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Federal Defendants, by and through their undersigned counsel, hereby oppose the Motion of the Commonwealth of Massachusetts and the State of New Hampshire for Summary Judgment (May 16, 2008), Dkt. No. 21 (“Pl. Mot.”) and cross-move for summary judgment in Federal Defendants’ favor. Plaintiffs filed their petition for review in November 2006, alleging that the challenged agency action, Framework Adjustment 42 (“Framework 42”), would drive fishermen out of business. After unsuccessfully moving to supplement the administrative record one year ago, Plaintiffs now seek summary judgment on two of the eight claims raised in their petition for review, just as the New England Fishery Management Council (“Council”), the body delegated the responsibility to recommend fishery management measures to Defendant, is considering new data and new measures which would render the challenged action moot. Plaintiffs have wholly failed to meet their burden to prove that the challenged framework adjustment violates applicable law. Moreover, the remedies sought by Plaintiffs are inappropriate and pointless in light of the measures under consideration by the Council. Because the administrative record reflects that Federal Defendants had a rational basis for their decision and the remedies sought are not justified, Federal Defendants are entitled to summary judgment on Plaintiffs’ claims.

BACKGROUND

I. LITIGATION BACKGROUND

Plaintiffs filed this action on November 21, 2006, challenging Framework 42, a set of measures promulgated by the National Marine Fisheries Service (“NMFS”) under the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “MSA”), 16 U.S.C. § 1801 *et seq.* See Verified Petition for Judicial Review, Dkt. No. 1

(“Petition”). See also Final Rule, 71 Fed. Reg. 62,156-96 (Oct. 23, 2006), Doc. No. 198, AR 8482-8523. Plaintiffs’ Petition alleges that Federal Defendants failed to comply with the Magnuson-Stevens Act; the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq.; and Executive Order 12866, in issuing Framework 42. Plaintiffs allege, inter alia, that: (a) Framework 42 fails to comply with the MSA’s requirement to achieve optimum yield, id. at ¶¶ 38-44; and (b) Framework 42 is not based on the best scientific information available, as required by the MSA, id. at ¶¶ 45-52.¹

Federal Defendants filed the administrative record in this case on January 22, 2007. See Dkt. No. 6. Plaintiffs moved to supplement the record on May 1, 2007, Dkt. No. 14, and this Court denied Plaintiffs’ motion on June 13, 2007. After inexplicably delaying nearly a year, Plaintiffs filed their motion for summary judgment and supporting memorandum on May 16, 2008. See Memorandum of Law in Support of Commonwealth of Massachusetts’ and State of New Hampshire’s Motion for Summary Judgment, Dkt. No. 24 (May 16, 2008) (“Pl. Mem.”).

^{1/} Plaintiffs’ Petition also raised the following additional claims: (a) Framework 42 fails to comply with the MSA’s requirements to prevent overfishing and promote rebuilding of Gulf Maine Cod, Petition at ¶¶ 31-37; (b) Framework 42 fails to comply with the MSA’s requirement that conservation and management measures shall not discriminate between residents of different states, id. at ¶¶ 53-59; (c) Framework 42 fails to comply with the MSA’s requirement that conservation and management measures shall take into account the importance of fishery resources to fishing communities, id. at ¶¶ 60-67; (d) Framework 42 fails to comply with the MSA’s requirement to promote the safety of human life at sea, id. at ¶¶ 68-73; (e) NMFS violated NEPA by, inter alia, issuing an unsupportable finding of no significant impact (“FONSI”) determination, failing to fully address the impacts of the final rule, failing to adequately consider available alternatives, and failing to prepare an environmental impact statement (“EIS”), id. at ¶¶ 74-91; and (f) NMFS violated Executive Order 12866 by promulgating Framework 42 without review of its economic impacts by the Office of Management and Budget (“OMB”), id. at ¶¶ 92-98.

By failing to offer any argument in their motion for summary judgment, Plaintiffs have waived these claims. Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir. 1995) (an issue that was raised in a complaint but was ignored at the summary judgment stage is deemed waived). Thus, Federal Defendants are entitled to summary judgment on Counts One, Four, Five, Six,

II. STATUTORY BACKGROUND

The Magnuson-Stevens Act originally was enacted in 1976, Pub. L. 94-265, 90 Stat. 331, and has been amended several times, most recently by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. L. 109-479 (Jan. 12, 2007). Congress passed the Magnuson Act (renamed the Magnuson-Stevens Fishery Conservation and Management Act by Pub. L. 104-208, 110 Stat. 3009-41 (Sept. 30, 1996)), *inter alia*, “to take immediate action to conserve and manage the fishery resources found off the coasts of the United States. . .” and “to promote domestic commercial and recreational fishing under sound conservation and management principles. . . .” 16 U.S.C. § 1801(b)(1), (3).

A. The Role of Councils and the Secretary in the Development and Implementation of Fishery Management Plans.

Regulation of fisheries is accomplished through fishery management plans (“FMPs”) that are developed and prepared by regional fishery management councils and approved, implemented, and enforced by NMFS. *See* 16 U.S.C. § 1852(h)(1); *see also id.* § 1854(c) (describing circumstances in which Secretary may prepare a FMP); Commonwealth of Mass. ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999) (“The [MSA’s] main thrust is to conserve the fisheries as a continuing resource through a mixed federal-state regime; the [fishery management plans] are proposed by state Councils but the final regulations are promulgated by the Secretary through the Fisheries Service.”). The fishery management councils are quasi-legislative bodies established by the Magnuson-Stevens Act and made up of federal, state and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery

conservation and management. See id. § 1852(b). The New England Fishery Management Council (“Council”) is responsible for recommending management plans for most fisheries seaward of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. See id. § 1852(a)(1)(A). Council business is conducted at public meetings and through written procedures established by each Council, subject to statutory requirements. Id. § 1852(h),(I); see also 50 C.F.R. § 600.135.

Pursuant to the Magnuson-Stevens Act, NMFS approves, partially approves, or disapproves FMPs and any amendments to FMPs developed by the Council and implements the plans or amendments through regulations. See 16 U.S.C. § 1854(a), (b). The Council submits the FMP to NMFS along with proposed regulations that the Council “deems necessary or appropriate” to implement the FMP or FMP amendment. See id. § 1853(c). Both the FMP or amendment and any necessary implementing regulations are subject to public review and comment. See id. § 1854(a)(1),(b)(1). NMFS may disapprove a FMP or amendment, in whole or in part, only to the extent it is inconsistent with applicable law, and may not substantively modify plans submitted by the Council. See id. § 1854(a)(3).

In addition to the amendment process, the Council and NMFS have adopted in FMPs for all Northeastern fisheries, including the Northeastern Multispecies FMP, an expedited regulatory process known as a framework adjustment. A framework adjustment is an abbreviated administrative procedure, validated by this court and others around the country, allowing the Council and NMFS to respond quicker and more efficiently to changing conditions in fisheries. 50 CFR § 648.90. See Gulf of Maine Fishermen’s Alliance v. Daley, 292 F.3d 84, 86 (1st Cir. 2002) (framework procedure for groundfish FMP permitted regional authorities to respond more quickly to fluctuations in the groundfish population); CLF v. U. S. Dept. of

Comm., 229 F. Supp. 2d 29, 33 (D. Mass. 2002) (upholding NMFS’s implementation of Framework 14 to the Scallop FMP); Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 252 (D.D.C. 2005) (“non-FMP changes to a management regime” such as framework adjustments may “implement” an FMP, but may not “propose new management measures”). Like FMPs and FMP amendments, NMFS may only concur or not concur in frameworks adjustments, thereby eliminating NMFS authority to substantively alter a framework adjustment once submitted by the Council. See A.R. 8494 (in implementing a framework adjustment “NMFS may only approve or disapprove substantive measures, and, may not unilaterally modify any measure in a substantive way pursuant to section 304(a)(3) to [*sic*] the Magnuson-Stevens Act”); 50 CFR § 648.90 (a)(2) and 16 U.S.C. § 1854(a)(3) (NMFS may only approve, disapprove or partially disapprove a plan amendment).

Like FMPS and amendments, framework adjustments are subject to public and agency review.

See id.

NMFS may also prepare FMPs or FMP amendments if the relevant fishery management council fails to act or after a FMP or FMP amendment prepared by a council is disapproved and the council fails to submit an adequate revised plan or amendment. Id. § 1854(c).

B. Fishery Management Plans Must Comply With Ten National Standards.

The Magnuson-Stevens Act describes both required and discretionary provisions for a FMP or amendment, and by extension, framework adjustments. See 16 U.S.C. § 1853(a),(b).

Among other things, FMPs must set out the conservation and management goals for the fishery, describe the relevant species and fishing industry, and discuss the scientific data available to the managers. See id. § 1853(a). They may also include measures such as permit requirements, closure areas, gear restrictions, and other limitations to carry out the goals of the FMP. See id. § 1853(b). In developing these FMPs, NMFS must use the best scientific information available

regarding target and non-target species, and protected species. See id. at § 1851(a)(2). The FMPs are prepared through a planning process that includes extensive public comment and involvement of persons concerned with and affected by the management of these resources. See 16 U.S.C. § 1854(a)(1)(B).

FMPs, amendments and framework adjustments must be consistent with ten National Standards set forth in the Magnuson-Stevens Act.² The National Standards require the Council and NMFS to balance many competing interests in managing fisheries. See CLF v. Mineta, 131 F. Supp.2d 19, 27 (D.D.C. 2001) (acknowledging “numerous – and oftentimes competing – statutory objectives” with which NMFS must “contend ... in managing the New England waters”); American Oceans Campaign v. Daley, 183 F. Supp.2d 1, 12 (D.D.C. 2000) (“Congress granted the Secretary broad discretion to balance the ten National Standards in determining whether an FMP has complied with them.”), citing Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996).

Plaintiffs raise claims in this case related to National Standards One and Two. National

^{2/}The National Standards provide that conservation and management measures shall:

- (1) prevent overfishing while achieving, on a continuing basis, optimum yield;
- (2) be based on the best scientific information available;
- (3) to the extent practicable, manage an individual stock of fish as a unit, and interrelated stocks of fish as a unit or in close coordination;
- (4) not discriminate between residents of different States;
- (5) where practicable, consider efficiency in the utilization of fishery resources;
- (6) take into account variations among fisheries, fishery resources, and catches;
- (7) where practicable, minimize costs and avoid unnecessary duplication;
- (8) take into account the importance of fishery resources to fishing communities;
- (9) to the extent practicable, (a) minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch; and
- (10) to the extent practicable, promote the safety of human life at sea.

16 U.S.C. § 1851(a)(1)-(10).

Standard One requires NMFS to prevent “overfishing,” defined in the MSA as “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. § 1802(34).³ In addition, NMFS must prevent overfishing while achieving, on a continuing basis, “optimum yield.” “Optimum yield” is defined as the amount of fish which:

- (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;
- (B) is prescribed such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and
- (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

16 U.S.C. § 1802(33). See also A.M.L. Int’l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000) (“Optimum yield . . . is the amount of fish which, in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield.”). If preventing overfishing conflicts with achieving OY, however, preventing overfishing prevails. NRDC v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000). In 1996, the Magnuson Act was amended by the Sustainable Fisheries Act (“SFA”), which, among other things, requires NMFS to identify overfished fisheries. Id. § 1854(e)(1). If NMFS identifies a species as overfished, the agency must notify the appropriate Council and request that the Council take action “to end overfishing in the fishery and to implement conservation and management measures to rebuild affected stocks of fish.” See id. § 1854(e)(2). According to the SFA, under which the challenged action

³“Maximum sustainable yield” (“MSY”) is “the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.” 50 C.F.R. § 600.310(c)(1)(i).

was implemented, the Council had one year from notification to prepare a FMP or plan amendment to end overfishing and rebuild affected stocks of fish. See id. § 1854(e)(3). The FMP or amendment had to set out a schedule specifying a time period for ending overfishing and rebuilding the fishery, which is not to exceed ten years unless “the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise.” 16 U.S.C. § 1854(e)(4)(A).⁴ NMFS has established National Standards Guidelines (“Guidelines”) to assist the Councils to determine the appropriate rebuilding time frames for overfished stocks. 50 C.F.R. § 600.310(e)(4)(ii).

The Guidelines set forth a limited exception to the requirement to prevent overfishing, pursuant to which the Council may permit overfishing of one stock in a multispecies fishery in order to permit harvest of another species at its optimum level. 50 C.F.R. § 600.310(d)(6). This exception may only be invoked if:

- (i) It is demonstrated by analysis . . . that such action will result in long-term net benefits to the Nation.
- (ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.
- (iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA.

Id. This is known as the “mixed-stock exception,” and is the subject of Plaintiffs’ claim under National Standard One, discussed infra at Section I.A.

⁴ Under the recently implemented Reauthorization of the MSA, most of these provisions are unchanged. However, under the current law, when a fishery is identified as being overfished a council has two years to address the problem, and overfishing must be ended immediately, rather than over a specified time period. See 16 U.S.C. § 1854(e)(3).

National Standard Two provides that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). “Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature.” 50 C.F.R. § 600.315(b)(1). The National Standard Two Guidelines clarify that an FMP must take into account the best scientific information available at the time the FMP is prepared. *Id.* at § 600.315(b)(2). The standard is a “practical” one, “requiring only that fishery regulations be diligently researched and based on sound science,” and the Secretary need not “rely upon perfect or entirely consistent data.” The Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147, 157 (D.D.C. 2005), aff’d 488 F.3d 1020 (D.C. Cir. 2007).

III. FACTUAL BACKGROUND

The Northeast Multispecies or “Groundfish” fishery consists of twelve species: cod, haddock, yellowtail flounder, pollock, plaice, witch flounder, white hake, windowpane flounder, Atlantic halibut, winter flounder, redfish, and ocean pout. A.R. 7220. Some of these species are further sub-divided into individual stocks that are attributed to different geographic areas, making a total of nineteen stocks of fish in this fishery. *Id.* The Northeast Multispecies FMP sets forth the management measures for these nineteen stocks off of the New England and mid-Atlantic coasts. *Id.*

A. Amendment 13 and Framework 42

The Northeast Multispecies FMP has been updated through a series of amendments and framework adjustments. A.R. 7220. The most recent amendment to the FMP, Amendment 13, became effective on May 1, 2004. *Id.* See also 69 Fed. Reg. 22,906 (Apr. 27, 2004). This amendment established the baseline management measures necessary to phase-out overfishing

and rebuild overfished stocks and meet other requirements of the Magnuson-Stevens Act, and adopted a schedule for adjustments to the management measures as necessary to achieve rebuilding targets. A.R. 7220. Subsequently, the Council implemented several framework adjustments, including Framework 40A (allowing fishermen to target healthy stocks), Framework 40B (improving the effort control program), and Framework 41 (expanding the vessels eligible to participate in a Special Access Program (“SAP”) targeting Georges Bank haddock). A.R. 7225. Framework 42, the subject of Plaintiffs’ claims in this case, was a prescribed biennial adjustment adopted in response to groundfish stock assessments performed in August 2005 reflecting that fishing mortality for seven stocks exceeded the targets adopted in Amendment 13. A.R. 7186. See also 50 CFR § 648.90 (a)(2). Framework 42, which went into effect on November 22, 2006, also sets forth, based on new groundfish stock assessments, a rebuilding program for Georges Bank yellowtail flounder and modifies the management measures in the Northeast Multispecies Fishery to reduce fishing mortality rates of six groundfish stocks: Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England/Mid-Atlantic yellowtail founder, Southern New England/Mid-Atlantic winter flounder, Georges Bank winter flounder, and white hake. See AR 8483.

B. Days-At-Sea

The aspect of Framework 42 that Plaintiffs challenge in this action is the methodology and model used to calculate days-at-sea (“DAS”). The Northeast Multispecies FMP uses DAS limitations as a tool to control fishing effort by allocating to each permit a specific number of DAS, thus restricting the total number of days that a given vessel may spend out on the water fishing for groundfish stocks. See A.R. 7186. Amendment 13 continued the use of DAS and

created new categories of DAS. See 69 Fed. Reg. at 22909. Under Amendment 13, NMFS determines each vessel's DAS allocation by reviewing the vessel's yearly DAS allocations from fishing years 1996 to 2001 (May 1, 1996 through April 30, 2002) and adopting the highest amount of DAS recorded during any of those years as the vessel's allocated DAS, provided that this number does not exceed the vessel's annual allocation prior to August 1, 2002. 69 Fed. Reg. at 22970-71 (codified at 50 C.F.R. § 648.82(c)). NMFS then classifies the vessel's DAS allocation into Category A, B, or C DAS, and restricts the use of these DAS depending on the classification. See 69 Fed. Reg. 22909. Category A DAS may be used to target any regulated groundfish stock, Category B may be used to target healthy groundfish stocks, and Category C may not be used at this time, but might be re-allocated as either Category A or B in the future as groundfish stocks rebuild. See A.R. 7186.

Framework 42 contains several DAS limitations, including the measure that Plaintiffs challenge here which applies to the Gulf of Maine ("GOM") Differential DAS Area. See Pl. Mem. at 2.⁵ Under Framework 42, each Category A DAS for vessels fishing in the GOM Differential DAS Area is counted at a ratio of 2:1. A.R. 8514. This applies to the entire trip, even if only a portion of the trip is actually spent fishing in the GOM Differential DAS Area. Id. Framework 42 mitigates the effect of the DAS restrictions by continuing the B DAS program and the DAS leasing and transfer programs. A.R. 7240; 7250-7251. The B DAS program allows vessels to target healthy stocks and the DAS leasing program allows fishermen

^{5/}The area at issue is defined by latitude and longitude coordinates in the final rule. See 71 Fed. Reg. 62,187. The EA for Framework 42 contains a map illustrating the location of the Differential DAS Area. See A.R. 7237. See also Pl. Mem. at Exhibit A, Dkt. No. 24-2 (reproducing map). NMFS selected this area to reduce fishing mortality for Gulf of Maine cod and Cape Cod/Gulf of Maine yellowtail flounder. A.R. 7236 ("The area selected accounted for nearly 85 percent of [Gulf of Maine] cod landings in FY 2004 and a similar percentage of [Cape

to temporarily transfer groundfish DAS to one another for up to one fishing year. 69 Fed. Reg. 22,911. The DAS transfer program allows fishermen to permanently transfer DAS to other permit holders. Id. Framework 42 adopts changes to the DAS transfer program to improve ease of use, including removing the requirement that the transferor exit all state and federal fisheries. See A.R. 7251.

C. The Closed Area Model

Plaintiffs also challenge the Closed Area Model (“CAM”) used by the Council to assess the effectiveness of the management measures in Framework 42. The CAM is an algebraic model used to project changes in mortality expected to result from area closures, revised trip limits, and changes in days-at-sea. A.R. Doc. 205 at V-3. The model predicts behavioral responses by fishermen to changes in regulation of the fishery, assuming that fishing effort will be redirected into open areas in response to closures of certain portions of the fishery. See A.R. Doc. 200 at I-226. An earlier version of the CAM was used to analyze the biological and economic impacts of the management measures proposed in Amendment 13. See Doc. 205 at V-4. Plaintiffs did not challenge the use of the CAM in the context of Amendment 13. However, in a challenge by several environmental organizations to Amendment 13, Oceana, Inc. v. Evans, No. Civ.A.04-0811(ESH), 2005 WL 555416 (D.D.C. Mar. 9, 2005), the court upheld the use of the CAM as a “reasonable exercise of discretion.” Id. at *16-20.

The methodology of the CAM was reviewed and endorsed by the Council’s Social Sciences Advisory Committee in 2001. A.R. 8504. The CAM was also subjected to peer review by a panel of independent experts in January 2004. Id. See also A.R. Doc. 202 at 16 (January

Cod/Gulf of Maine] flounder.”)

23, 2004 report by reviewer Susan Hannah, PhD) (finding that CAM is “an appropriate approach” but noting “limitation of the model of assigning vessel adjustments only to areas with fishing history”); A.R. Doc. 203 at 8 (January 26, 2004 report by reviewer Northern Economics) (finding that “the CAM is generally an acceptable model” but noting limitation that the model fails to consider vessel operating costs). Several modifications were made to the model based on advice received from reviewers. See A.R. 8504. See also A.R. Doc. 205 at V-3 (changes included: (1) incorporating costs into the model to measure vessel profits; (2) permitting vessels to shift effort to areas where they had not fished previously; and (3) basing total amount of effort available to a vessel on its 2005 fishing year allocation, rather than the average days-at-sea for 2001-2004). The Council used the Revised CAM “to predict vessel behavior to maximize fishing profit in response to the suite of proposed measures” in Framework 42, including the GOM Differential DAS Area. See A.R. 8498.

STANDARD OF REVIEW

Under the Federal Rules of Civil Procedure, summary judgment may be granted when the moving party shows that there are no material facts in dispute, and the party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). Judicial review of agency action under the Magnuson-Stevens Act is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. See, e.g., Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104 (1st Cir. 1997). In a case involving judicial review of a final agency action under the APA, the court’s role is limited to review of the administrative record. See 5 U.S.C. § 706 (a reviewing court “shall review the whole record or those parts of it cited by a party . . .”).

The reviewing court's task is to "decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Section 706(2)(A) of the APA directs a reviewing court to affirm final agency action, unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law." 5 U.S.C. § 706(2)(A). Under the APA, administrative actions are to be presumed valid and afforded great deference. Associated Fisheries, 127 F.3d at 109. Thus, agency decisions will be upheld so long as they "do not collide directly with substantive statutory commands and so long as procedural corners are squarely turned." Adams v. EPA, 38 F.3d 43, 49 (1st Cir.1994), quoting Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir.1993). This deference is especially marked in technical or scientific matters within the agency's area of expertise. Sun Oil Co., 8 F. 3d at 77. See also Rhode Island Higher Educ. Assistance Auth. v. Secretary U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) ("It is apodictic that a reviewing court should accord an agency's decision considerable deference when that decision involves a technical question within the field of the agency's expertise."). The First Circuit has recognized that:

Administrative decisionmaking is not an exact science, and judicial review must recognize that some arbitrariness is inherent in the exercise of discretion amid uncertainty. Accordingly, courts reviewing this type of administrative decision must leave room for a certain amount of play in the joints.

Associated Fisheries, 127 F.3d at 111. As long as the Secretary's determination "is 'within the bounds of reasoned decisionmaking,' [this Court] may not set it aside, regardless of whether [it would] have reached an opposite decision." M/V Cape Ann v. United States, 199 F.3d 61, 63-64 (1st Cir. 1999).

ARGUMENT

X. PLAINTIFFS' CLAIM UNDER NATIONAL STANDARD ONE MUST FAIL BECAUSE IT IS BASED ON A FLAWED READING OF THE MAGNUSON-STEVENS ACT AND NATIONAL STANDARDS GUIDELINES, AND BECAUSE FEDERAL DEFENDANTS' DECISION TO APPROVE FRAMEWORK 42 IS SUPPORTED BY THE ADMINISTRATIVE RECORD.

The Court must reject Plaintiffs' argument that Federal Defendants violated National Standard One by not applying the mixed-stock exception because it is based on a flawed understanding of the legal effect of the Guidelines. Plaintiffs allege that there is a "non-discretionary requirement" that the Secretary "consider the application of the mixed-stock exception to the groundfish fishery. . . ." Pl. Mem. at 18. Plaintiffs' argument must be rejected for two reasons. First, the Magnuson-Stevens Act is unambiguous: the Guidelines are not binding on the Secretary. See 16 U.S.C. § 1851(b). Second, the administrative record reflects that the Secretary did consider the mixed-stock exception, and rationally decided to uphold the Council's decision not to apply it in this case. Thus, Federal Defendants are entitled to summary judgment on Count Two of Plaintiffs' Complaint.

A. The Guidelines Are Not Binding And Thus Cannot Form The Basis For A Claim By Plaintiffs.

Plaintiffs dismiss the unambiguous language of the Magnuson-Stevens Act providing that the Guidelines do not have the force of law, see Pl. Mem. at 24, n.5, and rely on three words in 50 C.F.R. § 600.305(a)(3) to argue that the Guidelines "are binding upon the Secretary and the Councils." Id. The Magnuson-Stevens Act could not be more clear that the Guidelines "shall not have the force and effect of law." 16 U.S.C. § 1851(b). In fact, the preamble, quoted by Plaintiffs, makes clear that the Guidelines "are intended as aids to decisionmaking." See Pl. Mem. at 24, quoting 50 C.F.R. § 600.305(a)(3). The language of the mixed-stock exception

reinforces its discretionary nature. The Guidelines state that “[a] Council may decide to permit” harvesting of one species in a mixed-stock complex if certain conditions are met. 50 C.F.R. § 600.310(d)(6) (emphasis added). Thus, whether to apply the mixed-stock exception is left to the discretion of the Council.

Courts have acknowledged that the Guidelines are advisory in nature. See NRDC v. Nat’l Marine Fisheries Serv., 421 F.3d 872, 875 (9th Cir. 2005) (“The Act provides that the [National Standards Guidelines] ‘shall not have the force and effect of law.’”); Ocean Conservancy v. Evans, 260 F. Supp. 2d 1162, 1166 n.3 (M.D. Fla. 2003) (noting that Guidelines are “advisory”); NRDC v. Evans, 168 F. Supp. 2d 1149, 1158 (N.D. Cal. 2001) (same), vacated on other grounds, 316 F.3d 904 (9th Cir. 2003). As Plaintiffs note, Pl. Mem. at 24, n.5, another judge in this District has considered the language of 16 U.S.C. § 1851(b) in the context of determining whether the Guidelines are subject to judicial review under the Magnuson-Stevens Act or the APA. See Tutein v. Daley, 43 F. Supp. 2d 113 (D. Mass. 1999). However, Tutein actually stands for the exact opposite proposition of what Plaintiffs claim. In Tutein the court found that the Guidelines were not reviewable as “regulations” under the MSA based on the “plain meaning of the term ‘advisory guidelines’” and the statutory language that the Guidelines “shall not have the force and effect of law.” Id. at 122. The court further held that the Guidelines were not subject to judicial review under the APA, because the plain language of the MSA “evidences a Congressional intent that the Guidelines have no effect and, thus, do not create, in and of themselves, a private right of action.” Id. at 124. Therefore, Tutein upholds the plain meaning of the Magnuson-Stevens Act, which is that the guidelines are not binding or enforceable by third parties. Similarly, this Court should find that the Guidelines do not give rise

to a private right of action, and Plaintiffs cannot rely on any alleged violation thereof as the basis for their claim under National Standard One.

B. The Secretary’s Decision To Approve Framework 42 Despite The Council’s Failure To Apply The Mixed-Stock Exception Was Rational And Should Be Upheld.

Even if Plaintiffs could properly raise a claim based on the mixed-stock exception, their claim must fail because the record demonstrates that the Secretary had a rational basis for declining to apply the mixed-stock exception. Further, Plaintiffs do not even attempt to offer any evidence demonstrating that application of the mixed-stock exception would have been appropriate under the circumstances. Moreover, Amendment 13 had already implemented the equivalent of the mixed stock exception for several groundfish stocks to mitigate the harmful impact of Amendment 13 measures

The Council considered the mixed-stock exception in the context of developing Framework 42, but “it was not seriously considered and not analyzed, given the time constraints necessary to complete [Framework] 42 and uncertainty that the necessary criteria could be met.” A.R. 8507. Further, even if the Council had decided that application of the mixed-stock exception was appropriate in this case, it “would be such a radical departure from the current management regime that an amendment to the FMP, rather than a framework adjustment, would be necessary to implement it.” *Id.* See also *Oceana, Inc.*, 384 F. Supp. 2d at 252 (D.D.C. 2005) (“non-FMP changes to a management regime” such as framework adjustments may “implement” an FMP, but may not “propose new management measures”), citing 16 U.S.C. § 1855(f). As described above, Framework 42 was intended to be a biennial adjustment to measures adopted in Amendment 13, not a whole new look at groundfish management. In any event, NMFS could

not have unilaterally decided to apply the mixed-stock exception absent such a decision by the Council. See id. at 8494 (in implementing a framework adjustment “NMFS may only approve or disapprove substantive measures, and, may not unilaterally modify any measure in a substantive way pursuant to section 304(a)(3) to [*sic*] the Magnuson-Stevens Act”). See also 16 U.S.C. § 1854(a)(3), 50 C.F.R. §648.90(a)(2).

Although the Council did not explicitly rely on the mixed-stock exception, there are other measures in Amendment 13 that established the functional equivalent of the exception. To understand this, it is necessary to realize that the mixed stock exception only permits overfishing to continue on one stock in order to allow harvest of another stock at its optimum level. See 50 C.F.R. §600.310(d)(6). The exception does not eliminate the requirement to achieve rebuilding objectives. So at best, even if invoked, the mixed-stock exception is only a temporary measure because at some point the Council and NMFS will have to end overfishing of the stocks at issue to achieve rebuilding objectives. In Amendment 13, rather than requiring a dramatic end to overfishing for certain very precarious overfished stocks which would have severe economic consequences, the Council adopted a phased-in approach that permits fishing overfishing to occur on those stocks at the outset of the rebuilding plan, but gradually decreases the rate to end overfishing to allow rebuilding targets to be met. See Oceana, Inc. v. Evans, 2005 WL 555416, at *12-13. This results in the exact same benefit as the mixed-stock exception.

As the court found in Oceana, this approach avoids a “steep initial decline in fishing” and “enabl[es] more fishermen to remain in business while stocks rebuild.” Id. at *9. The phased-in approach is “designed to better account for ‘the complexity of the fishery and the co-occurrence of stocks of concern and stocks that are not overfished’” because imposing constant lower

fishing rates to protect overfished stocks would have the unintended effect of “reduc[ing] fishers’ ability to target abundant stocks in the same geographic area due to the need to avoid bycatch of the overfished stocks.” Id., quoting 69 Fed. Reg. at 22,920. The court upheld this approach as consistent with the Magnuson-Stevens Act not under the mixed-stock exception, but under the version of 16 U.S.C. § 1854(e) in place at the time Amendment 13 was implemented, which required a plan to end overfishing without precluding the possibility of phasing it out over time, as long as rebuilding objectives were not jeopardized.⁶ See id. at *12-15. Thus, the rebuilding plans adopted in Amendment 13 serve the same purpose as the mixed-stock exception: namely, permitting overfishing of certain stocks in order to permit continued harvest of healthy stocks.

Significantly, even assuming that there was no functional equivalent of the mixed-stock exception in place, Plaintiffs provide no evidence that the exceptional circumstances necessary to invoke explicitly the mixed-stock exception are present in this case. See A.R. 8507 (noting that commenters, including the Massachusetts Division of Marine Fisheries, “have not provided any analysis that suggest that the three criteria necessary to implement this exemption would be met”). See also NRDC, 168 F. Supp. 2d at 1159 (“The conditions that must be met [to invoke the mixed-stock exception] are onerous and would presumably involve exceptional circumstances.”).⁷ Plaintiffs have failed to demonstrate that NMFS lacked a rational basis for

⁶ Under the 2007 Reauthorization of the Magnuson-Stevens Act, 15 U.S.C. § 1854(e)(3) now requires overfishing to be ended immediately, thereby eliminating the alternative to the mixed-stock exception in place at the time Amendment 13 and Framework Adjustment 42 were implemented.

⁷ NMFS recently issued a proposed rule to revise the guidelines for National Standard One which would amend the mixed-stock exception to impose even more stringent conditions that must be satisfied before the exception may apply. See 73 Fed. Reg. 32,526, 32,547 (June 9, 2008) (resulting rate of fishing may not cause a stock complex to fall below its minimum stock size threshold – the point at which the stock is considered overfished – more than 50 percent of the time in the long-term). If the issue were remanded for reconsideration by the Council and

upholding the Council’s decision not to apply the mixed-stock exception. See C&W Fish Co. v. Fox, 931 F.2d 1556, 1562 (D.C. Cir. 1991) (reviewing court’s task is to determine whether agency’s decision is “rational and supported by the record”); Conservation Law Found. v. Evans, 360 F.3d 21, 27-28 (1st Cir. 2004) (to succeed on substantive challenge to an FMP, plaintiffs “must demonstrate that NMFS lacked a rational basis for adopting the framework”; it is not the court’s role to second-guess NMFS’ determinations). Thus, Federal Defendants are entitled to summary judgment on Plaintiffs’ claim under National Standard One.

XI. PLAINTIFFS’ CLAIM UNDER NATIONAL STANDARD TWO MUST FAIL BECAUSE PLAINTIFFS HAVE NOT MET THEIR BURDEN TO PROVE THAT THE CLOSED AREA MODEL IS NOT THE BEST SCIENTIFIC INFORMATION AVAILABLE.

Having lost their motion to supplement the administrative record, Plaintiffs attempt to relitigate the scope of the record in the context of their summary judgment motion. See, e.g., Pl. Mem. at 5 (arguing that Court cannot meaningfully review the Revised CAM on the basis of the administrative record); id. at 26 (arguing that “the Secretary cannot demonstrate on the existing Administrative Record that this statistical model constitutes the ‘best scientific information available’”). The Court should reject Plaintiffs’ effort to shift the burden of proof to Federal Defendants. Because Plaintiffs have failed to prove that the Secretary violated National Standard Two in promulgating Framework 42, the Court should grant summary judgment in favor of Federal Defendants on Count Three of Plaintiffs’ Complaint.

NMFS it is likely, based on preliminary information available, that few if any of the stocks in the groundfish fishery would meet the conditions for applicability of the mixed-stock exception under the revised guidelines. See Summary of Groundfish Assessment Review Meeting: Biological Reference Points (April 28-May 2, 2008) at 24-45, available at <http://www.nefmc.org/nemulti/index.html> (reflecting that most stocks are below their target biomass (B_{msy})).

A. NMFS Properly Concluded That The Revised CAM Constitutes the Best Scientific Information Available.

National Standard Two requires the Secretary to base conservation and management measures on “the best scientific information available.” 16 U.S.C. § 1851(a)(2). “Time and time again courts have upheld agency action based on the ‘best available’ science, recognizing that some degree of speculation and uncertainty is inherent in agency decisionmaking. . . .” Oceana, 384 F. Supp. 2d at 219. The Court should be particularly deferential to the Secretary’s decisionmaking in this case, which involves technical issues that implicate agency expertise. See Ocean Conservancy, 394 F. Supp. 2d at 157, citing Sierra Club v. U.S. DOT, 753 F.2d 120, 129 (D.C. Cir. 1985). See also Yakutat, Inc. v. Gutierrez, 407 F.3d 1054, 1072 (9th Cir. 2005) (“When the administrative agency has provided relevant data supporting its decision, we owe deference to the agency’s line-drawing.”)

NMFS rationally determined that the analysis conducted using the Revised CAM represents the best scientific information available, and the agency’s decision is entitled to deference. See A.R. 8505. The Revised CAM was thoroughly reviewed by independent experts, and modified in response to their comments. See A.R. 8504. NMFS considered a variety of public comments questioning the assumptions underlying the Revised CAM and determined that the criticisms were inaccurate. See A.R. 8504-8505. NMFS acknowledged the model’s limitations, but determined that “the CAM is able to sufficiently predict individual vessel behavior to maximize profits based on the available data.” A.R. 8505

In the absence of an ideal model, the Secretary must base his decisions on the best available information regarding the anticipated behavior of fishermen in response to the proposed management measures. The phrase “best scientific information available” is not

defined, and “case law . . . seems to imply that it does not mandate any affirmative obligation on the agency’s part,” and that the agency may act based on incomplete information.

Commonwealth of Mass. ex rel. Div. of Marine Fisheries v. Daley, 10 F. Supp. 2d 74, 77 (D. Mass. 1998), aff’d, 170 F.3d 23 (1st Cir. 1999). “Indeed, by specifying that decisions be based on the best scientific information available, the Magnuson-Stevens Act recognizes that such information may not be exact or totally complete.” Midwater Trawlers Coop. v. Dep’t of Commerce, 393 F.3d 994, 1003 (9th Cir. 2004). See also Mass. v. Daley, 170 F.3d at 30; A.M.L. Int’l, Inc. v. Daley, 107 F.Supp.2d 90, 101 (D. Mass. 2000); Parravano v. Babbitt, 837 F.Supp. 1034, 1046 (N.D. Cal. 1993), aff’d, 70 F.3d 539 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). This is true “even where concerns have been raised about the accuracy of the methods or models employed.” North Carolina Fisheries Ass’n v. Gutierrez, 518 F. Supp. 2d 62, 85 (D.D.C. 2007). The Revised CAM is the best available model to predict fishermen’s behavior in the face of uncertainty, and NMFS reasonably relied on the model.

It is not Federal Defendants’ burden to demonstrate that the Revised CAM constitutes the best scientific information available. Contra Pl. Mem. at 26. In order to successfully challenge the Secretary’s rational decision, Plaintiffs must introduce evidence of contrary science, and may not rely on bare allegations that the agency’s decision conflicts with undefined better available scientific information. See Oregon Trollers Ass’n v. Gutierrez, 452 F.3d 1104, 1120 (9th Cir. 2006), cert. denied, 127 S.Ct. 2028 (2007). Plaintiffs offer no specific critiques of the Revised CAM and do not attempt to identify an alternate model that NMFS should have used. By failing to offer any critiques or alternative model, Plaintiffs have failed to meet their burden of proof with respect to their claim that the Revised CAM does not constitute the best scientific

information available. See Mass. v. Daley, 170 F.3d at 30 (“If no one proposed anything better, then what is available is the best.”). Thus, the Court should uphold the Secretary’s rational decision to rely on the Revised CAM and reject Plaintiffs’ claim that Framework 42 violates National Standard Two.

B. Plaintiffs Fail To State A Claim Under National Standard Two Based On The “Timely Availability” Language Of The Guidelines.

Plaintiffs’ misguided arguments about “timely availability” of the information fail to sustain their burden to show that Defendants violated National Standard Two. Citing the National Standard Two Guidelines, Plaintiffs argue that the Secretary concealed the underpinnings of the CAM until after Framework 42 was promulgated. See Pl. Mem. at 13. First, as explained above, the Guidelines are not binding and therefore cannot form the basis of a claim by Plaintiffs. Second, Plaintiffs’ argument must be rejected because it relies on an erroneous reading of the Guidelines. Third, Plaintiffs ignore numerous instances where the Council and NMFS respond to questions and concerns about the Revised CAM.

Even if Plaintiffs could state a claim based on the Guidelines – which they cannot, see supra Section I.A. – their reading of the National Standard Two guideline is flawed. The Guidelines advise 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.” 50 C.F.R. § 600.315(b)(1). Plaintiffs pluck out the phrase “timely availability” from this sentence, ignoring the surrounding language that puts the phrase into the proper context, and attempt to base a claim under National Standard Two on these two words. See Pl. Mem. at 13-14 (arguing that Framework 42 “should be vacated on this independent ground”). The Guidelines go on to clarify that:

FMPs must take into account the best scientific information available at the time of preparation. Between the initial drafting of an FMP and its submission for final review, new information often becomes available. This new information should be incorporated into the final FMP where practicable; but it is unnecessary to start the FMP process over again, unless the information indicates that drastic changes have occurred in the fishery that might require revision of the management objectives or measures.

50 C.F.R. § 600.315(b)(2) (emphasis added). Thus, the Guidelines make clear that the “timely availability” reference is intended to limit the data that the Council and/or NMFS should consider to that available in time to be incorporated into the final decision. Plaintiffs offer no support for their argument that the Guidelines impose a requirement upon NMFS to “disseminate scientific information in a timely manner,” Pl. Mem. at 38, and their reading of 50 C.F.R. § 600.315(b)(1) is clearly erroneous when viewed in the context of the National Standard Two guideline as a whole.

Plaintiffs also fail to state a claim based on their allegations that the Secretary failed to make modifications to the CAM in response to specific comments. See Pl. Mem. at 40-42. As Plaintiffs point out, they had an opportunity to raise objections regarding the Revised CAM to both the Council and NMFS during the promulgation of Framework 42. See id. at 39. The Secretary is not required to take action in response to each public comment. An agency need only respond to “relevant” and “significant” public comments. See Penobscot Air Servs. v. FAA, 164 F.3d 713, 719 n.3 (1st Cir. 1999). See also Interstate Natural Gas Ass’n of America v. F.E.R.C., 494 F.3d 1092, 1096 (D.C. Cir. 2007) (“[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern”) (citation omitted); Natural Res. Def. Council v. EPA, 859 F.2d 156, 188 (D.C. Cir. 1988) (“[t]he APA requirement of agency responsiveness to comments

is subject to the common-sense rule that a response be necessary”).

In any event, NMFS did consider and respond to Plaintiffs’ comments and others that raised concerns about the Revised CAM. See A.R. 8504-8505. The response to Comment 42 in the final rule summarizes and refutes the criticisms raised by commenters, and reflects that NMFS considered the comments submitted by the Massachusetts Division of Marine Fisheries. See A.R. 8504; see also Pl. Mem. at 40. For example, issues raised in the August 25, 2006 letter from the Director of the Massachusetts Division of Marine Fisheries are addressed in the response. Compare A.R. 8184 (questioning whether the correct catch per unit effort (“CPUE”) was used for Cape Cod/Gulf of Maine yellowtail flounder) with A.R. 8504 (explaining that “is the same CPUE for CC/GOM yellowtail flounder is used to evaluate exploitation for both status-quo and proposed measures, then the relative change in exploitation between the two sets of measures would be the same, regardless of the value of the CC/GOM yellowtail flounder CPUE used by the model.”).

Plaintiffs cite another example: brief comments contained in an email message from Dr. Rothschild to Dr. Boreman, Northeast Fisheries Science Center. See Pl. Mem. at 41. Even if these comments rise to the level of “significant” public comments that require a response, which Defendants dispute, NMFS’ Northeast Fisheries Science Center fully responded to the comments, as Plaintiffs acknowledge. See id.; see also A.R. 8043-8056. Plaintiffs also cite an October 19, 2006 letter to NMFS enclosing a report critiquing the underlying assumptions of the Revised CAM. Pl. Mem. at 42. This letter was sent three days after Framework 42 was approved on October 16, 2006. See A.R. 8510. Nonetheless, the Northeast Fisheries Science Center responded by drafting an analysis of the criticisms, which NMFS forwarded to the

commenters on December 18, 2006. See A.R. Doc. 212.

The council and NMFS also fully considered and responded to comments regarding the Revised CAM by the Northeast Seafood Coalition, an industry organization. Contra Pl. Mem. at 42. The Northeast Seafood Coalition submitted comments questioning the validity of the Revised CAM to the Council during the development of Framework 42, and the Council provided a detailed response. See A.R. 8142-8144; A.R. 8145-8150. The Coalition's criticisms were also addressed in the response to Comment 42 in the final rule. Compare A.R. 8144 (“[T]he validity of the results of the CAM analysis to determine the effectiveness of [Framework] 42 management measures is directly dependent upon the validity of the CPUE values input into the model.”) with A.R. 8504 (“Assertions that changes in the CC/GOM yellowtail flounder CPUE used in the model would affect whether the proposed measures are able to achieve the necessary F reductions are also inaccurate.”)

The record shows that NMFS considered and adequately responded to comments on the Revised CAM. Plaintiffs fail to establish that NMFS lacked a rational basis for determining that the Revised CAM constitutes the best scientific information available. Nor do Plaintiffs offer any specific critique of the Revised CAM or identify any alternative model that NMFS should have used in place of the Revised CAM. Thus, Federal Defendants are entitled to summary judgment on Plaintiffs' third claim for relief.

XII. THE COURT SHOULD DECLINE TO GRANT THE REMEDY REQUESTED BY PLAINTIFFS BECAUSE THE COUNCIL IS CURRENTLY PREPARING AN AMENDMENT TO THE FMP THAT WILL SUPERCEDE FRAMEWORK 42.

Even if the Court finds that Plaintiffs are entitled to summary judgment on one or both of their claims, the Court should decline to grant the relief sought by Plaintiffs. Dissatisfied with

one limited aspect of Framework 42 – the computation of DAS in the Gulf of Maine – Plaintiffs seek to vacate the framework in its entirety and ask the Court to remand the final rule to the Secretary “for further proceedings aimed at bringing fishing mortality rates in the groundfish fishery in line with targets, and by the methods established in Amendment 13.” Pl. Mem. at 46. Neither vacatur nor remand is appropriate in this case.

As a general matter, where the administrative record does not support an agency action, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” See Florida Power & Light Co., 470 U.S. at 744; see also INS v. Ventura, 537 U.S. 12, 16 (2002) (“Generally speaking, a court . . . should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.”); Rhode Island Higher Educ., 929 F.2d at 857 (“[A] reviewing court, having determined that an administrative agency did not consider all the relevant factors, should ordinarily remand to the agency rather than compensating for the agency’s oversight by launching a free-wheeling judicial inquiry into the merits.”). If a regulation is not supported by the record, a court ordinarily would set aside the regulation pending further proceedings before the agency. Mass. v. Daley, 170 F.3d at 32. However, the court has discretion to “remand for further explanation while leaving the regulation in force.” Id.

Vacating Framework 42 would lead to chaos in the groundfish fishery. First, it is not clear what management measures would apply if the Court were to vacate Framework 42. Some case law suggests that Amendment 13 would be reinstated, based on the reasoning that “[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.” Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) (citation omitted). See also Georgetown Univ.

Hosp. v. Bowen, 821 F.2d 750,757 (D.C. Cir. 1987), aff'd 488 U.S. 204 (1988); Abington Mem. Hosp. v. Heckler, 750 F.2d 242, 244 (3d Cir. 1985). Alternatively, the D.C. Circuit has recognized that, although there are limited circumstances where vacatur reinstates a prior rule, “the better course is generally to vacate the new rule without reinstating the old rule” in order to “leave[] it to the agency to craft the best replacement for its own rule.” Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 545 (D.C. Cir. 1983). This approach is more consistent with the view expressed by the First Circuit that once a regulation is replaced by a subsequent regulation, the prior regulation is “defunct.” See Gulf of Maine Fishermen’s Alliance, 292 F.3d at 88 (when FMP amendment is superseded by new regulation, court “has no means of redressing either procedural failures or substantive deficiencies” associated with prior amendment). Thus, if the Court were to vacate Framework 42, it is not clear what management measures would apply in the groundfish fishery.

Second, vacating Framework 42 would be disastrous for the groundfish fishery because it would remove restrictions on fishing effort that the Council and NMFS concluded were necessary for conserving the resource. See A.R. 8483 (Framework 42 was developed by the Council to implement a rebuilding program for Georges Bank yellowtail flounder and reduce fishing mortality rates on six other stocks to achieve the rebuilding targets). See also A.R. 7224 (purposes of Framework 42 include adopting “management measures that are necessary to achieve the rebuilding fishing mortality rates required by Amendment 13” and “a formal rebuilding schedule for [Georges Bank] yellowtail flounder, a stock that was determined to be overfished and subject to overfishing in the summer of 2005”). The GOM Differential DAS Area that Plaintiffs challenge in this case is just one of a suite of management measures included

in Framework 42. See id. (other aspects of framework include: (a) requiring mesh modifications to reduce haddock bycatch; (b) implementing a vessel monitoring system (“VMS”) requirement; and (c) revising mesh requirements to reduce discards of yellowtail flounder). See also A.R. 8484-8494 (detailed description of management measures). Vacating the framework would remove these protections that the Council and NMFS concluded were necessary to conserve groundfish stocks. Thus, even if the Court finds in favor of Plaintiffs, the Court should exercise its discretion to leave Framework 42 in place during any remand.

Nor would it be appropriate to remand Framework 42 for reconsideration, because such an exercise would be futile, if not moot. If the Court were to remand the final rule to NMFS, the agency would be statutorily required to permit the Council to reconsider Framework 42 in the first instance. See 16 U.S.C. § 1854(a) (NMFS approves, partially approves, or disapproves FMPs developed by the Council). However, in this case it would be pointless for the Council to reconsider Framework 42 because it is already well along in the process of developing new management measures based on new data and assessments through a new amendment to the FMP. The Council is currently deliberating Amendment 16, which will include adjustments for the 2009 fishing year. See Draft Amendment 16 to the Northeast Multispecies Fishery Management Plan (June 1, 2008), available at <http://www.nefmc.org/nemulti/index.html> (“Draft Amendment 16”). Under the current time frame for Amendment 16, the Council expects to finalize the proposed amendment by February 2009 and submit it to NMFS for review in March or April 2009. See New England Fishery Management Council, Proposed A16 Schedule, at 6 (June 5, 2008) (attached hereto as Exhibit 1). In the context of Amendment 16, the Council is reconsidering the differential DAS scheme that Plaintiffs challenge in this case based on a whole

new assessment of data and the status of stocks (GARM III) which are scheduled to be completed by August, 2008. See Exhibit 1 at 3 (final stock assessment meeting to occur August 4-8, 2008); See also Draft Amendment 16 at 69-71. In light of the imminent availability of this new data, it would be a waste of resources for the Council and NMFS to reconsider Framework 42, which was based on data from 2004. See A.R. 7284-7305. Plaintiffs will have an opportunity to raise concerns about the DAS measures and other aspects of the amendment during the Council and public comment process. Thus, should the Court grant summary judgment in Plaintiffs' favor, it should decline to order Federal Defendants to reconsider Framework 42, as Plaintiffs request. Rather, the Court should permit the Council and NMFS to continue reevaluating the differential DAS scheme in the context of Amendment 16.

CONCLUSION

For the foregoing reasons, Framework 42 should be upheld. Plaintiffs' motion for summary judgment should be denied because Plaintiffs have failed to show that Federal Defendants violated National Standards One or Two. Because Framework 42 is supported by the administrative record and in accordance with applicable law, Federal Defendants' cross-motion for summary judgment should be granted and Plaintiffs' Petition should be dismissed in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non registered participants on June 19, 2008.

/s/ Kristen Byrnes Floom