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-TJK

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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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 Reply Memorandum in support of their Cross-Motion for Summary Judgment. *See* Docket ("Dkt.") 38; *see also* Dkt. 38-1 ("Memorandum" or "Defs.' Mem.").

INTRODUCTION

At issue is an amendment to the Bering Sea and Aleutian Islands ("BSAI") Groundfish Fishery Management Plan ("FMP") that sets aside a portion of the total allowable catch of Pacific cod in the Aleutian Islands ("AI") area for harvest by vessels targeting AI Pacific cod and delivering their catch to shoreplants in the AI area. As addressed in Defendants' Memorandum, this action – known as 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 increasing 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] In balancing these competing interests, NMFS did not intend to ensure the future viability of AI shoreplants or to guarantee any particular outcome for AI fishing communities. Rather, NMFS sought to achieve a more limited objective – to simply preserve an opportunity for AI fishing communities, which have far less flexibility than offshore processors to adapt to regulatory and biological changes in the AI Pacific cod fishery, to continue to participate in the fishery. It was within NMFS's statutory authority to reserve a portion of the fishery for these communities, and the administrative record demonstrates that NMFS conducted an extensive review of the available information and also weighed all the relevant factors in reaching its decision to do so.

Nothing in Plaintiffs' Opposition, *see* Dkt. 40 ("Opposition" or "Pls.' Opp."), compels a different conclusion. Based on a fly-specking of Amendment 113, Plaintiffs continue to second-

[1] For 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.

guess NMFS's exercise of judgment, arguing that Amendment 113 runs afoul of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and the Administrative Procedure Act ("APA"). But these arguments are unpersuasive. As discussed *infra*, Plaintiffs conflate the harvest set-aside with an exclusive processing privilege, infer requirements into the MSA and its National Standards where none exists, and raise conclusory objections regarding the adequacy of NMFS's decision-making that cannot be squared with the administrative record. Consequently, because Plaintiffs present no compelling grounds for overturning NMFS's exercise of judgment, Defendants' Cross-Motion for Summary Judgment should be granted.

ARGUMENT

I. Plaintiffs Misstate The Applicable Deference Standards

A. NMFS's Application Of Its Technical And Scientific Expertise Is Entitled To Heightened Deference

Courts in this Circuit have consistently given "a high degree of deference to [NMFS] in light of the scientific and technical nature of fishery management," *Natural Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 71 F.Supp.3d 35, 64 (D.D.C. 2014) (citations omitted), recognizing that it is "especially appropriate . . . 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) (emphasis added); *see also N.C. Fisheries Ass'n v. Gutierrez,* 518 F.Supp.2d 62, 79 (D.D.C. 2007) (stating that "[j]udicial review of agency action under the MSA is especially deferential") (emphasis added) (citation omitted).

No departure from this well-settled precedent is warranted here, and Plaintiffs' cramped interpretation of the terms "technical" or "scientific" fails to establish otherwise. Plaintiffs allege that the agency's decision was not based on its "application of agency technical or scientific expertise," Pls.' Opp. at 3, but rather was built on "assumptions" with respect to the viability of shoreplants, *id*. at 5. Hence, by Plaintiffs' reckoning, NMFS's decision "is not entitled to any

heightened degree of deference." *Id.*[2] This argument falters for two reasons.

First, Plaintiffs fault NMFS for "cit[ing] no calculations or scientific or published papers" in its analysis, *id.* at 3, but it was entirely appropriate for NMFS to focus on "qualitative factors" in "making [the] difficult policy judgments" required under the MSA. *Nat'l Fisheries Inst.*, 732 F.Supp. at 223. Furthermore, contrary to Plaintiffs' assertions, the record shows that NMFS did review the best available technical and scientific information in its decision-making. *See, e.g.*, AR 1000162-63 (listing the referenced studies). For example, in assessing the extent to which the harvest set-aside "could provide some stability to [AI] harvesters, shoreplants and the communities in which they are located," AR 1000118, NMFS examined a 2014 study by Sethi et al., *see* AR 7006201-08 ("Sethi study"), analyzing "economic risk – as measured by community-level fishing gross revenues variability . . . across Alaskan fishing communities over the past two decades." AR 7006201.[3] Similarly, in evaluating the "many factors for the decrease of catch in the Aleutian Islands," NMFS examined a regression analysis showing "very consistent declines" in both AI Pacific cod biomass and numerical abundance over a 23-year period. AR 1000139; *see also* AR 7006253 (referenced table with statistical analysis).[4] Plaintiffs may quibble with the

[2] Elsewhere in their Opposition, Plaintiffs appear to suggest that no deference is due. *See* Pls.' Opp. at 5 (asserting that the agency's findings are "not entitled to deference"). But this apparent argument is made only summarily and thus need not be credited by this Court. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998) (pointing out the "requirement that a [party's] arguments be sufficiently developed lest waived"). Further, to the extent that Plaintiffs contend that no deference applies to NMFS's decision in the first instance, this argument runs contrary to the "normal rules for judicial deference regarding agency action." *NVE, Inc. v. U.S. Dep't of Health & Human Servs.*, 436 F.3d 182, 196 (3d Cir. 2006) (citations omitted).

[3] The Sethi study found, *inter alia*, that fishing "portfolio size and diversification remained most strongly associated with community-level fishing revenues variability" and thus "play important roles in stabilizing community-level fishing gross revenues." AR 7006205. As NMFS noted, this study supported the agency's finding that "communities that are dependent on commercial fisheries, like Adak and Atka, can incur a higher degree of economic loss from unpredictable fishery conditions." AR 1000118.

[4] This long-term catch trend, in NMFS's view, bolstered its finding that "factors other than . . . [recent] Steller sea lion protection measures are believed to have had a greater impact on total Pacific cod catch by trawl CVs in the Aleutian Islands." AR 1000139.

conclusions that NMFS drew from this information, but it is readily apparent that NMFS did, in fact, consider technical and scientific information.

Second, NMFS's analysis of the likely socio-economic impacts of Amendment 113 was a product of its technical and scientific judgment. Plaintiffs appear to press for a more restrictive interpretation of "technical" and "scientific," *see* Pls.' Opp. at 3, but courts have interpreted these terms broadly. *See, e.g.*, *United States v. Frazier*, 387 F.3d 1244, 1261 & n.14 (11th Cir. 2004) (stating that, in evaluating expert testimony, "[s]cientific evidence encompasses so-called hard sciences (such as physics, chemistry, mathematics and biology) as well as soft sciences (such as economics, psychology, and sociology)") (citation omitted); *cf. Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (noting that evidentiary rules make "no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge"). Thus, as the Supreme Court has clarified, "[e]conomic, statistical, technological, and natural and social scientific data" may present "significant science-related issues." *General Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (citing Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (Apr. 2, 1990)). So too here, where NMFS analyzed exactly this sort of data in considering Amendment 113, and therefore NMFS's exercise of its technical and scientific judgment is entitled to heightened deference. *See, e.g., Oceana, Inc. v. Pritzker*, 26 F.Supp.3d 33, 41 (D.D.C. 2014) (noting "courts pay agencies 'an extreme degree of deference'" in reviewing "'complex judgments about . . . data analysis that are within the agency's technical expertise'") (citation omitted).

B. *Chevron* Deference Applies To NMFS's Interpretation Of The MSA

Plaintiffs' other deference-related argument – that *Chevron* deference should not apply to "NMFS'[s] interpretation . . . that [its] regulation extends to onshore processors," Pls.' Opp. at 6 – is puzzling.[5] To be clear, NMFS has made no such interpretation with respect to the regulation

[5] As discussed in Defendants' Memorandum, an agency's interpretation of a statute is reviewed under the two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *see also* Defs.' Mem. at 11-12. As relevant here, an agency's interpretation of a statute must be upheld if it "reflects a plausible construction of the statute's plain language and

of onshore processors. To the contrary, the agency has explicitly acknowledged that it lacks the "specific authority . . . to directly regulate on-shore groundfish processing activities." 71 Fed. Reg. 67,210, 67,210 (Nov. 20, 2006). For this reason, as discussed *infra*, Amendment 113 only regulates harvesting, consistent with NMFS's interpretation of the MSA's definition of "fishing." 16 U.S.C. § 1802(16); *see also* Defs.' Mem. at 17; AR 1000272 (clarifying that Amendment 113 sets aside for a limited time a portion of the AI total allowable catch ("TAC") "for harvest") (emphasis added); AR 1000037 (noting that the action prioritizes AI TAC "for harvest by catcher vessels delivering their catch for processing by shoreplants in the AI") (emphasis added).[6] Thus, Plaintiffs' efforts to sidestep *Chevron* deference by attacking a different interpretation – one that NMFS has not made – should be rejected.

II. Amendment 113 Creates No Exclusive Processing Privilege

As emphasized in Defendants' Memorandum and *supra*, Amendment 113, by its terms, only regulates "harvest by vessels." AR 1000273 (emphasis added); *see also* Defs.' Mem. at 14-15, 17-18. Hence, no processing permits are issued to shoreplants under Amendment 113. Nor does Amendment 113 impose any requirement that a shoreplant receive or process any amount of catch. Amendment 113 only directs the harvesters that participate in the set-aside to deliver their catch to "any shoreplant" in the AI area. AR 1000275. Stated differently, Amendment 113 was meant to regulate only the activities of harvesters, it was crafted only in terms of regulating harvesters, and it functions only as a regulation on harvesters. *Cf. Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 & n.2 (D.C. Cir. 1989) (adopting the "now-infamous 'duck-test,' dressed up in appropriate judicial garb: 'WHEREAS it looks like a duck, and WHEREAS it walks like a

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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).

[6] Insofar as they mount any response to this point, Plaintiffs argue that the quoted language from the decision documents reflects "nothing more than wordsmithing." Pls.' Opp. at 6 & n.4. Such a threadbare argument should be rejected on these grounds alone. *See, e.g.*, *City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (holding that an argument made "only summarily, without explanation or reasoning," was waived).

duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck'"). Since Amendment 113 "looks, walks, and quacks like" a regulation on harvesters, *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F.Supp.3d 373, 423 (D.D.C. 2014) (finding that an action that "looks, walks, and quacks like a policy statement" is a policy statement), Plaintiffs' attempts to reframe Amendment 113 as anything other than a regulation on harvesters should be rejected.

A. Plaintiffs' Efforts To Infer An Exclusive Processing Privilege Lack Support

Plaintiffs' insistence that Amendment 113 is an entirely different regulatory creature – an "exclusive processing privilege," Pls.' Opp. at 19 – does not make it so. Significantly, Plaintiffs do not allege that Amendment 113 on its face bears any of the indicia of an exclusive processing privilege. Nor could they. Indeed, NMFS emphasized that "[n]o aspect of this action establishes exclusivity." AR 1000290. Amendment 113 thus entitles shoreplants to no amount – or even any – of the AI TAC. *See* AR 1000283 (stating that "no exclusive opportunity to receive any portion of the set-aside is provided to an Aleutian Islands shoreplant"). The harvest set-aside also "applies only if specific notification and performance requirements are met." AR 1000271; *see also* Defs.' Mem. at 13-14; AR 1000275 (describing pre-season notification requirement); *id*. (describing provision for in-season removal of a set-aside "if less than 1,000 mt of [AI Pacific cod]. . . is delivered to Aleutian Islands shoreplants by February 28"). Such requirements, which govern when and for how long a set-aside might be available, are "directly contrary to exclusive privileges." AR 1000290. Plaintiffs' argument therefore finds no support in the actual text of Amendment 113.

Instead, Plaintiffs infer the existence of an exclusive processing privilege by pointing to purported "prohibitions" in Amendment 113 that allegedly limit their range of options. *Id*. at 20. But in describing these "prohibitions," Plaintiffs overstate the case considerably. Plaintiffs assert that "[o]ffshore processors are prohibited from processing cod during the period in which the set-aside is in place." *Id*. at 19. Not so. Even during a harvest set-aside period, a non-participating catcher processor ("CP") would still be permitted to receive and process "incidental catch while

directed fishing for groundfish other than Pacific cod." AR 1000274.[7] A catcher vessel ("CV") would also be "permitted to conduct directed fishing for groundfish other than Pacific cod" in the AI area and retain its "incidental harvests of Pacific cod." *Id.*[8] Such vessels also would have the opportunity to "participate in the Aleutian Islands Unrestricted Fishery, when available." AR 1000289.[9] As long as the AI Unrestricted Fishery is available, vessels may deliver their directed catch to "any eligible processor for processing." AR 1000274. These vessels have other options as well. For example, because Pacific cod sector allocations apply to either the AI or the Bering Sea ("BS"), a non-participating vessel could shift its operations "to make up part, or all, of the loss in the BS." AR 1000120. Alternatively, these vessels may choose to "fish in the Aleutian Islands for Pacific cod when the set-aside is lifted." AR 1000289. In short, CVs and CPs have no shortage of options available, and thus Amendment 113 is not nearly as limiting as Plaintiffs suggest.

In any event, there is no need for Plaintiffs to infer what an exclusive processing privilege might entail. As Defendants discussed in their Memorandum, NMFS previously implemented a set of "exclusive . . . processing privileges" as part of a pilot program for rockfish. 71 Fed. Reg. at 67,211; *see also* Defs.' Mem. at 15-16.[10] This pilot program created "fixed linkages" between

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[7] This is no insignificant amount. Annual incidental catch of AI Pacific cod (from 2003-15) has ranged from 894 mt to 1,992 mt. *See* AR 1000109 (table 2-32). Moreover, Plaintiffs' overstated assertions that "at-sea processing is prohibited in years when the TAC is not above 5,000 mt" and that "all cod from the federal fishery is exclusively reserved for shoreside processing" when "catch limits are below 5,000 mt," Pls.' Opp. at 19 & n.14, are incorrect for the same reasons.

[8] CVs harvest and deliver their catch for processing, whereas CPs harvest and process on board the catch delivered by CVs or their own catch. *See* AR 1000792.

[9] As explained in Defendants' Memorandum, *see* Defs.' Mem. at 31 & n.23, the AI Unrestricted Fishery is available "[w]hen the Aleutian Islands [directed fishing allowance] is greater than 5,000 mt, and therefore the Aleutian Islands CV Harvest Set-Aside is set equal to 5,000 mt." AR 1000274. This difference becomes "available for directed fishing by all non-[Community Development Quota ("CDQ")] fishery sectors with sufficient A-season allocations and may be processed by any eligible processor." *Id.* (emphasis added).

[10] Plaintiffs attempt to distinguish this pilot program as "irrelevant" because it was "created by a specific act of Congress." Pls.' Opp. at 21. But the fact that NMFS has only approved exclusive processing privileges when it was specifically authorized to do so, and even acknowledged that it

harvesters and shoreplants, requiring harvesters "to land all their catch to a specific shore-based processor." AR 5000070 (emphasis added). It also provided for "processor permit[s]," 71 Fed. Reg. at 67,248, conferring "an exclusive privilege to receive and process" rockfish, *id*. at 67,211, and an "annual cooperative quota" to set the amount that each harvester-shoreplant cooperative would be entitled to harvest and process for any given year, *id*. at 67,212. Importantly, none of these pilot program provisions – fixed linkages, processor permits, or annual quotas – appear in Amendment 113.[11]

B. The Lindeman Memorandum Illustrates What Is And Is Not An Exclusive Processing Privilege

This rockfish pilot program also provides important context for understanding an agency memorandum, *see* AR 5000068-78 ("Lindeman Memorandum"), which highlights the distinction between an exclusive processing privilege and Amendment 113's harvest set-aside. *See* Defs.' Mem. at 18-19. Plaintiffs cite to the Lindeman Memorandum for the unremarkable proposition that actions should not have "'the effect of allocating a shore-based processing privilege.'" Pls.' Opp. at 24 (citation omitted). But Plaintiffs' selective reading of the Lindeman Memorandum focuses solely on a single phrase and excludes further analysis that explicates what actions might have such an "effect." AR 5000072. Significantly, the portion of the Lindeman Memorandum cited by Plaintiffs was meant to address a particular question in connection with the expiration of

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otherwise did "not have specific authority . . . to directly regulate on-shore groundfish processing activities," 71 Fed. Reg. at 67,210, shows that NMFS was cognizant of the limits on its authority and thus sought to act in a manner consistent with those limits in approving Amendment 113.

[11] In their Memorandum, Defendants also demonstrated that Amendment 113 is "consistent with previous actions," AR 1000057, describing Amendment 18 to the BSAI Groundfish FMP and Amendment 23 to the Gulf of Alaska Groundfish FMP ("Amendments 18/23") through which NMFS sought to "protect the inshore component of the fishery from preemption by the offshore fleet." 57 Fed. Reg. 23,321, 23,322 (June 3, 1992); *see also* Defs.' Mem. at 16. While Plaintiffs attempt to draw factual distinctions between Amendment 113 and Amendments 18/23, *see* Pls.' Opp. at 21-22, these purported distinctions do not detract from Defendants' underlying point that NMFS has previously implemented an action that "in effect assigns fishing privileges among fishermen: those who process their catch at sea, and those who deliver their catch for processing on shore." *American Factory Trawler Ass'n v. Knauss*, No. 92-cv-00870-R, slip op. at 18 (W.D. Wash. July 24, 1992) (Dkt. 38-2) (examining and upholding Amendments 18/23).

the rockfish pilot program: "Would requiring a fixed linkage between harvesters and shore-based processors . . . be considered an allocation of a shore-based processing privilege?" AR 5000071 (emphasis added). Regarding this question, NMFS determined that an action that "[o]bligat[ed] a catcher vessel to deliver to a shore-based processor (*i.e.*, a 'fixed linkage' between a harvester and shore-based processor)" had "the effect of allocating a shore-based processing privilege." AR 5000072 (emphasis added). This parenthetical, omitted by Plaintiffs, is significant, because it clarifies the specific sort of action – a fixed linkage – that would have this "effect." Further underscoring the point, NMFS likewise concluded that, with respect to the possible continuation of the rockfish pilot program, the MSA "does not authorize requiring a harvester to deliver his or her catch to a specific shore-based processor (*i.e.*, 'fixed linkages' between harvesters and shore-based processors)." *Id*. (emphasis added). This distinction also applies here, where Amendment 113, unlike the rockfish pilot program, includes no fixed linkages. That is, Amendment 113 does not require harvesters to deliver their catch to any specific shoreplant, and thus it has no "effect of allocating a shore-based processing privilege." *Id*.; *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 rockfish pilot program and a later amendment was "the removal of the requirement for harvesters to deliver to a specific on-shore processor") (emphasis added).[12]

Further, in analyzing another question – whether the MSA "authorize[s] . . . 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 – the Lindeman Memorandum found, *inter alia*, that "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

[12] Plaintiffs insist that an "effect" should be inferred since "there is only one shoreplant with the equipment and capacity to process Pacific cod from the federal fishery." Pls.' Opp. at 24-25. But this argument, addressed *infra*, presumes that the Atka shoreplant would not be a participant, even though that shoreplant "began to take Pacific cod for processing in the summer of 2012," AR 1000119, and completed "substantial infrastructure investments . . . to make the plant a year-round operation." AR 1000096.

fishing vessels and fishing communities.'" AR 5000076 (citation omitted) (emphasis added); *see also* Defs.' Mem. at 18-19. As Plaintiffs point out, *see* Pls.' Opp. at 25, NMFS's conclusion was based, in part, on statutory provisions that pertain to limited access privileges, *see* AR 5000076 (citing 16 U.S.C. § 1853a(c)(5)(B)(i)), and a discussion of these privileges in a legislative report, *see* AR 5000076-77 (citing S. Rep. No. 109-229, at 25 (Apr. 4, 2006)). But there is no indication that NMFS's interpretation was meant to apply only in the context of limited access privileges. Indeed, NMFS made no reference to such privileges in its concluding summary. NMFS found only that "there could be a legal basis" for "an action that had the practical effect of limiting the number of sites to which deliveries could be made" if the record showed that such an action "was necessary for legitimate management or conservation objectives (*e.g.*, protection of processing sector employment or protection of fishing communities that depend on the fisheries)." AR 5000077-78. That is exactly the case here.

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

A. 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 communities . . . must not compromise the achievement of conservation requirements and goals of the FMP." 50 C.F.R. § 600.345(b)(1).[13] 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

[13] Even if "not entitled to automatic *Chevron* deference." Pls.' Opp. at 26 (citing *Guindon v. Pritzker*, 31 F.Supp.3d 169, 198 (D.D.C. 2014)), these National Standard advisory guidelines are "entitled to 'considerable deference' in light of their thoroughness, the agency's expertise, and the administrative formalities involved in their promulgation." *Guindon*, 31 F.Supp.3d at 198.

such communities would be the preferred alternative." *Id*. (emphasis added). So too here, where NMFS considered two alternatives that had the same conservation effects – one alternative that "would maintain the status quo management regime," AR 1000099, and another alternative that, in addition to maintaining the status quo as to conservation measures, would "provide access to and promote [the AI fishing communities'] sustained participation" in the fishery, AR 1000288 – then selected the "preferred alternative." 50 C.F.R. § 600.345(b)(1). As addressed further *infra*, Plaintiffs fail to demonstrate that NMFS's choice was irrational.

1. Amendment 113 Is Consistent With The Conservation Objectives Of The BSAI Groundfish FMP

To start, while it is true that Amendment 113 does not set forth its own "conservation purpose," Pls.' Opp. at 27, Plaintiffs fail to explain why it must. The primary flaw in Plaintiffs' argument is that there is no requirement in National Standard 8 – and Plaintiffs point to none – that compels a separate "conservation purpose" for Amendment 113, and Plaintiffs' Opposition fails to remedy this fundamental shortcoming. *See* Defs.' Mem. at 24-25. Rather, Plaintiffs only infer such a requirement, pointing to the "spirit and purpose of the MSA." Pls.' Opp. at 28. This is an inferential leap too far. The cases and MSA provisions cited by Plaintiffs only support the uncontested proposition that, as between two alternatives with differing conservation effects, the alternative with greater conservation effects should take priority. But this is no such case. Here, because the two alternatives had the same conservation effects, NMFS prioritized the "preferred alternative." 50 C.F.R. § 600.345(b)(1).[14]

More importantly, the National Standard 8 guidelines clarify that the relevant inquiry is whether Amendment 113 would "compromise the achievement of conservation requirements and goals of the [underlying] FMP." 50 C.F.R. § 600.345(b)(1) (emphasis added). This is a critical

[14] As addressed in Defendants' Memorandum, any potential increase in BS prohibited species catch ("PSC"), *see* Pls.' Opp. at 31, must still comply with existing PSC limits and thus would not interfere with the conservation goals of the BSAI Groundfish FMP. *Cf*. AR 1000282 (noting no effect with respect to "the total maximum permissible amount of halibut PSC established for BSAI groundfish fisheries"); *see also* Defs.' Mem. at 25 & n.18.

two-part distinction that Plaintiffs make no attempt to reconcile in their Opposition. Further, the record demonstrates that NMFS properly applied this FMP-wide frame of reference, finding that Amendment 113 would not compromise the conservation requirements and goals of the BSAI Groundfish FMP. *See, e.g.*, AR 1000157 (finding that "[n]one of the alternatives . . . would lead to overfishing of Pacific cod in the AI or BS"); AR 1000281 (noting that "specified and allocated amounts" in the FMP will continue to be enforced); AR 1000158 (noting that no modifications were made to any of the "measures currently in place to protect living marine resources").[15]

2. Amendment 113 Is Intended To Benefit All AI Shoreplants

Moreover, Plaintiffs contend that Amendment 113 runs afoul of the National Standard 8 guidelines by allegedly allocating resources to only Adak. *See* Pls.' Opp. at 31-32. In approving Amendment 113, however, NMFS emphasized that the opportunity to process Pacific cod under the harvest set-aside would be available to "any shoreplant" within the prescribed area (*i.e.*, the area "west of 170° W. longitude in the Aleutian Islands"). AR 1000275 (emphasis added). In particular, NMFS identified Atka as one community, in addition to Adak, that "will benefit from the harvest set-aside." AR 1000118. As NMFS explained, by preserving the "opportunity . . . to maintain shore-based processing," AR 1000056, Amendment 113 was meant to benefit all "AI shoreplants and the communities in which they are located," including Atka. *Id*.

In the specific case of Atka, NMFS acknowledged that the Atka shoreplant's processing of Pacific cod had been limited. But NMFS also acknowledged that Atka viewed Pacific cod as "the linchpin for the future of processing in the community" and had already made "substantial infrastructure investments," including "a $4 million expansion . . . to make the plant a year-round

[15] Plaintiffs cite to *Blue Water Fisherman's Ass'n v. Mineta*, 122 F.Supp.2d 150 (D.D.C. 2000), *see* Pls.' Opp. at 29, but that case does not dictate a different result. The court in that case held that NMFS, in requiring all longline fishers to install a vessel monitoring system, rather than a smaller subset of fishers, had failed to show any benefits of this broader requirement that would warrant the certain and quantifiable "blanket [] costs" of the requirement. 122 F.Supp.2d at 169. Here, by contrast, NMFS's cost-benefit analysis is supported by record evidence that shows not only the likely costs to the offshore sector, but also the likely social and economic benefits to AI communities, as discussed *infra*. *Blue Water* is thus distinguishable.

operation." AR 1000096. NMFS also considered the scale of Atka's efforts, noting that its plans would increase "the processing capacity of the shoreplant . . . [to] approximately 400,000 round pounds of Pacific cod per day (181 mt.)." *Id*. These were not speculative statements of someday intentions, as Plaintiffs insinuate, *see* Pls.' Opp. at 32, but rather specific and concrete near-term plans, and thus it was reasonable for NMFS to identify Atka as another AI community that might "benefit from the harvest set-aside." AR 1000118.[16]

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

Plaintiffs' final argument under National Standard 8 – that "Amendment 113's economic benefits are illusory," Pls.' Opp. at 32 – is also unavailing. Again, Plaintiffs allege that NMFS's analysis must have been based on "unsupported assumptions and conjecture." *Id*. But the record demonstrates that, far from being "unsupported," *id*., NMFS's assessment was grounded firmly in its review of the available information. For example, with respect to Adak, NMFS examined how Amendment 113 "could provide valuable consistent revenue for the Adak community from fish taxes, and generate consistent economic activity (both directed and indirect) from processing AI Pacific cod at the Adak shoreplant," including revenue associated with "port visits," "support for crew rotations," "fuel supplies," and "emergency medical services." AR 1000119. Similarly, regarding Atka, NMFS found that Amendment 113 "would likely benefit the community through increased economic activity," such as "port visits by trawl and nontrawl CVs" and "increases in [fish tax] revenues." *Id*. There was thus ample support in the record for NMFS's determination that Amendment 113 would likely "result in more consistent opportunity for community-level economic activity." AR 1000118.

Plaintiffs further assert that the economic impacts of Amendment 113 must be "illusory" because "5,000 mt is simply inadequate to support multiple Aleutian Islands communities." Pls.'

[16] NMFS also noted that "more Aleutian Islands shoreplants could become operational at any time." AR 1000283; *see also* AR 1000121 (explaining that the harvest set-aside would be available to "any new shoreplants" in the AI area).

Opp. at 32. But this argument mistakes opportunity for outcome and thus reveals a fundamental misapprehension as to the purpose of Amendment 113. To be clear, as explained in Defendants' Memorandum, *see* Defs.' Mem. at 41 & n.28, Amendment 113 does not guarantee a shoreplant in Adak or Atka (or anywhere else) any deliveries, much less a certain amount. In other words, Amendment 113 was never intended to guarantee a particular outcome for any AI community. Rather, Amendment 113 was meant to "provide[] the opportunity . . . to receive benefits from a portion of the Aleutian Islands Pacific cod fishery." AR 1000271 (emphasis added); *see also* AR 1000056 (noting that Amendment 113 "would provide an opportunity for AI shoreplants and the communities in which they are located to maintain shore-based processing") (emphasis added). Plaintiffs' argument thus is built on a faulty premise, as discussed further *infra*.[17]

B. Amendment 113 Is Consistent With National Standard 4

Plaintiffs also show no inconsistency with National Standard 4, which requires that an allocation of fishing privileges 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 relevant here, the guidelines for National Standard 4 state that it is permissible 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).

1. Amendment 113 Is Fair And Equitable

That is exactly the case here. NMFS undertook a careful weighing of the likely burdens on CVs and CPs, *see* AR 1000120 (noting that offshore vessels "will likely experience a loss of economic activity"), and the likely benefits to AI fishing communities, *see* AR 1000118 (finding that the action would likely "result in more consistent opportunity for community-level economic activity"). NMFS also considered measures to limit any adverse effects on offshore vessels.

[17] Further, nothing in Amendment 113 precludes shoreplants from processing higher amounts. *See* AR 1000124 (noting that the "set-aside does not limit the amount of AI Pacific cod delivered to AI shoreplants to just the set-aside").

See, e.g., AR 1000275 (describing anti-stranding measures); *see also* Defs.' Mem. at 31-32. This sort of weighing involves considerable judgment, and "it is precisely because National Standard 4 . . . leave[s] room for differing interpretations in close cases that deference is due." *N.C. Fisheries*, 518 F.Supp.2d at 94.

In their Opposition, Plaintiffs argue that AI fishing communities would bear no "unique" burdens without Amendment 113. Pls. Opp. at 34. While it may be true – so far as it goes – that "changes over the last decade . . . have resulted in fewer fish being available to all participants" in the fishery, *id*., Plaintiffs omit one fact that places AI shoreplants at a particular disadvantage: Shoreplants are immobile. Offshore vessels, by contrast, are able to "move to different locations to fish and process their catch" and therefore "are better able to adapt to changing conditions in the Aleutian Islands Pacific cod fishery." AR 1000285. In weighing the respective abilities of participants to adapt to changes in the fishery, NMFS determined that this "disparity in flexibility . . . leaves the AI shoreplants at a significant disadvantage." AR 1000108; *see also* Defs.' Mem. at 30-31 (describing options available to CVs and CPs). Plaintiffs' Opposition tellingly provides no response to this point.[18]

In addition, the record shows that NMFS specifically sought to reduce the burdens on offshore vessels. *See* Defs.' Mem. at 31-32. Plaintiffs do not dispute, for example, that NMFS chose to impose an earlier notification deadline (November 1) on Adak and Atka, rather than a later date (December 15), because "November 1 provides significantly more time for the industry to make the necessary arrangements to harvest and process" the AI TAC in the event that the notification requirement is not met. AR 1000127. As for NMFS's decision to reject a higher set-aside amount (7,000 mt) that "would reduce chances [of an AI Unrestricted Fishery] for the offshore sector" AR 1000124, Plaintiffs allege only that the selected amount (5,000 mt) traces its origins to "comments from Adak." Pls.' Opp. at 35-36. But NMFS's decision was not based on

[18] Also unavailing is Plaintiffs' argument that "sellers will have no negotiating leverage" under Amendment 113. Pls.' Opp. at 35. NMFS identified "several ways that CVs may retain leverage in negotiating fair prices from [AI] shoreplants." AR 1000284; *see also* Defs.' Mem. at 35.

these or any other comments, but rather the agency's own subsequent analysis, *see* AR 1000123-24 (describing NMFS's reasoning for selecting 5,000 mt), and therefore Plaintiffs' efforts to cast Defendants' explanation as a *post-hoc* rationalization should be rejected. *See, e.g.*, *Sierra Club v. Marsh*, 976 F.2d 763, 774-75 (1st Cir. 1992) (accepting allegedly *post-hoc* explanations that were "supported by evidence in the administrative record").[19]

2. Amendment 113 Is Reasonably Calculated To Promote Conservation

As explained in Defendants' Memorandum, NMFS also determined that Amendment 113 would be consistent with the conservation objectives of the BSAI Groundfish FMP. *See* Defs. Mem. at 32-34. Plaintiffs present no new arguments with respect to this factor, relying instead on their prior arguments in connection with National Standard 8. *See* Pls.' Opp. at 36. But in doing so, Plaintiffs fail to address two important points. First, as with National Standard 8, the National Standard 4 guidelines instruct 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, Inc. v. Locke*, 593 F.3d 886, 895 (9th Cir. 2010) (holding that an amendment "further[ed] the beneficial objectives of the FMP" and thus "comports with National Standard 4"). Second, the National Standard 4 guidelines further clarify that 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." 50 C.F.R. § 600.325(c)(3)(ii) (emphasis added). Amendment 113 is wholly consistent with these guidelines. *See* Defs.' Mem. at 32-34.

3. Amendment 113 Creates No Excessive Share Of The Fishery

Furthermore, the record shows that NMFS specifically sought to reduce the possibility of any shoreplant gaining inordinate control with respect to pricing. *See* Defs.' Mem. at 34-35; *see*

[19] Plaintiffs also allege that Adak's current "tax base includes revenues from the offshore sector . . . which are not guaranteed." Pls.' Opp. at 36. But NMFS considered this point, finding that Amendment 113 would result in offsetting impacts from the offshore sector. *See* AR 1000119 (finding that "increased CV port visits will likely be offset" by a "reduction in CP port visits").

also AR 1000281 (noting "performance measures which, if not satisfied, will lift the set-aside"); AR 1000284 (noting that the in-season milestone requirement (deliveries ≥ 1,000 mt) provides "an additional incentive" for "shoreplants to offer competitive prices"). It thus was reasonable for NMFS to conclude that no excessive share of the fishery would be created by Amendment 113. Plaintiffs' only discernible response is that, in spite of NMFS's concerted efforts to reduce the possible risk of inordinate control, "an excessive share of fishing privileges does not cease to be unlawful." Pls.' Opp. at 37.[20] This argument is repetitive, if not circular, and thus should not be credited by this Court.

C. 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). To prevail on their argument that "economic redistribution was Amendment 113's sole purpose," Pls.' Opp. at 38, 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").[21] Further, the National Standard 5 guidelines clarify that the

[20] Plaintiffs also raise a perplexing argument regarding the potential actions of CVs to "'remain solvent.'" Pls.' Opp. at 37. Plaintiffs appear to conflate separate sentences – one that pertains to shoreplants and their prices, *see* AR 1000284 ("To remain solvent, Aleutian Islands shoreplants will need to offer harvesters competitive prices or CVs could withhold delivery of catch to that shoreplant."), and another that pertains to the leverage of CVs to withhold their deliveries, *see id.* ("CVs could choose not to participate in the Aleutian Islands CV Harvest Set-Aside, wait until the set-aside has ended, or shift fishing operations to the Bering Sea.").

[21] Plaintiffs offer no further argument with respect to their related assertion that Amendment 113 "creates inefficiencies in the cod fishery," Dkt. 35-1 at 42-43, and thus this argument should be deemed waived. *See, e.g., McMillan v. Wash. Met. Area Transit Auth.*, 898 F.Supp.2d 64, 69 (D.D.C. 2012) (holding that "when a plaintiff files an opposition to a motion . . . a court may treat those arguments that the plaintiff failed to address as conceded") (citation omitted).

"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).

Such is the case here, where NMFS "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 1000284. Indeed, as NMFS explained, Amendment 113 was "designed . . . to create opportunities within, and improve the socio-economic stability" of these "remote, fishery dependent, low-income communities, principally populated by Native peoples, and with few alternative economic opportunities." AR 1000131. NMFS thus examined the potential impacts of Amendment 113 on population size, *see* 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 employment of community residents, *see* AR 1000092 (noting that "Pacific cod processing activity at the Adak shoreplant accounts for a large proportion of local employment in Adak"); tax revenues, *see* AR 1000119 (noting that increased "fish taxes" could "provide valuable consistent revenue for the Adak community"); as well as other community-wide benefits, *see* AR 1000279 (comment opining that "Amendment 113 will create numerous opportunities for small [local] boats and the community of Adak"). Plaintiffs respond by attempting to recast these socio-economic benefits as "purely economic," Pls.' Opp. at 37, but this alleged distinction is unpersuasive. *Cf. Guindon v. Pritzker*, 240 F.Supp.3d 181, 202 (D.D.C. 2017) (concluding that NMFS properly considered the "social effects on fishing communities," as required under another MSA provision, 16 U.S.C. § 1853(a)(9), by examining the effect on, *inter alia*, "the well-being of commercial communities"). Accordingly, Plaintiffs demonstrate no inconsistency with National Standard 5.

IV. Amendment 113 Complies With The APA

A. NMFS Made No Unfounded Assumptions

As an initial matter, it bears repeating what is – and is not – in dispute. 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, alleging that the agency relied on "unfounded assumptions" for which deference is not due, Pls.' Opp. at 8, and also faulting NMFS for "not independently assess[ing] the likely economics" of AI shoreplant activities, id. at 7. Neither argument withstands scrutiny.

Courts have consistently "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). Courts therefore "cannot interfere with reasonable interpretations of equivocal evidence." *Public Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986); *cf. New York v. Reilly*, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992) (noting that courts must be "particularly deferential" to "policy decisions based on uncertain technical information"). A corollary to this point is that when, as here, an agency must base its decision on the best available information, *see* 16 U.S.C. § 1851(a)(2) (requiring review of "the best scientific information available"), the available information need not be conclusive. *See, e.g., Midwater Trawlers Coop. v. U.S. Dep't of Commerce*, 393 F.3d 994, 1003 (9th Cir. 2004) (explaining that, "by specifying that decisions be based on the best scientific information available, the [MSA] recognizes that such information may not be exact or totally complete"); *cf. Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (holding that agency applying similar provision "must utilize the 'best scientific . . . data available,' not the best scientific data possible") (citation omitted). In other words, NMFS is authorized to "act when the available science is incomplete or imperfect." *General Category Scallop Fishermen*, 635 F.3d at 115 (citation omitted).

In this case, NMFS examined, *inter alia*, the historical data for both onshore and offshore processing of AI Pacific cod, *see, e.g.*, AR 1000109 (showing 2003-15 data); the data regarding the value of such processing activities, *see, e.g.*, AR 1000120 (showing 2003-14 data); and data on associated tax-related revenues for AI communities, *see, e.g.*, AR 1000098 (showing 2008-12 data). NMFS also assessed the then-current status of shoreplant operations, acknowledging that "neither the Adak nor Atka shoreplants are currently processing AI Pacific cod." AR 1000058. In addition, NMFS considered information regarding the near-term and longer-term prospects for

shoreplant operations, including the "substantial infrastructure investments" (totaling $4 million) made to increase the Atka shoreplant's processing capacity to "400,000 round pounds of Pacific cod per day (181 mt.)," AR 1000096, and recent efforts to prepare the Adak shoreplant for future operations, *see, e.g.*, AR 1000093 (describing the signing of a 20-year lease and the purchase of processing equipment and facility repairs in 2015). To the extent that this available information did not yield definitive conclusions, it was appropriate for NMFS to apply its expert judgment to formulate reasonable assumptions regarding the likely implications of this information. *See, e.g.*, *Oceana*, 384 F.Supp.2d at 219 (explaining that "an agency need not stop in its tracks when it lacks sufficient information") (citations omitted); *Blue Water Fisherman's Ass'n v. Nat'l Marine Fisheries Serv.*, 226 F.Supp.2d 330, 338 (D. Mass. 2002) (explaining that "imperfections in the available data do not doom any agency conclusion" since the "conclusion need not be airtight and indisputable").[22]

In addition, the administrative record shows that NMFS specifically sought to hedge the possibility that this forward-looking assessment might prove inaccurate. *See, e.g.*, AR 1000058 (noting that "one of the reasons the Council included the checks to limit unharvested AI Pacific cod TAC" was that no AI "shoreplants are currently processing" cod). If, for example, there are no shoreplants "open and able to process large amounts of cod" in a given year, as Plaintiffs fear, Pls.' Opp. at 7, then it follows that no pre-season notification would be submitted and no harvest set-aside would be triggered. *See* AR 1000275 (describing the pre-season requirement for Adak

[22] Plaintiffs' related argument – that NMFS failed to "test[] or validate[] its assumptions" in its responses to public comments, *see* Pls.' Opp. at 9 – also falters for similar reasons. As discussed *supra*, NMFS drew reasonable conclusions based on its assessment of the available information. To the extent that Plaintiffs object that NMFS did not cite to "objective evidence" in its response to a particular comment, *id*., NMFS was not obligated to rehash its analysis of such information in every response. *See, e.g., Oceana, Inc. v. Locke*, 725 F.Supp.2d 46, 64 (D.D.C. 2010) (finding that "[a]ny failure . . . to respond specifically to a particular comment" was "in light of the agency's overall consideration of the topic . . . insignificant") (citation omitted), *rev'd on other grounds*, 670 F.3d 1238 (D.C. Cir. 2011); *see also City of Waukesha*, 320 F.3d at 257-58 (noting an "agency 'need not address every comment'" so long as it "'respond[s] in a reasoned manner to those that raise significant problems'") (citation omitted).

and Atka to notify NMFS of their "intent to process Aleutian Islands Pacific cod in the upcoming fishing year"). NMFS also accounted for the possibility of in-season difficulties (*e.g.*, equipment problems or labor shortages), requiring 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 (also noting this provision would account for the risk that "too few or no vessels decide to participate in the set-aside fishery"). Hence, even if Plaintiffs' dire predictions come to pass, Amendment 113 includes specific provisions to reduce the burdens, if any, that might arise as a result.

B. NMFS Reasonably Determined That Amendment 113 Minimized The Risk To AI Communities Of Exclusion From The Fishery

Rehashing their argument regarding the "illusory" economic benefits of Amendment 113, Pls.' Opp. at 32, Plaintiffs further argue that it was irrational for NMFS to "conclude that a 5,000 mt set-aside will result in benefits to multiple communities." *Id*. at 10. Plaintiffs thus allege that the set-aside amount is not enough for "the Adak plant to survive on a sustained basis," and also not "sufficient to support" other communities, singly or collectively. *Id*. at 11 (emphasis added). The fundamental flaw in this argument, as with Plaintiffs' related National Standing 8 argument, is that Amendment 113 was never intended to ensure that any AI shoreplants would "survive" or guarantee sufficient "support" for AI communities. Rather, Amendment 113 was meant to serve a much narrower purpose – to "minimize the risk of exclusion from, and maintain opportunities for participation in," the AI Pacific cod fishery by AI communities. AR 1000273. That is, rather than guaranteeing a particular outcome for any AI community, Amendment 113 was meant only to establish a basic floor of "opportunity for AI shoreplants and the communities in which they are located to maintain shore-based processing." AR 1000056 (emphasis added); *see also* AR 1000271 (noting that Amendment 113 is meant to provide an "opportunity . . . to receive benefits from a portion of the Aleutian Islands Pacific cod fishery").

To be sure, NMFS expected Amendment 113 to increase the likelihood that some or all of the AI communities would realize social and economic benefits from these opportunities, *see* AR 1000273 (noting that the action was intended to "provide social and economic benefits to,

and promote stability in," AI communities), but NMFS determined that it was sufficient, for the more limited purposes of Amendment 113, to "provide access to and promote [the communities'] sustained participation" in the AI Pacific cod fishery, "especially at very low TAC levels." AR 1000288 (emphasis added). Providing this opportunity, NMFS determined, would achieve the purpose of "mitigat[ing] the risk that CVs, Aleutian Islands shoreplants, and the communities in which they are located will be preempted from participating in the Aleutian Islands Pacific cod fishery by CPs." AR 1000272. Consistent with this purpose, NMFS selected the 5,000 mt set-aside amount over lower (3,000 mt) and higher (7,000 mt) alternatives, not because that amount would ensure that AI shoreplants would "survive," but rather because NMFS determined that it would likely reduce "the risk of diminished historical processing for the AI shoreplants, while also allowing the offshore sectors to plan and conduct processing operations during periods of high AI TAC, which likely reduces the risk of leaving unharvested non-CDQ AI Pacific cod TAC in the water." AR 1000124 (emphasis added). This assessment was rational and supported by the record, and Plaintiffs fail to demonstrate otherwise.[23]

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

As discussed in Defendants' Memorandum, *see* Defs.' Mem. at 42-44, NMFS recognized that "[s]everal factors have contributed" to instability for AI shoreplants, AR 1000272, and that one such factor was "changing fishing practices in part resulting from rationalization programs that allocate catch to specific fishery participants." *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"). With respect to this factor, the agency found not only that the AI shoreplants' relative share of the fishery had declined since the implementation of Amendment 80 and Amendment 85 in 2008, *see* AR 1000040 (noting that an

[23] Plaintiffs also contend that the Adak shoreplant "has been unable to remain consistently open despite many years of processing amounts of cod well over 5,000 mt," Pls.' Opp. at 12 – but this argument fails to account for the increasingly "highly variable" deliveries to shoreplants." AR 1000272; *see also* AR 1000109 (noting higher variability post-2008); Defs.' Mem. at 43 & n.32.

"average [of] 69 percent" of AI Pacific cod deliveries went to shoreplants prior to 2008, versus only "34 percent . . . delivered to shoreplants" after 2008),[24] but also that post-2008 deliveries to the AI shoreplants were more "highly variable." AR 1000272; *see also* AR 1000109 (noting that the total combined percentage of shoreplant processing ranged from 25% to 36% from 2003-07, versus 0% to 49% from 2008-15). Such declining and uncertain results, NMFS found, were "not conducive to stable shoreside operations." AR 1000272.

Plaintiffs respond by arguing that "all participants" in the fishery were adversely affected by these various factors. Pls.' Opp. at 14. But this argument misses the mark entirely. There is no dispute that these factors "have resulted in reduced Pacific cod catches in the Aleutian Islands for all participants in both the onshore and offshore sectors." AR 1000288. But there is a critical difference in the respective abilities of these participants to adapt to these changes. As discussed *supra*, whereas CPs and CVs retain the option "to move to different locations to fish and process their catch," AR 1000285, shoreplants have no such option. Thus, CPs and CVs "are better able to adapt to changing conditions in the Aleutian Islands Pacific cod fishery," AR 1000285, which "leaves the AI shoreplants at a significant disadvantage." AR 1000108. Plaintiffs do not – and cannot – refute this point in their Opposition.

D. Plaintiffs' Reliance On Internal Briefing Memoranda Is Misplaced

Finally, Plaintiffs point to selected language excerpted from internal briefing memoranda in which a representative from NMFS recommended against the Council taking "further action" on a possible shoreplant delivery requirement because, "[b]ased on information in [a discussion paper], shoreside processing operations have not been adversely affected by offshore processing activities relative to their historic share of processing in the AI." AR 2006078;[25] *see also* Pls.'

[24] Plaintiffs' focus on the "number of catcher-processors," Pls.' Opp. at 14, fails to account for post-2008 consolidation among CPs. *See* AR 1000037 (noting that "rationalization has provided benefits to processing vessels, affording opportunities for consolidation"). Further, the historical data showed that the percentage of AI Pacific cod CV deliveries to "offshore vessels" increased from an average of 31 percent prior to 2008 to 66 percent after 2008. AR 1000040.

[25] The second memorandum cited by Plaintiffs, *see* AR 2006057-70, pertains to information in a draft "analysis," *see* AR 2006062, but is substantively the same. *See* Defs.' Mem. at 44 & n.33.

Opp. at 16-19. Plaintiffs point out that NMFS subsequently reached a different conclusion, and surmise that NMFS must have erred in making this "about-face." *Id*. at 18.

Plaintiffs mistake molehills for mountains. To start, 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." *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 33 (D.C. Cir. 1986). Such preliminary agency statements 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 v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007).[26] Further, the excerpted language appears in part of an initial recommendation made by NMFS to the agency's leadership prior to the Council's recommendation of Amendment 113. Under the MSA's stepwise rulemaking process, it was the Council's role, in the first instance, to develop the measures that would become Amendment 113. *See* 16 U.S.C. §§ 1854(a)-(b). The briefing memoranda at issue reflect NMFS's preliminary recommendations to the agency's leadership with respect to several issues, including its review of "an updated discussion paper" and a later draft "analysis" evaluating the potential impacts of a shoreplant delivery requirement. AR 2006077; AR 2006062. Based solely "on the information in the paper," then subsequently the "information in the analysis, the NMFS representative recommended against "further action." AR 2006078; AR 2006062. After the Council's further evaluation and deliberations crystallized into a proposed amendment, the Council then transmitted the then-proposed Amendment 113 to NMFS for its review "to determine whether [the proposed amendment] is consistent with the national standards, the other provisions of this chapter, and any other applicable law." 16 U.S.C.

[26] Plaintiffs misconstrue this argument. Defendants do not dispute that Plaintiffs are permitted to cite to draft documents in the administrative record. *See* Pls.' Opp. at 40. However, as the Supreme Court has clarified, the proper focus for a reviewing court should be on the explanation presented in the final decision, not preliminary statements made by agency staff. *Nat'l Ass'n of Home Builders*, 551 U.S. at 659; *see also Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (affirming that the district court "had only to determine if the final [decision] met the standards and requirements of the ESA," such that drafts were not relevant to the decision).

§ 1854(a)(1)(A). NMFS was obligated to approve the proposed amendment so long as it was not inconsistent with the applicable law and the best available information, *id*.; *see also* 16 U.S.C. § 1851(a)(2), and NMFS, finding no such inconsistency, properly did so here.

This context is important because it shows that these recommendations were based on limited information and were made prior to the Council's recommendation of Amendment 113. At most, the language excerpted by Plaintiffs reveals only that the Council and NMFS may have interpreted a "discussion paper" or draft "analysis" differently during the Council's development process. AR 2006077; AR 2006062. This context also explains why NMFS, at a subsequent step in the process, and based on its evaluation of the more complete rationale provided by the Council, ultimately approved Amendment 113. There was nothing improper in NMFS reaching a different conclusion than its initial recommendations, because "the fact that the agencies changed their minds [is] something that, as long as the proper procedures were followed, they [are] fully entitled to do." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658-59. Accordingly, Plaintiffs' efforts to assign error based on NMFS's initial recommendations should be rejected.[27]

CONCLUSION

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

[27] In addition, the Court should strike from Plaintiffs' Memorandum (1) any references to their 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, and any text related to such references; and (2) the extra-record table prepared by Plaintiffs, *see* Pls.' Mem. at 29, and the text references thereto. *See* Defs.' Mem. at 24 & n.17; *id*. at 42 & n.30. No such references appear in Plaintiffs' Opposition. While there is no dispute that Plaintiffs may rely on their extra-record declarations for the limited purpose of showing their standing, *see* Defs.' Mem. at 24 & n.17, Plaintiffs cite to these declarations in support of their non-standing arguments, *see* Pls.' Mem. at 31, 34, 40, 42, and in their statement of facts, *see id*. at 6-8, 10, 18-19. This is impermissible, since 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), and Plaintiffs do not allege that any exception applies here. Similarly, insofar as the extra-record table prepared by Plaintiffs, *see* Dkt. 35-1 at 29, includes data that does not appear in the EA and misstates certain data, *see* Defs.' Mem. at 24 & n.17, it should also be stricken.

Dated: October 4, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2017, I electronically filed the foregoing Reply Memorandum in Support of Defendants' Cross-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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