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## INTRODUCTION

The National Marine fisheries Service (“NMFS”) approved Amendment 16 to New England’s Northeast Multispecies Fishery Management Plan (“Groundfish FMP”) in order to accomplish two critical goals. One was to meet the 2007 statutory mandate to implement science-based “Annual Catch Limits” and related “Accountability Measures;” actions intended to end overfishing and rebuild overfished stocks in all U.S. fisheries. *See* Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. §1853(a)(15); Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (“MSRA”) P.L. 109-479, §104(b) (January 12, 2007). The second was to implement 17 additional “sectors” in the fishery, along with revisions to the rules for sectors. Sectors are groups of fishermen who have voluntarily entered into a contract and made a binding commitment to fish within specific annual limits in exchange for an allocation of the total allowable catch (“TAC”) of one or more stocks in the fishery, along with substantial relief from certain regulatory requirements.<sup>1</sup>

The expanded number of sectors and related rule changes is viewed by fisheries managers as a primary “tool” available to fishermen to help ensure compliance with the new Annual Catch Limit requirements. With implementation of Amendment 16, New England Fishermen holding a valid permit that want to fish for groundfish have two clear options: 1) join one of the (now) 19 sectors and fish according to that sector’s rules; or 2) remain in the “common pool” and fish under a different set of rules intended to control fishing mortality, which are not directly at issue here. Plaintiffs assert challenges to certain regulations adopted in Amendment 16 as allegedly unlawful under the Magnuson-Stevens Act, including regulations

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<sup>1</sup> On April 9, 2010, the National Marine Fisheries Service (“NMFS”) published three final rules implementing Amendment 16 effective May 1, 2010, together hereafter referred to as “Amendment 16.” *See* 75 Fed. Reg. 18262-18353 (Implementing Groundfish FMP changes in Amendment 16), AR Doc. 997 at 056485-056577; 75 Fed. Reg. 18113-18132 (Implementing Sector Operations Plans), AR Doc. 996 at 056465-056484; 75 Fed. Reg. 18356-18375 (Implementing Framework Adjustment 44, an action setting the actual Catch Levels for the fishery), AR Doc. 1001 at 056715-056735.

that apply broadly to all the sectors in the fishery. Plaintiffs also appear to unlawfully challenge a subset of regulations implemented on April 27, 2004 in “Amendment 13,”<sup>2</sup> the action that first authorized the formation of sectors and rules for the allocation of the total allowable catch of groundfish to sectors, and “Framework Adjustment 42,” a related October 23, 2006 action.

*Amicus curiae* Georges Bank Cod Fixed Gear Sector’s (“Fixed Gear Sector”) believes that Defendants have ably showed that all of the Plaintiffs’ claims are without merit. They nonetheless file this brief for two reasons. First, the members of the Fixed Gear Sector are small-boat fishermen who pioneered the first two sectors in New England, the other being the Georges Bank Cod Hook Sector (“Hook Sector”), and have a unique perspective that would assist the Court in evaluating the complexities of this case. Second, the outcome of this case could directly affect the interests of members of the Sector. Both of these sectors were approved by NMFS and received allocations of Georges Bank cod prior to the implementation of the MSRA on January 12, 2007. Because the Plaintiffs’ complaints are drawn broadly and fail to fully recognize that the sectors and the allocations implemented under Amendment 13 are different from the Amendment 16 sectors and allocations, the Fixed Gear Sector seeks to ensure that the claims are fully understood and that any relief granted with respect to Amendment 16 is not inadvertently applied to the Fixed Gear Sector, the Hook Sector, or these sectors’ allocations of Georges Bank cod. Further, as set forth below, the Fixed Gear Sector’s Amendment 16 allocations for other stocks of groundfish, like the allocations for the 17 new sectors, are consistent with the Magnuson-Stevens Act’s requirements and should not be set aside.

*Amicus curiae* Fixed Gear Sector have limited the scope of their brief to the issues most directly related to the formation of sectors and determination of sector allocations, however, the

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<sup>2</sup> The final rule implementing Amendment 13 to the Groundfish FMP specified a process for the formation of sectors and the allocation of total allowable catch for groundfish species. 69 Fed. Reg. 22906 (April 27, 2004).

generally supports Defendants' and Defendant Intervenors' arguments in response to the entire host of other complaints and arguments made by the Plaintiffs and *amici*.

### **THE INTERESTS OF THE AMICUS CURIAE**

The fishermen members of the Fixed Gear Sector earn their living by catching cod and other groundfish. They operate small, "day-boat" sink gillnet and hook-and-line (benthic tub trawl and rod-and-reel) fishing vessels and historically are highly reliant on Georges Bank cod--one of 20 managed stocks of groundfish--for their economic survival; however, they are increasingly dependent upon other species of groundfish as well. They formed the first sectors in New England, also referred to as "harvesting cooperatives," and participated in the development of the related regulations for their operation. Fixed Gear Sector fishermen live in fishing communities including Chatham and Harwich Port, on Cape Cod, Massachusetts, that depend on healthy populations of groundfish for the economic survival of their fishing-related businesses.<sup>3</sup>

The Fixed Gear Sector members are forward-thinking fishermen who decided over 10 years ago to initiate efforts to confront the negative impacts to groundfish populations and their livelihoods that were resulting from continued overfishing and the ineffective existing fishery management regulations in place at that time. These regulations relied on "input controls" -- primarily limits on the amount of fishing effort, such as the number of days each fisherman was allowed to fish (the so-called "Days-at-Sea" approach) or the amount of fish that could be caught on each fishing trip. It was plain to the Fixed Gear Sector fishermen that continuing the failed "Days-at-Sea" approach to management was likely to result in economic ruin to their businesses, the region's fishing infrastructure, and their fishing communities. The reasons for the failure of

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<sup>3</sup> *Amicus* fishermen received a letter in support of this brief from 30 similarly situated fishermen from all along Maine coast who are members of the Port Clyde Community Groundfish Sector. This letter credits their sector as key to their ability to continue fishing because it provides them with significantly greater flexibility in managing their businesses, and greater economic opportunity and security. *See* Exhibit 1.

the Days-at-Sea approach were many, but important among them was the failure of the system to provide accountable means of limiting catch to scientifically sustainable levels, ineffective monitoring of catch, trip limits that forced fishermen to discard fish that were already dead or dying, ineffective enforcement of the fishing rules, and the Days-at-Sea “clock” that resulted in inefficient operations as fishermen were forced to race against time on every fishing trip they took. *See e.g.*, 71 Fed. Reg. 64941 (Nov. 6, 2006), AR 20 at 004570.

As a result, the fishermen pursued a different approach to managing their most important fishery: they organized themselves, formed a sector, and voluntarily entered into a legally binding agreement with NMFS to operate within a hard total allowable catch (hard-TAC), or quota, of Georges Bank cod. 50 C.F.R. § 648.87. In exchange for this commitment, they received relief from the suffocating and inefficient regulatory constraints to their businesses that were inherent in the Days-at-Sea approach. The hard-TAC was based on peer reviewed federal science that set the catch at a level projected to minimize impacts of their fishing on the plan to rebuild the overfished Georges Bank cod population. *See* 69 Fed. Reg. at 22914. Sector members were obligated to stop fishing once the quota was reached, and thereby became the first New England fishermen committed to live within scientifically-determined catch limits. This was not the case for the fishermen who remained in the “common pool,” where catch targets were regularly exceeded. *See* Final A16 EIS; AR 773 at 047763-65 (overfishing still occurring on 12 stocks).

In general, sectors are allocated a share of the total ACL available to all commercial fishing vessels for each groundfish stock in the form of an Annual Catch Entitlement (“ACE”). The ACE is the maximum amount of a particular stock that a sector can catch during a particular fishing year. The ACE represents the sum of all the potential sector contributions (“PSCs”) of each vessel participating in the sector. The PSC for each vessel is calculated based on its share

of the total historical landings of each stock over a designated “baseline” time period. To help fishermen to maintain access to the fishery in the future and to contribute to the Magnuson-Stevens Act’s conservation and management goals, including to achieve optimum yield, all or a portion of a sector’s ACE for any stock may be transferred to another sector for the duration of a fishing year. Prior to the start of the following year PSCs are recalculated and the transferring sector (and its fishermen) begin the new fishing year with the appropriate ACE again.

The first sector established by these fishermen, the Hook Sector, was set up for fishermen using hooks (as opposed to other fishing gear, such as trawls) to catch fish and was implemented in 2004 as part of Amendment 13 to the Groundfish FMP. *See* 69 Fed. Reg. 22906 (April 27, 2004). In 2006 the New England Fishery Management Council established the Fixed Gear Sector through Framework Adjustment 42. This sector is comprised of fishermen using both hooks and gillnets. For the 2010 fishing year, the two sectors combined their operations as all of the fishermen from both sectors joined the Fixed Gear Sector; however, the Hook Sector continues to exist as a legal entity and may resume operations in the future. Both sectors are non-profit corporations organized under the laws of the Commonwealth of Massachusetts and section 501(c)(5) of the Internal Revenue Code. There are currently 56 members of the Fixed Gear Sector who operate 42 active vessels, and hold 99 permits. Through forming the Hook and Fixed Gear Sectors, these fishermen have been able to contribute to restoring the fisheries resource they depend upon while reducing the economic costs associated with the burdensome and inefficient input controls that were ruining New England’s legendary groundfish fishery. *See e.g.*, 75 Fed. Reg. at 18292; AR 997 at 56516 (sectors were able to increase efficiency of their operations and realize higher vessel revenue streams).

The Fixed Gear Sector is a proven success, both financially and socioeconomically. Some examples of the Fixed Gear Sector's recent successes from the 2009 fishing year include the following: 1) sector members sailed over 1,000 fishing trips and caught 1.1 million pounds of codfish - nearly 60 percent of their combined quota - during the first eight months of the fishing season; 2) sector members landed over 400,000 lbs pounds of codfish that they would have been forced to waste under old management rules; 3) for the sixth year in a row, sector members successfully targeted haddock through the Special Access Program – a program that allows fishermen to catch healthy haddock stocks without hurting struggling codfish populations. Further, despite investments in the sector system during the formative years, the average revenue per sector member nearly doubled, increasing from \$61,000 in 2004 to \$112,000 in 2008.

The Fixed Gear Sector is an accountable, efficient and effective means of fishing that allows its fishermen members to work cooperatively to meet the biological and socio-economic goals of the Magnuson-Stevens Act. As the only fishermen who have operated a sector since 2004, and in view of the baseline allocation of Georges Bank cod they have planned their businesses around since that time, the fishermen in the Fixed Gear Sector have a strong interest in preserving the sectors and baseline allocations received under Amendment 13. Based on their successful experience, the Fixed Gear Sector fishermen also have a strong interest in seeing their allocations of other groundfish stocks received in Amendment 16 preserved, and in expanded participation in sectors throughout the fishery. This will help to rebuild and sustain groundfish populations, benefit fishermen, and help to preserve New England's fishing communities.

### **ARGUMENT**

#### **I. The Georges Bank Cod Fixed Gear and Hook Sectors and their Associated Allocations of Georges Bank Cod Were Implemented Consistent With Magnuson-Stevens Act and Other Law**

Plaintiffs' complaints are drawn broadly and fail to fully recognize that the Fixed Gear and Hook Sectors, along with their baselines and allocations of Georges Bank cod, were implemented prior to the 2007 amendments to the Magnuson-Stevens Act and Amendment 16.<sup>4</sup> As a result, any challenges to implementation of these sectors and their Georges Bank cod allocations are not properly before this court. Therefore, Plaintiffs' challenges to Amendment 16 must be denied to the extent they may be construed as seeking relief that would adversely affect the existence of these sectors and their allocations of Georges Bank cod.

A. Challenges to the Fixed Gear and Hook Sectors and the Baseline Landings History Used for Allocations of Georges Bank cod to These Sectors are Time-Barred by the Magnuson-Stevens Act

To the extent that Plaintiffs' broad challenges to sectors or the use of "multiple" baseline landings histories to calculate allocations could be construed as a challenges to the baseline used by Defendants to calculate allocations of Georges Bank cod made to the Fixed Gear Sector and the Hook Sector, those claims are time-barred. In Amendment 13, allocations of Georges Bank cod were made to the Hook Sector, and Fishing Years 1996-2001 were set as the relevant "documented landings history" for all sectors established between 2004 and 2007. *See* 69 Fed. Reg. 22906, 22914 (April 27, 2004). Amendment 16 did nothing to change this regulation and it cannot be challenged here.

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<sup>4</sup> This brief responds to arguments made by the Plaintiffs (New Bedford et al. and Lovgren, et. al.), *amicus curiae* Food & Water Watch, Inc., and amici Representatives (Frank and Tierney). Memorandum of the Cities of New Bedford et. al. in Support of Their Motion for Summary Judgment, Docket No. 57 (Nov. 22, 2010)("NB Mem."); Memorandum of Law in Support of Plaintiff Lovgren's Motion for Summary Judgment, Docket No. 65 (Nov. 23, 2010)(Lov. Mem.); Memorandum in Support of *amicus curiae* Food & Water Watch, Inc.'s Proposed Motion for Summary Judgment, Docket No. 67 (Dec. 1, 2010)("FWW Mem."); Memorandum of *amici Curiae* Representatives Barney Frank and John Tierney in Support of the Plaintiffs and Prospective Plaintiff-Intervenor on Cross-Motions for Summary Judgment, Docket No. 62 (Nov. 22, 2010)("Frank Mem."). This brief does not respond to the brief Filed by Deval Patrick, Governor of the Commonwealth of Massachusetts and Paul Diodati, Director of the Division of Marine Fisheries for the Commonwealth, Docket No. 69 (Jan. 12, 2011).

Under the judicial review provision of the Magnuson-Stevens Act, a plaintiff challenging a regulation must bring a petition for review within 30 days of the promulgation of the regulation. *See* 16 U.S.C. § 1855(f); *see also, Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 943-44 (9<sup>th</sup> Cir. 2006). Congress intended to provide short and specific time periods for each stage of the rulemaking process so that challenges would be swiftly addressed and management plans could achieve a continuing optimum yield from each fishery. *See, e.g., Turtle Island*, 438 F.3d at 947-48. Further, this Magnuson-Stevens Act provision is jurisdictional. *See, e.g., Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 765 (9<sup>th</sup> Cir. 2009), *cert. denied*, 130 S.Ct. 1522 (2010); *Turtle Island*, 438 F.3d at 945; *Blue Water Fishermen's Ass'n v. NMFS*, 158 F. Supp. 2d 118, 122 (D. Mass. 2001). Thus, challenges brought under the Magnuson-Stevens Act that contravene the 30-day statute of limitation are time-barred and this Court lacks jurisdiction to address them.

New Bedford, for example, challenges NMFS's decision to use a different baseline for the allocation of Georges Bank cod to the Fixed Gear and Hook Sectors from the baseline used to allocate all other stocks of fish to the new Amendment 16 sectors. *See* NB Mem. at 15. This use of different baselines, New Bedford asserts, does not comply with various Magnuson-Stevens Act's provisions requiring that allocations of fish be fair and equitable to all fishermen. *Id.* at 15-16. New Bedford's challenge must fail, however, because the baseline for the allocations of Georges Bank cod to the Hook and Fixed Gear Sector, together with an allocation to the Hook Sector, was established in 2004 as part of Amendment 13, and the allocation to the Fixed Gear Sector was established according to the same baseline in 2006 as part of Framework Adjustment 42, all well more than 30 days prior to the filing of New Bedford's complaint here.

Amendment 13 contained specific rules for the allocation of Georges Bank cod to the first authorized sector – the Hook Sector. *See e.g.*, Final Rule 69 Fed. Reg. 22906 (April 27, 2004). The FEIS for Amendment 13 makes clear that, “[f]or any sectors formed that target GB cod during the period 2004 through 2007, landings will be based on fishing years 1996 through 2001.” AR 3 at 000032. The regulations implementing Amendment 13 also outlined the procedure for calculating allocations of the George Bank cod to the Hook Sector, establishing Fishing Years 1996-2001 as the baseline for future allocations. *See* 69 Fed. Reg. at 22914 (“This procedure will be repeated for each fishing year, using the landings history of GB cod by the sector participants from 1996-2001, and the GB cod TAC for that fishing year”). The Fixed Gear Sector received its first allocation of Georges Bank cod using the same baseline. *See* Final Rule 71 Fed. Reg. 62156 (October 23, 2006). Although the Hook and Fixed Gear Sectors were the only two sectors that participated during these formative years, other fishermen had the same opportunity to form sectors and lock in the same baseline allocation.

Amendment 16, as it pertains to these pre-existing sectors and their allocations of Georges Bank cod, is not a new regulation and does not affect their baselines. While the term used for an individual sector member’s contribution changed from “documented catch” to “potential sector contribution” in order to be technically consistent with the new baseline rule for the additional sectors approved in Amendment 16, the baseline and procedure for calculating the Hook and Fixed Gear Sectors’ allocation of Georges Bank cod is exactly the same as was used in Amendment 13. In fact, the Amendment 16 Final Rule states, “[f]or GB cod, any vessel owner that indicated his/her intent to participate in one of the existing sectors (i.e., the GB Cod Hook Sector or the GB Cod Fixed Gear Sector), . . . , is allocated a GB cod PSC based upon documented landings histories of this stock between FYs 1996-2001, the years selected to

determine the GB cod allocation for existing sectors under Amendment 13.” *Final Rule 75 Fed. Reg.* 18262 (April 9, 2010); AR 997 at 056500. This is entirely consistent with the policy established for fixed and permanent permit history baselines begun under Amendment 13, which stated “[u]nless changed by a future action, once a permit’s PSC is calculated in accordance with the selected PSC options, that PSC is permanent.”

Strict time limits ensure prompt resolution of challenges to fishing regulations and any attempt by Plaintiffs to avoid the Magnuson-Stevens Act 30-day statute of limitations would defeat Congressional intent to expedite review. Accordingly, because Plaintiffs failed to file challenges to the Hook Sector or the Fixed Gear Sector and their allocations of Georges Bank cod within the 30-days of the Federal Register publications of Amendment 13 or Framework 42, those claims are time barred and this Court lacks jurisdiction to address them.

B. The Sector Allocations provided to the Georges Bank Cod Fixed Gear Sector and the Georges Bank Cod Hook Sector are Specifically Exempted from the Magnuson-Stevens Act’s LAPP Requirements

Plaintiffs and *amici* make various vague or imprecise challenges to sector allocations and catch shares generally claiming that any allocations of resource made in this manner should have been subject to the Magnuson-Stevens Acts’ Limited Access Privilege Program (“LAPP”) provisions added by the MSRA. *See* NB Mem. at 16, 17, 20, 21; Lov Mem. at 21; FWW Mem. 19-21; Frank Mem. at 13-17. However, the baseline for allocations of Georges bank cod to the Fixed Gear and Hook Sectors and their sector allocations were implemented prior to the Magnuson-Stevens Reauthorization Act of 2006 (“MSRA”). The MSRA expressly exempts sector allocations in effect before January 12, 2007 from the LAPP requirements (including the New England Referendum requirement for Individual Fishing Quotas (“IFQs”):

(h) Effect on certain existing shares and programs

Nothing in this chapter, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocations in effect before January 12, 2007.

(i) Transition rules

The requirements in this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after January 12, 2007, . . .

16 U.S.C. § 1853a(h), (i). Giving the statute its plain meaning, there is no doubt that this sector allocation implemented in 2004 under Amendment 13 is exempt from the LAPP provisions of the MSRA because it “in effect before January 12, 2007.” Similarly, the Fixed Gear Sector’s allocation of Georges Bank cod, using the same baseline established in Amendment 13, was approved on October 23, 2006 in Framework Adjustment 42 and therefore is also exempt from the LAPP requirements. *See* 71 Fed. Reg. 62156 (Oct. 23, 2006).

Plaintiffs concede that the existing sectors were “undoubtedly” the basis for this exemption. *See* NB Mem. at 21 (“The initial Hook Gear and Fixed Gear Sectors constituted quotas and undoubtedly served as the basis for the exception.”); *see also* FWW Memo at 12, FN 15. Because the Fixed Gear and Hook Sectors and their allocations were in effect before January 12, 2007, they were correctly exempted from meeting the recently enacted LAPP requirements as part of Amendment 16; therefore, any claims by Plaintiffs that the LAPP requirements apply to Amendment 16 sectors cannot succeed in affecting those allocations. *See Infra* at II.B.

C. The Fixed Gear and Hook Sectors Baseline Landings History Used for Allocations of Georges Bank Cod is Fair and Equitable, and Consistent with the National Standards and Other Magnuson-Stevens Act Requirements

The allocations of Georges Bank cod to the Fixed Gear and Hook sectors are fair and equitable, consistent with National Standard 4 and other requirements of the Magnuson-Stevens

Act. Plaintiffs complain that NMFS's use of multiple landings history baselines results in inequitable allocations of the TAC; and specifically challenge the Fixed Gear Sector's baseline allocation of Georges Bank cod by claiming it is based on a "shorter qualifying timeframe, which significantly and inequitably increased their relative allocations" in violation of the Magnuson-Stevens Act. *See* NB Mem. at 8, 15-16. New Bedford's claim is not only legally flawed but it is also inaccurate in at least two ways. First, it suggests that the Fixed Gear Sectors' baseline was somehow increased in Amendment 16; it was not and remains the same as it was at its inception in 2004. Second, New Bedford also appears to assert that the baseline (shorter qualifying period) applies to all of the groundfish allocations made to the Fixed Gear Sector in Amendment 16; it does not and continues to apply only to the longstanding Georges Bank cod allocation made years ago in Amendment 13.

Equally unfounded are Plaintiffs' claims that continuation of the landings history baseline of 1996-2001 for the Fixed Gear and Hook Sectors' allocations of Georges Bank cod, which is based on individual vessel landings history from 1996-200, is unfair and inequitable<sup>5</sup> Amendment 16 provided that its new sector allocations would be based on a different range of landings histories from 1996-2006. *See Framework 44*, 75 Fed. Reg. 18356 (April 9, 2010). The Fixed Gear Sector itself received its new allocations for stocks other than Georges Bank cod based on this new baseline, and submits that there is nothing unfair or inequitable about the NEFMC and NMFS's decision to use this different baseline. All commercial fisherman receiving allocations under Amendment 16 are treated the same. *See also* Exhibit 1 (Letter from Port Clyde Community Groundfish Sector representing 30 Maine fishermen stating their view

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<sup>5</sup> In addition, the TAC for recreational fishing vessels, which catch two stocks of fish (Gulf of Maine cod and haddock), and do not participate in sectors, is based on landings history from 2001 to 2006. Although the Fixed Gear Sector views this allocation as fair and equitable for many of the same reasons discussed herein, these allocations do not significantly affect *amicus curiae's* interests and are ably addressed in Defendants' memoranda, so will not be specifically discussed herein.

that “the Council’s decision-making process for Amendment 16 was open and transparent and as a result the baseline allocation formula is fair and equitable.”).

National Standard 4 seeks to ensure all allocations are fair and equitable:

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.”

16 U.S.C. § 1851(a)(4). Other provisions in the Magnuson-Stevens Act reflect similar equity concerns. 16 U.S.C. § 1853(a)(14); 16 U.S.C. § 1854(e)(4).

The language of these provisions demonstrate that Congress recognized that there would be tension when making allocation decisions and a need to balance the interests of various fishermen, thus it left the Secretary with considerable discretion in meeting the requirement of National Standard 4 so long as the decision is rational and supported by the record. *See, e.g., Alliance Against IFQs v. Brown*, 84 F.3d 343 (C.A. 9 Alaska 1996) (Secretary’s decision to allocate shares of allowable catch to boat owners and lessees, and not crew members, was rational based on the Act’s additional requirements that FMPs prevent overfishing, promote efficiency and avoid unnecessary duplication), *certiorari denied* 520 U.S. 1185. Moreover, as explained below, NMFS has adequately explained how it arrived at these allocations. Therefore its decision is entitled to a certain degree of deference. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Co.*, 463 U.S. 29, 43 (1983) (agency’s decision is entitled to deference so long as the record supporting the decision reveals that the agency “examined[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”).

After an extended public process the NEFMC declined to take any action directed at changing the baseline qualifying period for the pre-existing sectors. *See* AR Doc 658 at 045955. Citing stability in the fishery so sectors can create business plans based on a permanent permit history, the Chairman of the NEFMC reiterated Amendment 13 and the Council's commitment to "freezing" baselines once an allocation was created. AR 658 at 045955. Acting Administrator for NOAA, Eric Schwaab, also explained the reasoning for fixing baselines once a sector was created stating "As it did in Amendment 13 for the two existing sectors, the Council [] indicated its intent to freeze catch history for newly formed sectors as of the implementation of Amendment 16 to preserve the allocation decisions made in Amendment 16, further promote stability in the fishery, and foster an environment where all sectors can create efficient and effective long-term business plans." AR 970 at 056265.

Citing its intent to promote stability in the fishery and diversification of the fleet, NMFS carefully and thoroughly outlined its rationale for selecting a baseline for the Amendment 16 allocations that is different from the existing baselines for Georges Bank cod:

Amendment 16 treats future participants in sectors in the same manner as participants in the existing sectors by indicating its intent to preserve existing allocations in future management actions to offer more stability in the fishery that will enable the development of longer-term business plans . . . . In addition, because these [existing] sectors represent cohesive groups of smaller vessels fishing with hook and gillnet gear, preserving existing sector allocations promotes the continuation of a diversified fishery in both size and gear type near Chatham, MA . . . . Revising existing sector allocations by selecting another sector allocation option could reduce fishing opportunities for these sectors and adversely affect associated communities. Therefore, NMFS has determined that sector allocations under Amendment 16 are consistent with the goals and objectives of the FMP, are fair and equitable, and are reasonably calculated to promote conservation consistent with National Standard 4 . . . . The allocation options adopted in Amendment 16 are intended to reflect current participation in the fishery. The 11-yr period for allocation of most stocks is meant to minimize the impact on catch history that result from changes to groundfish regulations during this period. At the time these options were developed, the Council was attempting to implement Amendment 16 by the start of FY 2009 on May 1, 2009, and complete landings data were only available through FY

2006. Therefore, these data represented the best scientific information available at the time they were first developed.”

AR Doc. No. 889 at 052108.

The Council and the Defendants chose a baseline for allocation in Amendment 16 that was designed to fairly and equitably produce the greatest benefit to all participants in the groundfish fishery. The Fixed Gear and Hook sector allocations for Georges Bank cod ultimately affects one of 20 managed stocks and results in only a small difference in the amount of catch of this single stock available to all other fishermen, totaling about two percent. AR 773 at 48433; AR 997 at 56518; AR 658 at 45955. Defendants’ actions were rational and consistent with National Standard 4 and related provisions of the Magnuson-Stevens Act.

## **II. The Amendment 16 Sectors and Allocations are Consistent with Magnuson-Stevens Act Requirements**

### **A. Sector Allocations Are Expressly Exempt from the Magnuson-Stevens Act’s Referendum Requirement**

The sectors approved as part of Amendment 16 do not require a referendum both because sector allocations were expressly exempted from the referendum requirement when the LAPP provisions were added to the Magnuson-Stevens Act in 2007, and because they are part of a sector allocation program that was established prior to those amendments. Plaintiffs, Amicus Food & Water Watch (“FWW”), and Plaintiff *amici* erroneously contend that Amendment 16 sectors and their allocations are a new program of IFQs, implemented after the addition of the 2007 amendments, and are unlawful because they were not approved through a referendum. *See* NB Mem. at 16, 17, 20, 21; Lov Mem. at 21 (vague allegation that catch shares created under Amendment 16 violate the LAPP provision); FWW Mem. at 9-15, 19-21; Frank Mem. at 13-17, FN 12 . All of these challenges ignore the plain language of the Magnuson-Stevens Act and the

Defendant's reasonable interpretation that the Amendment 16 sectors are a continuation of the sector program established in 2004 in Amendment 13.

The referendum requirement in the LAPP provision of the Magnuson-Stevens Act states:

(D) New England and Gulf referendum

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program, including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2/3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council,  
...

(vi) In this subparagraph, the term "individual fishing quota" does not include a sector allocation.

16 USC 1853a(c)(6)(D)(i), & (vi).

The plain words of the referendum requirement state that for the purposes of this provision "the term 'individual fishing quota' does not include a sector allocation." Statutes should be construed according to their plain meaning. *See Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857 (1<sup>st</sup> Cir. 1998). Here, where the title of the provision specifically refers to New England and the Gulf of Mexico; it is reasonable to conclude that the phrase "sector allocation" referred to the sector practice in one or both of those regions. Further, because the regulations for Gulf of Mexico fishery management plans do not even contain the term, "sector allocation," it is reasonable to conclude that this phrase referred to the sector allocations implemented in New England. AR Doc 103 at 010139. Sector allocations in New England are unambiguously not individual fishing quotas for the purposes of this referendum requirement.

Further, the record shows that NMFS carefully reviewed the statute and its application in New England before concluding that the referendum requirement did not apply. *See Final Rule* 75 Fed. Reg. at 18275; *see also* AR 103 at 010135. Defendants' reasonable interpretation of a

statute is entitled to deference. *See* Fed. Mem. at 15, 16 (discussing *Chevron*, *Skidmore*, and *Meade* deference framework). In 2007, when responding to questions posed by the NEFMC regarding whether sectors as implemented in the Northeast Multispecies FMP would be subject to the referendum requirement, the Defendants stated that “a reasonable interpretation is that ‘sectors’ [] are exempt from the referendum requirements.” AR 103 at 010135.

In its Final Rule, the Defendants provided further clarification on the issue. *See* 75 Fed. Reg. at 18292; AR 997 at 056516. Responding to comments from FWW and others, NMFS provided three reasons for its conclusion that a sector allocation was not an IFQ and thus, not subject to a referendum: 1) the Magnuson-Stevens Act explicitly states that a sector allocation is not an IFQ for the purposes of the referendum requirement; 2) NMFS had already determined that the sector program as currently implemented is neither an IFQ, nor a LAPP in its letter to the Council; and 3) none of the revisions to the current sector program in Amendment 16 changed their conclusions. *Id.* As discussed *infra* at I.B. the MSRA expressly exempted any quota programs and sector allocations in effect before January 12, 2007 from the LAPP requirements. Amendment 13 established a sector allocation program, including a baseline for determining the allocation of Georges Bank cod to sectors approved the following four fishing years, a method for determining the baseline to be applied to any other sector allocations, and a suite of additional regulations governing sector allocations. 69 Fed. Reg. at 22914; 50 C.F.R. § 648. Amendment 16 authorized 17 additional sectors and revisions to the existing regulations, but the sector allocation program established prior to “January 12, 2007” is fundamentally the same and was exempted from LAPP requirements, including the referendum, by the MSRA. Thus, it was reasonable for Defendants to conclude that the sector allocations contained in Amendment 16 are exempt from the Magnuson-Stevens Act’s IFQ referendum requirement and are lawful.

B. Sector Allocations Are Also Not IFQs or LAPPs and Therefore are Exempt From Meeting the Magnuson-Stevens Act's Referendum and LAPP Requirements

In addition to the express exemption from all LAPP requirements for sector allocations in effect before January 12, 2007, 16 U.S.C. §1853a(h), & (i), discussed *supra* at I.B., and the express exemption of sector allocations from the referendum requirement discussed above, the Amendment 16 sectors and allocation do not meet the statutory definition of an IFQ or a LAPP, and are therefore exempt from Magnuson-Stevens Act's referendum and LAPP requirements.

The Magnuson-Stevens Act defines an IFQ in the following manner: "The term 'individual fishing quota' means a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person." 16 USC § 1802(23). A LAPP is defined similarly: "The term 'limited access privilege' means a Federal permit, issued as part of a limited access system under section 1853a of this title to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person."). 16 U.S.C. § 1802(26). Both an IFQ and a LAPP require among other things a permit, to harvest a specific quantity of fish, held for the exclusive use of a person.

Amendment 16 sectors and their allocations do not fit the plain language of the statutory definitions of IFQs or LAPPs. When a statute's text is plain, "the inquiry should end," and "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). First, each year sectors receive an allocation of an annually determined amount of groundfish; they do not receive a permit. 75 Fed. Reg. at 18276 ("under this action, sectors will be allocated fishery resources for all regulated species stocks, . . ."). Second, allocations to sectors - in the form of an Annual Catch

Entitlement (“ACE”) - are not of “a fixed quantity of fish.” The actual amount of the allocation changes every fishing year based on the membership of the sector. *See* 75 Fed. Reg. at 18275 (“sectors are temporary, voluntary, [and] fluid.”); *see also id.* at 18276 (“The ACE allocated to a sector is valid only for one Fishing Year and is recalculated on a yearly basis based upon changes to sector rosters.”). Third, any allocation to the sector is not “held for exclusive use by a person” because: 1) it is based on landings history of other members as potential sector contributions (“PSCs”); and 2) the allocation is not for the exclusive use of a person because it is provided to the sector for all of its members to fish. *Id.* For these reasons, Amendment 16 sector allocations simply do not meet the statutory definition of an IFQ or a LAPP.

At least one court has described the characteristics of a limited access fishery that operates as an IFQ. *In Alliance Against IFQs v. Brown*, 84 F.3d 343 (USCAP 9<sup>th</sup> Cir. 1996) the court noted the key requirements of an IFQ permit and of a quota allocated to the vessel, stating “[t]he basic scheme is that any boat that fishes commercially for the regulated fish in the regulated area must have an individual quota share (IFQ) permit on board, specifying the individual fishing quota allowed for the vessel” *Alliance Against IFQs*, 84 F.3d at 345. Unlike the fishermen in *Alliance*, sectors established under Amendment 16 are neither issued an IFQ permit, nor are quotas set for individual vessels.

Amicus FWW takes one last bite at the apple, arguing that if sector allocations are not IFQs or LAPPS, then the potential sector contribution (“PSC”) of each vessel is an IFQ, and thus the referendum requirement applies. *See* FWW Mem. at 10, 11, 14. However, this argument fundamentally misunderstands the purpose of a PSC. A PSC is not “assigned to a permit holder for his exclusive use” as FWW claims, *id.*, rather it is an attribute of the Northeast Multispecies permit (which no one claims is an IFQ permit) based on a vessel’s landings history over time,

which is used only to determine fish available to a sector. *See* 75 Fed. Reg. at 18276. Any potential contribution that an individual vessel brings to the sector is for the purpose of determining the collective ACE of the sector, and is not a permit for a fixed quantity of fish or held for exclusive use by a person. Thus, NMFS reasonably concluded that the Amendment 16 sectors and allocations do not meet the statutory definition of IFQs or LAPPs, and are not subject to the referendum and other LAPP requirements. AR 889.

### **CONCLUSION**

For the reasons set forth above, the Georges Bank Cod Fixed Gear Sector submits that this Court should grant the Defendants' and Defendant-Intervenor's cross-motions for summary judgment, and deny the Plaintiffs' cross-motions for summary judgment. To the extent that any relief is granted in response to Plaintiffs' complaints and motions for summary judgment related to the additional sectors, allocations, or other measures implemented in Amendment 16, such relief should be carefully tailored so as not to adversely affect the existence of the Georges Bank Fixed Gear and Georges Bank Hook Sectors, and to avoid changing in any way the Georges bank cod allocation implemented in Amendment 13 and Framework Adjustment 42.

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Respectfully submitted,

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