

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVATION LAW FOUNDATION,)
et al.)
)
Plaintiffs,)
)
v.) Case No. 1:00CVO1134 GK
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DONALD L. EVANS, et al.)
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Defendants.)
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_____)

**FEDERAL DEFENDANTS’ OPPOSITION TO
PLAINTIFFS’ REQUEST FOR INJUNCTIVE RELIEF
AND STATEMENT WITH RESPECT TO REMEDY¹**

I. PRELIMINARY STATEMENT

In its December 28, 2001 Memorandum Opinion (“Mem. Op.”), the Court held that defendants “have not complied with the [Sustainable Fisheries Act (“SFA”)]” and that Framework 33 of the Northeast Multispecies (Groundfish) Fishery Management Plan (“FMP”) “violates the overfishing, rebuilding, and bycatch provisions of the SFA, while Amendment 9 violates the bycatch provisions of the SFA.” (Mem. Op. at 25). Defendants recognize that additional action is required to bring the FMP into compliance with the SFA, the Magnuson-Stevens Fishery Management and Conservation Act (“Magnuson Act”), and other applicable law. There is no dispute that further regulatory action is required to implement SFA-compliant

¹ Just four days ago, plaintiffs filed a request for an amended briefing schedule in which they yet again attempt to predetermine the contents of defendants’ statement addressing remedy and plaintiffs’ request for injunctive relief. Defendants oppose plaintiffs’ request and rely upon this memorandum in opposition to plaintiffs’ proposed briefing schedule and proposed order. (See in particular note 5, *infra*). Plaintiffs may identify any inadequacies they may perceive in their response on March 15, 2002.

rebuilding programs for overfished stocks of groundfish. However, defendants' view as to the extent of the Court's equitable discretion and the nature of an appropriate response to the Court's decision differs markedly from that of plaintiffs.

As described in further detail below, defendants are moving expeditiously forward with strong interim action, expected to be in place for the 2002-03 fishing season beginning on May 1, 2002, to reduce overfishing for certain critical stocks and to track and minimize bycatch pending a measured, deliberate process to develop, analyze and implement appropriate SFA-compliant management measures to stop overfishing and rebuild overfished stocks and to minimize bycatch. The National Marine Fisheries Service ("NMFS") will demonstrate that neither the groundfish fishery nor any stock component thereof is in imminent danger of collapse and that NMFS' stepped-up approach of immediate interim action, followed by a long-term response, will not compromise the fishery's ability to recover. The measures in the planned interim action, along with their continuation through the stopgap Secretarial amendment discussed below, are expected to reduce fishing mortality on Gulf of Maine cod and Georges Bank cod by approximately 60 percent and 20 percent over the status quo respectively. NMFS' incremental approach to compliance is well within the Court's equitable discretion and, moreover, is consistent with the intent of Congress to permit interim actions that reduce, rather than necessarily fully stop, overfishing while permanent measures to end overfishing are developed.

For their part, although no motion is pending, plaintiffs press the Court to enter extensive injunctive relief establishing terms under which the fishery would be managed. (See Plaintiffs' Position as to Remedy ("Remedy Statement" or "Pls.' Remedy Stmt")). The Court should deny the injunctive relief requested by plaintiffs for several reasons. First, plaintiffs request that the

Court substitute its judgment for that of the expert agency and constrain NMFS' discretion to adopt appropriate and necessary management measures to address overfishing and bycatch. Second, plaintiffs seek to impose a schedule for immediate implementation of Amendment 9 that will not permit adequate consideration of the important conservation and economic interests at stake in accordance with applicable law. Finally, in light of the absence of demonstrated irreparable harm, the balance of the public interests favors a full, measured process to develop, analyze and implement a SFA-compliant program.

II. BACKGROUND

A. The Most Current Scientific Data Suggest That The Groundfish Complex Is Rebounding.

NMFS regularly reviews stock assessment data and monitors the status of species, and stocks within species, that are part of the fishery. The declaration of Dr. Steven A. Murawski summarizes the current best available scientific information regarding the current status of the fishery.² The data summarized are more recent than the data available at the time the parties briefed their motions for summary judgment.

Overall abundance of groundfish has fluctuated. The most recent period of decline occurred during the late 1980s and early 1990s. However, during the period 1994 to 2000, the overall abundance index for the groundfish complex approximately doubled and has reached the level of the early 1980s. (Murawski Decl. ¶ 3 & Exh. 1). Indeed, biomass for the nineteen groundfish stocks addressed in FW 33 and Amendment 9 increased by an average of 150 percent

² Dr. Murawski is the Chief of the Population Dynamics Branch at NMFS' Northeast Fisheries Science Center ("NEFSC") in Woods Hole, Massachusetts, where he is responsible for coordinating the production of stock assessments for numerous species, including those regulated under the FMP. (Murawski Decl. ¶ 1).

when the most recent five-year period (1996 to 2000) is compared to the previous five-year period (1991 to 1995). (Id. ¶ 5). (As a point of reference, the SFA was enacted in 1996). Dr. Murawski avers that the complex's rebound is primarily due to improved recruitment in combination with lower exploitation rates on a number of the species or stocks. (Id. ¶ 3).

With respect to specific species or stocks, average biomass for 13 of the 19 stocks increased during the period 1996 to 2000, when compared to the period 1991 to 1995. (Id. ¶ 5). Of the six stocks that declined during the more recent period, four have shown recent increasing trends. Those four stocks are Gulf of Maine cod, Georges Bank cod, southern windowpane, and ocean pout. (Id.) Indeed, management actions implemented under Amendment 7 appear to be yielding a positive response as a result of lower exploitation rates. (Id. ¶ 6). Georges Bank yellowtail has rebuilt to current B_{msy} estimates. Georges Bank haddock also has made substantial progress toward long-term biomass rebuilding targets. Importantly, biomass is on the upswing for all of the five major groundfish stocks (Gulf of Maine and Georges Bank cod, Georges Bank and southern New England yellowtail, and Georges Bank haddock). (Id.)

In light of the most recent stock assessment data, projected biomass levels and information about the expected progression of year classes, Dr. Murawski's expert opinion is that the groundfish complex as a whole should continue to rebuild for the next year under targets and measures established under Amendment 7 and subsequent framework actions, even if Amendment 9 overfishing definitions are exceeded during that period. (Id. ¶ 7). It is also Dr. Murawski's expert opinion that a delay in implementing measures to address SFA standards will

not jeopardize the ability of these stocks to achieve current rebuilding targets. (Id.)³

B. NMFS Is Updating Scientific Information Necessary To Support Fishery Management.

Section 301(a)(2) of the Magnuson Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). Because of the limitations of the current scientific information as a basis for management of New England groundfish, NMFS’ scientists are in the process of updating the scientific analyses required for an SFA-compliant rebuilding program.

Amendment 9 is based, in part, on a June 17, 1998 report of the New England Fishery Management Council’s (“Council’s”) Overfishing Definition Review Panel. (See Declaration of Michael P. Sissenwine, Ph.D.⁴ (“Sissenwine Decl.”) ¶ 5(a)). NMFS believes the analyses underlying Amendment 9 no longer represent the best scientific information currently available and “should be updated to reflect better and more complete data, changing circumstances in the stocks, and a greater appreciation of the technical issues involved in making medium-term (5-10 year) projections of stock status.” (Id.). NMFS’ Northeast Regional Stock Assessment Review Committee (“SARC”) has concluded that important improvements regarding the use of information on age structure and stock and recruitment could improve biological reference points on which overfishing definitions are based. They also are important to projections that are used

³ Plaintiffs’ request for injunctive relief is accompanied by no evidence of harm to the groundfish complex, and plaintiffs have vigorously opposed defendants’ efforts to discover plaintiffs’ basis for irreparable injury.

⁴ As the Director of NMFS’ NEFSC, Dr. Sissenwine is responsible for federal research that “provides the scientific basis of fisheries management * * * in the Northeast Region.” (Sissenwine Decl. ¶ 1).

as the scientific basis for assessing the effectiveness of rebuilding plans. (Id.)

In order to ensure that future management actions are based on the best scientific information available, NMFS initiated an expedited process to update analyses along the lines recommended by the SARC. The process began in early February as NMFS' NEFSC scientists assembled data and reviewed analytical methods. (Sissenwine Decl. ¶ 6). With that task done, NEFSC scientists held a three-day meeting from February 12 to 14, 2002, during which they consulted with scientists from other NMFS' regions and from outside the federal government to develop a work plan and methods for performing their analyses. (Id.) NEFSC scientists are now conducting the analyses according to the work plan developed at the meeting. They anticipate assembling the results and preparing a written report by March 8, 2002, which will then be reviewed by the outside scientists who participated in the earlier meetings. (Id.) The outside scientists are expected to provide written comments by March 15th. If those comments do not indicate a need for additional work, NEFSC scientists will make the results available to support fisheries management decisions by March 19, 2002. (Id.)⁵

III. LEGAL STANDARDS FOR ENTRY OF PERMANENT INJUNCTION

Plaintiffs have requested the Court to enter a far-ranging injunctive order.⁶ The standard

⁵ Plaintiffs' request for an amended briefing schedule demands that defendants submit Amendment 9 total allowable catch ("TAC") targets and management measures intended to achieve those TACs to the Court by March 12, 2002. (See note 1, supra). This memorandum describes the reasons defendants believe that the Court should not require implementation of Amendment 9 prior to the beginning of the 2002-03 fishing season. In any event, management options for *any* SFA-compliant rebuilding program cannot be developed and analyzed until after the NEFSC has completed its work.

⁶ Notwithstanding plaintiffs' assertion that "the parties have fully briefed the legal issues concerning relief" (Pls.' Remedy Stmt at 3), plaintiffs' remedy statement and proposed order go far beyond their cursory discussion of remedies in the summary judgment briefing (See Pls.' S.J.

for entry of a permanent injunction is essentially the same as for a preliminary injunction, except that in the former case the plaintiff must show actual success on the merits, rather than a mere likelihood of success. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987). Thus, in deciding a motion for permanent injunction, a court must consider and weigh four factors: (1) whether the party seeking the injunction has prevailed on the merits; (2) the likelihood that the moving party will be irreparably harmed without the injunction; (3) the prospect that other interested parties will be substantially injured if the injunction issues; and (4) the public interest. See Katz v. Georgetown University, 246 F.3d 685, 687 (D.C. Cir. 2001); City Fed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). It is the movant's burden to establish the required elements. Id.

For the purposes of the remedial phase of this litigation, plaintiffs have shown actual success on the merits. Nonetheless, plaintiffs still must demonstrate irreparable injury and that the balance of harms and the public interest tip in their favor. Plaintiffs' repeated protestations that "the fishery is operating illegally" do not in and of themselves merit the injunction plaintiffs seek. "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

Mem., Oct. 6, 2000, at 41-42). There they requested remand on very general terms and suggested that the agency should have six months to develop management measures. (Id.) They now propose that the agency have less than three months to do the same work and, for the first time, make extensive demands for specific management measures. In addition, plaintiffs now make the extreme request that the Court retain jurisdiction and supervise the fishery until 2009. Given the importance of these issues, the Court should conduct a thorough examination of the question of irreparable injury and the public interest.

The Court enjoys broad equitable discretion including the ability to deny as well as grant injunctive relief and to craft an order as appropriate to fully protect the range of public interests at issue. Id. at 320. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” Id. at 312 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

Irreparable injury may not be presumed, even in an environmental case. Amoco Production Co., 480 U.S. at 545. In addition, the “public interest” plays an “important role * * * in the exercise of equitable discretion.” Id. at 545. The Court must balance competing interests and weigh them against the potential environmental impact. See id. (finding that district court properly withheld injunction where contrasting interests of energy development and subsistence uses were considered in light of limited threat of irreparable injury).⁷

In the context of the Magnuson Act, the statute specifically sets forth the public interests that must be considered in the form of National Standards. Fishery management actions must balance all of the Act’s statutory standards. See 16 U.S.C. § 1851(a). Alliance Against IFQs v.

⁷ Plaintiffs rely upon Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1080 (W.D. Wash. 2000), for the proposition that “Courts in other fisheries have fashioned interim [injunctive] measures after finding that the current management of the fishery was unlawful.” (Pls.’ S.J. Mem. at 41-42). In that case, however, the court found that NMFS had not satisfied its duty under the ESA to insure that the fisheries in question were not likely to jeopardize the continued existence of the endangered Steller sea lion. Id. at 1068. See also Center for Marine Conservation v. NMFS, No. 99-00152 (D. Haw.) (orders attached as exhs. 6 and 7 to Pls.’ S.J. Mem.) (implementing injunctive measures to protect endangered sea turtles pending completion of EIS). The Supreme Court has held that the ESA’s substantive no-jeopardy mandate altered the exercise of the courts’ traditional discretion “to balance the hardships.” See Romero-Barcelo, 456 U.S. at 313-14 (discussing TVA v. Hill, 437 U.S. 153 (1978)). The present case, however, does not involve a violation of the ESA, and the Court’s duty to carefully exercise its full equitable discretion is unaltered.

Brown, 84 F.3d 343, 350 (9th Cir. 1996); American Oceans Campaign v. Daley, Civ. No. 99-982 GK, 2000 WL 33673806, at *9 (D.D.C. Sept. 24, 2000). Among those, National Standard 1 promotes the nation's important interest in conservation. Magnuson Act § 301(a)(1), 16 U.S.C. § 1851(a)(1). However, one of the main purposes of the Act is to promote domestic commercial and recreational fishing, Magnuson Act § 2(b)(3), 16 U.S.C. § 1801(b)(3), because fishing "constitutes a major source of employment and contributes significantly to the economy of the Nation." Id. at (a)(3). Accordingly, the Magnuson Act explicitly requires that the effects of any potential regulation on the fishing industry and fishing communities be considered. See National Standard 1 (achieving optimum yield from the fishery on a continuing basis); National Standard 4 (fair and equitable treatment of fishermen); National Standard 5 (efficiency in the utilization of fishery resources); National Standard 7 (minimize costs to the fishing industry where practicable); National Standard 8 ("take into account importance of fishery resources to fishing communities" to provide for the sustained participation of those communities and minimize economic impacts to those communities where practicable); Magnuson Act § 301(a)(1)-(10), 16 U.S.C. § 1851(a)(1)-(10).

Additionally, with respect to the SFA's overfishing and rebuilding requirements, Congress specifically anticipated a circumstance where, as here, no fishery management plan, plan amendment, or regulation is in place to stop overfishing.⁸ Section 304(e)(6) of the Magnuson Act, 16 U.S.C. § 1854(e)(6), authorizes the Secretary to implement interim measures to reduce overfishing and provides that such measures need not fully comply with the SFA

⁸ As discussed in more detail below, although plaintiffs seek "immediate implementation" of Amendment 9, even they do not contend that a rebuilding program can be implemented without additional regulatory action.

rebuilding requirements. See also Magnuson Act § 305(c), 16 U.S.C. § 1855(c) (authorizing emergency actions and interim measures). Section 304(e)(6) provides:

During the development of a fishery management plan, a plan amendment, or proposed regulations required by this subsection [i.e. regulations to end overfishing and to rebuild affected stocks (see § 304(e)(3)(A))] the Council may request the Secretary to implement interim measures to *reduce* overfishing under section 305(c) until such measures can be replaced by such plan, amendment, or regulations. Such measures, if otherwise in compliance with the provisions of this Act, *may be implemented even though they are not sufficient by themselves to stop overfishing* of a fishery.

18 U.S.C. § 1854(e)(6) (emphasis added). Section 304(e)(6) manifests Congress' intent that pending development, adoption, and implementation of such regulations, NMFS may employ interim measures that reduce overfishing but do not fully satisfy the rebuilding requirements of the SFA.

IV. DISCUSSION

In ruling that Framework 33 does not comply with the SFA's overfishing and rebuilding provisions, the Court stated that NMFS "can give immediate effect to Amendment 9 by adopting the fishing mortality rates under the 'F control rule' [or by calculating and adopting such rates under 'F msmc' as soon as practicable]." (Mem. Op. at 17 & n.19). However, as even plaintiffs acknowledge, adopting either rule will not in and of itself result in compliance with the SFA's requirements that the agency end overfishing and rebuild affected stocks. A rebuilding program requires detailed information about management measures that will attain the SFA goals established by the agency. The dispute arises as to what action is necessary and what process is required to develop, determine, and implement such measures. The following pages discuss the

nature of the action and process that are required, set forth defendants' plan for complying with the SFA, and respond to plaintiffs' request for broad injunctive relief.

A. Amendment 9 Cannot Be Implemented Prior to May 1, 2002.

1. Additional Regulatory Action is Required to Implement An SFA-Compliant Rebuilding Program.

When a stock is identified as overfished, the SFA requires development of a rebuilding program to “end overfishing in the fishery and to rebuild affected stocks of fish.” 16 U.S.C. § 1854(e)(3)(A). The rebuilding program may be implemented through a fishery management plan, plan amendment or other regulations. *Id.* While Amendment 9 revised overfishing definitions for five stocks and revised the definition of optimum yield in accordance with the SFA amendments to the Magnuson Act, it did not establish target levels of fishing according to those overfishing definitions nor did it identify or analyze specific management measures that would achieve levels of fishing that would end overfishing and rebuild the stocks.

The Court indicated that NMFS may be able to give immediate effect to Amendment 9 by calculating fishing mortality rates using $F_{\text{control rule}}$ or F_{msmc} as soon as practicable. (Mem. Op. at 16-17 & n.19). However, determining fishing mortality rates would not alone have any impact on fishing mortality without development and implementation of management measures tailored to achieve those rates (while also balancing the demands of the other National Standards). Management measures are the actual restrictions or conditions on fishing that implement the rebuilding program on the water by controlling the level of fishing mortality. Management measures may include such things as limitations on days-at-sea (“DAS”), closing certain areas to fishing, and requiring or prohibiting certain types of fishing gear. *See* 50 C.F.R. §

648.90(a)(2),(b)(1) (describing types of management measures that may be employed).

Determining management measures is not a simple ministerial task. (See Sissenwine Decl. ¶ 6).

The specific measures that are implemented could have significant implications for the nation's supply of fish and for the economic well-being of fishing communities.

There appears to be no dispute that NMFS cannot establish management measures to implement a rebuilding program (whether Amendment 9, insofar as it goes, or another SFA-compliant rebuilding program) without promulgating additional regulations. (See Pls.' Remedy Stmt at 9 (requesting Court to direct NMFS "to issue framework regulations [establishing management measures] by no later than May 1, 2002")). The dispute arises with respect to the nature of the action that is required and the processes the agency must satisfy to take such action.

2. The Framework Adjustment Process is not Available to NMFS.

Plaintiffs contend that the agency may use the framework adjustment process to establish and implement management measures.⁹ Indeed, Amendments 7 and 9 both contemplate that the *Council* will employ the framework adjustment process to *adjust* management measures and modify overfishing definitions in light of new scientific information. (AR 3871, 3876).

However, the framework adjustment process may not be initiated by the Secretary; framework adjustments may be initiated only by the fishery management councils.

The regulations establishing the framework adjustment process authorize the Council to recommend to the Regional Administrator "changes, adjustments or additions" to management measures as necessary to achieve the FMP's objectives. 50 C.F.R. § 648.90(a)(4). The

⁹ Remarkably, at the instance of some of the plaintiffs in this case, one court has held that a rebuilding program may not be implemented through a framework adjustment. Natural Resources Defense Council, 168 F. Supp.2d 1149, 1157-58 (N.D. Cal. 2001) (appeal pending).

regulations establish a detailed process governing the Council's development and consideration of a framework adjustment providing for, among other things, public notice and comment prior to submission of a recommendation to the Regional Administrator. Id. § 648.90(a)(3). As with a Council's submission of a FMP or plan amendment, NMFS may adopt or reject a Council recommendation for a framework adjustment. Id. § 648.90(a)(5),(6). If the Council fails to submit a recommendation, or if the Council's recommendation is legally insufficient, NMFS may adopt one of the options reviewed and not rejected by the Council *provided that* the option meets the FMP objectives and is consistent with other applicable law. Id. § 648.90(a)(6). But nothing in the framework regulations authorizes the agency to initiate and develop a framework adjustment on its own. Indeed, the framework regulations stand in stark contrast to the Magnuson Act itself, which specifically provides for Secretarial action on FMPs and Plan amendments in lieu of Council action. See 16 U.S.C. § 1854(c). The absence of similar specific authorization in the regulations for Secretarial action on framework adjustments indicates an intent to limit framework adjustments to actions initiated and recommended (or at least reviewed) by the Council.

The limitation on frameworks to Council-initiated actions is consistent with the purpose and intent of frameworks. Framework adjustments are intended to provide a streamlined mechanism to modify an existing management regime in response to current science or management needs. See id. § 648.90(a)(1),(2); see also Conservation Law Foundation v. Mineta, 131 F. Supp.2d 19, 21 (D.D.C. 2001) (“[A] Council may modify an FMP without satisfying the full review process. * * * [Framework adjustments] allow the Council to make periodic changes in certain fishing limitations (e.g., size limits, DAS [days-at-sea] limits, trip limits, areas

restrictions, etc.) more quickly than the Council would be able to using the standard notice-and-comment procedures” (internal quotation marks omitted)); Southern Offshore Fishing Ass’n v. Daley, 995 F. Supp. 1411, 1419 (M.D. Fla. 1998) (framework adjustments allow “timely annual changes to management (such as commercial quotas, trip limits, and recreational bag limits) as better data develop from FMP reporting requirements”). This tool was not intended to be used to implement significant new actions, not contemplated by the FMP, such as a new rebuilding program. Instead, in order for NMFS to promulgate regulations on its own initiative to implement a rebuilding program, it must use the authority for Secretarial action for a Plan amendment under section 304(c) of the Magnuson Act, 16 U.S.C. § 1854(c).¹⁰

3. Compliance with Statutory Procedures is Both Required and Beneficial.

Regardless of the mechanism used, promulgation of a rebuilding program must be done in compliance with all statutory obligations imposing specific substantive or procedural requirements on agency action. See Magnuson Act § 303(a)(1)(C), 16 U.S.C. § 1853(a)(1)(C) (FMPs must conform to other “applicable law”). Among the “applicable laws” with which the agency must comply are the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1456(c) (requiring consistency determination and notice to States with 90 days notice), the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1371-1389, the Endangered Species Act (“ESA”), 16 U.S.C. § 1536 (requiring federal agencies to insure that

¹⁰ To a certain extent, the debate over the agency’s authority to implement a framework adjustment on its own is academic. It makes little difference whether the agency employs a framework adjustment or a Plan amendment because, as described in the next section of this memorandum, the same statutory requirements apply to both mechanisms.

their actions are not likely to jeopardize the continued existence of endangered or threatened species), the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (requiring consideration of the effect of proposed regulations on small businesses), the Paperwork Reduction Act (“PRA”), 44 U.S.C. § 3501 et seq. (requiring OMB approval of a “collection of information”). See also Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (requiring centralized review by OMB of all regulatory actions to ensure that regulations “are effective, consistent, sensible, and understandable”). Each of these statutory schemes serves its own important, Congressionally determined purposes. The dictates of several of the most significant statutes are addressed below.

The APA requires that a rulemaking, such as promulgation of a Plan amendment, be subject to notice and comment procedures. 5 U.S.C. § 553(a)-(c); see also Magnuson Act § 303(a)-(c), 16 U.S.C. § 1854(a)-(c) (procedures applicable to Secretarial review of Council actions and to Secretarial plans). “The rule-making provisions of [the APA] * * * were designed to assure fairness and mature consideration of rules of general application.” National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (citing H.R.Rep. No. 1980, 79th Cong., 2d Sess., 21--26 (1946); S.Rep. No. 752, 79th Cong., 1st Sess., 13--16 (1945)). “One of the central purposes of the notice and comment requirements is to allow public participation in the promulgation of rules which have a substantial impact on those regulated.” National Retired Teachers Ass’n v. USPS, 430 F.Supp. 141, 147 (D.D.C. 1977); see also Brown Express, Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979) (Congress prescribed APA procedures “to ensure that the broadest base of information would be provided to the agency by

those most interested and perhaps best informed on the subject of the rulemaking at hand.”¹¹

NEPA requires the preparation of an environmental impact statement (“EIS”) to consider the impact of any “major federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The purpose of NEPA is to focus the attention of the federal government and the public on a proposed action so that the consequences of the action can be studied before the action is implemented and potential negative environmental impacts can be avoided. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); Florida Audubon Society v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996); NRDC v. Lujan, 768 F. Supp. 870, 880 (D.D.C. 1991). “[T]he broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.” Marsh, 490 U.S. at 371 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-350 (1989)). Defendants are cognizant that the Court concluded that the failure to prepare an EIS with respect to Amendment 9 did not provide a basis on which to deny plaintiffs’ motion for summary judgment. (Mem. Op. at 12 & n.11). However, one instance of statutory non-compliance does not excuse another. In the context of moving forward and

¹¹ Plaintiffs may argue that NMFS should invoke the “good cause” exception to the APA’s notice and comment requirements when implementing new rebuilding programs. See 5 U.S.C. § 553(b)(3)(B). In the first instance, plaintiffs themselves are suing defendants for their use of the “good cause” exception to promulgate a framework adjustment without notice and comment in exigent circumstances. (See Pls.’ Combined Opp. and Reply Mem. re Summ. Judg., at 7-9, Conservation Law Foundation v. Evans, Civ. No. 01-CV-10927-RGS (D. Mass.) (copy attached as Exh. 5). Moreover, the exception is available only where the agency finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). With respect to implementing comprehensive long-term rebuilding measures, notice and comment are neither impracticable nor unnecessary in the present case and, as discussed infra, the public interest supports a full process of public comment and analysis of any SFA rebuilding program.

bringing the fishery into compliance with the SFA, the interests of the parties are best served by allowing full compliance with the environmental review process established by Congress.¹²

Separate and apart from the specific statutory purposes of these legal requirements, the presence of the varied constituencies represented by the parties in this case, including all of the intervening parties, demonstrates that the implementation of an SFA-compliant rebuilding program in the fishery is a matter of great public interest and importance. As the Court recognizes, “the 10 standards set forth in the statute involve a great many interests, many of which are not easily resolved.” (Status Conference, January 25, 2002, Transcript at 24). Indeed, the nature of both short-term and long-term solutions and the type of measures that should be employed already has engendered a great deal of dispute and contentiousness. (Compare, e.g., Pls.’ Remedy Stmt at 11 (advocating hard TACs) with Remedy Stmt. of Pl.- Int. Paul Parker et al., at 5 (opposing hard TACs); see also Declaration of Patricia A. Kurkul ¶ 22 (discussing hard TACs)). The public processes and measured pace of the administrative regulatory framework imposed by the APA, the Magnuson Act, NEPA, and other statutes provide an important opportunity to fully flesh out and balance the interests of all stakeholders.

B. The Agency’s Three-Part Plan For Achieving Full Compliance With The Rebuilding And Bycatch Provisions Of The SFA.

NMFS’ plan to achieve full compliance with the rebuilding and bycatch provisions of the SFA, as well as the Magnuson Act and all other applicable law, consists of three separate

¹² Some of the same plaintiffs who here appear to insist on dispensing with the NEPA process and any opportunity for public comment have in the past sued NMFS for failure to prepare an EIS on routine annual adjustments. Conservation Law Foundation v. Mineta, 131 F. Supp.2d 19 (D.D.C. 2001), or for failure to consider an adequate range of alternatives in the NEPA process for Magnuson Act regulations. American Oceans Campaign, 2000 WL 33673806, at *17.

regulatory actions. First, NMFS will immediately develop a Secretarial interim action to be implemented by May 1, 2002, to be effective for 180 days, as limited by statute. This interim action will put in place significant measures to reduce fishing effort and mortality on major groundfish stocks in the Northeast. Second, NMFS also will immediately develop a Secretarial Amendment to the FMP to be implemented before the Secretarial interim action expires in October 2002. This Amendment will continue the same or similar significant conservation measures on a longer term basis. Finally, NMFS and the Council will complete Amendment 13 to the FMP on an accelerated basis to bring the FMP into full compliance with all provisions of the SFA, the Magnuson Act, and other applicable law. Amendment 13 will be implemented in August 2003. The three components of the agency's plan are more fully described below.

1. Secretarial Interim Action.

Section 305(c) of the Magnuson Act provides:

If the Secretary finds that an emergency or overfishing exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency * * *.

18 U.S.C. § 1855(c)(1). Emergency regulations or interim measures are considered Plan Amendments for the period they are in effect. Id. subsec.(c)(3). Such regulations or measures must be published in the Federal Register and may remain in effect for not more than 180 days, with an additional 180-day extension, provided that the public has had an opportunity to comment. Id. para. (A), (B).

Pursuant to this authority, NMFS is in the process of developing and intends to publish by March 29, 2002, for implementation by May 1, 2002, an interim final rule setting forth specific

management measures to immediately and significantly reduce overfishing of Gulf of Maine and Georges Bank cod, the two groundfish stocks in most urgent need of attention. (Declaration of Patricia A. Kurkul¹³ (“Kurkul Decl.”) ¶ 4). The measures will reduce fishing mortality of other species of regulated groundfish. (Id.) The measures that will be employed have been derived from Alternative 5 of Framework 36 – a framework adjustment that was developed, analyzed and considered by the Council and the public but not finally acted upon – and will include extension of existing area closures that are about to expire, new area closures, new gear restrictions, significant DAS reductions, and new recreational fishing restrictions. (Id. & Att. A (setting forth specific measures)). With respect to bycatch, NMFS will significantly expand its observer coverage in the fishery to monitor and collect information on bycatch, as well as other biological and fishery related information, and will increase minimum mesh size. Observer coverage will be increased by approximately 1,200 days (more than double last year’s coverage) distributed across gear categories, vessel size, and fishing regions. The increased coverage is expected to provide statistically sound estimates of directed catch, non-directed catch and discards. (Id. ¶ 5).

As provided in section 305(c)(3)(B), the measures adopted in the interim action are expected to remain in effect for up to 180 days. The interim action is reasonable and consistent with applicable law because it builds on measures developed and analyzed by the Council, after public comment, for Framework 36. NMFS is in the process of preparing documents to comply with the environmental review requirements of NEPA. Because of the limited duration of the interim action, an environmental assessment (“EA”) rather than an EIS is believed to be

¹³ Ms. Kurkul is NMFS’ Northeast Regional Administrator with responsibility for the development of policy and the implementation of science and management programs for the northeastern United States, including administration of the FMP. (Kurkul Decl. ¶ 1).

adequate, and it is expected that the EA will result in a finding of no significant impact (“FONSI”). (Kurkul Decl. ¶ 6). Additionally, NMFS will prepare appropriate analyses and documentation to comply with other statutory and regulatory requirements, such as the PRA, the ESA, the MMPA, the CZMA, and Executive Order 12866. (Id.)

The measures in this interim action, along with their continuation through the Secretarial amendment discussed below, are expected to reduce fishing mortality on Gulf of Maine cod and Georges Bank cod by approximately 60 percent and 20 percent respectively over the 2001 fishing year mortality rate. (Kurkul Decl. ¶ 8).

2. Secretarial Amendment.

As indicated above, the interim action is limited in duration to 180 days. Moreover, as explained below, an additional 180-day extension likely will be insufficient to conclude the necessary processes for development and implementation of an amendment to fully comply with the SFA, NEPA and other applicable law. Accordingly, using the authority under section 304(c) of the Magnuson Act, NMFS will develop and implement a Secretarial amendment to the FMP to continue the interim action described above pending completion of a fully SFA-compliant amendment. (Kurkul Decl. ¶ 8). The measures to be implemented under the Secretarial amendment are intended to be essentially the same measures designed to reduce overfishing and monitor and assess bycatch described above. (See Kurkul Decl. Att. B (list of specific measures under consideration)). The Secretarial action will be initiated immediately and will be implemented by late October 2002, prior to expiration of the interim action described above. (Id.)

Because this action will be of longer duration than the interim action described above and

is therefore expected to have a more significant impact on the human environment than the interim action alone, NMFS will prepare a Draft Supplemental Environmental Impact Statement (“DSEIS”) to comply with the requirements of NEPA and ensure adequate public comment. The fact that the Council has already completed much of the necessary NEPA analyses will facilitate the timely completion of this action. (Id. ¶ 9). In addition, NMFS will prepare all of the necessary analyses to ensure compliance with the APA, ESA, MMPA, CZMA, PRA, and Executive Order 12866. Because a proposed rule must be prepared for this action, NMFS will complete an Initial Regulatory Flexibility Analysis at the proposed rule stage, and a Final Regulatory Flexibility Analysis at the final rule stage, to assess the impacts of this rule on small entities, as required by the Regulatory Flexibility Act. NMFS may seek waiver of the 30-day delay in effectiveness required under the APA, if necessary to implement the final rule for this action before expiration of the interim action described above. NMFS will keep the Council informed of this action, but will be fully responsible for its development and implementation. (Id.)

3. Long-Term Amendment.

Although NMFS itself intends to take the actions necessary to implement the important interim measures described above, as contemplated by Congress the third part of NMFS’ plan calls for the Council, with assistance from NMFS, to craft a long-term solution to the problem of overfishing in the fishery and ensure full compliance with all aspects of the SFA and the Magnuson Act.¹⁴ Under this plan, the Council will develop an amendment to the FMP to

¹⁴ The Magnuson Act provides for preparation of Secretarial amendments if the Council fails to develop and submit a plan after a reasonable period of time or if the Secretary disapproves or partially disapproves a revised plan. Magnuson Act § 304(c)(1)(A),(B). Thus,

establish a rebuilding program to end or prevent overfishing of all stocks of regulated groundfish and to rebuild those stocks. (Kurkul Decl. ¶ 10). In addition to developing and analyzing the management measures necessary for rebuilding, the agency will consider whether revisions to Amendment 9 overfishing definitions, status determination criteria, and rebuilding plans are appropriate based on updated scientific information and policy considerations.¹⁵ (*Id.*; Sissenwine Decl. ¶ 5 (discussing areas of concern with Amendment 9)). This comprehensive amendment will also address the Essential Fish Habitat (“EFH”) requirements of the SFA (to comply with the settlement agreement in *American Oceans Campaign v. Daley*, Civ. No. 99-982 GK (D.D.C.) (“AOC”)). (Kurkul Decl. ¶ 10).¹⁶ The amendment also is expected to continue the expanded

the Act contemplates that the Council will in the first instance remedy any inadequacies in an existing Plan. Nevertheless, Secretarial action is not likely to result in more expeditious action because of the processes required by other acts of Congress.

¹⁵ Plaintiffs appear to believe that the Court found that Amendment 9’s overfishing definitions are *required by* the SFA when, in fact, the Court merely held that Amendment 9 – as far as it goes – complies with the requirements of the SFA. (Mem. Op. at 12). Indeed, the Court explicitly recognized that NMFS may “seek to amend Amendment 9 * * * under the statutory rule-making process, provided that the new amendment complies with the SFA.” (*Id.* at 12 n.12). For several reasons, Amendment 9 should be reevaluated. First, the assumptions underlying Amendment 9 no longer constitute the “best available science” upon which fishery management must be based. (See Part II.B., *supra* at 5-6). Second, Amendment 9 is inconsistent with the National Standard Guidelines that govern all fishery management plans across the country. (Sissenwine Decl. ¶ 5(b)). The consideration of such issues, however, will not cause additional delay in development and implementation of a SFA-compliant rebuilding program. The proposed schedule calls for the Council to develop and adopt alternatives by July 15, 2002. (Kurkul Decl. Att. C). The remainder of the schedule is required to satisfy the requirements of statutory procedures.

¹⁶ As this Court is aware, the Joint Stipulation and Order in AOC on December 17, 2001, requires a 90-day public comment period for the draft EISs currently being prepared by NMFS for the Plan amendments addressing EFH requirements. Nevertheless, in order to expedite the development of Amendment 13 because of the exigent circumstances in this case, NMFS is proposing a schedule herein that provides for a 45-day public comment period for the EIS on the that Amendment, which is the minimum comment period permissible under NEPA and its

observer program to monitor and collect information on bycatch in this fishery. In addition, Amendment 13 will consider and implement, if necessary, specific measures to minimize bycatch, to the extent practicable, consistent with the Magnuson Act, the national standard guidelines, and other NMFS guidance. (Id.)

NMFS has established, in consultation with the Council, an extremely ambitious, but realistic, expedited schedule that calls for the Council to develop and adopt alternatives for analysis by July 15, 2002, with preparation of draft and final EISs to follow. (Kurkul Decl. ¶ 12, 13). Because the amendment is expected to have significant impacts on the human environment, it will require the preparation of a draft EIS and compliance with the statutory timelines for public input to satisfy the requirements of NEPA. The Council intends to submit the proposed amendment and final EIS to NMFS by March 14, 2003. (Id. ¶ 12). After statutorily required review, notice and comment procedures, NMFS will act on the final rule by July 23, 2003, with effectiveness on August 22, 2003. (Id.)

Importantly, the schedule contains specific critical milestones. In the event the Council is unable to meet those deadlines, NMFS will take over the action from that point in the process and will proceed with the analyses and other documents already prepared by the Council in order to complete the amendment (as a Secretarial Amendment) in roughly the same timeframe. (Id. &

implementing regulations. NMFS will have to obtain from plaintiffs in AOC – many of whom are plaintiffs in this case – an agreement to reduce the 90-day comment period to 45 days. Assuming that the AOC plaintiffs agree, the parties will modify the Joint Stipulation and Order in AOC accordingly and seek this Court’s approval of that modification. In the event that NMFS cannot obtain such agreement and/or approval, however, NMFS will have to provide for a 90-day public comment period for the EIS on Amendment 13, which will delay the schedule for the promulgation of the Amendment.

Att. C).

The Council recognizes the import of the Court's decision and has committed to act quickly to develop a new amendment. (Declaration of Thomas R. Hill¹⁷ ("Hill Decl.") ¶ 2). In order to expedite the development of alternatives, the Council anticipates using an innovative management plan development process to insure participation of a broad range of stakeholders, including the Plaintiffs. (Id. ¶ 4; Kurkul Decl. ¶ 13). Given the Council's commitment, the detailed schedule set forth by the agency, and the suasion of the Court's summary judgment decision, the Court may have confidence that the Council and NMFS will put forth a diligent effort to complete Amendment 13 as described in the accompanying declarations.

V. PLAINTIFFS' PROPOSED INJUNCTION SHOULD BE DENIED.¹⁸

Plaintiffs' Remedy Statement sets forth a request for broad injunctive relief. Among other things, plaintiffs request that the Court order NMFS to implement Amendment 9 and impose "certain measures necessary to prevent overfishing" no later than May 1, 2002.

Defendants have explained why full implementation of a rebuilding program under Amendment 9 in time for the 2002-03 fishing season is neither practicable nor desirable.

Instead, defendants propose, as discussed above, to phase in implementation of an SFA-compliant rebuilding program, beginning with immediate measures to reduce overfishing and

¹⁷ Mr. Hill is Chairman of the New England Fishery Management Council and is responsible for overseeing the administration of the Council. (Hill Decl. ¶ 1).

¹⁸ Several of the intervening parties have submitted memoranda that address the question of remedies in general terms, but none of them have specifically requested injunctive relief or provided a proposed order as have plaintiffs. Accordingly, defendants will reserve their responses to any proposals by the intervenors until the final briefing date established by the Court for March 22, 2002.

followed by longer term action to properly develop, analyze and implement a Plan amendment that will implement management measures necessary for rebuilding, as well as any revisions to overfishing definitions, status determination criteria, and rebuilding plans that may be appropriate based on updated scientific information and policy considerations. The Plan amendment will also include additional measures to monitor, assess, and, to the extent practicable, minimize bycatch.

A. The Court Should Deny Plaintiffs’ Request To Circumscribe The Agency’s Discretion To Adopt An Appropriate Suite Of Management Measures By Prescribing Specific Requirements That Are Inappropriate Or Unnecessary.

Plaintiffs’ Remedy Statement requests specific measures that plaintiffs apparently believe are necessary or appropriate for implementation in the fishery. Specifically, plaintiffs request that NMFS implement additional observer coverage, develop and implement a plan for the use of a Vessel Monitoring System (“VMS”), implement a hard quota or total allowable catch (“TAC”) level for each groundfish stock, and monitor and minimize bycatch. NMFS strongly believes that the specific measures necessary to achieve the specified goals of the FMP should be developed by the Council and NMFS, and that the measures and the process should comply with all applicable laws. By requesting the Court to prescribe specific management measures – for example, mandatory VMS, hard TACs, specific levels of observer coverage – for inclusion in the rebuilding program and future bycatch provisions of the FMP, plaintiffs’ proposal deprives the agency of its discretion to adopt an appropriate suite of measures and violates applicable law as discussed above.¹⁹

¹⁹ On February 5, 2002, defendants served plaintiffs with interrogatories and requests for production of documents intended to ascertain the basis for plaintiffs’ contention that such measures are required. The time for plaintiffs’ responses has not yet run. Defendants reserve the

1. It is the Province of NMFS and the Council to Determine Specific Management Measures.

Congress charged NMFS and the fishery management councils with the responsibility for developing, analyzing and adopting fishery management plans, including rebuilding program measures to stop overfishing and rebuild overfished stocks. Magnuson Act §§ 303, 304(e), 16 U.S.C. §§ 1853, 1854(e); see also Commonwealth of Massachusetts v. Daley, 170 F.3d 23, 31 (1st Cir. 1999) (balancing the Magnuson Act’s “conflicting objectives is primarily for the Secretary”). Where, as the Court has found here, an agency has not fulfilled its statutory obligations, the proper course is remand to the agency with direction to complete such action as the statute may require. 5 U.S.C. § 706. Although it is within the Court’s power to impose a reasonable schedule for compliance, the Court should not “intrude upon the agency’s realm of discretionary decision making.” Alaska Center for Environment v. Browner, 20 F.3d 981, 987 (9th Cir. 1994) (quoting opinion below at 796 F. Supp. 1374, 1379 (W.D. Wash. 1992)). The Court should be chary of imposing specific measures – even as interim relief – that are within the special province of the expert agency. See Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 476 (D.C. Cir. 1998) (declining to implement requested interim relief restricting overflights of the Grand Canyon pending full compliance with Overflights Act because court was “acutely aware of the limits of our institutional competence in the highly technical area at issue in this case”).

Indeed, even plaintiffs appear to recognize that NMFS should, in the first instance, be afforded the opportunity to determine what suite of measures should be adopted in the fishery.

right to supplement their arguments regarding the necessity for these measures in the event that plaintiffs rely upon additional support currently unknown to defendants.

As counsel for plaintiffs argued in opposition to the motions to intervene:

[E]xactly what management measures will be used and what allocational decisions will be made in implementing those deadlines and those conservation requirements will be the province of the agency on remand in a rulemaking as is the normal state of affairs in such an administrative law case.

(Status Conference, Jan. 25, 2002, Transcript at 10 (argument of Eric A. Bilsky); see also Pls.’ Response to Joint Motion for Order of Reference, Feb. 6, 2002, at 7 (“The Government must, in its role as fisheries regulator, generate and analyze proposed management measures * * *.”)). Yet, strikingly, plaintiffs themselves advocate specific measures.

After remand and promulgation of appropriate regulations (as to both interim and long-term actions) the Court may, if necessary, review the agency’s action under the appropriate substantive standards according to the procedures for judicial review established by the Magnuson Act and the APA.

2. The Measures Plaintiffs Request Are Not Necessary Or Appropriate.²⁰

First, plaintiffs seek increased observer coverage at a level of 10% to be implemented by May 1, 2002. (Pls.’ Remedy Stmt. at 13). Although increased observer coverage is needed to obtain better estimates of bycatch and discards, arbitrarily requiring a specific level of observer coverage is not particularly useful because sample size of the observations, rather than the percentage of observer coverage, is the statistically important factor for achieving scientifically valid estimates of bycatch. (Sissenwine Decl. ¶ 8; Kurkul Decl. ¶ 15). Accordingly, NMFS is

²⁰ Although defendants do not at this time respond to the various and often conflicting positions of the intervening parties, the extent of dissension among the parties about appropriate management measures, however, supports development, analysis and selection of such measures through a measured, deliberate rulemaking proceeding with ample opportunity for public input.

committing substantial additional resources to its observer program for implementation by May 1, 2002. (Kurkul Decl. ¶ 5). As discussed above, observer coverage will be more than doubled over previous levels. (Id.) Although NMFS' scientists are in the process of determining the precision of estimates that will result from the increased level of observer coverage (Sissenwine Decl. ¶ 8), defendants expect the significantly expanded observer program to achieve statistically meaningful results. (Id.; Kurkul Decl. ¶ 15).

Next, plaintiffs request that NMFS, within three months of the Court's order, develop a plan for use of a two-way VMS data collection system for every vessel with a groundfish permit and on all other vessels with a "significant" level of groundfish bycatch, to be implemented within seven months of the Court's order. (Pls.' Remedy Stmt at 11-12). According to plaintiffs, VMS is necessary to monitor and enforce TACs, bycatch mortality, DAS, trip limits and area closures. (Id.)²¹ Although NMFS is committed to expanding the use of VMS in the fishing industry, it is not necessary or appropriate to require implementation of such a complex system through a short-term interim action.

Reporting of bycatch is currently required of all federally permitted vessels fishing in fisheries managed by the Council, including the groundfish fishery. (Kurkul Decl. ¶ 18). Vessels must submit to NMFS a detailed Fishing Vessel Trip Report ("FVTR") reporting the total poundage of all species caught, both landed and discarded. (Id.). Although failure to report or

²¹ Without conceding the qualifications of plaintiffs' declarant, Dr. Ellen Pikitch, as an expert, defendants note that her averments regarding the utility of VMS hardly constitute expert opinion. Dr. Pikitch asserts that VMS "*can* effectively monitor vessel location and assist in the enforcement of closed area restrictions" and "*would* provide a two-way communication system." (Pikitch Decl. ¶ 14 (emphasis added)). These general statements do not support plaintiffs' contention that VMS is *necessary* to monitor and enforce TACs, bycatch mortality, DAS, trip limits and area closures.

misreporting may occur on FVTRs, there is no reason to believe that requiring vessels to report discard information through VMS e-mail messaging would provide any greater veracity since the quality of the data reported under either method is dependent on the honesty and accuracy of the person reporting that information. (Id.) In addition, NMFS uses information obtained from the observer program to audit information collected through the FVTR system. (Id.)²² Similarly, DAS are tracked primarily through a call-in system, whereby vessels start their DAS clock by calling in prior to leaving port, and stop their DAS clock by calling out of the DAS program after returning to port. (Id. ¶ 19). While VMS is useful in determining where a vessel is fishing or has fished, a VMS requirement would not directly improve the monitoring of trip limits. NMFS enforces trip limits at the dock and by investigating FVTRs and landings data submitted through Dealer Reports. (Id. ¶ 20). Lastly, there is no basis upon which to believe that enforcement of closed areas has been a major problem. (Id. ¶ 21). Implementation of a VMS program such as plaintiffs demand would cost the government and the industry approximately \$ 9,000,000, with additional ongoing usage costs to be borne by NMFS or fishermen. (Kurkul Decl. ¶ 17). Given the costs associated with the scope of implementation asked for by the Plaintiffs, and the availability of other less expensive means of acquiring information, the Court should not tie NMFS' hands by prescribing such an expensive program without permitting the agency to analyze the alternatives.

Plaintiffs also request that the Court order NMFS to implement hard TACs as a backstop management measure to ensure that the individual groundfish TACs established for each fishing

²² NMFS' Northeast Region is already operating an Interactive Voice Response (IVR) reporting system for fisheries that use hard TACs for management. This system provides for timely reporting without the enormous costs associated with VMS. (Kurkul Decl. ¶ 17).

year would not be exceeded. (Pls.’ Remedy Stmt at 11). While hard TACs can be an effective management measure, the use of a hard TAC quota monitoring system in multispecies fisheries is complex because vessels may catch multiple groundfish species during each fishing trip. (Kurkul Decl. ¶ 21). Once the fishery for a species or stock is closed due to attainment of a hard TAC, vessels may continue to fish on the remaining allowable species, resulting in discarding of the prohibited fish and thereby undermining efforts to minimize bycatch. (Id.) Given the complex issues surrounding the development of a successful and non-wasteful hard TAC system, careful consideration, analysis, and development is required and implementation within the timeframe proposed by plaintiffs simply is not feasible. (Id.)

Finally, plaintiffs request the Court to order NMFS to set bycatch TACs for all managed and non-managed species. In recent years, measures promulgated under the FMP to address bycatch have been extensive. (Kurkul Decl. ¶ 22). For example, several gear restrictions have been implemented that are designed to allow escapement of smaller fish. See 50 C.F.R. § 648.80. The multispecies regulations currently prohibit all vessels from fishing in any fishery in the exclusive economic zone (“EEZ”), from the Canadian border through southern New England, where the amount of regulated species (i.e., regulated under the FMP) is equal to or greater than 5 percent of the total catch, unless the vessel is fishing under a multispecies or scallop DAS. 50 C.F.R. § 648.80(a)(7); see also id. §§ 648.81 (closed areas), 648.86 (possession limits), 648.87 (marine mammal bycatch). NMFS also is working with the industry through cooperative research programs and experimental fisheries to encourage the development and testing of new gear designs that will significantly reduce bycatch. (Kurkul Decl. ¶ 22). Moreover, as discussed above, the interim Secretarial action and Secretarial amendment and the longer term Plan

amendment will contain additional measures to minimize bycatch. (Kurkul Decl. ¶¶ 22a, 4, 10). The Court should not, however, constrain NMFS' discretion by requiring the agency to set bycatch TACs for all managed and non-managed species.

The forgoing discussion merely provides examples of the types of measures that NMFS may employ and the nature of the considerations that must be carefully analyzed. As the Director of the NEFSC explains, "[t]he difficult question that fishery management authorities deal with is the identification of the appropriate suite of management measures to achieve intended results." (Sissenwine Decl. ¶ 6). Congress has designated NMFS as the expert agency charged with the development, analysis and selection of those measures. The Court should reject plaintiffs' effort to constrain the agency's discretion to do so.

B. Plaintiffs' Request That the Court Retain Jurisdiction And Supervise the Fishery Until 2009 Should Be Rejected.

Finally, plaintiffs make the extreme demand that the Court retain jurisdiction until overfished stocks in the groundfish complex are rebuilt to B_{msy} . (Pls.' Proposed Order ¶ 10). Generally, the SFA provides that overfished stocks should be rebuilt as soon as possible, but in a period not to exceed 10 years. Magnuson Act § 304(e)(4)(A), 16 U.S.C. § 1854(e)(4)(A). Since the ten year time frame began in 1999, plaintiffs apparently contemplate that the Court potentially will retain jurisdiction until 2009. It is not clear why they believe continuing jurisdiction is necessary even beyond the time that defendants implement an SFA-compliant amendment. The Court should summarily reject plaintiffs' request for continuing jurisdiction.

VI. IN LIGHT OF THE ABSENCE OF DEMONSTRATED IRREPARABLE HARM, THE BALANCE OF THE PUBLIC INTERESTS FAVORS THE AGENCY'S PROPOSAL FOR INCREMENTAL ACTION TO COMPLY WITH THE COURT'S DECISION.

Defendants' acknowledge that their plan for compliance with the Court's decision does not result in immediate full compliance with all aspects of the SFA and the Magnuson Act. Permitting NMFS to proceed according to that plan is, however, well within the Court's equitable discretion. (See supra Part III). Moreover, in light of the absence of irreparable harm, a stepped-up approach to compliance best balances the public interests by providing important additional protection to the groundfish complex while permitting a deliberate process that allows for full consideration of the alternatives for a SFA-compliant rebuilding program.

As discussed above, biomass for the groundfish complex is on the rebound. (Murawski Decl. ¶ 5). The Chief of the Population Dynamics Branch at NMFS' NEFSC concludes that the groundfish complex as a whole should continue to rebuild for the next year under targets and measures established under Amendment 7 and subsequent framework actions, even if Amendment 9 overfishing definitions are exceeded during that period. (Id. ¶ 7). A delay in implementing measures to address SFA standards pending development and implementation of an SFA-compliant rebuilding program will not jeopardize the ability of these stocks to achieve current rebuilding targets. (Id.) The additional conservation measures that will be implemented pursuant to the Secretarial interim action and the Secretarial amendment should reinforce this progress. As stated, those measures are expected to reduce fishing mortality on Gulf of Maine cod and Georges Bank cod by approximately 60 percent and 20 percent over the status quo respectively. (Kurkul Decl. ¶ 8). When the forgoing is weighed against plaintiffs' failure to present evidence about injury to the groundfish complex, plaintiffs have not satisfied their burden of establishing irreparable harm.

As all involved recognize, the public interests implicated in the nature and scope of

injunctive relief in this case are complicated and balancing them is difficult. The public interest in conservation and sustained yield in fisheries is given voice through the Magnuson Act's National Standards, as are the promotion of domestic and commercial fishing and the economic well-being of fishing communities. In light of the absence of demonstrated irreparable harm, the public interest favors a full, measured administrative process to develop, analyze and implement the management measures that will implement the SFA's rebuilding and bycatch requirements on the water.

VII. CONCLUSION

For the forgoing reason, defendants respectfully request that the Court deny plaintiffs' request for injunctive relief.

Dated: March 1, 2002

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