IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' REPLY WITH RESPECT TO REMEDY
AND RESPONSE TO MARCH 18, 2002 ORDER

TABLE OF CONTENTS

PRELIMINARY STATEMENT....1

DISCUSSION....4

I. REMAND TO NMFS TO PERMIT THE AGENCY TO PROCEED WITH ITS PLAN FOR SEQUENTIAL ACTIONS IS CONSISTENT WITH THE COURT'S REMEDIAL AUTHORITY, THE MAGNUSON ACT, AND OTHER APPLICABLE LAW. 4

A. Remand is the Proper Remedy and the Court's Authority to Order Specific or Mandatory Injunctive Relief is Extremely Constrained....4

1. Remand is the Appropriate Remedy When a Court Sets Aside Agency Action Under Section 706(2)(A) of the APA. 5

2. Plaintiffs' Proposed Order Takes the Form of a Mandatory Injunction. 8

3. The Interim Final Rule and Subsequent Plan Amendment Will Be Available for Judicial Review. 11

B. NMFS' Plan to Achieve Compliance Through Sequential Actions Consisting of Interim Measures and a Longer Term Plan Amendment is Consistent with the Magnuson Act....11

1. Interim Measures that Reduce, Rather Than Stop, Overfishing Are Authorized Under the Magnuson Act. 12

2. Allowing the Council to Prepare a Fully Compliant FMP Amendment Gives Effect to the Intent of Congress. 15

C. NMFS Must Comply With "Other Applicable Law."....16

1. The Magnuson Act Emergency Rulemaking Provision and the APA "Good-Cause" Exception Do Not Permit Promulgation of a Statutorily Compliant Plan Amendment In This Case....16

2. NEPA Compliance is Required. 19

II. THE COURT SHOULD TAKE INTO ACCOUNT THE CURRENT BEST AVAILABLE SCIENCE ON STOCK STATUS AND BIOLOGICAL REFERENCE POINTS. 21

A. The Best Scientific Information Available Suggest That The Groundfish Complex Is Rebounding And Will Not Be Irreparably Harmed By A Delay To Permit Development Of A New Plan Amendment....21

B. Further Fishery Management Action Should Be Based On The Biological Reference Points And Projection Models Recently Completed By Agency Scientists. 24

III. RESPONSE TO MARCH 18, 2002 ORDER. 25

IV. PLAINTIFFS' SPECIFIC REMEDIAL REQUESTS ARE WITHOUT MERIT. 28

A. OBSERVER COVERAGE....29

B. VESSEL MONITORING SYSTEMS ("VMS")....30

CONCLUSION....30

TABLE OF AUTHORITIES

13th Regional Corp. v. U.S. Department of Interior, 654 F.2d 758 (D.C. Cir. 1980).................. 10

American Oceans Campaign v. Daley, Civ. No. 99-982, 2000 WL 33673806
(D.D.C. Sept. 24, 2000).. 20

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001)... 6

Conservation Law Foundation v. Franklin, 989 F.2d 54 (1st Cir. 1993)...................................... 16

Environmental Defense Fund v. EPA, 852 F.2d 1316 (D.C. Cir. 1988) 6

Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1976).. 9

Maine v. Kreps, 563 F.2d 1043 (1st Cir. 1977) 15

NRDC v. Daley, 209 F.3d 747 (D.C. Cir. 2000) 5, 18

National Wildlife Federation v. United States, 626 F.2d 917 (D.C. Cir. 1980) 10

Parravano v. Babbitt, 837 F. Supp. 1034 (N.D. Cal. 1993),
aff'd, 70 F.3d 539 (9th Cir. 1995) 16, 18

Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983) 6

Sierra Club v. Marsh, 692 F. Supp. 1210 (S.D. Cal. 1988)... 20

Swan v. Clinton, 100 F.3d 973 (D.C.Cir.1996)... 10

Telecommunications Research & Action v. FCC, 750 F.2d 70 (D.C. Cir. 1984).........................21

United States Interstate Commerce Commission v. SCRAP, 412 U.S. 669 (1973)...................... 19

United States v. Southern Florida Water Management District, 28 F.3d 1563 (11th Cir. 1994) ...20

Women Prisoners of the District of Columbia Department of Corrections v.
District of Columbia, 93 F.3d 910 (D.C. Cir. 1999) 9

PRELIMINARY STATEMENT

Plaintiffs' most recent brief takes a strikingly strident tone, characterizing NMFS, at turns, as *defiant*, *recalcitrant*, *intransigent*, and *contumacious*. These rhetorical flourishes attempt to divert attention from the fundamental dilemma facing the Court regarding the nature of the appropriated remedial order. On the one hand, the Court could order strict adherence to Amendment 9 to the Northeast Multispecies ("Groundfish") Fishery Management Plan ("FMP"). However, as described in the Second Declaration of Steven A. Murawski, Ph.D. ("2nd Murawski Decl."), such an approach would lead to ridiculous results. For example, under the most literal interpretation of Amendment 9 controls (the so-called "$F_{control\ rule}$"), the fishery would be allowed to catch 48,550 metric tons of Georges Bank cod when the best estimate of the population size is only 34,500 metric tons. Id., at ¶ 12. Thus, strict literal adherence to Amendment 9 would allow a harvest 1.4 times higher than the entire available population. Id. Even if the agency were to follow a less literal application of Amendment 9 controls in order to account better for current conditions of a stock (the so-called "F_{msmc}" control rule), the resulting management measures would still cause severe socio-economic, if not irreparable, impacts to the fishing industry without any biological justification. Third Declaration of Patricia A. Kurkul ("3rd Kurkul Decl."), ¶ 14. Furthermore, the imposition of such measures would come at the expense of complying with the Magnuson Act and other applicable laws and at the expense of public comment and cooperation from the fishing industry. On the other hand, the Court could follow the remedial scheme set forth in the statute itself and allow the agency to continue with its three-part process for bringing the FMP into full compliance with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") and other applicable law.

Furthermore, plaintiffs' and intervenors' tired repetition of accusations of inaction and delay ignore the concrete steps that the National Marine Fisheries Service ("NMFS") has already taken in the last ten weeks to reduce overfishing, to enhance the scientific basis for management of the New England groundfish fishery ("Fishery") and to use the statutorily provided tools to bring the FMP back into compliance with the Magnuson Act and other applicable laws. Specifically, NMFS has:

- Prepared an Interim Final Rule for publication on or before April 15, 2002, for implementation by the beginning of the 2002-03 fishing season, to reduce overfishing in the Fishery.

- Committed the funds necessary to approximately double observer coverage in the Fishery to ensure a sample of fishing trips sufficient to produce useful estimates of discards.

- Commenced and concluded an extremely ambitious, expedited effort to update biological reference points and develop projection models to provide a comprehensive, up-to-date scientific basis for fishery management, resulting in publication of a 123 page report.

- Set in motion the process necessary to implement an fully compliant rebuilding plan through expeditious promulgation of a FMP amendment that will be based on the best available scientific information and consistent with the Magnuson Act, and will be adopted in accordance with applicable procedural and substantive law.

As explained in Federal Defendants' Response to Plaintiffs' Request for Injunctive Relief and Statement with Respect to Remedy ("Defs.' Remedy Stmt"), NMFS' three-part plan to achieve full compliance is a reasonable exercise of the agency's authority under the Magnuson Act and provides for compliance with all applicable law. The Interim Final Rule expected to be published by April 15, 2002, for implementation on May 1, 2002, will reduce overfishing across the groundfish complex, and will be continued by a stopgap Secretarial

action. Meanwhile, NMFS will work with the Council to ensure development of a FMP amendment that will fully comply with the bycatch and rebuilding provisions of the Magnuson Act and ultimately address the flaws in Amendment 9. The Interim Final Rule is an appropriate exercise of NMFS' statutory authority to adopt measures that *reduce*, rather than *stop*, overfishing pending the completion of the FMP amendment and provides the most appropriate option for measures in the interim period.

The forgoing constitutes NMFS' plan for responding to the Court's December 28, 2001, Memorandum Opinion ("Mem. Op.") regarding summary judgment. It does not constitute a proposal for a remedial order. Based on the Court's finding that Framework 33 violates the rebuilding provisions of the Magnuson Act and that Amendment 9 violates the bycatch provisions of the Magnuson Act, the appropriate remedy is to remand the disapproved provisions to the agency for further administrative proceedings. Further review of the agency's action on remand should occur only after the Interim Final Rule (and eventually a full FMP amendment) has been promulgated, according to the procedures and standards of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

To the extent the Court considers entering an order directing NMFS to take specific actions on remand or enjoining the fishery to be managed in a certain way pending remand, any such order would constitute a mandatory injunction. Such an order may be entered only under the most stringent conditions, which are not applicable here. Moreover, such an injunction may be entered only on the basis of a demonstrated showing of irreparable injury. NMFS has demonstrated that the groundfish complex will not be irreparably injured by permitting the

agency to go forward with the Interim Final Rule while continuing the process to implement a fully compliant rebuilding program by the summer of 2003.

Finally, defendants provide their response to the Court's March 18, 2002 Order, requiring defendants to submit Amendment 9 total allowable catch figures ("TACs") and management measures for the 2002-03 fishing season. As explained in more detail below, TACs based on Amendment 9 no longer retain any scientific validity and, in fact, are inconsistent with National Standard 2 requiring the use of the best scientific or commercial data available. Nonetheless, defendants present TACs, see 3rd Kurkul Decl., Exhibit 1, and management measures, id., ¶¶ 11-12 and Exhibits 2-5, that represent NMFS' best efforts to comply with the Court's Order while utilizing, to the extent possible, the most current scientific data.

DISCUSSION

I. REMAND TO NMFS TO PERMIT THE AGENCY TO PROCEED WITH ITS PLAN FOR SEQUENTIAL ACTIONS IS CONSISTENT WITH THE COURT'S REMEDIAL AUTHORITY, THE MAGNUSON ACT, AND OTHER APPLICABLE LAW.

A. Remand is the Proper Remedy and the Court's Authority to Order Specific or Mandatory Injunctive Relief is Extremely Constrained.

The plaintiffs and each of the intervenors in this case have urged upon the Court a remedial plan. Each of these plans, as one would expect, differs in substance, based on the parochial interests of its sponsors. Further, each of these plans is presented in a different

fashion, whether set forth in a proposed order (Plaintiffs, Northeast Seafood Coalition ("NSC")), a declaration (Massachusetts), an attachment or exhibit (Intervenor States), or in argument in a legal memorandum (Associated Fisheries of Maine ("AFM")). Despite these differences, all of the proposals are similar in one respect: they fail to recognize the limits on the Court's authority to impose specific relief on an agency in a coordinate branch of government.

1. Remand is the Appropriate Remedy When a Court Sets Aside Agency Action Under Section 706(2)(A) of the APA.

When one slices through the rhetoric, it becomes plain that plaintiffs have failed to identify the basis of the Court's authority to enter the mandatory injunctive order that plaintiffs seek. As this Court has recognized, judicial review in this action is based on section 706(2)(A) of the APA, Mem. Op., at 9, which authorizes the Court to "hold unlawful and set aside agency action * * * found to be * * * arbitrary, capricious, an abuse of discretion, or not in accordance with law." 5 U.S.C. § 706(2)(A). The Court has concluded that "Framework 33 violates the overfishing, rebuilding, and bycatch provisions of the [Sustainable Fisheries Act Amendments to the Magnuson Act ("SFA")], while Amendment 9 violates the bycatch provision of the SFA." Mem. Op. at 25. Having "h[e]ld unlawful" Framework 33 and Amendment 9 in those respects, the proper course is for the Court to "set [them] aside," if appropriate,[1/] and to remand the

[1/] In this case, setting aside Framework 33 measures during a remand would be counterproductive because the measures provide important incremental benefits that would be lost.

matter to the agency for further administrative proceedings. See NRDC v. Daley, 209 F.3d 747, 756 (D.C. Cir. 2000).[1]

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[2] Although the discussion in this case has often focused on whether defendants have "failed to implement" Amendment 9, plaintiffs did not contend that, and the Court did not address whether, there was a basis upon which the Court should "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Plaintiffs rely on several cases for the unremarkable proposition that a court that finds an agency action unlawful may remand to the agency with direction to take further administrative action by a date certain. Sierra Club v. EPA, 719 F.2d 436, 469-70 (D.C. Cir. 1983); Environmental Defense Fund v. EPA, 852 F.2d 1316, 1331 (D.C. Cir. 1988). Plaintiffs stretch the holdings of those cases to the breaking point, however, when they argue that those cases suggest that the Court may enter plaintiffs' proposed order without reference to the traditional standards for a preliminary injunction. In neither case, did the court, as plaintiffs request here, presume to break down the final agency action into constituent parts and enjoin the agency to perform certain tasks at certain times and in certain ways that confined the agency's discretion with respect to the substantive questions at issue. An order of that nature is a mandatory injunction, not a remand.[1/]

[3/] Plaintiffs contend that the Environmental Defense Fund court's remand order requiring EPA to list mining wastes for exclusion from Resource Conservation and Recovery Act ("RCRA") requirements "is analogous" to plaintiffs' request that the Court order NMFS to identify overfished stocks pursuant to Amendment 9 within 30 days of a court order. See Plaintiffs' Combined Reply to Federal Defendants' Opposition to Plaintiffs' Request for Remedy and Opposition to Federal Defendants' Statement with Respect to Remedy ("Pls.' Remedy II"), at 15. But the court in that case did not presume to tell the agency how EPA should promulgate the regulation and what priorities it should set. Rather, it merely set deadlines for proposed and final rules. Enviromental Defense Fund, 852 F.2d at 1331.

At least plaintiffs are in the ballpark when they discuss the standards for remand. In contrast, their citation to Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), finds them sitting in the bleachers.[1/] Cobell was a class action by Indian beneficiaries of trust accounts alleging that the United States had breached its unique trust responsibilities toward Native Americans. Although the APA provided the waiver of sovereign immunity in Cobell, the basis of the claim was a breach of common law trust principles. Id. at 1094-95. The case did not involve garden variety review of agency administrative action and therefore the court's remedial power was not limited by the confines of the typical judicial review of administrative action. See id. at 1107-08 (discussing authority of federal courts to provide relief for breaches of fiduciary obligations to Indians). Moreover, in Cobell the "specific relief" in question was "relatively modest," consisting of requirements that the Departments of the Interior and Treasury develop written policies and procedures for managing trust accounts and provide the court with regular reports, and providing for the retention of jurisdiction. Id. at 1109. The D.C. Circuit specifically noted that, "consonant with the judicial policy of granting agencies that have acted in an unlawful manner 'discretion to determine in the first instance,' how to bring themselves into compliance," the district court's injunctive order "does not tell the government what these procedures must

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[4/] Plaintiffs' own parenthetical descriptions of three other cases reveal that the legal and factual issues in those cases are so remote from the present case that they have no relevance whatsoever. See Pls.' Remedy II, at 17 (citing Checkosky v. SEC, 139 F.3d 221, 222 (D.C. Cir. 1998), Marshall v. Lansing, 839 F.2d 933, 945 (3d Cir. 1988), and Greyhound Corp. v. ICC, 668 F.2d 1354, 1356 (D.C. Cir. 1981)). All of the cited cases involved an agency's repeated failure to provide a reasoned explanation for an informal adjudicatory action, and thus invoked the "rare" or "exceptional" remedy of ordering a dismissal or directing a specific factual finding on remand. None of these cases purports to constrain the agency's discretion on remand to promulgate appropriate regulations.

entail." Id. (quoting Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986)). This is in stark contrast to plaintiffs' proposed order, which purports to tell the agency exactly what its regulations must entail.

Finally, plaintiffs rely on a decision in North Carolina Fisheries Association v. Daley, 27 F. Supp.2d 650, 667 (E.D. Va. 1998), which was before the court on a motion to hold the Secretary in contempt of an earlier order requiring NMFS to issue annual summer flounder quotas "within a reasonable period of time." Id. at 652 (quoting North Carolina Fisheries Ass'n, Inc. v. Daley, 16 F. Supp.2d 647, 658 (E.D. Va. 1997)). Finding that the agency's 1997 downward quota adjustments were untimely, in violation of the earlier order as well as the Magnuson Act, the Court sanctioned the agency by increasing the 1997 quota by the amount of the untimely adjustments. Id. at 667. In the present case, NMFS is not in contempt of any clear and unequivocal command set forth in an order of the Court. Thus, sanctions are not appropriate.[1/] It is also bears noting that the nature of plaintiffs' proposed injunctive order is quite different from the sanctions issued in North Carolina Fisheries Association. There the court's order was based on simple mathematical calculations increasing the numerical quota by the amount of two untimely adjustments, largely based on a finding of apparent double-counting.

[5/] Plaintiffs imply throughout their brief that NMFS is presently in violation of the Court's dictum that "Defendants can, and must, give *immediate* effect to Amendment 9." See, e.g., Pls.' Remedy II, at 3 (citing Mem. Op., at 17 (emphasis supplied by the Court))). The Court's separate Order, however, merely granted summary judgment to the plaintiffs and set in motion the remedial phase of the litigation currently underway to determine the nature of an appropriate remedy. Defendants have never suggested that they will not (reserving their right to request reconsideration, seek a stay, or appeal) abide by any clear and unequivocal command in an order of the Court.

See id. at 667. The court did not engage in the type of judicial rulemaking that plaintiffs suggest in the present case.

2. Plaintiffs' Proposed Order Takes the Form of a Mandatory Injunction.

Although plaintiffs characterize their proposed order as "specific relief" or a "remand . . . with a *mandate* to promulgate regulations by a date certain," the proposed order goes far beyond a request for a remand and establishment of a date certain for completion of new agency action. Plaintiffs demand that the Court specify what the agency will do, how the agency will do it, what incremental actions will be taken, and when the agency will do each of these things. Not only that, but plaintiffs' proposed order requires that any future regulatory action contain specific substantive provisions, such as hard TACs, specific levels of observer coverage, and mandatory Vessel Monitoring Systems ("VMS") on all vessels. Plaintiffs attempt to mask the mandatory nature of their proposed order by arguing that each sub-provision viewed in isolation is merely an "appropriate exercise[] of the Court's power to require compliance with the law by a date certain." Pls.' Remedy II, at 16. When viewed as a whole, plaintiffs' proposed order has the character of a mandatory injunction.[1/]

[6/] The intervenors take various approaches to the question of remedies. Some, such as AFM and Parker have properly refrained from setting forward specific proposals, perhaps recognizing that remand is the appropriate remedy. Others, however, such as Massachusetts and the Intervenor States, have submitted extremely detailed proposals for management of the Fishery, but have failed to explain how those proposals will be translated into an order by the Court, or on what authority they will be implemented in the Fishery. Finally, NSC has submitted an extremely detailed proposed order that appears to contemplate the type of structural injunction generally reserved "to effect institutional change" in prison reform or civil rights litigation. See Women Prisoners of the District of Columbia

When considering whether to enjoin agency action, the traditional test for entry of injunctive relief applies. See Fund for Animals v. Frizzell, 530 F.2d 982, 986 (D.C. Cir. 1976). In considering the entry of an injunction, the Court must evaluate the appropriateness of using its equitable powers based on the facts of the particular case, including an examination whether irreparable harm would result and the balance of the public interests. See Defs.' Remedy Stmt, at 6-9 (discussing *inter alia* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)).

Moreover, entry of plaintiffs' proposed order, or an order requiring the agency to adopt the proposal of any of the intervenors, would constitute a mandatory (rather than prohibitory) injunction. "An action purportedly requesting a mandatory injunction against a federal official is analyzed as one requesting mandamus." National Wildlife Federation v. United States, 626 F.2d 917, 918 (D.C. Cir. 1980). Because of the potential for conflict between coordinate branches of government, mandamus is an "extraordinary remedy." 13th Regional Corp. v. U.S. Department of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980). The courts "have limited its application to 'only * * * the clearest and most compelling cases.'" Id. (quoting Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974)); see also Swan v. Clinton, 100 F.3d 973, 976-77 & n. 1 (D.C.Cir.1996) (noting that mandatory injunction against Executive is appropriate only if injunction will compel performance of "ministerial" rather than discretionary

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Department of Corrections v. District of Columbia, 93 F.3d 910, 948 (D.C. Cir. 1999) (Rogers, J., concurring in part and dissenting in part).

obligation). In order for the court to exercise its discretion, the act sought to be compelled must be a ministerial duty and the obligation to act must be peremptory and clearly defined. Id. "'The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'" Id. (citing McLennan v. Wilbur, 283 U.S. 414, 420 (1931)).

Plaintiffs have made no showing that their proposed mandatory injunction satisfies these standards. The actions that they ask the Court to order are not ministerial actions. While there may be a requirement in the statute to take some action, the plaintiffs can point to no statutory provision which clearly defines and demands the specific action that plaintiffs request. Clearly, the Court has the power to enjoin or set aside regulations issued by the Executive Branch. The Court also has the power to require the Executive to make certain decisions by a date certain. But the Judicial Branch is constitutionally precluded from dictating the terms of those decisions to the Executive Branch. Accordingly, the plaintiffs request for just this type of an impermissible mandatory injunction must be rejected.

3. The Interim Final Rule and Subsequent Plan Amendment Will Be Available for Judicial Review.

As has been discussed, NMFS is moving forward with both an Interim Final Rule to reduce overfishing and a plan supporting the Council's further action, on an expedited basis, on a full-scale FMP amendment to fully implement an acceptable rebuilding program. NMFS' authority to take interim action is discussed in further detail in the next Part of this memorandum.

To the extent that further review of these actions is required, that review should be conducted in the context of the judicial review provisions of the APA. 5 U.S.C. §§ 701-706. In other words, after the agency has issued its Interim Final Rule, interested persons, including plaintiffs and intervenors, may bring their concerns with the substance of the management measures before the Court within 30 days for review based on the administrative record.[1/] Similarly, judicial review will be available when the agency adopts the FMP amendment. The Court should not review in advance the agency's exercise of its discretion to adopt appropriate policies on remand.

B. NMFS' Plan to Achieve Compliance Through Sequential Actions Consisting of Interim Measures and a Longer Term Plan Amendment is Consistent with the Magnuson Act.

Plaintiffs and several of the intervenors mischaracterize the nature of NMFS' plan to achieve compliance with the rebuilding and bycatch provisions of the Magnuson Act by focusing solely on the Interim Final Rule and ignoring NMFS' long-term plan for full Magnuson Act compliance by a FMP amendment. Moreover, plaintiffs and the intervenors utterly fail to acknowledge – indeed, for the most part, they do not even mention – the agency's statutory authority to take interim action that falls short of full compliance with the rebuilding provisions of the Magnuson Act. The agency's stepped up plan must be viewed as a comprehensive package

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[7/] The Magnuson Act requires that any petition for review of an implementing regulation, such as the Interim Final Rule, must be brought within 30 days of the publication of that regulation in the Federal Register. 16 U.S.C. § 1855(f)(1).

designed to achieve full compliance with the Magnuson Act as soon as possible in a manner consistent with all applicable law.

1. **Interim Measures that Reduce, Rather Than Stop, Overfishing Are Authorized Under the Magnuson Act.**

Defendants have been candid from the outset that the Interim Final Rule does not implement Amendment 9 and does not constitute an Magnuson Act-compliant rebuilding program. Indeed, they do not intend that it do so. The Interim Final Rule is, however, authorized by the Magnuson Act, as amended by the Sustainable Fisheries Act.

Section 304(e)(6) of the Magnuson Act 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). Notwithstanding the fact that Amendment 9 established overfishing definitions for five stocks, it did not establish target levels of fishing ("TACs") in accordance with those definitions nor did it identify or analyze specific management measures to reduce overfishing and rebuild the stocks in question. See Defs.' Remedy Stmt, at 11-12. Although they attempt to tiptoe around the issue, none of the other parties has disputed

or can dispute that additional regulatory action is required to establish TACs and management measures. In the absence of such TACs and management measures, no "fishery management plan, plan amendment, or proposed regulations * * * to end overfishing in the fishery and to rebuild affected stocks" currently exists. 16 U.S.C. § 1854(e)(3)(A).

NMFS' phased-in plan to use an interim action to *reduce* but not stop overfishing pending development of a fully compliant FMP amendment is consistent with the authority conferred by section 304(e)(6) and 305(c).[1/] The use of sequential actions furthers the intent of Congress in two important ways. It gives effect to the Congressionally authorized process for filling a gap in the management of overfished stocks by making use of the interim mechanism and it permits the Council to develop the rebuilding program in the first instance, as contemplated by Congress.[1/]

[8/] Section 305(c) of the Magnuson Act allows the Secretary to promulgate emergency regulations or interim measures necessary to address the emergency or overfishing. 16 U.S.C. § 1855(c).

[9/] The Intervenor States report that they "have engaged in considerable dialogue in an effort to develop management measures that are both effective and equitable." Response of Intervenors the State of Maine, State of New Hampshire, and State of Rhode Island to the Federal Defendants' Opposition to Plaintiffs' Request for Injunctive Relief and Statement with Respect to Remedy ("States Remedy II"), at 17 & n.6. This announcement is remarkable when one considers that such dialogue is exactly the

purpose for which Congress established the fishery management councils and provided that each State's fishery management official be a voting member. See 16 U.S.C. § 1852(b)(1)(A).

The Interim Final Rule itself is a reasonable use of NMFS' interim authority. Plaintiffs and several of the intervenors argue that the interim action's focus on Gulf of Maine cod and Georges Bank cod "neglects" other groundfish stocks. See, e.g., Pls.' Remedy II, at 31. To the contrary, although the measures under consideration for the Interim Final Rule are primarily designed to address overfishing of the cod stocks, the effort reduction measures and gear restrictions targeted at cod will provide significant protection to all groundfish stocks because many of the groundfish species commingle. 3rd Kurkul Decl., ¶ 5. For example, the Interim Final Rule is expected to reduce fishing mortality by 32% for American plaice, 24 % for Southern New England flounder, and nearly 16 % for Cape Cod yellowtail flounder. Id.[1/]

There also is no basis for the assertion that NMFS is attempting to implement Amendment 7. Simply put, at this point, Amendment 7 has no relevance. The Interim Final Rule will be promulgated pursuant to the authority conferred by section 304(e)(6) and 305(c) of the Magnuson Act. To be sure, the measures proposed have been *derived* from alternatives

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[10/] Several of the intervenors argue that the Interim Final Rule is arbitrary and capricious, in violation of National Standard 2, because it is not based on measurable scientific standards. (See, e.g., Parker Remedy II, at 8 & n.9). Because the Interim Final Rule is intended to reduce overfishing, rather than stop overfishing according to a rebuilding program, the fishing mortality rate reductions intended are not explicitly related to MSY reference points or the rate of rebuilding. Thus, the results of the scientific updating process were not needed to design and analyze the proposed interim action. Second Declaration of Michael P. Sissenwine, Ph.D. ("2nd Sissenwine Decl."), ¶ 11.

considered for Framework 36, which was an action by the Council based on Amendment 7. However, the fact that measures similar to those proposed for the Interim Final Rule were analyzed and vetted by the Council commends, rather than condemns, them. It is by building on the work done by the Council that NMFS can implement these measures consistent with applicable law and the Court can be assured that there has been a basic level of public participation through the Council process. Declaration of Patricia A. Kurkul ("1st Kurkul Decl."), ¶ 3.

Moreover, plaintiffs are flatly wrong when they state that "NMFS has proposed doing nothing more than promulgating Framework 36." Pls.' Remedy II, at 3. The Interim Final Rule is expected to accelerate the implementation of conservation measures to achieve the full conservation benefits in one year that would have been implemented over two years in Framework 36. 1st Kurkul Decl., ¶ 3. In addition, the Interim Final Rule will include additional measures to reduce fishing mortality that were not included in the Framework 36 process. Id.

2. Allowing the Council to Prepare a Fully Compliant FMP Amendment Gives Effect to the Intent of Congress.

As described in detail in Defendants' Remedy Statement, NMFS and the Council will complete an Amendment to the FMP on an accelerated basis to bring the FMP into full compliance with all provisions of the Magnuson Act, including the SFA Amendments, and other applicable law. The Amendment will be implemented in August 2003. The New England Fishery Management Council ("Council") will be responsible, in the first instance, for

development of the FMP Amendment, with support provided by NMFS as required. In the event that the Council fails to meet certain critical deadlines, NMFS will take over the process. See Defs.' Remedy Stmt, at 21-24.

Placing the responsibility with the Council gives effect to the intent of Congress that the fishery management councils initially develop, analyze and recommend fishery management plans, including program measures to stop overfishing and rebuild overfished stocks. Magnuson Act §§ 303, 304(e), 16 U.S.C. §§ 1853, 1854(e); see also Maine v. Kreps, 563 F.2d 1043, 1045 (1st Cir. 1977) (Councils established to "coordinate the various economic, ecological, and other interests in fish stock"). Indeed, the Magnuson Act, provides for the Council to have an opportunity to revise even disapproved plans or plan amendments. See 16 U.S.C. § 1854(a)(3),(4). Although the Secretarial action is authorized if the Council fails to do so "after a reasonable period of time", id., at subsection (c), consistent with the intent of Congress, the Council should be provided a reasonable period of time to prepare an statutorily compliant amendment in the present case. See Conservation Law Foundation v. Franklin, 989 F.2d 54, 60 (1st Cir. 1993) (statute requires that Council be given a "reasonable amount of time" to cure deficiencies and determination of what is a "reasonable amount of time" is within the discretion of the Secretary).

C. NMFS Must Comply With "Other Applicable Law."

Further regulatory action must comply with other "applicable law," including but not limited to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. See Defs.' Remedy Stmt, at 14-17

(discussing 16 U.S.C. § 1853(a)(1)(C), and other statutory and regulatory requirements). Apparently, plaintiffs are willing to dispense with these requirements for public notice and comment and environmental analyses when – and only when – it suits their needs. See Defs.' Remedy Stmt. at 16 n.11, 17 n. 12 (describing recent cases in which plaintiffs have argued that public notice and comment are required despite an urgent need to adopt protective measures in the fishery). NMFS, however, must comply with all applicable law.

1. The Magnuson Act Emergency Rulemaking Provision and the APA "Good-Cause" Exception Do Not Permit Promulgation of an Statutorily- Compliant Plan Amendment in This Case.

Relying on Parravano v. Babbitt, 837 F. Supp. 1034 (N.D. Cal. 1993), aff'd 70 F.3d 539 (9th Cir. 1995), plaintiffs argue that NMFS may invoke emergency rulemaking authority to implement a rebuilding program and, relying upon a finding that an emergency exists invoke the "good-cause" exception to the APA. See Pls.' Remedy II, at 21). 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 or overfishing * * *.

16 U.S.C. § 1855(c)(1). The agency's Policy Guidelines for the issuance of emergency rules provide that emergency action may be taken if (1) an emergency exists that results from recent, unforseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the immediate benefits of

emergency regulations outweigh the value of advance notice, public comment and deliberative consideration of the impacts under the normal rulemaking process. 62 Fed. Reg. 44421, 44422 (Aug. 21, 1997).

None of the criteria for finding an "emergency" are satisfied in this case.[1/] The putative emergency – the absence of a statutorily compliant rebuilding program – is not recent or unforseen, since all parties and the Council have long recognized that no fully compliant rebuilding program setting forth management measures was in place. Next, there is no serious conservation or management problem that justifies emergency rulemaking. A delay to permit promulgation of a fully compliant FMP Amendment should not jeopardize the ability of multispecies stocks to achieve current rebuilding targets assuming the implementation of the Interim Rule. See Part III.A, infra, and Defs.' Remedy Stmt, at 4-5. Indeed, this factor distinguishes this case from Parravano, in which the Court upheld the agency's use of emergency rulemaking and invocation of the APA's "good-cause" exception to reduce salmon quotas based on the agency's finding that a failure to act promptly "would substantially impact the restoration and maintenance of a viable Klamath chinook population." 837 F. Supp. at 1044; see also, id. at 1041 (action necessary to avoid "overfishing and further deterioration of chinook stock").[1/] Finally, the benefits to be gained by allowing public comment on an action of

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[11/] The absence of an emergency justifying emergency rulemaking does not alter the agency's authority to implement interim measures to reduce overfishing, pursuant to sections 305(c) and 304(e), 16 U.S.C. §§ 1855(c), 1854(e).

[12/] It is also important to note that the Parravano court was merely approving the Secretary's use of emergency powers. The Parravano court did not, nor could it, require the Secretary to use those

this magnitude outweigh the need to provide further protection to the resource. See Defs.' Remedy Stmt, at 17. For these same reasons, the APA "good-cause" exception also is inapplicable. See id. at 16 n.11.

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powers in the first instance.

Plaintiffs also analogize to an emergency interim rule amending the 2001 summer flounder quotas. 65 Fed. Reg. 47648 (Aug. 2, 2000). On appeal from a challenge to a prior rule, the D.C. Circuit had remanded the matter to the agency "for further proceedings consistent with [the Court's] opinion." NRDC v. Daley, 209 F.3d at 756. No such order currently exists in this case.[1/] More importantly, invocation of the emergency rulemaking authority under section 305(c) was warranted, not because of the D.C. Circuit's opinion, but because delay in further action would affect the relevant fishery management council's ability to allocate fishing quotas among the different states involved. 65 Fed. Reg. at 47649. Notably, NMFS did not invoke the occurrence of overfishing as a basis for emergency action. Moreover, the rule "merely establishe[d] a framework designed to guide the Committee and Council in the specification process for the 2001 fishery and does not impose requirements on members of the public with which they have to comply." Id. Thus, in contrast to the present case, there existed an emergency that presented serious management concerns and the use of normal rulemaking procedures did not outweigh the need for immediate action given that there would be further opportunity for advance notice, public comment and deliberative consideration.[1/]

[13/] As discussed above, a remand for further administrative proceedings consistent with this Court's December 28, 2001, order is the only appropriate remedy in this case. As the D.C. Circuit implicitly recognized in NRDC, it is up to the agency in the first instance to determine which administrative proceedings are appropriate. The D.C. Circuit did not require emergency rulemaking or proscribe in anyway the manner in which the agency was to conduct its affairs on remand.

[14/] Indeed, as described in more detail in Defs' Remedy Stmt, at 16 n. 11, the plaintiffs themselves are suing NMFS in the District of Massachusetts asserting that the promulgation of fishery management measures without prior notice and comment violates the Magnuson Act. See Pls' Combined Opp. and Reply Mem. re. Summ. Judg., at 7-9, Conservation Law Foundation v. Evans, Civ. No. 01-CV-

2. NEPA Compliance is Required.

Similarly, Plaintiffs assert that the Court should compel defendants to move forward without complying with the requirements of NEPA. However, in passing the Sustainable Fisheries Act amendments to the Magnuson Act, Congress did not exempt NMFS from NEPA. "When Congress desires exceptions to be made to the impact statement requirement under the NEPA, express exemption is provided." United States Interstate Commerce Commission v. SCRAP, 412 U.S. 669, 710, n. 7 (1973) (discussing Atomic Energy Commission's authority to grant a temporary operating license under certain circumstances without undertaking NEPA compliance). Furthermore, NEPA's emergency exemption does not permit NMFS "to waive NEPA review," as plaintiffs argue. Pls.' Remedy II, at 23. Rather, an agency may seek permission from the Council on Environmental Quality ("CEQ") to take an action without complying with NEPA in emergency circumstances, and leaves the determination whether an emergency exemption is warranted to CEQ. 40 C.F.R. § 1506.11. For the reasons described above, no emergency warranting a NEPA exemption exists. Regardless of the existence of an emergency, NEPA does not give a plaintiff any right to compel agency action that is otherwise subject to the requirements of the statute. Rather, the statute requires that CEQ review a particular situation in response to a request from a federal agency and determine whether an exemption is warranted.

10927-RGS (D.Mass.) (copy attached as Ex. 5 to Defs' Remedy Stmt).

The cases upon which plaintiffs rely for their argument that the Court should compel NMFS to act without complying with this "applicable law" are inapposite. See Pls.' Remedy II, at 23. In contrast to this case, the federal agency defendant in Sierra Club v. Marsh, 692 F. Supp. 1210, 1221 (S.D. Cal. 1988), *had already complied* with NEPA by completing an Environmental Assessment. The court rejected the plaintiff's argument that additional NEPA work was required prior to implementation of a settlement, finding that "Federal Defendants have at least arguably discharged their NEPA obligations." Id. Similarly, in United States v. Southern Florida Water Management Dist., 28 F.3d 1563 (11th Cir. 1994), the court held that a settlement agreement between a state and the federal government that required action by the state was *not* major federal action requiring analysis under NEPA. Id. at 1572-73. Therefore NEPA simply did not apply to the action in question. Accordingly, these cases provide no basis for the plaintiffs to assert that either the defendants or this Court can ignore a Congressionally imposed statutory requirement.[1/]

II. THE COURT SHOULD TAKE INTO ACCOUNT THE CURRENT BEST AVAILABLE SCIENCE ON STOCK STATUS AND BIOLOGICAL REFERENCE POINTS.

[15/] Indeed, as noted in Defs' Remedy Stmt, at 17 n. 12, some of the plaintiffs in this case have sued NMFS for enacting even routine management measures without proper NEPA compliance. See, e.g., Conservation Law Foundation v. Mineta, 131 F.Supp.2d 19 (D.D.C. 2001); American Oceans Campaign v. Daley, Civ. No. 99-982, 2000 WL 33673806 (D.D.C. Sept. 24, 2000).

National Standard 2 of the Magnuson Act requires that fisheries be managed "based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Since Amendment 9 was adopted, substantial new scientific information is available regarding both the current status of the stocks in the groundfish complex and the biological reference points and population projection models that serve as the basis for fishery management. This updated information may be relevant in two contexts. First, as argued above, the appropriate remedy in this case is for the Court to remand the matter to the agency for further administrative proceedings. To the extent the Court is considering imposing a deadline for further action, due consideration should be given to the agency's representations regarding the time necessary for completing a FMP amendment. In this context, the status of the stock may be relevant to the reasonableness of the agency's schedule. See Telecommunications Research & Action ("TRAC") v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (setting forth the factors that a court should consider before requiring an agency to take an action by any specific time). Second, in the event that the Court is considering devising an injunctive order pending further agency action, the Court must balance the equities and consider irreparable injury. Moreover, any such order should not be inconsistent with the best scientific information available.

A. The Best Scientific Information Available Suggest That The Groundfish Complex Is Rebounding And Will Not Be Irreparably Harmed By A Delay To Permit Development Of A New Plan Amendment.

As defendants demonstrated in their Remedy Statement and accompanying papers, the most current stock assessment data suggest that the groundfish complex is rebuilding. Defs.'

Remedy Stmt, at 3-5; 1st Murawski Decl. ¶ 3 & Exh. 1. Dr. Murawski specifically reviews the best scientific information available with respect to the groundfish stocks and renders his expert opinion that:

> Based on the most recent stock assessments and abundance data summarized above, and the expected progression of the year classes for these species and stocks, rebuilding of the resource as a whole should continue for at least the next year under targets and measures established under Amendment 7 and subsequent framework actions, even if Amendment 9 overfishing definitions are exceeded. Based on the forgoing analyses and considerations, delaying the implementation of Amendment 13 to the summer of 2003 should not jeopardize the ability of multispecies stocks to achieve current rebuilding targets.

1st Murawski Decl. ¶ 7. In response, plaintiffs' "expert,"[1/] Dr. Pikitch, does not proffer a contrary opinion about the meaning of the relevant stock assessment data. Indeed, Dr. Pikitch *does not advert to the data at all*. Her declaration is limited to a generalized attack on the Dr. Murawski's credibility and does not provide any specific scientific analyses or data to contradict Dr. Murawski's scientific conclusion. Second Declaration of Ellen Pikitch ¶ 3, filed March 15, 2002. Since there is no dispute as to Dr. Murawski's scientific analyses, Dr. Pikitch's second declaration is irrelevant and should be ignored.

Plaintiffs' arguments that the stock will be irreparably injured if implementation of a statutorily compliant amendment is delayed for one year are based on two erroneous arguments. First, they argue if a stock presently requires rebuilding, then any delay in implementation will

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[16/] Plaintiffs have not provided an "expert" report for Dr. Pikitch or otherwise complied with Fed.R.Civ.P. 26(b)(4) prior to utilizing her declaration in this proceeding.

necessarily constitute irreparable harm. The statute itself rebuts the plaintiffs' argument by indicating that the rebuilding is to occur over a course of ten years and that, in the interim, the Secretary may promulgate rules which simply reduce but do not eliminate overfishing. Magnuson Act § 304(c)(4)(A)(ii) and (c)(6), 16 U.S.C. §§ 1854(c)(4)(A)(ii) and (c)(6). Thus, the relevant question is not whether the stock must be rebuilt immediately but whether the opportunity to rebuild the stock in the long run will be compromised given the measures already in place and the significant additional measures being implemented by the Interim Rule. As Dr. Murawski explained, average biomass for 13 of the 19 groundfish stocks increased during the period 1996 to 2000, when compared to the period 1991 to 1995, and four of the six stocks that declined during that period have shown recent increasing trends. 1st Murawski Decl., ¶ 5. As discussed above, there is no basis upon which to conclude that irreparable injury is likely. See id., at ¶ 7.

The second fallacy of plaintiffs' approach is their apparent contention that there may be a risk of collapse if action is not taken immediately. Although the agency could never completely rule out the "risk" of collapse of even a healthy non-overfished population, plaintiffs offer no credible information indicating that there is a likelihood or even reasonable possibility of a collapse in this case. See 2nd Sissenwine Decl., ¶¶ 12-13.[1/]

[17/] Plaintiffs also contend that there is a risk of irreparable harm to skates caught as bycatch in the Fishery. See Pls.' Remedy II, at 34-35. However, the measures contained in the Interim Rule to reduce fishing effort will also reduce mortality to skates. 3rd Kurkul Decl., ¶ XX. In addition, the Council has approved a draft FMP for the northeast skate complex, which includes measures to conserve skates and minimize their bycatch. See Response of the Commonwealth of Massachusetts as Amicus Curiae in Reply to March 15 Proposed Remedies Filed by the Parties ("Mass. Remedy III"), at

B. Further Fishery Management Action Should Be Based On The Biological Reference Points And Projection Models Recently Completed By Agency Scientists.

On March 19, 2002, NMFS presented the Final Report of the Working Group on Re-Evaluation of Biological Reference Points for New England Groundfish ("Working Group Report") to the New England Fishery Management Council. See 2nd Murawski Decl., Ex. 1 (also available at http://www.nefsc.nmfs.gov/publications/crd/crd0204/. The Working Group was established to update "biological reference points," or the values of biomass required to generate maximum sustainable yield ("B_{msy}") and fishing mortality required to generate maximum sustainable yield ("F_{msy}"), for the 19 stocks included in the Northeast Multispecies Fishery Management Plan. 2nd Murwaski Decl., ¶ 1. The Working Group also developed population projection models, based on the updated biological reference points, to predict if, and how fast, fish populations will grow under various fishery management alternatives. Id., Fishery managers (such as NMFS policy makers and the Council) require these biological reference points and projection models to derive TACs and develop and analyze management measures for rebuilding programs as required under the Magnuson Act. Id., ¶ 6.

Although Amendment 9 included biological reference points, those values no longer represent the best scientific information available. 2nd Sissenwine Decl., ¶¶ 3-9; 2nd Murawski Decl., ¶ 14. The Working Group Report recommends changes in the values of B_{msy} and F_{msy}

3-4.

or both for 15 of the 19 stocks reviewed. 2nd Murawski Decl. ¶ 1. In some cases, changes are relatively minor, while for some stocks, the Working Group recommended that biomass targets be increased significantly over those listed in Amendment 9. Id.

Plaintiffs cynically accuse NMFS of using the Working Group Report as a "smokescreen behind which it maneuvers to ensure that it avoids implementing Amendment 9." Pls.' Remedy II, at 9. Nevertheless, Defendants have been forthright that they believe Amendment 9 is fundamentally flawed. Despite the plaintiffs repeated and increasingly histrionic efforts to create an impression of conspiracy, the updated biological reference points and projection models derived by the Working Group were necessary to ensure that any rebuilding program – whether based on Amendment 9 or some other future FMP Amendment – be based on the best available scientific information. 2nd Sissenwine Decl. ¶ 10; see also First Declaration of Michael P. Sissenwine, ¶ 5(a); 2nd Murawski Decl, ¶¶ 7 and 14.[1/]

III. RESPONSE TO MARCH 18, 2002 ORDER.

[18/] Plaintiffs accuse NMFS of *defying* the Court's February 15, 2002 order to consider whether it could develop Amendment 9 total allowable catch levels (TACs) and management measures by March 1, 2002. Pls.' Remedy II, at 6-7. The basis of the accusation seems to be plaintiffs' illogical assertion that NMFS falsely implied that the Working Group was established in response to the Court Order of February 15. Obviously, NMFS did not imply that a process which it clearly stated began in early February (which included a workshop held 12-14 February) was in response to a court order which was issued on a later date.

In an order entered March 18, 2002, the Court ordered defendants to submit no later than April 1, 2002,

> a. the appropriate total allowable catch levels (TACs) for the 2002-2003 fishing season for all fish species governed by Amendment 9; and
>
> b. Management measures that would bring Defendants into compliance with Amendment 9 for the 2002-2003 fishing season.

Order, March 18, 2002. The Order is not clear on what it means by "appropriate" TACs and several interpretations are possible as described below. Nevertheless, the Third Declaration of Patricia A. Kurkul presents defendants response to the Court's Order, setting forth TACs for the 2002-2003 fishing season based on their interpretation of the Court's Order, 3rd Kurkul Decl., Exhibit 1, two options for management measures that defendants believe would achieve those TACs. Id., ¶¶ 11-12 and Exhibits 2-5.[1/]

Defendants note that this information is provided solely in response to the Court's Order, and does not constitute defendants' proposal for agency action or regulations, nor does

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[19/] The first option assumes that a zero (0) TAC for a stock means no catch of the stock at all, precluding even insignificant levels of bycatch. This option would virtually shut down the Fishery, even for stocks for which the TAC is greater than zero, because of the possibility that fishing on such stocks will result in unavoidable bycatch of other stocks for which the TAC is zero. The second option assumes insignificant levels of bycatch for stocks where the TAC is greater than zero. This option allows some minimal fishing of stocks that have TACs greater than zero. See 3rd Kurkul Decl. ¶ 12.

it constitute suggested terms for an injunction. As explained in Defendants' Remedy Statement, and in Part I, supra, the proper remedy in this matter is a remand to the agency for further administrative action pursuant to the agency's statutory authority and consistent with the requirements of the Magnuson Act, and other applicable law. Moreover, as defendants have consistently maintained, and as described in further detail below, defendants believe that these TACs are seriously flawed. To impose management measures necessary to implement these TACs would result in severe, if not irreparable, harm to the fishing industry without any guarantee of even complying with the Magnuson Act. See 3rd Kurkul Decl., ¶¶ 14-15.

In calculating the appropriate TACs for the 2002-2003 fishing season, defendants attempted to interpret the March 18 Order and the December 28, 2001 Memorandum Opinion and Order *in pari materia*. The December 28, 2001 Opinion recognized two possible "control rules" that NMFS could use to calculate TACs under Amendment 9: the "$F_{control\ rule}$" or the "F_{msmc}" rule. Mem. Op. at 15-17. Although the agency considers both "control rules" deficient, F_{msmc} is preferable to $F_{control\ rule}$ because it integrates more effectively the current stock conditions and projection models resulting from the Working Group Report without being constrained needlessly by certain aspects of $F_{control\ rule}$. See 2nd Murawski Decl., ¶¶ 9-10.[1/]

[20/] A literal interpretation and application of $F_{control\ rule}$ leads to absurd results. For example, the TAC for Georges Bank cod according to $F_{control\ rule}$ is 48,550 metric tons, which is more than the amount of Georges Bank cod in the ocean. 2nd Murawski Decl., ¶ 12 and Table 1. To provide a complete picture of the different ways the TACs under Amendment 9 might be construed and calculated, NMFS prepared a table indicating TACs under several other possible interpretations of Amendment 9, as well as the TACs that defendants consider to reflect the best available scientific information using the Working Group Report and unconstrained by Amendment 9 control rules. See 2nd Murawski Decl. ¶ 9 and Table 1.

The agency therefore used F_{msmc}, to the extent possible, to calculate the "appropriate" TACs. Id.

To calculate the TACs using F_{msmc} as applied to Amendment 9, NMFS replicated, to the extent possible, the approach used by the Multispecies Monitoring Committee ("MMC"), as explained in the 1999 MMC Report. AR 1171-1172; 1218; 1459. In applying the F_{msmc} control rule, the agency used the B_{msy} and F_{msy} reference points established in Amendment 9 and the new projection models described in the Working Group Report, consistent with the agency's understanding of how F_{msmc} was expected to operate under Amendment 9. See id; 2nd Murawski Decl. ¶¶ 10-11. Further, consistent with the F_{msmc} approach, the agency ignored the Amendment 9 control function that would set fishing mortality to zero if the current biomass was less than 1/4 B_{msy}. Id. The agency applied only the function that determined whether rebuilding should occur in 5 or 10 years based on the biomass being greater than or less than ½ B_{msy}. Id.

Attempting to calculate TACs based on Amendment 9 has led to results that are seriously flawed and are inconsistent with the best scientific information available. For example, using the "F_{msmc}"

control rule, the projected mortality rate for Gulf of Maine cod is nearly three times the re-estimated mortality rate under the "New, New Rebuilt" model and Georges Bank yellowtail is nearly double the rate under the same model. 2nd Murawski Decl., ¶ 13. In both examples, significant overfishing will occur under Amendment 9 control rules. Id.

For the sake of comparison where possible, NMFS presents the TACs that defendants consider to reflect the best available scientific information using the Working Group Report and

unconstrained by Amendment 9 control rules. See 2nd Murawski Decl., Table 1 (Rows Labeled "New, New Rebuild" in first three columns).[1] These TACs are more consistent with the Magnuson Act's National Standard 2 and rebuilding requirements.2nd Murawski Decl, ¶ 14; 3rd Kurkul Decl, ¶ 15. NMFS also presents estimated commercial fishery mortality rates and catch levels for the Interim Final Rule which reveal that the agency's interim action results in greater reductions in commercial fishing mortality rates and catch levels for some stocks than are called for by the "F_{msmc}" control rule of Amendment 9.[1] The demonstrated problems with attempting to recreate Amendment 9 control rules at this juncture, and with ignoring the best scientific information available, dramatically illustrates why the proper remedy in this action is remand to the agency for further administrative proceedings.

IV. PLAINTIFFS' SPECIFIC REMEDIAL REQUESTS ARE WITHOUT MERIT.

Part I describes the reasons the Court should not issue an order constraining the agency's discretion to adopt appropriate management measures or requiring the agency to adopt specific measures or requirements as suggested by the plaintiffs. See also Defs. Remedy Stmt, at 26-27. Regardless of the questions surrounding the *scope* of an appropriate remedial

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[21] These TACs and management measures have been derived using preliminary work done by NMFS and the Council as it moves toward completing the third-part of its plan to achieve full statutory compliance by promulgating and implementing a FMP amendment. As indicated in the First Declaration of Patricia Kurkul, the Council is scheduled to develop and adopt alternatives for the amendment for analysis by July, 2002. 1st Kurkul Decl. ¶¶ 12-13. If the Council fails to do so, NMFS will take over the process. Id. .

[22] For example, the Interim Rule results in a 62.5% reduction in commercial fishing mortality rate for Gulf of Maine cod while the "F_{msmc}" control rule rate results in a three fold increase in the fishing mortality rate. See 3rd Kurkul Decl., ¶ 5; 2nd Murawski Decl, ¶ 13.

order, the Court should reject plaintiffs' specific requests. Although Defendants' Remedy Statement describes the reasons those requests are without merit, two contentions in plaintiffs' March 15 responsive papers require a brief reply.

A. OBSERVER COVERAGE

Based on nothing more than a comparison to another fishery and their scientist's "intuition," plaintiffs demand that the Court substitute its judgment for that of the expert agency and enjoin NMFS to require 10% observer coverage in the Fishery. As Dr. Sissenwine has already explained, it is the sample size of the observations, rather than the percentage of observer coverage, that is the statistically important factor for achieving scientifically valid estimates of bycatch. 1st Sissenwine Decl., ¶ 8. The Pacific groundfish fishery does not provide a valid basis for comparison because the size of the fleet and the days fished are much smaller than in the case of the New England groundfish fishery. 2nd Sissenwine Decl., ¶ 14. Because of the small size of the sampled population and occurrences in the Pacific, a higher percentage of sampling is required to provide estimates with a comparable expected relative precision. Id. ¶ 16. The observer coverage that is expected for the 2002-03 fishing season will generally produce useful estimates of bycatch in the Fishery, although allocational decisions about coverage of various stocks may be appropriate. Id. ¶ 20.

B. VESSEL MONITORING SYSTEMS ("VMS")

Plaintiffs assert that NMFS exaggerated the cost of VMS units, which plaintiffs contend should be required for all vessels in the fishery. See Pls.' Remedy II, at 39. Plaintiffs argument, however, relies on the costs of less sophisticated units that are not authorized for use in this

Fishery, are not feasible for smaller vessels and would not satisfy all of plaintiffs' demands. See 3rd Kurkul Decl. ¶ 8.

CONCLUSION

For the forgoing reasons, the Court should decline to enter the proposed orders submitted by plaintiffs and intervenor Northeast Seafood Coalition, should refrain from entering other mandatory or injunctive relief, and should remand to the agency for further administrative proceedings.

Dated: April 1, 2002

Respectfully submitted,

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