



CONSERVATION LAW FOUNDATION

November 8, 2010

The Honorable Gary Locke
Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

RE: Request by the Commonwealth of Massachusetts for Emergency Action

Dear Secretary Locke:

We want to thank you for the attention and resources you and the senior management of your fisheries team at NOAA and NMFS have dedicated to New England over the past year and one-half. There is still a long way to go before the trust and economic stability on which the health and sustainability of some of our regional fisheries depend are in place but your team has demonstrated both its willingness and commitment to reach those important objectives in a highly-charged environment.

Specifically, we are writing to provide our perspective on the recent request by Governor Patrick that you exercise emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855(c) to address an emergency in the New England groundfish fishery. We conclude that the Commonwealth has fallen far short of carrying the burden it bears of demonstrating that emergency circumstances exist, that it has attempted to take advantage of normal procedures for raising the issues it identifies as the basis of the emergency, and that the benefits associated with emergency action outweigh the important benefits of “advance notice, public comment, and deliberative consideration” that emergency action circumvents. In this particular case, acceding to Governor Patrick’s request would establish a precedent that would undo the years of hard--and transparent--work at the New England Fisheries Management Council to finally bring long term economic stability and sustainability to New England groundfish fisheries.

Summary of our Position:

Governor Patrick’s emergency petition is based on alleged unforeseen economic losses of \$21 million in direct economic losses and foregone yield of \$19 million in the groundfish fishery. *See*, A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery (MA Emergency Report) at 2. According to the MA Emergency Report, these alleged losses are attributed to the unforeseen effects of “unnecessarily low ACLs [annual catch limits] and market failure in trading under the new catch shares system....” *Id.* at 4. But the Report provides no data to quantify these effects. Moreover, there is no demonstration that the proposed emergency action would even benefit the class of fishermen that the MA Emergency

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CONSERVATION LAW FOUNDATION

Report identifies as forming the basis for the emergency: the Massachusetts fishermen who either caught more groundfish in recent years than they are now entitled to under the allocation formula approved by the Council, or the Massachusetts fishermen who caught a different complex of groundfish during the qualifying period than they have been landing in more recent years. Finally, there is little doubt that Amendment 16 is producing consolidation in the groundfish fishery as it was intended to and as the prior programs before Amendment 16 had been doing. The Governor's description of this consolidation provides no insight that would allow a conclusion that this was unforeseen by the Council or NOAA Fisheries.

With respect to the science component in the MA Emergency Report, this section of the report stands for the proposition that there are other ways that the fishery could have been modeled and those different approaches could have produced different results. There is no indication that there is new science or new assessment data. The purpose of this section appears to be: *if there are economic circumstances sufficient for an emergency declaration*, then there *may* be different ways to model or analyze various fish stocks to produce different results without overfishing or exceeding the rebuilding timelines. While that may be adequate grounds for a healthy scientific debate, it is not grounds for emergency action nor does the MA Emergency Report provide any suggestion that there is new fisheries data or modeling that independently forms the basis for an emergency action.

Response to Economic Emergency Demonstration In MA Emergency Report

We assume that there are many fishermen who have historically participated in the New England groundfish fishery but are no longer in the fishery or are barely hanging on. Some have taken advantage of buy-out programs, some have shifted their focus to other fisheries like monkfish, dogfish and other species, and others have been forced out and no longer are at sea for a variety of circumstances, many of which were beyond their control. Some, like the fishermen in Downeast Maine, were forced out of the fishery because of the overfishing by roaming boats fishing in their adjacent federal waters, which eliminated groundfish populations that they had always depended on during parts of the fishing year. The social pain and economic loss for individuals and communities associated with this consolidation, which has continued unabated and unanalyzed since at least the mid-1990's, is difficult to overstate.

At the same time, the Council has recognized for some time that the New England groundfish fishery was a bubble, subsidized by rampant overfishing and low cost federal money; a bubble that started to leak in the late 1990's and has continued to deflate through today. Amendment 16 was an important effort to accomplish two purposes: achieve compliance with the new catch limits and accountability requirements imposed by the Magnuson Reauthorization Act of 2006 (enacted in 2007) and inject flexibility into the fishery through sectors, which allowed a relaxation of some of the indirect controls imposed by earlier management regimes and allowed movement of quota inside and outside of sectors. As with all complex fisheries, there were many uncertain management alternatives that faced the Council; CLF believes that they did an excellent job tackling those issues under the circumstances.

Indeed, the MA Emergency Report reflects some positive early economic returns from Amendment 16: adjusted for inflation total groundfish revenues from Massachusetts boats, after falling 15% for the period from 2005-2009, rose 21% for the comparable period in the 2010 fishing year over that same period in the averaged 2005-2009 fishing years. MA Emergency Report at 7. The same data set indicate that the Massachusetts ports, and presumably the fishing support services in those ports, did even better year-to-year.

CONSERVATION LAW FOUNDATION

The gravamen of the MA Emergency Report with respect to the emergency unforeseen economic impacts of Amendment 16 is that the increased wealth reported for the first five months of the 2010 fishing year was not evenly distributed among Massachusetts fishermen. *Id.* This claim, however, demands further examination. The report lays out a range of statistics. First, the number of boats grossing more than \$300,000 during the first 5 months almost doubled from 21 to 41.¹ That is not evidence of consolidation. The bottom 75% of the active boats decreased gross revenues by 8% over the comparable early time period, but there is no indication that this decrease is a result of insufficient annual catch entitlement (ACE); it could just as easily be related to an individual business strategy to fish later in the fishing year. The \$21 million that the MA Emergency Report indicates was lost to the Massachusetts groundfish fleet is based on a comparison between the FY2010 ACE and the FY2009 Vessel Trip Reports for groundfish landings. That is a meaningless comparison. FY2009 landings history was not used by the Council to make allocations. The basis for the qualifying period for the FY2010 ACE is exhaustively documented in the Amendment administrative record and is the subject of litigation. If the issue for the emergency action is whether there was any expectation that the FY2010 ACE would be comparable to the FY2009 VTR reports, there is no issue because there was never any such expectation.

The Report alludes to “‘trapped’ quota”, *Id.* at 11, but provides no documentation of that phenomenon: How many fishermen are involved? What were their circumstances in prior fishing years? What was the basis for their business decisions in FY2009 and earlier? What other fisheries are they involved in that offset their stated difficulty in obtaining quota? What have the sectors done to make quota available within their membership to such individuals? What are the sector fees and other assessments that affect the net revenues of these operations? Perhaps some of these problems identified in the Report are uniquely associated with the sectors managed by the Northeast Seafood Coalition (NSC), which reportedly had significant start-up problems; we have not heard similar comments from other sector managers.

The MA Emergency Report advances claims such as: “too many fishermen who were very active in the 2009 fishing year cannot afford to buy or they cannot afford to sell [quota]” and “so many fishermen have been placed in this paralyzed state[,]” and “the costs of renting fish have become the highest percentage of fishing expenses of any expense realized in the past[,]” *id.* at 12, without any statistics, analysis or documentation. NSC, who apparently contributed significantly to this Report, manages over 260 active vessels of the total 500 vessels in sectors and yet provides no specific information to inform and substantiate the arguments of this report. Perhaps more damaging to the ultimate claims, the authors of the Report do not appear to have surveyed or collected economic data from any of the non-NSC sectors.

The MA Emergency Report states that “[i]ncreased ACLs for “choke stocks” are expected to allow the fleet to achieve their allocation of other stocks, thereby substantially increasing the mixed-stock yield within the multispecies ACLs. Preliminary analysis of mixed-stock catches suggests the increased ACLs would allow 14,500 tons more than the current ACLs.” *Id.* at 15. This statement, presumably, is the basis for the unsupported conclusion in the report that this “emergency” is causing \$19 million in foregone yields, *id.* at 2 & 17, in addition

¹ It is not clear from the Report whether the authors are reporting on landings and revenues from groundfish, all species, or all finfish. CLF will assume in this comment that the authors are referencing all revenues from boats carrying a multispecies groundfish permit.

CONSERVATION LAW FOUNDATION

to the purported \$21 million in direct costs. There is, however, no evidence that the groundfish fleet is being harmed by so-called “choke” species in FY 2010 to date. The year-to-date analysis (attached as an addendum to this letter) of annual catch limits by species compared to landings by species, indicates that none of the landings to date by the fleet is even remotely approaching the ACL for the species. One-third of the way into the fishing year, the maximum landings (Gulf of Maine haddock) is only slightly more than 40% of the ACL. Most of the stocks are well below 33% at the current time. Assuming the models are right and the fish are actually out there, landings are not being constrained by ACLs; they are being constrained by the business decisions of the sectors and their members.

Finally, while it is obvious that the positive aggregate gross revenues numbers for the Massachusetts groundfish fleet do not reflect the individual financial circumstances of a number of fishermen, the Report provides no information that would allow a more specific analysis of individual impacts. Simply pointing to reduced numbers of active boats or lower revenues per permit for a partial year and implicating overly conservative ACLs as the cause, as the Report does, is inconclusive for any number of reasons. Many individuals, for example, own multiple boats and permits, and individuals were expected to shift quota onto fewer boats. Others who haven’t shown up in the early season statistics have likely made business decisions to fish later in the fishing year now that they can to take advantage of higher winter prices without threat of the “race to fish” that existed in the old system. Doubtless there are numerous other explanations. Across the board, the Report simply falls far short of meeting its burden to show that there is an unforeseen economic emergency.

Response to Best Available Science Supporting Adjustment of ACLs

This section of the MA Emergency Report can be summarized in one sentence from the report itself: “[s]cientifically valid alternatives **may** be available for each component of Acceptable Biological Catch to allow increases in ACLs.” MA Emergency Report at 13 (emphasis added). Every item discussed in this section of the report—using direct estimates of F_{msy} instead of $F_{proxies}$; alternative models; reductions in scientific uncertainty calculations; and alterations associated with various components of the rebuilding plan—is a matter that has been previously considered and fully debated and discussed at the appropriate venue: the SSC and the Groundfish Assessment Review Meeting (GARM). The Secretary, in the context of an emergency petition, should not be placed in a position to act as a Monday-morning quarterback to evaluate the scientific arguments as to whether the selected ABCs could or should have been resolved differently. The underlying science process leading up to Amendment 16 and Framework 44 was competent for that purpose and decisions were made accordingly.

The lead author of the MA Emergency Report, Dr. Steve Cadrin, is the chair of the New England Council’s Science and Statistical Committee and has raised many of the same issues now raised in this section previously with the SSC, with the GARM III in August 2008, and directly with the Council. It is unfortunate that the Report is not more forthright in discussing why these analytical approaches were not adopted by that scientifically deliberative process. The report also fails to explain why Dr. Cadrin could not raise these matters with the SSC or the Council instead of authoring this report. In a similar vein, another author of the Report, Dr. David Pierce, is a long-term member of the Council itself. CLF can’t recall any effort by Dr. Pierce to have the Council re-visit the scientific analysis. It would seem to establish a bad, irreversible precedent if the emergency action procedures were used to advance the scientific preferences of one group of scientists over those of others.

CONSERVATION LAW FOUNDATION

Since there is no claim that the science process itself or subsequently discovered data or stock analysis forms the foundation of the emergency request itself, we will not address those aspects of the Report directly. If there is new information or if there are new, more accurate approaches to groundfish assessments the MA Division of Marine Fishery believes are important to the process, they should be encouraged to raise them as part of the management process itself, not as a hypothetical exercise at the end of the Report. CLF would strongly support any re-evaluation of the underlying fisheries science that the SSC determines to be appropriate but it has no place in the record before the Secretary on this emergency petition.

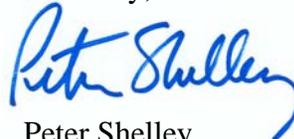
Conclusion

It is notable that this emergency action is not being requested by the one entity in New England that has the best grasp of the current situation: the New England Fishery Management Council. Amendment 16 and Framework 44 were adopted after four years of open, transparent, difficult debate and negotiation. The Commonwealth of Massachusetts was an active, if not dominant, participant in that process. The economic issues that are emerging with the implementation of the amendments are well within the range of the projected impacts that were fully analyzed in the management plan. The Governor's Report contains no specific data, analysis or information to demonstrate "recent and unforeseen events or recently discovered circumstances." Moreover, the Governor has provided no information with which you could conclude that relaxing the ACLs would prevent "significant direct economic loss." Indeed, as we argue above, since the allocation formula would not be changed by the emergency action being proposed by the Governor, any increased quota would simply further benefit the fishermen who are already being benefitted by the current formula. Similarly, the science issues being raised by Dr. Cadrin's team are all issues that were explicitly discussed and debated by the appropriate scientific bodies prior to being adopted by the Council.

There is nothing new in the Governor's submission that would warrant you in taking emergency action. In fact, emergency action would be extraordinarily destructive to the integrity of the Council process and undercut the credibility of the management system, in New England and elsewhere.

We hope that you decline this request for emergency action. We look forward to working with you, NOAA, and NMFS as well as with the Commonwealth of Massachusetts and other jurisdictions who haven't yet been heard on this petition to continue current efforts to improve the groundfish fishery for the benefit of New England fishermen and to restore the fish populations.

Sincerely,



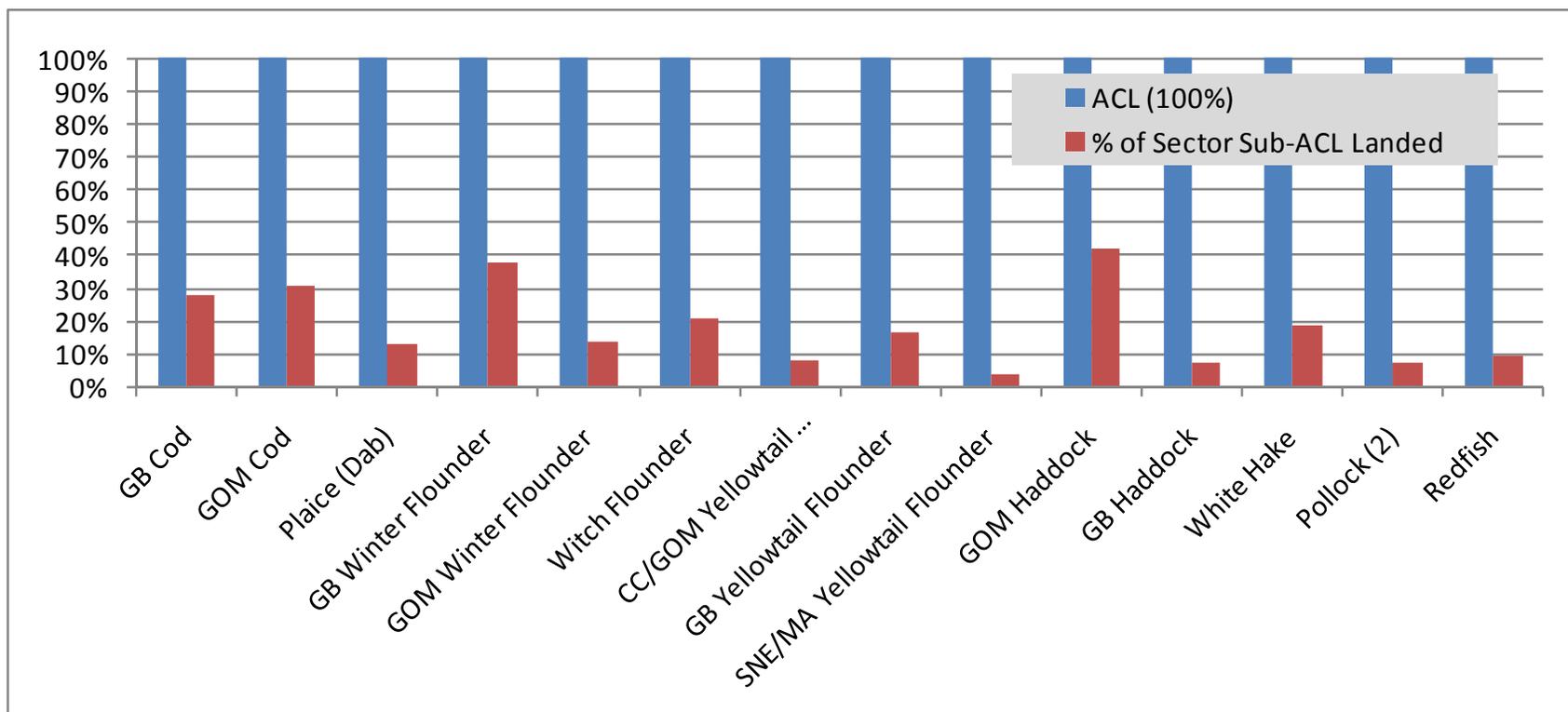
Peter Shelley
Vice President
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Attachment

C O N S E R V A T I O N L A W F O U N D A T I O N

cc: The Honorable Deval Patrick
 Dr. Jane Lubchenco, Administrator NOAA
 Ass't. Administrator Eric Schwaab, NMFS
 John Pappalardo, Chair, NEFMC

Four-month sector landings versus sector groundfish ACLs (May 1-August 31, 2010)



Source: NMFS four-month landings data (http://www.nero.noaa.gov/ro/fso/reports/Sector_monitoring/Table_4.pdf) compared to 2010 ACLs ([http://www.nefmc.org/nemulti/frame/fw44/Addendum to FW 44.pdf](http://www.nefmc.org/nemulti/frame/fw44/Addendum_to_FW_44.pdf))