

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE**

DAVID GOETHEL)
23 Ridgeview Terrace)
Hampton, NH 03842; and)
)
XIII NORTHEAST FISHERY SECTOR, INC.) Civil Action No. _____
c/o John Haran, Sector Manager)
205 Rockland Street)
Dartmouth, MA 02748,)
)
Plaintiffs,)
)
v.)
)
PENNY PRITZKER, in her official capacity)
as Secretary of the United States Department)
of Commerce)
Office of the Secretary)
Room 5858)
1401 Constitution Ave., NW)
Washington, DC 20230;)
)
UNITED STATES DEPARTMENT OF)
COMMERCE)
1401 Constitution Ave., NW)
Washington, DC 20230;)
)
KATHRYN SULLIVAN, in her official)
capacity as NOAA Administrator)
Department of Commerce)
Room 5128)
1401 Constitution Ave., NW)
Washington, DC 20230;)
)
NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION)
Department of Commerce)
Room 5128)
1401 Constitution Ave., NW)
Washington, DC 20230;

EILEEN SOBECK, in her official capacity as)
Assistant Administrator for Fisheries for the)
National Marine Fisheries Service)
Department of Commerce)
Room 14636)
1315 East-West Highway)
Silver Spring, MD 20910; and)
))
NATIONAL MARINE FISHERIES SERVICE)
Department of Commerce)
Room 14636)
1315 East-West Highway)
Silver Spring, MD 20910,)
))
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. This case arises out of an unlawful mandate by the Federal government requiring certain groundfish fishermen¹ in the Northeast United States not only to carry National Oceanic and Atmospheric Administration (“NOAA”) contractors called “at-sea monitors” (or “monitors”) on their vessels during fishing trips, but now to pay out-of-pocket for the cost of those government agents.

2. In a November 10, 2015 e-mail notice to groundfish fishermen, NOAA stated that effective January 1, 2016 those fishermen will be required to pay for the cost of at-sea monitors on their fishing trips whenever a monitor is assigned to the trip. E-mail from Jennifer Goebel, Pub. Affairs Officer, Ne. Fisheries Sci. Ctr., NOAA (Nov. 10, 2015) (the “November 10 Order”) (Exhibit 1).

¹ “Groundfish” is a generic term for a number of bottom-dwelling fish species including cod, haddock, yellowtail flounder, redfish, white hake, and pollock, to name a few.

The percentage of trips to be covered by at-sea monitors is determined by NOAA. To Plaintiffs' knowledge, this is the first time in the history of the Northeast United States groundfish industry that such an "industry funding" requirement has been imposed by a Federal agency. As discussed below, most of those fishermen will be unable to pay, and will be forced to give up their livelihoods.

3. For centuries, groundfish fishermen in the Northeast and Mid-Atlantic (*i.e.*, Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey, Maryland, Delaware, Virginia, and North Carolina) (the "Northeast United States" or "Northeast") have made a living by supplying the region and country with fresh seafood. Moreover, these fishermen — and the people in related industries who support their efforts, distribute their product, and sell it — have always formed a vital part of the region's history, culture, and economy.

4. In 2012 for example, the commercial fishing industry in the New England States landed 664 million pounds of seafood and earned \$1.2 billion in landings revenue. Nat'l Marine Fisheries Serv., NOAA, Fisheries Economics of the United States 2012 49 (Feb. 2014) [hereinafter "Fisheries Economics"], *available at* <http://goo.gl/v22g5c>. That same year, New England fishermen alone grossed \$68 million from the harvesting of groundfish. *See* Tammy Murphy *et al.*, Ne. Fisheries Sci. Ctr., NOAA, 2013 Final Report on the Performance of the Northeast Multispecies (Groundfish) Fishery (May 2013–April 2014) 51 (Sept. 2015), *available at* <http://goo.gl/wYcalY>.

5. In Fishing Year 2013, the Northeast groundfish fleet included 735 active vessels and employed approximately 2,039 crew members. *Id.* at 10. Those crew members and their families

are part of a larger seafood sector that supports nearly 300,000 jobs in countless fishing communities along the east coast of the United States. *See Fisheries Economics* at 53, 77.

6. Despite the importance of the groundfish industry in the Northeast, increasingly stringent government regulations — including, now, industry funding — threaten its viability. NOAA has implemented the industry funding requirement for at-sea monitoring despite the fact that:

- a. The Secretary of Commerce declared the groundfish fishery an economic disaster in 2012;
- b. The industry continues to struggle with the precipitous decline in groundfish profitability, as evidenced by a four-year low in groundfish revenue of \$55.2 million for Fishing Year 2013 — a 33.6 percent decline from Fishing Year 2010;
- c. Congress has directed NOAA to use its appropriated funding to cover the cost of these at-sea monitors, *see* Letter from U.S. Sen. Susan Collins *et al.*, to Eileen Sobeck, Assistant Adm'r for Fisheries, Nat'l Marine Fisheries Serv. (Apr. 29, 2015), which NOAA has refused to properly utilize and allocate in accordance with congressional intent, *see* Letter from Eileen Sobeck, Assistant Adm'r for Fisheries, Nat'l Marine Fisheries Serv., to U.S. Sen. Susan Collins (June 5, 2015);
- d. NOAA itself produced a study indicating that upwards of 60 percent of the groundfish industry could be rendered unprofitable if it is required to pay for at-sea monitors, *see* Greater Atl. Reg'l Fisheries Office and Ne. Fisheries Sci. Ctr., NOAA, A Preliminary Cost Comparison of At Sea Monitoring and Electronic Monitoring for a Hypothetical Groundfish Sector 6 (June 10, 2015); and

e. NOAA is specifically required by statute to implement regulations that allow fishing communities sustainable prosperity and “minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8).

7. Plaintiff fisherman David Goethel, and Plaintiff fishermen’s organization XIII Northeast Fishery Sector, Inc. (“Sector 13”), will be irreparably harmed if the November 10 Order goes into effect. Plaintiffs — like many others in their position — will be unable to continue participating in the groundfish industry, will be driven out of business altogether due to the large portion of their income that derives from the groundfish industry, and will be unable to recover their losses because of the Federal government’s sovereign immunity.

8. Plaintiffs file the instant Complaint in order to protect fishermen in the face of government regulation which seeks to deprive them of their livelihood and way of life.

JURISDICTION AND VENUE

9. This action arises under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*; the Magnuson-Stevens Fishery Conservation and Management Act, as amended in 1996 by the Sustainable Fisheries Act, 16 U.S.C. § 1801 *et seq.* (“Magnuson-Stevens” or the “Act”); the Anti-Deficiency Act, 31 U.S.C. § 1341 (“ADA”); the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370e (“NEPA”); the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (“RFA”); the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (“IOAA”); the Miscellaneous Receipts Statute, 31 U.S.C. § 3302 (“MRS”); the Commerce Clause of the Constitution, U.S. Const. art. I, § 8, cl. 3; the Appropriations Clause of the Constitution, U.S. Const. art. I, § 9, cl. 7; the Appointments Clause of the Constitution, U.S. Const., art. II, § 2, cl. 2; the Port Preference Clause of the Constitution, U.S. Const. art. I, § 9, cl. 6; the First Amendment of the Constitution, U.S.

Const. amend. I; the Third Amendment of the Constitution, U.S. Const. amend. III; the Fourth Amendment of the Constitution, U.S. Const. amend. IV; the Fifth Amendment of the Constitution, U.S. Const. amend. V; and the Tenth Amendment of the Constitution, U.S. Const. amend. X.

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the APA, 5 U.S.C. § 701 *et seq.* The November 10 Order is final and reviewable agency action, for it marks the consummation of the agency’s decision-making process, mandates obligations on Plaintiffs, and carries legal consequences. *See* 5 U.S.C. § 704.

11. In the alternative, this Court has jurisdiction over this action pursuant to Magnuson-Stevens, 16 U.S.C. §§ 1861(d), 1855(f), using the standards of the APA, *see id.* § 1865(f); 5 U.S.C. § 706(2)(A), (B), (C), (D). This petition is filed within the statutorily required 30-day window following issuance of the November 10 Order. 16 U.S.C. § 1855(f).

12. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e).

13. This Court may issue a declaratory judgment in this case pursuant to 28 U.S.C. §§ 2201–2202; may grant permanent injunctive relief pursuant to the APA, 5 U.S.C. § 706, and, in the alternative, Magnuson-Stevens, 16 U.S.C. § 1855(f); and may grant preliminary injunctive relief pursuant to the APA, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651.

PARTIES

14. Plaintiff David Goethel (“Mr. Goethel”) is a fisherman from Hampton, New Hampshire. He makes his livelihood fishing for groundfish on his vessel, the *Ellen Diane*. Mr. Goethel has been groundfishing for more than thirty years; he will be irreparably harmed if he is required to pay for at-sea monitors on fishing trips.

15. Plaintiff Sector 13 is a tax-exempt organization under 26 U.S.C. § 501(c)(5) composed of 32 fishermen, owning a total of 50 groundfish permits, who fish out of ports along the Northeast shore. Sector 13 and its members will be irreparably harmed if required to pay for at-sea monitors on fishing trips.

16. Defendant United States Department of Commerce is the Federal agency charged with managing United States marine fisheries.

17. Defendant Penny Pritzker is the Secretary of the United States Department of Commerce. She is sued in her official capacity as the chief administrator of the Federal agency charged with managing United States marine fisheries.

18. Defendant National Oceanic Atmospheric Administration is the agency within the Department of Commerce which supervises the National Marine Fisheries Service. The Secretary of Commerce delegated management responsibilities to NOAA, which sub-delegated them to the National Marine Fisheries Service (“NMFS”).

19. Defendant Kathryn Sullivan is sued in her official capacity as the chief administrator of NOAA.

20. Defendant National Marine Fisheries Service is an agency of the Department of Commerce with the sub-delegated responsibility to manage United States marine fisheries.

21. Defendant Eileen Sobeck is sued in her official capacity as the chief administrator of NMFS.

LEGAL BACKGROUND

The Regulatory Scheme

22. Magnuson-Stevens establishes the basis for Federal management of domestic fisheries in the United States. Recognizing the importance of fishery resources to the well-being of the American economy, Congress enacted Magnuson-Stevens to promote the conservation of fisheries in a way that sustains the industry. 16 U.S.C. §§ 1801(a)(6), (b)(1), (3).

23. In Magnuson-Stevens, Congress granted to the Department of Commerce authority to regulate commercial fishing in a zone extending from each State's waters to a line 200 nautical miles from the United States coastline (the "Exclusive Economic Zone"). *See* 16 U.S.C. § 1802(11). The Department of Commerce delegated this authority to NOAA, which exercises such authority through NMFS. NMFS regulates the fisheries within the Exclusive Economic Zone, including groundfish.

24. Magnuson-Stevens requires NMFS to enforce ten National Standards. These National Standards bind the Government to, *inter alia*, the following requirements:

- a. "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1) ("National Standard 1"); *see also* 50 C.F.R. § 600.310.
- b. "Conservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2) ("National Standard 2"); *see also* 50 C.F.R. § 600.315.

- c. “Conservation and management measures shall not discriminate between residents of different States.” 16 U.S.C. § 1851(a)(4) (“National Standard 4”); *see also* 50 C.F.R. § 600.325.
- d. “Conservation 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 by utilizing economic and social data that meet the requirement of [National Standard 2], 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) (“National Standard 8”); *see also* 50 C.F.R. § 600.345.

Fishery Management Councils

25. Magnuson-Stevens establishes eight regional Fishery Management Councils (“Regional Councils”). The New England Fishery Management Council (the “New England Council”) has jurisdiction over the coastal waters of Maine, New Hampshire, Massachusetts, Connecticut, and Rhode Island. 16 U.S.C. § 1852(a)(1)(A). The Mid-Atlantic Fishery Management Council (the “Mid-Atlantic Council”) has jurisdiction over the coastal waters of New York, Pennsylvania, New Jersey, Maryland, Delaware, Virginia, and North Carolina. *Id.* § 1852(a)(1)(B).

26. The voting members of the Regional Councils include (1) a set number of members appointed by the Secretary, based on nominations by the governors of the region’s States; (2) the regional director of NMFS for the Regional Council’s area; and (3) the principal officer with marine fishery management responsibility and expertise, or his designee, from each of the region’s

States. *Id.* §§ 1852(a)(1)(A), (B), 1852(b). The Regional Councils are required to develop regulations for the fishing industry in partnership with NMFS.

27. Under Magnuson-Stevens, the Regional Councils must prepare fishery management plans (“FMPs”) that regulate the harvesting of different species of fish within specified geographic areas. They also prepare amendments to those plans. FMPs and amendments are approved by the Secretary of Commerce and implemented and enforced by NMFS. The FMPs are the formal mechanism by which the Federal government manages domestic fisheries and seeks to achieve the Act’s conservation and resource management goals. *See id.* § 1853(a)–(b).

The Northeast Multispecies Fishery Management Plan

28. The Northeast Multispecies FMP regulates the harvest of sixteen groundfish species (American plaice, Atlantic cod, Atlantic halibut, Atlantic wolffish, haddock, ocean pout, offshore hake, pollock, redfish, red hake, silver hake, white hake, windowpane flounder, winter flounder, witch flounder, and yellowtail flounder). 50 C.F.R. § 648.2. The Northeast Multispecies FMP governs in waters under the jurisdiction of both the New England and Mid-Atlantic Regional Councils.

29. NMFS first implemented a Northeast Multispecies Plan in 1977. It was revised in 1986 as the Northeast Multispecies FMP and remains in place today, as modified by a number of amendments adopted by NMFS through the rulemaking process.

30. On April 9, 2010, NMFS implemented Amendment 16 to the Northeast Multispecies FMP. *See* Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262 (Apr. 9, 2010) (to be codified at 50 C.F.R. pt. 648). Among other alterations to the FMP, Amendment 16 mandated that groundfish fishermen either join a “sector” or fish in the “common pool.” Amendment 16

also mandated an At-Sea Monitor Program aimed at policing the FMP's requirements for fishermen in sectors.

STATEMENT OF FACTS

Fisherman are Forced to Join a Sector

31. A "sector" is a group of fisherman with Northeast Multispecies Permits who share an "annual catch entitlement" to certain portions of the "total allowable catch" for each of the fishery's stocks. Annual catch entitlement is assigned by NMFS prior to each fishing year.

32. As a condition for joining a sector, each fisherman is required to join an agreement with the other fishermen in the sector. This agreement binds the fisherman to the sector operations plan and agreement. NMFS controls the language of the sector operations agreements and reserves the right to approve and deny them. If NMFS does not approve a sector's operations agreement, the fishermen in that sector may not fish as a sector, but must instead fish in the common pool.

33. As a further condition for participation in the sector program, Amendment 16 requires that fishermen take at-sea monitors out on a certain percentage of their trips "to monitor and enforce catch levels ... for vessels participating in Northeast multispecies sectors." NOAA, Summary of Analyses Conducted to Determine At-Sea Monitoring Requirements for Multispecies Sectors FY 2015 (2015), *available at* <http://goo.gl/ZzbYKA>.

34. The annual catch limitations for each of the species subject to the Northeast Multispecies FMP, as well as the annual catch entitlements for eligible sectors, have typically decreased every year since 2010, and cumulative allocations have consistently dropped. In Fishing Year 2010 (May 1, 2010–April 30, 2011), for example, NFMS expected to allow sector participants to harvest 68,287 metric tons of groundfish across all stocks and divided among eligible sectors. 2010 Sector

Operations Plans & Contracts, and Allocation of Northeast Multispecies Annual Catch Entitlements, 75 Fed. Reg. 18,113, 18,116 (Apr. 9, 2010). For Fishing Year 2015 (May 1, 2015–April 30, 2016), however, NMFS set entitlements for all regulated species and sector participants at only 59,888 metric tons. 2015 & 2016 Sector Operations Plans and 2015 Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 80 Fed. Reg. 25,143, 25,147 (May 1, 2015). Based on NMFS’s expected allocations, Plaintiff Sector 13 has experienced a substantial reduction in its total entitlements over this five year period.

35. The “common pool” is made up of fishermen who have Northeast Multispecies Permits but have not joined a sector.

36. Even when compared with sector participation, fishing in the common pool is not an economically viable way to participate in the groundfish industry. For Fishing Year 2015, the adjusted cumulative catch quotas for *all* species, for *all* common pool vessels combined is only 649.58 metric tons, a fraction of the permissible harvest allocated to sector fishermen. Greater Atl. Reg’l Fisheries Office, NOAA, Northeast Multispecies Limited Access Permit Holders: Updated Annual Catch Limits for Sectors and Common Pool Vessels for Fishing Year 2015 (Aug. 17, 2015), *available at* <http://goo.gl/9CA9Iv> (last accessed Dec. 7, 2015). These annual catch limits for the common pool are further divided across the fishing year’s trimesters, such that, in the current trimester (Sept. 1, 2015–Dec. 31, 2015), common pool fishermen may only harvest 219.69 metric tons of fish, with individual limitations on each regulated species. *Id.* At such time as 90 percent of the trimester quota for any species is reached, NMFS may close that portion of the groundfish fishery. *See* 50 C.F.R. § 648.82(n)(2)(ii).

37. In addition to strict quota requirements, any fisherman who elects to fish in the common pool is subject to a limitation on the number of “days at sea” (“DAS”) he may fish, calculated based on past vessel records. Amendment 16 reduced the total DAS allocated to common pool vessels by 32 percent from 2009 levels and 50 percent from 2006 levels. 75 Fed. Reg. at 18,273. Amendment 16 further changed the reckoning of DAS to 24-hour increments rounded up to the next full day, under which, in the agency’s words, “if a vessel fishes 6 [hours], it will be charged for 24 [hours] of DAS usage; a vessel that fishes 25 [hours] will be charged for 48 [hours] of DAS usage.” *Id.* And even if a common pool fisherman still has fishing days left in his constricted allotment, he might not be allowed at sea if NMFS closes the groundfish fishery to common pool permittees. *See* 50 C.F.R. § 648.82(n)(2)(ii).

38. As a result of these limitations, and despite the increasingly tight restrictions on the allowable catch limitations of the sectors, sectors dominate the actual fishing activities of the Northeast Multispecies FMP. In the wake of Amendment 16’s promulgation, sector fishermen were responsible for landing nearly 98 percent of the groundfish harvest. 75 Fed. Reg. at 18,114. For fishing year 2015, NMFS expects sector vessels to account for nearly 99 percent of landed groundfish. 80 Fed. Reg. at 25,145.

39. Groundfish fishermen commonly refer to the common pool as the “cesspool,” referring to its undesirable and economically nonviable nature.

40. Thus, while joining a sector was disguised by the agency as voluntary decision, the regulatory conditions of the “common pool” were, and remain, prohibitive, such that fisherman are forced to join a sector to remain economically viable in the groundfish industry. The

Amendment 16 sector program, despite its own restrictive quotas for Fishing Year 2015, remains the only economically viable option for fishermen.

The Northeast Multispecies At-Sea Monitoring Program

41. NMFS requires sector-based fishermen to take at-sea monitors onboard their fishing vessels to collect scientific, management, compliance, and other fisheries data through interviews of vessel captains and crew, observations of fishing operations, photographing catch, and measuring selected portions of the catch and fishing gear. *See* NOAA, Northeast Fisheries At-Sea Monitoring Fact Sheet (June 3, 2015), *available at* <http://goo.gl/cr1jq5>. The information that at-sea monitors collect is referred to NOAA and can be used in civil and criminal enforcement proceedings, as well as for civil forfeiture. *See* 50 C.F.R. § 600.735.

42. At-sea monitors engage in catch monitoring to ensure that NOAA's annual catch limits are not exceeded. At-sea monitors collect information pertaining to catch composition, gear type, and area fished. Specifically, Amendment 16 states that: "In addition, ... sectors are required to develop an adequate independent third-party at-sea/electronic monitoring program ... to verify area fished and catch (landings and discards), by species and gear type, for the purposes of monitoring sector [annual catch entitlement] utilization." 75 Fed. Reg. at 18,278; *see id.* at 18,342. When present, they are quartered with the boat crew, often for multi-day fishing trips.

43. At-sea monitors are employees of third-party private companies approved by NOAA, with whom sectors are obligated to enter contracts. The at-sea monitors are trained by NOAA. NOAA sets both the standards for hiring at-sea monitors and their pay scale. NOAA also controls the data collected by at-sea monitors. Finally, NOAA requires that at-sea monitors make themselves

available to speak with NOAA Office for Law Enforcement agents for two weeks following each monitoring trip. *See* 50 C.F.R. § 648.87(b)(4)(ii)(B).

44. NMFS requires that a certain percentage of all sector vessel fishing trips receive at-sea monitor coverage. NMFS has the sole authority to set the rate at which vessels must take out at-sea monitors. The rate of coverage for Fishing Year 2015, which ends April 30, 2016, is 20 percent coverage. 80 Fed. Reg. at 25,149. This rate can go up as deemed necessary by NMFS for the following fishing year which begins on May 1, 2016.

45. NMFS maintains control over the Pre-Trip Notification System (“PTNS”), the system used to determine when a boat is selected for at-sea monitor coverage. Notification for Fishermen, Pre-Trip Notification System (PTNS), Northeast Fisheries Sci. Ctr., NOAA, <http://goo.gl/wGqrXp> (last visited Dec. 7, 2015); *see generally* NOAA, Pre-Trip Notification System Instructions (Mar. 2015), *available at* <http://goo.gl/4QyhWv>. The fishermen have never been informed how or why they are selected to carry an at-sea monitor except that they were “randomly” selected by the PTNS. On information and belief, assignment of at-sea monitors is not truly random, and instead is manipulated in various ways.

46. Although mandatory for sectors, at-sea monitoring is not necessary for collecting data on the groundfish industry. Other programs, potentially including dockside (as opposed to at-sea) monitoring — which has been part of the Northeast Multispecies FMP in the past — and the separate Northeast Fishery Observer Program which exists to collect scientific information, would still potentially be available if at-sea monitoring were not in place. Additionally, all groundfish vessels must maintain an operational Vessel Monitoring System (“VMS”). *See, e.g.*, 50 C.F.R. § 648.85(a)(3)(i); *see also id.* § 648.10; *see generally* Letter from Nat’l Marine Fisheries Serv., to

Limited Access NE Multispecies Permit Holders (June 3, 2010), *available at* <http://goo.gl/42axIA>.

This VMS operates 24 hours a day and reports vessel position to NOAA randomly every 30–60 minutes. Vessels are required to file trip catch reports and trip end hails through the VMS before returning to port, and must concurrently file paper or electronic logbooks under penalty of perjury.

47. In Amendment 16, NMFS asserted a right to force the industry to pay for the at-sea monitors starting in Fishing Year 2012.

48. To date, NMFS has always covered the cost of at-sea monitoring.

49. In February 2015, NMFS required sector operations plans to include language that would require the industry to fund at-sea monitoring when funds appropriated by Congress to the agency for monitors ran out.

50. On November 10, 2015, NMFS sent an electronic order to Plaintiffs and posted a notice on the NMFS website ordering plaintiffs to pay for at-sea monitors, effective January 1, 2016. *See* November 10 Order (“Transition of monitor sea-day costs to industry will ... be effective January 1, 2016.”).

51. Under the November 10 Order, Plaintiff fishermen would be responsible for all costs of the At-Sea Monitor Program. Those costs include costs to the provider for deployments and sampling; equipment, to the extent not provided by NMFS; costs to the provider for observer time and travel to a scheduled deployment that does not sail and was not cancelled by the vessel prior to sail time; overhead and project management costs; and other costs to meet performance standards laid out in the Northeast Multispecies FMP.

52. NOAA did not provide either an environmental assessment under NEPA or a regulatory flexibility analysis under the RFA in connection with the November 10 Order. The regulated parties have not been provided notice and opportunity for comment.

53. NOAA has conducted studies that have concluded industry-funded at-sea monitoring would cost groundfish sector fishermen \$710 per day at sea and would render up to 60 percent of the groundfish sector fleet unprofitable. *See* Greater Atl. Reg'l Fisheries Office and Ne. Fisheries Sci. Ctr., NOAA, A Preliminary Cost Comparison of At Sea Monitoring and Electronic Monitoring for a Hypothetical Groundfish Sector 6 (June 10, 2015), *available at* <http://goo.gl/m3ZRYt>; New Eng. Fisheries Mgmt. Council, Draft Report: Preliminary Evaluation of the Impact of Groundfish-Sector Funded At Sea Monitoring on Groundfish Fishery Profits 13, Table 12 (June 19, 2015), *available at* <http://goo.gl/WbCeSq>.

54. On December 2, 2015, NOAA provided notice that a potential agreement between three at-sea monitoring contract providers may allow Federal funds to cover at-sea monitors beyond the December 31, 2015 deadline. E-mail from Jennifer Goebel, Pub. Affairs Officer, Ne. Fisheries Sci. Ctr., NOAA (Dec. 2, 2015) (Exhibit 2). However, these agreements have not yet been finalized. Even if they are finalized, NOAA still believes the at-sea monitoring funds will run out in early 2016 and states “sectors will need to ensure they have agreements in place as soon as possible to provide a smooth transition to industry funding[.]” E-mail from Craig Woolcott, Cong. Affairs Specialist, Office of Legislative & Intergovernmental Affairs, NOAA (Dec. 2, 2015) (Exhibit 3).

NOAA has Refused Congressional Direction to Fund the At-Sea Monitor Program

55. Congress has repeatedly directed NMFS to fund the At-Sea Monitor Program from congressional appropriations rather than impose industry funding. As a June 2015 Senate Appropriations Committee report put it: “Since fiscal year 2012, the Committee has directed NMFS to provide adequate funding for at-sea and dockside monitoring for all fisheries with approved catch share management plans,” *i.e.*, the sector system. *See* S. Rep. No. 114-66 at 31 (2015).

56. On April 29, 2015, a bipartisan group of U.S. Senators wrote to Defendant Sobeck, commenting that the fiscal year 2015 Commerce, Justice, and Science Appropriations spending bill intended to achieve the aim of enabling NOAA to provide funding for at-sea monitoring in the Northeast. Letter from U.S. Sen. Susan Collins *et al.*, to Eileen Sobeck, Assistant Adm’r for Fisheries, Nat’l Marine Fisheries Serv. (Apr. 29, 2015) (Exhibit 4).

57. The letter criticized NOAA’s decision to prioritize another funding amendment, the Standardized Bycatch Reporting Methodology, over the At-Sea Monitor Program. Senators expressed concern that “NOAA has chosen an interpretation of the FY15 report language that is inconsistent with congressional intent, and consequently, that very high ASM costs will soon unreasonably burden already struggling members of the fishing industry in the Northeast.”

58. On June 5, 2015, Sobeck replied to the senators, insisting that the agency had been directed only to fund monitoring for “new or expanded fishing opportunities,” and stating, “[w]e know this will be economically challenging and we will continue to work with industry to reduce costs where possible.” *See* Letter from Eileen Sobeck, Assistant Adm’r for Fisheries, Nat’l Marine Fisheries Serv., to U.S. Sen. Susan Collins (June 5, 2015) (Exhibit 5).

59. NOAA has since rejected requests from the Regional Councils to delay industry funding, insisting that the suspension of at-sea monitoring would “jeopardize the management of the groundfish fishery,” despite the recognized “economic difficulty for individual fishermen.” Letter from John K. Bullard, Reg’l Adm’r, Greater Atl. Regional Fisheries Office, NOAA, to Thomas A. Nies, Exec. Dir., New Eng. Council (July 30, 2015) (Exhibit 6).

David Goethel

60. Mr. Goethel is a commercial fisherman residing in New Hampshire. He has fished since he was eight years old and has earned his livelihood through commercial fishing for more than thirty years.

61. Mr. Goethel has been groundfishing on his vessel, the *Ellen Diane*, for more than thirty years out of Hampton, New Hampshire. The *Ellen Diane*, named for Mr. Goethel’s wife, is a 44-foot trawler and uses drag-net style fishing to harvest groundfish that reside near the ocean floor.

62. Mr. Goethel supports himself and his family through commercial fishing.

63. Mr. Goethel has been severely economically impacted by NMFS regulation of the groundfish fishery.

64. Mr. Goethel is a member of Sector 11, one of the sectors established under the Northeast Multispecies FMP. Mr. Goethel joined a sector out of necessity. Joining the common pool is not a viable economic option for Mr. Goethel due, *inter alia*, to the restrictive quota limits and the low cap on the number of DAS he would be able to fish.

65. Mr. Goethel cannot afford to pay the costs for at-sea monitors.

66. Mr. Goethel will be driven out of business and may be forced to sell his boat if NMFS implements the industry-funding requirement for the At-Sea Monitor Program. That harm will be unrecoverable and irreparable.

XIII Northeast Fishery Sector, Inc.

67. Sector 13 is a non-profit corporation organized under 26 U.S.C. § 501(c)(5) of the United States Internal Revenue Code. Sector 13 is an organization composed of fishermen who engage in fishing under the Northeast Multispecies FMP.

68. NMFS approved the Sector 13 Operations Plan & Agreement for Fishing Years 2015 and 2016 by publishing notice in the Federal Register. 80 Fed. Reg. at 25,143; XIII Ne. Fishery Sector, Inc., Sector Operations Plan & Agreement for Fishing Years 2015–2016 (Exhibit 7).

69. If the industry is forced to fund the At-Sea Monitor Program, the number of fishing vessels in Sector 13 that will remain economically viable will be reduced to three boats.

70. Sector 13 is funded by a percentage charged to the fishermen within Sector 13 for each pound of fish landed. These funds are used to pay the salary of the Sector 13 Manager, who organizes the Sector and manages the quota of each fisherman. Sector 13 will collapse if the industry is forced to fund the At-Sea Monitor Program because fewer groundfish fishing trips will be economically viable, fewer fishermen will be able to afford to go groundfishing, and fewer pounds of groundfish will be landed, reducing the funding for Sector 13 and making it impossible for it to meet its organizational needs. That harm will be unrecoverable and irreparable.

71. Sector 13 represents the interests of its member fishermen in this case. The harms to Sector 13 members who are forced to stop fishing will be unrecoverable and irreparable.

CLAIM ONE — INDUSTRY FUNDING IS UNLAWFUL

72. Plaintiffs re-allege and incorporate by reference the allegations contained in Paragraphs 1–

71.

73. In issuing the November 10 Order, Defendants violated the APA and the United States Constitution.

74. By requiring Plaintiffs to fund the At-Sea Monitor Program, Defendants have engaged in final agency action, 5 U.S.C. § 704, which is arbitrary, capricious, and an abuse of discretion, *id.* § 706(2)(A); contrary to constitutional right, power, privilege, or immunity, *id.* § 706(2)(B); in excess of statutory jurisdiction, authority, or limitations, *id.* § 706(2)(C); and promulgated without observance of procedure required by law. *See also* 16 U.S.C. § 1855(f)(1).

75. Specifically, in requiring industry funding for at-sea monitors, Defendants have committed the following violations:

- a. Acting in excess of any statutory authority granted by Congress in Magnuson-Stevens or otherwise.
- b. Improperly infringing on Congress' exclusive taxation authority under the Appropriations Clause, the ADA, and the MRS.
- c. Charging Plaintiffs improper user fees in violation of the IOAA.
- d. Exceeding its Constitutional authority under the Commerce Clause.
- e. Failing to prepare a Regulatory Flexibility Analysis, as required by the RFA.
- f. Failing to assess the impact of regulatory actions on the environment, including the human environment, as required by NEPA.

g. Violating due process rights by not inviting a period for comment, challenge, or other criticism of the Order Letter. U.S. Const. amend. V.

76. Because the agency has no authority to compel industry funding, the Northeast Multispecies FMP is void to the extent that it does so.

77. Because the agency has no authority to compel industry funding, the sector operations agreements conditioned on such requirements are void and unenforceable to the extent they do so.

CLAIM TWO — AT-SEA MONITORING IS UNLAWFUL

78. Plaintiffs re-allege and incorporate by reference the allegations contained in Paragraphs 1–71.

79. In requiring Plaintiffs to carry at-sea monitors, Defendants violated the APA and the United States Constitution.

80. By mandating the at-sea monitor coverage requirement, Defendants have engaged in final agency action, 5 U.S.C. § 704, which is arbitrary, capricious, and an abuse of discretion, *id.* § 706(2)(A); contrary to constitutional right, power, privilege, or immunity, *id.* § 706(2)(B); and in excess of statutory jurisdiction, authority, or limitations, *id.* § 706(2)(C). *See also* 16 U.S.C. § 1855(f)(1).

81. Specifically, in requiring at-sea monitor coverage for sectors, Defendants have committed the following violations:

- a. Violating First Amendment associational rights by compelling fishermen to join sectors.
- b. Violating Third Amendment rights by forcing Plaintiffs to quarter Federal agents acting under the color of law to enforce Federal statutes.

- c. Violating the Port Preference Clause by discriminating between the various States, forcing vessels to prefer one State's ports over another.
- d. Violating the Fourth Amendment by conducting an unreasonable search and seizure of fishing vessels.
- e. Regulating the groundfish industry through Regional Councils that are improperly constituted under the Tenth Amendment and the Appointments Clause.

82. Because the agency has no authority to compel at-sea monitoring or industry funding, the Northeast Multispecies FMP is void to the extent that it does so.

83. Because the agency has no authority to compel at-sea monitoring or industry funding, the sector operations agreements conditioned on such requirements are void and unenforceable to the extent they do so.

CLAIM THREE — THE MAGNUSON-STEVENSON REGULATORY FRAMEWORK IS FACIALLY UNCONSTITUTIONAL

84. Plaintiffs re-allege and incorporate by reference the allegations contained in Paragraphs 1–71.

85. Magnuson-Stevens improperly compels State governors and officials to constitute and serve on the Regional Councils, in violation of the Tenth Amendment.

86. The members of the Regional Councils are inferior officers of the United States, but are appointed in violation of the Appointments Clause.

87. Because Magnuson-Stevens's procedure for development of FMPs facially violates the Constitution, the Northeast Multispecies FMP is void.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request and pray that this Court:

- a. enjoin each Defendant from requiring that Plaintiffs fund at-sea monitors pursuant to the Northeast Multispecies FMP;
- b. enjoin each Defendant from requiring that Plaintiffs enter contracts for at-sea monitoring pursuant to the Northeast Multispecies FMP;
- c. declare that the at-sea monitor funding requirement pursuant to the Northeast Multispecies FMP is *ultra vires* and violates applicable statutes and constitutional provisions;
- d. declare that the Northeast Multispecies FMP, the sector operations agreements, and any agreements between the sectors and providers of at-sea monitors, are void and unenforceable the extent that they compel at-sea monitoring or industry funding therefor, and in the alternative that they are facially unconstitutional;
- e. award such attorneys' fees and costs as Plaintiffs may be entitled to under the law, including the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- f. grant such other preliminary and final relief as the Court may deem just and proper.

Dated: December 9, 2015

Respectfully submitted,

DAVID GOETHEL AND XIII
NORTHEAST FISHERY SECTOR, INC.

By their attorneys,
WADLEIGH, STARR & PETERS, P.L.L.C.

s/ James C. Wheat

James C. Wheat – NHBA # 2721
95 Market Street
Manchester, NH 03101
(603) 669-4140 (telephone)
(603) 669-6018 (fax)
jwheat@wadleighlaw.com

Stephen S. Schwartz (*pro hac* pending)
Erica L. Marshall (*pro hac* pending)
Eric R. Bolinder (*pro hac* pending)
Ryan P. Mulvey (*pro hac* pending)
CAUSE OF ACTION INSTITUTE
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
(202) 499-4232 (telephone)
(202) 330-5842 (fax)
stephen.schwartz@causeofaction.org
erica.marshall@causeofaction.org
eric.bolinder@causeofaction.org
ryan.mulvey@causeofaction.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(d)(1), I hereby certify that on December 9, 2015, I filed this Complaint and all attachments, with the Clerk of Court using the CM/ECF system, which will send electronic notice of this filing to all parties registered to receive such notice.

I also certify that on December 9, 2015, the following parties and offices were conventionally served the same:

Penny Pritzker, Secretary of the United States Department of Commerce
1401 Constitution Ave., NW, Rm. 5858
Washington, DC 20230

United States Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Kathryn Sullivan, Administrator of the National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW, Rm. 5128
Washington, DC 20230

National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW, Rm. 5128
Washington, DC 20230

Eileen Sobeck, Assistant Administrator for Fisheries for the National Marine Fisheries Service
1315 East-West Highway, Rm. 14636
Silver Spring, MD 20910

National Marine Fisheries Service
1315 East-West Highway, Rm. 14636
Silver Spring, MD 20910

United States Attorney General
950 Pennsylvania Ave., NW
Washington DC 20530

United States Attorney's Office Civil Process Clerk
555 Fourth Street, NW
Washington DC 20530

United States Attorney for the District of New Hampshire
53 Pleasant St., 4th Floor
Concord, NH 03301

/s/ James C. Wheat
James C. Wheat
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market St.
Manchester, NH 03101