

EXHIBIT THREE

April 8, 2009

John Pappalardo, Chairman
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950

Dear Mr. Chairman:

This letter represents my dissenting opinion with regard to the motion passed by the New England Fishery Management Council (NEFMC), April 7, 2009, which reads as follows:

That the Council should: (1) disagree with the conclusions of the NMFS report dealing with further consideration of the application of the mixed stock exception and submitted to the Council for review as ordered by Judge Edward J. Harrington, and (2) inform Judge Harrington that NMFS has failed to perform the analyses for Council review; consequently, the Council is unable to provide the court with a review.

In February and again in April, the NEFMC discussed subjects of interest to the U.S. District Court, District of Massachusetts, with regard to the applicability of the “mixed stock exception” as described in guidelines for National Standard One of the Magnuson Stevens Fishery Conservation and Management Act (MSA). The National Marine Fisheries Service (NMFS) provided more than adequate documentation of NMFS and NEFMC actions taken during development of Framework 42 and the resulting regulations with regard to determining the applicability of the mixed stock exception.

Both NMFS and NEFMC had ample opportunity to explore options for applying a mixed stock exception. Neither body opted to do so. Instead they followed a different route to manage this multispecies fishery, fully consistent with the law. For this reason and others cited in the NMFS submissions to the Court, NMFS concluded correctly that the mixed stock exception could not have been applied in the context of Framework 42.

Unfortunately, the debate about the motion adopted by the NEFMC, cited above, ranged far beyond the scope of the litigation before the Court regarding the applicability of the mixed stock exception in the context of Framework 42. If the debate had stopped there, I would have simply voted “no” without submitting dissenting views. However, the debate was inappropriately expansive, and therefore the intent of the motion is inappropriately expansive. So, I am submitting these comments.

I have significant concerns about the misrepresentation of the applicability of the mixed stock exception as described in the National Standard One guidelines past and present. The proponents of the motion did not ultimately identify in the motion which stocks they believe would have potentially qualified for the mixed stock exception in Framework 42, however, there was noteworthy discussion based on written comments about the current status of the Southern New England (SNE) winter flounder stock.

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This stock currently stands at 9 percent of its target spawning stock biomass. SNE winter flounder was overfished and overfishing was occurring when Framework 42 was implemented as it is now, therefore should not have been the subject of a mixed stock exception debate. It was implied during the debate that a *weak* stock exception could be applied to a stock like SNE winter flounder. It is misleading that somehow the National Standard One guidelines could be applied to this stock and that the Framework 42 litigation may result in the actual *mixed* stock exception guidelines being applicable to winter flounder.

This misrepresentation of the guidelines is unproductive in terms of resolving FW42 litigation while potentially setting a dangerous precedent. Worse yet, the idea that the mixed stock exception could provide unlimited license for the NEFMC to fail to comply with rebuilding obligations stands to preclude valid attempts that the NEFMC might make to shift to an ecosystem-based management approach. Conflating the mixed stock exception with ecosystem-based management prevents progress on many fronts, including efforts to actually rebuild depleted stocks while maintaining a viable fishery.

Lastly, I believe it was out of place for the NEFMC to debate congressional intent behind the MSA. There is no mention of a mixed stock exception in the statute; therefore digging deeper will not yield any new insight regarding existing statute. To the contrary, this foray into the Congressional Record only led to confusion. While depth of understanding of the law is essential, conjecture about congressional intent only does disservice to the resource and those dependent on it for their livelihoods.

For these reasons, I cast my vote against this motion. Managing for restored abundance of depleted stocks is critical in New England and other regions. Erroneous and overreaching application of the mixed stock exception – far beyond the letter or intent of the MSA – would greatly impede if not preclude the attainment of that key goal.

I do not take lightly my submission of dissenting views. Given the magnitude of the issues the NEFMC must address in the very near future, and the scope of the debate on the motion, I feel that I have no alternative. Thank you for your consideration of these opinions.

Sincerely,

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cc: Patricia Kurkul
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