Program indeed meets the Magnuson-Stevens Act's definition of an IFQ, at least since 2002, there is no need to examine if the agency provided sufficient explanation because there is no change in the agency's position."[84]

As NMFS did not display awareness that that it was changing position in the Final Rule, and now contends that it has maintained a consistent position over time, the threshold question is whether NMFS did indeed change its stance in promulgating the Final Rule. Plaintiffs, as the party challenging NMFS' action, bear the burden of proof.[85] At the outset, the Court notes that the 1998 email and the excerpt from the 2002 environmental impact statement are significantly shorter and less comprehensive policy articulations than those courts typically consider in assessing a change in policy. In *F.C.C. v. Fox*, for instance, the Supreme Court considered an FCC enforcement policy that deviated from "prior Commission and staff action."[86] Likewise, in *California Public Utilities Commission v. F.E.R.C.*, the Ninth Circuit considered two FERC orders that departed from a "longstanding policy" that was "evinced in a series of FERC decisions and statements."[87]

In the present case, both parties' arguments largely turn on a single sentence contained in in a 2002 environmental impact study. The Court notes that Defendants' explanation is not entirely cohesive with Defendants' argument concerning the formation of the catcher/processor sector in their cross-motion for summary judgment, although it does not necessarily conflict with

[84] *Id*. at 41.

[85] *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009).

[86] 556 U.S. 502, 517 (2009).

[87] 879 F.3d 966, 977 (9th Cir. 2018).

the position articulated in the Final Rule.[88] The Court also notes that while Defendants contend NMFS has viewed the AFA catcher/processor sector program as an IFQ since 2002, Defendants do not explain why NMFS waited until 2015 to institute a cost recovery fee, particularly since NMFS acknowledges that the MSA "requires" NMFS to collect this fee for IFQ programs.[89] However, this lack of clarity also reflects the limited information available about NMFS' prior position.[90] Plaintiffs, on the basis of the documents in the administrative record, fall short of demonstrating that NMFS has departed from a prior position such that NMFS' position in the Final Rule constituted an arbitrary and capricious change.

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[88] Defendants contend that the NOAA General Counsel's opinion that "allowing catcher vessels to lease their 8.5% quota to catcher/processors is consistent with the intent of the statute and does not create a new IFQ program" refers to the possibility of creating *another* IFQ program, on top of the IFQ program already created for the catcher/processor sector by the AFA. However, Defendants also state that the catcher/processor sector — which is the "person" in the purported IFQ program — was only created when the two cooperatives entered into a joint agreement. *See* Dkt. 49 at 32. Although the Court notes the potential inconsistency in Defendants' arguments as argued in their cross-motion for summary judgment, the Court "may look only to the administrative record to determine whether the agency has articulated a rational basis for its decision." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). While the Proposed Rule contained similar language about the joint agreement, the Final Rule did not tie the creation of the creation of the catcher/processor sector to the joint cooperative agreement, but simply defined the relevant "person" as "the catcher/processor sector that is able to harvest pollock from the sector's directed fishing allowance defined in section 206(b)(2) of the AFA." A.R. 1006032 at 157 (Final Rule); *see also Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (concluding that the Forest Service's decision to issue a draft environmental impact study and then withdraw the document was not an agency change in policy, "as a draft EIS is not an agency decision at all").

[89] A.R. 1006032 at 157–58 (Final Rule).

[90] The administrative record also does not reveal any reliance on an understanding of NMFS' prior policy. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.").

B. Judicial estoppel

Judicial estoppel is "is an equitable doctrine invoked by a court at its discretion," and is "intended to prevent improper use of judicial machinery."[91] Although non-exhaustive, "several factors typically inform the decision whether to apply the doctrine in a particular case."[92] "First, a party's later position must be 'clearly inconsistent' with its earlier position."[93] "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled."[94] "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[95]

Plaintiffs contend that NMFS should be estopped "from asserting to this Court that the [catcher/processor] sector receives a Federal permit amounting to an IFQ."[96] Plaintiffs' argument centers on the First Circuit's decision in *Lovgren v. Locke*.[97] In *Lovgren*, the plaintiffs brought several challenges to NMFS regulations implementing an amendment to the Northeast

[91] *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal citations omitted); *see also Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013).

[92] *Id*.

[93] *Id*.

[94] *Id.*

[95] *Id*.

[96] Dkt. 45 at 22.

[97] 701 F.3d 5 (1st Cir. 2012).

Multispecies Fishery Management Plan.[98] Within the Northeast Multispecies Fishery, vessel owners were required to apply for permits. The challenged regulations established new annual catch limits for each of the Fishery's stocks, and assigned each permit holder a "potential sector contribution," which represented a share of the new annual catch limits.[99] Under the regulations, a permit holder could choose join a voluntary, self-selecting group or "sector," at which point the permit holder's potential sector contribution would be combined with those of other members to determine the sector's "annual catch entitlement" ("ACE"), representing "the maximum amount of each fish stock that a sector's members could collectively catch."[100] Sectors could also lease ACE from other sectors, and thereby increase their entitlement for a particular stock. Permit holders who chose not to join a sector could fish in the "common pool," which was governed by a different regime.[101] The *Lovgren* plaintiffs argued that the sector allocation program created by the NMFS regulations was both an IFQ and a limited access privilege program, but did not comply with the MSA's requirements for new limited access privilege programs.[102] The *Lovgren* defendants, including NMFS, argued that the amendment did not create a new limited access privilege program.[103]

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[98] The amendment, known as Amendment 16, or A16, was first adopted by the New England Fishery Management Council and submitted to NMFS for review and approval. NMFS then engaged in notice and comment rulemaking and ultimately largely approved the amendment and issued three related sets of regulations. *Id.* at 18.

[99] *Id.* at 18–19.

[100] *Id.* at 19.

[101] *Id*.

[102] *Id*. at 20. Plaintiffs also raised additional challenges to the regulations based on both the MSA and the National Environmental Policy Act. *Id.*

[103] *Id.*

Of particular relevance, the *Lovgren* defendants argued that a "sector" did not receive a "Federal permit" within the meaning of the MSA, as an ACE allocation is not a Federal permit "as that term is understood in fishery management."[104] The *Lovgren* plaintiffs acknowledged that the Northeast Multispecies Fishery had long had a regulated permitting system, and that the ACE allocation would not be a Federal permit under the Fishery's existing regulations on permits. However, they contended that the appropriate construction of the term "Federal permit" as used in the MSA would be "the layperson's meaning of the word 'permit,'" and that the ACE allocation thus qualified as a Federal Permit because it was "a form of permission."[105] The First Circuit agreed with defendants that the term "Federal permit," had "an understood meaning in fisheries management," and concluded that defendants' construction of the term was a permissible construction of the MSA. The First Circuit explained that the term permit refers to "a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery," and noted that "the MSA continues to distinguish 'Federal permits' from other forms of permission relating to fishing."[106]

In the present case, Plaintiffs contend that NMFS's position on the meaning of the term "Federal permit" is clearly inconsistent with NMFS' position in *Lovgren*, as NMFS now argues that the pollock sector directed fishing allowance is "documentation granting permission to fish" and is therefore a "Federal permit."[107] Plaintiffs note that NMFS successfully persuaded the First Circuit of its contradictory opinion in *Lovgren*, and argue that NMFS is now engaging in a

[104] *Id.* at 24.

[105] *Id.* at 25.

[106] *Id.* at 24–25.

[107] Dkt. 45 at 23–24.

deliberate change of position and should be judicially estopped. In response, Defendants argue that their present position is not inconsistent as the sector program at issue in *Lovgren* is significantly different from the directed fishing allocation for the AFA catcher/processor sector.[108] Defendants note that Northeast Multispecies Fishery and the Greater Atlantic Region of NMFS did not have a specific regulation defining the term "permit," and that by contrast, the Alaska region of NMFS has a regulation defining a permit as "documentation granting permission to fish."[109] Additionally, Defendants note that unlike the temporary and fluid sectors in *Lovgren*, the AFA catcher/processor sector is statutorily defined in the AFA. Defendants also contend that NMFS is neither deriving an unfair advantage nor imposing an unfair detriment on Plaintiffs.[110]

While NMFS's argument concerning the meaning of the term "Federal permit" in *Lovgren* differs from NMFS' position in the present case, NMFS' present argument is based on an application of an NMFS regulation that did not apply to the region at issue in *Lovgren*. A determination based on an Alaska regional regulation will not risk inconsistency with the First Circuit's conclusions regarding a regional fishery program based in New England.[111] Moreover, Plaintiffs do not appear to have relied on NMFS' position in *Lovgren*, and NMFS does not

[108] Dkt. 49 at 24–28.

[109] *Id*. at 25 (citing 50 C.F.R. § 679.2).

[110] *Id*. at 29.

[111] *See, e.g.*, *United States v. Washington*, 88 F. Supp. 3d 1203, 1213 (W.D. Wash. 2015) ("While Respondents point to the Makah's expressions of support for their customary ocean fishing grounds in *Mosbacher* and Subproceeding 92–1, the Court does not find any obvious inconsistency with the Makah's positions in this subproceeding…. the Makah's statements that substantial evidence supported the Secretary's determination pertained to the rights of tribes fishing in Subarea 2A–1, not the Quinault and Quileute specifically").

appear to gain any particular advantage by raising a distinct argument in the present case. Accordingly, judicial estoppel does not preclude Defendants from arguing that that directed fishing allocation for the catcher/processor sector is a Federal permit. Defendants' interpretive arguments and Plaintiffs' related contentions are substantively addressed in subsection D below.

C. Rational basis for distinguishing the Bering Sea pollock catcher/processor sector

In addition to judicial estoppel, Plaintiffs contend that the Final Rule is arbitrary and capricious agency action as there is "no rational basis on which to conclude the [catcher/processor] sector [directed fishing allocation] is a Federal Permit when NMFS previous determined that Amendment 16 sector ACE in the Northeast multispecies groundfish fishery and the allocation to the [catcher/processor] sector of the whiting fishery off the West Coast are not Federal permits."[112] Plaintiffs explain that the directed fishing allocation for the Bering Sea pollock catcher/processor sector, the annual catch entitlement for sectors in the Northeast, and the allocation to the Pacific whiting catcher/processor sector are all "published in the Federal Register."[113] Plaintiffs note that both the Northeast sector annual catch entitlement and whiting catcher/processor sector allocation were raised in a comment to the Proposed Rule, and that the Final Rule only addressed the Pacific whiting fishery and distinguished the pollock catcher/processor sector on the basis that it receives mandated allocations and has specifically named eligible participants — both of which Plaintiffs contend also apply to the Pacific whiting catcher/processor sector.

Defendants maintain that the Bering Sea pollock catcher/processor sector is distinct from both the Northeast sector annual catch entitlement and the Pacific whiting catcher/processor

[112] Dkt. 45 at 24.

[113] *Id.*

sector because the former is managed under the AFA. Defendants maintain that these regional regulations differ from those of the Pacific whiting fishery, and therefore distinguish the present program.[114]

Under the APA's arbitrary and capricious standard, the Court must "examine the agency's decision to ensure that it has articulated a rational relationship between its factual findings and its decision."[115] "A decision is arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[116]

In the Final Rule, NMFS explained its rationale for concluding that the Bering Sea catcher/processor sector receives a "Federal permit" and is therefore subject to cost recovery under the MSA. Although NMFS' response to the public comment concerning other fishery programs was sparse and did not specifically discuss permits, NMFS responded to another comment specifically addressing the meaning of a permit by citing the regional regulation defining a permit as "documentation granting permission to fish."[117] The present regulation and NMFS' conclusions largely concern legal interpretation, rather than specific factual findings.[118]

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[114] Dkt. 29 at 27.

[115] *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010).

[116] *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)) (internal citations omitted).

[117] A.R. 1006032 at 156 (Final Rule).

[118] *Cf. Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) ("Here, we hold that NMFS has not offered a satisfactory explanation for its action. First, the agency has not adequately explained its finding that sea lions are having a 'significant negative impact' on the decline or recovery of listed salmonid populations given earlier factual findings by NMFS that fisheries that cause similar or greater mortality among these populations are not having

Although NMFS' positions with respect to similar programs may be relevant to a change in position or judicial estoppel, as discussed above, and to the Court's evaluation of NMFS' interpretation of the MSA, as discussed below, there is no freestanding procedural obligation for NMFS to distinguish its application of a statutory and regulatory framework to a particular program from its application in other contexts.[119]

D. NMFS' Interpretation of the MSA

The Court generally reviews NMFS' interpretation of the MSA under the *Chevron* two-step framework.[120] At step one, the Court considers whether "the intent of Congress is clear."[121] When "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress."[122] If the statute is "silent or ambiguous" on the precise issue, the Court considers whether Congress delegated authority to the agency "to speak with the force of law when it addresses ambiguity in the statute or fills a

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significant negative impacts. Second, the agency has not adequately explained why a California sea lion predation rate of 1 percent would have a significant negative impact on the decline or recovery of these salmonid populations. These procedural errors require us to direct the district court to vacate NMFS's decision"); *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir. 2006) ("There is no evidence in the record that the Council's 1986 and 1988 studies are outdated or flawed. Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the 'best scientific evidence available' fails.").

[119] Plaintiffs did not argue that NMFS' response somehow constituted a failure to respond. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("An agency need only respond to 'significant comments,' those which, 'if adopted, would require a change in the agency's proposed rule.'").

[120] *See, e.g.*, *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016); *Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012); *Oregon Trollers Ass'n*, 452 F.3d at 1116.

[121] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Glacier Fish*, 832 F.3d at 1120.

[122] *Chevron*, 467 U.S. at 842–43; *Glacier Fish*, 832 F.3d at 1120.

space in the enacted law."[123] When the agency interprets the statute through an exercise of that authority, the Court must "accept the agency's construction of the statute" so long as "the implementing agency's construction is reasonable . . . even if the agency's reading differs from what the court believes is the best statutory interpretation."[124] An interpretation is reasonable so long as it "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent."[125]

Plaintiffs raise a number of arguments concerning NMFS' interpretation of the MSA. The MSA defines a "limited access privilege" to include an "individual fishing quota," and defines an individual fishing quota as "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person."[126] Plaintiffs contest NMFS' interpretation of the terms "Federal permit," "person," "under a limited access system," and "exclusive use," as well as NMFS' broader conclusion that the AFA created an IFQ, and the appropriate level of deference.[127]

[123] *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Glacier Fish*, 832 F.3d at 1120.

[124] *Nat'l Cable &Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Glacier Fish*, 832 F.3d at 1120.

[125] *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *Glacier Fish*, 832 F.3d at 1120.

[126] 16 U.S.C. § 1802(23).

[127] Dkt. 45 at 27–32; Dkt. 50 at 10–23.

a. Federal Permit

As described above, the parties dispute whether the harvest specifications published annually in the Federal Register constitute a "Federal permit." In the Final Rule, NMFS explained its rationale for concluding that the catcher/processor sector receives a Federal permit:

> Section 3 of the Magnuson Stevens Act defines an individual fishing quota as ''a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person.'' According to § 679.2, a permit means documentation granting permission to fish. The harvest specifications, with the AFA directed fishing allowance entitling the catcher/processor sector to harvest a quantity of fish for its exclusive use, is the individual fishing quota and documentation granting permission to fish.

In their cross-motion for summary judgment and at oral argument, Defendants maintain and expand on this explanation. Defendants quote the full definition of a "permit" at 50 C.F.R. § 679.2, part of the NMFS regulations implementing the AFA programs, which provides that "[p]ermit means documentation granting permission to fish and includes 'license' as a type of permit."[128] Noting that the NMFS regulations do not specifically define the term "license," Defendants then look to the APA, which defines a "license" to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[129] Defendants thus contend that the annual harvest specifications are a Federal permit as they "authorize fishing" and therefore fall within NMFS' "broad definition of the term 'permit.'"[130]

[128] Dkt. 49 at 20.

[129] *Id.*

[130] *Id.*

Defendants expressly tie this broad definition to the regulatory definition at 50 C.F.R. § 679.2. Defendants explain that the Alaska Region of NMFS promulgated this definition through notice and comment rulemaking, and distinguish the definition used in *Lovgren* on the basis that there was no comparable regulatory definition in the Northeast Region. At oral argument, Defendants acknowledged that the harvest specifications do not meet the definition of a "Federal permit" articulated in *Lovgren*. However, because the Alaska Region of NMFS has specifically defined the term "permit" to include a license, and as NMFS' interpretation of their own regulations are due particular deference, Defendants contend that the harvest specifications constitute a permit for the Bering Sea pollock catcher/processor sector.[131]

Plaintiffs object to Defendants' interpretation on several grounds. First, Plaintiffs argue that Defendants' broad interpretation of the term "permit" is not entitled to deference as NMFS did not include this interpretation in either the Proposed or Final Rules. Plaintiffs note that NMFS only quoted the first part of the definition at § 679.2 — leaving out the reference to a "license" — in the Final Rule, and made no mention of the APA's definition of a license.[132] Plaintiffs also argue that Defendants' interpretation of the term "Federal permit" in the MSA by reference to the definition of "permit" at § 679.2 is unreasonable, as nothing in the MSA or AFA indicates that Congress intended a "Federal permit" to mean a "permit" as defined by NMFS.[133] Moreover, Plaintiffs note that the regulatory definition at § 679.2 was only promulgated in 2008, and therefore "cannot serve as a basis on which to defend the CP sector's status as an IFQ

[131] *Id.* at 22, 25.

[132] Dkt. 50 at 16–17.

[133] *Id.* at 17–18.

program in effect before that date."[134] Finally, Plaintiffs argue that even if the regulatory definition is relevant, NMFS' interpretation is contrary to the plain language of the regulation and evidence of NMFS' intent at the time it adopted the regulation.[135]

Turning to *Chevron* step one, the MSA itself does not define "Federal permit" or "permit," and the Court has not found any provision in the MSA that specifically addresses the format of a Federal permit.[136] Similarly, in both *Lovgren* and *Glacier Fish*, the First and Ninth Circuits concluded that the MSA had not directly spoken to whether the disputed permits at issue in those cases constituted Federal permits within the meaning of the statute.[137] The Court concludes that Congress has not directly spoken to the precise question at issue.

With respect to whether Congress delegated authority to NMFS to "speak with the force of law" in interpreting this term, the MSA specifically directs the Secretary of Commerce to collect a fee to recover costs related to the management and enforcement of limited access privilege programs. To do so, the Secretary, acting through NOAA and NMFS, must determine which programs are limited access privilege programs, which in turn requires consideration of the term "Federal permit." Although the MSA does not specifically direct NMFS to engage in

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[134] *Id.* at 18–19.

[135] *Id.* at 20.

[136] At oral argument, Plaintiffs acknowledged that no provision in the MSA or the AFA foreclosed NMFS' interpretation. Tr. at 5, 9.

[137] *See Lovgren v. Locke*, 701 F.3d 5, 22 (1st Cir. 2012) ("we agree with defendants that the statutory text does not compel the conclusion that A16's sector program meets the statutory definition of a LAPP or an IFQ"); *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1121 (9th Cir. 2016) ("we have not found, and the parties have not identified, any provisions in the Magnuson–Stevens Act that specifically address whether a limited access privilege could include a permit issued to a coop along the lines set forth in NMFS's regulations. We therefore conclude that Congress has not directly spoken to this issue.").

formal rulemaking on this point, the statutory language implicitly requires NMFS to determine its applicability.[138] Accordingly, the Court will defer to NMFS' construction as long as it is reasonable.[139]

However, as Plaintiffs note, Defendants significantly expanded their interpretive argument in their briefing before this Court. NMFS referenced the definition of "permit" at 50 C.F.R. § 679.2 in the Final Rule, but did not discuss the meaning of a "license" within this definition, or refer to the definition of "license" under the APA. In reviewing agency action, the Court "may not accept . . . counsel's *post hoc* rationalizations," as "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[140] While the Court will defer to NMFS' interpretation as described in the Final Rule, Defendants' additional arguments are not entitled to the same deference.

Moreover, even applying *Chevron* deference, NMFS' conclusion that the harvest specifications constitute a "Federal permit" is not a "reasonable interpretation" of the MSA.[141] Under *Chevron*, the Court must determine whether the agency action was "based on a

[138] *Cf. Glacier Fish*, 832 F.3d at 1120 ("Here, Congress directed NMFS to promulgate a fishery management plan and implementing regulations that have the force of law through notice-and-comment rulemaking. See 16 U.S.C. § 1854. Accordingly, we must defer to NMFS's construction").

[139] *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Glacier Fish*, 832 F.3d at 1120.

[140] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, (1983); *see also Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008); *Kunaknana v. U.S. Army Corps of Engineers*, 23 F. Supp. 3d 1063, 1093 (D. Alaska 2014).

[141] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 880 (9th Cir. 2005) ("even under the *Chevron* standard of review, the 2002 quota was based on an impermissible construction of the Act.").

permissible construction of the statute,"[142] or in other words, "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent."[143]

Defendants assert, without explanation, that the term "Federal permit" in the MSA should be interpreted by reference to the definition of "permit" in the NMFS regulations concerning the AFA. At the outset, the Court notes that this argument suffers from a timing discrepancy. The meaning of a statutory term is ordinarily understood as of the time of the statute's enactment.[144] Congress amended the MSA to include the cost recovery provision and a definition of an IFQ, which included the term "Federal permit," in 1996. NMFS only adopted the regulatory definition of a "permit" codified at 50 C.F.R. § 679.2 in 2008. Defendants themselves argue that NMFS "has long held that the AFA Program indeed meets the Magnuson-Stevens Act's definition of an IFQ, at least since 2002," but do not explain how the harvest specifications could have constituted a "Federal permit" between 2002 and 2008, when there was no regional regulatory definition in place.[145] To the contrary, Defendants conceded at oral argument that the harvest specifications would not fall under the definition of a "Federal permit" in *Lovgren*,[146] which

[142] *Id.* at 843.

[143] *Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

[144] *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the IRA was enacted.").

[145] Dkt. 49 at 41.

[146] Dkt. 57 (Oral Argument held on Jan. 22, 2018).

Defendants distinguish from this case precisely because "the Northeast Fishery and the Greater Atlantic Region of NMFS did not have a specific regulation defining the term 'permit.'"[147]

More fundamentally, Defendants' contention that the term "Federal permit" may have different meanings in different regions is at odds with the text and purpose of the MSA. In addition to defining the terms "limited access privilege program" and "individual fishing quota," the MSA regulates the development of these programs by regional fishery councils.[148] Nothing in the MSA suggests that NMFS should be able to alter the definition of a "Federal permit" and thereby broaden or narrow the category of programs that qualify as "limited access privilege programs" — and are subject to the related provisions of the MSA — in different regions. While different regions could conceivably issue different types or formats of permits, such permits, in order to qualify a program as an individual fishing quota and/or a limited access privilege program, must all be "Federal permits" within the meaning of the MSA.[149] It strains the bounds of reasonability to conclude that the same agency could significantly expand the definition of a statutory term for one region while applying a far narrower definition elsewhere without ultimately draining the statutory term of any meaning.

NMFS' interpretation is also inconsistent with the use of the term "permit" in the MSA and in NMFS regulations, including the NMFS Alaska region regulations implementing the

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[147] Dkt. 49 at 25.

[148] *See* 16 U.S.C. § 1853a(a) ("After January 12, 2007, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.").

[149] Indeed, in *Lovgren*, the First Circuit cited different types of permits used in fisheries in a number of regions to conclude that a permit "is a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery." *Lovgren v. Locke*, 701 F.3d 5, 24–25 (1st Cir. 2012).

AFA. As described in *Lovgren*, the term "Federal permit" has "an understood meaning in fisheries management," and has been used consistently in the MSA and in NMFS regulations covering different regions.[150] The Alaska region regulations cited by Defendants include a provision on permits,[151] which describes a number of available permits — including a specific "IFQ permit" — that comport with the general understanding of a "permit" as "a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery."[152]

Finally, even looking to the definition of a "permit" in § 679.2, as advanced by Defendants, the definition itself does not suggest that a "permit" under these regulations is intended to encompass harvest specifications. This section defines a permit as "documentation granting permission to fish," including a "license." In *Lovgren*, NMFS quoted Black's Law Dictionary's definition of a "permit" as "a certificate evidencing permission; a license," and concluded that a Federal permit did not encompass "any sort of permission" but rather, in the context of the MSA, referred to a permit issued under that system.[153] NMFS' invocation of the term "license" does not significantly alter this analysis. Moreover, these same regulations, in addition to including a provision on permits that does not include harvest specifications, also include a provision implementing the AFA program which references the harvest specifications and makes no mention of an IFQ, limited access privilege, or a permit.[154]

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[150] *Id.* at 24–26.

[151] 50 C.F.R. § 679.4.

[152] *Lovgren*, 701 F.3d at 25.

[153] *Id.*, Brief for the Federal Defendant-Appellees, 2012 WL 1075783 at 37.

[154] 50 C.F.R. § 679.20.

The Court thus concludes that NMFS' interpretation of "Federal permit" in the Final Rule is not a permissible construction of the MSA.

b. Person

The parties also dispute whether the catcher/processor sector may be a "person" who receives an individual fishing quota under the MSA. As with the term "Federal permit," NMFS directly addressed this issue in the Final Rule in response to a comment. With respect to "person," however, NMFS acknowledged that "the proposed rule was not sufficiently specific in explaining who the person is that receives the individual fishing quota."[155] In the Proposed Rule, NMFS identified the relevant "person" as the "AFA Offshore Joint Cooperative,"[156] which NMFS described as a "joint agreement… to facilitate efficient harvest management and accurate harvest accounting between the participants in the catcher/processor sector."[157] In the Final Rule, NMFS did not link the "person" to the joint cooperative agreement, but rather identified the relevant person as "the catcher/processor sector that is eligible to harvest pollock from that sector's directed fishing allowance defined in section 206(b)(2) of the AFA."[158] NMFS explained:

> Regulations at § 679.2 define a person as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other non-individual entity (whether or not organized, or existing under the laws of any state), and any Federal, state, local, or foreign government or any entity of any

[155] A.R. 1006032 at 157 (Final Rule).

[156] A.R. 1005825 at 943, Table 2 (Proposed Rule).

[157] *Id.* at 940. The Proposed Rule did not specifically discuss the two cooperatives who formed this agreement, but noted that the joint agreement, in full, is "called the 'Cooperative Agreement between Offshore Pollock Catchers' Cooperative and Pollock Conservation Cooperative' (AFA Offshore Joint Cooperative)." *Id.*

[158] A.R. 1006032 at 157 (Final Rule).

> such aforementioned governments." A similar definition of a "person" is in section 3 of the Magnuson-Stevens Act.
>
> As explained in response to Comment 5, the directed fishing allowance is an individual fishing quota. NMFS allocates the directed fishing allowance to the AFA catcher/processor sector. NMFS considers the AFA catcher/ processor sector an entity and therefore a person under the Magnuson-Stevens Act.[159]

Plaintiffs acknowledge that the MSA defines "person" to include an "entity," but contend that NMFS' interpretation is foreclosed by the text of the AFA.[160] Plaintiffs point to the AFA's harvest cap provision, which prohibits any "particular individual, corporation, or other entity" from harvesting "a total of more than 17.5 percent of the pollock available to be harvested in the directed pollock fishery."[161] As Congress allocated the catcher/processor sector an amount greater than the 17.5% harvest cap, Plaintiffs argue, Congress could not have considered the catcher/processor sector to be an "entity" subject to that cap, and there is no evidence that Congress intended the word "entity" to have different meanings in the MSA and the AFA.[162] Plaintiffs also argue that the catcher/processor sector is "simply a description of the vessels" authorized under the AFA to harvest the 40% catcher/processor sector allocation, and therefore is not an entity capable of receiving a permit.[163]

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[159] *Id.*

[160] Dkt. 45 at 28; Dkt. 57 (Oral Argument held on Jan. 22, 2018).

[161] Pub. L. No. 105-277, § 206(b)(2) (Oct. 21, 1998), § 210(e)(1); *see also* § 205(4) ("the term 'directed pollock fishery' means the fishery for the directed fishing allowances allocated under paragraphs (1), (2), and (3) of section 206(b)").

[162] Dkt. 45 at 28; Dkt. 50 at 13.

[163] Dkt. 50 at 12.

In response, Defendants reiterate that the MSA defines "person" to include any "entity," and note that the NMFS regulations implementing the AFA contain a similar definition of "person" that expressly includes any "non-individual entity." The NMFS regulations further define a "non-individual entity" as "a person who is not an individual or 'natural' person; it includes corporations, partnerships, estates, trusts, joint ventures, joint tenancy, and any other type of 'person' other than a natural person."[164] In their briefing before this Court, Defendants change the description of the relevant sector from the description in the Final Rule, which did not specifically define the catcher/processor sector by way of the two cooperatives. Defendants now posit that the "AFA catcher/processor sector was created when two cooperatives entered into a joint agreement," and that through this agreement, "these two cooperatives, comprise a non-individual entity, i.e. the AFA catcher/processor sector, because the sector acts as a single entity and receives its exclusive harvest privilege as one entity."[165] With respect to the 17.5% harvest cap, Defendants argue that Plaintiffs are confusing the term "person," which includes a "non-individual entity," with the separate term "AFA entity" in NMFS' regulations implementing the AFA.[166] Defendants argue that the AFA's harvest cap applies to specifically to AFA entities, not to any non-individual entity.[167]

Under *Chevron*, the Court's analysis begins with the plain language of the MSA. Unlike the term "Federal permit," the MSA specifically defines "person": "The term 'person' means any

[164] Dkt. 49 at 32 (quoting 50 C.F.R. § 679.2).

[165] *Id*. at 32–33.

[166] 50 C.F.R. § 679.2 ("AFA entity means a group of affiliated individuals, corporations, or other business concerns that harvest or process pollock in the BS directed pollock fishery").

[167] Dkt. 49 at 32–33.

individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government."[168] The MSA does not define "entity," and NMFS based its interpretation in the Final Rule on its conclusion that the catcher/processor sector is an entity, and therefore a person. However, both the common sense meaning of the term "entity" and its use in the context of the MSA's definition "person" foreclose this interpretation.

When a statute does not expressly define a term, courts consider "the common sense meaning of the statute's words," including review of dictionaries.[169] Black's Law Dictionary defines an "entity" as a "real being; existence . . . an organization or being that possesses separate existence for tax purposes," and gives as examples "corporations, partnerships, estates and trusts."[170] Courts also read terms in context, and may consider "the structure of the relevant provisions."[171] The structure of the MSA's definition of "person," which includes "any

[168] 16 U.S.C. § 1802(36).

[169] *Arizona Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1249 (9th Cir. 2007); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003), *amended on reh'g en banc in part sub nom. Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004).

[170] Black's Law Dictionary 477 (5th ed. 1979). In considering the common sense meaning of a term, the Court looks to dictionaries that were current when the legislation was drafted. *Arizona Health Care*, 508 F.3d at 1249. Congress included the above definition of "person" in the MSA when it was first passed in 1976, although Congress only added a definition of an "individual fishing quota," which includes reference to a "person," in 1996. The 1999 version of Black's Law Dictionary similarly defines an "entity" as an "organization (such as a business or a governmental unit) that has a legal identity apart from its members." Black's Law Dictionary 553 (7th ed. 1999).

[171] *The Wilderness Soc'y*, 353 F.3d at 1062.

corporation, partnership, association, or other entity," indicates that corporations, partnerships, and associations are examples of the types of entities that constitute persons under the MSA.

Although the MSA's definition of a "person" is broad, it does not encompass a list. As described in the Final Rule, the "person" identified by NMFS is "the catcher/processor sector . . . defined in section 206(b)(2) of the AFA." Section 206(b)(2), in turn, refers to "catcher/processors and catcher vessels harvesting pollock for processing by catcher/processors in the offshore component." Sections 208(b) and 208(e) then list the individual catcher vessels and catcher/processors, respectively, that are eligible to harvest pollock under section 206(b)(2).[172] Although these provisions list a number of individual vessels, and may indeed describe the AFA's "catcher/processor sector," none of these provisions describe an organization or a being that possesses a separate existence outside of its constituent members. Moreover, the MSA's definition of an "individual fishing quota" describes a harvest privilege that may be "that may be received or held for exclusive use by a person."[173] A list of vessels, in contrast to an organization or another "real being," is not capable of receiving or holding such a privilege.[174]

[172] Sections 208(b) and 208(e) list eligible vessels by name and include provisions concerning unlisted vessels that may also be eligible to harvest pollock if they meet certain historical criteria. *See* Pub. L. No. 105-277, §§ 208(b)(8) and 208(e)(21).

[173] 16 U.S.C. § 1802(23). Moreover, while a sector allocation could potentially be a different type of quota program, the MSA distinguishes between an "individual quota program" and a "sector allocation." *See* 16 U.S.C. §§ 1853a(h) ("Nothing in this chapter . . . shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation") and 1853a(i) ("The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation").

[174] *Cf. Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016) (concluding that a "coop," which was "a group of participants that acts both as a group and individually," could hold a "Federal permit" under the MSA).

The language and format of the MSA's definition of "person" preclude NMFS' interpretation of this term.[175]

Defendants' revised description of the relevant "person" in their briefing before this Court is similarly unavailing. In their cross-motion for summary judgment, Defendants contend that by entering into a joint agreement, the two cooperatives in the catcher/processor sector now comprise an entity.[176] However, an "agreement," like a list, simply does not fall within the common sense meaning of the term entity. While an individual cooperative may receive a permit, as discussed in *Glacier Fish*, an "agreement" between two cooperatives is not itself an organization or a being capable of receiving a privilege.[177]

NMFS' interpretation of "person" in the Final Rule is not a permissible construction of the MSA.

c. Under a limited access system and exclusive use

Plaintiffs also argue that the AFA program is not an individual fishing quota because the purported Federal permit to the catcher/processor sector is not issued "under a limited access system," and the purported person does not have "exclusive use" to harvest a quantity of fish. As

[175] With respect to Plaintiffs' argument concerning the AFA's harvest cap, the Court notes that the AFA does not appear to have intended for the harvest cap to apply to the entire sectors receiving directed fishing allowances under section 206(b). However, the AFA's use of the term "entity" is not necessarily coextensive with the use of the term "entity" in the MSA, and NMFS has adopted a specific definition for an "AFA entity" who is subject to the harvest cap. *See* 50 C.F.R. §§ 679.2; 679.7(k)(6) ("It is unlawful for an AFA entity . . . to harvest, through a fishery cooperative or otherwise, an amount of BS pollock that exceeds the 17.5 percent excessive share limit"). As the Court concludes that NMFS' interpretation conflicts with the plain language of the MSA, the Court need not resolve whether the language of the AFA would similarly foreclose NMFS' construction.

[176] Dkt. 49 at 33.

[177] *Cf. Glacier Fish*, 832 F.3d at 1120.

the Court has concluded that both the "Federal permit" and the "person" described in the Final Rule reflect impermissible constructions of the MSA, the Court does not reach these issues.

E. Designation of CP Salmon Corporation as payor and recoverable costs

In addition to the procedural and interpretive challenges discussed above, Plaintiffs raise specific arguments about the designation of CP Salmon Corporation as the payor and the calculation of recoverable costs in the Final Rule. As the Court concludes that the Final Rule impermissibly interprets and thereby violates the MSA, the Court likewise does not reach these arguments.

F. Remedy

In their cross-motion for summary judgment, Defendants request the opportunity to submit additional briefing on remedy in the event the Court rules in favor of Plaintiffs.[178] While the Court notes that an impermissible construction of a statute, in contrast to other agency action, may not typically be cured on remand, the Court grants Defendants' request to provide further briefing on remedy.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Final Rule violates the Magnuson–Stevens Fishery Conservation and Management Act in its construction of the terms "Federal permit" and "person."

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART** with respect to these arguments and **DENIED IN PART**.
2. Defendants' Cross-Motion for Summary Judgment is **DENIED**.

[178] Dkt. 49 at 46.

3. Within 21 days of this order, Defendants shall file supplemental briefing on the remedy, limited to 10 pages. Plaintiffs may file any response within 14 days of Defendants' supplemental briefing, also limited to 10 pages.

Dated at Anchorage, Alaska, this 30th day of March, 2018.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE