

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF)
MASSACHUSETTS, by its DIVISION OF)
MARINE FISHERIES)
)
and,)
)
STATE OF NEW HAMPSHIRE, by its)
FISH & GAME DEPARTMENT,)
DIVISION OF MARINE FISHERIES,)
)
v.) Case No. 06-cv-12110 (EFH)
)
)
OTTO WOLFF, Acting Secretary of)
Commerce, et al.,¹)
)
Defendants.)

REVISED DECLARATION OF PATRICIA A. KURKUL

I, PATRICIA A. KURKUL, declare as follows:

1. I am the Northeast Regional Administrator of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (“NOAA Fisheries”), Gloucester, Massachusetts. In this capacity, I am responsible for the development of policy and the implementation of management programs for the living marine resources of the northeastern United States. I represent the Secretary of Commerce on the New England Fishery

¹ Mr. Wolff, Acting Secretary of Commerce, is substituted for Carlos M. Gutierrez pursuant to Fed. R. Civ. P. 25(d)(1).

Management Council (“Council”) and in other regional activities and am familiar with all activities undertaken by the Council and my staff in preparation and implementation of management measures regarding fisheries of the northeastern United States, including all multispecies (more commonly referred to as “groundfish”) under the Northeast Multispecies Fishery Management Plan (“FMP”). I supervise the personnel in the Region who are charged with the implementation of fishery management plans and who are involved with Council staff in developing and analyzing management measures under the multispecies FMP.

2. The purpose of my original declaration was to advise the Court of the severe negative consequences and implications of temporarily suspending Framework 42 (“FW 42”) to the multispecies FMP. This revised declaration is being submitted to correct an inadvertent misstatement regarding the consequences of suspending the 2:1 differential DAS counting provision as contained in Paragraph 9 (a). The revised language is presented in boldface type. The misstatement was due to overlooking a default measure prescribed by Amendment 13.

3. Since the implementation of FW 42 in November of 2006, significant changes and developments have occurred in the assessment of the status and health of the groundfish resource, the regulatory climate, and guidelines on how to implement FMPs. In light of these developments, the suspension of the carefully balanced and complex set of fishery conservation and management measures in FW 42 would result in a significant disruption in this fishery, likely leading to a substantial setback in progress to rebuild the groundfish resources, possibly irreparable economic harm to the fishing industry and widespread confusion and uncertainty in the fishing industry, at least in the short term, as to what rules it would be operating under. My office and staff have already been deluged with calls and inquiries from fishermen as to whether their leased days-at-sea (“DAS”) are still valid, whether they will reallocated DAS that have already by used under the differential DAS provisions, whether they are subject to declaration

requirements established by FW 42 and numerous other questions concerning how they are to know what rules apply to them. It would also suspend several important measures that were designed to alleviate impacts resulting from all groundfish measures, thus causing potentially irreparable economic harm to many members of the fishing industry, and removing flexibility in their fishing activity.

4. FW 42 was based on assessments of the groundfish resource through the process known as Groundfish Assessment Review Meeting (“GARM”) II. Based on the results of GARM II, FW 42 was developed primarily to target six stocks (Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England/Mid-Atlantic yellowtail flounder, Southern New England/Mid-Atlantic winter flounder, Georges Bank winter flounder, and white hake) for reductions in fishing mortality in order to comply with Amendment 13 rebuilding plans. Since the implementation of FW42, GARM III has taken place and concluded that groundfish continue to require substantial reductions in fishing mortality in order for these stocks to be rebuilt in the timeframes mandated by the Amendment 13 and the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”).

5. To address the need to reduce fishing mortality even further to ensure groundfish stocks are rebuilt in the timeframes mandated by MSA, NMFS has recently published a proposed interim rule that would impose even more restrictive measures than FW 42, including a significant expansion of the area subject to the 2:1 differential days-at-sea (DAS) measure that was established by FW 42. See Attachment A. This interim rule is designed to bridge the gap between the start of the 2009 fishing year and the implementation of Amendment 16 to the multispecies FMP, which is scheduled for start of the 2010 fishing year, and is substantially based on several key measures of FW 42. The purpose of the interim rule is to implement even more restrictive measures than FW 42 to address continued overfishing on groundfish stocks in

order to ensure that rebuilding objectives are not jeopardized. The suspension of FW 42 significantly undermines the basis of the proposed rule.

6. On January 16, 2009, NMFS published its final rule, scheduled to become effective on February 17, 2009, implementing new National Standard Guidelines to take into account new measures included in the 2006 law reauthorizing the MSA. See, Attachment B. These new guidelines have changed the guidance on the use of the mixed-stock exception, clarifying that it can only be used for stocks that are not overfished, meaning that the stocks are not below, or will not be driven below, $\frac{1}{2}$ of B_{msy} (spawning stock biomass at maximum sustainable yield, referred to as MSST in the guidelines). See Attachment B, Response to Comment 89, on p. 3201 and 50 CFR § 600.310(m)(3).

7. With these developments as a backdrop, it is important to understand the consequences and implications of suspending FW 42, even on a temporary basis, in the middle of a fishing year. To fully appreciate such consequences and implications, FW 42 must be put into context. FW 42 is the latest change to the multispecies FMP in a long line of amendments and frameworks. It is not a standalone action, but rather one that links to, and is based on, all of the actions taken before it. Many of the measures in FW 42 are unrelated to determining what conservation measures may be appropriate in light of the mixed stock exception. Several other measures that would be suspended are specifically designed to mitigate impact of FW 42 on the fishing industry. To suspend all of the measures in FW 42, regardless of their relationship to the issues in litigation, creates a myriad of unintended consequences and administrative burdens in trying to quickly adapt to and reconcile the reinstatement of pre-FW 42 measures.

8. To more fully understand this, I am highlighting, first, the significant measures that are meant primarily to mitigate negative impacts of all groundfish measures, including those that would remain if FW 42 is suspended, and, then, other measures necessary to conserve and

manage the groundfish resources. Measures to mitigate impacts of groundfish measures and their consequences and implications are as follows (See, Attachment C for more detailed comparison of significant measures that would presumably be in effect upon the suspension of FW 42 measures (“pre- FW 42”) and FW 42 measures):

a. Mandatory Vessel Monitoring System (“VMS”) – Suspending this measure eliminates a key device in all areas, except the U.S./Canada Management area and other Special Management Programs, for monitoring compliance with, enforcing and administering groundfish measures. The suspension will require a temporary return to a much less efficient and effective reliance on a telephone call-in requirement. It also will require a temporary change to complicated requirements for declaring into certain fisheries by fishermen and require, in some cases, that vessels fishing in multiple areas on the same trip must fish under the most restrictive area measures. It may take weeks to effectuate these changes due to software and hardware needs, resulting in even more confusion and uncertainty as to what happens in the meantime. The temporary suspension of mandatory VMS on groundfish vessels also takes away an important support tool for the U.S. Coast Guard in search and rescue operations.

b. Leasing DAS-- Leasing of DAS was originally implemented in Amendment 13 as a means of mitigating the impact of more severe fishing measures on fishermen. The leasing program would have expired but for its renewal in FW 42. Leasing of DAS allows fishermen, who lease DAS, to accumulate more DAS in order to be more profitable, or, conversely to obtain value by leasing DAS to another fishermen if it is not as profitable to fish such DAS under restrictive measures.

c. Regular B DAS Program – The regular B DAS program, implemented under Framework 40A, was scheduled to expire if not renewed in FW 42. The program is designed to provide additional fishing opportunities on healthier stocks under certain conditions.

It was renewed specifically to mitigate the severe impacts of measures in place before and after the implementation of FW 42.

d. U.S./Canada Management Area Measures – As more fully explained in Attachment C several adjustments to the U.S./Canada management regime were made to make fishing under that regime more flexible and easier to pursue than prior to FW 42.

e. Eastern Haddock SAP – FW 42 renewed this SAP, which was scheduled to expire in before implementation of FW 42. This SAP is an important fishing area to Massachusetts and New Hampshire fishermen because it allows them to target, under special restrictions, haddock, which is the healthiest stock in the multispecies FMP.

f. Fixed Gear Sector Program– Suspending FW 42 would reverse the authorization of a program known as the Fixed Gear Sector Program, which allows a group of fishermen to form a sector and fish under special rules. Under the program implemented by FW 42, fishermen using fixed gear, such as gillnets and hook gear, as opposed to trawl nets that are dragged behind a vessel, were allowed to be exempted from certain trip limits, gear restrictions, and closed areas, in exchange for agreeing to be subject to an overall total allowable catch (“TAC”) provision that prohibits the sector from groundfishing once the TAC is reached. This is an innovative new type of program that is almost universally supported by industry and environmentalists alike, and one that would be expanded to include 17 new sectors under Amendment 16.

9. Measures that are necessary to preserve the conservation and management program for groundfish stocks that will be suspended, and their consequences and implications, include the following:

a. 2:1 counting, and associated measures, in the Gulf of Maine and Southern New England—These measures, which appear to be at the heart of Plaintiffs’

Complaint, are critical to ensuring that rebuilding timelines mandated by the MSA are met for several key groundfish stocks, including Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England yellowtail, and white hake. **If these measures are suspended, under Amendment 13 provisions, the Gulf of Maine area would revert to 1:1 DAS counting and the entire Mid-Atlantic and Southern New England areas (a much larger area subject to differential DAS counting than prescribed by FW 42) would be subject to 1.5:1 DAS differential counting. This reduction in the differential DAS counting in the Gulf of Maine area,** without any **other** compensatory conservation measures, would invite, during the inclement weather common during winter months, a race to fish for these stocks before the suspension of FW 42 is lifted, resulting in fishing effort of up to twice the number of DAS prescribed by FW 42. This not only would have severe conservation consequences for stocks targeted in this area, but would also raise safety concerns related to the increased incentive to race to the fish during the inclement weather common during winter months in the Gulf of Maine. Just as an example, suspending these measures **in the Gulf of Maine area** would mean that Cape Cod/Gulf of Maine yellowtail flounder, whose stock biomass is significantly below the overfished level of $\frac{1}{2}$ of Bmsy, could be harvested in amounts equal to triple the trip limit (750 lb per trip vs. 250 lb per trip) on potentially twice as many DAS.

b. Trip limits—Suspension of FW 42 would significantly increase trip limits determined necessary for conservation for several stocks, as more specifically described in Attachment C

c. Gear regulations— Gear requirements, as described in Attachment C, would revert to pre-FW 42 measures, which in certain cases would be more restrictive (SNE/MA vessels) and other cases eliminate new gear standards for approving new, innovative gear.

d. Recreational fishery management measures—Suspending FW 42 would

lessen conservation benefits in the recreational fishery by reducing the minimum size limit from 24 inches to 22 inches, and eliminating a seasonal closed area.

10. Even a temporary suspension of these conservation measures may require NMFS to reconsider the measures being proposed in the interim rule for fishing year 2009 to compensate for overfishing that could occur as a result.

11. The confusion to the public, in particular the fishing industry, in trying to determine which rules are now applicable will be a practical problem caused by the suspension of FW 42. The confusion would be further exacerbated by administrative delays and burdens that would occur in adapting temporarily to the lack of a mandatory VMS. This would be further complicated if the suspension is imposed and then lifted shortly thereafter. The suspension, and resulting confusion regarding applicable regulations, would also compromise enforcement activities.

12. Regarding the Court's order concerning serious consideration and analysis of the mixed stock exception, NMFS intends to prepare a draft report for Council consideration at the next New England Fishery Management Council meeting, to be held February 9-11, 2009. Depending on the outcome of the review, NMFS on behalf of the Department of Commerce may submit the report shortly after the Council meeting.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gloucester, Massachusetts, on this 3rd day of February, 2009.



Patricia A. Kurkul
Regional Administrator, Northeast Region, NMFS