IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GROUNDFISH FORUM, et al., Plaintiffs, v. WILBUR ROSS, JR., in his official capacity as Secretary of the United States Department of Commerce, et al., Defendants, and THE CITY OF ADAK, et al., Defendant-Intervenors.	No. 1:16-cv-02495-CKK

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants Wilbur Ross, Jr., in his official capacity as Secretary of the United States Department of Commerce; the National Oceanic and Atmospheric Administration; and the National Marine Fisheries Service (collectively, "Defendants") respectfully move this Court for an order granting summary judgment for Defendants in the above-captioned action. This Cross-Motion is brought on the grounds that Plaintiffs fail to demonstrate that Amendment 113 to the Bering Sea and Aleutian Islands Groundfish Fishery Management Plan, *see* 81 Fed. Reg. 84,434 (Nov. 23, 2016), violates the Magnuson-Stevens Fishery Conservation and Management Act or the Administrative Procedure Act. Defendants further rely on the grounds in the Memorandum, filed herewith, in support of their Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment.

Dated: August 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2017, I electronically filed the foregoing Defendants' Cross-Motion for Summary Judgment and [Proposed] Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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FEDERAL REGULATIONS

Defendants Wilbur Ross, Jr., in his official capacity as Secretary of the United States Department of Commerce; the National Oceanic and Atmospheric Administration ("NOAA"); and the National Marine Fisheries Service ("NMFS") (collectively, "Defendants") respectfully submit this Memorandum in support of Defendants' Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment. *See* Docket ("Dkt.") 35; *see also* Dkt. 35-1 ("Pls.' Mem.").

INTRODUCTION

At the center of this dispute are fishing communities in the middle of the Aleutian Islands ("AI") chain in Alaska. These AI communities are small, remote, and sparsely populated. What these communities may lack in size, proximity, and population, however, they make up for in their access to fishing resources. The residents of these communities have traditionally fished the waters in the AI area, and these waters still provide an important source of development for these communities today. With respect to Pacific cod, however, recent regulatory and biological changes have raised the risk that these fishing communities may no longer be able to sustain their participation in the fishery. Not only has the total amount of Pacific cod in the AI area declined, but recent changes to the regulatory scheme have, *inter alia*, closed certain areas to fishing and spurred more competition for both the harvesting and processing of Pacific cod in the AI area. The net result of these changes, in NMFS's view, is that AI communities that rely on processing activities now face an increased risk of being excluded from the fishery altogether.

At issue is NMFS's effort to address this growing risk – an amendment to the Bering Sea and Aleutian Islands ("BSAI") Groundfish Fishery Management Plan that sets aside a portion of the total allowable catch of Pacific cod in the AI area for harvest by vessels targeting AI Pacific cod and delivering their catch to shoreplants in the AI area. *See* 81 Fed. Reg. 84,434 (Nov. 23, 2016) ("Amendment 113"). This action – Amendment 113 – is the product of more than eight years of combined effort by both the North Pacific Fishery Management Council ("Council" or "NPFMC") and NMFS to strike a reasonable balance between measures to mitigate the risk to AI fishing communities of exclusion from the Pacific cod fishery and the countervailing interests of

other participants in the fishery, such as offshore processors.[1] This was no small undertaking, requiring NMFS to consider information with respect to a broad range of issues and potential remedies. The administrative record, however, demonstrates that NMFS conducted a thorough review of this information, weighed all the relevant factors, and reached a reasonable balancing of competing interests based on its own expert judgment and the entire record, as discussed *infra*.

Plaintiffs disagree, arguing that Amendment 113 violates the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and the Administrative Procedure Act ("APA"). But NMFS's exercise of judgment in approving Amendment 113 is entitled to deference and, whether considered individually or collectively, Plaintiffs' arguments fail to clear that hurdle. At bottom, Plaintiffs misapprehend the regulatory scheme, conflating the harvest set-aside with an exclusive processing privilege; they infer requirements into the MSA and its National Standards where none exists; and they raise conclusory objections to the adequacy of the decision-making that cannot be squared with the administrative record. Accordingly, for all of these reasons, and as discussed further *infra*, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

LEGAL BACKGROUND

I. Magnuson-Stevens Act

The MSA, *see* 16 U.S.C. §§ 1801 *et seq*., establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the exclusive economic zone ("EEZ"). *Id*. §§ 1801(a)(6), 1811(a). For purposes of the MSA, the EEZ extends from the seaward boundary of each coastal state out to 200 nautical miles. *Id*. § 1802(11). Key purposes of the MSA are to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States" and to "promote domestic

[1] Amendment 113 was first developed by the Council and then submitted for review by NMFS, which approved the amendment and then issued a final rule for its implementation. *See, e.g.*, AR 1000271-72 (describing amendment background). For the sake of simplicity, the term "NMFS," as used herein in discussing the development of Amendment 113, refers to the collective efforts of the agency and the Council, unless otherwise specified.

commercial and recreational fishing under sound conservation and management principles." *Id*. §§ 1801(b)(1), (3). NMFS, acting under authority delegated from the Secretary of Commerce ("Secretary"), manages fisheries under the MSA.

Regulation of fisheries is accomplished through fishery management plans, amendments to those plans (collectively, "FMPs"), and implementing regulations. *See N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008) (explaining that FMPs "do not themselves have any regulatory effect – implementing regulations must also be enacted in order to effectuate them"). The MSA sets forth required provisions for FMPs, including that FMPs must contain measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A).

In addition, all FMPs and their implementing regulations must be consistent with ten National Standards. *Id*. § 1851(a). Three are particularly relevant here. National Standard 4 states that "[c]onservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege." *Id*. § 1851(a)(4). National Standard 5 provides that "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." *Id*. § 1851(a)(5). National Standard 8 requires that "[c]onservation and management measures . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements 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." *Id.* § 1851(a)(8).[2] Advisory guidelines for all of the National Standards are set forth at 50 C.F.R. §§ 600.305 *et seq*.

To assist in fishery management, the MSA established eight regional fishery management councils ("FMCs"). *See* 16 U.S.C. § 1852(a). "Each [FMC] is granted authority over a specific geographic region [within the EEZ] and is composed of members who represent the interests of the states included in that region." *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1557-58 (D.C. Cir. 1991) (citation omitted). Voting members of FMCs include federal, state, and territorial fishery management officials, as well as individuals nominated by state governors and appointed by the Secretary who are knowledgeable regarding the conservation and management, or commercial or recreational harvest, of fishery resources within the FMCs' geographic areas. *See* 16 U.S.C. § 1852(b). Each FMC has a scientific and statistical committee ("SSC") that provides ongoing scientific advice for fishery management decisions, as well as advisory panels to assist the FMC in carrying out its functions under the MSA. *Id.* § 1852(g). FMCs, SSCs, and advisory panels conduct their business in public meetings, pursuant to the procedures prescribed by the MSA and written procedures established by each FMC. *Id.* §§ 1852(e), (f)(6), (h), (i).

An FMC is required to prepare and submit to NMFS an FMP "for each fishery under its authority that requires conservation and management," as well as any proposed regulations that the FMC "deems necessary or appropriate" to implement the FMP. *Id.* §§ 1852(h)(1), 1853(c). FMPs are developed through a public process that includes notice of meetings, opportunity for interested persons to submit oral and written statements, and public hearings / meetings. *Id.* § 1852(h)(3), (i)(2). When an FMC transmits an FMP to NMFS, the agency publishes a notice of availability in the Federal Register announcing a 60-day comment period. *Id.* § 1854(a)(1)(B). Within 30 days of the close of the comment period, NMFS must approve, disapprove, or partially approve the FMP. *Id.* § 1854(a)(3). NMFS may only disapprove an FMP, in whole or in part, based on an inconsistency with applicable law, and may not substantively modify FMPs that are

[2] National Standard 2 requires that conservation and management measures be based on the "best scientific information available." *Id.* § 1851(a)(2).

submitted by an FMC. *Id*. § 1854(a)(3). NMFS reviews proposed regulations for consistency with the FMP and applicable law and, pursuant to a process set forth in the MSA, publishes proposed rules, solicits public comment, and promulgates final rules. *Id*. § 1854(b).

FACTUAL BACKGROUND

I. Pacific Cod

Pacific cod (*Gadus macrocephalus*) is one of the most abundant and valuable groundfish species harvested in the BSAI area. *See* AR 1000790. Vessels harvesting Pacific cod in the AI area operate as either catcher vessels ("CVs") that harvest and deliver the fish for processing, or as catcher processors ("CPs") that harvest and process the catch on board these offshore vessels. *See* AR 1000792. Although a variety of gear types is used to harvest AI Pacific cod, trawl CVs and trawl CPs have been among the most active participants in the AI Pacific cod fishery. *Id*. Some trawl CVs deliver their catch to AI shoreplants, and some trawl CVs deliver their catch to CPs for processing on board the CP. *Id*.[3] CPs may also harvest and process their own catch of AI Pacific cod. *Id*. The percentage of total processed AI Pacific cod by AI shoreplants has been highly variable, ranging from 0% to 49% since 2003. *See* AR 1000793. By comparison, the "offshore sector's portion of the total processed AI Pacific cod . . . [has] ranged from a low of 55 percent in 2013, to a high of 100 percent in 2011 and 2015." AR 1000040.

II. Aleutian Islands Fishing Communities

While Amendment 113 "would benefit any city west of 170 degrees W. longitude in the State of Alaska with a shoreplant," AR 1000090, NMFS focused on two such communities – Adak and Atka – in its analysis.

A. Adak

Adak is the southernmost community in Alaska, located on Adak Island in the Aleutian Islands. *See* AR 1000090. In 2004, the Aleut Corporation, an Alaska Native tribal organization, acquired the majority of Adak's former military facilities and has since sought to develop Adak

[3] As used in Amendment 113 and herein, the term "shoreplant" refers to "a processing facility physically located on land." AR 1000118.

as a civilian community with an economy focused on commercial fishing, including a small residential fleet and a large processing shoreplant with the capacity to process "one million round pounds (454 mt) of Pacific cod daily." AR 1000090-91. Since its establishment in 1999, the Adak shoreplant has changed ownership several times and, at the time the analysis was prepared for this action, was most recently acquired by the Aleut Corporation for leasing to processing operators. *Id*. This shoreplant is the only such processing facility in Adak, and it "accounts for a large proportion of local employment in Adak." AR 1000091. For FY2013, "approximately 1/3 of the tax base for Adak originated from [activities] associated with the fishing industry." AR 1000097.

B. Atka

Atka is located on Atka Island, roughly 100 miles east of Adak. *See* AR 1000095. The residents of Atka are primarily indigenous Aleut, and the community participates in the Western Alaska Community Development Quota ("CDQ") Program, which allocates a percentage of all BSAI quotas for groundfish, prohibited species, halibut, and crab to eligible communities. *Id*.; *see also* 16 U.S.C. § 1855(i)(1) (statutory provisions governing CDQ program). Atka's economy is based on subsistence activities and commercial fishing. *See* AR 1000095. The shoreplant in Atka started processing in 1995 and has continued to process "every year since." AR 1000096. The Atka shoreplant has primarily processed halibut and sablefish, but representatives for Atka informed the Council that they "recently completed a $4 million expansion and improvements to make the plant a year-round operation" to allow for the processing of additional species, such as Pacific cod and Western AI golden king crab. *Id*. As a result of these improvements, the Atka shoreplant expects to increase its processing capacity to "approximately 400,000 round pounds of Pacific cod per day (181 mt)." *Id*. For FY2012, the "[a]ggregate fisheries taxes represent[ed] approximately 27 percent of the . . . revenues for the municipality." AR 1000098.

III. Pre-Amendment 113

Several factors prompted the development of Amendment 113, as addressed *infra*. *See, e.g.*, AR 1000280 (identifying various factors that have "considerably changed the way in which

the BSAI Pacific cod fishery was managed and conducted by participants").

A. Amendments 80 / 85

Changes in fishing behavior by the offshore sector, starting with the implementation of two rationalization programs in 2008, have contributed to the decline in AI Pacific cod delivered to and processed at AI shoreplants. In 2007, NMFS approved Amendment 80 and Amendment 85 to the BSAI Groundfish FMP. *See, e.g.*, 72 Fed. Reg. 52,668 (Sept. 14, 2007) (final rule implementing Amendment 80); 72 Fed. Reg. 50,788 (Sept. 4, 2007) (final rule implementing Amendment 85). As relevant here, Amendment 80 provided for an allocation of total allowable catch ("TAC") with respect to six species, including Pacific cod, "to facilitate the development of cooperative arrangements among the eligible non-pelagic trawl CPs, thus allowing [them] opportunities for consolidation . . . [and for] increased processing participation by the sector in non-rationalized fisheries like AI Pacific cod." AR 1000040. Separately, Amendment 85 "reduced the allocation of BSAI Pacific cod to trawl sectors from 47 percent to 37.8 percent" and "further apportioned the BSAI Pacific cod allocation amongst the different trawl sectors." *Id.*

Following the implementation of these amendments in 2008, NMFS noted, "the fishing behavior for the trawl sectors appears to have changed in the AI Pacific cod fishery," such that, "after 2008, CV deliveries of AI Pacific cod to CPs played a more significant role in the offshore processing," increasing from 31% before 2008 to 66% after 2008. *Id.* The agency determined that Amendment 80, in conjunction with "other rationalization programs[,] . . . likely afforded the offshore sector the ability to change their fishing behavior in the AI Pacific cod fishery to lessen the impacts" of Amendment 85 and the other factors described *infra*. *Id.*[4] By contrast, NMFS noted that "shoreside processors cannot move their operations in response to changing conditions." AR 1000286. NMFS determined that this "disparity in flexibility between the offshore sector and AI shoreplants leaves the AI shoreplants at a significant disadvantage in adapting to changes in the AI Pacific cod fishery." AR 1000041.

[4] NMFS identified the American Fisheries Act and BSAI crab rationalization program as two such rationalization programs. *See* AR 1000049.

B. BSAI Pacific Cod TAC Split

Until 2014, BSAI Pacific cod was managed as a single stock throughout the BSAI area, and so TAC, among other limits, was set at the BSAI level. *See* AR 1000059. In 2014, due to the combined effects of a declining biomass of AI Pacific cod, revisions to the stock assessment, and the proportion of the stock attributed to the AI area, NMFS approved splitting BSAI Pacific cod into an AI stock and a Bering Sea ("BS") stock, with, *inter alia*, separate TACs for each stock. *See* AR 1000059; *see also* 79 Fed. Reg. 12,108, 12,115 (Mar. 4, 2014). In 2014, for example, the AI Pacific cod TAC was 6,997 metric tons ("mt"), whereas the corresponding BS TAC was 246,897 mt. *See* AR 1000050. This split resulted in a substantial decrease in the TAC available for harvest in the AI area. Further, because the AI TAC is "set separately from the BS TAC, and is relatively low," NMFS determined that the TAC split had "created the risk of processing vessels, with excess processing capacity, entering the AI Pacific cod fishery early in the fishing year and harvesting the AI TAC or processing deliveries of AI Pacific cod from catcher vessels, potentially closing the fishery and eroding the historical share of AI Pacific cod processed by the Adak shoreplant." *Id.*[5]

C. Steller Sea Lion Protection Measures

Steller sea lions have been protected under the Endangered Species Act since 1990. *See* AR 1000069. As relevant here, "[s]ince 2002, the AI Pacific cod fisheries have been managed to limit and disperse harvest in important Steller sea lion foraging areas." *Id.* NMFS implemented additional protection measures, including area closures, for Steller sea lions in 2011. *See* 75 Fed. Reg. 77,535 (Dec. 13, 2010). Starting in 2015, NMFS implemented a "comprehensive suite" of measures for the species, including "a combination of closed areas, harvest limits, and seasons that reduce fishery competition for Steller sea lion prey when and where Steller sea lions forage."

[5] Separately, with respect to the state-managed portion of the fishery, the State of Alaska in December 2015 "changed the AI [guideline harvest level ("GHL")] calculations to better align with the split of the Federal BSAI Pacific cod stock into separate BS and AI stocks," which NMFS determined might result in a "significant decline" for the AI GHL TAC, as compared to the GHL TAC generated by the pre-split formula. AR 1000062.

AR 1000070; *see also* 79 Fed. Reg. 70,286 (Nov. 25, 2014). These protection measures have "limit[ed] commercial fishing for AI Pacific cod." AR 1000070.

D. Declining AI Pacific Cod Biomass

Further, recent "biomass and numerical abundance data [for Pacific cod] indicate very consistent declines . . . in the AI." AR 1000139. NMFS identified this "decreased Pacific cod biomass in the Aleutian Islands subarea" as another factor supporting the "need for this action," AR 1000272, explaining that "declining biomass" has "resulted in reduced Pacific cod catches in the Aleutian Islands for all participants in both the onshore and offshore sectors." AR 1000288; *see also* AR 1000273 (acknowledging that "[r]ecent Aleutian Islands Pacific cod TACs have not been sufficient to allow all sectors to prosecute the Aleutian Islands Pacific cod fishery at their historical levels").

IV. Amendment 113

Since 2008, the "Council has been evaluating the need for community protections in the AI," AR 1000049, citing various factors as "increasing the risk that the historical share of BSAI cod of other industry participants and communities that depend on shoreplant processing in the region may be diminished." AR 1000050; *see also* AR 1000050-58 (describing the history of the amendment and alternatives considered). In July 2016, the Council submitted Amendment 113 to the Secretary for review, *see* 81 Fed. Reg. 46,883 (July 19, 2016), and NMFS then issued its proposed rule the following month, *see* AR 1000789-804. Following the close of the comment period, the Secretary approved Amendment 113 on October 17, 2016, *see* AR 1000272, and then issued a final rule for its implementation on November 23, 2016, *see* AR 1000271-95.

As stated in the final rule, Amendment 113 "modifies the BSAI Pacific cod fishery to set aside a portion of the Aleutian Islands Pacific cod [TAC] for harvest by vessels directed fishing for Aleutian Islands Pacific cod and delivering their catch to Aleutian Islands shoreplants for processing," provided that "specific notification and performance requirements are met, and only during the first few months of the fishing year." AR 1000272. Amendment 113 includes various measures to accomplish this objective. *See* AR 1000273 (providing an overview of measures).

As relevant here, Amendment 113 "[s]ets aside some or all of the Aleutian Islands Pacific cod non-CDQ [TAC that is available as a directed fishing allowance ("DFA")] for harvest by vessels directed fishing for Aleutian Islands Pacific cod and delivering their catch for processing by Aleutian Islands shoreplants from January 1 to March 15." *Id*. The maximum cap for a set-aside (5,000 mt) was based, in part, on NMFS's determination that AI "communities need about 9,000 mt of Pacific cod annually to support shoreplant operations," such that the set-aside amount "in combination with the State GHL fishery would give Aleutian Islands communities access to at least 9,000 mt of Pacific cod annually." AR 1000288. In addition, Amendment 113 "[l]imits the amount of early season (from January 20 until April 1), also known as A-season, Pacific cod that may be harvested by the trawl CV sector in the Bering Sea prior to March 21," *id*., so that "some of the trawl CV sector's A-season allocation remains available for harvest in the Aleutian Islands subarea by trawl catcher vessels" participating in the set-aside. AR 1000274. Amendment 113 requires, however, that both the harvest set-aside and the BS trawl sector limitation be removed "if less than 1,000 metric tons (mt) of the harvest set-aside is delivered to . . . Aleutian Islands shoreplants on or before February 28, or if the harvest set-aside is fully taken before March 15." AR 1000273. Amendment 113 also "[r]equires that either the City of Adak or the City of Atka annually notify NMFS of its intent to process Aleutian Islands Pacific cod during the upcoming fishing year in order for the [harvest set-aside and the BS trawl sector limitation] to be effective in the upcoming fishing year." *Id*.

STANDARD OF REVIEW

Judicial review of MSA claims is governed by the "arbitrary and capricious" standard in the APA. 5 U.S.C. § 706(2)(A); *see also* 16 U.S.C. § 1855(f)(1)(B) (limiting the grounds for setting aside challenged MSA actions to only the grounds in certain provisions of the APA, 5 U.S.C. § 706(2)(A)-(D)). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995) (quotation omitted). A court's only role is to "determine whether the [agency] has considered the relevant factors and articulated a rational connection between the

facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983) (citations omitted). Since the "ultimate standard of review is a narrow one," an agency's decision is entitled to a "presumption of regularity" in the first instance. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). In addition, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

This narrow standard of review is particularly applicable in the MSA context because "[f]isheries regulation requires highly technical and scientific determinations that are within the agency's expertise, but are beyond the ken of most judges." *N.C. Fisheries Ass'n v. Gutierrez*, 518 F.Supp.2d 62, 80 (D.D.C. 2007) (citations omitted). It thus is "especially appropriate for [a] [c]ourt to defer to the expertise and experience of those individuals and entities . . . whom the [MSA] charges with making difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors." *Nat'l Fisheries Inst. v. Mosbacher*, 732 F.Supp. 210, 223 (D.D.C. 1990); *see also N.C. Fisheries*, 518 F.Supp.2d at 79 (stating that "[j]udicial review of agency action under the MSA is especially deferential") (citation omitted). In light of this deferential standard, a court may "not second guess an agency decision or question whether the decision made was the best one," *C&W Fish Co.*, 931 F.2d at 1565, and a "party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed," *Village of Bensenville v. FAA*, 457 F.3d 52, 70-71 (D.C. Cir. 2006) (citations omitted).

Further, when a challenged action involves an agency's interpretation of a statute, courts apply the two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) ("*Chevron*"). "Under step one of *Chevron*, [the court] ask[s] whether Congress has directly spoken to the precise question at issue," such that the court "must give effect to the unambiguously expressed intent of Congress." *Sec'y of Labor v. Nat'l Cement Co. of Calif., Inc.*, 494 F.3d 1066, 1073 (D.C. Cir. 2007) (citation omitted). However, if "the statute is silent or ambiguous with respect to the specific issue . . . [then the court] move[s] to the second step

and defer[s] to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" *Id*. at 1074 (quoting *Chevron*, 467 U.S. at 843). An agency's interpretation must be upheld as "permissible" within the meaning of *Chevron* if it "reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (citing *Chevron*, 467 U.S. at 842-44).

ARGUMENT

I. Plaintiffs Misapprehend The Regulatory Scheme In Amendment 113

A. Amendment 113 Creates No Exclusive Processing Privilege

At the outset, it is important to clarify the nature of the harvest set-aside in Amendment 113. Plaintiffs' objections are several, but their arguments rely on the same faulty premise that Amendment 113 creates "an exclusive processing privilege" for certain shoreplants. Pls.' Mem. at 2; *see also id.* at 26 (alleging that the amendment "creates an exclusive grant of authority to process AI Pacific cod" and "is an onshore processing privilege"). Proceeding from this flawed premise, Plaintiffs then argue that the purported creation of an "onshore processing privilege" runs afoul of the MSA and APA. *Id*. at 24-25.

This argument is a red herring. Plaintiffs infer an exclusive processing privilege where none exists, presuming that the harvest set-aside in Amendment 113 can be shoehorned into the dissimilar category of an "onshore processing privilege." *Id*. at 26. Not so. To the contrary, the set-aside provision bears none of the characteristics of an exclusive privilege.[6] For example, a shoreplant is not entitled to a particular amount – or even any – of the AI TAC under the set-aside provision. *See, e.g.*, AR 1000283 (noting that the set-aside "does not provide any person a portion of the Aleutian Islands Pacific cod TAC that may be received or held for exclusive use"); *id*. (noting that the set-aside is not assigned, "in whole or in part, to any one person, Aleutian

[6] Exclusive privileges provide "exclusive access to the resource without diminishment by other participants or revocation without procedural due process." AR 1000290; *cf.* 16 U.S.C. § 1802(26)(A) (describing a "limited access privilege" as a permit authorizing the harvest of a specific "quantity of fish . . . that may be received or held for exclusive use by a person").

Islands shoreplant, or community"). Stated differently, the set-aside provides a shoreplant with no guarantee as to the amount of fish, if any, it may receive as part of a set-aside. *See, e.g., id*. (noting that "no exclusive opportunity to receive any portion of the set-aside is provided to an Aleutian Islands shoreplant"). Indeed, Amendment 113 does not preclude the possibility that a shoreplant might receive no deliveries during the set-aside period. *Cf.* AR 1000290 (noting, as an example, that "[n]othing in Amendment 113 . . . prevents the Atka shoreplant from processing Aleutian Islands Pacific cod and reducing the amount of Pacific cod that is delivered to Adak by vessels participating in the set-aside").

Furthermore, the harvest set-aside "applies only if specific notification and performance requirements are met," AR 1000271, which underscores the non-exclusive nature of the benefits conferred by such a set-aside. First, as discussed *supra*, Amendment 113 includes a pre-season notification requirement to trigger a set-aside, requiring submission of a "letter or memorandum signed by the City Manager of Adak or the City Administrator of Atka stating the city's intent to process Aleutian Islands Pacific cod in the upcoming fishing year." AR 1000275 (listing other requirements for notification).[7] Significantly, a set-aside "will not be in effect for the upcoming fishing year" unless such notification is timely submitted in advance of each fishing season. *Id*. Thus, whether a set-aside will even be triggered hinges on compliance with this requirement, which "is directly contrary to exclusive privileges" that grant "exclusive access to the resource without . . . revocation without procedural due process." AR 1000290; *cf. Lovgren v. Locke*, 701 F.3d 5, 27 (1st Cir. 2012) (rejecting argument that an allocation of potential sector contributions was a limited access privilege because "the [potential sector contribution] assigned to fishermen does not, by itself, allow them to catch any fish," rather "[i]t is only upon joining a sector that a fisherman's [potential sector contribution] becomes an allocation of catch"). Second, even after a harvest set-aside has commenced, it may subsequently be lifted if the deliveries to shoreplants

[7] Such notification must be submitted, if at all, by October 31. *See* AR 1000275. The Council also reserved the possibility of "requiring notification from additional Aleutian Island cities with shoreplants in the future, if they develop and the need arises." AR 1000799.

fall below a prescribed threshold. Specifically, to account for the risks that shoreplants might be "unable to process Pacific cod" during the set-aside period or that "too few or no vessels decide to participate in the set-aside fishery," Amendment 113 mandates that a set-aside be removed "if less than 1,000 mt of [AI Pacific cod]. . . is delivered to Aleutian Islands shoreplants by February 28." AR 1000275. Whether a set-aside continues beyond that date therefore turns on this in-season milestone, which is also "directly contrary" to the notion that a set-aside amounts to an exclusive privilege. AR 1000290.

Instead, the harvest set-aside contemplated by Amendment 113 is just that – an action that merely sets aside for a limited time a portion of the AI TAC "for harvest" by those vessels targeting AI Pacific cod that will deliver their catch to shoreplants located in the AI area. *See, e.g.,* AR 1000272 (emphasis added). This action thus regulates harvesting, which falls under the MSA's definition of "fishing," 16 U.S.C. § 1802(16), not onshore processing. Amendment 113 does not provide for the issuance of processing permits to shoreplants and does not otherwise regulate shoreplants – *e.g.*, it does not require that a shoreplant receive or process any amount of catch. *Cf.* 71 Fed. Reg. 67,210, 67,210 (Nov. 20, 2006) (explaining that NMFS "does not have specific authority . . . to directly regulate on-shore groundfish processing activities"). Rather, Amendment 113 only regulates "harvest by vessels," AR 1000273, directing the harvesters that participate in the set-aside to deliver their catch to "any shoreplant" in the AI area, AR 1000275. Accordingly, because Amendment 113 governs harvesters – not shoreplants – Plaintiffs' attempt to recast this set-aside delivery requirement imposed on harvesters as an exclusive processing privilege for shoreplants should be rejected.[8] *See, e.g., American Factory Trawler Ass'n v. Knauss*, No. 92-cv-00870-R, slip op. at 18 (W.D. Wash. July 24, 1992) (attached as Exh. 1) (upholding combined amendments that allocated fishery resources between inshore and offshore

[8] Plaintiffs raise another possibility – that the harvest set-aside might constitute an allocation of "harvesting privileges to onshore processors," Pls.' Mem. at 25 – but then summarily reject this possibility as "unlawful." *Id.* at 26. This apparent straw-man argument should not color this Court's analysis. For the same reasons that Amendment 113 creates no processing privileges, it also creates no harvesting privileges.

participants because, "[a]lthough the challenged regulations allocate fish to the 'onshore component,' which is defined to include onshore processors, the allocation in effect assigns fishing privileges among fishermen: those who process their catch at sea, and those who deliver their catch for processing on shore").

This distinction is made further apparent by comparison to an earlier pilot program for rockfish, in which NMFS specifically intended to "provide[] exclusive harvesting and processing privileges" for rockfish and other secondary species. 71 Fed. Reg. at 67,211.[9] As relevant here, the pilot program created "fixed linkages" between harvesters and shoreplants and "require[d] harvesters that are members of a cooperative to land all their catch to a specific shore-based processor." AR 5000070. Unlike Amendment 113, this pilot program provided for the issuance of "processor permit[s]" to eligible processors, 71 Fed. Reg. at 67,248, that would confer upon processors "an exclusive privilege to receive and process primary rockfish species and secondary species allocated to harvesters" that were members of the same cooperative. *Id*. at 67,211. Catcher vessels in the pilot program were granted similar "exclusive harvest privileges," provided they had "an association with a specific processor." *Id*. at 67,226. Specific harvesters were thus paired with specific processors through such cooperatives. *Id*. at 67,212. The amount that each cooperative would be entitled to harvest and process for any given year was fixed in an "annual cooperative quota," *id*., and the permits issued to these cooperatives were generally valid either "[u]ntil the end of the year," *id*. at 67,247, or "until all amounts of all [covered species] have been fully used," *id*. at 67,214.

The exclusive privileges created by the rockfish pilot program stand in stark contrast to Amendment 113, which includes no fixed linkages or other provisions conferring exclusivity.[10]

[9] Implementation of this pilot program was authorized by "additional specific statutory authority to manage rockfish fisheries" granted to NMFS by Congress as part of appropriations legislation in 2004. 71 Fed. Reg. at 67,210; *see also* AR 5000072 (noting that "Congress enacted specific legislation to authorize" the pilot program).

[10] To the extent that Amendment 113 contemplates any exclusivity, it is the establishment of an "exclusive fishing period" for catcher vessels that choose to participate in the harvest set-aside to "conduct directed fishing for AI Pacific cod," if specific conditions are met. AR 1000117.

As NMFS emphasized, "[n]o aspect of [Amendment 113] establishes exclusivity." AR 1000290. Therefore, the Court should reject Plaintiffs' argument that Amendment 113 creates an exclusive processing privilege on these grounds alone.

B. Amendment 113 Is Consistent With Prior Actions

In addition, Amendment 113 is "consistent with previous actions the Council has taken and NMFS has implemented." AR 1000057; *see also* AR 1000110 (noting that the "Council and NMFS have allocated fishery resources between inshore and offshore participants in the past"). For example, in its combined rulemaking for Amendment 18 to the BSAI Groundfish FMP and Amendment 23 to the Gulf of Alaska ("GOA") Groundfish FMP, *see* 57 Fed. Reg. 23,321 (June 3, 1992) ("Amendments 18/23"), NMFS specifically sought to "protect the inshore component of the fishery from preemption by the offshore fleet," *id*. at 23,322, by allocating 100% of the GOA pollock TAC and 90% of the GOA Pacific cod TAC to "the inshore component of the groundfish fishery," which included "processing plants on shore." *Id*. at 23,324. NMFS explained that, by protecting the inshore component of the fishery, Amendments 18/23 furthered the objectives of "promoting economic stability, growth, and self-sufficiency in the coastal communities" and "improving their opportunities for enhancing their self-sufficiency." *Id*. at 23,331; *see also id*. at 23,329 (noting that these "social benefits" supported approval of Amendments 18/23, "including stability within the community from year-round employment and the certainty of a steady supply of fish"). These benefits to "Alaska coastal communities" (specifically Kodiak and Sand Point), NMFS determined, outweighed the possible "economic losses" for offshore participants because the "failure to protect GOA coastal communities . . . would severely affect the employment and social fabric of the GOA communities." *Id*. at 23,323.[11]

[11] An association of processing vessels challenged Amendments 18/23, but their challenge was rejected. *See American Factory Trawler Ass'n v. Knauss*, No. 92-cv-00870-R, slip op. (W.D. Wash. July 6, 1995) (attached as Exh. 2); *id.*, slip op. (W.D. Wash. Sept. 29, 1992) (attached as Exh. 3); *id*., slip op. (W.D. Wash. July 24, 1992) (attached as Exh. 1).

C. Plaintiffs' Alternate Construction Of Amendment 113 Should Be Rejected

Plaintiffs nevertheless insist that Amendment 113 "creates an exclusive grant of authority to process AI Pacific cod." Pls.' Mem. at 26. Specifically, Plaintiffs assert that Amendment 113 is at odds with (1) the MSA's definition of "fishing," *id*. at 24; and (2) NMFS's interpretation of the MSA, as memorialized in an internal agency memorandum, dated Sept. 30, 2009, from Lisa L. Lindeman, NOAA Office of General Counsel's Regional Counsel for the Alaska Region, *id*. at 25-26; *see also* AR 5000068-78 ("Lindeman Memorandum"). Neither argument is persuasive, as discussed *infra*.

1. Plaintiffs' Reliance On The Definition Of "Fishing" Is Misplaced

To start, Plaintiffs point to the MSA's definition of "fishing," which refers to "operations at sea," 16 U.S.C. § 1802(16), and argue that NMFS's "regulation only extends to processors 'at sea.'" Pls.' Mem. at 24. This argument, however, misses the mark because, as discussed *supra*, Amendment 113 regulates the activities of harvesters, not shoreplants. *See* AR 1000037 (noting that Amendment 113 prioritizes AI TAC "for harvest by catcher vessels delivering their catch for processing by shoreplants in the AI"). In any event, to the extent that there is any ambiguity as to whether the MSA's definition of "fishing" limits NMFS's discretion to implement a harvest set-aside (and Defendants contend there is no ambiguity), NMFS's construction of the statute is permissible and thus should be upheld, even if it is not the "only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Deference is particularly apt when, as here, an agency's construction "is as clear as a glass slipper and fits without strain." *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000). Conversely, a court "should not approve an interpretation that requires a shoehorn," *id.*, and thus Plaintiffs' attempts to squeeze Amendment 113 into the ill-fitting category of an "onshore processing privilege," Pls.' Mem. at 26, should be rejected. *Cf. Coastal Conservation Ass'n v. United States Dep't of Commerce*, 846 F.3d 99, 106 (5th Cir. 2017) (rejecting argument that an amendment established a fishing quota for charters because it "begins from a false premise" and no such quota is created); *Lovgren*, 701 F.3d at 22

(rejecting argument that program constituted a limited access privilege program ("LAPP") or individual fishing quota ("IFQ") because a court "must defer to the agency's reasoned decision that [the] sector program is not a LAPP and is not an IFQ") (citation omitted); *Fishing Rights Alliance, Inc. v. Pritzker*, No. 8:15-cv-1254-MSS-MAP, 2017 WL 1653590, at *8 (M.D. Fla. Mar. 30, 2017) (concluding that an amendment did not allocate quota to "operators" of charters and headboats, as plaintiffs alleged, because "the plain language of the implemented regulation" referred to an allocation of quota between types of "vessels").

2. The Lindeman Memorandum Does Not Support Plaintiffs' Argument

Plaintiffs' reliance on the Lindeman Memorandum is equally misplaced. Again, it bears repeating what is – and is not – in dispute. There is no dispute that the MSA does not authorize "shore-based processing privileges." AR 5000070. This conclusion is inapposite here, however, because no such privileges are created by Amendment 113. Indeed, the Lindeman Memorandum underscores this distinction. As relevant here, the portion of the Lindeman Memorandum cited by Plaintiffs analyzed whether the MSA authorized the continuance of "fixed linkages" between harvesters and processors, as implemented in the rockfish pilot program. *Id*. Such fixed linkages are not authorized by the MSA, the Lindeman Memorandum concluded, because they have "the effect of allocating a shore-based processing privilege." AR 5000072. But this conclusion does not tip the analysis in this case, because no fixed linkages are created by Amendment 113. The set-aside provision in Amendment 113 imposes no obligation on harvesters to deliver their catch to any specific processor. *Cf. Trident Seafoods Corp. v. Bryson*, No. 12-cv-0134-MJP, 2012 WL 5993216, at *3 (W.D. Wash. Nov. 30, 2012) (noting that "one key difference" between the pilot program and a later amendment was "the removal of the requirement for harvesters to deliver to a specific on-shore processor") (emphasis added). Nor does the set-aside provision guarantee shoreplants any "portion of the total allowable catch" or "eliminate[] their competition for harvested fish to process," as a fixed linkage would. *Id*. at *2.

Instead, the set-aside provision better fits with the Lindeman Memorandum's analysis of a separate question – whether the MSA "authorize[s] the Council to establish an exclusive class

of shore-based processors that would be the recipients of all, or a specific portion of all, landings from a fishery." AR 5000075. In addressing this issue, the Lindeman Memorandum noted that, although "site specific landing or delivery requirements are not mentioned in the [MSA]," "port specific and regional specific landing or delivery requirements are explicitly contemplated in the language of the [MSA] as a way 'to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on fisheries.'" AR 5000076 (quoting 16 U.S.C. § 1853a(c)(5)(B)(i)) (emphasis added). The Lindeman Memorandum also highlighted the Congressional support for authorizing "linkage[s] . . . to a region or community," as evidenced by the discussion in a 2006 Senate Commerce Committee Report. AR 5000076-77 (citing S. Rep. No. 109-229, at 25 (Apr. 4, 2006)). This reasoning applies with equal force here, where the set-aside provision in Amendment 113 represents exactly the sort of "regional specific landing or delivery requirement[]" that is "explicitly contemplated" by the MSA. AR 5000076.[12] Hence, Amendment 113 is entirely consistent with the Lindeman Memorandum.

II. Amendment 113 Complies With The MSA's National Standards

Amendment 113 is also consistent with the National Standards set forth in the MSA. *See* 16 U.S.C. § 1851(a); *see also* AR 1000157-60 (describing how the action is consistent with each National Standard). Each of these National Standards "articulates a specific and essential policy objective." *C&W Fish Co.*, 931 F.2d at 1562 (citation omitted). Because the "purposes of the national standards are many," they "can be in tension with one another." *Lovgren*, 701 F.3d at 32 (citation omitted); *see also Alliance Against IFQs v. Brown*, 84 F.3d 343, 349 (9th Cir. 1996) (acknowledging "[t]here is a necessary tension, perhaps inconsistency, among these objectives"); *Conservation Law Found. v. Mineta*, 131 F.Supp.2d 19, 27 (D.D.C. 2001) (noting that NMFS has "numerous – and oftentimes competing – statutory objectives to contend with"). Ensuring

[12] The Lindeman Memorandum ultimately determined that "measures other than regional or port specific landing requirements" that "had the practical effect of limiting the number of sites to which deliveries could be made" might also be permissible, provided that the measures were "necessary for legitimate management or conservation objectives," such as the "protection of processing sector employment" and "protection of fishing communities." AR 5000077-78.

compliance with the National Standards thus "requires balancing by the agency and the exercise of discretion and judgment." *Lovgren*, 701 F.3d at 32 (citation omitted).

A. NMFS Struck A Reasonable Balance Between The National Standards

When, as here, an amendment is challenged as inconsistent with the National Standards, a court's "task is not to review *de novo* whether the amendment complies with these standards but to determine whether the Secretary's conclusion that the standards have been satisfied is rational and supported by the record." *C&W Fish Co*., 931 F.2d at 1562 (citations omitted). Hence, "so long as [NMFS] had a rational basis for the regulation, giving a high degree of deference to the agency in light of the scientific and technical nature of fishery management," an agency action is "consistent with the [MSA]" and should be upheld. *Natural Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 71 F.Supp.3d 35, 64 (D.D.C. 2014).

Such is the case here. In assessing whether Amendment 113 complied with the National Standards, NMFS applied its judgment to "strike[] a balance between providing protections for fishing communities and ensuring that the fishery sectors have a meaningful opportunity to fully harvest their BSAI Pacific cod allocations." AR 1000272. In weighing all the relevant factors, NMFS considered the possible consequences to AI fishing communities if it took no action. *See, e.g.*, AR 1000273 (noting that, "[w]ithout protections, Aleutian Islands harvesters, shoreplants, and fishing communities may be preempted from the fishery by harvests by CPs, or by harvests from CVs delivering their catch to CPs"); AR 1000283 (finding that, "without the set-aside, it is very likely that the processing plant in Adak will not be capable of sustained participation in the future"); AR 3004099 (letter from Adak Cod Cooperative stating that Adak "will suffer greatly and possibly not survive if the processing plant does get enough fish to be viable"). NMFS also considered the extent to which Amendment 113 might affect "offshore processing vessels and trawl CVs," such as Plaintiffs, acknowledging that these participants "will likely experience a loss of economic activity." AR 1000120. In addition, NMFS considered how any such losses might be mitigated – either by the affected participants themselves, *see* AR 1000120 (noting "the potential for these vessels to redeploy to the BS Pacific cod fishery"), or by incorporating certain

measures in Amendment 113, *see, e.g.*, AR 1000275 (describing "measures intended to prevent the stranding of Aleutian Islands non-CDQ Pacific cod TAC"). Additionally, NMFS examined the respective abilities of fishery participants to adapt to changes in the fishery, concluding that offshore "CPs are better able to adapt to changing conditions in the Aleutian Islands Pacific cod fishery given their ability to move to different locations to fish and process their catch, than Aleutian Islands shoreplants and the vessels that deliver to them, which have less flexibility and adaptability." AR 1000285; *see also* AR 1000108 (determining that this "disparity in flexibility . . . leaves the AI shoreplants at a significant disadvantage").

In spite of NMFS's careful weighing of these factors, Plaintiffs nevertheless allege that Amendment 113 runs afoul of three National Standards (National Standard 4, National Standard 5, and National Standard 8). *See* Pls.' Mem. at 32-44. However, Plaintiffs' allegations cannot be squared with the administrative record, which shows that NMFS balanced all of the relevant factors and then reached a reasonable conclusion based on its own expert judgment and the entire administrative record. Nothing more is required, and therefore Plaintiffs' efforts to second-guess NMFS's judgment should be rejected.[13]

B. Amendment 113 Is Consistent With National Standard 8

National Standard 8 requires FMPs and amendments to "take into account the importance of fishery resources to fishing communities . . . 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). As clarified in the advisory guidelines for National Standard 8, "[d]eliberations regarding the importance of fishery resources to affected fishing

[13] Plaintiffs also make a conclusory assertion that Amendment 113 "violates National Standard 1 because it will prevent the Pacific cod fishery from achieving optimum yield," alleging that Amendment 113 "will strand fish." Pls.' Mem. at 34 n.9 (citation omitted). But "optimum yield refers to a broad range of harvest spanning all species within the BSAI groundfish fisheries, not the TAC for a given species and area in a year." AR 1000282. This is a significant distinction, since Amendment 113 "do[es] not change the optimum yield of the BSAI groundfish fisheries." *Id*.; *see also* 50 C.F.R. § 679.20(a)(1)(i)(A) (setting a range for BSAI groundfish optimum yield of "1.4 million to 2.0 million mt"). In any event, Amendment 113 includes measures specifically "intended to prevent the stranding of [AI Pacific cod] TAC." AR 1000275.

communities . . . must not compromise the achievement of conservation requirements and goals of the FMP." 50 C.F.R. § 600.345(b)(1). However, "[a]ll other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative." *Id*. (emphasis added).

1. NMFS Minimized Adverse Economic Impacts On AI Communities Consistent With National Standard 8

That is exactly the situation presented here. NMFS considered two alternatives that had the same conservation effects, and then selected the alternative that also provided protections to fishing communities. Specifically, NMFS examined a no-action alternative that "would maintain the status quo management regime," AR 1000099, and another alternative that included the set-aside provision, AR 1000110. Neither alternative would "change the TACs for Pacific cod in the BS or AI or modify any measures currently in place to protect living marine resources." AR 1000158; *see also* AR 1000281 (noting that "harvests [will] stay within specified and allocated amounts," so that Amendment 113 will "continue to promote and do[es] not undermine [other] conservation measures"). Consequently, the set-aside alternative would achieve the conservation objectives of the BSAI Groundfish FMP to the same extent as the status quo. *Cf.* AR 1000158 (noting that Amendment 113 will not change the fishing levels "determined to be conservative and sustainable" for the fishery).

The two alternatives differed widely, however, with respect to their anticipated effects on fishing communities. Under the no-action alternative, NMFS flagged its concern that "increased entry by processing vessels . . . would erode the historical shoreplant processing share of the AI Pacific cod." AR 1000099. NMFS examined, for example, the distribution of both offshore and onshore processing over a 13-year period (2003-2015), finding that the amount of AI Pacific cod processed by offshore processors "ranged from a low of 44 percent in 2013 and 2014, to a high of 100 percent in 2011 and 2015," AR 1000107, whereas processing for shoreplants in Adak and Atka "ranged from a low of 0 percent in 2011 and 2015, when AI shoreplants did not process AI

Pacific cod, to a high of 49 percent in 2013," AR 1000108.[14] In addition, NMFS analyzed the extent to which offshore and onshore processors had adapted to recent changes in the fishery, finding the "flexibility of the Amendment 80 program . . . likely afforded the offshore sector the ability to change their fishing behavior in the AI Pacific cod fishery." *Id*. By contrast, "[w]hen compared to the offshore sector, the AI shoreplants have little ability to change their behavior . . . since the AI shoreplants rely 100 percent on CV deliveries of AI Pacific cod to their plant." *Id*.

Conversely, the second alternative – which was ultimately selected by NMFS – sought to increase the "potential for sustained participation" of fishing communities and to "minimize[] the adverse economic impacts" of recent changes on these communities. 50 C.F.R. § 600.345(b)(1). For fishing communities such as Adak and Atka, with "limited economic alternatives" that "rely on harvesting and processing of the nearby fishery resources to support and sustain the social and economic welfare of their communities," AR 1000273, NMFS determined that setting aside a portion of the AI Pacific cod TAC for these communities for a limited time during each fishing season would "provide access to and promote [the communities'] sustained participation" in the fishery, "especially at very low TAC levels." AR 1000288; *see also* AR 1000273 (noting that this alternative "provide[s] social and economic benefits to, and promote[s] stability in, fishery-dependent fishing communities in the Aleutian Islands"). This alternative, NMFS determined, was thus "directly responsive to National Standard 8." *Id.*[15]

2. Plaintiffs Show No Inconsistency With National Standard 8

Plaintiffs object to this conclusion, arguing that Amendment 113 is contrary to National

[14] Excluding the three years of non-operation, the lowest amount of AI Pacific cod processed by onshore processors in Adak and Atka was 19% in 2008. *See* AR 1000109.

[15] Plaintiffs infer from this statement that Amendment 113 must have been "based solely on a particular National Standard" to the exclusion of the other National Standards. Pls.' Mem. at 38 n.10. Plaintiffs infer too much. NMFS acknowledged Amendment 113 "must balance National Standard 8 with other National Standards." AR 1000111. Compliance with these other National Standards was also addressed at length by the agency. *See, e.g.*, AR 1000157-60 (describing "how the alternatives and options are consistent with the National Standards"); AR 1000280-84 (addressing the various requirements of National Standards 1, 2, 4, 5, and 8).

Standard 8 because (1) it "does not impose any new requirement to rebuild, restore, or maintain" the fishery, Pls.' Mem. at 33; (2) it "allocates fishery resources to a single community – Adak," *id*. at 36; and (3) it confers benefits on fishing communities that are, by Plaintiffs' reckoning, "illusory," *id*. at 37. None of these arguments withstands scrutiny.[16]

a. Amendment 113 Is Consistent With The BSAI Groundfish FMP's Conservation Objectives

First, there is no requirement in National Standard 8 – and Plaintiffs point to none – that compels NMFS to set forth a separate "conservation purpose," *id*. at 33, for Amendment 113.[17] Congress could have incorporated such a requirement in National Standard 8, but it did not. *Cf. Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says"). Rather, as explained in the advisory guidelines for National Standard 8, the appropriate frame of reference is to the larger "conservation requirements and goals of the FMP." 50 C.F.R. § 600.345(b)(1) (emphasis added); *see also* 16 U.S.C. § 1851(a)(8) (requiring measures to be "consistent with the

[16] Plaintiffs repeatedly cite to their own extra-record declarations in support of these and their other non-standing arguments, *see* Pls.' Mem. at 31, 34, 40, 42, as well as in their statement of facts, *see id*. at 6-8, 10, 18-19. Using these declarations in this manner is impermissible. While Defendants do not dispute that Plaintiffs may rely on such declarations for the narrow purpose of establishing their standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), such declarations cannot be used as a vehicle for attacking "the substantive soundness of the agency's decision." *Esch v Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (noting that "the familiar rule that judicial review of agency action is normally to be confined to the administrative record . . . exerts its maximum force" in such instances); *see also Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (holding that "[c]onsideration of [extra-record] evidence to determine the correctness or wisdom of the agency's decision is not permitted"). There are narrow exceptions to this rule, *see Silver State Land, LLC v. Beaudreau*, 59 F.Supp.3d 158, 164 (D.D.C. 2014) (examining D.C. Circuit cases narrowing these exceptions), but Plaintiffs do not allege, much less show, that any such exception applies here. Hence, this Court should strike from Plaintiffs' Memorandum any references to these extra-record declarations that do not pertain to the specific issue of standing, *see* Pls.' Mem. at 6-8, 10, 18-19, 31, 34, 40, 42, as well as any text related to such references.

[17] Plaintiffs' reliance on the definition of "conservation and management," *see* Pls.' Mem. at 33 (quoting 16 U.S.C. § 1802(5)), is misplaced. Amendment 113 made no modifications to any of the existing conservation measures in the BSAI Groundfish FMP, *see* AR 1000281, and thus Amendment 113 "maintain[s]" the fishery, within the meaning of 16 U.S.C. § 1802(5).

conservation requirements of the [MSA]"). The relevant inquiry in this case is therefore whether Amendment 113 would "compromise the achievement of conservation requirements and goals of the FMP." 50 C.F.R. § 600.345(b)(1) (emphasis added). In other words, Amendment 113 must not weaken the BSAI Groundfish FMP's conservation goals, but there is no requirement that it affirmatively strengthen such goals, or set forth its own separate conservation goals.

In this case, the provisions of Amendment 113 were grafted onto the existing regulatory scheme in the BSAI Groundfish FMP, which itself was previously approved as consistent with the MSA's conservation mandates. Amendment 113 made no modifications to "the allocation of BSAI Pacific cod . . . established in existing regulations." AR 1000281. As before, the "specific and allocated amounts" in the BSAI Groundfish FMP will continue to be enforced. *Id*.; *see also* AR 1000157 (finding that "[n]one of the alternatives . . . would lead to overfishing of Pacific cod in the AI or BS"). Likewise, no modifications were made to any of the "measures currently in place to protect living marine resources." AR 1000158. Consequently, because Amendment 113 continues to maintain the conservation requirements and goals of the BSAI Groundfish FMP, it is entirely consistent with National Standard 8. *Cf. Natural Res. Def. Council*, 71 F.Supp.3d at 65 (rejecting argument that National Standard 8 precluded NMFS's consideration of economic impacts on fishing communities where "the two alternatives available in this case (deep water prohibition or no deep water prohibition) would have similar conservation effects – *i.e.*, neither would be effective in preventing overfishing").[18]

b. Amendment 113 Is Intended To Benefit All AI Shoreplants

Plaintiffs also object to Amendment 113 on the grounds that it creates an "exclusive set-

[18] Plaintiffs' related argument – that Amendment 113 may "decrease resource conservation" by increasing the likelihood that "[m]ore [prohibited species catch ("PSC")] will be caught [as bycatch] in one area," Pls.' Mem. at 34-35 – lacks merit. As an initial matter, Plaintiffs' only support for this argument is their own extra-record declaration, which should not be considered by the Court for this purpose, as discussed *supra*. In any event, even assuming, *arguendo*, that BS PSC increases as a result of Amendment 113, Plaintiffs fail to explain how, if at all, any such increase that does not exceed the existing PSC limits would interfere with the conservation goals of the BSAI Groundfish FMP. *Cf.* AR 1000282 (noting that Amendment 113 "will not affect the total maximum permissible amount of halibut PSC established for BSAI groundfish fisheries").

aside" for "a single community – Adak." Pls.' Mem. at 36. Again, the premise of this argument is faulty. As NMFS emphasized, and as discussed *supra*, Amendment 113 entitles shoreplants to no amount – or even any – of the AI TAC under the set-aside provision, *see* AR 1000283 (noting that "no exclusive opportunity to receive any portion of the set-aside is provided to an Aleutian Islands shoreplant"), and thus "[n]o aspect of this action establishes exclusivity." AR 1000290.

Nor is Adak the only intended beneficiary of Amendment 113. NMFS identified Atka as another community that likely "will benefit from the harvest set-aside." AR 1000118. Plaintiffs discount Atka's prospects, alleging that "Atka never has, and likely never will, process Pacific cod." Pls.' Mem. at 36. But Plaintiffs overstate the case. While it is true that the shoreplant in Atka has primarily processed other species (halibut and sablefish), *see* AR 1000096, and it had previously lacked "an operational Pacific cod processing line," AR 1000119, "the plant began to take Pacific cod for processing in the summer of 2012." *Id*. To be clear, the Atka shoreplant's processing of Pacific cod to date has been very limited, *see* AR 1000093-94 (listing deliveries of 1 mt in 2003 and 5 mt in 2014; also listing deliveries of confidential amounts in 2006, 2007, 2008, 2010, and 2013), but Plaintiffs' assertion that Atka "never has" processed Pacific cod, *see* Pls.' Mem. at 36, is a stretch too far.[19] Similarly, the administrative record undercuts Plaintiffs' prediction that Atka "likely never will" process Pacific cod. *Id*. As NMFS pointed out, the Atka shoreplant had already drawn up "plans to add a Pacific cod processing line in order to expand production of Pacific cod in the future." AR 1000119. Further, the shoreplant had already made "substantial infrastructure investments . . . to make the plant a year-round operation," including "a $4 million expansion," and thereby increase its processing capacity to "400,000 round pounds of Pacific cod per day (181 mt.)." AR 1000096. Indeed, while Plaintiffs allege that Amendment 113 "created a system whereby Adak is at a permanent advantage," Pls.' Mem. at 37, the agency

[19] Plaintiffs contend that "the evidence is clearly to the contrary," but they only cite to a portion of a draft environmental assessment ("EA") that generally describes Atka. *See* Pls.' Mem. at 37 (citing AR 4001996-97). Plaintiffs fail to explain how, if at all, this draft might support their argument. *Cf. Entm't Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (noting that "[j]udges are not like pigs, hunting for truffles buried in briefs").

flagged the possibility that the opposite might be true, noting that Atka might have a "significant strategic advantage in securing deliveries of AI Pacific cod during periods of low AI Pacific cod set-asides" based on its "affiliation with [the Aleutian Pribilof Islands Community Development Association ("APICDA")]." AR 1000120.

Furthermore, although Adak and Atka are the only AI communities with shoreplants at present, Amendment 113 provides that the harvest set-aside provision would also be available to "any new shoreplants" in the area. AR 1000121. While NMFS's decision did not hinge on the likelihood of new shoreplants in the fishery, NMFS specifically reserved the possibility that "one or more Aleutian Islands shoreplants could become operational at any time." AR 1000283. This makes sense, since Amendment 113 resolves the "regulatory uncertainty surrounding AI Pacific cod" that hampered prior processing efforts in these communities. AR 1000091. Put otherwise, if Amendment 113 provides shoreplants in Adak and Atka with the amount of processing volume necessary "to justify both the investment in an increased processing capacity and the retention of a sufficient number of processing workers," AR 1000096, as intended, then similar investments may follow in other AI communities. Nowhere in their Memorandum do Plaintiffs even address this possibility.[20]

c. Amendment 113 Confers Reasonably Likely Economic Benefits To AI Communities

Plaintiffs' argument that the "economic benefits of Amendment 113 are illusory," Pls.' Mem. at 37-39, also misses the mark. First, contrary to Plaintiffs' assertion that Amendment 113 was "likely to result in net negative or at best net neutral economic impacts" to AI communities, *id*. at 37,[21] NMFS approved Amendment 113 based on its assessment that "any reduction in

[20] There also may be non-economic factors that increase the likelihood of new shoreplants. *Cf.* AR 1000279 (commenter opining that Amendment 113 "will help the aspirations of the Aleut people to repopulate some of the islands of the western Aleutians").

[21] Again, Plaintiffs offer bare citations to the administration record, providing no explanation for the relevance of these citations to their argument. *See* Pls.' Mem. at 37 (citing AR 3004638 and AR 4002020). This is unhelpful, as discussed *supra*. Compounding the problem, Plaintiffs also cite to preliminary drafts of the EA drafted as early as 19 months prior to the final version of the EA. *Compare* AR 1000030-164 (final version dated September 2016) *with* AR 3004575-684

operational efficiency would, it is believed, be offset by the welfare gains . . . from social and economic support" for these communities. AR 1000131 (emphasis added). Second, Plaintiffs presume that Atka's previous processing history must foretell its future, *see* Pls.' Mem. at 37 (questioning whether the city "will derive an economic benefit from Amendment 113 at all" given its limited processing of Pacific cod). However, the administrative record reflects Atka's efforts to "expand [its] production of Pacific cod in the future," AR 1000119, and anticipates that Amendment 113 will provide "some stability" for shoreplant operations, AR 1000118. Third, the fact that the upside benefits to AI communities may be "uncertain," Pls.' Mem. at 38, or that there may be downside risks to these communities, *see id.* at 37-38 (noting that CP visits may decline), does not render Amendment 113 inconsistent with National Standard 8. "[W]here the administrative record reveals that the Secretary was aware of potentially devastating economic consequences, considered significant alternatives, and ultimately concluded that the benefits of the challenged regulation outweighed the identified harms," *N.C. Fisheries*, 518 F.Supp.2d at 92 (citations omitted), there is no conflict with National Standard 8. Such is the case here.

In any event, Plaintiffs may disagree with NMFS's assessment as to the expected benefits of Amendment 113, but such assessments are exactly the sort of predictive judgments to which particular deference is due. *See, e.g., Alaska v. Lubchenco*, 825 F.Supp.2d 209, 220 (D.D.C. 2011) (noting that "exercise[s] involving a 'great deal of predictive judgment'" are "'entitled to particularly deferential review'") (quoting *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009)). "About the best a court can do is to ask whether the Secretary has examined the impacts of, and alternatives to, the plan he ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable." *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462,

(draft dated February 2015), AR 4001929-2069 (draft dated November 2015), and AR 2005813-19 (draft comments from October 2016). Such preliminary drafts are not the proper focus of review, because courts must focus on the explanation presented in the agency's final decision. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (holding that "federal courts ordinarily are empowered to review only an agency's final action") (citation omitted).

470 (1st Cir. 2003); *see also N.C. Fisheries*, 518 F.Supp.2d at 92 (noting that "courts apply a 'rule of reason' to [National Standard 8] challenges, and will not invalidate a regulation or plan amendment simply because the challenger's preferred alternative was not selected or because the Secretary could have, but did not, conduct a more thorough analysis"). Courts thus consistently reject challenges brought under National Standard 8. *Cf. Coastal Conservation Ass'n v. United States Dep't of Commerce*, No. 15-cv-1300-JTM, 2016 WL 54911, at *6 (E.D. La. Jan. 5, 2016) (rejecting National Standard 8 argument; also noting that plaintiffs "cite to only one case where a court found that the Secretary's analysis did not comply with National Standard 8" and the case was distinguishable). The same result should apply here.

C. Amendment 113 Is Consistent With National Standard 4

When, as here, an FMP or amendment allocates fishing privileges, National Standard 4 requires that the allocation be (1) "fair and equitable"; (2) "reasonably calculated to promote conservation"; and (3) "carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. § 1851(a)(4). As NMFS has emphasized in its advisory guidelines, "[i]nherent in an allocation is the advantaging of one group to the detriment of another." 50 C.F.R. § 600.325(c)(3)(i)(A). It thus is permissible under National Standard 4 to "impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." *Id*. § 600.325(c)(3)(i)(B). NMFS's balancing of interests is an exercise of judgment, and "it is precisely because National Standard 4 and its implementing regulations leave room for differing interpretations in close cases that deference is due" to the agency's assessment. *N.C. Fisheries*, 518 F.Supp.2d at 94.

In this instance, Plaintiffs assert that Amendment 113 satisfies none of the requirements of National Standard 4, alleging that Amendment 113 (1) is "not fair and equitable to long time offshore participants in the cod fishery," Pls.' Mem. at 40; (2) "does not promote conservation," *id*. at 41; and (3) "creates anti-competitive effects," *id*. Plaintiffs overreach. As discussed *infra*, the administrative record demonstrates that NMFS carefully weighed both burdens and benefits, and there is nothing "intentionally invidious or inherently unfair in the plan adopted" by NMFS.

Sea Watch Int'l v. Mosbacher, 762 F.Supp. 370, 378 (D.D.C. 1991). Plaintiffs thus demonstrate no inconsistency with National Standard 4.[22]

1. Amendment 113 Is Fair And Equitable

Plaintiffs' insistence that Amendment 113 is "unfair and inequitable," Pls.' Mem. at 40, does not make it so. *See N.C. Fisheries*, 518 F.Supp.2d at 91 (explaining that "lines drawn by the Secretary do not cease to be 'fair and equitable' . . . simply because plaintiffs view them as unfair and inequitable") (citation omitted). As a preliminary matter, Plaintiffs point to purported losses that they may bear as a result of Amendment 113, but they fail to address the substantial burdens that likely would be borne by AI communities if no action had been taken. *See, e.g.*, AR 1000280 (noting that Amendment 113 "addresses an inequity that has occurred, in part, from the establishment of rationalization programs and minimizes the risk of future inequities"). Without Amendment 113, these communities faced the prospect of continued instability, *see* AR 1000272 (describing multiple factors leading to instability) – a long-term trend that was unlikely to change since shoreplants have far "less flexibility and adaptability" than other participants in the fishery, AR 1000285. The upshot, in NMFS's view, was that these communities faced a distinct "risk of exclusion" from the fishery without Amendment 113. AR 1000272.

By comparison, while NMFS acknowledged that Amendment 113 was likely to impose burdens on "offshore processing vessels and trawl CVs," AR 1000120 (recognizing that these participants "will likely experience a loss of economic activity"), it also determined that at least some of these losses could be mitigated by these offshore vessels themselves. As NMFS noted, CVs and CPs that do not participate in a harvest set-aside have a wide range of options. Because

[22] Although Plaintiffs briefly note that "most" of the "CVs delivering to offshore processors" are "homeported in Seattle," Pls.' Mem. at 42, they raise no specific argument with respect to the separate provision of National Standard 4, which prohibits "discriminat[ion] between residents of different states." 16 U.S.C. § 1851(a)(4); *cf. Tribune Co. v. FCC*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998) (noting "requirement that a [party's] arguments be sufficiently developed lest waived"). Nor could they, since Amendment 113 is facially neutral with respect to the residence of fishery participants and thus "do[es] not include any measures that discriminate between residents of different states." AR 1000280.

these vessels "receive sector allocations of Pacific cod that they may fish in either the AI or BS," a non-participating vessel could shift its fishing operations and "may be able to make up part, or all, of the loss in the BS." AR 1000120. Another option would be to "participate in the Aleutian Islands Unrestricted Fishery, when available." AR 1000289.[23] Vessels may also wait to "fish in the Aleutian Islands for Pacific cod when the set-aside is lifted." *Id*. Alternatively, even during a set-aside period, a non-participating vessel would still "be permitted to conduct directed fishing for groundfish other than Pacific cod" in the AI area and retain "incidental harvests of Pacific cod." AR 1000274 (explaining that "CPs also will be permitted to retain and process Aleutian Islands Pacific cod that is caught as incidental catch while directed fishing for groundfish other than Pacific cod").

In addition, Amendment 113 incorporates specific measures to limit the potential adverse effects on offshore vessels. *See*, *e.g.*, AR 1000275 (describing "measures intended to prevent the stranding of Aleutian Islands non-CDQ Pacific cod TAC if the set-aside is not requested, if limited processing occurs at Aleutian Islands shoreplants, or if the Aleutian Islands CV Harvest Set-Aside is taken before March 15"). These measures were developed, in part, to be responsive to the concerns of offshore vessels. For example, NMFS selected the current set-aside amount (5,000 mt) over a higher amount, in part, because the "higher set-aside (7,000 mt) would reduce chances [of an AI Unrestricted Fishery] for the offshore sector." AR 1000124. Similarly, NMFS chose to impose an earlier notification requirement (November 1) on Adak and Atka, versus a later date (December 15), because "November 1 provides significantly more time for the industry

[23] The AI Unrestricted Fishery refers to the difference between the AI DFA and the set-aside amount "[w]hen the Aleutian Islands DFA is greater than 5,000 mt, and therefore the Aleutian Islands CV Harvest Set-Aside is set equal to 5,000 mt." AR 1000274. In that instance, the difference becomes "available for directed fishing by all non-CDQ fishery sectors with sufficient A-season allocations and may be processed by any eligible processor." *Id*. (emphasis added). That is, "vessels may conduct directed fishing for Pacific cod in the Aleutian Islands and deliver their catch to Aleutian Islands shoreplants or to any eligible processor for processing as long as the Aleutian Islands Unrestricted Fishery is open." *Id*. Likewise, "CPs will be permitted to conduct directed fishing for Pacific cod in the Aleutian Islands and process that directed catch as long as the Aleutian Islands Unrestricted Fishery is open to directed fishing." *Id*.

to make the necessary arrangements to harvest and process" the AI TAC in the event that the notification requirement is not met. AR 1000127. Hence, this is not a case in which the interests of offshore vessels were ignored.

In any event, National Standard 4 permits an allocation that may "impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." 50 C.F.R. § 600.325(c)(3)(i)(B). Courts therefore have consistently "declined to second-guess the Secretary's judgment simply because the provisions of a FMP or a plan allocation 'have a greater impact upon' one group or type of fishermen." *N.C. Fisheries*, 518 F.Supp.2d at 89; *see also Alliance Against IFQs*, 84 F.3d at 350 (concluding that the "Secretary is allowed . . . to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole."). This is true "even where the allocations chosen threatened the survival of segments of the fishing industry." *N.C. Fisheries*, 518 F.Supp.2d at 91.[24] Accordingly, Plaintiffs provide no grounds for displacing NMFS's exercise of judgment here. *See, e.g., Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 899-900 (9th Cir. 2010) (upholding amendment that "favored sectors that benefitted coastal Alaskan residents," even though "the interests of [the trawl CP sector] were sacrificed for the benefit of the fishery as a whole").

2. Amendment 113 Is Reasonably Calculated To Promote Conservation

In a variation on a recurring theme, Plaintiffs also contend that Amendment 113 is not "reasonably calculated to promote conservation," 16 U.S.C. § 1851(a)(4), because it "does not reduce TACs and other harvest limits," Pls.' Mem. at 41. This argument lacks support. While it is true that Amendment 113 does not set forth its own "conservation purpose," to use Plaintiffs'

[24] Plaintiffs point out that "some CVs . . . lack refrigerated seawater holding tanks" and thus may be unable to participate in a harvest set-aside. Pls.' Mem. at 31. NMFS acknowledged this possibility. *See* AR 1000120. But NMFS also determined that the likely benefits to AI fishing communities outweighed this potential harm to some harvesters, and National Standard 4 does not require a different result. *Cf. Little Bay Lobster Co. v. Evans*, No. 00-cv-007-M, 2002 WL 1004105, at *27 (D.N.H. May 16, 2002) (upholding action that would "limit the economic viability of large steel lobster boats" because NMFS "is not necessarily obligated to try to protect plaintiffs' ability to fish for lobsters from 70-foot steel boats").

characterization, Pls.' Mem. at 41, Plaintiffs fail to explain why it must. As with their National Standard 8 challenge, Plaintiffs again misframe the issue by decoupling Amendment 113 from the larger conservation objectives of the BSAI Groundfish FMP. But the advisory guidelines for National Standard 4 specifically state that the "motive for making a particular allocation should be justified in terms of the objectives of the FMP." 50 C.F.R. § 600.325(c)(3)(i)(A) (emphasis added); *cf. Fishermen's Finest*, 593 F.3d at 895 (concluding that amendment "further[ed] the beneficial objectives of the FMP" and "comports with National Standard 4"); *Little Bay Lobster Co.*, 2002 WL 1004105, at *24 (rejecting National Standard 4 challenge to an amendment that changed boundary lines to "better approximat[e] lobster habitat and migration patterns" because it "further[s] the conservation objectives" of the FMP). That is precisely what NMFS has done here. As discussed *supra*, NMFS addressed at length its efforts to ensure that Amendment 113 would be consistent with the conservation objectives of the BSAI Groundfish FMP, *see, e.g.*, AR 1000281 (noting that "specific and allocated amounts" in the FMP will continue to be enforced); *see also* AR 1000157 (finding that Amendment 113 would not "lead to overfishing of Pacific cod in the AI or BS"), and Plaintiffs fail to establish that anything more was required.

Similarly, Plaintiffs' cramped interpretation of the term "conservation" cannot be squared with National Standard 4's advisory guidelines, which emphasize that "[n]umerous methods of allocating fishing privileges are considered 'conservation and management' measures" under the MSA. 50 C.F.R. § 600.325(c)(3)(ii). Specifically, the guidelines state that an allocation "may promote conservation by encouraging a rational, more easily managed use of the resource." *Id.* Alternatively, an allocation "may promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product." *Id.* (emphasis added); *see also* 50 C.F.R. § 600.325(c)(3)(iv) (identifying "economic and social consequences" and "dependence on the fishery by present participants and coastal communities" as "other factors relevant to the FMP's objectives" to be considered under National Standard 4). This interpretation is also supported by other NMFS guidance. *See* AR 5000078 (describing the "protection of processing sector employment" and the "protection of fishing communities" as

"legitimate management or conservation objectives"). In this case, because Amendment 113 was intended to "provide social and economic benefits to, and promote stability in, fishery-dependent fishing communities in the Aleutian Islands," AR 1000273, it readily fits within the meaning of "promot[ing] conservation" under National Standard 4.[25]

3. Amendment 113 Creates No Excessive Share Of The Fishery

Plaintiffs' remaining argument regarding National Standard 4 – that "Amendment 113 creates anti-competitive effects that did not exist in the fishery and ignores the potential for a single operating shoreplant to exert its monopsony power to reduce prices for CVs," Pls.' Mem. at 41 – fares no better. Far from ignoring the issue, the administrative record shows that NMFS specifically sought to reduce the possibility of any shoreplant gaining "inordinate control." AR 1000281. Amendment 113 includes, for example, "performance measures which, if not satisfied, will lift the set-aside." *Id*.; *see also* AR 1000284 (noting that the in-season milestone to continue a set-aside (deliveries of at least 1,000 mt) provides "an additional incentive" for "shoreplants to offer competitive prices . . . so that harvesters do not wait until after February 28 . . . to deliver to offshore processors"). Amendment 113 also "cap[s] the maximum amount of the set-aside at a level that . . . will allow for the continued participation of the offshore sector." AR 1000281. In addition, Amendment 113 "allow[s] any . . . shoreplant to participate in the set-aside," *id*., which further reduces the risk that any single shoreplant might be able to control pricing in the fishery.

[25] The only case cited by Plaintiffs – *Texas v. Crabtree*, 948 F.Supp.2d 676 (S.D. Tex. 2013), Pls.' Mem. at 41 – is distinguishable. At issue in *Texas* was an emergency rule that took "away fishing days from Texas, Louisiana, and Florida and [gave] them to fishermen in Mississippi and Alabama." 948 F.Supp.2d at 687. In considering whether the emergency rule violated National Standard 4, the court in *Texas* held that the "rationale" for the rule was to "penalize the anglers living in states that enact fishing seasons that do not match the federal season and reward those that do," rather than to "enhance the conservation of red snapper." *Id*. at 688-89. By contrast, there is no punitive purpose to Amendment 113, which instead is meant to provide "economic or social benefit[s]" to AI fishing communities and thereby "promote conservation (in the sense of wise use)." 50 C.F.R. § 600.325(c)(3)(ii). Further, the fact that the rule in *Texas* was subject to the heightened criteria for emergency action, *see* 948 F.Supp.2d at 683, and, by its own terms, affected residents of different states differently, *see id* at 688 (noting that the rule "redistribute[s] the right to fish from Texas, Louisiana, and Florida fishermen to the anglers of Mississippi and Alabama"), also weighed against that action. No such circumstances are presented here.

See, e.g., AR 1000290 (noting that nothing "prevents a shoreplant in any other onshore location west of 170° W. longitude from processing Aleutian Islands Pacific cod").

Moreover, NMFS determined that there was a strong disincentive for shoreplants to seek below-market prices, since "shoreplants will need to offer harvesters competitive prices" in order to "remain solvent." AR 1000284 (emphasis added). Further, while NMFS acknowledged that "CVs may have less ability to use processor competition . . . to leverage higher prices," it also identified "several ways that CVs may retain leverage in negotiating fair prices from Aleutian Islands shoreplants." *Id*. NMFS pointed out, for example, that "CV participants could use the threat of not participating in the exclusive AI Pacific cod fishery, instead choosing to wait until the exclusive fishing period had expired." AR 1000121. Alternatively, CVs could threaten to "fish their allocation in the BS Pacific cod fishery." *Id*. This sort of "negotiating leverage," in NMFS's estimation, was likely to be particularly effective in negotiations with shoreplants that have been "more dependent on AI Pacific cod," such as the shoreplant in Adak. *Id*. At bottom, NMFS determined that "[i]f [AI] shoreplants are not competitive, they likely will not be able to operate," AR 1000284, and nothing in Plaintiffs' Memorandum refutes that assessment.

D. Amendment 113 Is Consistent With National Standard 5

National Standard 5 instructs that "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources," provided, however, that "no such measure shall have economic allocation as its sole purpose." 16 U.S.C. § 1851(a)(5). Plaintiffs contend that Amendment 113 is at odds with National Standard 5 because it allegedly (1) "creates inefficiencies in the cod fishery," Pls.' Mem. at 42-43; and (2) was formulated with "economic redistribution [as] its sole purpose," *id*. at 43. Neither argument withstands scrutiny.

To begin, Plaintiffs allege that Amendment 113 causes "inefficiencies," *id*., but National Standard 5 does not prohibit such an outcome. Rather, "all that is required under this standard" is that the "Secretary has considered efficiency." *Connecticut v. Daley*, 53 F.Supp.2d 147, 172 (D. Conn. 1999) (emphasis added); *see also Pacific Dawn, LLC v. Pritzker*, No. 13-cv-1419-TEH, 2013 WL 6354421, at *14 (N.D. Cal. Dec. 5, 2013) (rejecting National Standard 5

argument because NMFS "considered the relevant factors" related to efficiency); *A.M.L. Intern., Inc. v. Daley*, 107 F.Supp.2d 90, 102 (D. Mass. 2000) (rejecting National Standard 5 argument because the "record indicates that the Secretary has considered efficiency"). Further, "National Standard Five makes it clear that 'efficiency, though important, is neither the sole nor primary objective of conservation and management measures.'" *Connecticut*, 53 F.Supp.2d at 172 (citation omitted). Hence, "the fact that some inefficiencies may exist in a conservation and management system does not make the system inconsistent with National Standard Five." *Id*. This is true even when one group "bear[s] a disproportionate share of the economic burden" from these inefficiencies, because "'[t]he Secretary is allowed, under [National Standard Five], to sacrifice the interests of some groups . . . for the benefit as the Secretary sees it of the fishery as a whole.'" *Blue Water Fisherman's Ass'n v. Mineta*, 122 F.Supp.2d 150, 173 (D.D.C. 2000) (citation omitted).

Here, NMFS considered both "the potential gains and losses in efficiency that may result from Amendment 113." AR 1000284; *see also* AR 1000114 (examining "tradeoffs between the operational efficiency for shoreplant CV operation and offshore CV operation"). With respect to harvesters, for example, NMFS acknowledged that a "shorter time to processing is an advantage for offshore operation," but also pointed out that "CVs delivering to the Adak shoreplant have an added advantage of not having to coordinate fishing operations with an offshore processor" and therefore "can independently determine when to fish, where to fish, and how long to fish." *Id*. NMFS conducted a similar weighing with respect to the AI communities, acknowledging "there may be some losses to communities resulting from fewer port visits by CPs," AR 1000284, but also finding that such losses would "likely be offset to some degree" by a possible "increase in economic activity . . . as a result of increased CV port visits," AR 1000119. NMFS also flagged the possibility that "efficiencies may be gained by having a local fishing fleet that can fish closer to shore." AR 1000284. Plaintiffs may disagree with the outcome of NMFS's assessment, but the administrative record shows beyond dispute that the "Secretary has considered efficiency," *Connecticut*, 53 F.Supp.2d at 172, and nothing more is required.

The administrative record also undercuts Plaintiffs' argument that the "sole purpose" of Amendment 113 is "economic redistribution." Pls.' Mem. at 43. Significantly, to prevail on this argument, Plaintiffs "are required to show that the Secretary failed to consider any non-economic objectives" as part of the rulemaking. *General Category Scallop Fishermen v. Sec'y, United States Dep't of Commerce*, 635 F.3d 106, 116 (3rd Cir. 2011) (citation omitted); *cf.* 50 C.F.R. § 600.330(e) (prohibiting "only those measures that distribute fishery resources . . . on the basis of economic factors alone"). That is, while conservation and management measures should aim for "as efficient a fishery as is practicable or desirable," *id*. § 600.330(b), National Standard 5 does not require optimal efficiency, and therefore the "use of inefficient techniques" is permissible if it "contributes to the attainment of other social or biological objectives," *id*. § 600.330(b)(2)(ii) (emphasis added); *see also id.* § 600.330(e) (requiring consideration of "biological, ecological, and social objectives of the FMP").

In this case, NMFS specifically intended for Amendment 113 to provide both "social and economic benefits" to AI communities. AR 1000273. NMFS thus "considered a range of social factors in addition to efficiency, including providing socially and economically viable fisheries for the well-being of Aleutian Islands fishing communities." AR 1000273. For example, NMFS considered the extent to which Amendment 113 would "improve the socio-economic stability" of "remote, fishery dependent, low-income communities, principally populated by Native peoples, and with few alternative economic opportunities." AR 1000131; *see also* AR 1000096 (noting comment that AI communities "with a stable or growing population base and local economy are those with a year-round shore-based processing plant"). The agency also examined the extent to which the residents of these communities were employed in fishing-related activities. *See, e.g.*, AR 1000092 (noting that "Pacific cod processing activity at the Adak shoreplant accounts for a large proportion of local employment in Adak"); AR 1000279 (comment from a "small boat, Aleutian Islands fisherman" opining that "Amendment 113 will create numerous opportunities for small [local] boats and the community of Adak"). In addition, NMFS analyzed the extent to which fishing activities support municipal tax revenues. *See, e.g.*, AR 1000119 (concluding that

"increases in [tax] revenues are likely from increased deliveries of AI Pacific cod to Atka"); AR 1000117 (noting that increased "fish taxes" could "provide valuable consistent revenue for the Adak community").[26] Thus, the fact that NMFS "took into account 'biological, ecological, and social objectives' . . . is readily apparent from the record," *General Category Scallop Fishermen*, 635 F.3d at 116, and Plaintiffs' National Standard 5 challenge falters as a result.

III. Amendment 113 Complies With The APA

Finally, Plaintiffs assert a challenge under the APA to the adequacy of NMFS's decision-making, arguing that the agency "has not articulated a rational basis" for Amendment 113. Pls.' Mem. at 27. Specifically, Plaintiffs allege that NMFS (1) must have "ignored relevant historical data" regarding Atka and relied on "speculative" projections as to "future benefits to Atka," *id*. at 28; (2) assumed without adequate support that "there will be a net benefit to Adak," *id*. at 32; and (3) mistook "an increase in offshore processing capacity" as the "cause of instability" among AI shoreplants, *id*. at 28-29. As addressed *infra*, however, the administrative record directly refutes each of these arguments.

A. NMFS's Weighing Of The Relevant Information Is Entitled To Deference

At the outset, it bears repeating that an agency's evaluation of data "within its technical expertise" is entitled to "an extreme degree of deference." *Hüls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (citations omitted). This makes particular sense in the MSA context, since "judges are not marine biologists nor have they, in the main, any experience in [fisheries] management." *Ace Lobster Co., Inc. v. Evans*, 165 F.Supp.2d 148, 170 (D.R.I. 2001); *see also N.C. Fisheries*, 518 F.Supp.2d at 82 (noting that "[f]isheries regulation requires highly technical and scientific determinations that are within the agency's expertise, but are beyond the ken of most judges"). Consequently, a court's "proper function . . . is not to weigh the evidence anew and make technical judgments; [its] role is limited to determining if the [agency] made a rational

[26] NMFS also considered comments suggesting that Amendment 113 might "help the aspirations of the Aleut people to repopulate some of the islands of the western Aleutians" and "improve the conservation and ecosystem sustainability of the area." AR 1000279.

judgment." *Am. Petrol. Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981). A court thus may "not second guess an agency decision or question whether the decision made was the best one." *C&W Fish Co.*, 931 F.2d at 1565.

This deferential standard finds particular application here, because Plaintiffs identify no specific information that was not considered by NMFS. Nor do Plaintiffs allege that any of the information considered by NMFS was flawed. Plaintiffs also point to no better information that should have been considered. Instead, Plaintiffs simply disagree with NMFS's weighing of the information, pressing their own alternate interpretation. *See, e.g.*, Pls.' Mem. at 30 (arguing that the "record demonstrates . . . business challenges" for Adak); *id*. at 31 (arguing that "the record does show . . . that all participants in the AI Pacific cod fishery have been negatively impacted"). Such second-guessing is insufficient to satisfy Plaintiffs' "heavy burden" in this case, *Village of Bensenville*, 457 F.3d at 70-71, and thus provides no basis for overturning Amendment 113. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008) (cautioning that a court must "avoid[] all temptation to direct the agency in a choice between rational alternatives," especially "in an area characterized by scientific and technological uncertainty") (citation omitted).

B. NMFS's Assessment Regarding Atka Was Reasonable

Plaintiffs first take issue with NMFS's assessment as to Atka, alleging that NMFS must have "ignored relevant historical data" regarding Atka's prior processing history. Pls.' Mem. at 28. But the administrative record provides no support for this contention. As discussed *supra*, NMFS acknowledged that the prior processing history of the Atka shoreplant had been limited. *See* AR 1000093-94 (listing deliveries of smaller or confidential amounts in 2003, 2006, 2007, 2008, 2010, 2013, and 2014). AR 1000119. But continuing its analysis, NMFS also considered the recent efforts in Atka to "make the plant a year-round operation," AR 1000096 (describing its "$4 million expansion and improvements"), and the importance of Pacific cod as "the linchpin" for those expansion efforts, *id*. (explaining that the shoreplant expected Pacific cod to supply the "relatively high volume processing . . . needed at the plant to justify both the investment in an increased processing capacity and the retention of a sufficient number of processing workers").

In addition, NMFS considered the Atka shoreplant's "plans to add a Pacific cod processing line in order to expand production of Pacific cod," AR 1000119, and the "substantial infrastructure investments" made to increase the shoreplant's processing capacity to "400,000 round pounds of Pacific cod per day (181 mt.)," AR 1000096. This weighing of factors was entirely reasonable, and Plaintiffs fail to demonstrate otherwise.[27]

Plaintiffs further object on the grounds that the "future benefits to Atka are speculative." Pls.' Mem. at 28. But courts have "recogniz[ed] that some degree of speculation and uncertainty is inherent in agency decisionmaking." *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 219 (D.D.C. 2005). This is particularly true where, as here, an agency "is making predictions, within its area of special expertise." *Baltimore Gas & Elec. Co.*, 462 U.S. at 103. Such "predictive judgments" are "entitled to particularly deferential review." *Trout Unlimited*, 559 F.3d at 959; *see also New York v. Reilly*, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992) (emphasizing that a court should be "particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information"). Consequently, if "Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence." *Public Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). So too here, where NMFS's predictive judgment as to Atka is reasonable and thus entitled to deference.

C. NMFS's Assessment Regarding Adak Was Reasonable

Plaintiffs' arguments regarding Adak are similarly flawed. As an initial matter, Plaintiffs again find fault in NMFS's wholly unremarkable statement that "[a]ssessing the effects of the alternatives and options involves some degree of speculation." Pls.' Mem. at 31 (quoting AR 4015545). But such predictive judgments are exactly the sort of decisions for which deference is

[27] Plaintiffs' related argument – that Atka "cannot have been adversely affected" by changes in the fishery, Pls.' Mem. at 28 – also misframes the issue. There is no requirement – and Plaintiffs point to none – that NMFS must demonstrate harm to a community to justify minimizing adverse economic impacts on that community. In any event, the "risk of exclusion" that Amendment 113 sought to address, AR 1000272, applies equally to all AI communities.

due. *See Trout Unlimited*, 559 F.3d at 959. Plaintiffs also point out the risk that harvesters may not participate in a harvest set-aside, *see* Pls.' Mem. at 31, implying that NMFS failed to address this possibility. But the administrative record shows otherwise. Indeed, NMFS anticipated that harvesters would "use the threat of not participating in the exclusive AI Pacific cod fishery" as a "source of negotiating leverage." AR 1000121. NMFS also added a provision to lift a set-aside specifically to mitigate the risk that "too few or no vessels decide to participate in the set-aside fishery." AR 1000275. Far from ignoring the risk, the administrative record thus shows that NMFS fully accounted for – and even specifically hedged – the risk.[28] Plaintiffs also question if the shoreplant in Adak is "economically viable," noting that it "filed for bankruptcy in 2009." Pls.' Mem. at 32.[29] But as NMFS explained, this bankruptcy was partly the result of a short-term drop in the market price of Pacific cod. *See* AR 1000091 (explaining that, "[i]n 2009, the price of Pacific cod dropped to less than half of the 2008 price"). In any event, as with Atka, NMFS determined that the prospects of the Adak would likely improve with Amendment 113, since it resolved the "regulatory uncertainty" that had hampered prior processing efforts. AR 1000091.

D. NMFS Reasonably Determined That Several Factors – Including Increased Offshore Processing Capacity – Contributed To Shoreplant Instability

Finally, Plaintiffs object to NMFS's purported "assumption that an increase in offshore processing capacity since 2007 is the cause of instability" for AI shoreplants. Pls.' Mem. at 28. But Plaintiffs overstate the case. As NMFS emphasized, "[s]everal factors have contributed to this instability," AR 1000272 (identifying "decreased Pacific cod biomass in the Aleutian Islands

[28] As discussed *supra*, Amendment 113 does not guarantee a shoreplant any deliveries, nor was that its purpose. Rather, Amendment 113 was intended only to create "incentives" to influence the "actions of individual participants." AR 1000099. NMFS determined that these incentives would likely induce some harvesters to participate in a set-aside, but it also recognized that other harvesters might not participate. *See, e.g.*, AR 1000274 (describing options for non-participating harvesters). This possibility did not tip NMFS's analysis, however, since Amendment 113 was intended to increase the likelihood of continued participation by AI fishing communities in the fishery – not to guarantee such participation.

[29] Curiously, Plaintiffs allege elsewhere in their Memorandum that the "Adak shoreplant held its own in terms of its share of a reduced overall harvest when it was open." Pls.' Mem. at 31.

subarea; the establishment of separate [catch limits] for Pacific cod in the Bering Sea and the Aleutian Islands; [and] changing Steller sea lion protection measures" as factors), among which NMFS listed "changing fishing practices in part resulting from rationalization programs that allocate catch to specific fishery participants" as one such factor. *Id*. (emphasis added); *see also* AR 1000277 (emphasizing that NMFS "do[es] not assume that rationalization programs are the primary cause of this instability, but rather, one of many contributing factors").

It was reasonable for NMFS to consider this factor among the relevant factors. From the start, fishing communities had expressed "concern that increased entry by processing vessels . . . would erode the historical shoreplant processing share of the AI Pacific cod." AR 1000099; *see also* AR 1000119 (acknowledging concerns from "representatives of the Adak community . . . that competition from the offshore sector has contributed to the business difficulties of the Adak shoreplant"). NMFS also found that the historical data substantiated these concerns.[30] Prior to implementation of Amendment 80 and Amendment 85 in 2008, for example, an "average [of] 69 percent of the total CV deliveries of AI Pacific cod went to shoreplants . . . while 31 percent was delivered to offshore vessels." AR 1000040. But the numbers flipped after 2008, such that "34 percent of total CV AI Pacific cod was delivered to shoreplants, and 66 percent was delivered to offshore vessels." *Id*. This post-2008 switch, NMFS found, was partly the result of "increased processing participation by the [trawl] sector in non-rationalized fisheries like AI Pacific cod." *Id*. More importantly, as NMFS emphasized, the "amount of Pacific cod delivered to Aleutian Islands shoreplants has been highly variable." AR 1000272 (emphasis added). Over the 5-year

[30] For the same reasons that Plaintiffs' references to their extra-record declarations for any non-standing purpose should be stricken, as discussed further *supra*, the extra-record table prepared by Plaintiffs, *see* Pls.' Mem. at 29, and references thereto should be stricken. Although Plaintiffs allege that this table "is derived from" tables in the EA, their table includes data that does not appear in the EA, *see id*. (including calculations for averages), and also misstates certain data, *see id*. (listing incorrect figures for "# CVs" in 2015 and "GHL MT" for 2008). In addition, Plaintiffs rely on data from a draft version of the EA. *See* AR 4015476 (marked as draft). In any event, because Plaintiffs identify no basis for their submission of this extra-record information, and provide no explanation as to why, if at all, their table might be preferable to the information in the record, the Court should also strike this extra-record table and any references thereto.

period prior to 2008 (2003-2007), for example, the total combined percentage of AI Pacific cod processing for the shoreplants in Adak and Atka ranged from 25% to 36%. AR 1000109. By contrast, this same metric was far more variable over the following 8-year period (2008-2015), ranging from as low as 0% to as high as 49%. *Id.*[31] Such results, NMFS determined, were "not conducive to stable shoreside operations," *id.*, and Plaintiffs fail to show that NMFS's judgment was unreasonable.[32]

Plaintiffs further allege that, in approving Amendment 80, NMFS previously "considered potential harm to onshore processors and concluded that there would be none." Pls.' Mem. at 29. But this prior assessment in Amendment 80, which predates Amendment 113 by more than nine years, *see* 72 Fed. Reg. 52,668 (Sept. 14, 2007), carries little relevance here, since Amendment 113 is a separate agency action and is based on an entirely different administrative record. *See, e.g., Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (noting that review must be "based on the full administrative record that was before the [agency] at the time [it] made [its] decision") (quoting *Overton Park*, 401 U.S. at 420). Moreover, Amendment 113 reflected NMFS's evolving understanding of post-Amendment 80 changes to the fishery. *See, e.g.*, AR 1000280 (explaining that the "implementation of several rationalization programs, Steller sea lion protection measures, the BSAI TAC split, and decreasing biomass of Aleutian Islands Pacific cod . . . [have] considerably changed the way in which the BSAI Pacific cod fishery was managed and conducted"). In any event, it is "well within [an] agency's discretion" to undertake a "reevaluation of which policy would be better in light of the facts." *Nat'l Ass'n of*

[31] Even excluding the three years of limited or no operations (2010, 2011, and 2015), the range for this 8-year period still shows greater variability, ranging from 19% to 49%. *Id.*

[32] Plaintiffs' related argument – that the shoreplant in Adak previously "received a substantial amount of Pacific cod . . . but was still unable to sustain operations over the long term," Pls.' Mem. at 29 – is inapposite. As NMFS explained, irrespective of the amounts, the deliveries to shoreplants became more "highly variable." AR 1000272. For example, over the 5-year period prior to 2008, the amount of CV deliveries in the federal Pacific cod fishery to shoreplants in Adak and Atka ranged from 4,763 mt to 10,000 mt, whereas deliveries to these shoreplants over the following 8-year period ranged from 0 mt to 8,268 mt. *See* AR 1000109.

Home Builders v. EPA, 682 F.3d 1032, 1038 (D.C. Cir. 2012); *cf. Nat'l Ass'n of Home Builders*, 551 U.S. at 658-59 (holding "the fact that the agencies changed their minds [is] something that, as long as the proper procedures were followed, they were fully entitled to do").[33]

CONCLUSION

For all these reasons, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

Dated: August 23, 2017

Respectfully submitted,

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[33] Equally misplaced is Plaintiffs' reliance on internal briefing memoranda – one that predates approval of Amendment 113 by more than a year, *see* AR 2006057-70, and another almost three years, *see* AR 2006071-86 – for the proposition that "AI onshore processing was not harmed by rationalization programs." Pls.' Mem. at 29. The language excerpted by Plaintiffs appears in an initial recommendation by NMFS to the Council, reflecting the preliminary views of agency staff at an early stage in the decision-making process. *See* AR 2006062; *see also* AR 2006057 (noting that the memoranda are only intended to provide "brief background information" for meetings). Such preliminary statements by agency staff are not the proper focus for a reviewing court, since courts are "empowered to review only an agency's final action." *Nat'l Ass'n of Home Builders*, 551 U.S. at 659 (citation omitted); *cf. San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 33 (D.C. Cir. 1986) (emphasizing that the "position of an agency's staff, taken before the agency itself decided the point, does not invalidate the agency's subsequent application and interpretation of its own regulation"). Further, agency staff acknowledged that further data might be relevant, recommending that the Council "monitor and review processing trends and consider action if these trends change." AR 2006062.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2017, I electronically filed the foregoing Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN FACTORY TRAWLER ASSOCIATION, Plaintiff, and AMERICAN INDEPENDENT FISHERMEN; NORTH PACIFIC LONGLINE ASSOCIATION; and ROYAL SEAFOODS, INC., Intervenor-Plaintiffs, v. JOHN A. KNAUSS, Under Secretary of Commerce for Oceans and Atmosphere, United States Department of Commerce, and BARBARA H. FRANKLIN, Secretary, States Department of Commerce, Defendants. and PACIFIC SEAFOOD PROCESSORS ASSOCIATION; SOUTHWEST ALASKA MUNICIPAL CONFERENCE; HORIZON TRAWLERS, INC.; MIDWATER TRAWLERS CO-OPERATIVE; MARINO T. VILLANUEVA; THE ALEUTIANS EAST BOROUGH; PENINSULA MARKETING ASSOCIATION; THE KODIAK ISLAND BOROUGH; ALASKA GROUNDFISH DATA BANK; SEA WOLF LIMITED PARTNERSHIP; ALVIN BURCH; and ALASKA DRAGGERS ASSOCIATION, Intervenor-Defendants.	NO. C92-870R ORDER REGARDING PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Oct, BJR

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THIS MATTER comes before the court on cross-motions for partial summary judgment. Having reviewed the motions together with all documents filed in support and in opposition, and having heard oral argument on the motions, the court finds and rules as follows:

I. BACKGROUND

On May 29, 1992, plaintiff American Factory Trawler Association filed a complaint against defendants John A. Knauss, Department of Commerce Under Secretary for Oceans and Atmosphere, (the "Secretary") and Barbara H. Franklin, Secretary of the Department of Commerce, challenging regulations promulgated by the Department on May 28, 1992.

Plaintiff is a Seattle-based association of eighteen companies that own and operate forty-one at-sea processing vessels in the North Pacific groundfish fisheries. The challenged regulations allocate shares of the pollock and Pacific cod harvest in the Bering Sea and Aleutian Islands, ("BSAI"), and Gulf of Alaska, ("GOA"), between inshore and offshore fishing interests. See 57 Fed. Reg. 23321-23346 (1992) (to be codified at 50 C.F.R. pts. 672 and 675), Admin. Record No. 36, submitted with plaintiff's motion for partial summary judgment. The Regulations allocate 100% of the pollock and 90% of the Pacific cod in the GOA to the inshore component of the fishery, see 57 Fed. Reg. 23344, § 672.20 (a) (2) (v) (A) & (B), and 35% of the pollock in the BSAI to the inshore component. See 57 Fed. Reg. 23346, § 675.20 (a) (2) (iii). The Regulations prohibit the offshore component from fishing in an area designated as the

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"Catcher Vessel Operational Area," see 57 Fed. Reg. 23346, § 675.22 (g), which plaintiff asserts encompasses much of its fleet's historical fishing area.

Three parties have intervened as plaintiffs. Intervenor-plaintiff American Independent Fishermen (AIF) is a Washington-based organization of owners of small fishing vessels involved in harvesting groundfish in the North Pacific and Pacific Coast. See AIF's Complaint in Intervention, page 2, lines 10-17. Intervenor-plaintiff North Pacific Longline Association is a Washington-based organization representing fourteen companies that own and operate twenty-one freezer longline fishing vessels. See North Pacific Longline Association's Complaint in Intervention, page 2, lines 11-16. Intervenor-plaintiff Royal Seafoods, Inc., is a Washington-based corporation which owns an onshore processing plant in Seattle, Washington, and operates several factory trawler vessels that harvest and process groundfish in the North Pacific. Twelve parties have intervened as defendants.[1]/

This matter is before the court on cross-motions for partial summary judgment on two claims: (1) plaintiff's and intervenor-plaintiffs' claim under the National Environmental Policy Act, (NEPA), 43 U.S.C. §§ 4321-4335; and (2) intervenor-plaintiff AIF's challenge to statutory authority under the Magnuson Act, 16 U.S.C.

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[1]/ Intervenor-defendants include Pacific Seafood Processors Association; Southwest Alaska Municipal Conference; Horizon Trawlers, Inc.; Midwater Trawlers Co-operative; Marino T. Villanueva; The Aleutians East Borough; Peninsula Marketing Association; The Kodiak Island Borough; Alaska Groundfish Data Bank; Sea Wolf Limited Partnership; Alvin Burch; and Alaska Draggers Association.

§§ 1801 et seq. All of the intervenor-plaintiffs join in plaintiff's motion for partial summary judgment. The cross-motions raise questions of statutory interpretation, which are questions of law appropriately determined by the court on summary judgment. See Central Montana Elec. Power Coop. v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1476 (9th Cir. 1988). The court will first address the cross-motions for partial summary judgment on the NEPA issues, and then the cross-motions for partial summary judgment on the Magnuson Act statutory authority issue.

II. MOTIONS REGARDING NEPA

Plaintiff and intervenor-plaintiffs ("plaintiffs") move for partial summary judgment, arguing that the regulations are invalid because defendants failed to comply with NEPA procedure. Defendants and defendant-intervenors ("defendants") cross-move for partial summary judgment on the NEPA question, arguing that plaintiffs lack standing to challenge the regulations under NEPA, and that if there were standing, the regulations should be upheld because defendants complied with the policy underlying NEPA.

It is unnecessary for the court to reach the question of whether plaintiffs have standing because the court determines that the NEPA claims before the court on these cross-motions do not state substantial procedural violations which would warrant invalidation of the regulations.

Before the court on these cross-motions are plaintiffs' claims that defendants violated NEPA procedure in that they: (1) approved

the allocation on March 4, 1992, one day before the final supplemental environmental impact statement (final SEIS) was released, and thus did not have the final SEIS for review when the decision was made; and (2) did not afford the public an opportunity to comment on the economic cost-benefit analysis contained in the final SEIS before the allocation was approved.

It is clear to the court that there are serious questions involved in this lawsuit which are not before the court on these cross-motions. The parties should be aware that the court is not deciding whether it was a violation of the Magnuson Act not to obtain public comment on the economic cost-benefit analysis contained in the final SEIS, or whether the draft SEIS and final SEIS were adequate, See Plaintiffs' Memorandum in support of motion for partial summary judgment, p. 2, line 10--p.3, line 3.

1. Lack of public comment on the cost-benefit analysis

Plaintiffs are correct in their assertion that the cost-benefit analysis appended to the final SEIS was not available for public comment. However, plaintiffs are incorrect that this fact invalidates the regulations as a matter of law under NEPA. Council on Environmental Quality (CEQ) regulation 40 C.F.R. § 1502.23 provides in pertinent part:

> If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences . . . .

40 C.F.R. § 1502.23 (emphasis added). The cost-benefit analysis appended to the final SEIS was not one that was performed in order

to shed light on a choice among environmentally different alternatives. Plaintiffs do not seriously contend that the economic cost-benefit analysis that accompanied the final SEIS provides information relevant to any environmental factors or choices in this case. Rather, it is clear that the issues confronted in the cost-benefit analysis were relevant to Magnuson Act considerations and the allocations, which involved social and economic, not environmental, choices. See Memorandum "Evaluating the Economic Impact of Natural Resource Harvests", Appended to final SEIS, Admin. Record No. 47; Cost Benefit Analysis of Pollock and Cod Quota Allocations in the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish Fisheries - Final Report, April 14, 1992, Admin. Record No. 540.

National Wildlife Federation v. Marsh, 568 F. Supp. 985 (D.D.C. 1983), cited by plaintiffs, is instructive by way of contrast. In Marsh, the court enjoined the Army from authorizing any activity under a permit to build an oil refinery because the Army omitted data relating to transportation costs and cost-benefit analysis from the final EIS and supplemental EIS, but included that data in a Staff Evaluation. The cost-benefit analysis evaluated issues that were directly germane to the environmental choices before the agency, and the court correctly reasoned that failure to provide the analysis in accordance with NEPA's procedural requirements was fatal to the agency action. Marsh, 568 F. Supp. at 998.

In this case the failure of the Secretary to obtain public comment on the cost-benefit analysis does not constitute a departure

from NEPA procedure that warrants invalidating the regulations. Whether or not this failure represents a procedural flaw pursuant to the Magnuson Act that affects the validity of the regulations is an issue that is not before the court at this time.

2. The failure to publish the final SEIS before approval of the allocation

Plaintiffs are correct in their assertions that the Secretary approved the regulations before the final SEIS was issued. CEQ regulation 40 C.F.R. § 1506.10(b) provides as follows:

> No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:
>
> . . .
>
> (2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

C.F.R. § 1506.10(b). Plaintiff would have the court find that any violation of NEPA procedure automatically invalidates a regulation. The court holds otherwise.

While courts have expressed concern that the procedural requirements of NEPA be strictly enforced so that the process not be subverted and become a "useless ritual, defeating the purpose of NEPA, and rather making a mockery of it," see National Resources Defense Council v. Callaway, 524 F.2d 79, 92 (2nd Cir. 1975), the courts have also required that the violation be "substantial," see Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985), not merely "inconsequential" or "technical." Oregon Environmental Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987). Typically, in cases

where agency action has been stricken down by the courts, there has been little doubt that the procedural violations were substantial. See, e.g., Bob Marshall Alliance, 852 F.2d at 1227-28 (court enjoined activity pursuant to oil and gas leases issued by government in Lewis and Clark National Forest because leases had been issued without preparation of EIS or consideration by government of alternatives to leases); Thomas, 753 F.2d at 763 (court held that Forest Service should be enjoined from taking action to build timber road in former National Forest roadless area, because Forest Service had decided to build without having performed biological assessment of Rocky Mountain Gray Wolf, an endangered species listed under the Endangered Species Act). In those cases, the purpose of NEPA, namely to ensure consideration of environmental factors in major federal decision-making, would have been thwarted had the courts not granted the plaintiffs relief for defendants' procedural violations.

This case presents a dramatically different situation. Here, the defendants issued two draft supplemental environmental impact statements, see Admin. Record No. 38, 42, and obtained comments thereon before the Secretary approved the allocation. It is undisputed that the final SEIS, issued one day after the Secretary approved the allocation, was identical to the second draft SEIS, with the exception that the final statement included the cost-benefit analysis and comments and responses to comments on the draft SEIS. See Plaintiffs' Memorandum in support of motion for summary judgment, p. 12, lines 3-16. The environmental analysis contained

therein had been available for public comment and indeed, had been extensively commented upon by the relevant reviewing agencies. See Memorandum for Dr. John Knauss from Frank DeGeorge, Commerce Department Inspector General, with Audit Report, dated February 1992, Admin. Record No. 505; Presentation to the Administrator on Proposed Amendments 18/23 to the Bering Sea and Aleutian Islands and Gulf of Alaska Fishery Management Plans, by J. Ginter, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS)[2]/, (Redacted), dated February 29, 1992, Admin. Record No. 492; Memorandum to Steve Pennoyer, Alaska Region Director, NMFS, from Steve Zimmerman, re: Review of Inshore/Offshore DEIS, dated October 8, 1991, Admin. Record No. 346; Memorandum for Steve Pennoyer from William Aron, Alaska Fisheries Science Center, NOAA, with three reviews of the draft SEIS attached, dated October 3, 1991, Admin. Record No. 342.

The comments to the draft SEIS that addressed potential environmental harm from the proposed allocation focused on three areas of concern: (1) that bycatch, (the unintended harvesting of species other than the intended species), might be increased, see, e.g., Memorandum from Sandra Lowe, Resource Ecology and Fisheries

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[2]/ NMFS is an agency of NOAA, and is responsible for planning and administering fishery management activities and policy for the Department of Commerce. NMFS is headed by the Assistant Administrator for Fisheries, who reports to the Under Secretary for Oceans and Atmosphere, the head of NOAA. The organizational structure of NMFS includes regional directors who arrange for services and support to each of the eight regional fishery management councils established by the Magnuson Act. See Audit Report of Inspector General of the Commerce Department at p. 3, Admin. Record No. 505.

Management Division of Alaska Fisheries Science Center, NMFS, to J. Ginter, re: Response to request for additional information, dated February 5, 1992, Admin. Record No. 470 at p.6; (2) that pollution from shoreside factories might be increased, see Id. at p. 5-6.; and (3) that the inshore allocation might deplete the food supply of marine mammals and birds that live near shore, see Memorandum and Audit Report for Dr. John Knauss from Frank DeGeorge, Admin. Record No. 505 at p. 16; Memorandum from Steve Zimmerman, NMFS, to Steve Pennoyer, dated Oct. 8, 1991, Admin. Record No. 346 at p.4; Memorandum from Susan Mello, Ecologist, Protected Resources Management, NMFS, to Lisa Lindeman, Office of General Counsel, dated Jan. 27, 1992, Admin. Record No. 462.

It is clear that these areas of environmental concern were either discounted in the comments or considered by the Department. With respect to bycatch, NMFS concluded in its comments on the draft SEIS that although limits on bycatch possibly would be attained more quickly under the proposed allocation, the overall removal of prohibited species would be unchanged because total bycatch already is limited by caps. See Lowe Memo to J. Ginter, Feb. 5, 1992, Admin. Record No. 470 at p.6 (caps on bycatch possibly would have effect of shutting down some fisheries before attainment of allocation). Concerning the possibility that the regulations will contribute to increased processing waste from onshore factories, NMFS commented as follows:

> "Under this alternative, the amount of processing waste being discharged would not increase relative to the status quo. There could be increased discharges nearshore. Current indications are that the amount and type of

> processing discharge are not negatively impacting the environment. Potential adverse effects of any additional discharges of processing waste into the environment would be reduced if existing EPA requirements were more closely adhered to . . . .

Lowe Memo to J. Ginter, Feb. 5, 1992, Admin. Record No. 470 at p. 5.

The Inspector General of the Commerce Department, NOAA, NMFS and the Environmental Protection Agency (EPA) all comment on the inadequacy of the September 19, 1991, draft SEIS with respect to possible adverse effects on Steller sea lion populations, and raise concerns that the Steller sea lions possibly would require additional protection if the inshore allocation were adopted. See Memo and Audit Report from Frank DeGeorge, Commerce Dept. Inspector General, to Dr. John Knauss, dated February 1992, Admin. Record No. 505 at p. 16; Memo from Susan Mello, NMFS ecologist, to Lisa Lindeman, dated January 27, 1992, Admin. Record No. 462; Memo from Steve Zimmerman to Steve Pennoyer, dated October 8, 1991, Admin. Record No. 346 at p.4. It is evident from the record that the Commerce Department responded to concerns relating to Steller sea lions by conducting an Endangered Species Act (ESA) Section 7 consultation. See Memorandum from Steven Pennoyer re: ESA Section 7 Consultation, Dated November 12, 1991, Admin. Record No. 380. As a result of this consultation and its report, the Department developed regulations increasing the buffer zone in which fishing is prohibited surrounding Steller sea lion rookeries from a 3-mile radius to a 10-mile radius, in conformity with the recommendations of NMFS in the Section 7 Consultation Biological Opinion. See ESA Section 7 Consultation Biological Opinion at p. 3, Admin. Record

380; NMFS Biological Opinion Letter, Admin. Record No. 514. These regulations were implemented in January 1992. See 57 Fed. Reg. 2683.

The Secretary also addressed the question of the effect of the inshore allocation on Steller sea lions and other listed species in the response to Comment 13(b) accompanying the published regulations. See 57 Fed. Reg. 23329, Comment 13(b) and Response. The Secretary indicated that NMFS predicted a concentration of fishing effort on the southeastern Bering Sea Aleutian Island shelf in 1992. The Secretary therefore expanded no-trawl zones around Steller sea lion rookeries during the 1992 first season pollock allowance, which NMFS anticipated would mitigate any potential adverse impact to Steller sea lions of increased harvests on the southeastern BSAI shelf. The Secretary goes on to state that with respect to the "B" season harvest, the allocation would, in fact, limit to a greater extent the amount of fishing effort that would be conducted in areas known to be important foraging and breeding grounds for the Steller sea lion. See 57 Fed. Reg. 23330. It is significant to the court that all of plaintiffs' concerns regarding the threat to the Steller sea lions cite to comments made by NMFS and NOAA before implementation of the 10-mile buffer zone in January 1992.

The complete record in this case demonstrates that despite the timing of the final SEIS, the agency received public comment and the Secretary considered and evaluated the environmental impact of the allocation.

Protection of the environment is the purpose of NEPA. In this instance, the timing of the final SEIS did not result in a failure on the part of the agency to consider the possible harm to the environment that might result from the proposed regulations. Thus, the timing defect is not substantial and should not be grounds for invalidating the regulations. Plaintiffs' motion for partial summary judgment on the NEPA claims is denied. Defendants' motion for partial summary judgment on the NEPA claims is granted.

III. STATUTORY AUTHORITY UNDER THE MAGNUSON ACT

Intervenor-plaintiff AIF moves for partial summary judgment on its claim that the challenged regulations are beyond the scope of rule-making authority granted to defendants by Congress under the Magnuson Act, 16 U.S.C. §§ 1801 et seq. AIF argues that: the Magnuson Act grants defendants authority to allocate fish among fishermen only, not among processors; and since the regulations allocate fish to onshore processors, the regulations therefore exceed defendants' authority under the Act. Defendants cross-move for partial summary judgment, arguing that the regulations are within defendants' authority under the Act.

In reviewing an agency's construction of the statute which it administers, the court first looks to whether Congress has directly spoken to the question in the statute. If the intent of Congress is clear, the court must give effect to that intent. If Congress has not directly addressed the precise question, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Chevron U.S.A., Inc., v. National

Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). In general, the court will defer to the interpretation of a statute by the agency charged with administering it, Washington Crab Producers, Inc., v. Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990), but will not defer to agency action which rewrites rules that Congress has affirmatively and specifically enacted. See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

As a threshold matter, the court notes that the Alaska fishery is a complex industry in which inshore and offshore fishing fleets compete directly for a finite resource, with the additional complicating factor that the industry as a whole is overcapitalized. See Supplementary Information, Purpose and Description of Allocations, 57 Fed. Reg. 23322. Further, there exists an interdependent relationship between the coastal fishing fleet and inshore processing sector located in Alaska, whereas the offshore catcher-processor fleet has ties to the State of Washington. See Affidavit of Robert Watson, Exhibit A attached to Declaration of George J. Mannina in opposition to AIF motion for partial summary judgment. That the balancing of interests involved in the Alaska fishery is a complex matter calling for agency expertise is attested to by the vast size of the Administrative Record filed in this lawsuit. In cases such as this, "where the resource to be managed and the act, regulations, and case law are complicated," the agency's construction of its enabling legislation and regulations is accorded particular deference." Washington Crab Producers, 924 F.2d at 1447 (9th Cir. 1990).

The challenged regulations allocate fish between an "inshore component" and an "offshore component." See 57 Fed. Reg. 23344, § 672.20; 57 Fed. Reg. 23346, § 675.20-.22. The term "inshore component" is defined as that part of the fishery that includes all shoreside processing operations, and certain processor vessels meeting specific geographic and size requirements. The term "offshore component" is defined as all processor vessels not included in the definition of "inshore component." See 57 Fed. Reg. 23344, § 672.2; 57 Fed. Reg. 23345, § 675.2. Vessels that catch fish but do not process their catch at sea are identified under the regulations as "catcher vessels." See id. "Catcher vessels" are not included in the definition of either the "inshore component" or the "offshore component." See id. Rather, their harvests are counted against either the inshore or offshore allocations, depending on where they deliver the fish for processing. See 57 Fed. Reg. 23324, Supplementary Information, Inshore and Offshore Definitions.

The Secretary is authorized to implement fishery management plans. 16 U.S.C. § 1853. The regulations must be necessary for the management of fishing and consistent with applicable law to be within the authority of the Secretary. 16 U.S.C. § 1853 (1).

1. Coastal fishing communities

The record contains evidence that certain fishermen in the North Pacific depend on inshore processors for their market while other fishermen depend on offshore catcher-processors or processing motherships. See Watson Affidavit at paragraphs. 6 & 8. Further,

if there were no allocation to inshore processors, offshore catcher-processors would quickly harvest the quota of fish. See id.

The Secretary has responded as follows to public comment on the inshore allocation:

> The objectives of Amendments 18/23 were to address the problems of (1) The future ecological, social, and economic health of the resource and the industry; (2) excessive harvests and processing capabilities; (3) resource allocation; and (4) appropriate management measures to advance the conservation needs of the area. The future ecological, social, and economic health of the resource and the industry is being addressed by the allocations as approved by controlling the percent of the fishery resource that can be taken by the offshore sector. The factory trawler fleet is capable of harvesting a large amount of fish in a short period of time, which can quickly lead to an overharvest. Evidence of the high harvesting capability occurred in 1991 when the third quarter specification for pollock was obtained in a little over one month for both the Central and Western subareas of the GOA and the fishery had to be closed prior to the end of the third quarter, September 29, 1991.

57 Fed. Reg. 23328, Secretary's response to comment 9. With respect to the Gulf of Alaska fisheries, the Secretary stated as follows:

> The GOA fisheries for pollock and Pacific cod are primarily conducted from Kodiak and Sand Point. Both communities are historically dependent on commercial fisheries for their existence. Fishermen who base their operations in Kodiak and Sand Point operate smaller vessels than those used in the Bering Sea fisheries and land their catches for processing in Alaskan ports. These fishermen pursue an annual round of fisheries in the GOA, shifting among fisheries for Pacific cod and pollock, halibut, and salmon depending on the season. The seasonal round of fisheries provides relatively stable employment for fishermen and processing workers on a year-round basis. While seasonal species composition varies with stock abundance, these fisheries have provided the bulk of the employment in these communities. The loss of any one element of the seasonal round of fisheries, such as pollock, that is not replaced, would result in significant social costs.

57 Fed. Reg. 23323.

Support for coastal fishermen is one of the purposes of the Magnuson Act. Among Congress's Findings in the Act was that "[m]any coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. 16 U.S.C. § 1801 (a) (3). Pursuant to the Act, fishery management plans are to "take into account the social and economic needs of the States." 16 U.S.C. § 1801 (b) (5). In developing an allocation of fishing privileges, Regional Councils are to consider "economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery by present participants and coastal communities, . . ." 50 C.F.R. § 602.14 (c) (3) (iv). The court finds that the challenged regulations are consistent with these statutory purposes and do not exceed the Secretary's rulemaking authority.

2. National Standard 4

AIF argues that the regulations are inconsistent with National Standard 4 of the Magnuson Act, which provides as follows:

> Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851 (4). AIF argues that the reference in National Standard 4 to allocation of fishing privileges among fishermen indicates that Congress intended the agency to allocate fishing

privileges only among fishermen, not processors. However, National Standard does not express "clear congressional intent" to prohibit the allocation which AIF challenges. See Chevron, 467 U.S. at 843, n.9 (1984) (court must reject administrative constructions which are contrary to clear congressional intent). Although the challenged regulations allocate fish to the "onshore component," which is defined to include onshore processors, the allocation in effect assigns fishing privileges among fishermen: those who process their catch at sea, and those who deliver their catch for processing on shore. The legitimate purpose of the allocation is to preserve a share of the resource for fishermen who deliver their catch for processing on shore. AIF fails to persuade the court that the regulations are inconsistent with the requirements set forth in National Standard 4.

3. General Counsel memorandum

AIF argues that General Counsel for the Commerce Department has acknowledged that the Department lacks authority to allocate fish to onshore fish processors. AIF points to a memorandum written by Margaret Frailey in connection with unrelated proposed regulations. See Memorandum to North Pacific Fishery Management Council from Margaret H. Frailey, Assistant General Council for Fisheries, and Craig R. O'Conner, Alaska Regional Attorney, dated December 1, 1989, at p. 13, Exhibit A attached to Declaration of Michael R. Scott in support of motion for partial summary judgment. The relevant language of the memorandum provides as follows:

> The risk in mandating particular uses of harvested fish is that a court, in reviewing the statute, its history, and

> the agency practice in implementing it, may conclude that direct regulation of processors is a new venture, outside the original intent of Congress. A court might discern a limited authority over anyone beyond the harvester, since the Magnuson Act is so elaborately focused on harvesting activities. Even the processor-preference amendment stopped short of requiring harvesters to deliver fish to U.S. processors or interfering in the business arrangements between processors and harvesters.

Id. The General Counsel's observations about regulating processors do not apply to the regulations this case. Whereas the proposed regulations at issue in the General Counsel's memorandum would have prohibited processors from engaging in particular conduct,[3]/ the regulations challenged by AIF do not purport to control the conduct of processors. Rather, they in effect regulate offshore catcher-processors, which would otherwise preempt the coastal sector of the fishing industry. As the Secretary has stated:

> The amendments do not make specific allocations among shore-based processors. Amendments 18/23 allocate fish between fishing vessels that deliver to either the "inshore component" or "offshore component." The allocation applies directly to fishing vessels because it limits the amount of fish a vessel can deliver either component. The Secretary is authorized to make such an allocation under the Magnuson Act.

Comment and Response No. 22, published with the Final Regulations, 57 Fed. Reg. 23331.

The court notes that other federal district courts that have considered the Commerce Department's authority to regulate complicated matters involving fisheries pursuant to the Magnuson Act have declined to adopt a restrictive approach. In National Fisheries

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[3]/ The conduct at issue was roe-stripping by processors: "stripping" roe from female fish while discarding male pollock and female carcasses. See Frailey Memorandum at p. 1.

Institute, Inc. v. Mosbacher, 732 F. Supp. 210 (D.D.C. 1990), the court upheld the agency's authority to adopt a fishery management plan which prohibited commercial fishermen from possessing, retaining, or selling billfish, and which required seafood dealers and processors to document billfish in their possession in order to show that it was not harvested from their management unit. See Id. at 213, 218. The plaintiffs in National Fisheries Institute argued that the measure prohibiting possession of billfish exceeded the scope of the Secretary of Commerce's authority because it applied to fish possessed in the EEZ without regard to where they were harvested. The court concluded that although the plaintiffs possibly were correct that the provision indirectly regulated fishing which occurs outside the EEZ, the dispositive issue was "whether interpreting the Magnuson Act to authorize such indirect regulation is a permissible construction of the statute," and held that the Act did authorize such regulation. Id. at 215. In Stinson Canning Co. Inc. v. Mosbacher, 731 F. Supp. 32 (D. Me. 1990), the court upheld a measure which prohibited importation of undersized groundfish, despite a lack of explicit authority under the Magnuson Act for the Secretary to regulate foreign imports.

Accordingly, intervenor-plaintiff AIF's motion for partial summary judgment is denied. Defendants' and intervenor-defendants' cross-motion for partial summary judgment on AIF's statutory authority claim is granted.

NOW, THEREFORE, it is ORDERED as follows:

(1) Plaintiff's and intervenor-plaintiffs' motion for partial summary judgment on their NEPA compliance claims is DENIED;

(2) Defendants' and intervenor-defendants' cross-motion for partial summary judgment on the NEPA compliance claims is GRANTED;

(3) Intervenor-plaintiff AIF's motion for partial summary judgment on its statutory authority claim under the Magnuson Act is DENIED;

(4) Defendants' and intervenor-defendants' cross-motion for partial summary judgment on AIF's statutory authority claim is GRANTED.

DATED at Seattle, Washington this 23rd day of July, 1992.

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN FACTORY TRAWLER ASSOCIATION,

Plaintiff,

and

AMERICAN INDEPENDENT FISHERMEN and NORTH PACIFIC LONGLINE ASSOCIATION, and ROYAL SEAFOODS, INC.,

Intervenor-Plaintiffs,

v.

D. JAMES BAKER, Under Secretary of Commerce for Oceans and Atmosphere, United States Department of Commerce, and RONALD H. BROWN, Secretary, United States Department of Commerce,

Defendants,

and

PACIFIC SEAFOOD PROCESSORS ASSOCIATION, et al.,

Intervenor-Defendants.

NO. C92-870R

ORDER DENYING PLAINTIFF NPLA'S MOTION FOR SUMMARY JUDGMENT AND GRANTING FEDERAL DEFENDANTS' AND INTERVENOR-DEFENDANTS' CROSS MOTIONS FOR SUMMARY JUDGMENT

BSR CNSL

THIS MATTER comes before the court on cross motions for summary judgment by plaintiff North Pacific Longline Association

("NPLA"), federal defendants and intervenor-defendants. Having reviewed the motions together with all documents filed in support and in opposition, having heard oral argument, and being fully advised, the court finds and rules as follows:

Plaintiff NPLA seeks judicial review of a final rule adopted by defendant Secretary of Commerce implementing an amendment to a Fishery Management Plan formulated pursuant to the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 et seq., which allocates fish between the inshore and the offshore components of the fishing industry in the Gulf of Alaska as well as the Bering Sea and Aleutian Islands.[1] The final rule challenged by the NPLA includes longline vessels with a production capacity of more than 18 tons round weight per day and a length of more than 125 feet in the offshore component of the Gulf of Alaska fishery.[2] The NPLA asserts that this rule violates the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because it is arbitrary and capricious. It is the NPLA's contention that longliners should be included in the inshore component of the industry.

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[1]In the NPLA's initial brief, there was some language tending to indicate that the NPLA was challenging the recommendation of the North Pacific Fishery Management Council which was later adopted by the Secretary rather than the final rule itself. Later briefing and counsel's argument clarified that the NPLA was indeed challenging the final rule, as well as the fact that the court should examine the entire record, including the Council's deliberations, in order to ascertain the legality of the final rule.

[2]Longline vessels or longliners harvest fish by dragging lines behind the vessel baited with hooks rather than by using nets.

The Secretary's action in adopting a final rule is subject to extremely limited judicial review. Because the Secretary has substantial discretion in the exercise of his management authority under the Magnuson Act, his decisions are reviewed only for reasonableness. Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990). The court may not substitute its own judgment for that of the Secretary. In order to prove that a decision is arbitrary and capricious, the moving party must show that there is no rational basis for it and that the record is devoid of reasonable evidence supporting the decision. Organized Fishermen of Florida, Inc. v. Franklin, 846 F. Supp. 1569, 1573 (S.D. Fla. 1994).

In this case, the NPLA's argument boils down to two points. First, it argues that there is no rational basis in the record for the conclusion that large freezer-longliners might exercise preemptive fishing capability if included in the inshore component, and that it was accordingly arbitrary and capricious for the Secretary to place them in the offshore component for that reason.

Having carefully reviewed all references to the record in the briefs and at oral argument, the court concludes that the NPLA's first point is not well founded. It may be true that there is no evidence in the record that large freezer-longliners had exercised preemptive power prior to the adoption of the challenged rule. But the Secretary is not necessarily limited to regulating the fishery for existing problems. He can also regulate to ward off a potential threat before the problem matures as long as there is a

rational basis for the prediction. Sea Watch International v. Mosbacher, 762 F. Supp. 370, 378-79 (D.D.C. 1991).

In this case, the North Pacific Fishery Management Council ("the Council") considered a number of alternative management options with various definitions of the inshore and offshore component. After initially deciding in April of 1990 to place all longliners in the inshore component, the Council again considered the issue during its meetings from June 24-29, 1991 and concluded that longliners above a certain length and production capacity should instead be placed in the offshore component. Reasons stated on the record for this switch included the high mobility of the larger longliners coupled with the risk of preemption if all larger longerliners were to concentrate on one spot, and evidence that factory trawlers could easily convert to freezer longliners and were doing so. This evidence was also before the Secretary.

The NPLA attacks the comments in the record as speculative and conjectural. Even if this were so, it would not automatically mean that conclusions based on those comments must be arbitrary and capricious. As Sea Watch states, special deference is due to regulatory agencies where the issue turns on predictions about the future in an area of technical or scientific expertise. 762 F. Supp. at 379. The Magnuson Act places the responsibility for making recommendations to the Secretary on the members of the Council precisely because of their knowledge of the fishing industry, including knowledge which permits them to make informed predictions about future problems. Thus, it is not necessarily

unreasonable to rely on speculation leading to a considered judgment in the rulemaking process.

Second, NPLA contends that the Secretary's decision is arbitrary and capricious because he relied on an input/output analysis ("I/O analysis") which assumed that the longliners were included in the inshore component, and did not redo the analysis after the longliners were shifted to the offshore component.

The court finds no merit in this argument. The I/O analysis to which the NPLA refers was completed before the Council's final recommendation placing the longliners in the offshore component. While that analysis was not redone to take into account the change, there is no requirement that every study and analysis must be reworked to include every modification in the Council's recommendations. Instead a cost-benefit analysis ("CBA") was prepared.

NPLA criticizes the CBA on the grounds that it did not include any data on the longliners and thus could not have resulted in an accurate calculation of the economic effects of moving longliners from the inshore to the offshore component. However, the catch attributable to the longliners is a very small percentage of the total harvest. Even if the CBA had included data on the longliners, it would have made very little difference to the ultimate conclusions of the analysis.[3]

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[3]By saying this, the court does not mean to downplay the significance of the issue to the longliners themselves or to suggest that their arguments are not worthy of serious scrutiny. The court simply concludes that, for purposes of the CBA, the longliner data was a very small part of the overall analysis.

For the above-stated reasons, the court finds that the Secretary's decision to place larger longliners in the offshore component of the Gulf of Alaska was not an arbitrary and capricious decision. The NPLA's motion for summary judgment is accordingly DENIED; the federal defendants' and intervenor-defendants' cross motions for summary judgment are GRANTED.

DATED at Seattle, Washington this 5th day of July, 1995.

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN FACTORY TRAWLER ASSOCIATION, Plaintiff, and AMERICAN INDEPENDENT FISHERMEN, et al., Intervenor-Plaintiffs, v. JOHN A. KNAUSS, et al., Defendants, and PACIFIC SEAFOOD PROCESSORS ASSOCIATION, et al. Intervenor-Defendants.	NO. C92-870R MEMORANDUM OPINION RE: CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON MAGNUSON ACT AND ADMINISTRATIVE PROCEDURES ACT CLAIMS

THIS MATTER comes before the court on a motion by intervenor-plaintiff Royal Seafoods, Inc. ("RSI"), joined by intervenor-plaintiff American Independent Fishermen and plaintiff American Factory Trawler Association, for partial summary judgment under the Magnuson Act and the Administrative Procedures Act. Defendants

Knauss and Franklin as well as intervenor-defendants[1] cross-move for partial summary judgment. Having reviewed the motions together with all documents filed in support and in opposition including the administrative record, having heard oral argument and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

A. Introduction

The court has already set forth the background of this case in a prior Order Regarding Parties' Cross-Motions for Partial Summary Judgment signed on July 23, 1992. In the motion now before the court, plaintiffs allege that defendants Barbara H. Franklin, Secretary of the State Department of Commerce and John A. Knauss, Under Secretary of Commerce for Oceans and Atmosphere (hereafter "the Secretary") violated the Magnuson Act, 16 U.S.C. § 1801 et seq., and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et seq., by failing to obtain public comment on a cost-benefit analysis which was prepared by the National Marine Fisheries Service ("NMFS") and relied on the Secretary in making a final decision on Amendment 18 to the Fishery Management Plan ("FMP") for the Groundfish Fishery of the Bering Sea and Aleutian Islands, and Amendment 23 to the FMP for the Groundfish Fishery of the Gulf of Alaska (hereafter "Amendments 18/23"). Plaintiffs argue that the

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[1]Intervenor-defendants include Pacific Seafood Processors Association, Southwest Alaska Municipal Conference, Horizon Trawlers, Inc., Midwater Trawlers Co-operative, Marino T. Villanueva, The Aleutians East Borough, Peninsula Marketing Association, The Kodiak Island Borough, Alaska Groundfish Data Bank, Sea Wolf Limited Partnership, and Alaska Draggers Association.

Secretary's regulations adopting Amendment 23 and a portion of Amendment 18 are accordingly invalid. See 57 Fed. Reg. 23, 321 (June 2, 1992), to be codified at 50 CFR §§ 672.2, 672.20, 675.3, 675.20 and 675.22.

Defendants in turn cross-move for partial summary judgment, declaring that neither Act was violated because the Secretary properly considered the cost-benefit analysis in making her final decision, and was not required to delay her approval of Amendments 18/23 until she had obtained additional public comment on the results of the analysis.

B. Regulatory History

The North Pacific Fisheries Management Council ("the Council") is responsible for overseeing the development of the FMPs involved in this case. In 1989, the Council began working on regulations which would allocate shares of the pollock and Pacific cod harvest in the Bering Sea and Aleutian Islands ("BSAI") and in the Gulf of Alaska ("GOA") between inshore and offshore fishing interests. See 56 Fed. Reg. 66010 (Dec. 20, 1991). Over the next year or so, the Council developed a range of seven management alternatives, which it then began analysing in terms of projected social, environmental and economic consequences.

In particular, the Council's technical team of economists produced an input-output ("I/O") analysis of the proposed alternatives, which was initially published in an April 23, 1991 Draft Supplemental Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis ("DSEIS/RIR").

Administrative Record ("AR") 38, Chapter 3. A Notice of Availability for the DSEIS/RIR was published in the Federal Register on May 10, 1991 and public comment was accepted until June 23, 1991. 56 Fed. Reg. 21675 (May 10, 1991). At its June 1991 meeting, the Council voted to adopt Amendments 18/23, which combined aspects of several of the proposed management alternatives and set forth allocations for the 1992-1995 seasons. AR 116. In the GOA, the Council voted to allocate 100% of the pollock and 90% of the Pacific cod to the inshore component. In the BSAI, the Council phased in the allocation over four years starting with a 65/35 split for the offshore and onshore components respectively, and ending in 1995 with approximately a 55/45 split.

Prior to the publication of the DSEIS/RIR in April, NMFS staff began reviewing the Council's research including its economic analysis. Over the next few months, NMFS repeatedly criticized the assessment of economic impact as inadequate and strongly recommended that some form of cost-benefit analysis should be done to supplement the record.[1] AR 303, p. 5. See also, Exhibits D, E, G and H to Declaration of Michael Helgren submitted in support of RSI's Motion for Partial Summary Judgment.

On September 19, 1991, the Council issued a revised DSEIS/RIR. AR 42. NMFS economists concluded that this document again failed

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[1]Pursuant to the Magnuson Act, 16 U.S.C. § 1851, all FMPs must be consistent with certain national standards, including § 1851(a)(7), which requires that regulations implementing plans or plan amendments result in a net benefit to the Nation. It was the opinion of the NMFS economists that only a cost-benefit analysis could adequately assess the net economic value of the management alternatives proposed by the Council.

to address the serious shortcomings in economic analysis present in the earlier DSEIS/RIR. See Exhibit F to Helgren Declaration. Nevertheless, the Council affirmed its decision to approve Amendments 18/23, AR 319, and sent them to NMFS for review and approval. AR 335, 337.

On November 13, 1991, the NMFS Alaska Regional Director recommended that the Secretarial review process on Amendments 18/23 should proceed. AR 380. In doing so, he certified that the "amendment package" was complete because it contained all of the required documents. But he also noted that serious questions and reservations had been voiced about whether Amendments 18/23 met applicable legal standards and that "[w]e have substantive critical comments on the SEIS from our staff, particularly our economists, concerning the lack of a cost-benefit analysis of the alternatives. . . ." Id. at 2. See also the final audit report dated February 1992 from the Office of Inspector General to defendant Krauss which examined at length the process by which the Council developed and adopted Amendments 18/23. AR 505. The report harshly criticized the Council's use of an I/O rather than a cost/benefit analysis framework for evaluating the proposed management alternatives. Id. at 7-14.

On December 20, 1991, the Secretary published Amendments 18/23 in the Federal Register as a proposed rule. 56 Fed. Reg. 66009 (Dec. 20, 1991). In introducing and describing the proposal, the Secretary stated:

> A major concern identified during the preliminary review by the Secretary of Amendments 18 and

> 23 is that the economic analysis submitted by the Council may be fatally flawed. The economic analysis does not appear to contain a full quantitative analysis of costs and benefits expected, should these two amendments be approved by the Secretary. NMFS will conduct a separate economic analysis on the proposed management measures prior to final action to approve, disapprove, or partially disapprove the amendments.
>
> . . .Comments are specifically requested on the adequacy of the economic analysis to support findings of compliance with national standards 2 (best scientific evidence), 4 (fair and equitable allocations), 5 (justification for economic allocations), and 7 (net benefits to the Nation).

Id. at 66010.

As the Secretary had indicated in the Federal Register, NMFS prepared a cost-benefit analysis of Amendments 18/23 which was submitted in draft form to the Secretary on February 14, 1992 with a supplement dated March 3, 1992. AR 480, 510.

On March 4, 1992, defendant Under Secretary Knauss approved Amendment 23 in its entirety on the grounds that it "would result in sufficient benefits to balance the net economic loss." AR 515. He also approved the 1992 allocation in Amendment 18. But he disapproved the Amendment 18 allocations recommended by the Council for 1993 through 1995:

> With respect to the 1993-1995 allocations, the record now includes cost-benefit data showing a large net economic loss for that fishery from 1993 through 1995, without evidence of enough social or other benefits to counter that loss. As a result, on the present record, the disapproved measures would violate national standard 7 and Executive Order 12291.

Id.[3] The disapproved portion of Amendment 18 was accordingly sent back to the Council for further consideration.

As for the approved portions of Amendments 18/33, the SEIS was filed with the Environmental Protection Agency on March 13, 1992 and the final rule was published on June 3, 1992 to be effective immediately. 57 Fed. Reg. 23321 (June 3, 1992). In explaining the basis for her decision, the Secretary addressed the role of the economic information:

> During the public comment period, NOAA [National Oceanic and Atmospheric Administration] used the Council's data to review the Council's findings that the proposed allocations would result in net national benefits. NMFS cost-benefit data, as well as the Council's input-output analysis and information regarding social benefits to coastal communities, were part of the administrative record considered by the Secretary in evaluating the costs and benefits of the amendments. The Council found national benefits would result associated with maintaining a balance in the social and economic opportunities inherent in the fisheries of the GOA and the BSAI. NMFS economic data, when considered along with the information in the record regarding the social benefits accruing to coastal communities from the allocations, confirmed the conclusions of

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[3]Under Secretary Knauss also suggested:

> The Council should examine and refine the assumptions and methodology of the NMFS economic review. . . .Clearly a cost-benefit analysis should be prepared when it is reasonably apparent from the size of a proposed allocation that the cost to the nation associated with that allocation might begin to approach the level that we are presented with by the full implementation of Amendment 18. Given the significant economic cost to the nation of the second, third, and fourth years of Amendment 18, I recommend that the Council carefully consider whether losses of that magnitude can be offset by other benefits.

AR 515 at pp. 2-3.

the Council regarding the net national benefits derived from amendment 23 for the GOA and the 1992 "B" season, only, of amendment 18 in the BSAI.

Id. at 23327.

Pursuant to the Secretary's remand, the Council began reconsidering the disapproved portion of Amendment 18 in April of 1992. The final draft of the NMFS cost-benefit analysis was released on April 14, 1992. Exhibit Q to Helgren Declaration. Because comments received on the final draft criticized its reliance on outdated information, the Council decided to redo the I/O and cost-benefit analyses using 1991 data.[4] The revised analyses were disseminated in a Supplemental Analysis to the SEIS published for public comment on July 19, 1992. Exhibit N to Helgren Declaration. After receiving comment, the Council adopted a revised Amendment 18 which established an allocation split of 35/65 for onshore and offshore interests, respectively, in 1993 and a split of 37.5/62.5 for the 1994 and 1995 seasons.

II. LEGAL ANALYSIS

Plaintiffs contend that the Secretary's failure to obtain public comment on the completed cost-benefit analysis conducted by NMFS before she made her final decision on Amendments 18/23 violated the Magnuson Act and the Administrative Procedure Act. For the reasons stated below, the court concludes that plaintiffs' position is not well taken.

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[4]Defendants contend and plaintiffs do not dispute that 1991 data was not available at the time that NMFS originally undertook its cost-benefit analysis.

A. Magnuson Act

The policy of Congress as declared in the Magnuson Act, 16 U.S.C. § 1801(b)(5)(3), is "to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available," and that it "involves, and is responsive to the needs of, interested and affected States and citizens." Regarding action by the Secretary after receipt of a proposed FMP amendment, the Act provides that the Secretary must immediately begin reviewing the amendment to determine whether it is consistent with applicable law, publish notice of the availability of the amendment in the Federal Register and request public comment. 16 U.S.C. § 1854(a)(1). The Act specifically states that, in undertaking the required review, the Secretary must "take into account the data, views, and comments received from interested persons." 16 U.S.C. § 1854(a)(2)(A).

B. Administrative Procedures Act

Pursuant to 50 CFR § 604.4, the Secretary is required to comply with the APA, which mandates that agencies must publish notice of proposed rulemaking in the Federal Register, including "either the terms or substance of the rule or a description of the subject and issues involved." 5 U.S.C. § 553(b)(3). Agencies must then give interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

The purpose of notice under the APA is to disclose the thinking of the agency and the data on which it relied in forming or reach-

ing a decision. Lloyd Noland Hospital and Clinic v. Heckler, 762 F.2d 1561, 1565 (11th Cir. 1985). When a proposed rule is based on scientific data, the agency should identify the data and the methodology used to obtain it. United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251 (2d Cir. 1977). If an agency notice fails to accurately portray the reasoning underlying the proposed rule, interested parties cannot comment meaningfully on the agency's proposals. Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982).

C. Secretary's Actions Regarding Cost-Benefit Analysis

In defining the issue raised by the Secretary's actions, the court must first clarify what this case does not involve. The Secretary did not withhold from interested parties, hide or disguise relevant data, studies, reports or other information which she had in her possession and on which she had relied in formulating the proposed rule. Compare Connecticut Light and Power, 673 F.2d 525.[3] This is also not a situation in which, without any

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[3]The opinion in Connecticut Light and Power condemned such practices in no uncertain terms:

> If the notice of proposed rulemaking fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. . . .In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An

notice, the agency added information to the record near or after the end of the comment period, thereby depriving interested parties of any opportunity to reply. Compare Small Refiner Lead Phase-down Task Force v. U.S. E.P.A., 705 F.2d 506, 540-41 (D.C. Cir. 1983) (late addition of evidence to the record gave interested parties little or no opportunity to submit meaningful comment).

In this case, the parties were well aware that NMFS was doing a cost-benefit analysis as part of the Secretarial process of reviewing Amendments 18/23. 56 Fed. Reg. 66010 (Dec. 20, 1991). The parties were invited to submit data or comments regarding the sufficiency of the economic analysis in the record. Plaintiffs do not dispute that much, if not all, of the information which NMFS used in performing its cost-benefit analysis was in the public domain, nor do they contest that the methodology used in such an analysis is fairly standard.

But plaintiffs strenuously argue that, despite knowing about NMFS's analysis in progress and having the opportunity to submit comments, they could not comment in a meaningful way without being privy to the assumptions used by NMFS and the conclusions reached.[6]

> agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

673 F.2d at 530-31 (footnote omitted).

[6]There is some dispute between the parties as to how much access plaintiffs had to the raw data on which NMFS relied in performing the cost-benefit analysis. However, the gist of plaintiffs' argument is not that they lacked knowledge of the data or the applicable methodology, but that they were not privy to the assumptions derived from the data and the ultimate results of the analy-

council or part of the administrative record, including certain studies. The court held that:

> In evaluating a fishery management plan, the Secretary may use a variety of information sources. . . [T]he studies cited by the Secretary in the present case were not used to establish the OY limits or the gear allocation. Rather the studies served as information by which to judge the validity of the plan.

831 F.2d at 1467.[7]

Cases decided under the APA also recognize that the Act does not automatically mandate another opportunity for comment simply because an agency considers new data after the close of the original comment period. In Chemical Manufacturers Ass'n v. U.S. E.P.A, 870 F.2d 177, 201 (5th Cir. 1989), the court reasoned that the nature of the newly considered data determines whether the agency must invite additional comment. The key consideration is whether the original notice adequately framed the subjects for discussion. Id., quoting Air Transport Ass'n v. Civil Aeronautics Board, 732 F.2d 219, 224 (D.C. Cir. 1984), quoting Connecticut Light and Power Co., 673 F.2d at 533.

In Rybachek v. U.S. E.P.A., 904 F.2d 1276 (9th Cir. 1990), plaintiffs contended that the EPA's addition of more than 6,000

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[7]Defendants make much of the distinction drawn in AFTA v. Baldridge between studies used to establish regulations and those used to judge their validity. They argue that the former use mandates a higher degree of disclosure than the latter, and that the cost-benefit analysis involved in this case falls into the latter category. This court believes that AFTA v. Baldridge did nt intend to make such a rigid distinction. Instead, the focus should be on whether, given the facts of the individual case, the public was provided with information sufficient "to make intelligent, informed, meaningful comments." Washington Trollers Ass'n v. Kreps, 645 F.2d 684, 686 (9th Cir. 1981).

pages to the administrative record after the close of the comment period violated their right to comment on the record. The court disagreed on the grounds that the additional material was the EPA's response to comments made during the public comment period, and that adding supporting documentation for a final rule in response to public comment was permissible. The court continued:

> In fact, adherence to the Rybacheks' view might result in the EPA's never being able to issue a final rule capable of standing up to review: every time the Agency responded to public comments, such as those in this rulemaking, it would trigger a new comment period. Thus, either the comment period would continue in a never-ending circle or, if the EPA chose not to respond to the last set of public comments, any final rule could be struck down for lack of support in the record.

Id. at 1286 (cite omitted).

Likewise, the court in BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642, 644-45 (1st Cir. 1979), commented that the APA "procedural rules were meant to ensure meaningful public participation in agency proceedings, not to be a straitjacket for agencies." Thus, it was "perfectly predictable" that new information would be amassed during the comment period, either submitted by the public or collected by the agency "in a continuing effort to give the regulations a more accurate foundation." BASF Wyandotte concluded that if data used and disclosed for interim regulations presented the issues for comment, than there was no need to seek new comment later even though the final results based on the receipt of new data were significantly different.

See also, Community Nutrition Institute v. Block, 749 F.2d 50, 57-58) (D.C. Cir. 1984) (agency reliance on two staff studies

completed after the close of the comment period did not occasion need for new comment where studies did not contain new information critical to agency determination, but only expanded on and confirmed information summarized in notice of proposed rulemaking); State of Texas v. Lyng, 868 F.2d 795, 798-800 (5th Cir. 1989) (lack of opportunity to comment on findings in task force report completed after close of comment period did not violate APA because most of information relied on in report was available during comment period); City of Stoughton v. U.S. E.P.A., 858 F.2d 747, 752-753 (D.C. Cir. 1988) (agency's reliance on consultant report submitted during comment period did not deprive public of procedural rights where there was notice of and opportunity to comment on issue involved); Abbott Laboratories v. Young, 691 F. Supp. 463, 466-68 (D.D.C. 1988) (agency reliance on additional solicited expert opinion did not entitle plaintiff to comment since plaintiff had already submitted memorandum on issue).

D. Inapplicability of Allegations of Procedural Violation

There is no question that the Council's analysis of the economic impact of Amendments 18/23 was seriously deficient. Not only the plaintiffs and other members of the interested public, but internal agency staff critized the shortcomings of the Council's I/O analysis. In response to this criticism, NMFS decided to do a more extensive cost-benefit analysis, published its intent in the Federal Register and invited comment on the issues raised by such an analysis. The court concludes that this process was in keeping with both the letter and the spirit of the notice and comment

is DENIED and defendants' cross-motions for summary judgment are GRANTED.

DATED at Seattle, Washington this 28th day of September, 1992.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GROUNDFISH FORUM, et al., Plaintiffs, v. WILBUR ROSS, JR., in his official capacity as Secretary of the United States Department of Commerce, et al., Defendants, and THE CITY OF ADAK, et al., Defendant-Intervenors.	No. 1:16-cv-02495-CKK

[PROPOSED] ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This Court, having reviewed the parties' cross-motions for summary judgment, and for good cause shown, hereby:

GRANTS Defendants' Cross-Motion for Summary Judgment;

DENIES Plaintiffs' Motion for Summary Judgment; and

ORDERS that Plaintiffs' Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: _____, 2017

By: _____
THE HON. COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE