

Pursuant to the Court's February 23, 2009 Order, Dkt. No. 47, Gary Locke, Secretary of Commerce, et al. (collectively "Federal Defendants")^{1/} hereby file this second notice to inform the Court and the parties of the status of consideration of the mixed-stock exception by the National Marine Fisheries Service ("NMFS") and the New England Fishery Management Council ("Council"). As Federal Defendants have fully complied with the Court's Order, Federal Defendants respectfully request that the Court enter judgment in their favor on Count II of Plaintiffs' Complaint and lift the injunction suspending the 2:1 days-at-sea ("DAS") counting as specified in the Court's February 17, 2009 Order, Dkt. No. 45, and extended by the Court's February 23, 2009 Order. Further, the Court should dismiss Count II, and all remaining claims (Counts I, IV, V, VI, VII, and VIII), as moot because NMFS has issued an interim rule that supersedes Framework 42.^{2/}

BACKGROUND

Pursuant to the Court's January 26, 2009 Order, Federal Defendants were required to analyze the applicability of the mixed-stock exception – set forth in the guidelines for National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-

^{1/} Mr. Locke is substituted for Carlos M. Gutierrez pursuant to Fed. R. Civ. P. 25(d)(1).

^{2/} Alternatively, Federal Defendants are entitled to summary judgment on Counts I, IV, V, VI, VII, and VIII because Plaintiffs waived these claims by failing to offer any argument in their motion for summary judgment. See Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir. 1995) (an issue that was raised in a complaint but was ignored at the summary judgment stage is deemed waived). See also Federal Defendants' Combined Memorandum in Opposition to State Plaintiffs' Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment, Dkt. No. 29, at 2-3 n.1. Federal Defendants are willing to provide supplemental briefing on this issue at the Court's request. See January 26, 2009 Memorandum and Order, Dkt. No. 38 ("January 26, 2009 Order"), at 7-8 (declining to rule on Federal Defendants' cross-motion for summary judgment on Counts I, IV, V, VI, VII, and VIII because the issue was "neither adequately briefed nor orally argued").

Stevens Act” or “MSA”) – and file a report of their findings with the Court no later than March 27, 2009. January 26, 2009 Order at 7. The Court temporarily suspended Framework 42 in its entirety pending Federal Defendants’ review of the mixed-stock exception. Id. In response to Federal Defendants’ Motion to Alter or Amend the Court’s Order, Dkt. No. 39, the Court reinstated Framework 42 with the exception of the 2:1 DAS counting provisions. See February 17, 2009 Order at 2. Federal Defendants filed the required report with the Court on February 19, 2009, attaching the draft and final versions of NMFS’ report concluding that the mixed-stock exception cannot be applied to the northeast multispecies fishery. See Federal Defendants’ Notice of Consideration of Mixed-Stock Exception, Dkt. No. 46 (“Notice”). The Court then extended the stay of the 2:1 DAS counting provisions to April 10, 2009 to permit the Council to review NMFS’ Revised Report and ordered Federal Defendants to file a second report with the Court after considering the Council’s findings. See February 23, 2009 Order at 2.

I. NMFS HAS FULLY COMPLIED WITH THE COURT’S ORDERS BY COMPLETING A REPORT ON ITS CONSIDERATION OF THE MIXED-STOCK EXCEPTION AND PROVIDING AN OPPORTUNITY FOR COUNCIL REVIEW.

As required by the Court’s February 23, 2009 Order, the Council considered the Revised Report at its meeting scheduled for April 7-9, 2009. See Exhibit 1 (agenda for April 7-9, 2009 Council meeting reflecting that the Council reviewed NMFS’ report on the mixed-stock exception on April 7). The Council declined to adopt NMFS’ Revised Report on the basis that NMFS has “failed to perform the analyses for Council review” of the mixed-stock exception. See April 8, 2009 Letter from Paul Howard to Patricia Kurkul, attached hereto as Exhibit 2. One member of the Council submitted a dissenting opinion. See April 8, 2009 letter from Sally

McGee to John Pappalardo, at 1 (attached hereto as Exhibit 3) (“... NMFS concluded correctly that the mixed stock exception could not have been applied in the context of Framework 42.”).

NMFS disagrees with the Council’s assertion that the agency failed to perform necessary analyses. Notwithstanding the Council’s views, NMFS stands by the conclusion in its Revised Report that the mixed-stock exception cannot apply to this fishery because neither the Council nor NMFS could make the required threshold showing – under either the 1998 Guidelines or the 2009 Guidelines – that rebuilding requirements could be met if the exception were employed. See Second Kurkul Decl., Attachment D, Dkt. No. 46-6, at 11. The mixed-stock exception applies only to the Magnuson-Stevens Act requirement for ending overfishing, and not to the requirement to rebuild overfished stocks. Under the 2009 Guidelines the mixed-stock exception may not be applied to overfished stocks and, under the 1998 Guidelines, it may only be applied to overfished stocks if the exception would be consistent with rebuilding requirements and the conditions stated in the Guidelines are satisfied. If application of the exception were consistent with rebuilding, then, in addition, the Council and NMFS would have to consider whether specific conditions set forth in the Guidelines are satisfied. See id. Therefore, NMFS properly considered first the threshold issue of whether applying the exception would be consistent with rebuilding requirements. NMFS’ finding that it would not be consistent with rebuilding requirements eliminated the need for NMFS to reach the second issue (i.e., whether the specific conditions set forth in the Guidelines are satisfied). NMFS’ interpretation of the Magnuson-Stevens Act and the Guidelines, which the agency administers, is entitled to deference. See Munoz-Monsalve v. Mukasey, 551 F.3d 1, 5 (1st Cir. 2008) (“We accord deference, however, to

the agency's reasonable interpretations of statutes and regulations that it administers.”), citing Chevron U.S.A., Inc., v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

NMFS' view that application of the mixed-stock exception must not jeopardize existing rebuilding targets is supported by judicial opinions concluding that, if measures designed to mitigate impacts on the fishing industry would jeopardize a fishery's ability to meet conservation objectives, such as rebuilding requirements, then conservation measures must dictate the outcome. See Dkt. No. 46-6 at 4 n.2. This Court has similarly recognized that the Magnuson-Stevens Act prioritizes conservation over economic considerations. Application of the National Standards “must be consistent with the ultimate conservation requirements of the Magnuson-Stevens Act,” and “[a]ny fishery management plan must, first and foremost, contain measures which prevent overfishing and rebuild overfished stocks.” A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 107 (D. Mass. 2000) (emphasis added). Economic considerations cannot override the mandate to conserve the resource. See id. at 107-108 (“Measures contained in a fishery management plan may well result in the closure of a fishing industry. This terrible and unfortunate consequence, however, was readily anticipated by Congress when it amended the Magnuson-Stevens Act in 1996.”). See also Natural Res. Def. Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (if preventing overfishing conflicts with achieving optimum yield, preventing overfishing prevails). NMFS' determination that the mixed stock exception could not be applied absent a showing that rebuilding requirements could be met recognizes the priority that Congress has assigned to preventing overfishing and rebuilding overfished stocks.

Significantly, the Council did not raise similar concerns regarding NMFS' analyses when it considered NMFS' draft report at its February meeting. At that time, the Council did not find

that NMFS failed to do an analysis; rather, the Council disagreed with the substance of NMFS' analysis. See February 13, 2009 letter from Paul Howard to Patricia Kurkul, Dkt. No. 46-5 (describing motion "that the Council disagree with the conclusions of the NMFS report to the court that the mixed stock exception cannot be applied to the northeast multispecies fishery and request NMFS reconsider its position and make it consistent with congressional intent. . ."). NMFS responded to the Council's February comments in the Addendum to the Revised Report. See Dkt. No. 46-6 at 12-15. The Council, without any formally adopted explanation or discussion, has now taken a different position, concluding that it is "unable to provide the Court with a review" of the mixed-stock exception because NMFS "has failed to perform the analyses for Council review." See Exhibit 2.

Given that the Council disagreed with NMFS' analysis, it could have conducted its own analysis of the applicability of the mixed-stock exception. Under both the 1998 and 2009 Guidelines, the Council has discretion to consider whether to analyze or apply the mixed-stock exception. See 50 C.F.R. § 600.310(d)(6) (1998 Guidelines) ("A Council may decide to permit this type of overfishing. . . ." if certain criteria are met (emphasis added)); 50 C.F.R. § 600.310(m) (2009 Guidelines, effective February 17, 2009) ("The Council may decide to allow this type of overfishing. . ." if certain criteria are met (emphasis added)). This is fully consistent with the Magnuson-Stevens Act, which gives the Council primary responsibility for drafting FMPs and amendments, subject to subsequent Secretarial review and approval or disapproval, consistent with the Act and other applicable law. However, the Council elected not to independently analyze the applicability of the mixed-stock exception.

As Federal Defendants have previously explained, NMFS lacks authority to do anything in this context other than request that the Council take the Revised Report into consideration. See Federal Defendants' Memorandum in Support of Federal Defendants' Motion to Alter or Amend the Court's Order and in Support of Motion for Stay Pending Resolution of Motion, Dkt. No. 40 (February 2, 2009), at 4-5; Federal Defendants' Notice of Consideration of Mixed-Stock Exception, Dkt. No. 46, at 5-7. The Court's orders properly did not dictate the substance of NMFS' consideration of the mixed-stock exception, but set forth a process requiring NMFS to consider the exception and seek Council input. NMFS has fulfilled the Court's orders by seriously considering and analyzing the mixed-stock exception and taking appropriate steps, within the permissible bounds of the Magnuson-Stevens Act, to ensure that the Council considered the results of NMFS' analysis.

II. PLAINTIFFS' CLAIMS ARE MOOT IN LIGHT OF THE INTERIM RULE ISSUED BY NMFS, WHICH SUPERSEDES FRAMEWORK 42.

In addition to Federal Defendants having completed their consideration of the mixed-stock exception, recent events have rendered this matter moot. On April 6, 2009, NMFS submitted to the Federal Register a final interim rule adopting new management measures for the northeast multispecies fishery. Federal Defendants anticipate that the final interim rule will be published on April 13, 2009, and they will promptly file the rule with the Court upon publication. The final interim rule as filed with the Federal Register is attached hereto as Exhibit 4. As explained in the February 3, 2009 Revised Declaration of Patricia A. Kurkul, Dkt. No. 42-2, the interim rule essentially replaces or modifies management measures of Framework 42 which NMFS determined are insufficient to address overfishing:

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.

Kurkul Decl. at ¶ 5 (discussing proposed interim rule, Dkt. No. 42-3). The final interim rule, based on further analysis and comments from the Council, fishing industry and the public, significantly lessened the severity of impacts of the proposed rule by allowing, through NMFS' interim rule authority, overfishing to continue on some stocks:

In this instance, the purpose of the interim rule is to reduce or end overfishing and help ensure that stocks rebuild consistent with Amendment 13 objectives for FY 2009, and to reduce overfishing on the three other stocks, which were recently identified as being overfished. The measures implemented through this rule will satisfy these objectives, while at the same time mitigating, to the extent practicable, the impacts on the fishing community. As indicated by the EA and the comments received on the proposed rule, ending overfishing on all multispecies stocks in this interim rule would result in substantial negative consequences to the fishing industry. The Council is developing mitigating measures in Amendment 16, primarily through sector proposals, that should help to offset these negative consequences. The full range of possible mitigation measures cannot be implemented in this interim rule because they have not been fully developed and analyzed.

See Exhibit 4 at 6. The final interim rule does not expand the Gulf of Maine differential DAS area, as included in the proposed rule, but maintains the existing differential DAS area in the Gulf of Maine and the 2:1 rate. See id. at 13. NMFS considered the applicability of the mixed-stock exception to the Northeast multispecies fishery in the interim rule. See id. at 42-44 (Comment 9).

The final interim rule renders moot all of Plaintiffs' claims related to Framework 42. See Gulf of Maine Fisherman's Alliance v. Daley, 292 F.3d 84, 88 (1st Cir. 2002) ("The promulgation of new regulations and amendment of old regulations are among such intervening

events as can moot a challenge to the regulation in its original form.”). See also State Plaintiffs’ Memorandum of Law in Reply to the Federal Defendants’ Opposition to State Plaintiffs’ Motion for Summary Judgment and in Opposition to Federal Defendants’ Cross-Motion for Summary Judgment, Dkt. No. 31 (“Pl. Opp.”), at 7, citing Gulf of Maine, 292 F.3d at 88 (“Once a Framework or Amendment is replaced, it cannot be challenged.”). Plaintiffs’ case is moot in light of the interim rule, which replaces Framework 42.

This is not a case where the agency’s action is capable of repetition, yet evading review. “In order to qualify for this narrow exception to the mootness doctrine, a plaintiff must show that ‘(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.’” Gulf of Maine, 292 F.3d at 88-89, quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975). As the First Circuit has noted, “[n]ew fishing regulations are not promulgated so quickly under the Framework system that all timely legal challenges are inevitably precluded.” Gulf of Maine, 292 F.3d at 89. In this case, but for the fact that Plaintiffs delayed in prosecuting their case for over one year, their claims could have been fully litigated before the adoption of the interim rule.

Nor can Plaintiffs satisfy the second requirement, because the deficiency alleged by Plaintiffs is not likely to recur. Plaintiffs implied in their summary judgment briefs that the differential DAS provisions might have been modified if the mixed-stock exception was considered. In response to the Court’s January 26, 2009 Order, NMFS considered the applicability of the mixed-stock exception to the fishery, concluding that the exception cannot be applied, and filed a report of its findings with the Court. See Dkt. No. 46-6. Because the error

alleged by Plaintiffs has been remedied, there is no reasonable expectation that it will occur again.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court determine that they have complied with the terms of the Court's January 26, 2009 and February 23, 2009 Orders, and enter judgment in Federal Defendants' favor on Count II of Plaintiffs' Complaint. Federal Defendants further request that the Court lift the injunction suspending the 2:1 DAS counting that is required by the Court's February 17, 2009 Order. Further, the Court should dismiss Count II, and all remaining claims (Counts I, IV, V, VI, VII, and VIII), as moot because NMFS has issued an interim rule that supersedes Framework 42.

Dated: April 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non registered participants on April 9, 2009.

/s/ Kristen Byrnes Floom

