sector program, and that process was begun long before Dr. Lubchenco was appointed. The Council also included representatives from the fishing industry and the Commonwealth of Massachusetts, and New Bedford does not explain whether they too were "politically motivated." In any event, New Bedford's allegations are false and serve only as a distraction from the real evidence here that demonstrates that NMFS's decision to approve Amendment 16 was rational. *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that it is "not the function of the court to probe the mental processes of [agency decision-makers].").

5. NMFS used the best scientific information available.

The landings history database used here is not perfect, but it is the "best scientific information available." Docket No. 76 at 51-56. Mr. Lovgren now clarifies that he "seeks the actual paper [dealer] reports, not reliance upon the flawed computer database." *Lov. Opp.* at 3. But as we already explained, the paper dealer reports that Mr. Lovgren argues are the "best science" are themselves the source of many of the errors in the database. Moreover, the paper dealer reports are unusable in their present format and the act of recompiling thousands of them into a new database would itself introduce new errors into the data. Mr. Lovgren's claim fails because he has not even explained, much less proven, why the paper dealer reports are the "best scientific information available." *See* Docket No. 76 at 53-54.

B. NMFS Fully Complied With NEPA in Approving Amendment 16

Federal Defendants demonstrated in their opening brief that NMFS fully complied with NEPA in approving Amendment 16 and that Plaintiffs' claims to the contrary are without merit.

See Defs. Opp. at 60-79. In their reply briefs, Plaintiffs offer nothing to rebut Federal Defendants' arguments.

1. The FEIS Adequately Addressed Uncertainty.

The New Bedford Plaintiffs devote only one footnote in their reply brief to their NEPA claim. NB Opp. at 6 n.4. New Bedford argues that NMFS violated NEPA regulation "40 C.F.R. § 1502.24(b)(3)" in evaluating economic and social impacts because, faced with uncertainty concerning the how many fishers would join sectors, the agency did not provide a summary of existing credible scientific evidence, namely an extra-record report prepared by a NOAA employee titled "Social Impact Assessment Literature Review: Leasing and Permit Stacking." *Id.* As an initial matter, Plaintiffs appear to have mistakenly cited section 1502.24(b)(3) because their argument appears to be based on section 1502.22(b). In any event, their argument should be rejected for several reasons.

First, New Bedford did not raise this argument concerning section 1502.22(b) and the above-referenced document in their opening brief, and it is therefore waived. *See Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298, 349 (D. Mass. 2010) ("purpose of a reply memorandum is not to file new arguments that could have been raised in a supporting memorandum"). Second, this document was prepared in connection with a wholly separate fishery management plan, is not part of the administrative record for Amendment 16, and the Court unambiguously denied Plaintiffs' motion to add it to the record. *See* Dkt. 78 at 2 (Order denying Plaintiffs' motion (Dkt. 39) to supplement the administrative record). The document is therefore not properly part of the Court's review of this case. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("focal point for judicial review" is "the administrative record already in existence, not some new record made initially in the reviewing court.").

Finally, Plaintiffs’ argument – that NMFS “fail[ed] to provide a summary or survey of existing research and analysis regarding the likely impacts of the types of measures included in Amendment 16, such as the catch share/sector system” – is belied by the extensive analysis of impacts contained in the FEIS. As detailed at length in Federal Defendants’ opening brief, the FEIS contains a thorough discussion of likely environmental, social, and economic impacts. *See e.g.*, AR 773 at 48382-502 (addressing economic impacts), 48502-34 (addressing social impacts). And the FEIS specifically evaluates potential impacts resulting from implementation of the sector measures. *See e.g.*, AR 773 at 48258 (biological impact of sector measures), 48339-46 (sector impacts on protected species), 48363-64 (sector impacts on essential fish habitat), 48385-438 (economic impact of sector measures), 48464-65 (economic impact of sector measures), 48522-23 (social impacts of sector measures). Moreover, the FEIS forthrightly recognizes certain inherent uncertainties in evaluating the sector measures because, at the time the FEIS was finalized, it was not known for certain how many permit holding vessels would join and remain in sectors. *Id.* at 48237. FEIS section 7.1.1 provides a lengthy and well-reasoned discussion of this issue and its impacts on the analysis contained in the FEIS. *See e.g.*, *Id.* at 48238. In addition, impacts resulting from the sector measures were further developed and discussed in the NEPA analysis prepared in connection with the individual sector operation plans. *See e.g.*, AR 905-920 at 52378-54857; AR 922-23 at 54857-55240; *see also* AR 948 at 55785-56090 (EA for Framework Adjustment 44). The FEIS and subsequent NEPA documents thus demonstrate that NMFS complied with NEPA by taking a “hard look” at both the potential impacts from the sector measures, and the inherent uncertainties in forecasting those impacts.

2. Mr. Lovgren’s arguments are without merit.

Mr. Lovgren erroneously asserts that Defendants did not rebut his argument that Defendants failed to analyze years 1996 through 2001 and 2001 through 2007 “with respect to

sectors or catch shares.” Lov. Opp. at 5. As Federal Defendants’ opening brief pointed out, the FEIS thoroughly discussed the fishing practices and results for those years. Defs. Opp. at 72; *see* AR 773 at 48063-131 (discussing commercial fishery). And, in fact, the FEIS contains a lengthy discussion of the performance of the two sectors existing during those years. *See* AR 773 at 48131-42.

The remainder of Mr. Lovgren’s reply concerning his NEPA claim is difficult to comprehend. His reply cites inapposite case law concerning statutory interpretation and asserts that “Defendants have failed ‘*Chevron’s* Step-Two reasonableness test.” Lov. Opp. at 5-6. His “*Chevron*” argument is completely misplaced and irrelevant here where he has raised no issue concerning the agency’s interpretation of NEPA. Moreover, it is axiomatic that the Administrative Procedure Act governs judicial review of agency actions challenged under NEPA. 5 U.S.C. § 706; *see Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1284 (1st Cir. 1996). Mr. Lovgren thus fails to present a cogent theory and his argument must be rejected.

C. NMFS did not violate the Freedom of Information Act.

Mr. Lovgren suggests that he should prevail on his Freedom of Information Act (“FOIA”) claim because “Defendants did not challenge this count.” Lov. Opp. at 6. In fact, we did respond to this count in our opening brief, Docket No. 76 at 83-84 n.55, and Mr. Lovgren has entirely failed to articulate what his FOIA claim is.⁶ *Id.*

II. CONCLUSION

For the reasons discussed above, summary judgment on all of the Plaintiffs’ claims should be entered on behalf of the Federal Defendants.

⁶ As to his other claims, Mr. Lovgren has not responded to Defendants’ arguments. *See* Defs. Opp. at 80-81 & n.51. Regarding the mid-Atlantic fishers, Mr. Lovgren again fails to cite the record, which demonstrates that the agency and the Council considered mid-Atlantic fishers. Lastly, he has not provided the jurisdictional basis for his challenges to the composition of the Councils. *Organized Fishermen of Florida v. Franklin*, 846 F. Supp. 1569, 1578 (S.D. Fla. 1994) (“no private right of action ... to challenge the Council’s composition”).

Respectfully submitted this 2nd day of March, 2011,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ James A. Maysonett

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