

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS
by its DIVISION OF MARINE FISHERIES,

and

STATE OF NEW HAMPSHIRE, by its FISH
& GAME DEPARTMENT, DIVISION OF
MARINE FISHERIES,

Plaintiffs

v.

CIVIL ACTION NO.:
06-12110-EFH

CARLOS M. GUTIERREZ, in his official
capacity as Secretary of Commerce of the
United States, et al.,

Defendants.

ORDER

February 23, 2009

HARRINGTON, S.D.J.

The court rules on Federal Defendants' Notice of Consideration of Mixed-Stock Exception (Docket No. 46).

The Federal Defendants state in their Notice that they "seriously considered and analyzed" the Mixed-Stock Exception, pursuant to the Court's Orders of January 26, 2009 and February 17, 2009. Importantly, the Federal Defendants further explain in their Notice that the National Marine Fisheries Service ("NMFS") and the New England Fishery Management Council (the "Council") disagree as to the applicability of the Mixed-Stock Exception. Upon receiving the

Court's Memorandum and Order of January 26, 2009, NMFS prepared what it identifies as a draft report (the "Draft Report"), dated January 2009, in which it concludes that the Mixed-Stock Exception should not be applied to Framework 42. NMFS presented the Draft Report to the Council at a meeting held on February 10, 2009. After considering the Draft Report, the Council passed a motion disagreeing with NMFS "that the Mixed-Stock Exception cannot be applied" to Framework 42. NMFS responded by preparing a revised report (the "Revised Report"), dated February 2009, but the Council has not had an opportunity to review the Revised Report. The Council will have reviewed the Revised Report by its next meeting, to be held between April 7th and 9th (the "April Meeting").

The Council plays an integral role in passing and amending fisheries regulations. Therefore, prudent and thorough agency action leads the court to extend the suspension of Framework 42's 2:1 Days at Sea counting provisions, as provided for in the Court's January 26, 2009 and February 17, 2009 Orders, from March 27, 2009 to **April 10, 2009**. This extension shall allow the Federal Defendants to "seriously consider and analyze" the Mixed-Stock Exception as to Framework 42's 2:1 Days at Sea counting provisions in response to the Council's findings from the April Meeting. On **April 10, 2009**, the Federal Defendants shall file a report with the court after considering the Council's findings.

The suspension of Framework 42's 2:1 Days at Sea counting provisions, as provided for in the Court's January 26, 2009 and February 17, 2009 Orders, is hereby extended from March 27, 2009 to **April 10, 2009**.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior District Judge