



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of General Counsel  
P.O. Box 21109  
Juneau, Alaska 99802-1109

**Litigation Updates for the  
October 2024 Meeting of the North Pacific Fishery Management Council**

***Groundfish Forum v. NMFS***

Parties:

**Plaintiff:** Groundfish Forum, Inc.

**Federal Defendants:** National Marine Fisheries Service (NMFS); National Oceanic & Atmospheric Administration (NOAA); Secretary of Commerce, Gina M. Raimondo; and Assistant Administrator for NOAA, Janet Coit.

**Defendant-Intervenors:** Central Bering Sea Fishermen's Association; City of Saint Paul, Alaska; Alaska Longline Fishermen's Association; Fishing Vessel Owners' Association; Homer Charter Association; The Boat Company; Petersburg Vessel Owners' Association; Alaska Marine Conservation Council; Halibut Association of North America; North Pacific Fisheries Association; Aleut Community of St. Paul Island Tribal Government; and Seafood Producers Cooperative.

Case Activity:

On December 19, 2023, Plaintiff filed a complaint in the United States District Court for the District of Alaska challenging NMFS Alaska Region's implementation of Amendment 123 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area. On April 26, 2024, Plaintiff filed its opening brief. Plaintiff's opening brief can be found in the NOAA GC B3 Report for the June 2024 Council meeting. Federal Defendants filed a brief in opposition on June 27, 2024, as did Defendant-Intervenors and *amici curiae* including the State of Alaska, Cordova District Fishermen United et al., and Senator Daniel Sullivan and Representative Mary Peltola. Plaintiff filed a reply brief on August 1, 2024.

Status/Next Steps:

The Court has set oral arguments for October 1, 2024, at 10:30am in Anchorage. The public may listen to the hearing by dialing 571-353-2301 and using Call ID 275666327.

Attached: Federal Defendants' Opposition Brief  
Defendant-Intervenors' Opposition Brief  
Plaintiff's Reply Brief

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

GROUND FISH FORUM, INC.,

Plaintiff,

vs.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants,

and

CENTRAL BERING SEA FISHERMAN'S  
ASSOCIATION, *et al.*,

Intervenor-Defendants.

CIVIL NO. 3:23-cv-00283-JMK

**FEDERAL DEFENDANTS'  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND CROSS-MOTION  
FOR SUMMARY JUDGMENT**

Federal Defendants – National Marine Fisheries Service (“NMFS”); National Oceanic and Atmospheric Administration (“NOAA”); Gina Raimondo – in her official capacity as the United States Secretary of Commerce; and, Janet Coit, in her official capacity as Assistant Administrator of NOAA – respectfully cross-move under Federal Rule of Civil Procedure 56 for summary judgment on all claims in Plaintiff’s Complaint. *See* ECF No. 1.

Federal Defendants are entitled to summary judgment because NMFS complied with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and the National Environmental Policy Act in issuing the rule to implement Amendment 123 to the Fishery Management Plan for the Groundfish of the Bering Sea

and Aleutian Islands. This cross-motion is supported by the previously filed Administrative Records (ECF Nos. 20 and 25), the accompanying Memorandum in Support of Defendants' Cross Motion and Opposition to Plaintiff's Motion for Summary Judgment, and upon such oral and/or documentary evidence as may be presented in any hearing on this motion.

Plaintiffs also waived all claims not raised in their opening brief (ECF No. 36). *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived."); *see, e.g.*, ECF No. 1 (First Claim ¶ 87(e)-(m); Second Claim ¶¶ 93-96).

Dated: June 27, 2024

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

GROUND FISH FORUM, INC.,

Plaintiff,

vs.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants,

and

CENTRAL BERING SEA FISHERMAN'S  
ASSOCIATION, *et al.*,

Intervenor-Defendants.

CIVIL NO. 3:23-cv-00283-JMK

**MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS MOTION AND  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATUTORY BACKGROUND.....	2
	A.    Magnuson-Stevens Fishery Conservation and Management Act .....	2
	B.    The Halibut Act.....	5
	C.    National Environmental Policy Act (NEPA) .....	6
III.	STATEMENT OF FACTS.....	7
IV.	STANDARD OF REVIEW.....	12
V.	ARGUMENT .....	12
	A.    The Rule complies with National Standard 4 (“NS4”). .....	12
	1.    The Rule did not allocate halibut within the meaning of NS4 because PSC limits are not “fishing privileges.” .....	12
	2.    NMFS determined that the Rule satisfies NS4. ....	15
	a.    The Rule is inherently fair and equitable. ....	16
	b.    The Rule promotes conservation of halibut. ....	21
	bc.   The Rule is practicable.....	23
	B.    NMFS did not violate NEPA because Amendment 123’s scope is consistent with its statutory authority and the EIS contains a reasonable range of alternatives within that scope.....	26
VI.	CONCLUSION .....	30

## TABLE OF AUTHORITIES

### Cases

<i>All. Against IFQs v. Brown</i> , 84 F.3d 343 (9th Cir. 1996) .....	14, 21
<i>City of Alexandria v. Slater</i> , 198 F.3d 862 (D.C. Cir. 1999).....	27, 29
<i>City of Carmel–By–The–Sea v. U.S. Dep't of Transp.</i> , 123 F.3d 1142 (9th Cir.1995) .....	7
<i>City of New York v. U.S. Dep't of Transp.</i> , 715 F.2d 732 (2d Cir.1983) .....	6
<i>Communities, Inc. v. Busey</i> , 956 F.2d 619 (6th Cir. 1992) .....	29
<i>Conservation Law Found. of New England v. Franklin</i> , 989 F.2d 54 (1st Cir. 1993).....	4
<i>Friends of Southeast's Future v. Morrison</i> , 153 F.3d 1059 (9th Cir. 1998) .....	6
<i>Guindon v. Pritzker</i> , 240 F.Supp.3d 181 (D.D.C. 2017).....	15
<i>Guindon v. Pritzker</i> , 31 F. Supp. 3d 169 (D.D.C. 2014).....	4
<i>HonoluluTraffic.com v. Fed. Transit Admin.</i> , 742 F.3d 1222 (9th Cir. 2014) .....	28
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	28
<i>Kootenai Tribe of Idaho v. Veneman</i> , 313 F.3d 1094 (9th Cir. 2002) .....	27
<i>Lathan v. Brinegar</i> , 506 F.2d 677 (9th Cir.1974) .....	6
<i>League of Wilderness Defenders v. U.S. Forest Serv.</i> , 689 F.3d 1060 (9th Cir. 2012) .....	28
<i>Marsh v. Or. Nat. Res. Council</i> , 490 U.S. 360 (1989).....	6
<i>Mid States Coal. for Progress v. Surface Transp. Bd.</i> , 345 F.3d 520 (8th Cir. 2003) .....	29

<i>Montana Wilderness Ass'n v. Connell</i> , 725 F.3d 988 (9th Cir. 2013) .....	30
<i>Morongo Band of Mission Indians v. F.A.A.</i> , 161 F.3d 569 (9th Cir. 1998) .....	6
<i>Mt. Graham Red Squirrel v. Espy</i> , 986 F.2d 1568 (9th Cir. 1993) .....	12
<i>N. L. R. B. v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969).....	26
<i>Nat'l Cable &amp; Telecommunications Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).....	14
<i>Nat'l Parks &amp; Conservation Ass'n v. Bureau of Land Mgmt.</i> , 606 F.3d 1058 (9th Cir. 2010) .....	27, 29
<i>North Carolina Fisheries Ass'n, Inc. v. Gutierrez</i> , 518 F. Supp. 2d 62 (D.D.C. 2007).....	28
<i>Ocean Conservancy v. Gutierrez</i> , 394 F. Supp. 2d 147 (D.D.C. 2005).....	21
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	6
<i>State of California v. Block</i> , 690 F.2d 753 (9th Cir. 1982) .....	29
<i>Tutein v. Daley</i> , 43 F. Supp. 2d 113 (D. Mass. 1999).....	3
<i>U.S. Postal Serv. v. Gregory</i> , 534 U.S. 1 (2001).....	12
<i>United Cook Inlet Drift Ass'n v. NMFS ("UCIDA")</i> , No. 3:21-CV-00247-JMK, 2022 WL 2222879 (D. Alaska June 21, 2022) .....	4, 19
<i>United States v. Erstgaard</i> , 222 F.2d 615 (9th Cir. 2012) .....	5
<i>Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.</i> , 435 U.S. 519 (1978).....	26
<i>Westlands Water Dist. v. U.S. Dep't of Interior</i> , 376 F.3d 853 (9th Cir. 2004) .....	6, 26
<i>Wilderness Soc'y v. U.S. Forest Serv.</i> , 630 F.2d (9th Cir. 2011) .....	27

*Yakutat, Inc. v. Gutierrez*,  
407 F.3d 1054 (9th Cir. 2005) ..... 16

**Statutes**

16 U.S.C. § 1801(a)(6) ..... 2  
16 U.S.C. § 1801(c)(3) ..... 4  
16 U.S.C. § 1802(2)..... 5  
16 U.S.C. § 1851(a).....*passim*  
16 U.S.C. § 1851(a)(1) ..... 22  
16 U.S.C. § 1851(a)(8) ..... 3, 23  
16 U.S.C. § 1851(a)(9) ..... 3, 21  
16 U.S.C. § 1851(b)..... 3  
16 U.S.C. § 1852(a)(1) ..... 4  
16 U.S.C. § 1852(b)..... 4  
16 U.S.C. § 1852(h)(1) ..... 2, 4  
16 U.S.C. § 1853(a)(14) ..... 15  
16 U.S.C. § 1855(f)(1)..... 12  
16 U.S.C. § 773b ..... 5, 15  
16 U.S.C. § 773c(c) ..... 14  
16 U.S.C. § § 773-773k ..... 5  
5 U.S.C. § 706(2)..... 12, 26  
5 U.S.C. § § 701-706 ..... 12

**Regulations**

40 C.F.R. § 1501.9..... 27



40 C.F.R. § 1502.14.....	7
50 C.F.R. § 600.325(c)(1) .....	13, 14
50 C.F.R. § 600.350(a) .....	14
50 C.F.R. § 600.350(d)(4) .....	24
50 C.F.R. § 679.2.....	5
50 C.F.R. § 679.21(a)(2) .....	13
50 C.F.R. § § 600.305.....	3
50 C.F.R. § § 600.345.....	27
53 Fed. Reg. 19275 (March 18, 2024).....	5
58 Fed. Reg. 59375 (Nov. 9, 1993) .....	16
72 Fed. Reg. 52668 (Sept. 14, 2007).....	7, 8, 9
78 Fed. Reg. 75844 (Dec. 12, 2013).....	13
84 Fed. Reg. 55044 (Oct 15, 2019) .....	10
86 Fed. Reg. 50331 (Sept. 8, 2021).....	11
87 Fed. Reg. 75570 (Dec. 9, 2022).....	16
88 Fed. Reg. 30934 (May 15, 2023).....	3
88 Fed. Reg. 82740 (Nov. 24, 2023) .....	<i>passim</i>
89 Fed. Reg. 17287 (March 11, 2024).....	11, 20

## TABLE OF EXHIBITS

Exhibit 1	Map of the BSAI and Area 4
Exhibit 2	Amendment 80 Sector and Area 4CDE Directed Fisheries Comparison
Exhibit 3	Examples of Other Abundance-Based Rules in this Region

## TABLE OF ABBREVIATIONS

BSAI	Bering Sea and Aleutian Islands
Convention	Convention for the Preservation of the Halibut Fishery of the Northern Pacific Halibut
Council	North Pacific Fishery Management Council
Directed fishery	Commercial fishermen who target Pacific halibut
EBS	Eastern Bering Sea
EEZ	Exclusive economic zone
EIS	Environmental Impact Statement
FMP	Fishery management plan
Halibut	Pacific halibut
Halibut Act	Northern Pacific Halibut Act
IPHC	International Pacific Halibut Commission
MSA	Magnuson-Stevens Fishery Conservation and Management Act
mt	Metric ton
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PSC	Prohibited species catch
SIA	Social impact assessment
The Rule	The final rule implementing Amendment 123 to the Fishery Management Plan for the Groundfish of the Bering Sea and Aleutian Islands

## I. INTRODUCTION

To address low abundance of Pacific halibut biomass and a corresponding dramatic reduction in the amount of halibut available to the directed halibut fisheries and the rural, Native Alaskan communities that depend on these fisheries, the National Marine Fisheries Service ("NMFS") issued a rule under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") to implement Amendment 123 to the Fishery Management Plan for the Groundfish of the Bering Sea and Aleutian Islands ("BSAI"). During this time of low abundance, the Amendment 80 sector's bycatch limits (also known as prohibited species catch ("PSC") limits) remained static, resulting in the sector wasting more halibut (in the form of bycatch) than the directed halibut fisheries were authorized to harvest most years. These extraordinary circumstances initially led NMFS to issue a rule implementing Amendment 111 to reduce halibut PSC for a number of sectors, including Amendment 80. However, even as NMFS issued the Amendment 111 rule, it recognized that further reductions, in the form of abundance-based management, might be necessary. Since that time, the Amendment 80 sector's own data demonstrates that its halibut avoidance tools can dramatically reduce the sector's halibut PSC mortality and, thus, further reductions are practicable.

Plaintiff disregards this context and claims the Amendment 123 Final Rule ("Rule") violates the MSA and the National Environmental Policy Act ("NEPA") because it singles out the Amendment 80 sector and is not fair and equitable. These claims are not credible. The Rule reduces halibut PSC for the Amendment 80 sector because it causes the majority of halibut PSC. Moreover, there is nothing novel about

sector-specific or abundance-based rules. And, although NMFS determined that Amendment 123 does not constitute an allocation under National Standard 4, NMFS nevertheless determined that the Rule is fair, equitable, promotes conservation, and is practicable. Finally, the refined scope of Amendment 123 was the result of public engagement—the touchstone of the NEPA analysis. The alternatives analyzed in the EIS flow naturally from its scope and thus conform with NEPA’s procedural requirements. In sum, the Court should grant summary judgment to Defendants because the Rule is supported by the record and fully complies with the MSA and NEPA.

## II. STATUTORY BACKGROUND

### A. Magnuson-Stevens Fishery Conservation and Management Act

The MSA, 16 U.S.C. §§ 1801 et seq., establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the U.S. exclusive economic zone (“EEZ”). 16 U.S.C. §§ 1801(a)(6), 1811(a). Regulation of fisheries is accomplished through fishery management plans (“FMPs”), plan amendments, and implementing regulations. *Id.* §§ 1852(h)(1), 1853, 1854(a)-(c). The FMP for Groundfish of the Bering Sea and Aleutian Islands Management Area (“BSAI Groundfish FMP”) governs groundfish fisheries in the Bering Sea and Aleutian Islands. *See* NOAA4592. The MSA sets forth required provisions for FMPs, including that FMPs must contain measures “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild

overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” *See id.* § 1853(a)(1)(A).

All FMPs and their implementing regulations must be consistent with ten National Standards (NS). *See* 16 U.S.C. § 1851(a). NS4 requires that “[c]onservation and management measures shall not discriminate between residents of different States,” and, “if it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.” *Id.* § 1851(a)(4). NS8 requires conservation and management measures to “take into account the importance of fishery resources to fishing communities by utilizing economic and social data” to provide for “sustained participation of such communities” and “minimize adverse economic impacts.” *Id.* § 1851(a)(8). NS9 requires FMPs to minimize bycatch and mortality of bycatch that cannot be avoided. *See id.* § 1851(a)(9). Advisory guidelines for the NSs are set forth at 50 C.F.R. §§ 600.305 *et seq.* The NS guidelines do not have the force and effect of law, 16 U.S.C. § 1851(b), and are not subject to judicial review under the MSA and Administrative Procedure Act. *See Tutein v. Daley*, 43 F. Supp. 2d 113, 121–125 (D. Mass. 1999).<sup>1</sup> Even so, courts give the guidelines “‘considerable deference’ in light of their thoroughness, the agency’s

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<sup>1</sup> NMFS has issued an Advance Notice of Proposed Rulemaking to amend the guidelines for National Standards 4, 8, and 9. *See* Fisheries of the United States, 88 Fed. Reg. 30934 (May 15, 2023).

expertise, and the administrative formalities involved in their promulgation.” *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 198 (D.D.C. 2014).

The MSA established eight regional fishery management councils. 16 U.S.C. § 1852(a)(1). Alaskan fisheries are managed by the North Pacific Fishery Management Council (“Council”). *Id.* § 1852(a)(1)(G). Council members include federal and state fishery management officials and other fishery experts nominated by state governors and appointed by the Secretary. 16 U.S.C. § 1852(b). Councils are “simply advisory bodies and have no legal authority.” *United Cook Inlet Drift Ass’n v. NMFS (“UCIDA”)*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at \*19 (D. Alaska June 21, 2022) .

Ultimately, NMFS is responsible for implementing, and ensuring compliance with, the MSA and other laws. *See Conservation Law Found. of New England v. Franklin*, 989 F.2d 54, 60 (1st Cir. 1993).

A council is required to prepare and submit to NMFS an FMP “for each fishery under its authority that requires conservation and management,” as well as proposed regulations that the Council “deems necessary or appropriate” to implement the FMP. 16 U.S.C. §§ 1852(h)(1), 1853(c). NMFS reviews proposed regulations for consistency with the FMP and applicable law, and pursuant to a process set forth in the MSA, publishes proposed rules, solicits public comment, and promulgates final rules. *Id.* § 1854(b).

One of the MSA’s principal goals is to “minimize bycatch and avoid unnecessary waste of fish.” 16 U.S.C. § 1801(c)(3). Bycatch refers to fish that are unintentionally caught by a directed fishery that is targeting another species. The MSA defines bycatch as “fish that are harvested in a fishery, but which are not sold or kept for personal use.”

16 U.S.C. § 1802(2). The MSA requires all FMPs to “include conservation and management measures, that to the extent practicable” minimize bycatch and minimize the mortality of bycatch that cannot be avoided. *Id.* § 1853(a)(11).

## **B. The Halibut Act**

In 1953, Congress enacted the Northern Pacific Halibut Act (“Halibut Act”), 16 U.S.C. §§ 773-773k, to implement the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Halibut (“Convention”), a treaty between the United States and Canada. The Convention authorizes the International Pacific Halibut Commission (“IPHC”) to adopt regulations to conserve Pacific halibut, such as annual halibut catch limits, but such regulations are not effective in the United States until the Secretary of State, with the Secretary of Commerce’s concurrence, accepts them. *Id.* § 773b. Once accepted, NMFS publishes notice of their efficacy. *See, e.g.*, 53 Fed. Reg. 19275 (March 18, 2024). By contrast, NMFS manages the groundfish fisheries in Alaska and promulgates their halibut bycatch limits (or “prohibited species catch” (PSC))<sup>2</sup> limits under the MSA. *See United States v. Erstgaard*, 222 F.2d 615, 616-17 (9th Cir. 2012).

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<sup>2</sup> Prohibited Species Catch is a term that the BSAI Groundfish FMP uses for bycatch of particularly valuable or important species in Alaska. Under the BSAI FMP, "Pacific halibut, Pacific herring, Pacific salmon and steelhead, king crab, and Tanner crab are prohibited species and must be avoided while fishing for groundfish and must be returned to the sea with a minimum of injury except when their retention is required or authorized by other applicable law." North Pacific Fishery Management Council, *Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area 44* (Nov. 2020), <https://www.npfmc.org/wp-content/PDFdocuments/fmp/BSAI/BSAIfmp.pdf> (“FMP”); *see also* 50 C.F.R. § 679.2.



### C. National Environmental Policy Act (NEPA)

NEPA “does not mandate particular results, but simply prescribes the necessary process[]” that an agency must follow in issuing an EIS. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “A court must avoid passing judgment on the substance of an agency's decision.” *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Instead, its focus is on ensuring that agencies took a “hard look” at the environmental consequences of their decisions. *Robertson*, 490 U.S. at 350. A court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one.” *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 573 (9th Cir. 1998) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).

“Courts have afforded agencies considerable discretion to define the purpose and need of a project.” *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) (internal citations and quotations omitted). Preparing an EIS “necessarily calls for judgment, and that judgment is the agency's.” *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir.1974). Courts evaluate a Statement of Purpose and Need under a reasonableness standard. See *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066–67 (9th Cir. 1998). When an action is taken pursuant to a specific statute, the statutory objectives serve as a guide by which to determine the reasonableness of objectives outlined in an EIS. *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir.1983).

The regulations implementing NEPA require that an EIS must consider and assess the environmental consequences of the proposed action and reasonable alternatives to the action. *See* 40 C.F.R. § 1502.14. “The stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives and an agency cannot define its objectives in unreasonably narrow terms.” *City of Carmel–By–The–Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1995) (internal citations omitted). “Project alternatives derive from an [EIS’s] ‘Purpose and Need’ section.” *Id.* Thus, a court begins by determining whether or not the “Purpose and Need” statement was reasonable. *Id.*

### III. STATEMENT OF FACTS

Halibut is an iconic and highly valued fish with cultural significance for many Alaskan communities. NOAA1096, NOAA4839-40, NOAA3805-09, NOAA4766 (Table 4-7).<sup>3</sup> The commercial fishermen who target halibut (“directed fishery”) often operate small vessels and depend exclusively on halibut for their livelihood in the northern and eastern Bering Sea (“Area 4CDE”).<sup>4</sup> *See id.* And the rural communities in which these fishermen often live also depend on the directed fishery for their economic survival and cultural identity. *See id.*

The Amendment 80 sector constitutes a subset of the BSAI trawl sector and has an exclusive privilege to target six non-pollock groundfish species. *See* 72 Fed. Reg. 52668

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<sup>3</sup> Citations to the administrative record begin with “NOAA” and include the relevant bates numbers, excluding any preceding zeros.

<sup>4</sup> *See* Ex. 1 (map of BSAI and Area 4CDE). The Rule’s analysis focused on this area because it is where most of the Amendment 80 sector’s bycatch occurs, and also where many of the halibut-dependent communities are located. *See* NOAA4616.

(Sept. 14, 2007). Trawl fishing generally involves dragging a large, weighted conical net along the ocean floor.<sup>5</sup> Although trawl fishing is highly effective, it is less capable of distinguishing between target and non-target species than other forms of fishing (e.g., hook and line). *See, e.g.*, NOAA4720. As a result, trawl fishing often results in higher levels of bycatch than other forms of fishing. *See, e.g., id.*

NMFS created the Amendment 80 sector in 2008 principally to mitigate the “race for fish” by creating incentives that would enable the sector to be less wasteful. 72 Fed. Reg. 52668, 52669. Prior to Amendment 80, trawl vessels competed among one another to harvest non-pollock groundfish species, which share similar habitat and are often harvested together. *Id.* This resulted in an “economic incentive to discard less valuable species,” which resulted in the sector having “the lowest retained catch rates of any groundfish trawl fishery in the BSAI.” *See id.* The sector also had little incentive to minimize PSC for halibut and other species. *Id.* at 52669-70. Amendment 80 addressed this, in part, by facilitating the formation of a cooperative through which participants could trade privileges to harvest target species and PSC limits to encourage more efficient fishing. *Id.* at 52672.

The Amendment 80 sector has generated significant revenue. Between 2010 and 2019, the wholesale value of the sector’s annual haul ranged from around \$307 million to \$398 million – and total gross wholesale revenue across all activities was even higher.

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<sup>5</sup> *See* <https://www.fisheries.noaa.gov/national/bycatch/fishing-gear-bottom-trawls>.

*See* NOAA4698, 4701. Yet, although an explicit goal of Amendment 80 was to reduce halibut bycatch, 72 Fed. Reg. 52668, 52671, the Amendment 80 sector continues to account for more than three times the amount of halibut bycatch as the next highest sector in the BSAI – and most of this bycatch occurs in Area 4CDE. Ex. 2 (table comparing Amendment 80 PSC with the directed fisheries’ halibut harvest), NOAA4616, NOAA4719-20 (Table 3-18), NOAA4827-28.

Since the 1990s halibut biomass has declined, and this decline became especially apparent in 2012 for the Area 4CDE directed fishery. NOAA4594. Yet, even as the directed fishery’s halibut allocation shrank by two thirds in just a few years, the Amendment 80’s PSC limit remained static and authorized annual waste of nearly 4 million pounds of halibut, whether halibut stock was abundant or low and declining. *See* Ex. 2. Throughout most of this time, the Amendment 80 sector wasted more halibut (as bycatch) than the Area 4CDE directed fishery was authorized to harvest. *See id.*

By 2014, the Council’s Advisory Panel recommended an “emergency regulatory process” to reduce halibut PSC limits and to fast-track deck sorting procedures to address “dramatic declines of the directed [halibut] fishery catch limits” in the BSAI.

NOAA35323-25. Less than two years later, NMFS issued a rule implementing Amendment 111, which reduced halibut bycatch limits for four sectors, including for the Amendment 80 sector. NOAA508-28. In the notice for the Amendment 111 rule, NMFS acknowledged additional halibut management actions were underway, including an evaluation of whether to link halibut bycatch limits to halibut abundance and an investigation into whether deck sorting could reduce halibut mortalities. *See* NOAA511.

Around this same time, the Council requested that the Amendment 80 sector develop a Halibut Avoidance Plan, which ultimately resulted in the sector increasing implementation of three principal avoidance measures beginning in late 2015: (1) selective fishing time/location, (2) halibut excluders, and (3) deck sorting.<sup>6</sup> *See* NOAA4736-40.

In December 2017, NMFS published a Notice of Intent to publish an Environmental Impact Statement (EIS) to evaluate abundance-based management of halibut PSC limits (or imposition of greater restrictions during low abundance and looser ones during high abundance) for groundfish fisheries in the BSAI. *See* NOAA7. For the next four years, the Council conducted approximately 20 public meetings to address this issue and invited public participation at meetings and by soliciting comments. *See id.* Although the Council initially sought to evaluate abundance-based management for all groundfish sectors, by December 2019, both the Council and stakeholders expressed concern that such an action would be too complex and would hinder reasonable consideration of the alternatives. *See* NOAA53002 at 8:07, 8:11, 8:16, 8:19, 8:32:30, 8:55. In February 2020, the Council heard testimony on ways to streamline the action and unanimously passed a motion to limit Amendment 123 to the Amendment 80 sector because it accounted for the vast majority of PSC in the BSAI. NOAA043065; NOAA53003 at 3:27, 3:29. This naturally simplified the action because different sectors

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<sup>6</sup> As its name suggests, deck sorting allows halibut to be quickly sorted on deck, as opposed to first putting them in bins and sending them to the on-board observers for data collection, so they can be returned to the sea with higher chances of survival. *See* 84 Fed. Reg. 55044, 55046 (Oct. 15, 2019).

use different gear-types, which necessarily have different impacts and abilities to manage PSC, and therefore different analytical considerations. *See* NOAA41812, NOAA41913

In September 2021, NMFS published the Draft EIS on the simplified action for public comment. 86 Fed. Reg. 50331 (Sept. 8, 2021). The Draft EIS proposed five alternatives, including one no-action alternative. NOAA4647-49. Halibut PSC limits under the four action-alternatives ranged from 20% above to 45% below the Amendment 80 sector's then current PSC limit of 1,745 mt. *Id.* At the December 2021 Council meeting, the Council voted to recommend a preferred alternative for NMFS's approval and sent the proposed rule to NMFS in October 2022. NOAA4633. NMFS published the proposed rule to implement Amendment 123 in December 2022 and the final rule in November 2023. NOAA11. The final rule went into effect in January 2024. NOAA10.

The Rule provides that the Amendment 80 sector's annual halibut PSC limit is determined by halibut survey results in the BSAI and a corresponding look up table. *See* 88 Fed. Reg. 82740, 82771 (Nov. 24, 2023).<sup>7</sup> The table establishes the PSC limit based on the abundance state in the BSAI: high – 1,745 metric tons (mt); medium 1,396-1,571 mt; low – 1,309-1,396 mt; and very low – 1,134 mt. *Id.* The current abundance of halibut is low for the IPHC index and high for the EBS survey, so the Amendment 80's PSC limit for 2024 is 1396 mt. 89 Fed. Reg. 17287, 17302 (March 11, 2024). The final rule is expected to minimize habitat mortality and may result in additional harvest opportunities

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<sup>7</sup> The “look up” table is a matrix that contains PSC limits that correspond to results of the IPHC setline survey and the Eastern Bering Sea (EBS) shelf trawl survey. NOAA4647.

in the commercial halibut fishery, as well as for the subsistence and recreational fisheries. See 88 Fed. Reg. at 82740 (Nov. 24, 2023).

#### IV. STANDARD OF REVIEW

Challenges to agency action are reviewed under the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701-706. Under the APA, a plaintiff must show that the agency’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A); see also 16 U.S.C. § 1855(f)(1). Judicial review under this standard is “extremely narrow,” and a court cannot “substitute its own judgment for that of the [agency].” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001) (citation omitted). Courts are at their most deferential “where, as here, the challenged decision implicates substantial agency expertise.” *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

#### V. ARGUMENT

##### A. The Rule complies with National Standard 4 (“NS4”).

Contrary to Plaintiff’s assertion, Pls.’ Br. at 11-14, the Rule does not involve the type of allocation that is subject to NS4. But, even if it did, NMFS determined the rule is fair, equitable, practicable, and will achieve a conservation purpose – and thus complies with NS4.

1. The Rule did not allocate halibut within the meaning of NS4 because PSC limits are not “fishing privileges.”

NS4’s three-part test applies only to certain allocations and, by its plain language, does not apply to the bycatch limits established here. An allocation is defined as “a direct and deliberate distribution of an opportunity to participate in a fishery among identifiable, discrete user groups or individuals.” 50 C.F.R. § 600.325(c)(1). Any management measure “has incidental allocative effects, but only those measures that result in *direct distributions of fishing privileges* will be judged against the allocation requirements of [NS4].” *Id.* (emphasis added). As explained in the MSA’s implementing regulations, “[a]llocations of fishing privileges include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational commercial fishermen, assignment of ocean areas to different gear uses, and limitations of permits to a certain number of vessels or fishermen.” *See id.* The halibut bycatch limit in the Rule is not encompassed by or analogous to any of these examples.

The Rule does not establish an allocation within the meaning of NS4 because a PSC limit is by definition not a “fishing privilege” or an “opportunity to participate” in the halibut fishery. NMFS has never “allocated” to the Amendment 80 sector any privileges to target or harvest halibut.<sup>8</sup> Instead, NMFS and the Council designated halibut as a “prohibited species” in the groundfish FMP, meaning that the Amendment 80 sector is required to avoid and is prohibited from retaining halibut unless an exception applies. *See* NOAA4592; 50 C.F.R. § 679.21(a)(2). This reading is consistent with NS9, which

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<sup>8</sup> NMFS carefully allocated fishing privileges, or quota, to the commercial and charter sectors, leaving out many non-qualifying fishers. *See* 58 Fed. Reg. 59,375 (Nov. 9, 1993) (commercial sector’s catch share program); 78 Fed. Reg. 75844 (Dec. 12, 2013) (charter sector’s catch share program).



requires conservation and management measures that minimize bycatch. 50 C.F.R. § 600.350(a). Contrary to Plaintiff's suggestion, NMFS has not implemented a policy change with respect to how it evaluates prohibited species rules under NS4. *See* Pls.' Br. at 13. NMFS simply and adequately explained that this Rule does not directly allocate halibut in a manner that would be subject to NS4's requirements. 88 Fed. Reg. 82751, 82755; *see Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (an adequately explained change in policy is not invalidating). Thus, the halibut PSC limit is the amount of bycatch mortality that is tolerated before the sector's directed groundfish harvest activities must be curtailed; it does not grant the Amendment 80 sector a privilege or opportunity to participate in the halibut fishery. To hold otherwise would expand fishing privileges in a manner that would undermine NMFS's ability to minimize bycatch and its longstanding halibut catch share program under which halibut privileges were carefully allocated according to a specific formula based on participation in the directed fishery. *See All. Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996).

Implicit in Plaintiff's argument is that the Rule constitutes an allocation to the directed fishery. But halibut allocations are not governed by the MSA and, thus, are outside the scope of this case. *See* 16 U.S.C. § 773c(c); ECF No. 1 ¶¶ 84-88. Even if they were governed by the MSA, the Rule will at most have an indirect or secondary allocative impact on the directed halibut fishery – not the direct and deliberate distribution that is required to implicate NS4. *See* 88 Fed. Reg. 82740, 82751; 50 C.F.R. § 600.325(c)(1). By reducing halibut bycatch, the Rule may permit the IPHC more

latitude to decide whether to recommend allocating more halibut to the directed fishery in the future, consistent with the Convention and the Halibut Act. *See* 16 U.S.C. § 773b.

Nor do the MSA's requirements for FMPs convert the Rule into an allocation. *C.f.* Pls.' Br. at 12 (referring to 16 U.S.C. § 1853(a)(14) as "Required Provision 14"). MSA Section 1853(a)(14) applies only to actions "which reduce the overall harvest in a fishery," such as rebuilding plans for overfished stocks and similar measures. 16 U.S.C. § 1853(a)(14). Yet Plaintiff provides no evidence to support the contention that the Rule will or has reduced the Amendment 80 sector's overall harvest. Indeed, since the Amendment 80 sector began implementing deck sorting in 2015, its PSC has repeatedly been below the limits now established by the Rule – with the exception of the Rule's "very low" abundance scenario, which has not yet occurred. *Compare Ex. 2, with NOAA4600.* Even so, the Rule complies with MSA Section 1853(a)(14) because, as described below, NMFS considered the economic impact of each alternative, which is all the MSA requires. *Guindon v. Pritzker*, 240 F.Supp.3d 181, 200 (D.D.C. 2017) (holding that Required Provision 14 imposes a procedural obligation, and the Court need only ask whether NMFS produced the required assessments, without an evaluation of their conclusions).

While the Rule is not an allocation under NS4, the Court need not wade into this issue because, as explained below, NMFS determined the action is fair, equitable, practicable, and promotes conservation of halibut and is thus consistent with NS4.

2. NMFS determined that the Rule satisfies NS4.

Plaintiff's argument that the Rule is an allocation also fails on the facts. *See* Pls.' Br. at 17-22. As NMF explained, even if the Rule made an allocation, it is consistent with NS4. 88 Fed. Reg. at 82740, 82751 (final rule); *see also* 87 Fed. Reg 75570, 75579-80 (proposed Dec. 9 2022); NOAA1137-40; NOAA4880; NOAA4833; NOAA3781.

*a. The Rule is inherently fair and equitable.*

To determine whether an allocation is fair and equitable, the Council and NMFS must analyze whether such allocation is rationally connected to the achievement of a legitimate FMP objective and provide justification. *See* 50 C.F.R. § 600.325(c)(3)(i)(A); *see also Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1073 (9th Cir. 2005) (finding that a decision does not lack a rational basis if it considers the fishermen's interests, considers the relevant factors, and articulates a rational connection between the facts found and the choice made). Consistent with NS1 and NS9, NMFS and the Council determined that Amendment 123 would reduce bycatch and also prevent overfishing while achieving optimum yield. NOAA1144-45; NOAA4593; NOAA4878-79. The Final EIS described four justifications to support this determination: (1) when halibut abundance is low, the Amendment 80 sector may be less likely to encounter it and may still be able to obtain their total allowable catch; (2) when halibut abundance declines, the Amendment 80 sector becomes a larger proportion of the overall halibut mortality, which reduces the halibut available to the directed fisheries and other users; (3) abundance-based management may provide the Amendment 80 sector with new incentives to minimize halibut mortality at all times (i.e., even when abundance is low); and (4) the Rule

promotes conservation of halibut because it reduces waste of bycaught halibut and lowers the amount of halibut mortality caused by the Amendment 80 sector by hundreds of thousands of pounds whenever the IPHC survey index is in the medium, low, or very low state. *See* NOAA4878-79. The Final EIS and Social Impact Assessment (SIA) included extensive evaluation of the social costs of each of the alternatives, including no action, and NMFS determined the action was fair and equitable. *See* NOAA3781, NOAA4833, NOAA1144-45, NOAA4850 (“[T]his action addresses an inequity and promotes fairness in halibut management such that when halibut abundance is low, both the directed fishery’s allocation and the Amendment 80 fishery’s PSC allotment will be adjusted based on estimated abundance.”).

Consistent with the NS4 guidelines, NMFS identified benefits and hardships in the directed fishery associated with Amendment 123’s alternatives (including the no action alternative). *See* 50 C.F.R. § 600.325(c)(3)(i)(B). The Final EIS cataloged the directed fishery’s dependence on halibut and concluded that the Rule would “have a positive effect on all directed halibut fisheries.” NOAA4849. It also identified 17 Alaskan communities that were halibut-dependent, of which all 17 had Alaska Native populations greater than 65 percent and all but one was a federally recognized tribe. NOAA4843-44. As such, disproportionate impacts to these communities under the no action alternative implicate environmental justice concerns and government policy on the rights of Alaska Natives. *See id.*; 50 C.F.R. § 600.325(c)(3)(i)(B). For these rural communities “commercial fishing is not seen as a stand-alone socioeconomic activity, but an integral part of self-identity.” NOAA4845. And, for some of these residents, their families have

been involved in halibut fishing for multiple generations and subsistence fishing in this area is rooted in “thousands of years of history.” *Id.* Moreover, both halibut (as a species) and halibut fishing (as a traditional activity) are culturally significant for Alaska Native tribes. *Id.* In recent years, participation in commercial fisheries has become more challenging for these communities resulting in less flexibility to adjust to short- and long-term fluctuations in halibut availability. *Id.* And non-fishing sources of income and employment are limited in these areas. NOAA4845-46. In sum, the static PSC limit considered in the no action alternative could impose a hardship on these halibut-dependent communities by indirectly reducing their halibut allocation. NOAA4840.

NMFS also analyzed the relative benefits and hardships to the Amendment 80 sector. Although five Alaskan communities and greater Seattle might be affected by Amendment 123, none of these communities were found to be entirely Amendment 80-sector dependent. *See* NOAA4833-39, NOAA3633-39. Many of the five Alaska communities were also engaged in directed halibut fisheries activities and were, thus, also vulnerable to economic impacts from low abundance under the no action alternative. *See id.* This was true even in Unalaska/Dutch Harbor, the community that is “most closely associated” with Amendment 80 activities. *See id.* As for impacts to the Seattle area, where the Amendment 80 sector is largely based, “numerous variables” could impact the effect of PSC reductions and could be influenced by behavioral changes. *See* NOAA4838.<sup>9</sup> As a result, quantifying costs associated with any reductions is not

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<sup>9</sup> Plaintiff seems to suggest that Amendment 123 had a discriminatory intent. *See, e.g.,* Pls.’ Br. 10 (claiming the Council “singled out the Washington-based Amendment 80

straightforward. See *id.* Although potential lost income and employment opportunities for the Amendment 80 sector’s crew is a concern, the Council noted that there are likely to be “many more alternate employment and income opportunities... in a large urban area than are available in smaller communities or rural settings.” NOAA4839. Although Plaintiff place weight on revenue loss estimates, Pls.’ Br at 4, the Final EIS repeatedly emphasized that these were worst case illustrations, not predictive of future revenue, and did not capture mitigation measures the Amendment 80 sector can employ to reduce PSC. NOAA4788, NOAA4796, NOAA4814, NOAA4852, NOAA4905.

NMFS properly weighed these benefits and hardships and determined that the Rule was fair and equitable. Even if the Rule imposes a hardship on the Amendment 80 sector, the MSA “clearly accounts for ‘winners’ and ‘losers’ in any distribution of privileges.” *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.* (“UCIDA”), No. 3:21-CV-00247-JMK, 2022 WL 2222879, at \*15 (D. Alaska June 21, 2022). And an allocation under NS4 “may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups.” 50 C.F.R. § 600.325(c)(3)(i)(B). As NMFS explained in the final rule, regulatory costs alone do not determine whether an

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sector”); see *id.* at 24. Yet, nothing in the proposed action “considers residency as a criterion for the Council’s decision” and, although the Amendment 80 sector may be predominantly based in Seattle, residents of other states (including Alaska) participate in the sector. See NOAA3633. The final rule also explained that while the Amendment 80 cooperative may be based in Washington, the residency of the Amendment 80 cooperative or any of its members, employees, or associated persons is not the basis for Amendment 123. See 88 Fed. Reg. 82740, 82753. The action is a conservation and management measure applicable to the entire Amendment 80 sector, without regard to state of incorporation or residency. *Id.*

action is fair and equitable. *See* 88 Fed. Reg. 82740, 82751. In any case, NMFS determined linking halibut PSC limits to halibut abundance is more equitable than static PSC limits because “when abundance drops, a static level of halibut PSC represents a greater proportion of all halibut fishing mortality.” *Id.* at 82747.

Contrary to Plaintiff’s assertions, NMFS is not singling out the Amendment 80 sector. *See* Pls’ Br. at 1, 16, 24. The Rule focuses on the Amendment 80 sector because it “is responsible for the majority of the PSC mortality.” NOAA4880, NOAA4631. Among the BSAI groundfish fisheries, Amendment 80 is responsible for over 60% of the mortality of halibut. NOAA4720. In 2019 alone, the Amendment 80 sector bycaught and killed 1,461 mt (2.4 million pounds) of halibut. *See id.* Nor is there anything novel about a sector-specific rule. NMFS often issues sector-specific regulations because they are based on scientific, technical, and other factual considerations that are common to that sector. For example, NMFS recently reduced halibut PSC limits for another BSAI sector (the Pacific Cod trawl sector) by 25% over two years. *See* 89 Fed. Reg. 17287, 17305 (March 11, 2024). Similarly, NMFS has previously issued abundance-based management rules. Indeed, in crafting Amendment 123, NMFS looked to Amendment 91 (related to Chinook salmon management) as an example of an abundance- and performance-based management regime. NOAA4818-20; *see also* Ex. 3 (table with examples of other abundance-based rules in this region).

Altogether, the Final EIS dedicated hundreds of pages of analysis to thoroughly evaluating the relative impact of the alternatives on both the Amendment 80 sector and the directed fisheries. NMFS had years’ worth of data demonstrating that the Amendment

80 sector routinely wastes more halibut as bycatch than the directed fisheries are collectively authorized to catch in Area 4CDE, and post-Amendment 111 data indicating that the Amendment 80 sector could further minimize halibut bycatch. Ex. 2. In the end, based on the Council's recommendation, NMFS concluded that the Rule's benefits in bycatch reduction and secondary benefits to the directed fisheries outweighed any hardships to the Amendment 80 sector. Where, as here, NMFS articulated a rational connection between the facts found and the choice made, the Court may not substitute its judgment regarding an allocation, even if the action will adversely impact the lives of fishermen. *See All. Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996).

*b. The Rule promotes conservation of halibut.*

The NS4 guidelines state that an allocation “may promote conservation by encouraging a rational, more easily managed use of the resource,” 50 C.F.R. § 600.325(c)(3)(ii), thereby recognizing that management and conservation are often intertwined. NS4 must also be read in concert with NS9, which requires conservation and management measures to minimize bycatch to the extent practicable. *See* 16 U.S.C. § 1851(a)(9); *see also The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 158 (D.D.C. 2005) (National Standards should not be read in a vacuum, but in relation to other National Standards).

NMFS determined that the Rule would promote conservation of halibut in both the short and long term by minimizing the Amendment 80 sector's halibut bycatch and improving consistency with the IPHC's halibut management. NOAA4656; NOAA1145. The Rule will conserve between 174 mt (medium/high) to 611 mt (very low) of halibut



each year, which is about 383 thousand to 1.35 million pounds of halibut. NOAA4600. And NMFS explained that the Rule creates incentives to reduce halibut bycatch in the Amendment 80 sector<sup>10</sup> and prevent the sector from causing a disproportionate share of the overall halibut mortality in the BSAI, thereby promoting more rational management of halibut. *See* NOAA4878-79. Although the Council acknowledged the Amendment 80 sector's concern that encounter rates have not been well correlated with halibut abundance, the Council determined that the "imbalance among users" and need for "greater conservation" of halibut required implementing the Rule to ensure that "the Amendment 80 fisheries does not become a greater share of overall halibut removals in the BSAI, particularly in Area 4CDE." NOAA4655.

Plaintiff seems to interpret 'conservation' in such a way that NMFS could never promulgate a rule that reduces bycatch because some fish conserved by such an action might still be subject to an allocation to a directed fishery. *See* Pls.' Br. at 17-18. Yet such an interpretation directly contradicts the MSA's express directives that optimum yield be achieved for (directed) fisheries and that bycatch (among non-directed fisheries) be minimized to the extent practicable. *See* 16 U.S.C. § 1851(a)(1), (9). Plaintiff's interpretation is also inconsistent with NS8 because it would prevent NMFS from considering the importance of fishery resources to fishing communities when

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<sup>10</sup> For instance, NMFS recognized that there was variability among the Amendment 80 sector's utilization of tools to minimize bycatch, and that the cooperative structure of Amendment 80 afforded it an opportunity to further maximize halibut bycatch reduction. *See, e.g.*, NOAA4879.

implementing conservation and management measures. NOAA1153; 16 U.S.C. § 1851(a)(8).

Plaintiff's reliance on cherry picked language from a draft EIS is also unavailing because it ignores the context of these quotes. *See* Pls.' Br. 17-18. In 2019, a draft of the EIS described Amendment 123 as an "allocation decision" in the context of explaining a model used to evaluate alternatives' impacts on halibut stock. *See* NOAA42367.

Although the model conservatively assumed that the IPHC would reallocate a portion of the halibut conserved by the Rule to the directed fishery, the Council lacks the authority to do so directly and, thus, the IPHC would ultimately have to exercise its own expertise and judgment before such an allocation could occur. NOAA4592. Moreover, even if the IPHC allocates some of the conserved halibut, it could not allocate all conserved halibut to the directed fisheries due to size requirements applicable to the directed fisheries.

NOAA4832. Thus, the smaller size halibut conserved might eventually contribute to an increase in halibut biomass. NOAA4629, NOAA4850; *see also*, NOAA1122. Regardless, the Council ultimately decided not to carry the modeling discussion over to the Final EIS because the model reflected a large amount of uncertainty and was unable to reliably estimate changes to halibut stock abundance based on changes in levels of PSC. *See* NOAA4747-49.

*c. The Rule is practicable.*

When NMFS issued Amendment 111 in 2015, the Amendment 80 sector had not yet meaningfully implemented some of the most important bycatch reduction tools available to the sector. Under NS9, NMFS's obligation to minimize bycatch to the extent

practicable is an ongoing one. *See* 50 C.F.R. § 600.350(d)(4) (“Effects of implemented measures should be evaluated routinely.”). Thus, NMFS’s updated evaluation of what is practicable for the Amendment 80 sector properly included post-2015 data concerning the Amendment 80 sector’s PSC mortality.

Although the preamble to Amendment 111 suggested that more stringent PSC limit reductions were not practicable for the Amendment 80 sector as of 2015, NMFS elsewhere noted that additional bycatch reduction would be needed in the future. NOAA1098-99. Similarly, in the preamble to the final rule for Amendment 111, NMFS acknowledged that it was still investigating how deck sorting might reduce PSC. NOAA511. Around this time, the Amendment 80 sector also developed and began implementing the Halibut Avoidance Plan, which created halibut PSC performance standards for the sector and identified halibut avoidance tools, including deck sorting and better communication between vessels about halibut encounters. NOAA4604-05. As the Amendment 80 sector implemented these tools between the latter half of 2015 and 2020, the Amendment 80 sector’s halibut mortality rate declined markedly to well below the 1,745 mt limit in the Amendment 111 rule. NOAA1099; NOAA4724 (Table 3-30); NOAA4724 (Table 3-30); *see also*, Ex. 2. Prior to issuing the Rule, NMFS determined that future PSC would most likely be similar to this post-2015 data as the Amendment 80 sector continues to optimize existing halibut avoidance tools. NOAA4613. NMFS concluded that Amendment 123 was practicable thanks to implementation of the halibut avoidance plan, the deck sorting program, and other tools to reduce halibut mortality. *See id.*

NMFS also determined the Amendment 123 is practicable because the Amendment 80 sector is not fully utilizing existing halibut avoidance tools. NOAA1155. NMFS assumed that the Amendment 80 sector would further optimize its operations to prevent halibut PSC limits from constraining groundfish harvest by using “cooperative fishing strategies, evaluating behaviors against standard fleet-wide bycatch rates, communication among captains, test tows, excluder use and deck sorting to reduce mortality when encounters cannot be avoided.” NOAA4613. Past efforts show that these halibut avoidance and mortality reduction measures are effective and continued improvements are likely under reduced PSC limits. *See* NOAA4910, NOAA4796.

NMFS also noted that mere inconvenience or reduced profitability do not constitute impracticability. *See* NOAA4799. Although Amendment 123’s PSC limits under very low abundance could decrease the Amendment 80 sector’s revenue by 9-32%, NMFS determined that such economic consequences would not render the action impracticable. NOAA4896. Such significant potential revenue losses were modeled to occur only in the very low abundance state (and based on the unlikely assumption that there would be no modification in fishing practices), whereas the other abundance states resulted in a PSC limit reduction of only 0-20%. *Id.* Although the Amendment 80 sector may incur some costs associated with the PSC limit reductions, including by leaving some fish unharvested, a more equitable balance between users and greater conservation of halibut warranted such costs. *See* NOAA4954.

Plaintiff again cherry-picks the Council’s conservative estimate of economic impacts associated with the Rule. *See* Pls.’ Br. at 21 n.4. Yet, Plaintiff does not claim to

have lost any actual money due to the Rule, nor does it explain why its members are not fully utilizing the existing tools. *See id.* Plaintiff also does not acknowledge that – unlike the directed fisheries, which are dependent on halibut – the Amendment 80 sector has inherent flexibility to coordinate among its members to identify fishing strategies that maximize their yield while minimizing PSC. NOAA4736-37.

For all these reasons, Plaintiff has not met their burden of proving a violation under the MSA and certainly not one that would justify vacating the Rule under the APA. See 5 U.S.C. § 706(2) (judicial review of an agency action requires due account of the “rule of prejudicial error”). Judicial review should not convert “agency action into a ping pong game,” and, thus, remand is not required where, as here, it “would be an idle and useless formality.” *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969); *see also, Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). Because NMFS already determined that the Rule complies with NS4, there can be no doubt that vacating it, as Plaintiff requests, would be an idle and useless formality. *See id.* Thus, the Court should reject Plaintiff’s MSA claim.

**B. NMFS did not violate NEPA because Amendment 123’s scope is consistent with its statutory authority and the EIS contains a reasonable range of alternatives within that scope.**

Because the scope of the Amendment 123 EIS permissibly concentrates on the Amendment 80 sector—far and away the sector with the largest halibut bycatch—its alternatives are also appropriately limited to the Amendment 80 sector. Plaintiff improperly tries to flip the analysis by beginning with the alternatives rather than the scope of the EIS. *See Westlands Water Dist. v. U.S. Dep’t of the Interior*, 376 F.3d 853,

865 (9th Cir. 2004); *City of Alexandria v. Slater*, 198 F.3d 862, 867-69 (D.C. Cir. 1999). As NMFS reasonably identified and defined its purpose and need statement in the EIS, the alternatives within that scope are also reasonable.

Amendment 123's purpose and need statement conforms with NMFS's duties under the MSA by applying measures for the management of halibut PSC to the sector accountable for the most halibut PSC mortality in the BSAI groundfish fisheries—the Amendment 80 sector. NOAA4627. As reflected in the purpose and need statement, this action minimizes halibut bycatch to the extent practicable in accordance with NS9 (50 C.F.R. § 600.350) and achieves optimum yield on a continuing basis in accordance with NS1 (50 C.F.R. § 600.310). *Id.* As discussed above, the Rule also promotes conservation in accordance with NS4 (50 C.F.R. § 600.325) and utilizes economic and social data in accordance with NS8 (50 C.F.R. 600.345). These actions and objectives are consistent with NMFS's statutory authority under the MSA. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010).

NMFS did not single out the Amendment 80 sector and “retrofit” the purpose and need statement to match that decision. Pl.'s Mot. 25. The evolution of the Rule was a normal result of the scoping process where the agency determines the scope based on “meaningful dialogue with members of the public about a proposed action.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002) *abrogated on other grounds*, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.2d 1173 (9th Cir. 2011); *see also* 40 C.F.R. § 1501.9. While NMFS began by considering abundance-based management for all fishing sectors in the BSAI with halibut bycatch, the resulting early draft of the EIS

was exceptionally complex. *See* NOAA53002 at 8:07, 8:11, 8:16, 8:19, 8:32:30, 8:55.

The Council then requested and received public testimony regarding ways to streamline and simplify the action. *See* NOAA043065. Recognizing the comparatively minor halibut PSC of the other sectors, the Council unanimously passed a motion to limit Amendment 123 to the Amendment 80 sector. NOAA53003 at 3:27, 3:29.

The scoping decision for the Rule was the result of public engagement and recognition that the Amendment 80 sector accounts for the overwhelming majority of halibut bycatch. This decision was not only informed by public participation but was also based on NMFS’s scientific expertise and is entitled to deference. Agencies enjoy considerable discretion to define the purpose and need of a project. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (cleaned up). Resolving issues regarding the scope of an EIS “requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *see also North Carolina Fisheries Ass’n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 80 (D.D.C. 2007) (“Fisheries regulation requires highly technical and scientific determinations that are within the agency's expertise, but are beyond the ken of most judges.”). By choosing to streamline the action, NMFS avoided delay that would have resulted in additional years of excess bycatch.<sup>11</sup>

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<sup>11</sup> Additionally, purpose and need statements are not too narrow when they are tailored to address a unique problem, like Amendment 80’s large halibut PSC. *See, e.g., HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230–31 (9th Cir. 2014) (finding that a purpose and need statement that considered only a rapid rail system as an

Next, the scope of the Rule does not foreclose all but one alternative such that the “EIS would become a foreordained formality.” *Nat’l Parks*, 606 F.3d at 1070 (quotations and citation omitted). The EIS considers one no-action alternative and four action alternatives with a wide range of possible halibut PSC limits, none of which are a foregone conclusion based on the scope of the EIS. NOAA4647. These limits are based on considerable agency expertise and are reasonable in light of the scope of the EIS.

Plaintiff laments that no alternative “applied abundance-based restrictions to many sectors in the groundfish fishery.” Pl.’s Mot. 23. However, alternatives need not be included in an EIS if they present “unique problems and would not accomplish the [agency’s] goal.” *Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992). As discussed, an alternative that applied to all sectors proved too complex because different sectors use different gear and require different analytical considerations. *See* NOAA41812, NOAA41913. Thus, it was not a viable option. NMFS was not “required to explore alternatives that, if adopted, would not have fulfilled the project goals.” *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 546 (8th Cir. 2003); *see also City of Alexander v. Slater*, 198 F.3d 862, 867-69 (D.C. Cir. 1999).

Nor did NMFS delete viable alternatives or “shroud[] the issue from public scrutiny behind the claim of administrative expertise.” *State of California v. Block*, 690 F.2d 753, 768 (9th Cir. 1982). Indeed, the change of the Rule’s scope was based on

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option to remedy traffic congestion was reasonably framed to “provide faster, more reliable public transportation service . . . than can be achieved with buses operating in congested mixed-flow traffic.”).



public engagement and feedback. NOAA043065; NOAA53003 at 3:27, 3:29. “[T]he touchstone of the NEPA inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013) (internal quotations omitted). The process of developing an abundance-based halibut management strategy for all sectors in a single action proved to be too complex and protracted. It was not a viable alternative because its implementation lagged for years. By efficiently developing the action to focus on the sector with the largest halibut bycatch, Amendment 123 is both consistent with NMFS’s statutory authority and broad enough to guide the agency’s selection of viable alternatives.

## VI. CONCLUSION

For all the foregoing reasons, the Court should deny Plaintiff’s Motion for Summary Judgment and enter judgment for Defendants.

Dated: June 27, 2024

Respectfully submitted,

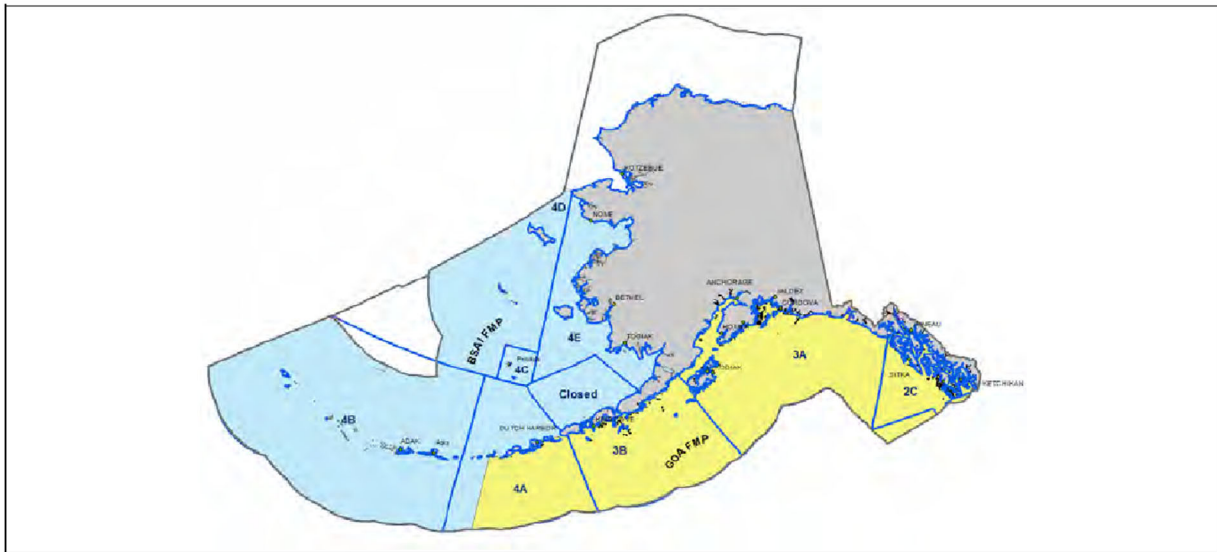
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# EXHIBIT 1

## Map of the BSAI and Area 4



**Figure ES-1 Map of IPHC Regulatory Areas (outlined in dark blue) and BSAI FMP (shaded in light blue) and GOA FMP (shaded in yellow) areas.**

NOAA004594.

# EXHIBIT 2

**Amendment 80 Sector and Area 4CDE Directed Fisheries Comparison**

<b>Year</b>	<b>4CDE Directed Fisheries – Halibut Allocation</b>	<b>4CDE Directed Fisheries – Total Halibut Removal</b>	<b>Amendment 80 – Halibut PSC Limit</b>	<b>Amendment 80 – Halibut PSC in 4CDE</b>	<b>Amendment 80 – Total Halibut PSC</b>
2020	1046	1022	1745	969	1097
2019	1234	1034	1745	1309	1461
2018	956	871	1745	1207	1343
2017	1028	998	1745	1476	1167
2016	1004	925	1745	973	1412
2015	780	744	2325	1222	1638
2014	780	786	2325	1166	2178
2013	1167	1101	2325	1897	2166
2012	1488	1458	2325	1410	1944
2011	2250	2177	2375	1412	1810
2010	2165	2044	2425	1961	2254

NOAA4649 (Table 2-5), NOAA4827-28 (Table 5-16)

<sup>1</sup> All columns are in metric tons.

<sup>2</sup> The Amendment 80 PSC is reported in net round metric ton. However, the IPHC reports data in net million pounds. Thus, to compare these values, NMFS converted from net million pounds in the directed fisheries columns to round metric tons using the following formula: (million pounds/0.75)\*0.000453592\*1000000. See NOAA4827-28 (Table 5-16).

# EXHIBIT 3

**Examples of Other Abundance-Based Rules in this Region**

<b>Rule (Title)</b>	<b>Citations</b>	<b>Description (of how it is abundance-based)</b>
Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Management in the Bering Sea Pollock Fishery	50 C.F.R. § 679.21(f); 81 Fed. Reg. 37,534 (June 10, 2016).	NMFS established abundance-based Chinook salmon PSC limits for the pollock vessels in the BSAI.
Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Bering Sea and Aleutian Islands Area; Trawl Closure to Protect Red King Crab	50 C.F.R. § 679.21(e)(1); NOAA4685-4689.	The PSC limits for crab species in certain fishing zones depends on crab abundance.
Herring PSC limits in the BSAI	50 C.F.R. § 679.21(e)(1)(v);	“The PSC limit of Pacific herring caught while conducting any domestic trawl fishery for groundfish in the BSAI is 1 percent of the annual eastern Bering Sea herring biomass.”



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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

GROUND FISH FORUM, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants.

Case No. 3:23-cv-00283-JMK

**INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

*Groundfish Forum, Inc. v. NMFS*  
Case No. 3:23-cv-00283-JMK

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND.....	2
I. Halibut’s Importance to Fishing Families and Communities.....	2
II. The Devastating Impacts of Bycatch on Halibut Fishermen and Communities.....	3
III. The Council’s Efforts to Reduce Bycatch and Development of A123.....	5
STATUTORY OVERVIEW AND STANDARD OF REVIEW .....	8
ARGUMENT.....	9
I. A123 is Consistent with National Standard 4 .....	10
A. A123 is not an “allocation” under National Standard 4.....	10
B. A123 is consistent with National Standard 4’s requirements .....	12
II. A123 is Consistent with National Standard 9 .....	18
A. The Council and NMFS properly exercised their Congressionally delegated authority to balance competing interests.....	18
B. GFF’s assertions regarding economic losses lack merit .....	21
C. NMFS’s practicability determination appropriately considered social and economic costs and benefits.....	23
III. NMFS Satisfied its NEPA Obligations.....	24
CONCLUSION .....	25
CERTIFICATE OF COMPLIANCE WITH LENGTH LIMIT AND TYPEFACE AND TYPE-STYLE REQUIREMENTS .....	27
CERTIFICATE OF SERVICE.....	27

## TABLE OF AUTHORITIES

<b>Ninth Circuit Opinions</b>	<b>Page(s)</b>
<i>Alaska Factory Trawler Assoc. v. Baldridge</i> , 831 F.2d 1456 (9th Cir. 1987).....	15, 21
<i>Alliance Against IFQS v. Brown</i> , 84 F.3d 343 (9th Cir. 1996) .....	9, 18, 21
<i>Douglas Cty. v. Babbitt</i> , 48 F.3d 1495 (9th Cir. 1995) .....	24
<i>Drakes Bay Oyster Co. v. Jewell</i> , 747 F.3d 1073 (9th Cir. 2014) .....	25
<i>Nw. Env'tl. Def. Ctr. v. Brennen</i> , 958 F.2d 930 (9th Cir. 1992) .....	8, 9
<i>Oceana, Inc. v. Bryson</i> , 940 F. Supp. 2d 1029 (N.D. Cal. 2013) .....	25
<i>Pac. Dawn LLC v. Pritzker</i> , 831 F.3d 1166 (9th Cir. 2016) .....	22
<i>San Luis &amp; Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014) .....	25
<i>United Cook Inlet Drift Ass'n v. NMFS</i> , 2022 U.S. Dist. LEXIS 109879 (D. Alaska June 21, 2022) .....	9, 10, 12
<b>Federal Court Opinions</b>	
<i>Assoc. Fisheries of Me., Inc. v. Evans</i> , 350 F. Supp. 2d 247 (D. Me. 2004) .....	8
<i>Associated Gas Distribs. v. FERC</i> , 824 F.2d 981 (D.C. Cir. 1987) .....	14
<i>C &amp; W Fish Co. v. Fox</i> , 931 F.2d 1556 (D.C. Cir. 1991) .....	13
<i>Conserv. L. Found. v. Ross</i> , 374 F. Supp. 3d 77 (D.D.C. 2019) .....	9, 25

<i>Conserv. L. Found. v. Evans</i> , 360 F.3d 21 (1st Cir. 2004) .....	24
<i>N.C. Fisheries Ass’n v. Gutierrez</i> , 518 F. Supp. 2d 62 (D.D.C. 2007) .....	9, 21
<i>Nat’l Coal. for Marine Conserv. v. Evans</i> , 231 F. Supp. 2d 119 (D.D.C. 2002) .....	10, 13
<i>Oceana, Inc. v. Pritzker</i> , 24 F. Supp. 3d 49 (D.D.C. 2014) .....	18
<i>Transp. Div. of the Int’l Ass’n of Sheet Metal, Air, Rail &amp; Transp. Workers v. FRA</i> , 10 F.4th 869 (D.C. Cir. 2021) .....	14
<b>United States Code</b>	
16 U.S.C. § 773c .....	11
16 U.S.C. § 1802(5) .....	16
16 U.S.C. § 1802(42) .....	16
16 U.S.C. § 1851 .....	12, 16
16 U.S.C. § 1853(a)(14) .....	16
16 U.S.C. § 1854 .....	8
16 U.S.C. § 1854(a)(3)–(b) .....	9
16 U.S.C. § 1855 .....	9
<b>Other</b>	
50 C.F.R. § 600.305(a)(1)–(3) .....	15
50 C.F.R. § 600.325 .....	11, 16
50 C.F.R. § 600.350(d)(3) .....	24
50 C.F.R. § 600.350(d)(3)(i)(H)–(J) .....	24
50 C.F.R. § 679.2 .....	10, 11
50 C.F.R. § 679.21 .....	13
81 Fed. Reg 24,714 (Apr. 27, 2016) .....	5, 8
88 Fed. Reg. 53,704 (Aug. 8, 2023) .....	15
88 Fed. Reg. 82,740 (Nov. 24, 2023) .....	1
89 Fed. Reg. 19,275 (Mar. 18, 2024) .....	15

Brett M. Kavanaugh, *Fixing Statutory Interpretation*,  
129 Harv. L. Rev. 2118 (2014) ..... 19

## INTRODUCTION

This case involves a challenge by the “Amendment 80” fleet (A80) of groundfish trawlers to overturn Amendment 123 (A123) to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands (BSAI). *See* 88 Fed. Reg. 82,740 (Nov. 24, 2023). A123 limits the amount of halibut A80 can kill as bycatch based on halibut abundance, allowing more bycatch when halibut are abundant and less when they are not. This type of “abundance-based management” — that is, using indices of abundance to set fishery limits — is a basic fisheries concept that has long been used to set catch limits for halibut and virtually every other managed fishery, along with bycatch limits for other species in the BSAI. A123 extends this common-sense principle to A80.

A80 is the largest source of halibut bycatch mortality in the BSAI. In 2022, it was responsible for almost 74% of the halibut bycatch mortality in all BSAI trawl fisheries. Between 2015 and 2022 alone, A80 killed and wasted almost 24 million pounds of halibut. The overwhelming majority of this bycatch was small juvenile fish inhabiting sensitive nursery areas where almost 90% of A80’s bycatch occurs, preventing literally millions of juvenile halibut from migrating out to other areas along the Pacific coast, recruiting to the halibut fishery, or reproducing and contributing to the long-term health of the halibut stock.

Halibut fishermen and their communities have borne the burden of A80’s bycatch, seeing their harvest limits reduced to conserve the halibut stock while A80’s bycatch limits remained fixed at levels that, *by definition*, did not require bycatch to be minimized to the extent practicable, as National Standard 9 requires. A123 addresses this profound inequity, requiring A80 to share in the effort to conserve the halibut stock and to take reasonable and

practicable steps to limit its impacts during times of low halibut abundance. It was adopted by the North Pacific Fishery Management Council with broad support; it follows Congress’s clear mandate that bycatch be minimized; and it can be implemented using tools available today with little if any impact on A80 revenues. NMFS’s conclusion that it is consistent with the Magnuson-Stevens Act is reasonable and supported by the record. The Groundfish Forum’s (GFF) motion should be denied.

## **BACKGROUND**

### **I. Halibut’s Importance to Fishing Families and Communities**

Halibut is an “iconic species” that holds tremendous economic, social, and cultural significance along the entire Pacific coast, where it is “highly valued ... among commercial, recreational, charter, and subsistence fishermen.” NOAA035282. Halibut fishing is one of the most important — if not the most important — sources of employment and income for many coastal Alaska communities, where fishing fleets’ dependence on halibut often ranges from “90 percent or greater” to “virtually complete.” NOAA004119–23. More broadly, through commercial fishing, family-run recreational charter fishing operations, the operation of onshore processing facilities, and the contribution of tax revenues, the halibut economy is critical to communities and small businesses from the Bering Sea and the Gulf of Alaska to Seattle, Washington, where many vessels that fish for halibut in the BSAI are based. *E.g.*, NOAA000194; NOAA000189–95; NOAA060223–25; NOAA000368–74; NOAA059686–87, 881–93; NOAA042466–68; NOAA004126.

Halibut fishing is also a cultural touchstone “for fishermen and their associated communities,” where halibut fishing is both “a meaningful vocation and way of life.”

NOAA004163. In these communities, the halibut fishery’s significance far “exceeds the economic value of the fishery.” *Id.* This is especially true for predominantly Alaska Native communities in the BSAI, where the “cultural importance of halibut (as a species) and halibut fishing (as a traditional activity)” is well-documented and fishing is part of traditional practices “rooted in thousands of years of history.” NOAA004125.

## **II. The Devastating Impacts of Bycatch on Halibut Fishermen and Communities**

Halibut stocks are managed by the International Pacific Halibut Commission (IPHC) under a Convention between the United States and Canada. Each year, the IPHC conducts a “stock assessment,” which it uses to evaluate the health of the halibut population and set catch limits for each fishery sector in “regulatory areas” that extend from California to the Aleutian Islands and Northern Bering Sea. NOAA003885–88, 3905; Ex. 1, p. 1.<sup>1</sup>

While the IPHC sets annual limits on overall halibut mortality and limits for halibut, it has no power to limit the amount of halibut that can be killed as bycatch in U.S. fisheries, which are managed by the Council and NMFS. NOAA003888. Thus, under the IPHC’s system, halibut killed as bycatch are subtracted from the total allowed fishing mortality before directed fishery catch limits are set. NOAA003887–88. In other words, mortality from bycatch is “taken off the top,” so it directly reduces the amount of halibut available to other fisheries and users. NOAA003217; *see also* NOAA003887–88.

An enormous number of halibut are killed and wasted as bycatch in the BSAI. Based

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<sup>1</sup> The FMP here generally coincides with IPHC “Area 4,” which covers the parts of Area 4A and 4B north of the Aleutian Islands, along with Areas 4C, 4D, and 4E, which are managed together and simply called “Area 4CDE.” NOAA003871.



on data from NMFS, trawl fisheries in the BSAI killed over 15,300 metric tons — *almost 34 million pounds* — of halibut between 2015 and 2022. NOAA000321; Ex. 1, p. 3. A80 is responsible for the overwhelming share of this bycatch. In 2022, A80 accounted for about 69% of the total bycatch mortality in the BSAI and almost 74% of all trawl-sector bycatch. *Id.* More, almost 90% of A80’s bycatch is concentrated in parts of the Bering Sea that are home to large numbers of juvenile halibut and A80 kills them in great numbers. NOAA000318–19, 21; Ex. 1, p. 4. Between 2010 and 2020, about 55% of A80’s bycatch *by weight* was juvenile halibut. NOAA004102. In 2016, that number was 71.8%. *Id.* And because these juvenile fish do not weigh much (under 5 pounds compared to over 22 pounds for the halibut fishery, NOAA050439), the millions of pounds of halibut A80 catches equates to huge numbers of juvenile fish, meaning that A80 kills literally millions more halibut than halibut fishermen are allowed to catch. NOAA000323–24; Ex. 1, p. 5.

Killing large numbers of juvenile fish is, in a word, bad. Juvenile bycatch in the BSAI “can affect the overall productivity of the stock,” because these fish can never grow, reproduce, contribute to the halibut population, or recruit to the directed fishery. NOAA004031. Further, juvenile halibut from the BSAI migrate out to other areas. *Id.* (discussing “emigration of exploitable halibut from these areas”); NOAA050440 (70% to 90% of juvenile halibut tagged in the BSAI are recovered in the Gulf of Alaska). Thus, reducing mortality of these smaller halibut leads “to longer term benefits to the commercial halibut fisheries throughout the distribution of the halibut stock,” benefiting populations and fisheries “in the Bering Sea and elsewhere as these halibut migrate and recruit into the commercial halibut fisheries.” NOAA004192; NOAA003881. Indeed, an IPHC study finds

that every pound of bycatch reduction increases halibut fishery yield by as much as 144%, while other studies put the increase as high as 330%. NOAA003447; NOAA033074.

Bycatch has devastated the halibut fishery. The halibut stock declined by as much as 70% during the period from 1992 to 2010. NOAA003886; NOAA003216–17; Ex. 1, p. 2. Because the IPHC has no power over bycatch, however, its only management option to conserve the stock was to reduce fishery limits. Further, because bycatch limits for other fisheries did not vary with halibut abundance, bycatch consumed an ever-increasing proportion of the halibut as abundance declined. *E.g.*, NOAA003873; NOAA037449.

This created a profound imbalance. By 2014, bycatch mortality in the BSAI far exceeded commercial halibut fishery landings, especially in Area 4CDE, where bycatch skyrocketed and halibut fishery catches plummeted. NOAA037058; Ex. 1, p. 6. Indeed, bycatch was so high, and so few halibut were left over, that bycatch threatened to consume all the available halibut and preempt the halibut fishery entirely. *E.g.*, NOAA037059. This caused widespread economic uncertainty and pushed the halibut fishery in Area 4 to the brink of collapse, with catastrophic consequences for halibut fishermen and their communities. *E.g.*, NOAA003234–36; Ex. 1, p. 7–8.

### **III. The Council’s Efforts to Reduce Bycatch and Development of A123**

The Council began to address the harm caused by excessive bycatch in 2015, adopting Amendment 111 and reducing bycatch limits across all sectors by 15–25%. 81 Fed. Reg 24,714, 24,716 (Apr. 27, 2016). At that time, GFF and its members told the Council that reduced bycatch limits would result in “devastation to employees in our sector and the support industries that depend on it”; that they were already “using all available

means to reduce bycatch to the extent practicable,” and that the reductions being considered “would be disastrous to Amendment 80 fisheries.” NOAA000325. These threats proved empty, however — A80 reduced its bycatch to levels “well below” the new limits, while its revenues actually increased under the lower limits. NOAA035283; NOAA000325–26.

When the 2015 limits were set, the Council emphasized they were only a first step and further reductions were needed. NOAA035283. The Council thus began evaluating a range of complicated measures to set bycatch limits tied to halibut abundance, including “alternatives that applied to all groundfish fishing sectors.”<sup>2</sup> However, after “extensive consideration of proposed changes” and stakeholder input, NOAA043184, and agonizingly slow progress despite devoting five years and enormous resources to the effort, the Council decided to simplify the action in two ways. First, it focused the initial abundance-based management effort on A80, explaining the fleet was “responsible for more than 60% of the annual halibut bycatch mortality in the Bering Sea”; that it had “already initiated” other actions to reduce bycatch in other trawl fisheries; and the remaining sectors “contribute a relatively small proportion” of the annual bycatch. *Id*; *see also* NOAA043160–62. Second,

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<sup>2</sup> The Council considered a host of alternatives, including “complex multi-dimensional control rules,” “alternatives that apply to all groundfish fishing sectors,” “roll-over provisions,” and various “survey indices” of halibut abundance, and even extending the action to include the entire Gulf of Alaska; it worked to develop a “simulation model” of the halibut stock and fishery responses that could inform its decision and set bycatch limits; it received extensive feedback from its Scientific and Statistical Committee (SSC) regarding the alternatives it was considering; and it heard from thousands of stakeholders across 28 Council meetings, not including meetings of its SSC and abundance-based management working group, where halibut bycatch limits were considered. NOAA003942–44; *see generally* ECF 20-1 & 25-2.

the Council abandoned its complicated “simulation model” and approach based on complex “multi-dimensional control rules,” moving instead “to lookup table alternatives” submitted by stakeholders that would be “more transparent ... to the public” and “analyzed in the traditional method.” NOAA003942–44; NOAA035123.

These critical decisions finally let the Council make progress, and the Council adopted A123 in December 2021. NOAA060271–72. A123 establishes a variable bycatch limit for A80 using two fishery-independent indices of halibut abundance derived from scientific survey data — the IPHC Setline Survey and NMFS’s Eastern Bering Sea trawl survey index — both of which are used in the IPHC stock assessments on which the directed fishery harvest limits are based. NOAA035283–84. Under A123, A80’s annual bycatch limit remains at its prior level (1,745 mt) when abundance is high, but becomes increasingly protective as abundance declines, reaching 1,134 mt if halibut abundance were to reach the “very low” condition, which has never previously occurred. NOAA035313.

In setting the limits in A123, the Council struck a carefully considered balance among a range of alternatives. It emphasized both “the complex and challenging nature of this action” and the need “to establish abundance-based management of halibut PSC [“prohibited species catch” or bycatch] for the A80 groundfish fisheries and to promote continued participation of other fishery participants and communities dependent on the halibut stock in the BSAI.” NOAA060296. And it declined to adopt more stringent cuts advocated by many users on grounds that the costs to A80 might be too high, instead selecting a middle-ground solution that, in its view, struck the “appropriate balance between the Magnuson-Stevens Act requirements to establish conservation and

management measures that minimize bycatch to the extent practicable under MSA National Standard 9 while achieving optimum yield on a continuing basis under MSA National Standard 1.” *Id.* A123 was passed with broad support, with 8 of the 11 members voting to adopt it. NOAA060271–72.

NMFS approved A123 in March 2022 and adopted regulations implementing it in November 2023. NOAA001053; NOAA035282. Exercising its limited authority to review FMP amendments adopted by the Council, NMFS found A123 was both “necessary to comply with the obligation in the [MSA] that FMPs minimize bycatch to the extent practicable,” and “consistent with the Magnuson-Stevens Act’s National Standards.” NOAA035282. This litigation followed.

### **STATUTORY OVERVIEW AND STANDARD OF REVIEW**

The MSA is our nation’s primary fishery management law. Through the MSA, Congress created “an elaborate mechanism to weigh [the] competing interests” that permeate fishery management. *Assoc. Fisheries of Me., Inc. v. Evans*, 350 F. Supp. 2d 247, 249 (D. Me. 2004). To that end, Congress created eight regional fishery management councils, which it gave “primary responsibility” for establishing FMPs to regulate fishing in their region. *Id.* Congress, in turn, vested the Secretary of Commerce, through NMFS, with limited power to review FMPs and plan amendments approved by the councils to confirm they are consistent with ten National Standards set forth in the Act and other applicable laws. *Id.*; *see also Nw. Env’tl. Def. Ctr. v. Brennen*, 958 F.2d 930, 932 (9th Cir. 1992); 16 U.S.C. § 1854(a). If NMFS determines an FMP or amendment is consistent with applicable statutes, it “shall approve” the amendment and “shall promulgate” regulations

implementing it. 16 U.S.C. § 1854(a)(3)–(b); *Nw. Envtl. Def.*, 958 F.2d at 932.

NMFS’s approval of an FMP amendment is subject to review under the deferential arbitrary and capricious standard. 16 U.S.C. § 1855(f)(1); *United Cook Inlet Drift Ass’n v. NMFS*, 2022 WL 2222879, 2022 U.S. Dist. LEXIS 109879, at \*29–30 (D. Alaska June 21, 2022) (“*UCIDA*”); *N.C. Fisheries Ass’n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007) (“Judicial review ... under the [MSA] is especially deferential.”). As this Court has observed, “[f]isheries regulation requires highly technical and scientific determinations that are within the agency’s expertise, but are beyond the ken of most judges.” *Id.* (citing *Gutierrez*, 518 F. Supp. 2d at 80). Thus, the Court’s “only function is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Alliance Against IFQS v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996) (internal quotations omitted).

Importantly, “it is the ‘actions of the NMFS ... [that] are subject to judicial review,’ rather than the actions of the Council directly.” *Conserv. L. Found. v. Ross*, 374 F. Supp. 3d 77, 94 (D.D.C. 2019) (quoting *NRDC v. NMFS.*, 71 F. Supp. 3d 35, 43 (D.D.C. 2014)).

Particularly where a party challenges an FMP, plan amendment, or regulation as inconsistent with one or more of the ten National Standards set forth in 16 U.S.C. § 1851(a), a court’s task is not to review de novo whether the amendment complies with these standards but to determine whether the Secretary’s conclusion that the standards have been satisfied is rational and supported by the record. *UCIDA*, 2022 U.S. Dist. LEXIS 109879, at \*16 (quotations and citation omitted).

## ARGUMENT

GFF argues A123 should be set aside for three basic reasons: (1) GFF claims A123 violates National Standard 4 because it is an “allocation” of fishing privileges that is not

“fair and equitable” and not “reasonably calculated to promote conservation”; (2) GFF asserts it violates National Standard 9, because its bycatch reductions are not “practicable”; and (3) GFF claims NMFS violated NEPA by failing to consider alternatives that would have set abundance-based bycatch limits for other fisheries. None of these claims has merit.

**I. A123 is Consistent with National Standard 4**

**A. A123 is not an “allocation” under National Standard 4**

GFF claims A123 “is an allocation” to the directed fishery under National Standard 4, ECF 26, p. 17–20, but GFF is wrong. Under National Standard 4, an “‘allocation’ is a ‘direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals.’” *UCIDA*, 2022 U.S. Dist. LEXIS 109879, at \*41 (quoting 50 C.F.R. § 600.325(c)(1)). A123 is not an allocation because setting bycatch limits does not “distribute” the opportunity to participate in any fishery.

Halibut is a “prohibited species” in groundfish fisheries, which A80 and other groundfish participants may neither target as part of the halibut fishery nor keep when caught incidentally. 50 C.F.R. § 679.2. Reducing A80’s limit has no direct effect on the opportunity to harvest groundfish. It changes neither the species A80 may target nor the share of the total allowable groundfish catch assigned to any sector or participant. This is not an “allocation” under National Standard 4. *See Nat’l Coal. for Marine Conserv. v. Evans*, 231 F. Supp. 2d 119, 131 (D.D.C. 2002) (accepting that “measure to reduce bycatch ... is not a type of allocation measure addressed by National Standard Four”).

It is true that A123 has indirect allocative effects. As the Council and NMFS both recognized, halibut fishery limits are expected to go up when there is less bycatch mortality



for the IPHC to subtract from its annual harvest limits. *E.g.*, NOAA004160; NOAA035305. Considerations of fairness and equity, embodied in both National Standard 4 and the Halibut Act, also appropriately inform the decision to adopt A123. *See, e.g.*, 16 U.S.C. § 773c(c) (requiring any assignment of “halibut fishing privileges” to be “fair and equitable” and ensure that “no particular ... entity acquires an excessive share”). But the Council “does not have direct authority over setting halibut catch limits,” and A123 cannot make a “direct allocation or assignment of fishing privileges to the directed halibut fishery participants.” NOAA004160.

Incidental and indirect effects, even if expected, do not make A123 an “allocation” under National Standard 4. Every “management measure ... has incidental allocative effects.” 50 C.F.R. § 600.325(c)(1). “[O]nly those measures that result in *direct distributions* of fishing privileges,” however, are “judged against the allocation requirements of Standard 4.” *Id.* (emphasis added).<sup>3</sup> The indirect allocative effects that GFF cites — and that were openly discussed by the Council and evaluated in the EIS — do not make A123 an “allocation” under National Standard 4. *Id.*

In the end, GFF’s discussion of A123 lays bare its real complaint, which is that it will be forced to kill fewer halibut as bycatch when halibut abundance is low and the impacts of its bycatch on others are most profound. GFF specifically and repeatedly

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<sup>3</sup> For similar reasons, GFF’s focus on “catch limits” and “quotas” is misplaced. These terms are used in § 600.325 as examples of actions that could constitute a “direct and deliberate distribution of the opportunity to participate in a fishery.” A123 does not do so for the reasons explained above, so it is not an “allocation” under National Standard 4.



describes A123 as “allocat[ing] the burdens of abundance-based management,” complaining that it will be forced “to bear the entire burden of [the] new ‘abundance-based’ approach.” ECF 26, p. 9–10, 18, 21. But National Standard 4 addresses “allocations” of “fishing privileges,” not supposed regulatory “burdens” based on the manner in which bycatch limits are determined. That certain individual A80 companies *might* have to curtail operations at the end of *some unspecified future* fishing season (which the record shows is unlikely) does not make A123 an allocation or render it improper.

### **B. A123 is consistent with National Standard 4’s requirements**

Even if A123 were an allocation under National Standard 4, NMFS’s conclusion that it is consistent with the National Standards should be affirmed. National Standard 4 requires that allocations be: (1) fair and equitable and (2) reasonably calculated to promote conservation. 16 U.S.C. § 1851(a)(4). A123 meets both requirements.

#### **1. A123 is fair and equitable**

First, A123 furthers legitimate FMP objectives. “Allocations are ‘fair and equitable’ if they are ‘rationally connected to the ... furtherance of a legitimate FMP objective.’” *UCIDA*, 2022 U.S. Dist. LEXIS 109879, at \*41 (quoting *Fishermen’s Finest, Inc. v. Locke*, 593 F.3d 886, 890 (9th Cir. 2010)). Here, an objective of the FMP is to “reduce bycatch and waste,” specifically by “manag[ing] incidental catch and bycatch,” “control[ing] the bycatch of prohibited species,” and “reduc[ing] waste to biologically and socially acceptable levels.” FMP, p. 5, available at <https://bit.ly/BSAI-FMP>; NOAA031286. A123 is directly related to this goal, because reducing halibut bycatch during times of low halibut abundance reduces waste during these critical periods. NOAA035295 (amendment furthers

FMP objectives of “reduction of bycatch and waste”); NOAA035294 (Council’s decision is a “rational approach ... and promotes its wise use”).

GFF does not assert that reduction of bycatch and waste is not a “legitimate FMP objective.” Nor does it argue that A123, which reduces bycatch at times of low abundance, is not “rationally connected” to the objective of controlling bycatch and reducing waste. This alone satisfies the “fair and equitable” prong of National Standard 4. *See C & W Fish Co. v. Fox*, 931 F.2d 1556, 1563 n.13 (D.C. Cir. 1991) (explaining that bycatch reduction is a “legitimate objective” and upholding bycatch reduction measure as fair and equitable); *Nat’l Coal. for Marine Conserv.*, 231 F. Supp 2d at 131 (upholding measure that “furthers the ‘legitimate FMP objective’ of reducing bycatch”).

Second, nothing about A80’s bycatch limit is unfair or inequitable when considered against other groundfish sectors: A80 will remain the primary source of all halibut bycatch mortality in the BSAI, and its bycatch limits will continue to far exceed those of other sectors. Under A123, A80’s limit of 1,745 mt essentially equals that of all other sectors combined and is more than double the 745 mt bycatch limit for other trawl sectors. *See* 50 C.F.R. § 679.21(b)(1). Even at the lowest levels, which are not in effect and may never be reached, A80’s limit is 39.1% of the allowable bycatch across all sectors; over 150% of the limit for other trawl sectors; and dwarfs the bycatch of other non-trawl sectors, which are not major contributors. Giving A80 half of all allowable bycatch and more than double the other largest sectors is hardly unfair or inequitable to A80.

Third, A80 was not unfairly “singled out.” GFF argues A123 is not fair and equitable because other fishery sectors were not also subjected to the “burdens of abundance-based

management.” ECF 26, p. 21. But agencies do not “have to regulate a particular area all at once.” *Transp. Div. of the Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers v. FRA*, 10 F.4th 869, 875 (D.C. Cir. 2021). Rather, agencies can move forward “pragmatic[ally]” and “‘have great discretion to treat a problem partially’ and ‘regulate in a piecemeal fashion.’” *Id.* (quoting *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409–10 (D.C. Cir. 2013) (cleaned up)). An agency is “entitled to the highest deference in deciding priorities among issues, including the sequence and grouping in which it tackles them,” *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1039 (D.C. Cir. 1987), and “courts should not strike down a regulation” simply because “it is a first step toward a complete solution,” *Transp. Div.*, 10 F.4th at 875 (quotations omitted).

While GFF complains that A123 does not change the bycatch limits for other sectors too, an agency is not required “to reweave the whole whenever it reweaves a part.” *Assoc. Gas Distribs.*, 824 F.2d at 1039. Setting abundance-based limits is a “complex and challenging” task, NOAA060296, one where the Council spent years seeking a global solution before simplifying the action to focus on the problem’s biggest contributor. Given A80’s overwhelming contribution to halibut bycatch and where that bycatch occurs (in areas with high concentrations of juveniles), the Council’s reasoned decision to focus on A80 — made “after extensive consideration of proposed changes,” analysis of literally dozens of alternatives, and “after considering the issues identified in the problem statement, the amount of halibut bycatch in each fishery sector, input at numerous public meetings, and other proposed actions ... in other fishery sectors” — is rational, fair, and equitable. NOAA035290; NOAA043273. So too is NMFS’s endorsement of this “step-wise

*Groundfish Forum, Inc. v. NMFS*

Case No. 3:23-cv-00283-JMK

14

approach,” as “allow[ing] for a simplified and more efficient approach to adjusting halibut PSC management measures in the BSAI.”<sup>4</sup> NOAA035290. In contrast, GFF’s position that every Council action must either comprehensively address every sector and every part of a complex problem or be considered unfair and inequitable would cripple the Council and hamstring fishery regulation. National Standard 4 requires no such thing.

Fourth, to the extent GFF suggests A123 “allocates” halibut between A80 and the directed fishery — which the Council and NMFS cannot do — A80’s share is beyond fair. As discussed, bycatch mortality in Area 4 has exceeded directed fishery landings for years, threatening the halibut fishery with preemption and driving it to the brink of collapse. Even with A123, a limit of 1,745 mt is almost 60% of all allowable halibut mortality in Area 4 for 2024, while its current 2024 limit of 1,396 mt exceeds the total 2024 fishery limit in Area 4CDE by 151 mt or over 330,000 pounds.<sup>5</sup> Nothing about this is unfair or inequitable to A80.<sup>6</sup> Nor is it unfair and inequitable for A80 to manage its bycatch based on the same

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<sup>4</sup> Consistent with its stepwise approach, the Council has reduced bycatch in other sectors. In narrowing A123, for example, it explained it had already initiated an action addressing the next largest source of bycatch (~20%). NOAA043184. This was adopted as Amendment 122, which reduced Pacific cod trawl bycatch limits by 12.5% in 2024 and 2025, respectively, for a total reduction of 25%. *See* 88 Fed. Reg. 53,704 (Aug. 8, 2023).

<sup>5</sup> *See* 89 Fed. Reg. 19,275, 19,281–82 (Mar. 18, 2024). The 2024 fishery limit in Area 4CDE is 934 mt “net weight,” *id.* at 19,282. This equates to 1,245 mt “round weight,” the unit of A80’s limit. *See* NOAA003872 (0.75 conversion factor from net weight to round weight).

<sup>6</sup> GFF claims NMFS failed to conduct a “required” cost-benefit analysis, ECF 26, p. 21, but the cited provisions are guidelines to promote expeditious NMFS review, not actionable requirements. *See* 50 C.F.R. § 600.305(a)(1)-(3); *Alaska Factory Trawler Assoc.* 831 F.2d at 1464. Regardless, the analysis was conducted and, “after considering the totality of potential impacts, including quantifiable and non-quantifiable economic and non-

*(footnote continued on next page)*

considerations of abundance used to manage the directed halibut fishery. NOAA035309.

*Finally*, A123 does not violate “Required Provision 14,” as GFF suggests. ECF 26, p. 20, 23. That provision requires conservation measures that “reduce the overall harvest in *a* fishery” to allocate “any harvest restrictions” “fairly and equitably among the commercial, recreational, and charter fishing sectors in *the* fishery.” 16 U.S.C. § 1853(a)(14) (emphasis added). Here, A123 does not reduce harvests in the BSAI groundfish fishery, which is the subject of the FMP. NOAA004079 (optimum yield in the BSAI groundfish fishery would be achieved even with zero A80 catch). Further, “recreational” and “charter” sectors do not exist in the groundfish fishery. *See* FMP, p. 110. GFF’s complaint that A123 does not consider these sectors is unfounded.

## **2. A123 promotes conservation**

In addition to being fair and equitable, allocations under National Standard 4 must be “reasonably calculated to promote conservation.” 16 U.S.C. § 1851(a)(1)(4). “This requirement poses only a minimal hurdle,” which A123 clears by any definition. *C & W Fish*, 931 F.2d at 1564 (D.C. Cir. 1991) (explaining measure “will prevent excessive by-catch and, accordingly, is reasonably calculated to promote conservation”).

Applying the statutory definition of “conservation and management,” A123 is “useful in rebuilding, restoring, or maintaining” both the halibut fishery and halibut stock, which are “distinct from and broader than” the coastwide spawning stock biomass.

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economic impacts, the Council and NMFS concluded that Amendment 123’s overall benefits outweigh the negative economic impacts of this action and that Amendment 123 maximizes the net benefits to the Nation.” NOAA035282; *see also* NOAA035299–300.

NOAA035294; 16 U.S.C. § 1802(5), (42). The common-sense approach of reducing waste in times of low abundance also meets the regulatory definition because it is a “more rational approach to managing the halibut resource” and “promotes its wise use.” NOAA035294; 50 C.F.R. § 600.325(c)(3)(ii). And it is consistent with the ordinary meaning of “conservation,” because it “avoid[s] wasteful or destructive use of” halibut. *See* Merriam-Webster, [www.merriam-webster.com/dictionary/conserve](http://www.merriam-webster.com/dictionary/conserve) (last visited May, 29, 2024).

GFF’s repeated references suggesting there is no “conservation benefit” rely on a cramped definition of “conservation” that focuses only on potential changes to coastwide spawning stock biomass and recruitment — one that cannot be squared with either the statutory or regulatory definitions or the ordinary meaning of the term. *Compare supra*, with ECF 26, p. 24 (arguing A123 does not promote conservation “because it has ‘very little impact on Pacific halibut spawning biomass and recruitment’” (quoting NOAA042367)). That participants in the long Council process may have sometimes used “conservation” in this narrower sense does not render NMFS’s application of statutory and regulatory definitions unlawful.

GFF’s focus on the words “could” or “may” to suggest that conservation benefits are only “potential” or “contingent” is also misplaced. First, these statements merely acknowledge the reality that the Council has no direct authority to set halibut harvest limits. Second, the benefits of A123 are both real and “expected.” NOAA035294 (“by definition, lower halibut PSC limits *will result* in lower halibut mortality, which is *expected to* provide benefits to the coastwide halibut stock, the directed halibut fisheries, or both”); *id.* (“NMFS *expects* that much of the biomass conserved by this measure *will accrue* to the directed

commercial halibut fishing limits.”). This conclusion is supported by the administrative record, which describes both the short and long-term benefits of reducing bycatch, not just potential or contingent impacts. *E.g.*, NOAA003881; NOAA004235; NOAA003251–52. Use of conditional words in this context does not render NMFS’s conclusion arbitrary.

## **II. A123 is Consistent with National Standard 9**

GFF asserts A123 violates National Standard 9 because the bycatch limits are “not ‘practicable,’” claiming it will impose massive economic losses and there is nothing more A80 can do to limit its bycatch. ECF 26, p. 27–28. Neither claim is correct.

### **A. The Council and NMFS properly exercised their Congressionally delegated authority to balance competing interests**

A123 reflects a careful balance by the Council among many competing objectives. Over a five-year period, the Council received extensive information from agency experts, stakeholders, and the public about how best to address the complex problems bycatch presents. It carefully analyzed both the tools available to A80 to reduce its bycatch, as well as the economic and social costs and benefits to all affected parties. And, on that basis, the Council made a reasoned determination that A123 reduced bycatch to the extent practicable, as National Standard 9 requires, which NMFS has affirmed. This is exactly how the MSA is supposed to work. *See Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 67 (D.D.C. 2014) (by using the phrase “to the extent practicable,” Congress “delegated ... discretion to weigh the relevant factors”); *Alliance Against IFQS*, 84 F.3d at 350 (“Congress required the Secretary to exercise discretion and judgment in balancing among



the conflicting national standards in section 1851.”).<sup>7</sup>

GFF’s assertion that A123’s limits are not practicable provides no basis to overturn the Council’s careful balance. A80 uniformly achieved the previous limits set by Amendment 111, never once approaching the static 1,745 mt limit, much less being constrained by it. NOAA000322. What is more, A80’s current bycatch levels using its existing fishing practices are already below the limits set by A123 in many years. *E.g.*, NOAA000330–31; Ex. 1, p. 9. Thus, A80 can meet the new limits in many years without doing anything more than it already does today. And, to the extent further reductions are required, the record shows they can be readily achieved.

The EIS extensively discusses both the existing tools available to A80 and those under development (*e.g.*, NOAA004084–89), while also explaining that existing measures to reduce bycatch are not fully implemented. *E.g.*, NOAA003883, 4086, 4087; *see also* NOAA003205–06. It also explains how reducing limits will bring tools into use. “A fleet’s last response to constraining halibut PSC limits is to reduce total groundfish harvest.” NOAA004084. Thus, A80 will “optimize their harvest” in response to lower limits, including by “prioritizing fishing operations to the best target fishery, area, and time to

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<sup>7</sup> Even Justice Kavanaugh, who is a vocal critic of agency deference, would agree it applies here. As he has explained, statutory language requiring a determination as to what is “reasonable,” “serious,” or “major” requires what can only be described as a delegated “policy decision,” which “courts should be leery of second-guessing.” Thus, courts should “still defer in cases involving statutes using broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘*practicable*,’” allowing agencies to “choose among reasonable options allowed by the text of the statute.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152–54 (2014) (emphasis added).



maximize net revenue, and reducing effort in the target fishery, area, and time that produce less net revenue.” *Id.* This assumption is especially appropriate for A80, where certain species like low-priced yellowfin sole, *see infra* n.8, account for a disproportionate share of the bycatch. NOAA004001–04; NOAA060474.

Similarly, measures like excluders, which NMFS researchers have found to be highly effective (excluding between 83.7% and 93.7% of halibut by weight) but result in marginal cost increases, will become more cost-effective as bycatch limits are reduced and each pound of halibut bycatch becomes more valuable. NOAA004087–89; NOAA059664–66, 59737–41, 59976–60021. As a prominent natural resources economist explained:

The regulatory environment in which the fleet operates determines their willingness to innovate to reduce bycatch, and there exist ongoing margins for cost effective adjustment. Continued bycatch reductions require stricter regulation. Past reductions in bycatch and the adoption of proven by catch avoidance technologies have only occurred after bycatch limits were lowered. NOAA053012 (3:52:10 to 3:52:32); *see also* NOAA003425–26.

Advancement of these devices will only increase as they become more necessary and widely adopted; in fact, studies by “A80 fishermen of halibut excluders in the Bering Sea flatfish trawl fishery and to conduct field testing to explore improved designs” are occurring today. NOAA004087–88. *See also, e.g.*, NOAA059400–06; NOAA059407–13.

GFF’s contrary claims are unavailing. Its assertion that A80 “‘has *already* reduced halibut PSC usage to the maximum extent practicable using all available tools,” and its threat that “member companies ‘may not survive under substantially lower PSC limits,” are identical to the claims GFF made about Amendment 111, which history has proven untrue. *Compare* ECF 26, p. 27, with NOAA000325–26. Similarly, statements made in

2016 regarding the practicability of further reductions were based on information available then; they say nothing about the purported impracticability of A123, given lessons learned over the past eight years. Finally, GFF’s citations to statements from a *draft* EIS, ECF 26, p. 27–28, fail to account for information developed in response to the draft, which shows the needed reductions are readily achievable. *E.g.*, NOAA003205–06, 3264–75, 3293–94.

**B. GFF’s assertions regarding economic losses lack merit**

GFF suggests A123 is impracticable and arbitrary because it will inflict “enormous costs” and “staggering economic losses,” repeatedly asserting it will cost the fleet “\$100 million per year.” *E.g.*, ECF 26, p. 7, 17, 23. These claims also lack merit.<sup>8</sup>

On the law, management measures are not impracticable because they are expensive. To the contrary, courts have approved management measures even when they “will undoubtedly have an adverse impact” on interested groups, *Alliance Against IFQS*, 84 F.3d at 350, or “some interest groups might be harmed,” *Alaska Factory Trawler Assoc. v. Baldrige*, 831 F.2d 1456, 1460 (9th Cir. 1987). *See also* NOAA004235. And “courts have consistently rejected challenges” under the National Standards when NMFS was

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<sup>8</sup> GFF claims members “have been forced to tie up fishing vessels for the 2024 season as a result of A123.” ECF 26-2, p. 7. Based on media reports, however, these decisions appear to be driven by market conditions and the low value of their target species. *See* Undercurrent News, *American Seafoods latest to tie up yellowfin sole vessel as industry seeks to counteract low prices with marketing* (May 28, 2024), <https://bit.ly/UCN-YFS> (reporting that “multiple US vessels elect not to operate in the Alaskan yellowfin sole fishery due to low prices,” including non-A80 companies that are unaffected by A123, for which the decision is “100% market driven” and due to the sector being “too reliant on sending ... yellowfin sole to China for processing”). Notably, members of A80 not over-invested in low-value yellowfin sole appear to be fully operating. *See id.*

“aware of potentially devastating economic consequences,” but “ultimately concluded that the benefits of the challenged regulation outweighed the identified harms.” *N.C. Fisheries Ass’n*, 518 F. Supp. 2d at 92. Where, as here, the “Council considered the potential negative economic and social impacts to the Amendment 80 sector,” but concluded that A123 strikes the best “balance between potential costs to that sector and conservation of the halibut resource,” NOAA004186, the Court should not substitute its judgment for that of the agency, *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1176 (9th Cir. 2016).

On the facts, GFF’s claim that A123 will impose “staggering economic losses” of “\$100 million” per year is meritless. Both the EIS and NMFS repeatedly state that the values GFF cites, which are based on economic models developed using historical data, “are not stand-alone predictions of future Amendment 80 revenues,” NOAA035301, because they “do not capture behavioral adjustments such as changes in targeting, fishing location, or other halibut avoidance strategies that might have been employed” in past years had the limits been different, NOAA035282. Thus, they are useful only “to inform the reader of the relative difference in direction and magnitude of the alternatives” considered and should not be presented as actual estimates of future A80 revenues. *E.g.*, NOAA035301. In other words, the EIS and NMFS’s decision both emphasize that the economic impact values GFF cites should not be used as GFF uses them here.

More, GFF’s claims rely on selectively chosen and biased model runs that use data from periods when A80’s bycatch limits were significantly higher; its fishing behavior was markedly different; and that do not represent future conditions. As NMFS explained:

After extensive input from the public, the affected industry, and the Council's SSC, NMFS concluded that the 2016 through 2019 dataset is likely the best predictor of potential revenue impacts for the reasons stated in the Analysis. Data from years prior to Amendment 111's implementation (that is, prior to 2016) have higher PSC limits and less PSC avoidance behavior, meaning the 2016 through 2019 period is likely to be more reliable in predicting future results under lower PSC limits and more PSC avoidance behavior.

NOAA035301; NOAA004076–77 (due to “substantial changes in fleet operation,” data from “more recent years are likely to be better representative of future outcomes.”).

This is significant. As the EIS emphasizes, using unrepresentative historical data “has the largest impact” on modeled A80 revenues “of any other variations between the scenarios.” NOAA004075. And when 2016 to 2019 data that reflect A80's current behavior are analyzed, the revenue impacts GFF cites dwindle or disappear entirely — ranging from *literally zero* to at most 2% under the 1,396 mt limit now in effect. NOAA004074. Further, extensive information in the record shows even these modest impacts are overstated, because they fail to account for adaptations that will occur in response to the new limits, and there are multiple rational steps A80 can take to minimize the limits' effects. *See* NOAA000336; NOAA059655–57. Given this, NMFS' determination that “the costs do not exceed what is practicable” is amply supported by the record.

**C. NMFS's practicability determination appropriately considered social and economic costs and benefits**

Finally, GFF is wrong to claim (ECF 26, p. 26–27) that NMFS relied on factors Congress did not intend when it considered increased directed fishing opportunities and important social benefits that limiting bycatch will provide. The statutory term “practicable” intentionally delegates authority to NMFS to use its “expertise and

discretion” to interpret and apply it. *Conserv. L. Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004). And NMFS’s regulations interpreting National Standard 9 specifically direct Councils to consider, among other things, “changes in the economic, social, or cultural value of fishing activities,” “changes in the distribution of benefits and costs,” and “social effects.” 50 C.F.R. § 600.350(d)(3)(i)(H)–(J). Considering the benefits of A123 to the halibut fishery and the communities that depend on it was not improper.

GFF’s claim (ECF 26, p. 20–21) that A123 improperly uses bycatch limits to effect an allocation is equally flawed. A80’s bycatch was substantially below the prior limits for years. By definition, those limits did not ensure bycatch is minimized to the extent practicable. As the Council and NMFS explained, the “practicability of measures that address bycatch can evolve over time, and the Council and NMFS are required to revisit them” when available information shows existing measures do not satisfy National Standard 9’s requirements. NOAA004162. In that context, it is both necessary and appropriate to consider the imbalance between A80’s bycatch and other fisheries, and A80’s disproportionate impacts in setting new limits. *See* 50 C.F.R. § 600.350(d)(3).

### **III. NMFS Satisfied its NEPA Obligations**

GFF asserts the EIS violated NEPA requirements by failing to consider alternatives imposing limits on other sectors, and by relying on an “unreasonably narrow” purpose and need statement. ECF 26, p. 29–31. GFF’s arguments fail.<sup>9</sup>

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<sup>9</sup> It is far from clear under Ninth Circuit precedent that NEPA applies to an action reducing harmful bycatch, which conserves the environment. *See Douglas Cty. v. Babbitt*, 48 F.3d (footnote continued on next page)

Here, the purpose and need statement and the range of alternatives analyzed were reasonable. As GFF acknowledges (ECF 26, p. 21), the Council considered a wide range of alternatives, including adopting abundance-based limits for other groundfish sectors, but eliminated those alternatives from consideration and articulated a rational reason for doing so. *E.g.*, NOAA043184. Councils “are the primary bodies charged with developing FMPs in the first instance, a process that generally involves years of research and the weighing of various alternatives,” while NMFS’s “options are limited” to approval or disapproval. *Conserv. L. Found.*, 374 F. Supp. 3d at 117 (cleaned up). “Nothing requires the Agency to duplicate or supplement the Council’s work,” and NMFS “need not reanalyze alternatives previously rejected” by the Council. *Id.* (quotations omitted). GFF offers no reason why the purpose and need statement and alternatives analysis are inadequate given the Council’s extensive work to develop alternatives and NMFS’s limited statutory role.

### CONCLUSION

For these reasons, GFF’s motion should be denied and the Council’s careful balance adopted in A123 should be upheld.

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1495, 1505 (9th Cir. 1995) (“[A]n EA or an EIS is not necessary for federal actions that conserve the environment.”); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090 (9th Cir. 2014) (“The Secretary’s decision [to limit commercial oyster harvesting] is essentially an environmental conservation effort, which has not triggered NEPA in the past.”). *But see San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646, 653 (9th Cir. 2014). Courts “have applied this rule to reject NEPA challenges where challenged actions maintained the status quo or had only beneficial environmental impacts,” including approval of FMP amendments that “set[] catch levels equal or less than the levels permitted under [the prior FMP].” *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1057, 1060 (N.D. Cal. 2013) (collecting cases and holding FMP changes that “will have only a neutral or beneficial effect on the environment” do not trigger NEPA obligations).

Respectfully submitted this 27th day of June, 2024.

/s/ John L. Fortuna

John L. Fortuna, *Pro Hac Vice*

Ari S. Gordin, *Pro Hac Vice*

Attorneys for Intervenor-Defendants

**CERTIFICATE OF COMPLIANCE WITH LENGTH LIMIT  
AND TYPEFACE AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the length limit set by this Court, because the document was prepared using a computer and, excluding the sections identified in L.Civ.R. 7.4(a)(4), is 25 pages.
2. This brief complies with the typeface and type-style requirements of L.Civ.R. 7.5 because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 for Business in 13-point Times New Roman font.

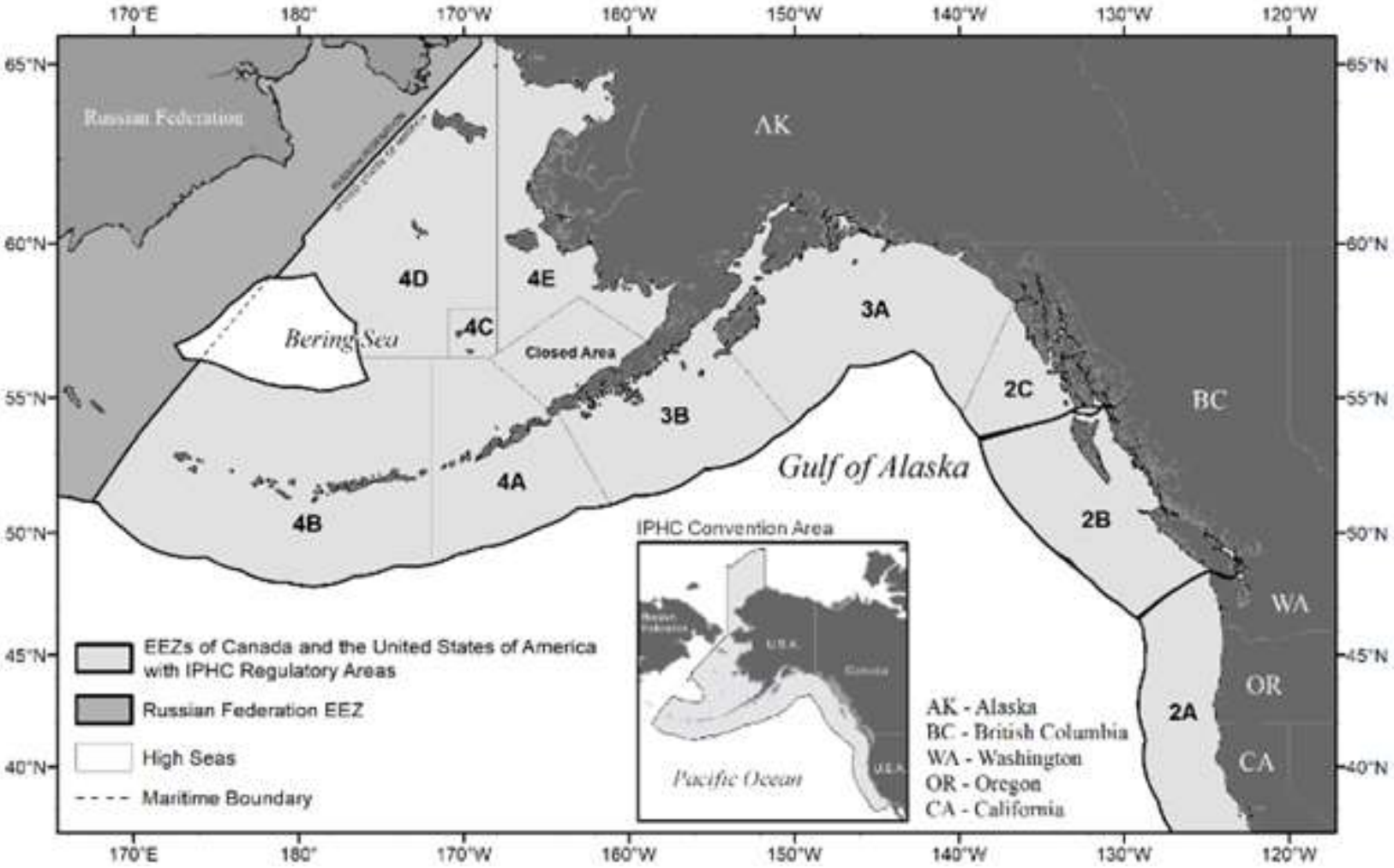
**CERTIFICATE OF SERVICE**

I certify that on this date I filed the foregoing Intervenor-Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment with the Court's CM/ECF System, which will electronically serve the same on all parties.

/s/ John L. Fortuna  
John L. Fortuna, *Pro Hac Vice*

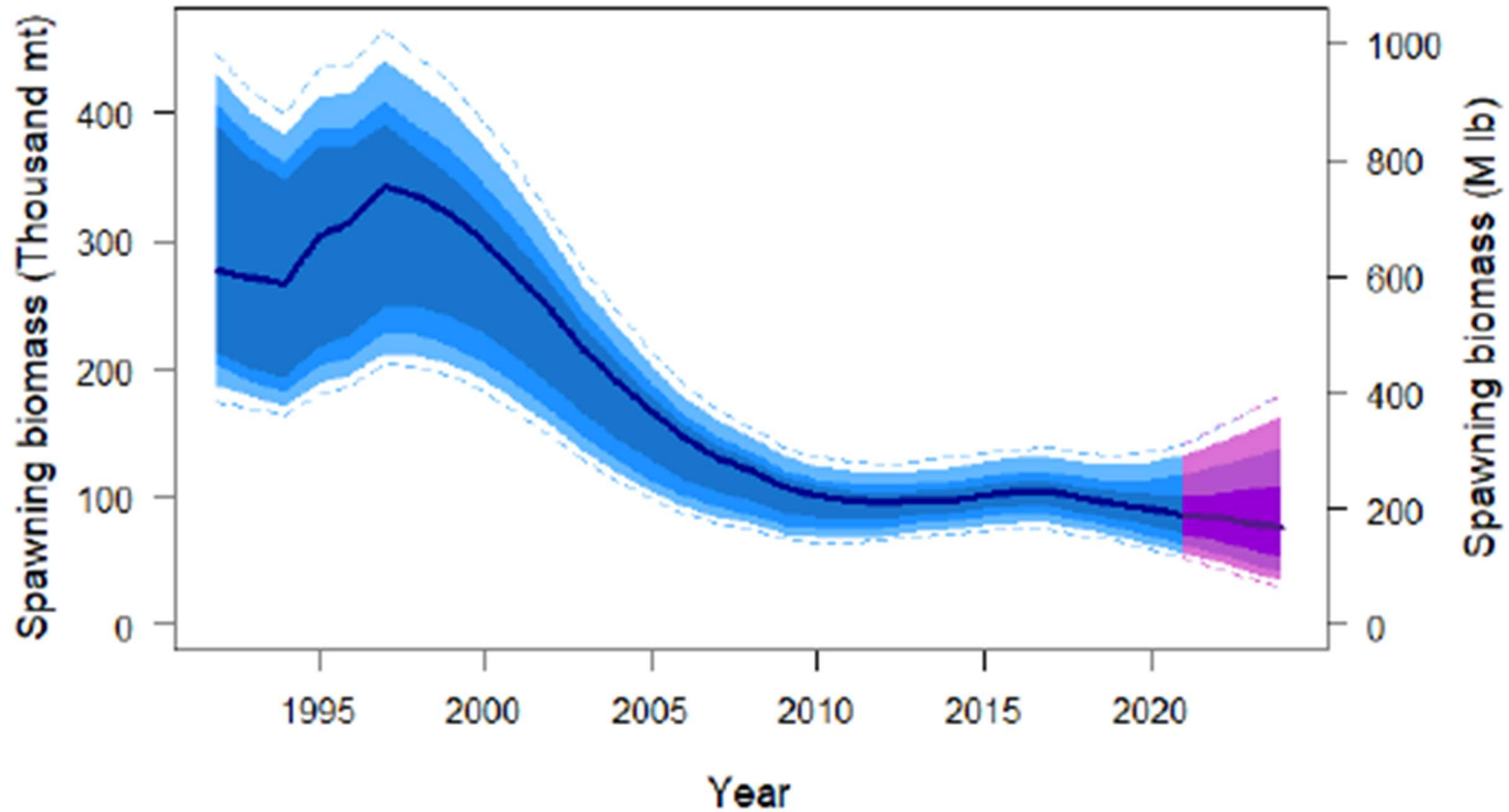


Figure 1. Map of IPHC Regulatory Areas



(Reproduced from NOAA018720)

Figure 2. Projected Halibut Spawning Stock Biomass (IPHC Stock Assessment 2 2 )



(Reproduced from NOAA003886<sup>1</sup>)

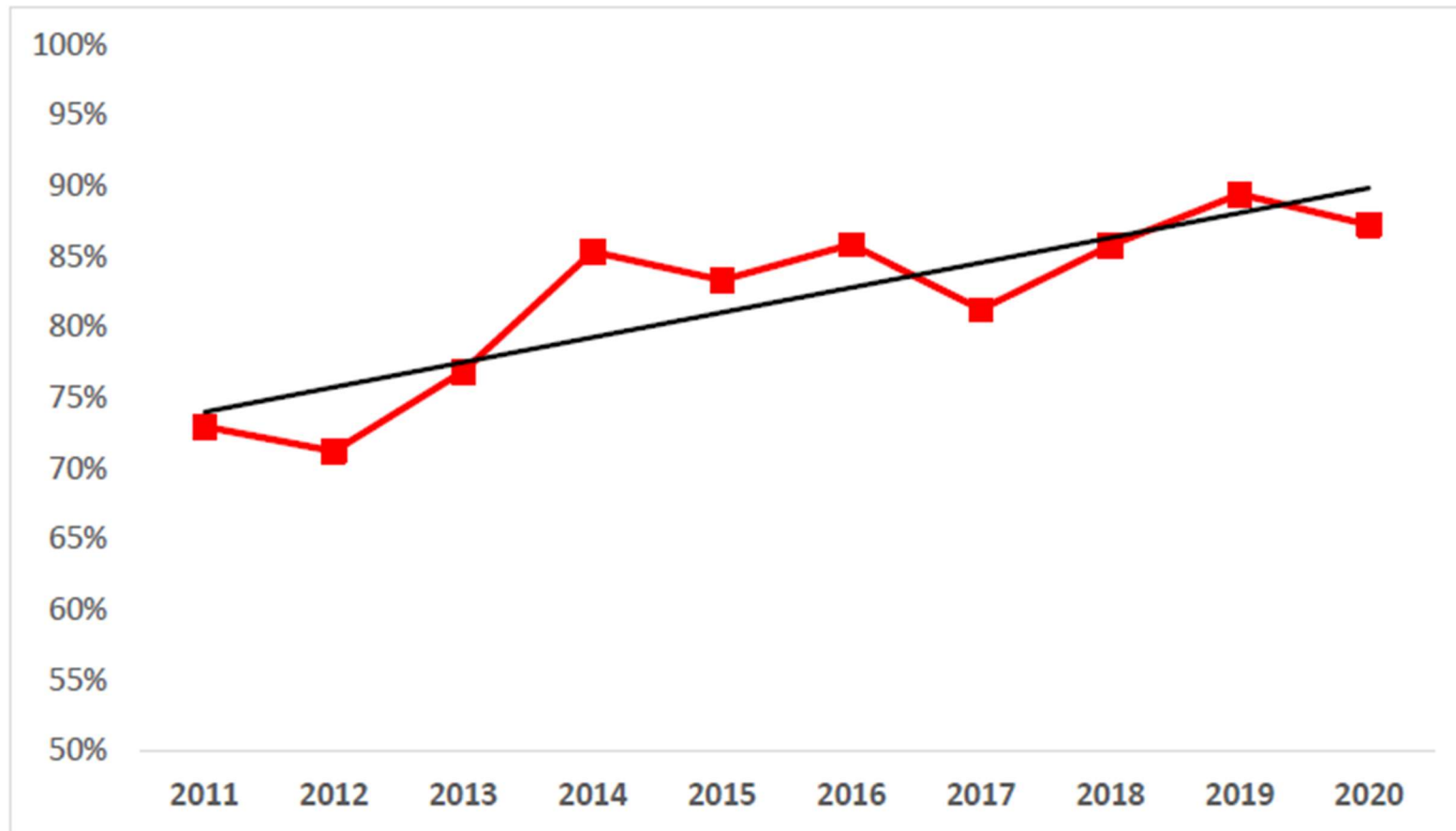
<sup>1</sup> More recent IPHC stock assessments predict halibut populations will remain at low levels at least the next three years. Compare ECF 10-3, p. 10 (Figure 2).

**Figure 3. Halibut Bycatch Mortality in the BSAI by Sector (metric tons)**

<b>BSAI Sector</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
Non-Pelagic Trawl (A80 C/P)	1,638	1,412	1,167	1,343	1,461	1,097	1,044	1,519
Non-Pelagic Trawl (AFA C/P)	71	78	57	105	39	34	38	67
Non-Pelagic Trawl (Catcher Vessels)	310	410	337	309	499	262	155	257
Non-Pelagic Trawl (CDQ)	100	140	129	137	168	90	80	90
Pelagic Trawl (AFA C/P)	74	64	57	32	66	56	78	93
Pelagic Trawl (AFA C/V)	30	19	17	10	16	19	18	17
Pelagic Trawl (CDQ)	8	9	6	7	17	10	13	13
<b>Trawl Total</b>	<b>2,231</b>	<b>2,132</b>	<b>1,770</b>	<b>1,943</b>	<b>2,266</b>	<b>1,568</b>	<b>1,426</b>	<b>2,056</b>
<b>Amendment 80 Share of Halibut PSC Use</b>	<b>73.4%</b>	<b>66.2%</b>	<b>65.9%</b>	<b>69.1%</b>	<b>64.5%</b>	<b>70.0%</b>	<b>73.2%</b>	<b>73.9%</b>

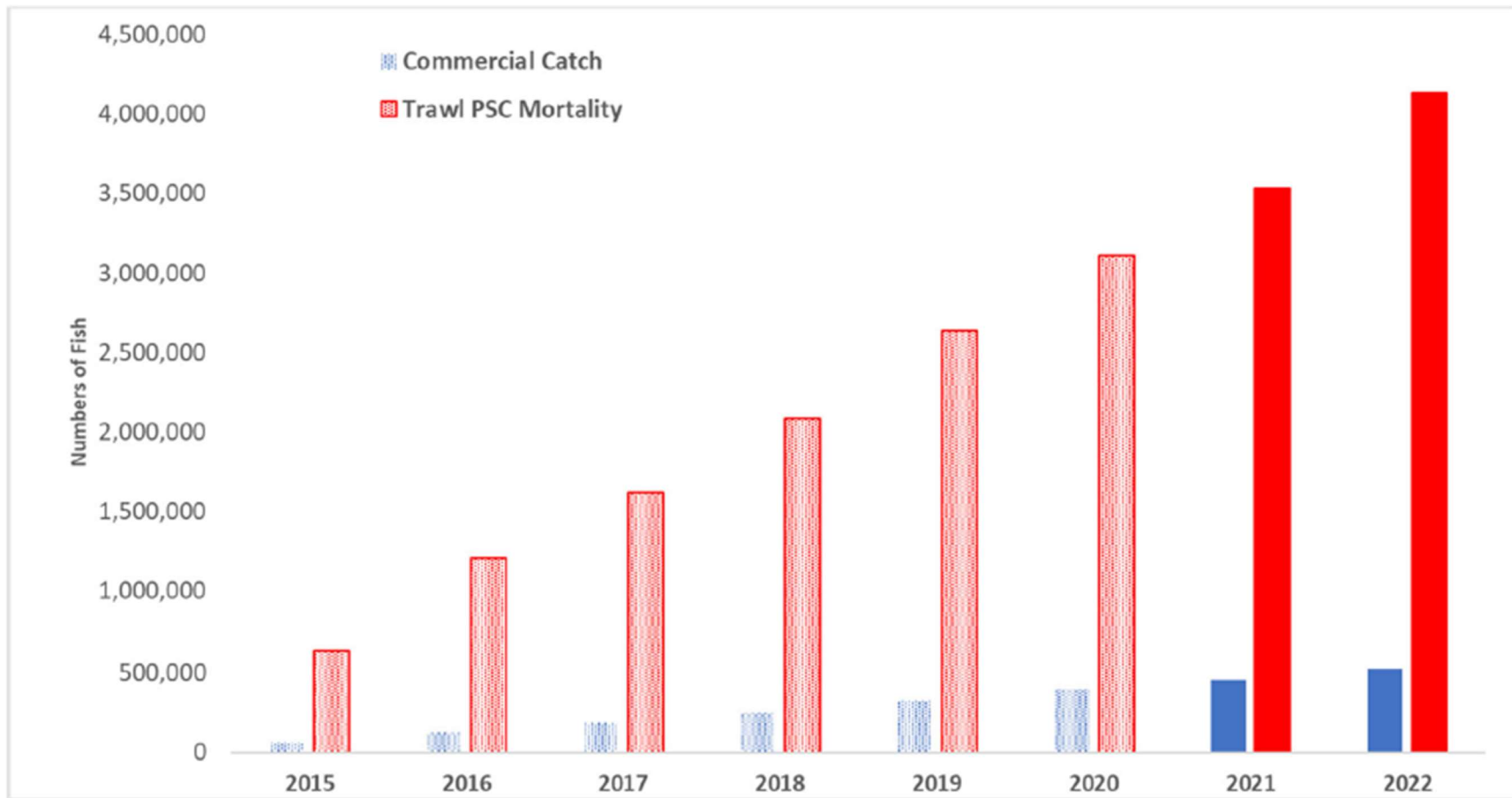
(Reproduced from NOAA000321)

**Figure 4. Trend in A Bycatch Mortality in Area 4CDE as Proportion of BSAI**



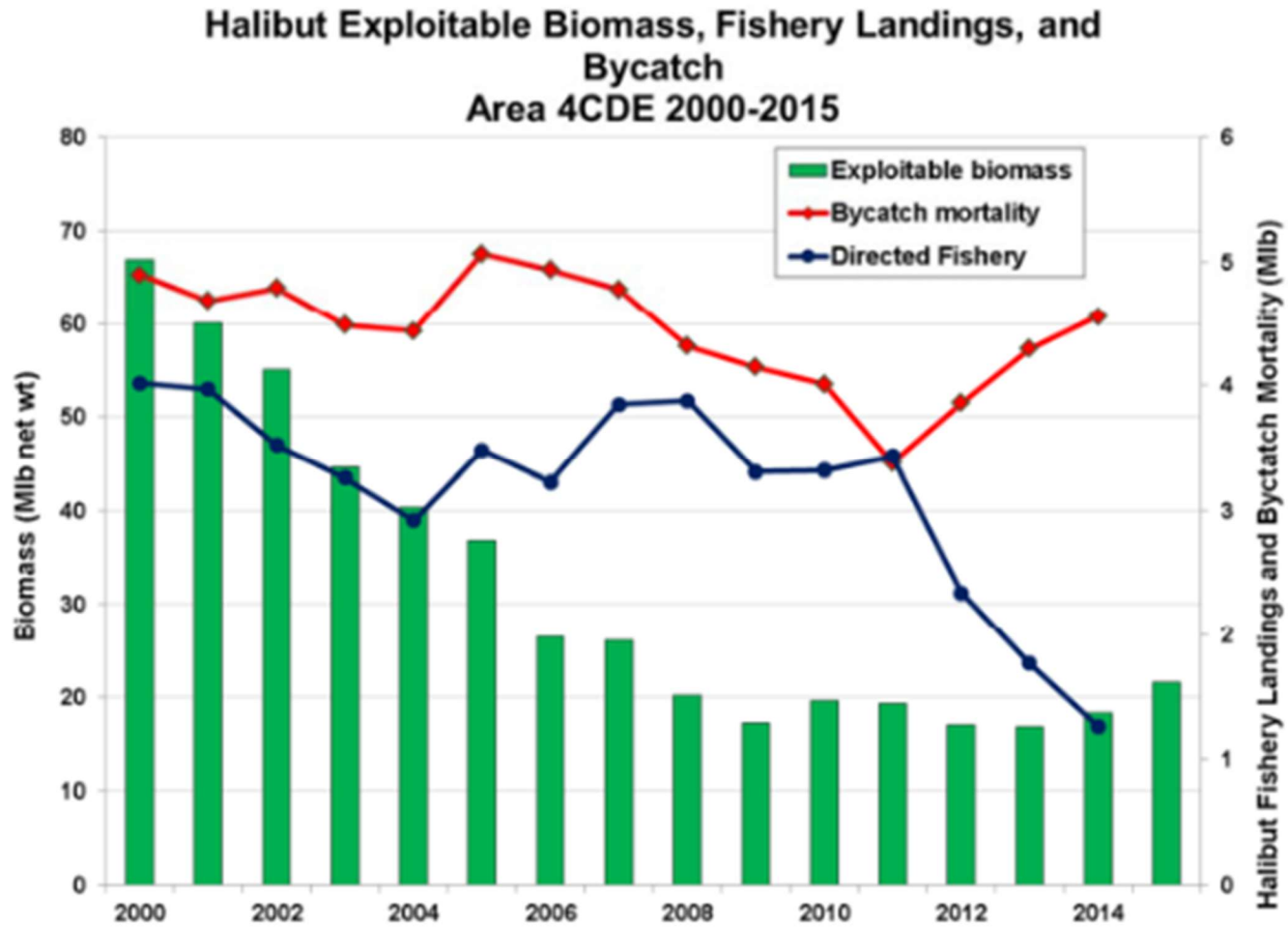
(Reproduced From NOAA000319)

**Figure . Cumulative Number of Halibut Removed in Area 4CDE Bycatch vs. Directed Fishery**



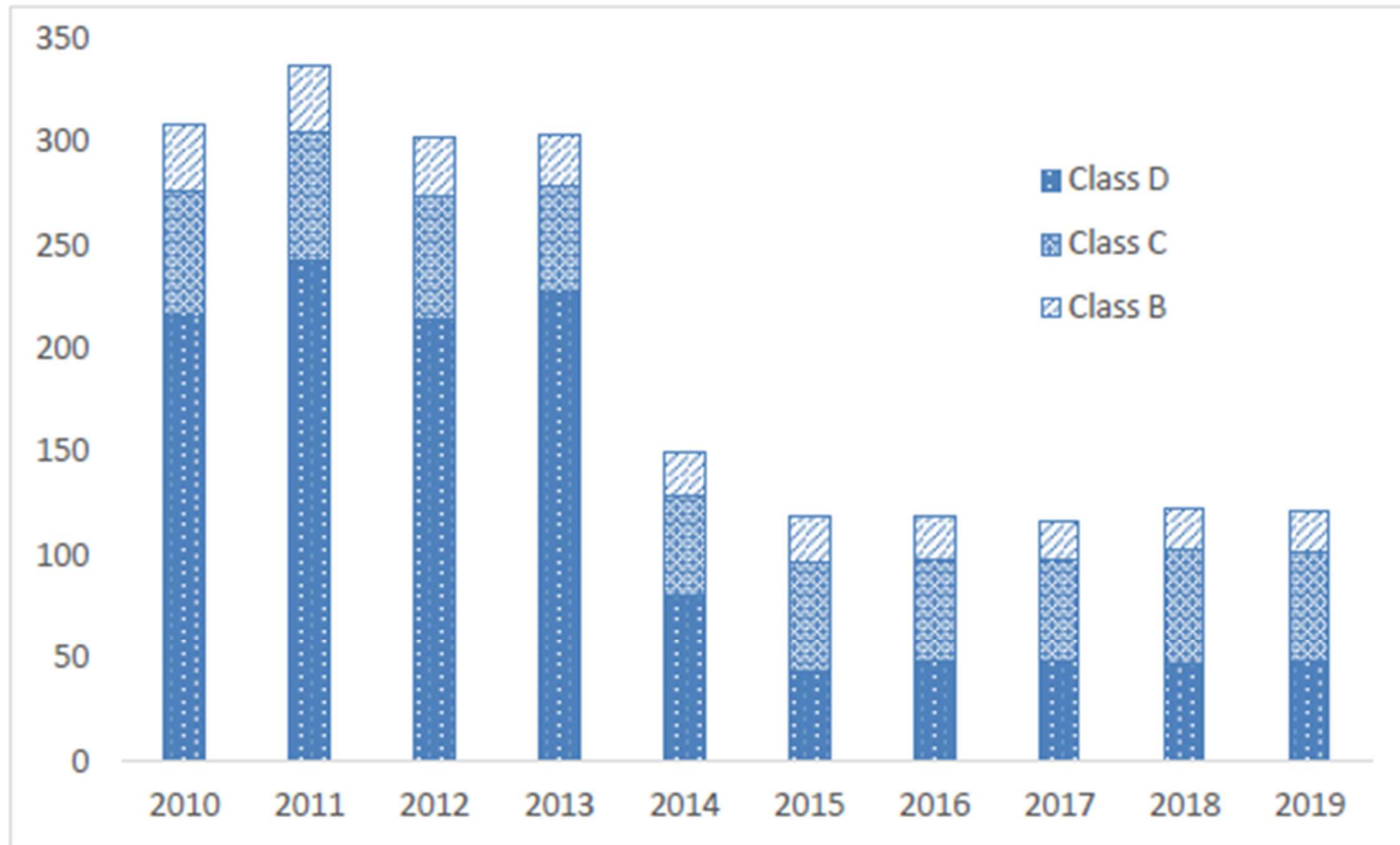
(Reproduced from NOAA000324)

Figure . Halibut Bycatch Mortality vs. Directed Fishery Landings



(Reproduced from NOAA037059)

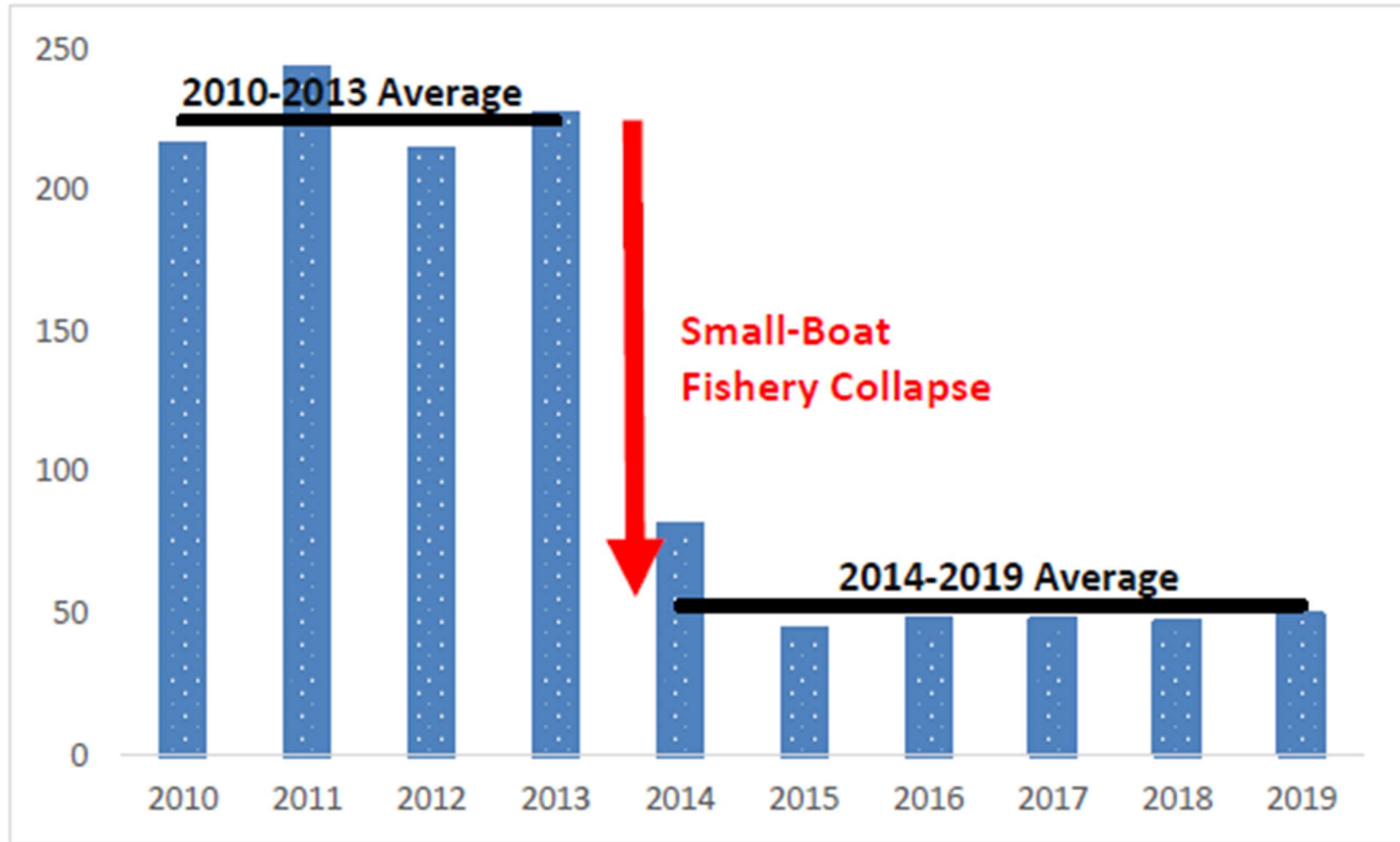
Figure . Number of Vessels in the Area 4 Halibut Fishery by Vessel Class 2 1 -2 19



(Reproduced from NOAA003235)



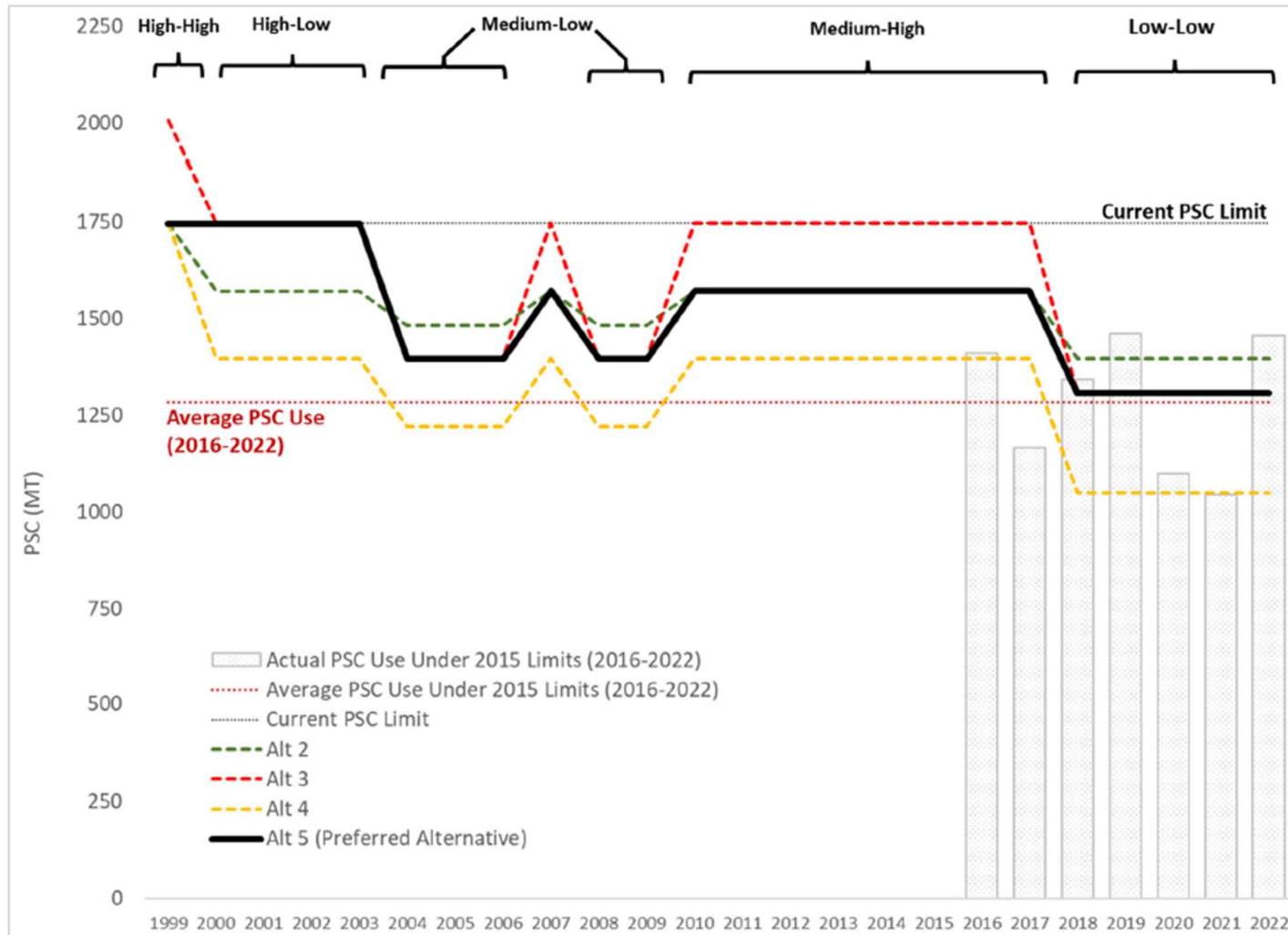
Figure . Collapse of Small-Boat Halibut Fishery in Area 4



(Reproduced from NOAA003236)



**Figure 9. A123 Bycatch Limits vs. Actual A Bycatch**



(Reproduced from NOAA000331)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

GROUND FISH FORUM, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES  
SERVICE; NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION;  
GINA RAIMONDO, in her official capacity  
as the United States Secretary of Commerce;  
and JANET COIT, in her official capacity as  
Assistant Administrator, National Oceanic  
and Atmospheric Administration,

Defendants.

Case No.: 3:23-cv-00283-SLG

**PLAINTIFF'S REPLY BRIEF**

(Local Civil Rule 16.3)

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
TABLE OF ABBREVIATIONS .....	iv
I. INTRODUCTION.....	1
II. ARGUMENT .....	3
A.    Amendment 123 Improperly Allocates All Abundance-Based Bycatch Restrictions Only to the Amendment 80 Sector. ....	3
1.    Amendment 123 Is an Allocation.....	3
2.    Amendment 123 Is Not Fair and Equitable.....	6
3.    Amendment 123 Is Not Reasonably Calculated to Promote Conservation.....	10
B.    The Bycatch Reduction Measures Imposed by Amendment 123 Are Impracticable and Improperly Intended to Allocate.....	11
C.    Amendment 123 Violates NEPA. ....	14
III. CONCLUSION .....	20

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>Ariz. Cattle Growers’ Ass’n v. U.S. Fish &amp; Wildlife</i> , 273 F.3d 1229 (9th Cir. 2001) .....	1
<i>City of Los Angeles v. Fed. Aviation Admin.</i> , 63 F.4th 835 (9th Cir. 2023) .....	19
<i>Groundfish Forum v. Ross</i> , 375 F. Supp. 3d 72 (D.D.C. 2019) .....	7, 9, 11, 14
<i>Guindon v. Pritzker</i> , 240 F. Supp. 3d 181 (D.D.C. 2017) .....	6
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	1, 8, 9
<i>Nat’l Parks &amp; Conservation Ass’n v. Bureau of Land Mgmt.</i> , 606 F.3d 1058 (9th Cir. 2010) .....	20
<i>Organized Vill. of Kake v. U.S. Dep’t of Agric.</i> , 795 F.3d 956 (9th Cir. 2015) .....	5, 13
<i>Sustainable Fisheries Coal. v. Raimondo</i> , 589 F. Supp. 3d 162 (D. Mass. 2022) .....	11
<i>Westlands Water Dist. v. U.S. Dep’t of Interior</i> , 376 F.3d 853 (9th Cir. 2004) .....	20
<i>Yakutat, Inc., Inc. v. Gutierrez</i> , 407 F.3d 1054 (9th Cir. 2005) .....	6
<b>Statutes</b>	
16 U.S.C. § 1802(2) .....	4
16 U.S.C. § 1802(16) .....	3
16 U.S.C. § 1851(a)(4) .....	9
16 U.S.C. § 1852(a)(1)(G) .....	17

## TABLE OF AUTHORITIES

	<b>Page</b>
16 U.S.C. § 1852(b)(1)(A).....	17
16 U.S.C. § 1853(a)(14) .....	6
<b>Regulations</b>	
50 C.F.R. § 600.325(c) .....	7
50 C.F.R. § 600.325(c)(2).....	7, 8
50 C.F.R. § 600.325(c)(3).....	10
50 C.F.R. § 600.325(c)(3)(i)(B) .....	7, 9
50 C.F.R. § 600.325(c)(3)(ii).....	10
50 C.F.R. § 679.2.....	4
50 C.F.R. § 679.21(a)(2)(ii).....	2
50 C.F.R. § 679.21(b)(1)(i)(C) .....	3
50 C.F.R. § 679.26.....	2
50 C.F.R. § 679.91.....	3
50 C.F.R. § 679.91(d).....	3
50 C.F.R. § 679.91(d)(1) .....	3
50 C.F.R. § 679.91(h)(3)(iv) .....	4
<b>Other Authorities</b>	
142 Cong. Rec., H11437 (1996).....	11
<i>Privilege, Black’s Law Dictionary</i> (12th ed. 2024).....	4

**Table of Abbreviations**

<b>ABM</b>	Abundance-Based Management
<b>ABM Workgroup</b>	North Pacific Fishery Management Council's Abundance-Based Management Workgroup
<b>APA</b>	Administrative Procedure Act
<b>BSAI</b>	Bering Sea and Aleutian Islands Management Area
<b>CDQ</b>	Community Development Quota
<b>Council</b>	North Pacific Fishery Management Council
<b>EIS</b>	Environmental Impact Statement
<b>FMP</b>	Fishery Management Plan
<b>Groundfish FMP</b>	Fishery Management Plan for Groundfish in the Bering Sea and Aleutian Islands Management Area
<b>IPHC</b>	International Pacific Halibut Commission
<b>MSA</b>	Magnuson-Stevens Fishery Conservation and Management Act
<b>NEPA</b>	National Environmental Policy Act
<b>NMFS</b>	National Marine Fisheries Service
<b>PSC</b>	Prohibited Species Catch
<b>SSC</b>	Scientific and Statistical Committee

## I. INTRODUCTION

The common theme uniting the briefs of Federal Defendants (“NMFS”) and Intervenor (collectively, “Defendants”) is their reliance on *post-hoc* revisionist history. However, “courts may not accept . . . counsel’s *post hoc* rationalizations for agency action.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The “focal point for judicial review is the administrative record” and the “court may not substitute reasons for agency action that are not in the record.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quotation marks and citation omitted). Defendants’ *post-hoc* arguments cannot stand.

But before addressing Defendants’ legal arguments, Plaintiff pauses to address some of the anti-trawl rhetoric and half-truths that litter Defendants’ briefs. Although most are extraneous to the legal issues, a few of those comments merit a brief response.

*First*, Defendants and *amici* tout the public process leading to Amendment 123. *See, e.g.*, Dkt. 41-1 (“NMFS Br.”) at 28.<sup>1</sup> But as detailed *infra* at pages 15-20, the record shows a decided lack of transparency. The State of Alaska representative on the Council developed the decision to single out the Amendment 80 fleet behind closed doors and presented it for a Council vote “without notice” to the public—despite recognizing that “it just doesn’t seem like the right thing to do.” NOAA035110.

*Second*, Defendants repeatedly accuse the Amendment 80 sector of “wasting” halibut. *See, e.g.*, NMFS Br. at 9; Dkt. 39 (“Intv. Br.”) at 1. The Amendment 80 sector

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<sup>1</sup> Original page numbers, rather than blue docket page numbers, are used in this brief.

lawfully operates in the regulatory context *that NMFS created*. Although the fleet has dramatically reduced halibut mortality over almost two decades, Amendment 80 vessels cannot fish for target species without catching some halibut. Dkt. 26 (“Plaintiff Br.”) at 6-7; NOAA003873. They cannot sell or even donate those incidentally caught fish because NMFS mandates they be thrown back. 50 C.F.R. §§ 679.21(a)(2)(ii), 679.26. Any “waste” is therefore NMFS’s own doing.

*Third*, NMFS claims that “[a]lthough trawl fishing is highly effective, it is less capable of distinguishing between target and non-target species than other forms of fishing (e.g., hook and line).” NMFS Br. at 8. That is false. In 2021, trawl fisheries off Alaska had a 2% bycatch rate whereas hook-and-line fisheries had a 17% bycatch rate and groundfish pot fisheries had a 3% bycatch rate. *See* NOAA059421.

*Fourth*, Intervenors suggest that the “halibut stock declined by as much as 70% during the period from 1992 to 2010” as a result of bycatch. Intv. Br. at 5. However, “[t]he spawning stock biomass of Pacific halibut in the 1990’s was the highest seen in many decades” and declines from that “unusually high” level are “largely a result of decreasing size-at-age, as well as somewhat weaker recruitment strengths than those observed during the 1980s.” NOAA004594; NOAA006858; NOAA006948. The stock has been stable from 2011 through 2023. NOAA000495; NOAA053020-21.

*Fifth*, contrary to Intervenors’ insinuations, the directed halibut fleet (not the Amendment 80 sector) is by far the “largest component of mortality” of halibut. NOAA018716-17. In 2021, directed halibut fishing was responsible for 65% of all halibut mortality whereas *all* bycatch (not just the Amendment 80 sector) was responsible



for 10%. NOAA059424. The directed halibut fleet also has the “largest effect on spawning biomass” (NOAA018716), which is due to the fact that the directed halibut fleet kills almost exclusively sexually mature females—as much as 92% in Area 4CDE alone. NOAA018717; NOAA018944; NOAA006947-48.

Finger pointing aside, NMFS has violated the MSA and NEPA in approving Amendment 123. NMFS’s unlawful decisions must be vacated.

## II. ARGUMENT

### A. Amendment 123 Improperly Allocates All Abundance-Based Bycatch Restrictions Only to the Amendment 80 Sector.

#### 1. Amendment 123 Is an Allocation.

NMFS wrongly argues that National Standard 4 is irrelevant because PSC limits are not “fishing privileges” and therefore not “allocations.” NMFS Br. at 13. NMFS’s EIS states that “halibut PSC” limits *are* “fishing privileges.” NOAA004140. And NMFS’s new regulations set the “Amendment 80 Program annual harvester *privileges*,” 50 C.F.R. § 679.91 (emphasis added), and those *privileges* include the “amount” of “Allocations of halibut PSC” to the Amendment 80 sector, *id.* § 679.91(d)(1). *See id.* § 679.21(b)(1)(i)(C) (“[f]or Amendment 80 cooperatives and the Amendment 80 limited access fishery, BSAI halibut PSC limits will be allocated according to the procedures and formulas in § 679.91(d)”). Amendment 123 is an allocation of fishing privileges.

NMFS blows past its regulations and EIS, arguing that “by definition” a PSC limit is not a “fishing privilege.” NMFS Br. at 13. By *what* definition? The MSA defines “fishing” as “the catching, taking, or harvesting of fish” and “any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.” 16

U.S.C. § 1802(16). Bycatch is a form of fishing. “Bycatch” refers to “fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes ... regulatory discards.” *Id.* § 1802(2). The MSA does not define “privilege,” but the word commonly means: “A special legal right, exemption, or immunity granted to a person or class of persons; .... A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.” *Privilege, Black’s Law Dictionary* (12th ed. 2024).

Halibut PSC plainly is a “fishing privilege”—just as any other harvesting quota or limit. *See* 50 C.F.R. §§ 679.2 (defining “cooperative quota (CQ)” for the Amendment 80 program to include “the annual halibut ... PSC”), 679.91(h)(3)(vi) (“Is this CQ an exclusive catch and use privilege? Yes ...”). The grant of a PSC limit makes the catching of halibut lawful, thus immunizing the Amendment 80 sector to liability. NOAA035282. If the halibut PSC limit is reached in a given year, then all fishing must cease. Thus, NMFS’s “fishing privilege” argument is dead in the water, and the analysis can end there.

NMFS tries to shore up its lead argument with the red herring that “halibut [*directed fishing*] allocations are not governed by the MSA” and are thus irrelevant. NMFS Br. at 14. This just avoids Plaintiff’s primary argument that the modification of halibut PSC limits *itself* is an “allocation”—as it was in Amendment 111—regardless of impacts to directed halibut fisheries. Plaintiff Br. at 12-14. As NMFS explained in the Amendment 111 rulemaking: “Because halibut PSC limit reductions could potentially constrain harvest of groundfish [total allowable catches], the proposed action would be an allocation of fishing privileges and must be consistent with National Standard 4.”

NOAA036973-74. In fact, Amendment 123 started from the position that the new abundance-based program would retain Amendment 111’s “status quo allocations” of PSC among the groundfish sectors.<sup>2</sup> NOAA0039133; NOAA040145 (assuming “that the allocation of the PSC limit between groundfish trawl sectors would remain the same”); NOAA0042161 (preliminary draft EIS describing how PSC “would be allocated” to sectors to maintain status quo). But the decision to single out the Amendment 80 sector for PSC limit reductions substantially changed those “status quo allocations.”

Besides, even Intervenor disagree with NMFS’s red herring argument, as they admit that halibut bycatch mortality is directly ““taken off the top”” of the harvest levels set for the directed halibut fishery by the IPHC (Dkt. 10 at 10-11) and, thus, they assert, “PSC limits established for Amendment 80 are a de facto allocation of the halibut resource” (NOAA059670). And while NMFS wants to dismiss the allocative impacts as merely incidental or indirect, the “Purpose and Need” includes providing “additional opportunities for the directed halibut fishery,” NOAA003907, and “the *direct* effect of reduced PSC limits is increased catch limits for directed halibut fishing,” NOAA042367 (emphasis added). In short, whether it is an allocation of PSC among groundfish sectors or an allocation to the directed halibut fishery, “in the end, . . . ABM is really another allocative decision.” NOAA0035138 (Council member Baker); NOAA035106 (ABM is

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<sup>2</sup> NMFS’s only response to the obvious about-face from Amendment 111 to Amendment 123 on whether assignment of halibut PSC is an “allocation” is that NMFS “has not implemented a policy change.” NMFS Br. at 14. This is legally insufficient. *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (when reversing a policy, an agency must display ““awareness that it is changing position””).

“ultimately an allocation issue”); NOAA035101 (“ABM is primarily an allocative action”); NOAA004140 (Amendment 123 “allocate[s] fishing privileges”).

Finally, NMFS tries to evade Required Provision 14 by arguing it applies only to “rebuilding plans for overfished stocks and similar measures.” NMFS Br. at 15. But that provision also applies to “conservation and management measures which reduce the overall harvest in a fishery.” 16 U.S.C. § 1853(a)(14). The Ninth Circuit determined that Required Provision 14 applies to bycatch measures that reduce harvest. *Yakutat, Inc., Inc. v. Gutierrez*, 407 F.3d 1054, 1059 (9th Cir. 2005). And NMFS itself determined that because reduced halibut PSC limits operate as a hard cap, the Amendment 80 sector could experience losses *from reduced harvest* of more than \$100 million annually. *See* NOAA053057-60; NOAA003892 (Table ES-1-8).<sup>3</sup>

In sum, NMFS’s failure to treat Amendment 123 as an allocation, and its complete and unexplained reversal from Amendment 111, is arbitrary, capricious, and contrary to law. This fundamental error infected the entire decision and alone is grounds for vacatur.

## **2. Amendment 123 Is Not Fair and Equitable.**

NMFS argues that, even if Amendment 123 is an allocation, it is “inherently fair and equitable.” NMFS Br. at 16. NMFS’s *post-hoc* arguments for why Amendment 123

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<sup>3</sup> NMFS also contends that Required Provision 14 is merely procedural, citing *Guindon v. Pritzker*, 240 F. Supp. 3d 181, 200 (D.D.C. 2017). NMFS Br. at 15. But *Guindon* appears to presume it is procedural, and that presumption is wrong. Required Provision 14 imposes a substantive obligation to “allocate . . . harvest restrictions . . . fairly and equitably.” 16 U.S.C. § 1853(a)(14). Even so, NMFS procedurally conducted no assessment of relative benefits and burdens of its allocation among groundfish sectors. *See* Plaintiff Br. at 14-16.

satisfies National Standard 4—despite its assertion that Amendment 123 is “not an allocation” subject to National Standard 4—have no support in law or fact.

NMFS has a “statutory duty to explain” *in the record* “how the amendment comports with National Standard 4.” *Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 91 (D.D.C. 2019). In so doing, NMFS follows its MSA National Standard Guidelines, which explain: “An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, *and* if the measures conform with paragraphs (c)(3)(i) through (c)(3)(iii) of this section.” 50 C.F.R. § 600.325(c) (emphasis added). Specifically, the Guidelines instruct that NMFS “may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups” and this requires “an initial estimate of the relative benefits and hardships imposed by the allocation.” *Id.* § 600.325(c)(3)(i)(B). NMFS must show its work in reaching those conclusions, including a “discussion” of “[a]llocation schemes considered, but rejected.” *Id.* § 600.325(c)(2).

Plaintiff demonstrated that the record contains none of those required analyses. Plaintiff Br. at 14-16. NMFS has no answer. Nowhere in the record does NMFS explain why the hardship imposed on the Amendment 80 sector is “outweighed” by the benefits to other groundfish sectors or even identify what the benefits are to those other sectors. That alone is fatal under National Standard 4.

With no record, NMFS argues that Amendment 123 is “inherently” fair and equitable because the Amendment 80 sector “is responsible for the majority of the PSC mortality.” NMFS Br. at 20. But this does not explain why it is fair and equitable to

single out one sector to the exclusion of all other sectors. Those other sectors have substantial halibut PSC allocation percentages that are not constrained in times of low abundance. NOAA035288. NMFS’s Assistant Regional Administrator for Sustainable Fisheries raised this very question, but it goes unanswered in the record:

First, as I noted on the purpose and need statement issues, I am concerned that we are narrowing the scope of this action, so that we are focusing our abundance based response only on one sector. Although that sector may be responsible for approximately 60% of the total bycatch mortality, that leaves the other 40% that aren’t being held to the same standard and that would not flex or change with abundance. I do think it will be appropriate for this Council when this issue comes back to reexamine whether or not our purpose and need statement is still appropriate and the potential equities that creates between the various sectors.

NOAA0053003 at 3:46:30. NMFS’s failure to address the issue is particularly arbitrary given that Amendment 111 equitably reduced PSC levels across all four groundfish sectors. NOAA036973-74. By failing to consider the fairness of proportionately changing the halibut PSC allocations, NMFS “entirely failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43.<sup>4</sup>

NMFS and Intervenors both contend that singling out the Amendment 80 sector was fair because NMFS could address the other sectors later, in separate decisions. But if NMFS wants to pick winners and losers by allocating PSC limits, it can only impose a

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<sup>4</sup> NMFS also argues that the allocation between the Amendment 80 sector and *the directed halibut fishery* (an allocation which it denies occurred) is fair and equitable. *See, e.g.*, NMFS Br. at 19-21. NMFS provides no record citations for those claims, much less an analysis performed under 50 C.F.R. § 600.325(c)(2). Besides, the EIS concluded that this action results in a net *negative* economic benefit to the nation. NOAA004078.

“hardship on one group” (here, the Amendment 80 sector) “if it is outweighed by the total benefits received by another group.” 50 C.F.R. § 600.325(c)(3)(i)(B). NMFS cannot punt its obligation to comply with the statutory mandate that every allocative action “*shall be* [] fair and equitable” by saying that it may (or may not) take some future action that may (or may not) make its present action more (or less) equitable. 16 U.S.C. § 1851(a)(4) (emphasis added).<sup>5</sup>

NMFS tries to fill the National Standard 4 gap by cobbling together an argument based on the National Standard 1, 8, and 9 analyses in the record. *See* NMFS Br. at 16-19. But the D.C. district court rejected nearly identical arguments, explaining that the court is “limited to the rationale put forth by” NMFS in the record and ““may not accept ... counsel’s post hoc rationalizations for agency action.”” *Groundfish Forum*, 375 F. Supp. 3d at 91 (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50). In so doing, the court rejected NMFS’s “argument that the socio-economic benefits identified for purposes of National Standard 8 are a sufficient substitute for the Service’s obligation to provide a rational explanation of how [the amendment] is consistent with the requirements of National Standard 4.” *Id.* at 92. NMFS made the same error here.

Finally, it bears emphasis that there is nothing “inherently” fair or equitable about singling out one fishing sector for economically damaging restrictions without rationally explaining the reason for doing so and without even considering the possibility of sharing

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<sup>5</sup> Intervenors detour into non-MSA cases to argue that agencies “do not ‘have to regulate a particular area all at once.’” *Intv. Br.* at 14. The MSA is different because it mandates that all allocations “shall be” fair and equitable. 16 U.S.C. § 1851(a)(4).



the burden of those restrictions across the sectors in the same fishery (as was done in Amendment 111). NMFS's failure to comply with National Standard 4 violates the MSA.

### **3. Amendment 123 Is Not Reasonably Calculated to Promote Conservation.**

NMFS and Intervenor argue that Amendment 123 promotes conservation for the simple reason that it reduces halibut bycatch. They miss the point. The critical inquiry is not whether a particular *regulation* promotes conservation in the abstract, but whether an “allocation scheme” promotes conservation by, for example, “encouraging a rational, more easily managed use of the resource” or “optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product.” 50 C.F.R.

§ 600.325(c)(3)(ii). Again, the record contains no § 600.325(c)(3) analysis or otherwise explains why the *allocation scheme* chosen here—*i.e.*, imposing abundance-based limits on a single sector to the exclusion of other sectors—promotes conservation in either the halibut fishery or the groundfish fishery.

Without record support of its own, NMFS instead accuses Plaintiff of “cherry pick[ing]” the record. NMFS Br. at 23. But the tree is full of cherries. For example, the modeling performed to support Amendment 123 showed that “the implementation of abundance-based management of halibut PSC is an allocation decision rather than a conservation decision.” NOAA041940. The SSC critically reviewed the model and expressly agreed with that conclusion. NOAA042542. NMFS does not dispute these facts, but says they are taken out of context. Here is the context: after the modeling results showed that abundance-based management for all sectors had no conservation



benefit, the Council discarded the model, deleted the discussion from the draft EIS, and inexplicably pivoted to options that singled out the Amendment 80 sector for restrictions. Plaintiff Br. at 2-4. As the EIS itself explains, “[t]here is likely to be little difference among the average future halibut spawning biomass under levels of PSC anticipated across all of the alternatives, including the no action alternative.” NOAA003894; NOAA035138 (Council member Baker stating that directed halibut users “have muddied the water by saying that ABM is necessary for conservation of the halibut resource, which the available information just does not support.”); NOAA035101 (similar).

Thus, the action alternatives merely “reallocate halibut from one user group to another with no real conservation benefit” (NOAA055162), and Amendment 123 violates National Standard 4 for this additional reason. *Groundfish Forum*, 375 F. Supp. 3d at 89 (an “allocation must actually ‘promote’ a conservation purpose”); *Sustainable Fisheries Coal. v. Raimondo*, 589 F. Supp. 3d 162, 172 (D. Mass. 2022) (“potential” and contingent “biological benefits” provide “lackluster support for ... conclusion that the final rule promotes conservation”).

**B. The Bycatch Reduction Measures Imposed by Amendment 123 Are Impracticable and Improperly Intended to Allocate.**

Plaintiff identified two independent ways that Amendment 123 violates National Standard 9 and Required Provision 11. *First*, Plaintiff showed that “Congress [did] not intend” that bycatch reduction measures “will be used to allocate among fishing gear groups,” 142 Cong. Rec., H11437 (1996), and that NMFS therefore violated the MSA because Amendment 123 is intended to, and does, shift allocations from the Amendment

80 sector to the directed halibut fishery at enormous expense to the Amendment 80 fleet. Plaintiff Br. at 20. NMFS concedes this argument in silence.

*Second*, Plaintiff demonstrated that Amendment 123’s reduced PSC limits are not “practicable” because the record shows that the Amendment 80 sector is currently using all available tools to the fullest extent possible and there are no new tools available. *See* Plaintiff Br. at 21-22. NMFS responds with misdirection, pointing to the tools created and fully implemented as a result of *Amendment 111*. NMFS Br. at 24. NMFS says that *Amendment 123* (which imposes PSC limit reductions of up to 35% below Amendment 111) is also “practicable thanks to implementation” of those same tools. *Id.* But the record says the opposite, explaining that the existing measures could *not* practicably achieve those results and estimating annual losses (due to foregone harvest) of more than \$100 million in low-abundance years. NOAA003899.<sup>6</sup> The record also shows that “all PSC reduction tools (e.g. excluders and decksorting) are currently being maximized,” NOAA060247, and that any “substantial reductions” in halibut mortality would have to come from “the development and implementation of new technologies” that presently do not exist. NOAA004176. Unidentified future technologies that do not exist are not “practicable” bycatch measures, and the EIS agrees. NOAA004088 (EIS explaining that future “technologies” are “speculative” and “not practicable”).

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<sup>6</sup> NMFS and Intervenors argue that the \$100 million-plus in losses estimated in the EIS is a “worst case” estimate. NMFS Br. at 19; Intv. Br. at 22-23. But the record shows that this estimate is on the upper bound of expected costs and that while the industry might be able to mitigate the costs, the “extent” of mitigation is “unknown” because “a key unanswered question is how close the A80 sector is to the point of diminishing returns in halibut PSC mitigation.” NOAA004076.

NMFS tries to whitewash its Amendment 111 conclusion that “greater reductions were not practicable” (NOAA000515) as merely a “suggested” finding. NMFS Br. at 24. This was not a *suggestion*. In Amendment 111, the “Council *concluded* that larger reductions are not practicable” and the “rationale the Council and NMFS used for *concluding* that larger reductions in PSC limits are not practicable is described in the preamble to the proposed rule.” NOAA000511 (emphases added). If NMFS wants to reach a different conclusion this time, it must acknowledge that it is changing its position (which it has not done) and provide facts in the record to support that change (which it also has not done). *Organized Vill. of Kake*, 795 F.3d at 968.<sup>7</sup>

Next, NMFS cites NOAA001155 to argue that Amendment 123 is practicable “because the Amendment 80 sector is not fully utilizing existing halibut avoidance tools.” NMFS Br. at 25. But no such determination appears at NOAA001155 (or anywhere in the record). That citation is to a summary of a public comment (by halibut fishermen) disparaging the Amendment 80 sector. NOAA001155. NMFS also references NOAA004613, but that citation also does not support NMFS. There, NMFS says that “[r]eductions in halibut mortality are expected to result from the sector *increasing costs*,

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<sup>7</sup> Intervenors argue that greater reductions must be possible because the Amendment 80 sector currently fishes below its PSC limit. Intv. Br. at 19. This is misleading and not a rationale asserted by the agency. The sector intentionally fishes below its limit (at a significant economic loss) “due to a wide range of operational factors, including the fleet’s desire to avoid a closure or an enforcement action if a PSC limit is reached.” NOAA000449. A mid-season closure would be economically devastating and cause serious market disruptions, so the fleet must operate well below *any* PSC limit to avoid those results. *Cf.* NOAA053003 at 31:00-32:00, 59:00-1:01:00.

*reducing efficiency*, and improving the use of existing tools” (with no discussion or evidence how those improvements would occur). NOAA004613 (emphases added).<sup>8</sup>

Lastly, NMFS says that “Plaintiff does not claim to have lost any actual money due to the Rule, nor does it explain why its members are not fully utilizing the existing tools.” NMFS Br. at 26. The MSA does not require Plaintiff to prove a negative. Rather, NMFS has a “statutory duty to explain”—in the record—“how the amendment comports with” the MSA. *See Groundfish Forum*, 375 F. Supp. 3d at 91. Plaintiff told NMFS, in the administrative record, that its members were fully using all existing tools, there were no new tools available, and some member companies may not survive under the lower PSC limits. NOAA053060. NMFS cites no contrary explanation or evidence in the record. Failure to comply with a statutory duty is not an “idle and useless formality,” as NMFS suggests. NMFS Br. at 26. NMFS failed to comply with National Standard 9.

### **C. Amendment 123 Violates NEPA.**

NMFS claims it limited Amendment 123 to one sector as the “normal result of the scoping process” and “based on meaningful dialogue with members of the public.” NMFS Br. at 27 (quotation marks and citation omitted). NMFS claims it “did not single out the Amendment 80 sector” or “‘retrofit’ the purpose and need statement to match that decision,” but merely dropped the multi-sector alternatives from the EIS because they were “too complex” and in response to “public testimony regarding ways to streamline

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<sup>8</sup> Intervenors claim the “needed reductions are readily achievable,” but support that statement only with gratuitous citations to their own comment letter. Intv. Br. at 21 (citing NOAA003205-06, NOAA3264-75, NOAA3293-94). Additionally, the article referenced in note 8 on the same page does not even involve an Amendment 80 vessel.

and simplify the action.” NMFS Br. at 27-29. This revisionist history is directly contradicted by the administrative record. What actually occurred is summarized below.

In April 2016, the Council “unanimously adopted a purpose and need statement to establish abundance-based halibut PSC limits *for the BSAI groundfish fisheries*” (meaning all of the sectors). NOAA035258 (emphasis added); *see* NOAA038674-708. The Council focused on “potential implications of abundance-based halibut PSC allocations using the proportional allocations to the four sectors defined under Amendment 111 as the basis.” NOAA038894; *see also* NOAA038900-02.

In December 2017, NMFS published its notice of intent to prepare an EIS, which included the purpose and need statement. NOAA035256-59. The notice describes the “proposed action” as establishing abundance-based halibut PSC limits for the “Federal groundfish fisheries prosecuted in the BSAI using trawl and non-trawl (fixed) gear.” NOAA035258. In March 2018, the ABM Workgroup produced a detailed report analyzing various abundance-based “allocations” across all four primary groundfish sectors. NOAA040445-82. In October 2018, the Council reiterated the need to evaluate the effects of the allocations on the four sectors. NOAA040849.

Consistent with that direction, the September 2019 preliminary draft EIS (NOAA041691) analyzed abundance-based bycatch measures on all the “groundfish fisheries.” NOAA041713-14. The draft contained 16 total alternatives (NOAA041702-03)—all “designed to accomplish the stated purpose and need” and applicable to all four primary groundfish sectors. NOAA041731-58.

At its October 2019 meeting, the Council discussed whether and how the 16 alternatives could be simplified. *See* NOAA053000 (audio). The entire discussion on that topic focused on how to reduce the *existing* alternatives. There was no discussion about reducing the scope of the action by removing sectors. NOAA053001 at 8:53:54-8:57:19; *see* NOAA042621.

The Council discussed the 16 alternatives in December 2019, with a staff member noting that the analyses “would certainly be easier to understand if there were less” alternatives. NOAA053002 at 8:07:58; *see also id.* at 8:11. They discussed “reducing the number of alternatives.” *Id.* at 8:19, 8:25-8:34. There was no mention of removing sectors. The Council passed a motion requesting “stakeholder input on additional management alternatives that serve to streamline the action and meet the Council’s objectives to establish abundance-based PSC limits.” NOAA043065; *see* NOAA053002 at 8:52:30 (State of Alaska representative Rachel Baker).

The Council met again on February 1, 2020, but in the evening of January 31, 2020, things were already happening behind the scenes. Ms. Baker sent an email to Council Chair Simon Kinneen, saying: “I’m rethinking the decision to remove all sectors except Amendment 80 in the current ABM analysis. It’s a really big shift *without notice* . . . . I tend to be a pretty cautious person so may be overthinking it, but *it just doesn’t*

*seem like the right thing to do.*” NOAA035110 (emphases added). This email is the first mention in the record about any “decision” to “remove all sectors” but Amendment 80.<sup>9</sup>

Ms. Baker sent two more emails later that evening. In the first, Ms. Baker said she was “going to keep all sectors in the current ABM analysis for the first motion” and review a second motion that would apply “only to the Am 80 sector.” NOAA035113. In the second email (to Glenn Merrill, NMFS’s Assistant Regional Administrator for Sustainable Fisheries), Ms. Baker explained that the “second motion” would request a “discussion paper to evaluate abundance based halibut PSC management approaches for the Amendment 80 sector.” NOAA035136; *see also* NOAA035120. Mr. Merrill responded the next morning, clearly surprised and concerned. NOAA035136. Ms. Baker says that “[t]here’s a reason we need to do it, can discuss later.” *Id.* Mr. Merrill responds: “Why do we need to do this now? What is the goal?” *Id.* Neither the “reason” nor the “decision” mentioned by Ms. Baker is disclosed anywhere in the record.

In the morning of the February 1, 2020 Council meeting, the Council’s Advisory Panel presented a motion recommending narrowing the 16 multi-sector alternatives to four *multi-sector* alternatives (consistent with the December 2019 meeting discussion). NOAA043143-46; NOAA053003 at 08:12 a.m. The motion explained that it “is in direct response to the Council’s request for stakeholders to provide input on additional management alternatives that serve to streamline the action,” “is responsive to public

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<sup>9</sup> Ms. Baker, who serves as Alaska’s designated “principal State official” (16 U.S.C. § 1852(b)(1)(A)), and the five additional Council members “appointed from the State of Alaska” (16 U.S.C. § 1852(a)(1)(G)) comprise a voting majority on the Council.



comment,” and “drops alternatives that are no longer relevant and/or do not meet Council objectives.” NOAA043144. During discussions, a longline representative suggested streamlining the action by removing his sector. That was met with laughter. *See* NOAA053003 at 2:00:30-3:04:35.

After a break, Ms. Baker, despite her prior reservations that it was not “the right thing to do,” presented a motion to eliminate all multi-sector alternatives and replace them with four alternatives focusing solely on the Amendment 80 sector because that sector has “60%” of the bycatch mortality. NOAA053003 at 3:27:36-3:39:20; NOAA043187 (motion). Mr. Merrill responded (as quoted *supra* at 8) that he was “concerned” about narrowing the action to leave out “the other 40%,” which would require the Council to “reexamine whether or not our purpose and need statement is still appropriate.” NOAA053003 at 3:46:30. But after only 15 minutes of additional discussion—none of which involved the *viability* of multi-sector alternatives—the motion passed unanimously. NOAA053003 at 4:02:30.

In October 2020—eight months after deciding to narrow the alternatives to the Amendment 80 sector—the Council changed the purpose and need statement to match those new alternatives. NOAA044492-93. Even Intervenor Central Bering Sea Fishermen’s Association complained about this backwards process: “we did not advocate for removing the other sectors” and the “reduced scope” also “reduces the overall effectiveness.” NOAA003346-47 (emphasis omitted).

This account confirms that NMFS’s responsive arguments contradict the record. There was no “public testimony” (NMFS Br. at 28) or “meaningful dialogue” (*id.* at 27)



informing the decision to single out the Amendment 80 sector. The public was only asked for ways to streamline the multi-sector alternatives. The Amendment 80-only idea was presented to and voted on by the Council “without notice” to the public and based on cryptic *non-public* decisions and reasons that are not disclosed in the record.

NOAA035110.

NMFS also did not eliminate all multi-sector alternatives because they were “too complex,” as it now argues. NMFS Br. at 29. Section 2.8 of the EIS (“Alternatives considered but not carried forward for analysis”) states that NMFS dropped “[a]lternatives that apply to all groundfish fishing sectors” “because [sic] Amendment 80 sector comprises the majority of halibut PSC mortality.” NOAA004662; *see* NOAA043184 (same reason for “exclusive” focus on Amendment 80 sector). But this explanation does not say *why* a multi-sector alternative was *not viable*. Nor could it. The Amendment 80 sector had an even greater proportion of halibut PSC limits before Amendment 111, but Amendment 111 still evaluated viable multi-sector alternatives. The existence of a viable but unexamined alternative renders the EIS inadequate. *City of Los Angeles v. Fed. Aviation Admin.*, 63 F.4th 835, 844 (9th Cir. 2023).<sup>10</sup>

NMFS *did* retrofit the purpose and need statement to match the narrowed alternatives. That occurred in October 2020—eight months after the February 2020

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<sup>10</sup> The complexity referenced by NMFS regards the *method* for calculating PSC limits and projecting alternative impacts, *not* the inclusion of multiple sectors. That complexity was fixed by dropping “complex multi-dimensional control rules” and instead using a “look up table” to set PSC limits. NOAA004662. There is no record explanation for why this simplified method could not have been applied to multiple sectors. Besides, mere complexity does not mean an alternative is not viable.

decision to eliminate all multi-sector alternatives. This is not a “normal result of the scoping process” (NMFS Br. at 27). *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (scope of alternatives are derived from purpose and need).

*And*, the retrofitted purpose and need statement is unlawful anyway because it forecloses the consideration of *any* multi-sector alternatives, making the decision to single out the Amendment 80 sector ““a foreordained formality.”” *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010). This confined the scope of action alternatives to effectively *one*: reducing only the Amendment 80 sector’s PSC limit. NMFS was also not faced with a “unique problem” (NMFS Br. at 28 n.11, 29) given that (i) it had recently completed Amendment 111, which examined several multi-sector alternatives, and (ii) 16 different multi-sector alternatives had already been developed (but later entirely deleted) in the Amendment 123 process. In short, NMFS violated NEPA.

### III. CONCLUSION

For the reasons stated above and in Plaintiff’s opening brief, Amendment 123, the associated final rule and implementing regulations, and the EIS are arbitrary, capricious, and contrary to law, and should be vacated. Defendants argue for no exceptions to the default remedy of vacatur. Nor could they: vacatur will simply result in reinstating the status quo that existed under the lawful Amendment 111.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2024, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will electronically serve a copy of the foregoing on counsel of record.

/s/ Ryan P. Steen  
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