

**UNITED STATES DISTRICT COURT
FOR THE 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.

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

Defendants.

**Civil Action
No. 1:06-cv-12110-EFH**

**STATE PLAINTIFFS’ OPPOSITION TO
FEDERAL DEFENDANTS’ MOTION FILED UNDER FED. R. CIV. P. 59(e)**

The Plaintiffs in this action, the State of New Hampshire and the Commonwealth of Massachusetts (together, the “States”) oppose the motion of the Secretary of Commerce, et al. (together, the “Federal Defendants”) filed pursuant to Fed. R. Civ. P. 59(e) to alter or amend the Court’s January 26, 2009 Memorandum and Order (“Motion to Alter/Amend”). Federal

Defendants' motion should be denied because the Court acted within its authority in remanding the matter to the New England Fisheries Management Council (the "Council) the consideration of the Mixed Stock Exception in compliance with the Magnuson-Stevens Act, 16 U.S.C. § 1851, et seq. (the "MSA") and the Secretary's own regulations and guidelines, and in temporarily suspending Framework 42 for sixty days pending the consideration of that exception. The States also ask the Court to modify its Order as to the remedy during this interim period, by reinstating Framework 42 except for those provisions pertaining to the 2:1 Days-At-Sea or "DAS" counting system, the primary focus of the States' challenge to Framework 42, and by extending the deadline for DAS Leasing by 30 days in order to avoid the March 1, 2009, deadline.¹

RELEVANT PROCEDURAL HISTORY

On January 26, 2009, the Court issued its Order remanding to the Council and the Secretary the "serious consideration and analysis of the Mixed-Stock Exception" in compliance with the MSA and the Secretary's own regulations and guidelines; and temporarily suspending Framework 42, the fisheries management plan (or "FMP") pertaining to groundfish in the

¹ This is the current deadline for application to the Secretary for taking advantage of the DAS leasing program for the last part of the fishing year provided under Framework 42.

Northeast Multispecies Fishery, for sixty days. See Court's Memorandum and Order, dated January 26, 2009 ("Order") at 5 and 7 n. 4.

On February 2, 2009, the Federal Defendants filed their Motion to Alter/Amend the Court's Order, and a supporting memorandum of law. In their supporting memorandum, the Federal Defendants "[did] not object to that portion of the Court's Order requiring [them] to review the applicability of the mixed-stock exception." See Federal Defendants' Memorandum In Support of Motion To Alter Or Amend The Court's Order And In Support Of Motion For Stay Pending Resolution of Motion ("Federal Defendants' Memorandum") at 4. The Federal Defendants also filed a Motion For Stay Pending Resolution of Motion To Alter Or Amend The Court's Order ("Motion to Stay"). The next day, February, 3, 2009, the Federal Defendants sought to correct errors in their pleadings by filing errata.

On February 9, 2009, the Court denied the Motion to Stay rejecting Federal Defendants' request to vacate the Remedy of temporarily suspending Framework 42. The States submit this objection to Federal Defendants' Motion to Alter/Amend.

ARGUMENT

I. FEDERAL DEFENDANTS' MOTION TO AMEND/ALTER SHOULD BE DENIED.

A. The Court Is Has Considerable Discretion In Ruling On A Motion Under Fed. R. Civ. P. 59(e).

Under Fed. R. Civ. P. 59(e), a party may move to alter or amend a judgment. In deciding upon a motion brought under Fed. R. Civ. P. 59(e), “[d]istrict courts enjoy considerable discretion.” ACA Fin. Guar. Corp. v. Advest Inc., 512 F.3d 46, 55 (1st Cir. 2008). In order to prevail, a plaintiff must demonstrate (1) a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in the law. See National Metal Finishing Co. v. Barclays/American/Commercial, Inc., 899 F.2d 119, 124 and 124 n. 2 (1st Cir. 1990). “A Rule 59(e) motion should not, however, ‘raise arguments which could, and should, have been made before judgment issued.’” ACA Fin. Guar. Corp., 512 F.3d at 55 (citations omitted).

Because Federal Defendants have not demonstrated the circumstances that would require this Court to alter or amend its Order, their motion should be denied.

B. The Court Acted Within Its Authority Under The APA And The MSA In Remanding To The Council And In Temporarily Suspending The Framework For 60 Days During That Remand.

This Court retains the authority to “set aside” an administrative decision and to remand the matter to the agency for further consideration upon a finding that the agency did not comply with statutory or regulatory procedures. The MSA incorporates by reference the Administrative Procedures Act. See 16 U.S.C. § 1855(f)(1)(B) (incorporating by reference 5 U.S.C. § 706(2)(A)-(D)). Under the APA, a court has the implicit authority to “set aside agency action, findings, and conclusions,” and to remand the matter to the agency. See U.S. Secretary of Labor v. Farino, 490 F.2d 885, 891 (7th Cir. 1973).

In this case, the Court had the power to “hold unlawful and set aside” Framework 42 because the Secretary failed to follow his own guideline for considering the Mixed Stock Exception in accordance with the MSA. See 5 U.S.C. § 705(D) (providing that “the Court can hold unlawful and set aside agency action, findings, and conclusions found to be” . . . “(D) without observance of procedure required by law.”); see also 5 U.S.C. § 705(A) (when agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); 5 U.S.C. § 705(C) (when agency action is “in excess of statutory jurisdiction, authority, or limitations, or

short of statutory right.”). Where, as is the case here, the Court determines that the Secretary did not consider all of the relevant factors, specifically, the Mixed Stock Exception, remand is appropriate. See Massachusetts v. Daley, 170 F.3d 23, 32 (1st Cir.1999) (noting that remand was an option when the Secretary failed to analyze the state-by-state scup quota in violation of the MSA).

A remand is necessary because the Secretary has the responsibility in the first instance to consider his own guidelines. See Asarco, Inc. v. U.S. Evtl. Protection Agency, 616 F.2d 1153, 1159-60 (9th Cir. 1980) (holding that when an agency did not consider all of the relevant factors, the agency – not the court – should consider these factors on remand). As the Court notes in its decision, “Congress requires the Secretary to have its own guidelines” under the MSA, and “Congress want[s] to assure that detailed analysis underlies the work of Commerce.” Order at 3-4 (citing on page 4, 16 U.S.C. § 1851(b)). Thus, it would not be appropriate for this Court to conduct its own analysis of the Mixed Stock Exception because the Secretary neglected to do so in promulgating Framework 42.

Moreover, the Court acted within its authority in temporarily suspending Framework 42 until the Secretary completed the review of the Mixed-Stock Exception. In Massachusetts v. Daley, the First Circuit, upon

finding that the Secretary failed to consider the state-by-state scup quota in violation of the MSA, “set aside” the Secretary’s action pending further proceedings. See Massachusetts v. Daley, 170 F.3d at 32 (citing Camp v. Pitts, 411 U.S. 138, 143 (1973)) (holding that “[w]here a regulation is not adequately supported, the normal practice is to set it aside pending further proceedings,” though the court may alternatively “remand [to the agency] for further explanation while leaving the regulation in force.”) In this case, the Court took the reasonable approach of requiring that the Council, under the supervision of the Secretary, perform the necessary review of the Mixed Stock Exception instead of vacating Framework 42 in its entirety. In addition, the Court retained jurisdiction over the matter until the Secretary completes this review in order to ensure that it is in fact “seriously considered and analyzed,” and not merely treated as “window dressing.” See Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411, 1437 n. 36 (M.D. Fla. 1998). Thus, it was well within the Court’s power to make the remand and suspend the rule during a relatively brief period while the Council and the Secretary have the opportunity to conduct a review consistent with the MSA guidelines.

C. The Court Has the Equitable Power To Suspend Framework 42 Pending Further Administrative Consideration.

The Court is vested with equity powers and may adjust its relief, even in administrative review cases, “to the exigencies of the case and in accordance with the equitable principles governing judicial action.” Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939); see, e.g. N.A.A.C.P. v. Secretary of Housing and Urban Devel., 817 F.2d 149, 160-61 (1st Cir. 1987) (Breyer, J.) (“A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion” and can remedy an administrative oversight through remand); Avery v. Secretary of Housing and Urban Devel., 762 F.2d 158, 163-65 (1st Cir. 1985). This power includes the ability to suspend all or part of a proposed rule while a remand is ordered for further information and consideration. South Terminal Corp. v. Env'tl. Protect. Agency, 504 F.2d 646, 666-67 (1st Cir. 1974).

As noted above, the Court took a very measured step in redressing a fairly serious problem that was admitted to by the Secretary. Given the serious harms that Framework 42 visited upon the commercial fishermen bound by Framework 42's harsh provisions, it was appropriate for the Court to provide relief from a potentially flawed rule. The temporary suspension and remand is perfectly consistent with the MSA and APA and thus the

Court's exercise of its equitable power is not in derogation of anything in law. It was in the "interest of a just result, and in aid of the judicial function" to conduct a meaningful review of the rule that the Court acted. South Terminal, 504 F.2d at 666.

D. The Court Did Not Grant Relief Precluded By 5 U.S.C. § 705.

The MSA precludes the grant of certain preliminary relief of the type often sought at the outset of litigation challenging a federal rule. 16 U.S.C. § 1855(f)(1)(A) (precluding entry of certain preliminary orders otherwise available under the APA, 5 U.S.C. § 705). The Court, however, did not grant relief foreclosed by the MSA.

The Court's order to remand to the Secretary and temporarily suspend the framework, made after review of the administrative record and consideration of the merits, is not an order precluded by 18 U.S.C. § 1855(f)(1)(A). That section only forecloses certain preliminary relief that is otherwise potentially available under the APA, see 5 U.S.C. § 705. In an APA action, Section 705 permits a court to "postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." The MSA precludes this specific, preliminary relief. 18 U.S.C. § 1855(f)(1)(A). Here, the Court did not enter a preliminary stay of the framework pending its consideration of the merits; it temporarily

suspended the rule only after having found a defect in its promulgation.

Thus, this Court's Order does not grant relief foreclosed by the MSA, 18 U.S.C. § 1855(f)(1)(A). The Federal Defendants' arguments are unavailing in this regard.

II. PENDING THE COUNCIL'S CONSIDERATION OF THE MIXED STOCK EXCEPTION, THE STATES HEREBY REQUEST THE COURT TO MODIFY THE REMEDY.

While the Council under the guidance of the Secretary is responding to the Court's Order to "seriously consider and analyze the Mixed-Stock exception," the States ask the Court to modify the Order as to remedy. Until the review and analysis that the Court ordered is completed and reported to the Court,² and the Court makes its final ruling, the States respectfully ask this Court to modify the remedy in order to (1) provide clarification to interested stakeholders, e.g., commercial fishermen, as to the status of federal regulations pertaining to groundfish in the Northeast Multispecies Fishery; (2) refine the Court's remedy so that it reflects the States' immediate concerns; and (3) narrow the scope of the issues before this Court and thus, render some of the issues raised by Federal Defendants in their Motion to Alter/Amend as moot. The States specifically seek a modification that reinstates Framework 42 except for those provisions pertaining to the

² If the Court were to grant the States' motion for summary judgment, it would necessarily need to re-consider the issue of an appropriate remedy.

2:1 Days-At-Sea or “DAS” counting system, the primary focus of the States’ challenge to Framework 42, and that which extends the deadline for DAS Leasing by 30 days in order to avoid the impending March 1, 2009, deadline.

Reinstating a modified Framework 42 will have the beneficial effect of promoting certainty among interested stakeholders, including commercial fishermen, who were subject to the challenged FMP. While it is within the Federal Defendants’ power to issue emergency regulations, they have not taken any action to clarify the situation. See Massachusetts v. Daley, 170 F.3d at 32 (noting that “the Secretary retains power to issue emergency regulations with a minimum of formalities” and citing 16 U.S.C. § 1855(c)). To the contrary, Federal Defendants have made public statements that have had the effect of creating further discord and uncertainty among interested stakeholders in an already complex fishery. As a result, there is confusion among commercial fishermen, as well as others, as to the status of the federal regulations pertaining to the fishery. A decision by the Court to narrow the remedy would provide increased certainty and prevent unwarranted disruption to those who (were and) are trying to comply with the general regulatory scheme of Framework 42.

In addition, the proposed modification of the remedy is congruent with the States' requested relief. In their summary judgment pleadings, the States anticipated that the Court's decision to vacate Framework 42 would necessarily mean a revival of an earlier regulatory scheme that did not include the 2:1 DAS counting scheme. See State Plaintiffs' Memorandum of Law In Reply To The Federal Defendants' Opposition to State Plaintiff's Motion for Summary Judgment and In Opposition to Federal Defendants' Cross-Motion For Summary Judgment ("Reply Memorandum") at 3-5. As the Federal Defendants acknowledge, the States' primary concern was that the regulatory scheme replacing Framework 42 "[did] not include the 2:1 [Days-At-Sea] counting ratio that is causing so much harm to New Hampshire and Massachusetts fishermen." See id. at 4; Federal Defendants' Memorandum at 10. Based upon this rationale, the State Defendants now ask the Court to vacate only those provisions that pertain to the 2:1 DAS counting scheme. It is within the Court's authority to vacate severable portions of Framework 42, specifically the provisions pertaining to 2:1 DAS counting system. See South Terminal, 504 F.2d at 667 (reinstating some rules, suspending others); Oceana, Inc. v. Evans, 384 F. Supp. 2d. 203, 256 (D.D.C. 2005); Oceana, Inc. v. Evans, Civ. A. No. 04-0811, 2005 WL 555416, at *43 n. 36 (D.D.C. March 9, 2005). Moreover, a decision to

reinstate Framework 42 with the exception of the 2:1 DAS provisions and with the addition of a 30-day extension for DAS leasing would provide a system that is presently familiar to commercial fishermen, who were complying with Framework 42 and not the previous regulatory scheme (i.e., Amendment 13).

Modifying the remedy would also narrow the scope of the issues currently before the Court and render some of Federal Defendants' arguments as moot. In their Motion to Alter/Amend, Federal Defendants maintain that this Court did not narrowly tailor its Remedy. See Federal Defendants' Memorandum at 10-11. Federal Defendants also note that the Court's decision to modify the remedy would be consonant with the States' requested relief. See id. at 10. Thus, the Court would not need to consider the Federal Defendants' assertions that the remedy was not narrowly tailored as the narrower tailoring that would come with this requested modification would render these assertions as moot.

For these reasons, the States request that the Remedy be modified (1) to reinstate Framework 42 except for those provisions pertaining to the 2:1 Days-At-Sea or "DAS" counting system; see 50 C.F. R. §§ 648.82(e)(2)(i)(A) (GOM Differential DAS Area) and 648.82(e)(2)(iii)(A) (Differential DAS counting when fishing in the GOM differential DAS

Area); and (2) to extend the deadline for DAS Leasing by 30 days in order to avoid the impending March 1, 2009, deadline; see 50 C.F. R. § 648.82 (DAS Leasing Program).

CONCLUSION

For these reasons, the States ask that the Court (1) deny Federal Defendants' Motion to Alter/Amend and (2) modify the Remedy set forth in its Order.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS, by its
DIVISION OF MARINE FISHERIES

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February 13, 2009

STATE OF NEW HAMPSHIRE,
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February 13, 2009

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on February 13, 2009, I served a true copy of the foregoing upon counsel to the defendants, by ECF.

Dated: February 13, 2009

/s/ Peter C.L. Roth