

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)
CONSERVATION LAW FOUNDATION,)
 et al.,)
 Plaintiffs,)
)
 v.) Civil Action No. 00-1134 (GK)
)
DONALD EVANS, et al.,)
)
 Defendants.)

REMEDIAL ORDER OPINION

I. Background

On May 19, 2000, Plaintiffs Conservation Law Foundation ("CLF"), National Audubon Society ("NAS"), Natural Resources Defense Council ("NRDC"), and The Ocean Conservancy (collectively "Plaintiffs") brought suit against the United States Secretary of Commerce Donald Evans, the National Marine Fisheries Service ("NMFS"), and the National Oceanic and Atmospheric Administration ("NOAA") (collectively "Defendants"), charging that Defendants failed to prevent overfishing and minimize bycatch¹ along the New England coast.

¹ Bycatch refers to fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. See 16 U.S.C. § 1802(2).

Specifically, Plaintiffs alleged that Defendants violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. § 1801 et seq., as amended by the Sustainable Fisheries Act ("SFA"), Pub.L. No. 104-297, 110 Stat. 3559 (1996), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

The Magnuson-Stevens Act, enacted in 1976, provides a complex, multi-layered statutory framework for the protection and management of the nation's marine fishery resources. It establishes eight Regional Fishery Management Councils, each of which has the authority and responsibility to govern conservation and management of the fisheries under its geographical jurisdiction by developing and implementing fishery management plans ("FMPs") and amendments thereto. See 16 U.S.C. § 1852.

In 1996, Congress enacted the SFA in order to prevent overfishing and to rebuild the New England groundfish stock, which had become severely depleted by the mid-1980s. See Conservation Law Foundation v. Mineta, No. 00-1718, slip op. at 5 (D.D.C. Feb. 1, 2001). The SFA strengthened the Magnuson-Stevens Act by requiring Defendants, inter alia, (1) to prevent overfishing and rebuild depleted fish populations; and (2) to

report, assess, and minimize bycatch. See 16 U.S.C. §§ 1802 (28)-(29), 1853 (a)(10)-11, 1854(e).

The New England Fishery Management Council ("NEFMC"), developed FMP Amendment 9, which became effective on November 15, 1999. See A.R. 834. Amendment 9 revised the maximum annual fishing mortality rates for 12 depleted groundfish species.²

On December 28, 2001, the Court granted Plaintiffs' Motion for Summary Judgment. The Court determined that Defendants violated the Magnuson-Stevens Act, as amended by the SFA and the APA. Specifically, the Court found that Defendants violated the SFA and APA by failing to implement Amendment 9 of the Fishery Management Plan, thereby violating the overfishing, rebuilding, and bycatch provisions of the SFA. The Court further held that Amendment 9 violated the bycatch provisions of the SFA.

Subsequent to the Court's summary judgment ruling, the parties commenced briefing the remedial phase of the case. The following parties have intervened in these remedial proceedings: (1) Northeast Seafood Coalition; (2) Associated Fisheries of Maine, the Cities of Portland, Maine and New Bedford, Massachusetts, and the Trawlers Survival Fund; (3) the State of

² The 12 species are: cod, haddock, yellowtail flounder, American plaice, witch flounder, winter flounder, redfish, white hake, pollock, windowpane flounder, ocean pout, and Atlantic halibut.

Maine; (4) the State of New Hampshire; (5) the State of Rhode Island; (6) the Commonwealth of Massachusetts; and (4) Paul Parker, Craig A. Pendelton, Northwest Atlantic Marine Alliance, Stonington Fisheries Alliance, Saco Bay Alliance, and Cape Cod Commercial Hook Fishermen's Association. In addition, many, many members of the public have written to the Court expressing their heartfelt views and concerns about the far-reaching consequences of whatever remedy is to be ultimately selected.³

Recognizing the substantive complexity of the relief which had to be considered, as well as the enormous regional interest in the issue, the Court held a status conference on February 15, 2002, with the Plaintiffs, the Government, and the previously mentioned States, Cities, organizations, and individuals who were allowed to intervene. At that status, the Court urged the parties to consider mediation, discussed why it might prove particularly effective in this difficult case, introduced the parties to Ms. Nancy Stanley, the Director of the Court's Alternative Dispute Resolution Program, and directed them to have an initial conference/discussion with her since virtually all parties were personally present at the courthouse that day.

³ In order to keep the record clear and public, those letters, which were sent to Chambers and not filed in the Clerk's Office, are being attached hereto as Appendix A.

At the same time, the Court made it clear that, because of the imminence of the opening of the fishing season on May 1, 2002, the parties would have to operate on parallel tracks: mediation or a variation thereof, if they so chose; and formal briefing of the issues so that the Court was not forced to decide the remedy under intense time pressures. Unfortunately, despite everyone's best efforts, the latter is precisely what happened.

On the mediation track, all the parties engaged in a truly Herculean effort. Under the expert guidance of Ms. Stanley and her co-mediator Dan Dozier (as well as his two hard-working assistants, Ms. Braden Sweet and Ms. Regan Maund), more than 40 people (representing all parties) engaged in a marathon five-day mediation. While the Court of course has no knowledge of the substance of any of those sessions, it has been assured that every single participant worked incredibly hard, in good faith, and with great flexibility and creativity, to achieve a resolution. When that could not be achieved after the end of five 14-hour days, the parties continued communicating and attempting to reach consensus even after they had separated and returned to their home jurisdictions. Ultimately, after expenditure of an incredible number of hours and intellectual and emotional energy, many of the parties were able to reach a

proposed settlement which was formally filed on April 16, 2002, as a Settlement Agreement Among Certain Parties. The Court cannot give enough high praise to all the parties---and of course the mediators---who participated in this intense effort to craft a complex settlement which would meet the core needs of all concerned.

In addition to working with the parties on the substance of a settlement, the mediators were able to help the parties with another difficult project. The Court became convinced at an early point that access to a technical advisor would be necessary. As fully explained in the Court's Order of April 9, 2002, Dr. Wayne Getz was chosen for this position. Ultimately, minimal use was made of Dr. Getz' services. The Court and its law clerk held two lengthy conference calls with Dr. Getz (each of which was approximately one hour) in which many questions were asked, as anticipated, about the meaning of various scientific terms and descriptions of certain kinds of fishing gear and nets. The Court much appreciates the explanations provided by Dr. Getz and his ready accessibility, especially given his busy teaching schedule and the difference in time zones.

On the formal briefing track, the parties have submitted numerous and extensive memoranda regarding the scope and nature

of the relief to be ordered. Briefing began with Defendants' submission of their proposed remedy on March 1, 2002. Responses followed, and at Plaintiffs' request, Defendants were ordered to submit, by April 1, 2002, appropriate Total Allowable Catch ("TAC") levels for the 2002-2003 fishing season for all fish species governed by Amendment 9, and the management measures that would secure compliance with Amendment 9 for the 2002-2003 fishing season. Thereafter, there were two additional rounds of briefing: one pertaining to the Defendants' April 1 submission, and one pertaining to the April 16 Settlement Agreement Among Certain Parties.⁴ The last of many briefs was filed on April 22, 2002--a mere 8 days before the opening of the fishing season.

II. Fashioning An Appropriate Remedy

Fashioning an appropriate remedy has been one of the hardest tasks this Court has ever undertaken. The livelihood--indeed

⁴ The following parties submitted the Settlement Agreement: Plaintiff Conservation Law Foundation; Defendants Donald L. Evans, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service; the State of Maine; the Commonwealth of Massachusetts; the State of New Hampshire; the State of Rhode Island; the Associated Fisheries of Maine, Inc., the City of Portland, Maine, the City of New Bedford Massachusetts, the Trawlers Survival Fund and; Paul Parker, Craig A. Pendelton, Northwest Atlantic Marine Alliance, Inc., Stonington Fisheries Alliance, Saco Bay Alliance, and Cape Cod Commercial Hook Fishermen's Association, Inc.

Objections to the joint proposal were filed by Plaintiffs National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy, and by Intervenor Northeast Seafood Coalition.

the way of life--of many thousands of individuals, families, small businesses, and maritime communities will be affected. The economy of state and local governments in the region will therefore undoubtedly be impacted in turn. The future of a precious natural resource--the once-rich, vibrant and healthy--and now severely depleted New England Northeast fishery--is at stake. All of these diverse interests must be respected and considered, as the ten National Standards set forth in the Magnuson-Stevens Act mandate.⁵

To compound the difficulties of the task, we lack the rigorous, focused, scientific research, data, and understanding which are absolutely necessary to develop long-term strategies for rebuilding stocks, preventing overfishing, and minimizing bycatch and its mortality.⁶ As recently as March 19, 2002--a

⁵ The ten National Standards require that conservation and management measures: (1) prevent overfishing and maintain "optimum yield;" (2) be based on the best scientific information available; (3) manage each stock of fish as an individual unit; (4) fairly and equitably allocate fishing privileges among the states; (5) be efficient in the utilization of fishery resources; (6) take into account variations and contingencies in fishery resources; (7) minimize costs and unnecessary duplication; (8) minimize adverse economic impacts on communities; (9) minimize bycatch and the mortality of bycatch; and (10) promote the safety of human life at sea. See 16 U.S.C. § 1851(a).

⁶ Much of the blame for this situation can be laid at the feet of NMFS. It frequently misses its own deadlines for complying with statutory mandates, it drags its feet completing vitally significant marine research, and it is often the case that the federal courts must

mere six weeks before the May 1 deadline--the Government filed the Final Report of the Working Group on Re-Evaluation of Biological Reference Points for New England Groundfish ("2002 Working Group Report"). That Report, virtually all parties concede, represents the best available scientific information (as mandated by National Standard Two) for the multispecies New England groundfish complex. Put starkly, it has completely changed the scientific landscape--or seascape--in this instance.⁷

Although this Court ruled in its Memorandum Opinion of December 28, 2001, that the Government "can, and must, give effect to Amendment 9," slip op. p. 17, it is clear that that course of action is now impossible. Not only would it produce absurd and damaging results in terms of statutory objectives,⁸

be called upon to force it to live up to its statutory obligations. The very fact that this Court is in the unenviable position of having to decide such an important issue on the eve of the May 1 deadline reflects the failure of NMFS to comply with the statute in a timely fashion. Even before adoption of Amendment 9 on October 15, 1999, the New England Fishery Management Council announced (on September 2, 1999) that it would not implement it. Amendment 13, which was intended to supersede Amendment 9, was originally scheduled for promulgation in the fall of 2002; having failed to meet that deadline, NMFS has now scheduled it for completion by August 2003.

⁷ Even this well-received Report, it should be noted, has not yet been subjected to any in-depth analysis by the scientific community or the public.

⁸ For example, if we apply the TAC numbers supplied by the Government which would satisfy Amendment 9, the TAC for Georges Bank Cod would be 48,550 mt--a number that represents more fish than the new data says even exist. Other examples of the totally anomalous results

but the scientific basis on which it rests has become invalid, even though it may have been the best available back in 1999 when the Amendment was approved. For example, two of the most basic and significant scientific parameters, Bmsy goals and fishing mortality rates which will achieve and maintain those goals for the Fishery's 12 groundfish species, have been newly calculated and established in the 2002 Working Group Report. Because of these new calculations, other provisions in Amendment 9, such as the all-important control rules, need to be re-evaluated.

In short, given the completion on March 19 of the 2002 Working Group Report, which now represents the "best scientific information available," it cannot be said that either the Settlement Agreement Among Certain Parties or the Order the Court is now entering complies with Amendment 9, based as it is on outmoded and no longer valid scientific underpinnings.

What the Settlement Agreement Among Certain Parties does represent is an extraordinary degree of consensus--after much give and take--amongst a broad coalition of parties ranging from the lead Plaintiff Conservation Law Foundation (with a long history of dedicated advocacy on behalf of fishery management

which would be obtained from applying the TAC data are given in the briefs of different settling parties.

issues in New England) to the Government (with its attendant statutory responsibilities) to individual States including Maine, Massachusetts, New Hampshire, and Rhode Island to individual Cities such as Portland, Maine and New Bedford, Massachusetts, to fishing groups with diverse interests such as the Associated Fisheries of Maine, the Trawlers Survival Fund, Northwest Atlantic Marine Alliance, and the Cape Cod Commercial Hook Fisherman's Association.

These parties have reached a consensus on what is both necessary and achievable in the short-term and the long-term to preserve and enhance the multispecies groundfish complex in New England, while the Government--under the Court's watchful continuing jurisdiction--develops and then uses the best scientific information available to design, publicly air, and then adopt, a multispecies groundfish management plan that will comply with Amendment 9 and the National Standards set forth in the Magnuson-Stevens Act.⁹

⁹ It should be noted that this procedure respects the intent of Congress in structuring the Magnuson-Stevens Act, as amended by the Sustainable Fisheries Act, to require the fishery management councils to first develop, analyze, and recommend fishery management plans, before those plans are then reviewed and approved or disapproved and/or modified by the Secretary. The procedure also ensures that NMFS retains administrative discretion to carry out its statutory responsibilities. The retention of that discretion--if exercised reasonably and above all in a timely fashion--is particularly appropriate in a case like this where scientific expertise is so crucial to outcomes.

Thus, the Court has concluded, after careful examination and study of the many documents submitted and, in particular the objections of the three non-settling Plaintiffs (National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy¹⁰) and the Northeast Seafood Coalition, that it is appropriate to use the Settlement Agreement Among Certain Parties as a baseline remedy.

As more fully explained, infra, that Agreement provides, until adoption of Amendment 13, significant new restrictions on DAS, on the larger trawl vessels which account for much of the groundfish mortality, and on mesh sizes and gear to reduce bycatch and fish mortality; it provides for significant area closures designed to protect the vulnerable Gulf of Maine cod and Georges Bank cod; it increases the minimum size of cod that can be landed and reduces the possession limits; it greatly limits the unused DAS or "latent effort" which can be legally activated at any time; it increases observer coverage; it provides for the collection and analysis of timely and accurate fishing and bycatch information without which no long-term

¹⁰ These Plaintiffs, like Conservation Law Foundation, also have a long history of dedicated advocacy on behalf of environmental issues.

fishery management plan can be adopted; and it provides a firm schedule for adoption of Amendment 13.¹¹

Some additions, as explained infra, have been made to the terms of the Settlement Agreement where the Court felt that certain provisions could be strengthened in terms of reducing overfishing and minimizing bycatch without risking the lives of fishermen or endangering the future of their communities and their way of life.

The Court recognizes that none of the interests involved in this litigation will be unaffected by this Order. By the same token, every one of those interests will undoubtedly be unhappy about some provision in the Order. The Court has done its best, in exercising its equitable jurisdiction, to reconcile and comply with Congress' directives.

It is now time for all parties to move forward with the enormous and challenging--but gratifying--task of rebuilding the New England multispecies groundfish fishery to the glory of Nature it once was.

¹¹ To the extent that the Settlement Agreement Among Certain Parties provides, in Exhibit C, for parties to support and advocate for certain positions, the Court views that as a contract between private parties which is not appropriately incorporated in this final Remedial Order.

III. The Remedy

The management measures contained in the Court's Remedial Order, and derived in substantial part from the Settlement Agreement Among Certain Parties, represent significant conservation steps to reduce overfishing and bycatch in the New England groundfish fishery, while minimizing, to the extent possible, the adverse economic impact on the fishing industry and communities. The National Standards contained in the Magnuson-Stevens Act served as a guide to the development of these remedial measures. Fishing mortality and bycatch are reduced through reductions in fishing effort such as significant decreases in DAS and the preclusion of new fishing effort from entering the fishery, increased area water closures, changes in mesh sizes and the amount of gear that can be fished, and increased observer coverage.

The Remedial Order provides for implementation in three stages: the Amended Interim Rule, effective May 1, 2002; the Second Amended Interim Rule, effective August 1, 2002, until implementation of Amendment 13; and the long-term Fishery Management Plan Amendment 13. The distinction between the first and Second Amended Interim Rule is necessary to provide a transitional period that affords sufficient notice and opportunity for compliance with the more detailed and, in the

case of some measures, more stringent requirements imposed in the latter Rule. Further, the present procedural approach defers to the discretion and expertise of the Executive Branch agency in developing the appropriate scientific methodology that is necessary for long-term management of the Fishery and in developing the long-term management measures mandated by that methodology. If the agency carries out its responsibilities, it will develop and promulgate, no later than August 22, 2003, a Fishery Management Plan--Amendment 13--that complies with the overfishing, rebuilding, and bycatch provisions of the SFA.

NMFS' history demonstrates the necessity of judicial monitoring, and the Court will therefore retain jurisdiction until promulgation of Amendment 13 to ensure adequate and timely compliance by the agency.

As noted earlier, the Court is aware of the substantial negotiations and compromises underlying the Settlement Agreement Among Certain Parties, and has honored that agreement to the extent possible. Nonetheless, changes have been made in areas where the Court has concluded, in light of the entire record, that the negotiated Agreement fails to provide sufficient protection for the most vulnerable species. Such changes include modified DAS restrictions, increased area closures, accelerated implementation dates for some measures, elimination

of the increase in poundage limits for Gulf of Maine Cod, and increased observer coverage.

The central component of the proposal for relief originally advanced by the majority of Plaintiffs¹² is implementation of a so-called "hard TAC" system.¹³ Plaintiffs National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy advocate the importance of hard TACs as a backstop to the "indirect" management measures generally employed by NMFS to prevent overfishing.¹⁴ The immediate implementation of a hard TAC system is vigorously opposed by the Defendants, Intervenors, and by Plaintiff Conservation Law Foundation in its most recent submission. It is the determination of this Court that

¹² Initially, the four Plaintiffs advanced a unified remedial proposal. Conservation Law Foundation, however, subsequently advocated the measures set forth in the Settlement Agreement Among Certain Parties and cautioned against immediate implementation of hard TACs in the New England groundfish fishery. See Settlement Agreement Among Certain Parties; Conservation Law Foundation Reply to Responses of National Audubon Society et al. and Northeast Seafood Coalition to the Proposed Settlement Agreement and Stipulated Order at 9-11, Ex. 1, Chatwin Decl. ¶¶ 24-33, Ex. 2, Brooks Decl. ¶¶ 4-12. Plaintiffs National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy (collectively "NAS Plaintiffs") have continued to advocate for immediate implementation of hard TACs.

¹³ A hard TAC is essentially a management system that prohibits further catching of a particular species as soon as a pre-set quota of that species has been caught.

¹⁴ Such "indirect" management measures may include controlling the number of boats in the fishery, the number of nets deployed in the fishery, the size of the mesh openings or configurations of the nets, or the amount of fishing time allowed in the fishery.

implementation of a hard TAC program beginning in May 2002 will not achieve the desired results and may result in extremely negative, though unintended, consequences for the groundfish stocks, the fishermen, and the fishing industry as a whole.

First, the data necessary to effectively implement a hard TAC system simply does not exist at this time. To implement a hard quota system, a total allowable catch amount must be determined at the beginning of a fishing season, and fishing for that species must be prohibited as soon as that quota has been caught. To be successful, the TAC program must have access to real time catch data, not just landings data, so that bycatch mortality can be accurately measured. The New England groundfish fishery does not presently possess the necessary information (or information collection capacity), including data on the amount and type of bycatch in the fishery. See Conservation Law Foundation's Reply to Responses of National Audubon Society et al. and Northeast Seafood Coalition to the Proposed Settlement Agreement and Stipulated Order, Ex. 1, Chatwin Decl. ¶ 31 ("CLF Reply").

Moreover, as discussed supra, there is presently a lack of consensus regarding the best scientific information available as to the current status of the groundfish stocks and the biological reference points and population projection models

that serve as the basis for fishery management. See Federal Defendants' Reply with Respect to Remedy and Response to March 18, 2002 Order at 21-25. Such scientific information is necessary to develop appropriate TAC levels. Absent agreement upon the scientific methodology to derive the TAC levels, any hard TAC system would contravene National Standard Two, which requires that fisheries be managed "based upon the best scientific information available," 16 U.S.C. § 1851(a)(2), and runs the risk of imposing quotas that have unnecessary adverse effects on the fishing industry or the groundfish stocks.

Second, National Standard Nine requires that fisheries be managed to minimize bycatch, See 16 U.S.C. § 1851(a)(9), and there is danger that a hard TAC system may actually increase the discarding of fish once the TAC is reached, rather than reduce it. The use of hard quotas in multispecies fisheries is particularly complex because, once the fishery for a species or stock is closed due to attainment of a hard TAC, vessels may continue to fish for the remaining allowable species, resulting in discarding of the prohibited fish and thereby increasing bycatch and fish mortality. See CLF Reply, Ex. 1 ¶ 31.

Third, a poorly planned and hastily implemented hard TAC system may have severe negative consequences for the safety of fishermen, thereby violating National Standard 10 which requires

the promotion of safety. See 16 U.S.C. § 1851(a)(10). Because a hard TAC system entails shutting down a fishery for a particular species once the quota is caught, "such a system inevitably leads to a race to fish whereby individual fishing vessels are compelled to catch as much of the quota possible before fishing is shut down." CLF Reply, Ex. 2 ¶ 5. As fishermen are induced to fish as much as possible in a compressed time period, it is likely that they will risk their lives by fishing for longer periods of time and at times of the year and in dangerous weather during which they would otherwise have stayed tied to the dock.

Finally, the imposition of a hard TAC system may have adverse effects on the very species the system was designed to protect. The aforementioned "race to fish" beginning on May 1 would concentrate fishing effort at a time when a number of regulated species remain aggregated for spawning. Consequently, additional fishing pressure may be placed on the species at a critical time. See CLF Reply, Ex. 2 ¶ 7.

For these reasons, the Court has rejected implementation, at this time, of a "hard TAC" system to achieve compliance with the Magnuson-Stevens Act and the Sustainable Fisheries Act. Such rejection, however, should in no way preclude or discourage parties from considering its utility in the future.

The accompanying Order contains the detailed provisions which will govern fishing in the multispecies New England groundfish complex from May 1, 2002 until promulgation of Amendment 13.

Date

Gladys Kessler
U.S. District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DONALD EVANS, et al.,)
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 Defendants.)
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REMEDIAL ORDER

Upon consideration of the numerous briefs submitted by the parties regarding the remedial action necessary in this case, and for the reasons stated in the Remedial Order Opinion, it is hereby

ORDERED:

A. Effective **May 1, 2002**, to **July 31, 2002**, for all vessels fishing under a multispecies DAS, the **Amended Interim Rule**, containing the following measures, shall apply:

1. Restrict vessels from fishing more than 25 percent of their allocated DAS during May through July.

2. Count multispecies DAS as a minimum of 15 hours, for any trip longer than 3 hours.

3. Prohibit "front loading" of the DAS clock (require that vessels leave port within 1 hour after calling into the DAS

program to prevent vessels from accumulating time for the purposes of fishing Gulf of Maine cod).

4. Close the inshore Western Gulf of Maine closure area.

5. Close the existing Cashes Ledge closure area year-round.

6. Close statistical area blocks 128 and 130 year-round, 124 and 125 during the month of May, and 132 and 133 during the month of June.

7. Require 6.5 inch diamond or 6.5 inch square mesh codend for trawl vessels and 6.5 inch mesh nets for trip gillnet vessels in Gulf of Maine.

8. Reduce dayboat gillnet allowance to 50 roundfish nets with minimum 6.5 inch mesh, 100 flatfish nets with minimum 7 inch mesh, and 150 monkfish nets with minimum 10 inch mesh.

9. Increase cod minimum size limit to 22 inches for cod that may be sold, and to 23 inches for charter, party, and private recreational vessels.

10. Prohibit use of de-hookers or "crucifiers" with no less than 6 inch spacing between the fairlead rollers.

11. Limit all charter and party recreational vessels in the Gulf of Maine to ten cod/haddock.

12. Limit all private recreational vessels to ten cod.

13. Vessels intending to charter/party fish in the Gulf of Maine closed areas must "declare into charter/party fishery"¹⁵ for the duration of the closure or for three months whichever is greater.

14. Subject to the changes listed above, all existing regulations and restrictions will continue to apply.

B. Effective **August 1, 2002**, until promulgation of Amendment 13, for all vessels fishing under a multispecies DAS, **the Second Amended Interim Rule**, containing the following measures, shall apply:

1. Freeze DAS at the average DAS used during the base period of May 1, 1996-April 30, 2001, not to exceed the current allocation. Vessels are not entitled to any minimum DAS other than their average during the five-year base period. For limited access vessels not operating under the call-in system during the period May 1996 through June 1996, a vessel's DAS will be based on vessel trip reports submitted to NMFS before April 9, 2002. Otherwise, DAS will be based on NMFS' call-in system.

2. DAS will be reduced by 20% from the baseline set forth in Paragraph B 1.

¹⁵ This is the phraseology used in the Settlement Agreement Among Certain Parties.

3. Any latent effort permit not used in 2001 may not be activated.

4. The minimum size for cod that may be sold shall be 22 inches.

5. For all gear sectors, NMFS shall provide 5% observer coverage, or higher, if necessary to provide statistically reliable data. Effective May 1, 2003, NMFS shall provide 10% observer coverage for all gear sectors, unless it can establish by the most reliable and current scientific information available that such increase is not necessary.

6. Reduce trip limits for open access hand-gear vessels to 200 pounds of regulated species.

7. Freeze issuance of new open access hand-gear permits to any vessel that has never been issued such permit, or has not applied for such permit, as of August 1, 2002.

8. Prohibit "front loading" of the DAS clock for all areas (require that vessels leave port within 1 hour after calling into the DAS program to prevent vessels from accumulating time).

9. Continue Western Gulf of Maine year round closure, unless modified by amendment.

10. Prohibit use of de-hookers or "crucifiers" with no less than 6-inch spacing between the fairlead rollers.

11. Trawl mesh shall be no less than 6.5 inch diamond or 6.5 inch square in the cod end.

12. Mesh size in monkfish gillnets shall be no less than 10 inches and limited to 150 nets.

13. Mesh sizes in the large mesh permit category shall be two inches greater than the current regulated mesh size.

14. In Georges Bank, all vessels using gillnet mesh shall use no less than 6.5 inches with a limit of 50 nets. Each net must have 3 tags, except for monkfish gillnets if they are 10 inches or greater in mesh size.

15. In Georges Bank, the cod trip limit shall remain 2,000 lbs/day, with a maximum trip limit of 20,000 lbs/trip (as a trip is currently defined). Cod landing limits and clock running computations shall be applied as set forth in 50 C.F.R. § 648.86(b).

16. In Georges Bank, close statistical area blocks 80, 81, and 118, 119 and 120 south of 42 degrees 20' during May 2003.

17. In Georges Bank, hooks on any limited access multi-species vessel shall be limited to 3,600 in number and must be 12/0 circle hooks.

18. In the Gulf of Maine, all trip vessels using gillnet mesh shall use no less than 6.5 inch mesh with a limit

of 150 nets; each net must have a tag, except monkfish gillnets of 10 inches or greater mesh.

19. Continue closure of the existing Cashes Ledge closure area year-round.

20. In the Gulf of Maine, there will be no increase in cod trip poundage limits per day or cod poundage limits per trip.

21. In the Gulf of Maine, hooks on any limited access multi-species vessel shall be limited to 2,000 in number and must be circle hooks of 12/0.

22. In the Gulf of Maine, open statistical area blocks 124 and 125 in January, February, and March.

23. In the Gulf of Maine, for dayboat gillnet vessels, stand-up gillnet mesh shall be no less than 6.5 inches with a limit of 50 nets; tie-down gillnet mesh shall be no less than 7 inches, with a limit of 100 nets; tie-down gillnet mesh of 10 inches or greater will be limited to 150 nets. During the months of March through June, only tie-down gillnets may be used except for monkfish gillnets of 10 inches or greater mesh size. Tags for all nets (including monkfish nets) shall be limited to 150 tags--three tags per stand-up, two tags per tie-down, and one tag per monkfish nets.

24. In the Gulf of Maine, continue closure of statistical area blocks 128 and 130 year-round, 124 and 125 during the month of May, and 132 and 133 during the month of June.

25. The boundary for the Southern New England measures, which are set forth in Paragraphs B. 26-31, herein, is as follows:

(a) Bounded on the east by straight lines connecting the following points:

<u>Lat.</u>	<u>Long.</u>
(*)	70"00'
40"50'	70"00'
40"50'	69"40'
40"18.7'	69"40'
40"22.7'	69"00'
(**)	69"00'

(*) South facing shoreline of Cape Cod

(**) Southward to its intersection with the EEZ

(b) Bounded on the west by:

A line beginning at the intersection of 74"00' longitude and the south facing shoreline of Long Island, NY, and then running southward along the 74"00' longitude line.

26. In Southern New England, trawler net mesh in the cod end shall be no less than 7 inch diamond or 6.5 inch square cod end.

27. In Southern New England, all vessels using gillnet mesh shall use no less than 6.5 inch mesh with a limit of 75 nets and each net must have two tags except monkfish gillnets of 10 inches or greater mesh.

28. In Southern New England, the following Yellowtail Flounder trip limit shall apply:

(a) March 1-May 31: 250 lbs possession.

(b) June 1-February 28: 750 lbs./day, with a maximum trip limit of 3,000 lb./trip

29. In Southern New England, hooks on any limited access multi-species vessel shall be limited to 2,000 in number and must be 12/0 circle hooks.

30. In Southern New England, South of 40 degrees Latitude, there shall be no possession of Yellowtail Flounder.

31. The following Georges Bank specific measures apply to that portion of the current Southern New England regulated mesh area east of the eastern boundary described above:

(a) All vessels using gillnet mesh shall use no less than 6.5 inch mesh with a limit of 50 nets.

(b) Hooks on any limited access multispecies vessel shall be limited to 3,600 in number and must be 12/0 circle hooks.

32. In all areas, increase cod/haddock fish size to 23 inches for all charter, party and private recreational vessels.

33. In all areas, except the Gulf of Maine during December 1-March 31, limit all charter, party, and private

recreational vessels to ten cod/haddock creels. In the Gulf of Maine, during December 1-March 31, limit all charter, party, and private recreational vessels to five cod creels.

34. In the Gulf of Maine, limit all charter, party, and private recreational vessels to five cod creels December 1-March 31.

35. Vessels intending to charter/party fish in the Gulf of Maine closed areas must "declare into charter/party fishery" for the duration of the closure or for three months whichever is greater.

36. Subject to the changes listed above, all existing regulations and restrictions will continue to apply.

C. The Secretary shall, as was agreed in the Stipulated Order submitted to the Court on April 18, 2002, **promulgate** an **Amended Interim Rule**,¹⁶ to become effective no later than **May 1**,

¹⁶ The Court is of course aware that there are some differences between the provisions of the Settlement Agreement submitted by certain parties which were to be incorporated into the first and Second Interim Rules and the final Remedial Order being entered today. The Court is also aware that the Government, apparently assuming that the Court would simply rubber-stamp the Settlement Agreement and accept it as written, has published the first Interim Rule in the Federal Register. That is unfortunate since the Government had no grounds for that assumption, knew that a remedial order had to issue before May 1, 2002, and could easily have waited until this final Remedial Order was issued. In any event, the present Remedial Order includes those departures, and only those departures, from the Settlement Agreement which the Court deemed essential to meet the demands of the statute. The Government will need to publish in the Federal Register, as quickly

2002, to reduce overfishing during the first quarter of the 2002-2003 fishing season.

D. The Secretary shall, as was agreed in the Stipulated Order submitted to the Court on April 18, 2002, **promulgate an Amended Second Interim Rule**, to become effective no later than **August 1, 2002**, to reduce overfishing beginning with the second quarter of the 2002-03 fishing season, beginning August 1, 2002, and continuing until implementation of a Fishery Management Plan Amendment that complies with the overfishing, rebuilding, and bycatch provisions of the SFA.

E. The Secretary shall, as was agreed in the Stipulated Order submitted to the Court on April 18, 2002, promulgate, no later than **August 22, 2003**, a **Fishery Management Plan Amendment** that complies with the overfishing, rebuilding, and bycatch provisions of the SFA.

F. The Secretary shall, no later than **December 1, 2002**, develop, prepare, publicize, and make public the most current and reliable scientific information available to enable completion of the Fishery Management Plan Amendment referred to in Paragraph E no later than August 22, 2003; the Secretary

as possible, the Amended Interim Rule and Amended Second Interim Rule to include the departures from the Settlement Agreement incorporated in the Remedial Order.

shall, no later than **December 1, 2002**, calculate the TAC for all species governed by Amendment 9.

G. The present action is temporarily **stayed** pending such further proceedings as may be required with respect to each of the three administrative actions set forth above.

H. This Court shall retain jurisdiction until promulgation of Amendment 13.

Date

Gladys Kessler
U.S. District Judge

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