THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE CITY OF NEW BEDFORD, and THE CITY OF GLOUCESTER, et al., Plaintiffs,	
v.	**Case No. 1:10-CV-10789-RWZ**
GARY LOCKE, et al., Defendants.	
JAMES LOVGREN, et al., Plaintiffs,	
v.	
GARY LOCKE, et al., Defendants.	

BRIEF, AMICI CURIAE, FILED BY ATTORNEY GENERAL MARTHA COAKLEY ON BEHALF OF DEVAL PATRICK AS THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND PAUL DIODATI AS THE DIRECTOR OF THE DIVISION OF MARINE FISHERIES FOR THE COMMONWEALTH

Attorney General Martha Coakley submits this brief on behalf of Deval Patrick, the Governor of the Commonwealth of Massachusetts ("Governor Patrick"), and Paul Diodati, the Director of the Division of Marine Fisheries ("Director Diodati"), amici curiae (collectively, the "State Amici"), setting forth their view of the motion for summary judgment filed by the plaintiffs Cities of New Bedford and Gloucester ("Port Plaintiffs") and the amicus brief filed by the amici Representatives Barney Frank (D-MA) and John Tierney (D-MA) ("Representative Amici"). Despite strong objections during the development of Amendment 16,[1] the Commonwealth ultimately supported the

[1] During the underlying administrative proceedings, the State Amici raised other objections that are not addressed in this amicus brief including, but not limited to, the

decision by the defendant Gary Locke, Secretary of Commerce ("Secretary"), United States Department of Commerce and the National Oceanic and Atmospheric Administration to extend fishery-wide a catch-share or sector-based management system in the Northeast Multispecies Fishery. Notwithstanding that support, the State Amici argue that the Secretary's promulgation and implementation of that sector-based system, which was accomplished via Amendment 16,[2] violates at least four national standards, One, Two, Six and Eight, that must be complied with under the Magnuson-Stevens Act, 16 U.S.C. § 1851, et seq., and the related regulations, 50 C.F.R. §§ 600.310, 600.315, 600.335, 600.345. See 75 Fed. Reg. 18262-53 (April 9, 2010); Administrative Record ("AR") 56485-56577; see also 75 Fed. Reg. 18356-75 (April 9, 2010); AR 56715-35.

INTEREST OF THE AMICI CURIAE

The Division of Marine Fisheries[3] is charged with enforcing federal fishing regulations and promulgating and enforcing state fishing regulations to manage commercial fishing in the waters off the Commonwealth's shores. See M.G.L. c. 130.

Secretary's method for allocating quota to commercial fishermen based upon their fishing history.

[2] While the plaintiffs' Amended Complaint, dated June 24, 2010, challenges Amendment 16, this Court's review of Amendment 16, i.e., 75 Fed. Reg. 18262-53 includes Framework 44, i.e., 75 Fed. Reg. 18356-75, a later supplement to Amendment 16. See Gulf Fishermen's Ass'n v. Gutierrez, 529 F.3d 1321, 1323 (11th Cir. 2003) (recognizing that timely petition for judicial review includes review of regulation and any subsequent action taken by the Secretary under that regulation) (relying on Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1113 (9th Cir. 2006)); see also 75 Fed. Reg. 18356 ("FW 44 is implemented in this rule in conjunction with approved Amendment 16 measures"). Accordingly, the State Amici's references to "Amendment 16," incorporate both the regulation and Framework 44.

[3] In the Commonwealth of Massachusetts, marine fisheries laws are administered by the Division, an agency within the Department of Fish and Game (the "Department"), Executive Office of Energy and Environmental Affairs. M.G.L. c. 130, § 1A. The Division is administered by Director Diodati.

The Division oversees one hundred ninety two (192) miles of coastline. See Secretary's Fishing Communities of the United States, 2006 ("2006 Social Report"), at 32.[4] Federal regulations apply to federal permit holders who are fishing in the EEZ, the area that is located between three and two hundred (200) nautical miles offshore. See 16 U.S.C. § 1802(11). State regulations pertain to the area within three nautical miles of the shoreline. See id. Federal permit holders have to comply with federal law regardless of whether they are fishing in federal or state waters. In addition, the Division licenses and continues to regulate commercial fishing vessels -- including "trip boats" or larger vessels that travel offshore and "day boats" or smaller vessels that remain inshore -- of which approximately 500 vessels are subject to the new regulatory scheme imposed by Amendment 16. See A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery, dated November 5, 2010, attached as Exhibit ("Ex.") A to this amicus brief ("MA Economic and Scientific Report"), at 6.

By the Secretary's own count, there are at least twenty nine (29) fishing communities[5] and ports in the Commonwealth. See 2006 Social Report at 35. Among

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[4] This report is located at: http://www.st.nmfs.noaa.gov/st5/publication/communities/NE_ALL_Communities.pdf

[5] Under the Guidelines for National Standard Eight, a "fishing community" is defined as:

> [A] community that is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing or on directly related fisheries-dependent services and industries (for example, boatyards, ice suppliers, tackle shops).

50 C.F.R. § 600.345(b)(3).

these are the City of New Bedford, which was the largest fishing port in the nation in terms of value, i.e., $249.2 million, and the eighth largest port in terms of volume of landings, i.e., 170 million pounds, in 2009, and the City of Gloucester, which was the tenth largest port in the nation in terms of volume of landings, i.e., 122.3 million pounds. See NOAA Press Release, "New Bedford, Mass. and Dutch Harbor-Unalaska, Alaska Remain Top Fishing Ports," dated September 9, 2010.[6]

As the Secretary himself acknowledges, these fishing communities and ports have been essential to our nation's history, including its economic and social growth. See 2006 Social Report at 32. The City of Gloucester has been a fishing community since it was founded in 1623. Id. at 33. As various writers have chronicled, commercial fishing continues to be firmly anchored in the lives of these fishing communities and the families that populate them. See, generally, Mark Kurlansky, Cod (1998); Peter Matthiessen, Men's Lives (1988).

The significance of commercial fishing to the Commonwealth is not just a historical anomaly. According to the Secretary's 2008 Economic Report, Massachusetts led the New England region, which includes the states of Maine, New Hampshire, Rhode Island, and Connecticut, in landings revenue, pounds landed, sales, income and jobs generated by the commercial fishing industry. See Secretary's Report on Fishery Economics of the United States, 2008 ("2008 Economic Report"), at 50.[7] Despite the historical and continuing importance of this industry, "[m]multiple factors have led to reduced commercial fishing in [the New England] region over the past twenty years

[6] This article is available at: http://www.nmfs.noaa.gov/mediacenter/docs/fus_2009_top_ports.pdf

[7] A copy of this report can be found at: http://www.st.nmfs.noaa.gov/st5/publication/econ/2008/NE_ALL_Econ.pdf

including . . . changes in fishing regulations." 2006 Social Report at 32. Federal regulations are "changing the nature of fishing communities." See id.; see also Don't Forget About The Fishermen: In The Battle Over Fisheries Conservation And Management A Conservation Ethic Has Trumped Economic Concerns Of The Community-Or Has It?, 36 Suffolk U. L. Rev. 765, 778 (2003) (noting that "[f]ishing communities of New England, particularly those dependent upon the groundfish fishery, are experiencing a social and economic crisis brought on by regulatory changes.") As a result of the changes in federal regulations prior to Amendment 16, the Division has measured decreases in the number of commercial fishing vessels in Massachusetts. See MA Economic and Scientific Report at 7 and 11. It is those MA commercial fishermen who have navigated the choppy regulatory waters of the past several decades that now confront Amendment 16. See id. at 11-12.

At the federal level, the Secretary, through the National Marine Fisheries Service ("NMFS") and the New England Fishery Management Council (the "Council"), which includes a Massachusetts representative, controls the fisheries in New England and develops and implements fishery management plans and periodic amendments (collectively, "FMPs"). See 16 U.S.C. § 1801(b)(4)-(5); 16 U.S.C. § 1854(e)(2); 50 C.F.R. § 310(2)(2). Amendment 16 is one of nine FMPs for the New England region. See 2008 Economic Report at 50. While the Division's delegate to the Council ultimately voted in favor of the adoption of Amendment 16, that is, to support a transition to a catch-share or sector-based management system, the Division and other Massachusetts officials consistently and repeatedly raised the issues set forth in this amicus brief, including that the Secretary is required under the National Standards of the

Magnuson-Stevens Act to set reasonable annual catch limits ("ACLs") so that Massachusetts commercial fishermen can achieve optimum yield ("OY"). See 75 Fed. Reg. at 18365, cols. 1-3 (AR 56725); AR 56998.

Historically, the Division has been a consistent proponent of the issues before this Court. In Commonwealth of Massachusetts, et al. v. Gutierrez, et al., the Division, as co-plaintiff with the New Hampshire Division of Marine Fisheries, convinced this Court that federal regulators did not "seriously consider and analyze" the Mixed-Stock exception before promulgating Framework 42, the most recent suite of regulatory measures governing the Northeast groundfish fishery; the plaintiffs persuaded the Court that the Mixed-Stock exception, had the Secretary invoked it, would have resulted in ACLs that allowed for the overfishing of some "choke stocks" in exchange for the harvesting of other "healthy" stocks, thereby permitting fishermen to achieve OY, as is required by National Standard One. See Massachusetts v. Gutierrez, 594 F. Supp. 2d 127 at *4 (D. Mass. 2009) (Harrington, J.). In that litigation, the Division also argued that the Secretary's failure adequately to consider the social and economic impacts of Framework 42 threatened the viability of Massachusetts commercial fishermen and fishing communities. See id.

On November 5, 2010, after the promulgation of Amendment 16, Director Diodati, who co-chairs the Massachusetts Marine Fisheries Institute ("MFI"), which is based at the University of Massachusetts School of Marine Science and Technology, published "A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery" (previously defined as "MA Economic and Scientific

Report").[8] "The report provides an analysis and evaluation of the current economy and overall economic viability of the Massachusetts sector groundfish fleet resulting from the unforeseen consequences of unnecessarily low ACLs and market failure in trading under the new catch shares system, and what scientifically valid alternatives exist to increase ACLs." See MA Economic and Scientific Report at 4. In doing its analysis, MFI primarily relied on data that were available to the Secretary before he promulgated Amendment 16. See id. Moreover, the report corroborates the State Amici's arguments that the Secretary's promulgation of Amendment 16 violated at least four National Standards under the Magnuson-Stevens Act, 16 U.S.C. § 1851, et seq.

On November 5, 2010, Governor Patrick forwarded a copy of the MA Economic and Scientific Report to the Secretary, under a cover letter requesting the Secretary, for the reasons documented in the report, to (a) prospectively raise ACLs for certain species; and (b) issue emergency financial relief to certain Massachusetts fishermen who were displaced from the groundfish fishery as a result of Amendment 16's setting of low ACLs. By letter dated January 7, 2011, the Secretary denied both of Governor Patrick's requests, in their entirety, primarily for the paradoxical reason that most of the scientific

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[8] On November 5, 2010, Governor Patrick forwarded this report to the Secretary asking for emergency action, including, but not limited to

> regulations to revise catch limits to higher levels that are still consistent with conservation requirements. The report demonstrates that there is scientific justification to raise catch limits by at least 30% for most species, and significantly more for some, while still remaining within conservation bounds. Based on this analysis, the report identifies approximately $19 million of foregone economic opportunities in Massachusetts due to catch limits that were set at the lowest end of allowable ranges.

See Letter from Governor Patrick to Secretary Locke, dated November 5, 2010, attached as Ex. B to this amicus brief. Despite the fact that the report partially relies on his own data, the Secretary has refused to revise ACLs. See Secretary Locke's Letter.

information set forth in the report was not new, but instead was available to (and, apparently, disregarded by) the Secretary at the time he promulgated Amendment 16. See Secretary Locke's Letter.

SUMMARY OF THE ARGUMENT

Amendment 16 constitutes a major change in the federal regulation of the Northeast Multispecies Fishery, a complex of 19 interrelated fish stocks located in the Exclusive Economic Zone ("EEZ"), the federal waters that are located between three and two hundred (200) nautical miles off the nation's shores. See 75 Fed. Reg. at 18262, col. 1 (AR 56485-86) (describing "significant revisions to the sector management measures"). Amendment 16 dramatically extends a sector-based management system, almost entirely replacing the previous days-at-sea ("DAS") regulatory scheme that rationed fishermen's access to the fishery by allocating days for fishing to vessel owners. See 75 Fed. Reg. at 18291, cols. 1-2 (AR 56515) (comparing the sector "quota management system" to the DAS "effort control system"). Under Amendment 16, the Secretary has allocated catch-shares to vessel owners based on their fishing history. See 75 Fed. Reg. at 18295, col. 1 (AR 56518-19). Vessel owners can opt to join a sector and bring their catch-share allocation into that sector.[9] See 2008 Economic Report at 50 n.1.

As a result of Amendment 16, seventeen (17) sectors are operating in the fishery during the 2010 fishing year, i.e., May 1, 2010 through April 30, 2011. See MA

[9] Upon approval of an application to join a sector, vessel owners "agree to work [with other vessel owners in the sector] for a specific period of time and under specific regulations to harvest a share of the available [annual catch limits ("ACLs")]." 75 Fed. Reg. at 18291, col. 1 and 3 (AR 56514-15). Sectors, in turn, can trade "[a]nnual catch entitlement" ("ACE"), which is "the [ACL] for each [New England ("NE") multispecies stock that is allocated to an individual sector based upon the cumulative fishing history attached to each permit participating in that sector in a given year." 75 Fed. Reg. at 18295, col. 1 (AR 56519, 56533).

Economic and Social Report at 4. Nearly all, specifically, 95%, of the annual catch limits (previously defined as "ACLs") are assigned to sectors, with the remainder assigned to the so-called "common pool," which includes vessel owners whose individual catch-share allocation is not brought into a sector.[10] See id. When carefully crafted, a sector system can conserve the stocks in the fishery, i.e., by preventing overfishing, while enabling commercial fishermen to achieve optimum yield (previously defined as "OY"), through reducing overcapacity, reducing bycatch, and improving economic efficiencies, which are the essential requirements of National Standard One, the first of ten National Standards set forth in the Magnuson Stevens Act, 16 U.S.C. § 1851(a)(1). See MA Economic and Scientific Report at 5-6.

In preparing Amendment 16, the Secretary was aware of the potential hazard of setting ACLs at low levels. In the Secretary's own words, if the majority of ACLs are set "low," it "will constrain the fishery's ability to catch other stocks with larger ACLs, and may result in the closure of some sectors in specific stock areas for prolonged periods of time." 75 Fed. Reg. at 18365, col. 3 (AR 56725). Despite this awareness, the Secretary set ACLs that were unreasonably and unnecessarily low, in part by allowing, "choke stocks," the stocks that need to rebuild, to dominate the setting of catch limits in a multispecies fishery. By setting low ACLs for choke stocks, the Secretary has

[10]Common pool participants continue to be subject to the DAS regulatory scheme, which includes reduced days for fishing and other regulatory requirements that do not apply to sectors. See 45 Fed. Reg. at 18291, col. 1 (AR 56515). The State Amici raised objections concerning the impact of Amendment 16 on common pool participants during the development of Amendment 16, and more recently, asked the Secretary to take emergency regulatory action and provide economic relief to these Massachusetts commercial fishermen. In a letter dated January 7, 2011, the Secretary denied these requests. See Letter from Secretary Locke to Governor Patrick, dated January 7, 2011, attached as Ex. C ("Secretary Locke's Letter).

constrained commercial fishermen's ability to harvest healthy stocks that have higher ACLs; see 75 Fed. Reg. at 18365, col. 2 (AR 56725); 75 Fed. Reg. at 18368, col. 3 (AR 56728); see also AR 56998. Once the ACL of the choke stock is reached, and a stock area is closed to commercial fishing, commercial fishermen can no longer harvest the ACLs of healthy stocks. See 75 Fed. Reg. at 18365, col. 3 (AR 56725). Tethered by low ACLs, Massachusetts commercial fishermen cannot achieve OY as required by National Standard One.[11] See 16 U.S.C. § 1851(a)(1). See 75 Fed. Reg. at 18365, col. 2 (AR 56725); AR 56998. As a result, the Secretary's low ACLs threaten the successful implementation of an immature sector system. See 75 Fed. Reg. at 18365, col. 2 (AR 56725); AR 56998; MA Economic and Scientific Report at 5-12.

In addition to violating National Standard One, the Secretary ran afoul of at least three other National Standards, namely, Two, Six and Eight. The Secretary established ACLs that are not supported by his own data or "the best scientific information available" in violation of National Standard Two. See 16 U.S.C. § 1851(a)(2); 50 C.F.R. § 600.315. The Secretary did not develop contingency plans for recalculating ACLs, if necessary, as new and better data became available after the promulgation of Amendment 16, in violation of National Standard Six. See 16 U.S.C. § 1851(a)(6); 50 C.F.R. § 600.335. Nor did the Secretary adequately consider critical social and economic impacts of the sector system prior to implementing Amendment 16, as required by National Standard

[11] The State Amici also note that Massachusetts commercial fishermen cannot achieve OY because the Secretary is not exercising his discretion under the Guidelines for National Standard One that would permit the overfishing of choke stocks in order to promote the harvesting of healthy stocks. See 50 C.F.R. § 600.310(m). See Massachusetts v. Gutierrez, 594 F. Supp. 2d 127 at *4 (D. Mass. 2009) (agreeing with State Amici that the Secretary was required to "seriously consider and analyze" an earlier version of the "Mixed Stock Exception").

Eight. See 16 U.S.C. § 1851(a)(8); 50 C.F.R. § 600.345. As discussed above, the State Amici are uniquely positioned to address these issues.

ARGUMENT

I. THE SECRETARY VIOLATED NATIONAL STANDARDS ONE AND TWO BY SETTING UNREASONABLY AND UNNECESSARILY LOW ACLs, AND NATIONAL STANDARD SIX BY NOT DEVELOPING CONTINGENCY PLANS TO RECALCULATE ACLs.

A. Under National Standard One, the Secretary Must Allow For OY.

The Secretary's promulgation of Amendment 16 is governed by the Magnuson-Stevens Act, which regulates commercial fishing by federal permit holders in the EEZ or state waters. See 16 U.S.C. § 1851, et seq. In authorizing the Magnuson-Stevens Act, Congress found, among other things, that "fisheries can be conserved and maintained so as to provide optimum yields [(previously defined as "OY")] on a continuing basis." 16 U.S.C. § 1801(a)(5) (emphasis added). Congress included among the purposes of the Act, "to promote domestic commercial and recreational fishing under sound conservation and management principles;" and to "prepar[e] and implement[], in accordance with national standards, . . . fishery management plans [(previously defined as "FMPs")] which will achieve and maintain, on a continuing basis, the [OY] from each fishery." Id. at § 1801(b)(3)-(4) (emphasis added).

In order to regulate federal waters, the Secretary oversees eight Regional Fishery Management Councils, including the Council, and primarily tasks them with preparing and implementing FMPs (and periodic amendments). See 16 U.S.C. § 1801(b)(4)-(5); 16 U.S.C. § 1854(e)(2); 50 C.F.R. § 600.310(e)(2). Under the Act, all FMPs must be consistent with the ten National Standards enumerated in 16 U.S.C. § 1851(a)(1)-(10). See 16 U.S.C. § 1801(b)(4). The burden of reviewing FMPs and determining whether

they are consistent with the Act, including the National Standards and the Guidelines,[12] belongs to the Secretary.[13] See 16 U.S.C. § 1854(a) (requiring that "(1) [u]pon transmittal by the Council to the Secretary of a fishery management plan . . . , the Secretary shall-- (A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law").

Both the National Standards and Guidelines require the Secretary to ensure that OY can be achieved in an FMP. National Standard One explicitly directs that the Secretary prioritize OY in developing FMPs, by explicitly providing that "[c]onservation and management measures shall prevent overfishing, while achieving, on a continuing basis, the [OY] from each fishery." 16 U.S.C. § 1851(a)(1) (emphasis added); see also 50 C.F.R. § 600.310. The Act further requires that an FMP includes "the present and probable future condition of" OY. 16 U.S.C. § 1853(a)(3) (requiring that an FMP "assess and specify the present and probable future condition of, and the maximum sustainable yield and [OY] from, the fishery, and include a summary of information utilized in making such specification") (emphasis added); see also 16 U.S.C. § 1853(a)(4)(A) (requiring that an FMP "assess and specify . . . the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the [OY] specified under paragraph (3)") (emphasis added); 50 C.F.R. § 600.310(b)(1)(i).

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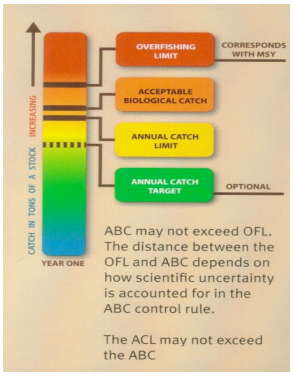
[12] Under16 U.S.C. § 1851(b), the Secretary is required to promulgate advisory guidelines, based on the National Standards, to assist in the development of FMPs. See 50 C.F.R. §§ 600.305–600.355.

[13] The Secretary promulgates the FMP as a regulation published in the Federal Register. See 16 U.S.C. § 1854(b)(1)(A); see also Massachusetts v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999). The published regulation has the full force and effect of law. See 16 U.S.C, §§ 1854 and 1855.

The ability of fishermen to harvest OY from the fishery is not, however, without limits. As noted above, OY is balanced with the "prevent[ion of] overfishing." 16 U.S.C. § 1851(a)(1); 50 C.F.R. § 600.310(b)(1)(iii). The Guidelines for National Standard One describe the inherent tension between preventing overfishing and achieving optimum yield, observing that "[t]he determination of OY is a decisional mechanism for resolving the Magnuson-Stevens Act's conservation and management objectives, achieving a [FMPs'] objectives, and balancing the various interests that comprise the greatest overall benefits to the Nation." 50 C.F. R. § 600.310(b)(2)(ii).

Here, "in the case of an overfished fishery," OY, in part, "[is the amount of fish . . . [that] provides for rebuilding to a level consistent with producing the maximum sustainable yield [("MSY")] in such fishery." 16 U.S.C. § 1802(33); 50 C.F.R. § 600.310(3)(3)(i)(A). While a balancing act is required, there is no provision in the Magnuson-Stevens Act that allows the Secretary to prevent overfishing or pursue rebuilding without considering OY. As discussed in further detail below, the apparent disregard of OY in Amendment 16 constitutes a violation of the explicit provisions of National Standard One, as well as three other National Standards.

B. The Secretary Must Calculate ACLs That Allow Commercial Fishermen to Achieve OY.



In the context of a FMP, the determination of the overfishing limit, which corresponds with maximum sustainable yield ("MSY"), is the ceiling from which optimum yield ("OY") is calculated. See Chart, inserted on this page and attached (in a more readable size) to this amicus brief as Ex. D. The Guidelines for National Standard One describe MSY "as the basis for fishery

management." 50 C.F.R. § 600.310(b)(2)(i). As alluded to above, the overfishing limit is defined as the "rate of level of fishing mortality that jeopardizes the capacity of a fishery to produce the [MSY] on a continuing basis." 16 U.S.C. § 1802(34); see also 16 U.S.C. § 1802(33); 50 C.F.R. § 600.310(e)(1).

Fishermen, therefore, cannot fish at the brink of MSY, but only at a lower level so that overfishing will not occur and/or rebuilding of the stocks will be fostered. See MA Economic and Scientific Report at 13; 50 C.F.R. § 600.310(b)(2)(i). This lower level is defined as acceptable biological catch ("ABC"). See MA Economic and Scientific Report at 13; 50 C.F.R. § 600.310(f)((2)(ii) (defining ABC as "a level of a stock or stock complex's annual catch that accounts for the scientific uncertainty in the estimate of [Overfishing Limit, or "OFL"] and any other scientific uncertainty (see paragraph (f)(3) of this section), and should be specified based on the ABC control rule").

Annual catch limits (previously defined as "ACLs") are set even lower to account for management (as opposed to scientific) uncertainty. See MA Economic and Scientific Report at 13; 50 C.F.R. § 600.310(f)((2)(iv) (defining ACL under the Act as "the level of catch that serves as the basis for invoking accountability measures [("AM")]"). Vessel owners who join sectors are allocated a certain quantity of catch share, based upon their fishing history. See 75 Fed. Reg. at 18295, col.1 (AR 56519). This is also known as the vessel owners' "percent sector contribution" ("PSC") to the sector. 75 Fed. Reg. 18309 (defining PSC under the Act as "an individual vessel's share of the ACLs for each stock of regulated species or ocean pout that is derived from the fishing history associated with the permit issued to that particular vessel for the purposes of participating in a sector and contributing to that sector's ACE for each stock allocated to sector"). "Annual catch

entitlement" (previously defined as "ACE"), in turn, is "the [ACL] for each NE multispecies stock that is allocated to an individual sector based upon the cumulative fishing history attached to each permit participating in that sector in a given year." 50 C.F.R. § 648.2. Sectors can trade their members' catch-share allocations or ACE.[14] See 75 Fed. Reg. at 18297, col. 1 (AR 56520); 75 Fed. Reg. at 18301, col. 2 (AR 56525). According to the Secretary, "ACE trading is critical to the success of sector management." 75 Fed. Reg. at 18301, col. 2 (AR 56525).

As will be discussed in further detail below, the setting of unreasonably and unnecessarily low ACLs prevents commercial fishermen from achieving OY. See 75 Fed. Reg. at 18365, col. 3 (AR 56725). When choke stocks have low ACLs, it limits commercial fishermen's harvesting of healthy stocks that have higher ACLs. See 75 Fed. Reg. at 18365, col. 2 (AR 56725) ("NMFS agrees that low ACLs for most stocks will constrain the fishery's ability to catch other stocks with larger ACLs"); 75 Fed. Reg. at 18368, col. 3 (AR 56725) (determining that "[the] available ACL for some species will constrain the ability to harvest the full ACL of others"); see also AR 56998. In addition, when the ACL for a choke stock is reached, and federal regulators close a stock area to commercial fishing, commercial fishermen can no longer harvest healthy stocks in that same complex. See 75 Fed. Reg. at 18365, col. 3 (AR 56725). A direct consequence of

[14] While Amendment 16 appears to prohibit vessel owners from trading their PSC, and to permit only sectors to trade its ACE, the Division has observed that, as a practical matter, vessel owners are trading their individual allocations, both within and outside their sectors. Compare 75 Fed. Reg. 18289, col. 2 (AR 56533) ("PSC is not a commodity or allocation unto itself that can be traded among vessels, but rather a characteristic of the permit") and 75 Fed. Reg. at 18297, col. 1 (AR 56520). The apparent discontinuity between the language of Amendment 16 and its implementation is reflective of the Secretary's reluctance to consider "critical" trading issues, and flows directly from his stated intention to devolve regulatory authority over such trades to the sectors themselves.

unreasonably low ACLs, then, is that Massachusetts fishermen cannot harvest the OY as required by the Act. See 16 U.S.C. § 1851(a)(1); 50 C.F.R. 600.310. For a fishery management plan to be tenable, therefore, it is imperative that ACLs be set with the utmost possible precision.

C. The Secretary Did Not Use The Best Scientific Information Available To Calculate ACLs In Violation Of National Standard Two.

Federal regulators must prepare and implement fishery management plans using "the best scientific information available." Under National Standard Two, "conservation and management measures must be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2); see also 50 C.F.R. § 600.315. "[S]cientific information" includes, but is not limited to, "information of a biological, ecological, economic, or social nature." 50 C.F.R. § 600.315(b)(1). Under his own Guidelines, the Secretary recognizes that "[s]uccessful fishery management depends, in part, on the timely availability, quality, and quantity of scientific information, as well as on the thorough analysis of this information, and the extent to which the information is applied. If there are conflicting facts or opinions relevant to a particular point, [the Secretary's] council[s] may choose among them, but should justify the choice." Id.; see also North Carolina Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62, 85 (D.D.C. 2007) (relying on Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147, 157 (D.D.C. 2005), aff'd 488 F.3d 1020 (D.C. Cir. 2007).

While the Secretary is usually afforded considerable deference in selecting the data upon which he opts to rely, a reviewing court need not and should not defer when the administrative record lacks support for his analytical choices. See Massachusetts v. Daley, 170 F.3d 23, 31-32 (1st Cir. 1999); Massachusetts v. Gutierrez, 594 F. Supp. 2d at

* 5; Hall v. Evans, 165 F. Supp. 2d 114, 134 (D.R.I. 2001); Parravano v. Babbitt, 837 F. Supp. 1034, 1046 (N.D.Cal.1993), aff'd, 70 F.3d 539 (9th Cir.1995). In developing FMPs, the Secretary "must inform [his] audience of the actual scientific basis supporting" his analytical choices; see Hadaja, Inc. v. Evans, 263 F. Supp. 2d 346, 348 (D.R.I. 2003); and even "justify the choice" between "conflicting facts or opinions." 50 C.F.R. § 600.315(b)(1).

Here, the Secretary cannot demonstrate that he adequately considered data[15] that would have allowed him to set reasonable and higher ACLs for both healthy and choke stocks. These data were "the best scientific information available," insofar as they supported a choice to set ACLs at a higher level (and thereby make the achievement of OY a viable possibility) while still preventing overfishing and allowing for rebuilding. See 16 U.S.C. § 1851(a)(1)-(2); MA Economic and Scientific Report at 12-15. If the Secretary had set reasonable ACLs, he would have allowed Massachusetts commercial fishermen to come closer to achieving OY. Contrast 75 Fed. Reg. at 18365, col. 3 (AR 56725).

In order to understand how Amendment 16 could have established higher ACLs, it is necessary to demonstrate how the Secretary could have made different, more scientifically supportable analytical choices for acceptable biological catch (previously defined as "ABC") in promulgating Amendment 16. See Massachusetts v. Gutierrez, 594 F. Supp. 2d at * 5 (reasoning that "any party objecting to the [Secretary's] science must introduce 'better' science"). For most of the stocks, i.e., 15 out of 19, the Secretary

[15] The State Amici's arguments primarily rely on data that was available to the Secretary during the preparation of Amendment 16. See MA Economic and Scientific Report at 12-15; Secretary Locke's Letter at 1.

calculated ABC by first considering (1) F_{MSY} (the definition of overfishing); (2) a percentage reduction of F_{MSY} that accounts for scientific uncertainty; and then (3) multiplying the percentage reduction of F_{MSY} by the estimate of the current stock size to get ABC, which, in turn, is the starting point for calculating ACLs. See MA Economic and Social Report at 13.

The Secretary consistently opted for the most conservative calculus at each stage of this process. First, the Secretary's calculations of F_{MSY} for some stocks were not based upon direct estimates, i.e., on extant 2002 data, but on calculations of a proxy that consistently underestimated F_{MSY}. See MA Economic and Scientific Report at 3, 13. As discussed below in the bulleted examples, there was an underestimation of F_{MSY} of 3% to 43%, depending upon the stock in question. See infra. The Secretary's decision to calculate proxies when direct estimates were available did not satisfy the Guidelines for National Standard One that proxies are appropriate only "[w]hen data are insufficient to estimate MSY directly." See 50 C.F.R. § 600.310(e)(1)(iv). The calculations of stock size for some stocks were based upon more conservative "GARM III"[16] stock assessments instead of the alternative 'base case' assessments.[17] See MA Economic and Scientific Report at 3-4, 14. Finally, the Secretary reduced F_{MSY} even further (by an additional 25%) to account for scientific uncertainty, but after using a lower proxy for F_{MSY} and conservative stock estimates, reducing ABCs for some stocks by another 25% was "doubly-precautious" in that it accounted for the same variable at least twice. Id. at

[16] The GARM III stock assessments can be found in the Report of the 3rd Groundfish Assessment Review Meeting, dated August 2008.

[17] The State Amici objected to these stock assessments prior to the development of Amendment 16.

3. At any of these analytical turns, the Secretary could have made less conservative, but still scientifically-sound and conservation-minded decisions that ultimately would have resulted in higher ACLs and, ultimately, a FMP predicated on OY.

Further compounding the problem are the "choke stocks."[18] See id. A mixed-stock fishery, such as the Northeast Multispecies Fishery, contains both healthy and choke stocks, i.e., stocks that need to rebuild such as Gulf of Maine cod, Georges Bank cod, Georges Bank yellowtail, Gulf of Maine winter flounder, and Southern New England flounder. Unavoidably, several stocks are harvested together. 63 Fed. Reg. 24,221, col. 1 (1998). Because of this, it is virtually impossible to reduce fishing mortality (and therefore yield) of one stock without concomitantly affecting the yield of another stock. 71 Fed. Reg. 19,357, col. 3 (2006). Federal regulations aimed at reducing the catch of the weakest stocks prevent fishermen from fully pursuing healthy stocks, (e.g., Georges Bank haddock and Gulf of Maine haddock, to name two of the more robust and commercially significant stocks in the fishery), and thereby achieving OY. See 75 Fed. Reg. at 18365, col. 2-3 (AR 56725); 75 Fed. Reg. at 18368, col. 3 (56728); AR 56998. As a result of the regulatory limits in Amendment 16, the Secretary unnecessarily foreclosed Massachusetts commercial fishermen from catching about 32 million pounds of fish. See MA Economic and Scientific Report at 3.

Some concrete examples of how the Secretary's own data could have resulted in higher ACLs for choke stocks illustrate the real world consequences of the Secretary's constrained analysis:

[18] The State Amici also support the argument that the Secretary was required to manage this multi-species fishery as a whole, instead of allowing choke stocks to dominate, in accordance with National Standard Three. See Port Plaintiffs Memo at 9-11; Representative Amici Memo at 11-12.

- For Gulf of Maine cod, the Secretary could have used a F_{MSY} of 0.225 instead of a proxy of 0.17, thereby raising F_{MSY} by 29%. By reducing the proxy by another 25%, there was a doubling of caution. **The ACL for this stock could have been increased by 69% (from 8,530 metric tons to 14,380 metric tons).**

- For Georges Bank cod, a F_{MSY} proxy of 0.17, instead of F_{MSY} of 0.175, lowered F_{MSY} by 3%. In addition, the size of the stock was lowered by 44% , i.e., by using the GARM III stock assessment of 17,672 metric tons instead of the alternative 'base case' stock assessment of 25,377 metric tons. The Secretary, therefore, did not need to reduce F_{MSY} by another 25% to account for scientific uncertainty; that had already been accounted for via the choice of the lower stock assessment. **The ACL for Georges Bank cod could have been increased by 93% (from 3,800 metric tons to 7,324 metric tons).**

- For Georges Bank yellowtail, the Secretary could have chosen a F_{MSY} of 0.32 instead of a proxy 0.25 (24% lower). In addition, the size of the stock could have been estimated at 92% higher, i.e., by using the alternative 'base case' stock assessment of 18,248 metric tons instead of GARM III stock assessment of 9,527 metric tons. **This would have increased the ACL for Georges Bank yellowtail by greater than 92% (greater than 2,298 metric tons versus 1,200 metric tons).**

- For Gulf of Maine winter flounder, the Secretary could have chosen a F_{MSY} of 0.43 instead of a proxy of 0.28, which was 43% lower. In addition, the size of the stock could have been estimated at 151% higher, by using the alternative 'base case' stock assessment of 2,765 metric tons instead of the GARM III stock assessment of 1,100 metric tons. **This would have increased the ACL for Gulf of Maine winter flounder by 236% from 238 metric tons to 800 metric tons.**

See MA Economic and Scientific Report at 16.

Similar analyses performed with healthy stocks would have also resulted in increases. The ACL for Georges Bank haddock would have increased by 28%, and Gulf of Maine haddock by 27%. See id. at 16. Amendment 16 violates National Standard Two because the Secretary did not adequately consider these data. See Massachusetts v. Daley, 170 F.3d at 32; Hall v. Evans, 165 F. Supp. 2d at 128; Caravan v. Babbitt, 837 F. Supp. 2d. at 1046; see also 50 C.F.R. § 600.315(b)(1).

The Secretary may argue that his analytical choices to calculate proxies for F_{MSY} (instead of direct estimates), rely upon more conservative stock estimates (instead of

alternative stock assessments), and include percentages for scientific uncertainty that were doubly precautious, were discretionary, but such analytical choices -- all of which err in the same direction -- are not entitled to deference. As this Court has recognized, "where two alternatives achieve similar conservation goals, the alternative which provides the greater potential for sustained participation of communities and minimizes the adverse economic impacts is preferred." A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 103 (D. Mass. 2000) (relying on 50 C.F.R. § 600.345(b)); see also Natural Resources Defense Council, Inc. v. Daley, 209 F.3d 747, 753 (D.D.C. 2007). This is especially true where, as in the instant case, the Secretary has provided "almost no explicit explanation" for rejecting scientifically-sound and conservation-minded analytical decisions that would have resulted in higher ACLs. Massachusetts v. Daley, 170 F.3d at 30 (emphasis in original); see also Massachusetts v. Gutierrez, 594 F. Supp. 2d at *5; Hall v. Evans, 165 F. Supp. 2d at 134; Parravano v. Babbitt, 837 F. Supp. 2d. at 1046; see also 50 C.F.R. § 600.315(b)(1). The Secretary's consistent over-accounting of the risk of conservation "uncertainty" at the expense of OY concerns in reaching his ultimate scientific conclusions forfeited his claim to judicial deference. On this record, he cannot demonstrate that he adequately considered analytical alternatives that would have resulted in higher ACLs, and that would have come closer to achieving National Standard One's OY requirement.

D. The Secretary Did Not Make Contingency Plans For Recalculating ACLs As Required By National Standard Six.

In authorizing (and re-authorizing in 2006) the Magnuson-Stevens Act, Congress took into account that the availability of the "best scientific information" and its analysis is often a work in progress. The Guidelines for National Standard Two provide that

"FMPs must take into account the best scientific information available at the time of preparation." 50 C.F.R. § 600.315(b)(2). The Secretary may rely on the general permissiveness of the Guidelines to argue that while alternative data were "available," they had not yet ripened into the "best scientific information," and that he recognized that it would be necessary to acquire and analyze additional scientific data before concluding that the alternative data were reliable. This argument loses all force, however, where the Secretary did not develop adequate contingency plans for ACLs and OY to account for such data becoming available after the promulgation of Amendment 16.

Under National Standard Six, the Secretary is required to include in an FMP, such as Amendment 16, contingency plans. "Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." 16 U.S.C. § 1851(a)(6) (emphasis added); see also 50 C.F.R. § 600.335. Under the Act's "required provisions," the Secretary must develop contingency plans for gathering and analyzing scientific data, in general, and for recalculating ACLs in order to realize OY, in particular. See 16 U.S.C. § 1853(a)(3), (4)(a), (8) and (15).

As the Secretary amplifies in the Guidelines to National Standard Six:

> (b) Conservation and management. Each fishery exhibits unique uncertainties. The phrase "conservation and management" implies the wise use of fishery resources through a management regime that includes some protection against these uncertainties. The particular regime chosen must be flexible enough to allow timely response to resource, industry, and other national and regional needs. Continual data acquisition and analysis will help the development of management measures to compensate for variations and to reduce the need for substantial buffers. Flexibility in the management regime and the regulatory process will aid in responding to contingencies.

50 C.F.R. § 600.335(b) (emphasis added); see also 50 C.F.R. § 600.315(c)(2) (providing similar Guidelines for National Standard Two, including a provision that "[a]n FMP

should identify scientific information needed from other sources to improve understanding and management of the . . . fishery"). Under the Guidelines, "[c]ontingencies" include "a range of management options through which it is possible to act quickly without amending the FMP or even its regulations." 50 C.F.R. § 600.335(d). The Guidelines further provide that the Secretary's FMP should describe "management options and their consequences . . . in the necessary detail to guide the Secretary in responding to changed circumstances, so that the Council preserves its role as policy-setter for the fishery. The description should enable the public to understand what may happen under the flexible regime, and to comment on the options." Id. at 600.335(d)(1); see also id. at § 600.335(d)(2) (requiring that FMP "include criteria for the selection of management measures, directions for their application, and mechanisms for timely adjustment of management measures comprising the regime").

At the bare minimum, the Secretary should have included plans for reassessing in a timely way whether annual catch limits ("ACLs") and optimum yield ("OY") needed to be recalculated as new scientific information became available. The data that supported higher ACLs put the Secretary on notice that his analytical choices -- even if supportable in real time as rational selections, a proposition that the State Amici dispute -- may not, as more information about the fishery is learned, prove to have been the "best scientific information available." See supra. If the Secretary had done so, he would have met the general requirement that the FMP "assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan." 16 U.S.C. § 1853(a)(9).

Moreover, the Secretary should have satisfied the more exacting requirements under the Act that a FMP include plans for ongoing recalculation, if necessary, of ACLs

in order to achieve OY. See 16 U.S.C. § 1853(a)(3) (providing that a FMP "assess and specify the present and probable future condition of, and the [MSY] and [OY] from, the fishery, and include a summary of information utilized in making such specification") (emphasis added); 16 U.S.C. § 1853(a)(4)(A) (requiring that a FMP "assess and specify . . . the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the [OY] specified under paragraph (3)") (emphasis added); 16 U.S.C. § 1853(a)(4)(A) (requiring that a FMP "establish a mechanism for specifying [ACLs] in a plan (including a multiyear plan) . . . at a level such that overfishing does not occur in the fishery, including measures to ensure accountability") (emphasis added).

The Secretary should have included plans in Amendment 16 for "[c]ontinual data acquisition and analysis" in order to "compensate for variations" among the determinations of F_{MSY} (direct estimates versus proxies) and estimates of stock size (GARM III stock assessments versus alternative 'base case' stock assessments). See supra. He should have planned for additional data acquisition and analysis to "reduce the need for substantial buffers" (i.e., the additional 25% reduction) to account for scientific uncertainty in determining ABC. See 50 C.F.R. § 600.335(b); see also J.H. Miles & Co. v. Brown, 910 F. Supp. 1138 (E.D. Va. 1995) (responding to claim under National Standard Six that Secretary's action may have been arbitrary and capricious if there was no consideration of data demonstrating increases in stock size in setting quotas).

In Amendment 16, the Secretary either did not adequately consider, or abdicated his duties under, these explicit statutory and regulatory requirements. In responding to the Division's comments in Amendment 16, which the State Amici later reprised in the MA Economic and Scientific Report, the Secretary only offered generalizations: "[T]he

Council may modify elements of the FMP, if necessary to more effectively account for scientific or management uncertainty, etc., based upon new scientific information and/or additional information to be gained in the future on the operation of the fishery under the amended FMP." 75 Fed. Reg. at 18,365, col. 3 (AR 56725). After acknowledging the potential hazard posed by low ACLs, the Secretary suggested that "[t]he impact of these low ACLs could be mitigated by . . . sector management," not by any further actions by federal regulators, including data acquisition and analysis. Id. This reluctance to regulate conflicts with the requirements under the Guidelines that the FMP should describe "management options and their consequences . . . in the necessary detail to guide the Secretary in responding to changed circumstances, so that the Council preserves its role as policy-setter for the fishery." 50 C.F.R. § 600.335(d)(1).

By not including specific plans for the timely acquisition of additional scientific data and their analysis, by dumping allocation into opaque sectors and creating no blueprint for how later-acquired data could be incorporated into management measures, the Secretary has "not seriously considered and analyzed" and arguably, has abdicated his statutory responsibility under the Act to formulate contingency plans for recalculating ACLs in order to realize OY in Amendment 16. Thus, the Secretary violated National Standard Six.[19]

[19] The absence of a functional vehicle for making prospective changes to ACLs under Amendment 16 was underscored by the Secretary's rejection of the Governor's plea to raise ACLs for certain stocks based on the analysis set forth in the MA Economic and Scientific Report. See, generally, Secretary Locke's Letter. According to the Secretary, such relief was not available even where Massachusetts scientists took pains to rely only on data that were available to the Secretary at the time of promulgation, but which he misconstrued or elided entirely. Id. Absent such a forward-looking mechanism to ensure the incorporation of biological, economic and sociological data, the State Amici, like other stakeholders, are left with no avenue of attack other than a retrospective

II. IN VIOLATION OF NATIONAL STANDARD EIGHT, THE SECRETARY DID NOT ADEQUATELY CONSIDER THE ECONOMIC AND SOCIAL IMPACTS UPON MASSACHUSETTS COMMERCIAL FISHERMEN AND FISHING COMMUNITIES.

Under National Standard Eight, "[c]onservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8).

In Amendment 16, the Secretary anticipated that the sector system "is likely to have a negative effect on . . . important social factors" and that "[t]he economic impacts of this action [on] communities are expected to be severe and in some cases may threaten the existence of fishing businesses in some communities." AR 47771; see also AR 48595. In addition, "[t]he impacts will fall most heavily on vessels and communities that are most dependent on groundfish. These tend to be the . . . Massachusetts ports." AR 47771. According to the Secretary's own estimates, Amendment 16 would result in reductions in total fishing revenues of approximately $22 million in FY 2010. 75 Fed. Reg. at 18368, cols. 1-2 (AR 56728). There would also be losses of approximately $3 to $27 million in FY 2011, which would increase to approximately $26.9 to $53.8 million in FY 2012 and $27.6 to $54.8 million in FY 2013. See 75 Fed. Reg. at 18369, col. 1 (AR 56729).

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challenge to Amendment 16 for its failure to comply with the identified National Standards under the Magnuson-Stevens Act.

The MA Economic and Scientific Report has borne out the Secretary's predictions, finding that Amendment 16 "caused major shifts in the distribution of quota (and income) resulting in $21 million in direct economic losses and forgone yield of $19 million for the Massachusetts groundfish fishery" in FY 2010. MA Economic and Scientific Report at 2. MFI has also measured an increase in operating costs, a reduction in the number of commercial fishing vessels and the activity of existing vessels, a redistribution of income from smaller to larger vessels, and an overall consolidation of the industry, among other things. See id. at 2-3 and 5-12.

Despite his awareness, the Secretary did not adequately consider critical and likely economic impacts that now threaten the successful implementation of sectors, specifically the ability to trade (or sell) catch-share allocation, i.e., quota. As described in the MA Economic and Scientific Report, "[f]or the intended economic efficiencies and profitability of [sectors] to be realized as forecasted in Amendment 16, a high level of quota movement would need to occur from those who were allocated below a break-even point to those who were close to or above the break-even point. For this to happen, there would have to be an extraordinary level of liquidity within the fishery." Id. at 11. While the Secretary acknowledged the "critical" importance of the trading of allocation, see infra, economically-strained Massachusetts commercial fishermen cannot trade quota or acquire additional quota. See id. at 11-12. As a result, many small vessel owners (who have survived past regulatory regimes) are not able to break even because this new sector management system is not functioning in the way that the Secretary envisioned. See id. at 11-12. These economic impacts are the result of the Secretary's failure to comply with

National Standard Eight. See id. at 11 (noting that the Secretary did not consider these issues).

While the Secretary recognized that trading "is critical to the success of sector management," 75 Fed. Reg. 18301, col. 2 (AR 56525) (emphasis added), he did not take any regulatory action to ensure that such a market actually developed, or otherwise to mitigate potential adverse economic impacts. In general, the Secretary acknowledged that there was no consideration of any "measures that would address the issue of sector ACEs as they relate to the FMP's social and economic objectives." 75 Fed. Reg. 18296, col. 2 (AR 56520) ("NMFS recognizes the potential legitimate concerns raised by the public, and . . . [will] work with the Council . . . to consider developing measures that would address the issue of sector ACEs as they relate to the FMP's social and economic objectives . . . .").

The Secretary rejected specific requests for federal regulatory action to safeguard commercial fishermen, especially small vessel owners, and to regulate the trading of allocation. See 75 Fed. Reg. 18301, col. 2-3 (AR 56525). The Secretary considered trading among sectors "as a private business arrangement that is not subject to any restrictions on the nature of the transactions between the sectors." Id. The Secretary maintained that the sectors themselves could "stipulate to conditions" governing trading, because NMFS "is not inclined to dictate the conditions under which individual sectors may trade ACE with one another." Id. The Secretary suggested that in the event that there were adverse economic impacts, including "obstacles in trading ACE that affect the conservation and management objectives of the FMP," then "NMFS or the Council could make changes to measures governing such trading." Id. Thus, even though the Secretary

recognized that "ACE trading is critical to the success of sector management," he declined to regulate the trading of allocation by sectors, including regulatory actions that would have potentially "minimize[d] adverse economic impacts." 16 U.S.C. § 1851(a)(8). In so doing, the Secretary appears to be suggesting that merely taking no action to thwart the development of a functioning market for catch-share trading was somehow equivalent to ensuring that this "critical" feature of the sector management plan actually came to fruition. This approach is insufficient to meet the Secretary's affirmative obligation under National Standard 8. 16 U.S.C. § 1851(a)(8).

Some of the adverse economic impacts that the Secretary foresaw for fishermen and fishing communities could have been alleviated by higher ACLs. See MA Economic and Scientific Report at 12. If the Secretary had set reasonable ACLs -- or even if the Secretary developed contingency plans for recalculating ACLs on an ongoing basis -- the market would be better able to function, and ultimately, this new sector management system better able to realize its economic promises. See id. at 2, 11-12.

As the Court (Harrington, J.) observed in Massachusetts v. Gutierrez, "[a]t the least, administrative agencies are to be expected to approach their work carefully and thoroughly. This means taking their time before making decisions affecting society, especially those of great consequence, such as [an FMP]." Id. The record does not demonstrate that the Secretary undertook such "serious consideration and analysis" regarding how the anticipated impacts of Amendment 16 upon Massachusetts fishermen and fishing communities could have been avoided or mitigated. Id.

III. THE STATE AMICI'S ONLY AVENUE OF RELIEF IS VIA JUDICIAL INTERVENTION.

As noted above, on November 5, 2010, Governor Patrick forwarded the MA Economic and Scientific Report to the Secretary requesting emergency action. On January 7, 2011, the Secretary refused the Governor's request. See Secretary Locke's Letter, and Letter from Eric Schwaab, NMFS's Assistant Administrator for Fisheries, to Governor Patrick, dated January 7, 2011, attached as Ex. E. In the context of a refusal to take emergency action, the Secretary wrote that the Magnuson-Stevens Act "does not permit me to overrule Council decisions on the basis of a disagreement over scientific judgment." Secretary Locke's Letter at 1. He maintained the Act precludes him from taking further action based upon scientific data that were "previously considered and rejected by the Council," and "in the absence of new data." Id. He also suggested that there has been adequate consideration of the economic and social impacts of Amendment 16. See id.

This amicus brief does not purport to challenge the Secretary's refusal to make prospective modifications to Amendment 16, as to do so would lie outside the scope of this litigation. The Secretary's refusal is grounded, however, in some basic misconceptions about the scope of his authority and regulatory responsibility under the Magnuson-Stevens Act that should be remedied by this Court. It was the Secretary who bore the ultimate responsibility for ensuring that Amendment 16 complied with the National Standards, namely, that Amendment 16 established ACLs that enabled Massachusetts commercial fishermen to achieve OY in accordance with National

Standards One and Two. See 16 U.S.C. § 1854(a);[20] see also 16 U.S.C. §§ 1851(a)(1)-(2). In the absence of complete scientific data and analysis for the calculation of ACLs, the Secretary was required to develop contingency plans for gathering and analyzing additional scientific data and if necessary, recalculating ACLs in accordance with National Standard Six. See 18 U.S.C. §§ 1851(a)(1)-(2). The Secretary was also required to explain analytical choices based upon certain biological evidence (e.g., the Council's calculation of proxies for F_{MSY} (instead of direct estimates), reliance upon more conservative stock estimates (instead of alternative stock assessments), and inclusion of percentages for scientific uncertainty that were doubly precautious) given the social and economic consequences of those choices. See 18 U.S.C. § 1851(a)(2). In accordance with National Standard Eight, the Secretary was required to consider the social and economic impacts of Amendment 16, and "to the extent practicable, minimize adverse economic impacts on [fishing] communities." 16 U.S.C. § 1851(a)(8). To the extent that the Secretary reads his role in the process as deferring to choices made by the Council, whether or not those choices conform to the National Standards set forth in the Magnuson-Stevens Act, a remand by this Court is the only avenue of relief that remains available to the State Amici to remedy the Secretary's narrow conception of his responsibilities under the Act.

[20] The Secretary was not required to accept the ACLs that were established by the Council, especially given that the ACLs did not comply with National Standards One or Two. As required by the Magnuson-Stevens Act, "[u]pon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall . . . immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law." 16 U.S.C. 1854(a)(1)(A). The Secretary is also required to provide written notice to the Council if he disapproves of aspects of the FMP and to allow the Council "to submit a revised plan . . . to the Secretary for review." 16 U.S.C. 1854(a)(3)-(4).

CONCLUSION

The State Amici respectfully request that this Court remand the matter to the Secretary with instructions that he recalculate higher ACLs consistent with the MA Economic and Scientific Report, so as to enable Massachusetts commercial fishermen to achieve OY in accordance with National Standards One, Two, Six and Eight of the Magnuson-Stevens Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine A. Baily, hereby certify that a true and accurate copy of this Brief of the Amici Curiae, filed by Attorney General Martha Coakley on behalf of Deval Patrick, as the Governor of the Commonwealth Of Massachusetts, and Paul Diodati, as the Director of the Division Of Marine Fisheries for the Commonwealth, was served electronically upon all parties listed on this Court's ECF system on January 12, 2011.

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January 12, 2011