IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GROUNDFISH FORUM, *et al.*

Plaintiffs,

v.

WILBUR L. ROSS, *et al.*

Defendants

and

THE CITY OF ADAK, *et al.*

Defendant-Intervenors.

Civ. No. 1:16-cv-02495-TJK

REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant-Intervenors the City of Adak, Alaska ("Adak"), the City of Atka, Alaska ("Atka"), the Adak Community Development Corporation ("ACDC"), the Aleutian Pribilof Island Community Development Association ("APICDA"), and the Aleut Corporation (collectively, "Defendant-Intervenors"), by and through undersigned counsel, hereby submit this Reply in Support of their Cross-Motion for Summary Judgment (Dkt. 36) and Memorandum in Support (36-1) ("Memorandum or "Mem").

I. INTRODUCTION

Plaintiffs The Groundfish Forum, United Catcher Boats, B & N Fisheries Company, and Katie Ann LLC (collectively, "Plaintiffs"), in their Opposition to Defendants and Defendant-Intervenors' Cross-Motion for Summary Judgment (Dkt. 40, hereinafter "Opposition" or "Opp."), fail to rehabilitate their fatally flawed arguments against Defendants' reasonable, rational, and record-based actions in approving Amendment 113 to the Fisheries Management Plan ("FMP") for the Bering Sea/Aleutian Island ("BSAI") Groundfish Fishery ("Amendment 113"), and promulgating its implementing Final Rule, 81 Fed. Reg. 84434 (Nov. 23, 2016) ("Final Rule").

In their attempt to discredit Defendant the National Marine Fisheries Service ("NMFS")'s reasoned judgment in promulgating Amendment 113 and the Final Rule, Plaintiffs lodge curious – and often contradictory – arguments. For instance, Plaintiffs first claim the 5,000 mt set-aside of Pacific cod for vessels delivering to AI shoreside processing plants is irrational because it is *not enough* to sustain these plants, *see* Opp. at 11-12; and then claim 5,000 mt is an "*excessive share*" for these plants. *Id*. at 36-37. In another example, Plaintiffs argue *both* that the Atka plant is unlikely to operate in the Pacific cod fishery, *id*. at 12-13, *and* that NMFS irrationally failed to account for the "likely competition" the Atka plant would pose to Adak's plant in the Pacific cod fishery. *Id*. at 11. In a third instance, Plaintiffs acknowledge that "sustainable businesses and employers support the health of the communities in which they are located," *id*. at 8; but

subsequently argue that NMFS's goal of supporting sustainable employment in Adak and Atka is merely an "economic," rather than a community, or social, goal. *Id*. at 37-38. Plaintiffs also misapply the legal standards relevant to Defendants' rulemaking. Contrary to Plaintiffs' arguments, Defendants were entitled to make "predictive judgments" about the likely, future consequences of Amendment 113, and Defendants were not required to guarantee the success or future viability of the AI onshore processing plants before taking regulatory action to aid the communities in which these plants are located.

As discussed in Defendant-Intervenors' Memorandum and as further set forth herein, Defendant-Intervenors respectfully ask the Court to grant their Cross-Motion for Summary Judgment, and deny Plaintiffs' Motion for Summary Judgment.

II. ARGUMENT

A. Amendment 113 Represents Rational, Reasoned Decision-making by NMFS under the Magnuson-Stevens Act ("MSA") and National Standards

Plaintiffs spend significant effort in their Opposition arguing that NMFS is not owed the traditionally high degree of deference provided by Administrative Procedure Act ("APA") review, because NMFS purportedly "made unsupported assumptions regarding the viability of Aleutian Islands shore-based processing." Opp. at 3; *see also id*. at 7-10, 26-27. Plaintiffs' argument is problematic for several reasons.

1. Plaintiffs Incorrectly Characterize the Court's Inquiry

While it is true that courts "'do not defer to an agency's 'conclusory or unsupported suppositions,'" Opp. at 4 (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (in turn quoting *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004)), NMFS's "assumption" about the likely benefits that will accrue to Adak and Atka as a result of Amendment is not an "unsupported supposition." In *McDonnell*

Douglas Corp., for instance, the court found an assumption by the Air Force unfounded where the Air Force assumed that two bidders in a federal procurement *likely had received* different prices from the same vendors bidding for the same subcontract based on nothing more than "casual observations that it was 'entirely possible' and 'not uncommon'" that this would have occurred. 375 F.3d at 1190.[1] By contrast, here Plaintiffs challenge NMFS's predictive judgments about the *future* "likely economic effects of [its] rule," which are entitled to a heightened degree of deference. *Nat'l Tel. Co-op Ass'n v. FCC*, 563 F. 3d 536, 541 (D.C. Cir. 2009) (citing *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001)). Amendment 113 represents NMFS's predictive judgments regarding the likely impacts of a rule that seeks to mitigate unintended consequences of nearly a decade of conservation and management measures, based on NMFS's experience and understanding of the regulatory intricacy of the BSAI groundfish fishery and the series of operational responses among the fishery various participants.

2. Uncertainty Does Not Preclude NMFS From Assisting Coastal Communities

Perhaps more importantly, whether the processing operations on Adak and Atka ultimately prove to be viable and sustainable is entirely irrelevant to whether NMFS acted reasonably and rationally in attempting to alleviate negative economic impacts on these communities through Amendment 113. Plaintiffs claim Amendment 113 was unreasonable or irrational because it does not represent a comprehensive solution to the operating challenges faced by Adak's and Atka's processing plants, *see* Opp. at 10-16, and because these plants ultimately might be unsuccessful despite the set aside of Pacific cod provided by Amendment 113. *See id*. at 7-9. Simply put, Plaintiffs' demand that NMFS establish that the AI communities' processing plants will be viable

[1] The *National Shooting* case does not concern unsupported agency assumptions, and in fact the court in that case *denied* the plaintiffs' "arbitrary and capricious" claims against the agency action at issue. 716 F. 3d at 217.

"with or without Amendment 113," Opp. at 8, asks much more of NMFS than is required by law. Neither the MSA, nor its implementing National Standards, nor the APA, foist such a heavy burden on NMFS, and Plaintiffs have cited no law that would do so.

To the contrary, Defendants' obligations with respect to fishing communities are to (1) "*take into account* the importance of fishery resources to fishing communities by utilizing economic and social data . . . in order to (A) provide for the *sustained participation* of such communities, and (B) *to the extent practicable*, *minimize* adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8) (emphasis added). Nothing therein requires NMFS either to affirmatively guarantee its attempt to aid shore-based communities will be successful or provide a wholesale solution to challenges faced by these communities. *See, e.g.*, *NRDC v. Nat'l Marine Fisheries Serv.,*71 F. Supp. 3d 35, 42 (D.D.C. 2014) (NMFS is required to choose the alternative that "provides the greater *potential* for sustained participation of fishing communities and that minimizes adverse economic impacts'") (citation omitted) (emphasis added). Thus, the rationality of Amendment 113 is not dependent on the ultimate economic viability of the fish processing plants located on Adak and Atka, and Plaintiffs' repeated complaint that Defendants assumed the viability of these plants is inconsequential.[2]

Instead, the Court's inquiry is whether NMFS drew a rational connection between the facts found and the choice made. *NRDC,* 71 F. Supp. 3d at 56. Here, that choice was to implement Amendment 113 "as a community protection measure, and a way to provide an *opportunity*, *not a guarantee*, to maintain shore-based cod processing" on Adak and Atka. AR 6000176 (recording

[2] Indeed, it is precisely because of the vulnerable and precarious nature of these remote island communities that NMFS decided to implement Amendment 113 in the first place. NMFS has long recognized the need for protections for these communities, but first wanted to evaluate the impacts of the TAC split and Steller sea lion measures before taking action. *See* Mem. at 38-39; AR 3004737.

time beginning at 7:37:11) (statement from Councilmember N. Kimball) (emphasis added). As explained in Defendant-Intervenors' Memorandum, there is ample support in the AR for Defendants' decision. *See* Mem. at 7-16; 18-25. Here, it is undisputed that:

- Adak and Atka are "fishing communities," as that term is defined by the MSA, 16 U.S.C. § 1802(17);
- NMFS has an obligation to consider these communities and make efforts to "provide for the sustained participation of such communities" in the fisheries that are important to them and "minimize adverse economic impacts" on them, 16 U.S.C. § 1851(a)(8);
- Processing Pacific cod is an important part of maintaining a year-round processing plant on Adak and Atka, which in turn is vital to the long-term sustainability of these communities, *see* AR 3004834-35 (written comments by City of Adak showing importance of plant to its tax base and viability); AR 1000092 (EA conclusion that "without A season cod, the [Adak] plant does not survive); AR 6000176 (recording time beginning at 5:49:41) (APICDA testimony to Council that the Atka community will not be viable with its processing plant).
- "[S]ustainable businesses and employers support the health of the communities in which they are located," Opp. at 8 (calling this proposition "obvious");
- NMFS considered the historic instability of the processing operations on Adak and Atka, *see* AR 1000090-96, and wanted to provide these communities with some sort of stability going forward. *See* AR 6000159 (recording time beginning at 7:14:20) (statement from Dr. Balsiger that Adak's plant "also ha[s] uncertainty and they can't move forward without some certainty").

In light of these uncontested facts, NMFS's decision to establish a 5,000 mt set-aside of Pacific cod for fishing vessels that deliver to the AI communities to provide an "opportunity" for

these communities to participate in the Pacific cod fishery is rational and reasonable. This is especially true where, as here, NMFS considered the possibility that the AI shoreplants may be unable to process Pacific cod, and built contingency mechanisms into the Final Rule which will eliminate the set-aside if Adak or Atka is not prepared to process Pacific cod in the upcoming year. 81 Fed. Reg.at 84436-37, 84457-58.

3. Plaintiffs' Substantive Challenges to Amendment 113 Fall Flat

a. NMFS rationally determined Amendment 113 would benefit AI communities

Plaintiffs claim that Amendment 113 is irrational based on a curious and contradictory argument that the 5,000 mt Pacific cod set aside might *not be enough* to sustain the processing plant located on Adak, and certainly not enough to sustain Adak together with other AI processing plants. Opp. at 10-11. Plaintiffs' argument suffers from multiple flaws in logic:

First, even if a higher volume of cod is necessary to "stabilize" the Adak and Atka shore-plants, NMFS's set aside of 5,000 mt. for vessels delivering to AI shoreplants was reasonable to provide for AI communities "sustained participation" in AI fisheries. "The term 'sustained participation' means continued access to the fishery *within the constraints of the condition of the resource*." 50 C.F.R. § 600.345(b)(4) (emphasis added). It is undisputed that the total volume of available Pacific cod in the AI has declined in recent years, *see* Opp. at 14, and NMFS established the set-aside amount in light of the current condition of Pacific cod stocks. The set-aside amount was reasonable and rational.

Second, Plaintiffs immediately undercut their own argument by later contending there are no other AI processing plants that will be able to process the set-aside cod, and the Amendment 113 set-aside cod will all end up at Adak anyway. *Id*. at 13.

Third, Plaintiffs subsequently contradict their argument by arguing that Adak's processing plant "was holding its own" in 2012-2014, when it was processing between 2,477 - 4,777 mt of Pacific cod from the federal directed fishery. *Id*. at 16.

Fourth, Plaintiffs ignore the fact that Pacific cod processing is one important *piece* of a sustainable year-round processing operation for AI communities. *See* AR 1000092. Defendant-Intervenors do not contend Pacific cod *alone* is sufficient to sustain the AI onshore processing plants; nor does the Amendment 113 record.

Fifth, Plaintiffs disregard the fact that NMFS is not required to single-handedly "stabilize" these processing plants through its rulemaking, *see* discussion at pp. 3-5, *supra*, and therefore providing for less than the full amount of Pacific cod needed to sustain these operations through the Amendment 113 set-aside does not make NMFS's rulemaking arbitrary or capricious.

Sixth, Plaintiffs' argument implies that in order to be rational, NMFS should have set aside a *larger* volume of Pacific cod under Amendment 113 for vessels delivering to onshore processors. *See* Opp. at 11. Such a conclusion runs contrary to nearly all of Plaintiffs' remaining arguments. *See, e.g*., *id*. at 36-37.

Seventh, Plaintiffs' fear that the AI onshore processors may be unable to maintain consistent operations fails to account for the contingencies in Amendment 113: If the AI onshore processing plants are unable to process Pacific cod, the set-aside will not take effect, *see* 81 Fed. Reg. at 84448, and Plaintiffs would be free to process AI Pacific cod wherever they choose during the set-aside period. *Id.*

In short, Plaintiffs have failed to set forth any credible reason why the 5,000 mt. set-aside under Amendment 113 is not rationally related to promoting the AI communities' sustained participation in the fishery and minimizing economic impacts on these communities.

b. NMFS Reasonably Considered Increased Offshore Processing as a Contributing Factor to Onshore Instability

In their second attack on Amendment 113's rationality, Plaintiffs fail to establish NMFS acted improperly by citing an increase in offshore processing capacity, as a result of rationalization programs, as *one* cause of the onshore processors' increased instability. *See* Opp. at 14-19. Plaintiffs argue there could not have been an influx of offshore processing capacity because "the number of catcher-processors in the fishery actually declined" and because all processors – both onshore and offshore – were "negatively impacted by the TAC split and sea lion mitigation measures." Opp. at 14. But "increased processing *capacity*" is not the same as "increased number of CPs." As Defendant-Intervenors have explained, the increased processing capacity resulted from CPs shifting into "mothership mode," using their processing capacity to process catch from CVs instead of just their own catch, rather than any influx of CPs into the AI. *See* Mem. at 20; *see also* AR 3004772 (Table 2-32 showing pre-Amendment 80, CPs' processing was 12% to 39% from CV deliveries, and post-Amendment 80 that percentage has ranged from 43% to 92%).

Plaintiffs further argue the record percentages of onshore versus offshore Pacific cod processing are "misleading" because of the few years Adak's shoreplant was not operational, Opp. at 15, but fail to counter Defendants' argument that even excluding these nonoperational years, the range for the total combined percentage of AI Pacific cod shoreplant processing for 2008-2015 was still extremely variable. Mem. in Support of Defs.' Cross-Motion for Summary Judgment (Dkt. 38-1) at 43, n.31. In any case, even though both onshore and offshore processors have been "negatively impacted by the TAC split and sea lion mitigation measures," Opp. at 14, NMFS properly found that onshore processors have been disproportionately affected. Importantly, whereas the *AI* Pacific cod stock has dramatically decreased in recent years, the *BS* Pacific cod stock has been *increasing*. *See* AR 1000077 (Table 2-11, showing that from 2003 to 2007, trawl

CP revenues averaged $155 million in the combined BSAI fishery, but from 2008 to 2014 they increased to an average of $240 million annually). Unlike CP vessels, Adak's and Atka's processing plants are immobile, and therefore do not benefit from the availability of significantly more Pacific cod in the BS. AR 1000286. Thus, the AI onshore processing plants have seen a *decrease* in both the percentage of aggregate *BSAI* cod and gross tonnage of Pacific cod processed. While at-sea processors showed a similar decline in both absolute tonnage and percent of *AI* processing, the impact of the shrinking AI "pie" needs to be put in context of relative dependence: From 2008 to 2014, AI cod only accounted for an average of approximately 1.76% of the overall revenues of CPs that retained cod in the Aleutians. AR 1000077 (calculated from Table 2-11). Accordingly, NMFS reasonably concluded that onshore processors are more affected by the volatility in Pacific cod landings than are offshore processors.

Nor is Plaintiffs' attack on NMFS's purported "change of position" on this issue persuasive. *See* Opp. at 16-19. Plaintiffs claim the position of Dr. James Balsiger, the NMFS Alaska Regional Administrator, was "consistent from 2014 to the eve of final Council action in 2015" that "shoreside processing operations have not been adversely affected" by offshore processing. Opp. at 17 (citing AR 2006062, 2006078). Plaintiffs argue Dr. Balsiger then "abruptly" changed course in July 2016, and adopted the Council's view that "[s]ince 2008, 'Aleutian Island fishing communities have lost their historical place in the Pacific cod fishery' and 'rationalization programs . . . have allowed an influx of processing capacity by catcher processors into the Aleutian Islands.'" *Id*. at 18 (quoting AR 4015901).

Initially, "[i]t is well-established that an agency can [even] reverse course on an issue, and that no heightened standard applies when an agency changes its mind." *NRDC*, 71 F. Supp. 3d at 58 (citing *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 514 (2008)). More importantly,

however, the "Balsiger" memos were not, in fact, prepared by Dr. Balsiger himself, but rather were prepared on his behalf by a member of his staff, Mr. Glenn Merrill. *See* AR 2006071, 2006078. As Defendant-Intervenors explained in their Memorandum, the initial 2014 "Balsiger" memo's recommendation not to go forward with the proposed amendment "was based on 2014 Council analysis which calculated onshore processors' historical share of cod using the total amount of cod processed in the AI only." Mem. at 20, n.8.; *see also* AR 2006071, 2006078.

However, this was not the position of Dr. Balsiger. Dr. Balsiger spoke for himself on this issue at the Council's October *2014* meeting, during which Dr. Balsiger supported moving forward with an initial review of the proposed amendment, stating:

> Uncertainty makes it difficult to plan . . . But that's exactly the argument that we heard from the people who want to build at Adak. They also have uncertainty and they can't move forward without some certainty. This Council has actually taken steps for regional delivery and other programs; it's not quite clear to me why this region should not benefit from that same kind of thing . . . I do think we should move forward and not kill it right here.

AR 6000159 (recording time beginning at 7:14:20).

In January 2015, Defendant-Intervenor ACDC submitted written comments urging NMFS to revise its problem statement to calculate onshore processors' historical share of Pacific cod using the total amount of cod processed in the AI *and* BS, in the aggregate. *See* AR 3004557-58; *see also* AR 3004685 (handout from D. Fraser of ACDC at Feb. 2015 Council meeting graphically illustrating difference between AI only denominator and BSAI aggregate denominator). At its February 2015 meeting, the Council adopted ACDC's suggestion and revised the problem statement to include the aggregate BSAI Pacific cod as the denominator for purposes of calculating the onshore processors' historic share. *See* AR 3004511 (Council meeting notes revising problem statement to include "the historical share of <u>BSAI cod</u> of other industry participants"). Based on this new calculation, the revised February 2015 Draft EA included new analyses showing that

shoreside Pacific cod processing – when calculated as a percentage of the BSAI cod aggregate – was decreasing both as a percentage of BSAI cod and in absolute amounts. *See* AR 3004631.

Nonetheless, in the October 2015 Balsiger Memorandum – once again prepared on Dr. Balsiger's behalf by Mr. Merrill, *see* AR 2006057 – Mr. Merrill apparently ignored the new analysis set forth in the February 2015 Draft EA and recycled the analysis from the prior 2014 memorandum. *See* AR 2006062. Presumably, Dr. Balsiger ignored Mr. Merrill's recycled advice at the October 2015 meeting where the Council took final action, as the Final EA analysis shows that "[p]rior to 2008, on average 69 percent of the total CV deliveries of AI Pacific cod went to shoreplants, while 31 percent was delivered to offshore vessels. Since 2008, 34 percent of total CV AI Pacific cod was delivered to shoreplants, and 66 percent was delivered to offshore vessels." AR 4015554. The record thus supports the Council's decision to pass Amendment 113.

B. Amendment 113 is Not an Exclusive Processing Privilege

Plaintiffs incorrectly argue in their Opposition that Amendment 113 creates an exclusive processing privilege based on two factors: (1) the restrictions created by Amendment 113; and (2) the hypothesis that the set-aside only benefits a single processing plant in Adak. Opp. at 19-23. Both arguments are legally and factually erroneous.

1. Amendment 113's Restrictions Do Not Amount to an Exclusive Privilege

First, Plaintiffs overstate Amendment 113's provisions to paint a picture of utter doom and gloom, arising from the purportedly draconian prohibitions on the BSAI Pacific cod fishery. They allege offshore processors will be "*prohibited* from processing cod during the period in which the set-aside is in place," and that "in years when catch limits are below 5,000 mt, *all* cod from the federal fishery [will be] exclusively reserved for shoreside processing." Opp. at 19 (emphasis added). In reality, offshore processors are only restricted from processing the first 5,000 mt of cod from the directed *AI fishery* under those conditions, as it must go to the shoreplants. Those

processors, however, are free to process any landings from the *BS* component of the combined fishery in any manner they choose.

Next, Plaintiffs contend that the so-called exclusive privilege may lead to a situation in which catcher vessels *will not even be paid at all*. Opp. at 20. ("The shore-based processor is not required to accept such deliveries or compensate the fishermen"). The Council did consider potential competitive impacts of the set-aside in its EA, and determined that while "CV participants would have less ability to use competition among processors for AI Pacific cod landings to leverage higher prices during price negotiations," vessels would have negotiating leverage including, among other matters, through "the threat of harvesting the entire A-season sector allocation in the BS." AR 1000043.

Then, Plaintiffs allege Amendment 113 constitutes a reallocation of BS cod to AI fishery participants who deliver to shoreside processors. Opp. at 20, n. 20. Rather, sectors are allocated a share of the *combined* BSAI TAC, which they can choose to harvest in either area. AR 1000058. Moreover, more than 5,000 mt of Pacific cod have been landed in the AI in every year since at least 2003, *see* AR 1000100, so there will be no shift of historic BS catch to the AI even if the entire 5,000 mt is caught and delivered there.

Plaintiffs' contention that Amendment 113 constitutes a fundamental departure from previous NMFS and Council actions implemented processing set-asides similarly is an exercise in blowing smoke. Opp. at 21-22. Variations in the details of the set-aside, arising from historical and operational differences in the pollock and rockfish fisheries (including the number of shore-based processors impacted by the action, whether the delivery set-aside is for an onshore or offshore processor, and whether a vessel can opt in to the onshore or offshore sectors), are irrelevant to the Council's authority to implement such set-asides. Amendment 113 does not

deprive a vessel owner of all operational decisions. A vessel operator can choose, for example, whether to fish its allocation in the BS or AI. AR 1000058. It is free to choose where to process AI cod from the AI Unrestricted Fishery prior to March 15,[3] and after March 15 it is free to decide where to process all of its directed AI cod. *See* 81 Fed. Reg. at 84458. Similarly, a vessel operator will be free to choose where to process directed AI cod at any time if the conditions necessary to trigger the set-aside are not met in a given year. *Id.* at 84457.

2. Amendment 113 Does Not Only Benefit One Community

In arguing Amendment 113 creates an exclusive processing privilege, Plaintiffs correctly state that Atka and Adak currently are the communities to which Amendment 113 is expected to apply. Opp. at 22.[4] However, they attempt to argue that only Adak, not Atka, will benefit from the set-aside. Plaintiffs rely on the differences between the Draft and Final EAs to imply that the agency swept Atka's inability to process Pacific cod immediately under the rug in order to skirt the exclusive privilege issue. Opp. at 23, n. 17. In fact, the Draft EA does not state that impacts to Atka will be "improbable at best," as Plaintiffs contend, *id.*, but only that "impacts from the preferred alternative are likely to be more long term." *Id.* (citing AR 3004819). There is no reason a Council cannot or should not base its decisions on long-term impacts; in fact, the MSA requires them to do just that. *See Nw. Envtl. Def. Ctr. v. Brennen*, 958 F.2d 930, 935 (9th Cir. 1992) ("The [MSA] contemplates maximum utilization of fishery resources consistent with the long-term

[3] Table 8A of the Final Rule provided for an allocation of 3,965 tons to the AI unrestricted fishery for cod in 2017, as well as an allocation of 2,500 mt for the incidental catch allowance. 81 Fed. Reg. at 84439.

[4] Plaintiffs are incorrect, however, in the assertion that "[t]here are no other MSA "fishing communities" west of 170 degrees west longitude." In fact, Saint Paul, Savoonga, and Gambell are too. *See* NOAA, *Community Profiles for North Pacific Fisheries – Alaska Volume 6,* NOAA Technical Memorandum NMFS-AFSC-259 (Nov. 2013). Although it may currently be impractical to land AI cod in any of these communities, at least one of them – Saint Paul – does have a processing plant.

health of the fishery"). Moreover, Plaintiffs elsewhere acknowledge "the likely competition" between two operational plants in Adak and Atka – conceding that the Atka plant's future is far from aspirational. Opp. at 11.[5] Therefore, Plaintiffs' contention that only a single processor in Adak would benefit from Amendment 113 must be rejected.

C. The MSA Provides Authority to Establish the Amendment 113 Set-aside

Plaintiffs continue, in their Opposition, to mischaracterize the guidance in the 2009 Lindeman Memorandum by stating that the Amendment 113 set-aside constitutes an unlawful "fixed linkage."[6] Despite their contentions, the set-aside does not create a "fixed linkage" between specific vessels and processors as Ms. Lindeman describes for the relevant fisheries in "Question 1" of the memo. AR 5000071-72. The Council requested Ms. Lindeman's analysis in the context of the Central Gulf of Alaska rockfish fishery, for which it was considering several allocation schemes, including allowing any harvester to join only one cooperative that was, in turn, obligated to deliver to a certain processor. Specifically, the Council requested a description of "the bounds of its authority for establishing a 'closed class' of processors . . . [in other words] whether a limited entry program could be established for processors..." Letter from Chris Oliver, Director, NPFMC to Lisa Lindeman, NOAA General Counsel (Jul. 2, 2009), at 3-4.[7]

Amendment 113 is not a limited entry program at all, but rather, a community set-aside. Therefore, it is more akin to the analysis of "Question 4" in the Lindeman Memorandum: the

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[5] Amendment 113's reasoned consideration of Atka's participation in Pacific cod processing is discussed more thoroughly in the context of National Standard 8 on pp. 18-19, *infra*.

[6] We note that the Lindeman Memorandum, while part of the Administrative Record considered by the Council in the development of Amendment 113, is simply an internal agency guidance document and has no force of law. *See Western Radio Servs. Co., v. Espy,* 79 F.3d 896, 900-02 (9th Cir. 1996) (internal agency guidance does not have "independent force and effect of law").

[7] Available at: https://www.npfmc.org/wp-content/PDFdocuments/catch_shares/Rockfish/RockfishAttachments909.pdf.

Council's creation of "an exclusive class of shore-based processors that would be recipients of . . . a specific portion of . . . landings from a fishery," which the memorandum concludes is clearly permissible in certain situations. AR 5000075-78. Although Plaintiffs contend that fixed linkages "ha[ve] the effect of allocating a shore-based processing privilege," and are therefore unlawful, Opp. at 24 (citing AR 5000072), they fail to recognize that because there is no direct "linkage" such as that contemplated for the rockfish program, there is no allocative effect. Thus, the citations in the Opposition are inapplicable to Amendment 113.

Moreover, Plaintiffs acknowledge the MSA *does* authorize regional delivery requirements "in the context of a limited access privilege program ['LAPP']." Opp. at 25. However, they summarily dismiss the applicability of those provisions here, because Amendment 113 itself does not create a LAPP. *Id.* (citing AR 1000283). What Plaintiffs miss is that, while it is true that Amendment 113 cannot possibly be a LAPP because it does not create a true allocation of fishing privileges, the fisheries to which it applies – Amendment 80 and AFA – both are LAPPs. *See* 73 Fed. Reg. 75659, 75660 (Dec. 12, 2008) (referring to both the Amendment 80 and AFA fisheries as "LAPPs"). Plaintiffs finally argue that even if the MSA does provide a legal basis for regional delivery requirements, such an action would still be unlawful if its "purpose is to allocate shore-based fishing privileges." Opp. at 26 (citing AR 5000075). The purpose of Amendment 113 is *not* allocation, but rather, the protection of remote coastal communities. *See* 81 Fed. Reg. at 84436.

D. Amendment 113 is Consistent with National Standard 8

1. National Standard 8 Does Not Require a Conservation "Purpose"

In their Opposition, Plaintiffs continue to flip National Standard 8's requirements on their head. Plaintiffs would have this Court find Defendants violated National Standard 8 by doing precisely what is required under that National Standard – *i.e.*, providing for the sustained participation of fishing-dependent communities, and minimizing adverse economic impacts on

such communities. 16 U.S.C. § 1851(a)(8). Plaintiffs' claim that National Standard 8 requires every FMP amendment to have an independent "conservation purpose" finds no support in the National Standard itself, or in the case law. Instead, in support of their claim, Plaintiffs merely cite the unexceptional principle that NMFS must give *priority* to conservation measures. Opp. at 29 (citing *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000); *N.C. Fisheries Ass'n, Inc*., 518 F. Supp. 2d at 91–92), and that "[i]t is only when two different plans achieve similar conservation measures that the [NMFS] takes into consideration adverse economic consequences." *Id.* (citing *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 44 n. 4 (D.D.C. 2008)). But nothing in these holdings requires a conservation purpose behind every FMP amendment.

To the contrary, as Defendants and Defendant-Intervenors have explained, Amendment 113 helps to bring the BSAI groundfish FMP into compliance with National Standard 8 after, *inter alia*, the TAC split and Steller sea lion measures proved deleterious to the AI onshore processors and the communities in which they are located. *See* Mem. at 38-39. In evaluating which action to take, NMFS complied with National Standard 8 by determining that two alternatives (*i.e*., adoption of Amendment 113, or no action) had similar conservation effects, and reasonably opted for "the alternative that provides the greater potential for sustained participation of fishing communities." Mem. at 29 (quoting *NRDC*, 71 F. Supp. 3d at 42 (in turn quoting *N.C. Fisheries Ass'n,* 518 F. Supp. 2d at 92) (emphasis added). Defendants cannot have violated National Standard 8 by doing the very thing it requires, even if the underlying purpose of Amendment 113 was not strictly a "conservation measure."[8] In *Blue Water Fisherman's Ass'n v. Mineta*, for instance – the sole case

[8] Notably, several National Standards guidelines expressly link "conservation" with the attainment of social or economic objectives. *See* 50 C.F.R. § 600.325(c)(3)(ii) (promotion of conservation may be achieved "by optimizing the yield in terms . . . *economic or social* benefit of the product") (emphasis added); 50 C.F.R. § 600.330(b)(2)(ii) (exception to National Standard 5's

Plaintiffs cite as an illustration of a violation of National Standard 8, *see* Opp. at 29-30 – the court found regulations requiring pelagic longline vessels to install a vessel monitoring system (VMS) violated National Standard 8 because NMFS chose an alternative that *failed* to minimize adverse economic impacts, without providing a conservation-based justification for doing so. 122 F. Supp. 2d 150 (D.D.C. 2000).[9] Here, by contrast, NMFS chose the alternative that both provides for sustained participation of the AI communities in the Pacific cod fishery, and minimizes economic impacts on these communities. No "conservation-based justification" was required for NMFS's *compliance* with National Standard 8.[10]

2. Amendment 113 Does Not Allocate Resources to a Specific Fishing Community

Plaintiffs' argument Amendment 113 violates National Standard 8 by "allocating resources to a specific fishing community," Opp. at 31-32 (citing 50 C.F.R. § 600.345(b)(2)), fares no better. Plaintiffs entirely fail to address the statement in the Final Rule that Amendment 113 does not allocate any resources to any "specific fishing community" at all, but rather allocates fishing privileges to "any properly permitted and licensed *vessel*, operated by any resident of any community or state" that will deliver its catch "to any Aleutian Islands shoreplant in any Aleutian Islands community." Mem. at 30-31 (quoting 81 Fed. Reg. at 84446) (emphasis added). Because

inefficiency rule where conservation and management measures "contribute[] to the attainment of other *social* or biological objectives") (emphasis added).

[9] Plaintiffs' attempt to distinguish *NRDC*, 71 F. Supp. 3d at 56, also fails. *See* Opp. at 30. Though the *initial* fishing prohibition in that case was intended to prevent overfishing, the regulatory action actually at issue was a *subsequent* action lifting the prohibition aimed at alleviated economic burdens on fishing communities. *See* 71 F. Supp. 3d. at 60.

[10] Plaintiffs' claim that "[a]ccording to Intervenors, Amendment 113 did not need to be based on the best available science because 'conservation measures' were not 'reopened' with Amendment 113," Opp. at 31, is a figment of Plaintiffs' imagination and merits little response. Defendant-Intervenors never made this claim. Instead, Defendant-Intervenors noted that because Amendment 113 did not re-open the conservation measures of the BSAI groundfish FMP, Amendment 113 need not have its own independent "conservation purpose." Mem. at 27.

NMFS has not allocated any resources to any community at all – and because Plaintiffs fail to refute this point – Plaintiffs' claim must fail. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004).

In any case, even if Amendment 113 allocates resources to communities (which it does not), Plaintiffs have failed to establish Amendment 113 allocates resources to a "specific" community. First, Amendment 113 is facially neutral as to which AI community may receive the Pacific cod set-aside for processing. *See* 81 Fed. Reg. at 84446. Second, Plaintiffs' entire argument that only Adak, and not Atka, will benefit from Amendment 113 is based on Plaintiffs' mistaken belief that because Atka *historically* has not processed cod from the directed Pacific cod fishery, it will be unable to do so in the *future*. *See* Opp. at 13, 22. Plaintiffs also grossly mischaracterize NMFS's statement that "impacts [to Atka] from [Amendment 113] are likely to be more long term," AR 3004819) (emphasis added) as a concession from NMFS that "it was improbable at best that Atka would be able to take advantage of the set aside." Opp. at 23 n. 17.

NMFS's determination that Atka would likely be able to process Pacific cod in the future is well supported by the record, which shows Atka has been making investments in its processing plant with the goal of processing Pacific cod from the directed fishery as part of a year-round operation. *See* AR 1000096 (describing Atka's "$4 million expansion and improvements to make the plant a year-round operation" to allow for the processing of additional species, such as Pacific cod and Western AI golden king crab, and expects to increase its processing capacity to "approximately 400,000 round pounds of Pacific cod per day (181 mt)"); AR 6000176 (recording

time beginning at 5:50:09) (APICDA testimony to the Council in October 2015 that "the community continues to make strides towards [] P. cod [] expansion through infrastructure development…"); *see also* Dkt. 36-3 (City of Atka Resolution 18-01). This conclusion was well within the Council's authority. *See* 18 U.S.C. § 1801(b)(5) (establishing the fishery management councils "to exercise sound judgment in the stewardship of fishery resources" by preparing, monitoring, and revising FMPs in a manner that enables "the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on" such plans and "which take into account the social and economic needs of the States").

E. Amendment 113 is Consistent with National Standard 4

The fatal flaw in Plaintiffs' National Standard 4 argument comes from the text of the Standard itself. Again, National Standard 4 provides that conservation and management measures "shall not discriminate *between residents of different states*," and that if NMFS allocates "fishing privileges among various United States fishermen, such allocation shall be (a) fair and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege." 16 U.S.C. § 1851(a)(4) (emphasis added). Plaintiffs have framed their argument in terms of whether Amendment 113 is "fair and equitable" between AI onshore processors and offshore processors, but National Standard 4 only requires that fishing privileges be allocated fairly and equitably between "fishermen" of "different states." The onshore processors are not "fishermen," and Amendment 113 does not allocate fishing privileges between fishermen of different states.[11] As Defendants and Defendant-Intervenors have repeatedly

[11] For this reason too, Plaintiffs' claim that NMFS "acted unfairly and inequitably by singling out Adak and enacting Amendment 113 solely for its benefit," Opp. at 35, falls flat. National Standard 4 simply does not concern fairness or equality between shoreside processing plants.

explained, under Amendment 113 "any properly permitted and licensed vessel, operated by any resident of any community or state, within any BSAI Pacific cod non-CDQ sector can participate in the Aleutian Islands CV Harvest Set-Aside." Mem. at 33-24 (quoting 81 Fed. Reg. at 84444). Because Amendment 113 does not allocate fishing privileges between fishermen of different states, the Court need not reach the issue of whether such allocation was "fair and equitable," "reasonably calculated to promote conservation" or "carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege." In any case, Amendment 113 meets these standards as well.

1. Amendment 113 is Fair and Equitable

In response to Defendants' argument that Plaintiffs "fail to address the substantial burdens that likely would be borne by AI communities if no action had been taken," Plaintiffs respond that (1) the decrease in Pacific cod biomass as a result of the TAC split and Steller sea lion measures has been "borne collectively by all participants," and (2) because Adak's shoreplant has faced unique challenges outside of offshore processing, Adak would face no "burdens" if no action was taken and the *status quo* maintained. Opp. at 34. Neither response addresses the issue.

First, regardless of whether "all participants" in the Pacific cod fishery have been affected by the declining stocks, the record demonstrates the importance of Pacific cod landings to AI communities, and the social, cultural, and economic impacts of no action. *See* AR 1000090-96; AR 1000099-109 (EA description of no action alternative, concluding "the AI shoreplants [are] at a significant disadvantage in adapting to changes in the AI Pacific cod fishery"). By contrast, the sum total of Plaintiffs' alleged injuries are two allegations in Plaintiffs' opening brief, unsupported by citations to the record, that (1) "Motherships cannot process at all [*in the AI*] when the exclusive set-aside period is fully in effect" and (2) "[l]ongline and trawl CPs [will] no longer able to prosecute a fishery that they have operated in for decades." Pls.' Mem. at 40 (citing to Plaintiffs'

own self-serving Loomis declaration). As Defendant-Intervenors noted, however, from 2008 to 2014, AI cod only accounted for an average of approximately *1.76%* of the overall revenues of CPs that retained cod in the Aleutians. AR 1000077 (calculated from Table 2-11).

On reply, Plaintiffs miss their second opportunity to identify any record support for their claims, or to explain how the inability of certain vessels to process cod in the AI (while remaining free to do so in the BS), up to a specified amount and only during a short period of the year, would outweigh the benefits to shoreside communities Amendment 113 provides. *See* Opp. at 34-26. Even if Plaintiffs suffer some economic harm from Amendment 113's set-aside provisions, however, the record shows NMFS properly considered this harm and rationally concluded it was insufficient to outweigh the benefits to Defendant-Intervenors. *See* AR 1000120; *see also Alliance Against IFQs v. Brown*, 84 F. 3d 343, 350 (9th Cir. 1996) ("Despite the harshness to the fishermen who were left out, there is no way we can conclude on this record that the Secretary lacked a rational basis for leaving them out").

Second, Plaintiffs' argument that no action would result in "no 'burdens'" to Adak because Adak's processing plant has experienced operating difficulties, Opp. at 34, is nonsensical. The record shows that access to Pacific cod for processing "is a #1 driver of whether the plant succeeds or not." AR 6000176 (recording time beginning at 5:34:47; testimony from L. Lockett). Of course a measure which aims to set aside at least 5,000 mt of Pacific cod for delivery to AI shorebased processors will be more beneficial to these processors than the *status quo*, in which these processors are not given priority for any quantity of cod for processing.

2. Amendment 113 is Calculated to Promote Conservation

Plaintiffs, in a single sentence, purport to restate their argument that Amendment 113 was not reasonably calculated to promote conservation, as required by National Standard 4. Opp. at 36. Plaintiffs once again ignore, and fail to address, Defendant-Intervenors' argument that

National Standard 4's implementing guidelines provide that promotion of conservation may be achieved "by optimizing the yield in terms . . . *economic or social benefit* of the product," Mem. at 36 (quoting 50 C.F.R. § 600.325(c)(3)(ii)) (emphasis added), and that the record shows Amendment 113 is tied to the FMP's conservation measures. *See id*. at 38-39. Plaintiffs should be deemed to have conceded this argument. *Hopkins*, 284 F. Supp. 2d at 25, *aff'd*, 98 F. App'x 8.

3. Amendment 113 Does Not Create an Excessive Share

Plaintiffs next argue that Amendment 113 "creates an excessive share" in violation of National Standard 4 by "reallocat[ing] cod from the offshore sector to the inshore sector, and from the Bering Sea to the Aleutian Islands." Opp. at 36. Notably, Plaintiffs never directly argued in their opening brief that Amendment 113 provided AI shorebased communities with an "excessive share" of fishing privileges (nor could they, as Amendment 113 grants them no fishing privileges at all). *See* Mem. at 39, n.17. Instead, Plaintiffs relied on the guideline prohibiting the creation of "conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist," Pls.' Mem. at 41 (quoting 50 C.F.R. § 600.325(c)(3)(iii)), and summarily stated Amendment 113 provides Adak with an "excessive processing privilege," without explaining why or how 5,000 mt of Pacific cod per year is "excessive." Having failed to state any facts or law in support of this argument in their opening brief, Plaintiffs have waived this "excessive share" argument. *See Public Citizen Health Research Gr. v. Nat'l Inst. of Health*, 209 F. Supp. 2d 37, 43-44 (D.D.C. 2002) ("The Court highly disfavors parties creating new arguments at the reply stage that were not fully briefed during the litigation").

In any case, Defendant-Intervenors explained in their Memorandum that 5,000 mt in fact is not an excessive share of Pacific cod for processing, in light of Adak's historical share. *See* Mem. at 20-21, n.8. Moreover, Plaintiffs' claim that a 5,000 mt annual set-aside is "excessive"

for Adak directly contradicts their argument that 5,000 mt is "insufficient" to sustain processing operations in the AI. *See* Opp. at 10-11.

With respect to Plaintiffs' argument that Amendment 113 created "anti-competitive conditions," Opp. at 35, Plaintiffs fail to counter their own admission "that fishermen in the BSAI '*are price takers for cod . . . no matter how many processors there are*.'" Mem. at 24 (quoting AR 6000168) (recording time beginning at 1:32:22; testimony of B. Paine) (emphasis added). In any event, NMFS acknowledged this concern and identified "several ways that CVs may retain leverage in negotiating fair prices from Aleutian Islands shoreplants." 81 Fed. Reg. at 84447. The remainder of Plaintiffs' argument is mere disagreement with NMFS's reasoned consideration of Plaintiffs' "anti-competitive" issue, and offers no valid basis on which to overturn the Agency's rational decision-making. *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F. 3d 138, 174 (D.C. Cir. 2015).

F. Amendment 113 is Consistent with National Standard 5

Finally, Plaintiffs complain that Amendment 113 is inconsistent with National Standard 5, which requires conservation and management measures to consider efficiency and prohibits them from "hav[ing] economic allocation as [their] sole purpose." 16 U.S.C. § 1851(a)(5). Plaintiffs gloss over the fact that the National Standard 5 guidelines specifically carve out an exception to the inefficiency rule where conservation and management measures "contribute[] to the attainment of other *social* or biological objectives," 50 C.F.R. § 600.330(b)(2)(ii)) (emphasis added), and instead argue that Amendment 113's intended social benefits actually are "purely economic benefits." Opp. at 37. Plaintiffs' argument strains credulity.

For instance, Plaintiffs claim that the goal of improving employment in Adak "is an economic benefit . . . not a social issue." *Id.* Not only does this argument defy common sense, it is belied by Plaintiffs' own admission that it is "obvious" "sustainable businesses and employers

support the health of the communities in which they are located." Opp. at 8. The record is replete with evidence that Adak and Atka both are completely dependent on their respective processing plants for their very survival. *See, e.g.*, AR 3004834-35; AR 1000092; AR 6000176 (recording time beginning at 5:49:41). This is not a case in which NMFS is attempting to funnel funds to a particular private entity operating Adak's or Atka's shoreplants; instead, all that matters to these communities is that the shoreplants are operational for their respective well-being. *See* AR 6000159 (recording time beginning at 6:12:50) (statement from ACDC that "these are community protection measures, not processor protections. We're not trying to protect any particular processing company; what we are trying to do is seek a regulatory environment that will be conducive to shorebased processing in the Aleutians.")

At the same time, the Plaintiffs denigrate Atka's ambition to process cod as merely "aspirational," *see* Opp. at 13, when in fact the survival of a unique Aleut village is at stake. Atka is a remote village that has been occupied for over 2,000 years by Aleut residents. AR 3004758. The island was evacuated during World War II. AR 6000159 (recording time beginning at 6:22:00 ("They stood on the deck of a U.S. Navy ship singing hymns while their homes were burned, and they were taken to internment camps where all the old people and newborns died.") Atka is "facing significant issues with outward migration due to the lack of employment opportunities and high cost of living." AR 6000130 (recording time beginning at 10:17) (APICDA oral testimony). *See also id.* (recording time beginning at 12:45) ("For us, the future and survivability of our communities will depend on making these [fish processing] operations work."); AR 6000176 (recording time beginning at 5:50:10) ("Atka faces population decline due to a lack of a year-round economy"). The social benefit of providing hope to a unique and vulnerable Aleut community is intangible and transcends economics.

Because Amendment 113 is designed to provide stability to the *communities* of Adak and Atka, the Amendment comports with National Standard 5.

III. CONCLUSION

Plaintiffs twist themselves into knots trying to undo Amendment 113, but fail to lodge a single persuasive complaint against it. The record demonstrates Defendants considered input from all interested parties; conducted thorough and thoughtful analyses; and concluded with a reasonable and rational Final Rule that will support fragile AI communities, in compliance with the MSA and National Standards. For all the reasons set forth above, and in Defendant-Intervenors' Memorandum, Defendant-Intervenors respectfully request the Court grant Defendant and Defendant-Intervenors' Cross-Motion for Summary Judgment, and deny Plaintiffs' Motion for Summary Judgment.

Dated: October 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of October, 2017, I caused the foregoing Reply to be filed on the Court's CM/ECF system, which will electronically serve counsel for Plaintiffs and Defendants in this case.

/s/ David E. Frulla

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