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 2025 Meeting of the North Pacific Fishery Management Council

Oceana v. NMFS et al.

Parties:

Plaintiff: Oceana, Inc.

Federal Defendants: National Marine Fisheries Service (NMFS); United States Department of Commerce; Secretary of Commerce, Howard W. Lutnick; Deputy Assistant Administrator for Regulatory Programs, NMFS, Samuel D. Rauch, III.

Defendant-Intervenors: At-Sea Processors Association, Alaska Groundfish Data Bank, Groundfish Forum, Inc.

Case Activity:

On August 16, 2024, Oceana filed suit against the National Marine Fisheries Service (NMFS), the Department of Commerce, Secretary Lutnick, and Samuel D. Rauch, III. Plaintiff challenges NMFS's approval of the revisions to essential fish habitat (EFH) for five fishery management plans (FMPs) in the North Pacific. Specifically, Plaintiff alleges NMFS disregarded obligations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA) by failing to consider more protective alternatives and underrepresenting adverse impacts from fisheries on habitat. Plaintiff also asserts NMFS's environmental assessment violated NEPA, arguing NMFS should have instead prepared a supplemental environmental impact statement.

The parties submitted their briefs (Plaintiff's opening brief and motion for summary judgment is provided as an attachment to the NOAA General Counsel B3 Litigation Report - Oceana v. NMFS EFH on the April 2025 Council agenda). The U.S. District Court for the District of Alaska held oral argument on September 12, 2025.

Status/Next Steps:

Awaiting the decision from the District Court.

Attached: Federal Defendants' Response Brief and Cross-Motion for Summary Judgment
Defendant-Intervenors' Response Brief and Cross-Motion for Summary Judgment
Plaintiff's Reply Brief

ADAM R.F. GUSTAFSON
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

ERIKA FURLONG, Trial Attorney (PA Bar No. 319350)
JENNIFER SUNDOOK, Trial Attorney (DC Bar No. 241583)
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0424
E-mail: erika.furlong@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al*.,

Defendants,

AT-SEA PROCESSORS ASS'N, ALASKA GROUNDFISH DATA BANK, and GROUNDFISH FORUM, INC.,

Defendant-Intervenors,

Case No. 3:24cv180

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Federal Register

TABLE OF ACRONYMS

APA	Administrative Procedure Act
BSAI	Bering Sea and Aleutian Islands
EA	Environmental Assessment
EEZ	Exclusive Economic Zone
EFH	Essential Fish Habitat
EIS	Environmental Impact Statement
FMPs	Fishery Management Plans
GOA	Gulf of Alaska
HAPC	Habitat Areas of Particular Concern
LEI	Long-Term Effects Index
MSA	Magnuson-Stevens Fishery Conservation and Management Act
MSST	Minimum Stock Size Threshold
NEPA	National Environmental Policy Act
NS	National Standards
SSC	Scientific and Statistical Committee

INTRODUCTION

For the past quarter century, the National Marine Fisheries Service ("Service") and the North Pacific Fishery Management Council engaged in an iterative process to update essential fish habitat ("EFH") based on the best available science, consistent with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). During this time, the Service has acted to conserve and enhance EFH across hundreds of thousands of nautical miles in the waters off Alaska. These measures have been successful in conserving the habitat of Alaska's federally managed fish species. *See* NMFS00953.

While Oceana commended the Service's approach to updating and analyzing EFH in the prior 2017 EFH review cycle, Oceana now suggests that the same approach does not go far enough. It claims the 2023 EFH review's fishing effects analyses are flawed, even though the most recent review built upon and improved the process from the 2017 review. Yet, the Service, the Council, and the experts who reviewed the best available science and analyzed fishing effects on EFH determined that additional management actions were not necessary to conserve and enhance EFH. Instead, the Council recommended and the Service approved amending EFH descriptions and maps for the five fishery management plans challenged in this case (the "FMPs").[1]

At bottom, Oceana would prefer that the Service issue a rule adopting Oceana's "freeze the footprint" proposal and redesign the fishing effects model and evaluation

[1] Oceana challenges the amendments to the FMPs for Groundfish of the Bering Sea and Aleutian Islands (BSAI), Groundfish of the Gulf of Alaska (GOA), for BSAI King and Tanner Crabs, Salmon Fisheries in the Economic Exclusive Zone (EEZ) Off Alaska, and Fish Resources of the Arctic.

according to Oceana's specifications. But the Service is entitled to substantial deference in selecting the appropriate scientific models and tools to analyze EFH. Moreover, Oceana's sweeping proposal is outside the narrow scope of the Service's 2023 EFH review action. The Service complied with the MSA by approving FMP amendments that reflect the best available science and by rationally concluding that fishing effects on EFH were not more than temporary and minimal. The Service also satisfied NEPA by considering a reasonable range of alternatives appropriate for its EFH review, where the action is simply whether to update the Council's FMPs with new EFH information.

LEGAL BACKGROUND

I. The Magnuson 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). *Id.* §§ 1801(a)(6), 1811(a). Management authority generally extends from the seaward boundary of each coastal State to the outer boundary of the EEZ (generally, 200 nautical miles). *Id.* § 1802(11). Key purposes of the MSA are to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States. . ." and "to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available." *Id.* § 1801(b)(1), (3). The Service, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries pursuant to the MSA.

Regulation of fisheries is accomplished through FMPs, plan amendments, and implementing regulations. *Id.* §§ 1852(h)(1), 1853, 1854(a)-(c). The MSA sets forth required provisions for FMPs, including that FMPs identify and describe EFH. *Id.* § 1853(a)(1)(A), (a)(7). In addition, all FMPs and their implementing regulations must be consistent with ten National Standards ("NS"). 16 U.S.C. § 1851(a). 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. *Tutein v. Daley*, 43 F. Supp. 2d 113, 121–125 (D. Mass. 1999).

To assist in fishery management, the MSA established eight regional fishery management councils ("Councils"). 16 U.S.C. § 1852(a). Councils are "simply advisory bodies and have no legal authority." *United Cook Inlet Drift Ass'n v. NMFS (UCIDA)*, No. 3:21-CV-00247, 2022 WL 2222879 at *19 (D. Alaska 2022). Ultimately, the Service is responsible for implementing, and ensuring compliance with, the MSA and other laws. *Conservation Law Found. of New England v. Franklin*, 989 F.2d 54, 60 (1st Cir. 1993); *Flaherty v. Bryson,* 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (The Service may not simply "rubber stamp the Council's decisions" but must examine whether an FMP is consistent with the law). Each Council has a Scientific and Statistical Committee ("SSC") that provides ongoing scientific advice for fishery management decisions, as well as advisory panels to assist the Council in carrying out its functions under the Act. 16 U.S.C. § 1852(g). Councils, SSCs, and advisory panels conduct their business in public meetings, pursuant

to procedures prescribed by the MSA and written procedures established by each Council. *Id.* §§ 1852(e), (f)(6), (h), (i).

A Council is required to prepare and submit to the Service 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. *Id.* §§ 1852(h)(1), 1853(c). Both the initial development and subsequent amendment of FMPs takes years and includes multiple opportunities for interested persons to submit oral and written statements as public comment. *Id.* § 1852(h)(3), (i)(2). When a Council transmits an FMP or FMP amendment to the Service, the agency publishes a notice of availability in the Federal Register announcing a 60-day comment period. *Id.* § 1854(a)(1)(B). Within 30 days of the end of the comment period, the Service must approve, disapprove, or partially approve the FMP or amendment based on consistency with law, and then publish a notice of agency decision. *Id.* § 1854(a)(3).

A Council's proposal in an FMP has no legal effect without implementing regulations. *See N. C. Fisheries Ass'n, v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008) (noting that FMPs need implementing regulations and dismissing case on other grounds); *Gulf Restoration Network, Inc. v. NMFS*, 730 F. Supp. 2d 157, 166-167, 173-174 (D.D.C. 2010) (stating that the FMP was not a "final agency action [under the APA] without promulgation of the corresponding regulations;" finding a lack of standing due to no injury in fact from the FMP; and distinguishing *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 5, 10-11 (D.D.C. 2000), where the court found that plaintiffs had standing because the FMP amendments caused actual harm).

In 1996 Congress amended the MSA to add provisions to "promote the protection of [EFH] in the review of projects…." 16 U.S.C. § 1801(b)(7); *see also*, 50 C.F.R. § 600.905. EFH is defined as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." 16 U.S.C. § 1802(10). FMPs must "describe and identify essential fish habitat for the fishery" and "minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat." *Id.* § 1853(a)(7); *see also*, 50 C.F.R. § 600.815(a)(1)(i), (2)(ii). As noted in *Conservation Law Foundation v. Ross*, "[t]he Council is no doubt required to consider the impact of fishing on essential habitat. It need not, however, exalt this objective over all others." 374 F. Supp. 3d 77, 92 (D.D.C. 2019).

The MSA directs the Service to establish by regulation guidelines to assist in the identification and description of EFH in FMPs and in the consideration of action to ensure the conservation and enhancement of EFH. 16 U.S.C § 1855(b)(1)(A). The Service established guidelines that require each FMP to contain the following ten EFH components: (1) EFH descriptions and identification, (2) fishing activities that may adversely affect EFH, (3) non-Magnuson Act fishing activities that may adversely affect EFH, (4) non-fishing activities that may adversely affect EFH, (5) cumulative impacts analysis, (6) EFH conservation and enhancement recommendations, (7) prey species lists and locations, (8) habitat areas of particular concern ("HAPC") identification, (9) research and information needs, and (10) review and revision of EFH components of FMPs. 50 C.F.R. § 600.815(a). The EFH guidelines encourage the Service to "periodically review the EFH provisions of FMPs and revise or amend EFH provisions as warranted…. A

complete review of EFH information *should* be conducted… at least once every 5 years." *Id.* § 600.815(a)(10) (emphasis added); *see also*, 16 U.S.C. § 1855(b)(1). Following consultation on development or revision of EFH provisions, the Service provides recommendations to the Council. *See* 16 U.S.C. § 1855(b)(1)(B); 50 C.F.R. § 600.815(b) ("…NMFS will develop written recommendations…that should be considered to ensure the conservation and enhancement of EFH for each FMP.").

Although the MSA requires the Service to conduct a review to update EFH information, both the MSA and the guidelines afford the Service flexibility and discretion in deciding how to conduct the reviews. The MSA directs the Service to set a schedule for amending FMPs "to include the identification of [EFH]" and to "review[] and update[] such identifications based on new scientific evidence or other relevant information." 16 U.S.C. § 1855(b)(1)(A). The EFH guidelines repeatedly use permissive language ("should") rather than mandatory language (such as "shall" or "must") when describing the EFH reviews, which underscores that the Service retains discretion in implementing the statutory requirement to update EFH provisions. *See* 50 C.F.R. §§ 600.815(a)(10), 600.810(b).

Fishing can impact the availability and abundance of certain types of habitat, which fish use to spawn, feed, breed, and grow. COUN07527. Such changes to habitat can affect the abundance, distribution, and productivity of fish species, thereby affecting the species' ability to "support a sustainable fishery and the managed species' contribution to a healthy ecosystem." *Id*. The EFH guidelines state that FMP's "must contain an evaluation of potential adverse effects of fishing on EFH…" but does not prescribe a particular method

for doing so. *See* 50 C.F.R. § 600.815(a)(2). The guidelines also direct the Council to "prevent, mitigate, or minimize any adverse effects from fishing to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature…." *Id*. § 600.815(a)(2)(i)-(ii).[2] But neither the MSA nor the guidelines state that such management actions must occur at the conclusion of each EFH review. *See id.;* 16 U.S.C. § 1855(b)(1)(A).

II. National Environmental Policy Act

NEPA "does not mandate particular results, but simply prescribes the necessary process." *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)). When determining whether an agency has complied with NEPA's procedural requirements, "a court should afford substantial deference to the agency." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Col.*, No. 23-975, 2025 WL 1520964 (U.S. May 29, 2025).

[2] The guidelines identify management options to mitigate adverse effects from fishing (e.g., fishing equipment restrictions, time/area closures). 50 C.F.R. § 600.815(a)(2)(iv).

NEPA requires agencies to define the purpose and need of an action. *See W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1046 (9th Cir. 2013). "Courts have afforded agencies considerable discretion to define the purpose and need of a project." *Westlands Water Dist.*, 376 F.3d 853 at 866 (internal citations and quotations omitted). 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).

In addition to stating the purpose and need of a project, agencies must consider a reasonable range of alternatives. *See W. Watersheds Project*, 719 F.3d at 1046. "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives." *City of Carmel–By–The–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1995) (internal citations omitted). Alternatives that do not advance the [action's purpose] will not be considered reasonable or appropriate." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005) (citing *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) and *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp*., 42 F.3d 517, 524 (9th Cir. 1994)).

An agency may prepare an Environmental Assessment ("EA") to ascertain whether a proposed federal action will have significant impacts. 42 U.S.C. § 4336(b)(2). "[A]n agency's obligation to consider alternatives under an EA is a lesser one than an EIS." *Native Ecosystems Council*, 428 F.3d at 1246. If the agency concludes in the EA that there are no significant impacts, the agency issues a finding of no significant impact in lieu of preparing an Environmental Impact Statement (EIS). *See* 42 U.S.C. § 4336(b)(2).

FACTUAL BACKGROUND

I. Essential Fish Habitat

EFH refers to the physical, biological, and chemical features that fish need to spawn, breed, feed, and grow to maturity. *See* 50 C.F.R. § 600.10; COUN05230. Although EFH as a whole may include biological features composed of living organisms (e.g., corals, sponges, macroalgae, aquatic vegetation), EFH refers more broadly to both the physical characteristics of the sea bottom (e.g., substrate such as rocks and mud, and terrain such as depth and slope) as well as the water itself (e.g., currents, temperature, dissolved gases, and biochemical interactions that support food chains). Altogether, EFH is the collection of necessary habitat features that a species occupies in a defined geographic area. *See* 50 C.F.R. § 600.815(a)(1). FMPs describe EFH for all managed species' life history stages (e.g., eggs, larvae, early juveniles, subadults, and adults) based on the Service and the Council's interpretation of the best available science. *See, e.g.,* COUN05239; NMFS000254. Because there is sometimes limited data concerning managed species, particularly for earlier life stages, FMPs identify areas where there is limited or uncertain data and prioritize future research to improve EFH information. *See, e.g.,* NMFS00025-26; COUN05274-81.

II. The Science Underlying the Service's Fishing Effects Analysis

To meet the EFH guideline's fishing effects evaluation requirement, 50 C.F.R. § 600.815(a)(2)(i), the Service uses the best available science to describe and map EFH and then determines how and where fishing is adversely affecting EFH. For the past two decades the Service and the Council have continually improved upon the scientific methods

it uses to perform the fishing effects analysis and to describe and map EFH. *See* COUN02566; COUN02701; COUN02996.

Since 2017, the Service has used a multi-tiered method to assist in the determination of whether there are fishing effects on EFH that should be elevated to the Council for possible mitigation actions. During the first step, the Service evaluates both the species' population status and estimates of EFH disturbance. In other words, the Service determines whether the managed fish stock has low abundance (*i.e.*, is below the minimum stock size threshold (MSST[3])) and whether fishing has destroyed the stock's habitat (*i.e.*, whether there has been a 10% or more reduction in the species' Core EFH Area). COUN19293. If either threshold is triggered, then the stock assessment author performs the second step of analyzing estimates of habitat disturbance. COUN19296-97.[4] The third and final step is for the stock assessment author to decide if the species should be elevated to the Council for possible mitigation measures. *See id*. The Service adopted this approach during the 2017 EFH review and continued to apply it in the 2023 EFH review. However, the Service also gave stock assessment authors the option to provide a qualitative analysis if there were data limitations. NMFS05568-70.

The Service and the Council use scientific models to estimate habitat disturbance as part of the fishing effects analysis for EFH. During the 2005 review, the Service developed

[3] MSST represents the level at which a stock can no longer produce its maximum sustainable yield. *See* 50 C.F.R. § 600.310(e)(2)(F).
[4] The SSC's fishing effects subcommittee selected the 10% threshold in 2016 but noted that it does not preclude stock assessment authors from completing an evaluation if the estimated disturbance is below that. NMFS07514.

and used the Long-Term Effects Index (LEI), which "estimated the proportional reductions of habitat relative to an unfished state." COUN09743. Although this model included information about different habitat and fishing gear types, the data varied in quality and applicability to Alaska fisheries. *See id.* In 2016, the Service led the development[5] of a new fishing effects model to replace the LEI model and modernize the fishing effects analysis for EFH in Alaska. COUN19219. The fishing effects model uses spatial-temporal fishing data and incorporates habitat susceptibility and recovery data from scientific studies. *See* NMFS05556-61. The model produces estimates of habitat disturbance in the Aleutian Islands, Eastern Bering Sea, and GOA.[6] NMFS05554. Whereas the LEI analyzed four habitat types, the fishing effects model defines twenty-six habitat features, including coral and sponge communities. *See* NMFS05659-62. The SSC reviewed the fishing effects model prior to the 2017 and 2023 EFH reviews and approved its use for both reviews while also identifying areas for future improvement. *See* COUN09752; COUN07544. At the conclusion of the 2017 EFH review, Oceana commended the Service's Alaska Region on its approach and for leading "the effort to designate and protect [EFH]" and for "developing the maps and analyses to support updating the descriptions of EFH." *See* COUN20254.

III. EFH Reviews

For more than twenty-five years, the Service has regularly evaluated EFH in its fishery management plans for fisheries off the coast of Alaska. *See* COUN02578. In 1999,

[5] The Service worked with Alaska Pacific University to develop the fishing effects model. *See* NMFS05553.
[6] Each grid is twenty-five kilometers squared. NMFS05553.

the Council first proposed an EFH description in an FMP amendment and draft EA in which it outlined human-induced impacts to EFH. *See id*. In 2005, after a coalition of environmental groups and fishing associations challenged EFH FMP amendments nationwide, the Service completed its most comprehensive evaluation of EFH for fisheries off Alaska. *See* COUN02578-79. The review resulted in a 1,000-page EIS, in which the Service (1) described and identified EFH for the fisheries; (2) addressed each of the ten EFH components; (3) adopted an approach for the Council to identify HAPCs within EFH for the Service's consideration; and (4) minimized to the extent practicable the adverse effects of fishing on EFH. *See* NMFS00841-1965. The EIS supported amendments for five FMPs and large-scale regulatory actions to protect EFH from adverse impacts from fishing, including area closures, prohibiting trawling in certain areas, trawl gear modifications, and limitations on fishing. *See* NMFS00857; NMFS00845-46.

Since the 2005 EIS, the Service has completed an EFH review of the FMP provisions three times. The EFH review process has multiple steps: First, the Service conducts a scientific review of new information and provides an analysis to the Council. Next, the Council considers whether to update FMPs with this new information. Finally, if the review reveals that further fishery management measures may be warranted, the Council and the Service consider potential management actions through notice and comment rulemaking. *See* COUN2578-80. Each EFH review takes three to five years to complete because of the amount of data and coordination involved. *See id*.

The Service completed its 2010 EFH review in 2012 (*see* NMFS03371-4032), its 2017 review in 2018 (*see* NMFS03291-370), and its 2023 review in 2023 (NMFS00644-

705 (2023 review). *See* COUN02574. During these reviews, the Service built on the best available science and corresponding analyses from prior reviews. At the conclusion of each review, the Council recommended FMP amendments to update EFH information. *See* NMFS03376, NMFS03302, NMFS00655. The Service then approved those FMP amendments. *See, e.g.,* FR00001-04. And in the EAs for each review, the Service only considered two alternatives: no action/status quo or amending the FMPs to incorporate updated information identified in the EFH review. *See* NMFS03379-80 (2012 alternatives for the 2010 review), NMFS03302-03 (2018 alternatives for the 2017 review), NMFS00655-56 (2023 alternatives for the 2023 review). In addition, the Service has taken regulatory actions since 2005 to minimize the effects of fishing on EFH, separate from this EFH review process. *See* NMFS07451-56.

A. 2023 EFH Review

The Service most recently initiated an EFH review process during the April 2019 Council meeting. *See* COUN2576 (Table 1). Over the next two years, the Service provided progress reports to the Council and its subcomponents and obtained input from the Council's SSC. *See* COUN02576-77 (Table 1). In early 2021, the Service began meeting with the stock assessment authors and thirty species experts who peer reviewed the best available science concerning 125 managed species' EFH and completed the evaluation of fishing effects on EFH. *See id.*

The stock assessment authors reviewed the updated EFH maps for each major life stage of the 125 managed species to estimate the percent of habitat disturbance for each species. COUN07772-73; NMFS05568. The authors found habitat disturbance from

fishing events for 103 species or species complexes, and of those sixteen species were further evaluated for fishing effects because they exceeded the 10% Core EFH Area threshold. NMFS05585-86. The stock assessment authors for those species looked for correlations between Core EFH Area disturbance and impacts on individual species throughout their life cycle, using information generated by the fishing effects model. NMFS05569.

In February 2022, the Service presented the results of the stock assessment author reviews and the EFH fishing effects analysis to the Council's SSC. *See* COUN00507; COUN01703. The stock assessment authors ultimately concluded that effects of fishing on EFH were not more than minimal or temporary for any of the managed species. NMFS05571. None of the authors recommended any additional conservation and enhancement measures for EFH. *Id*. The SSC, Council, and the Service concurred with this determination. *See* NMFS00687; NMFS00008.

At the February 2023 Council meeting, after nearly four years of analysis, the Service presented a draft summary report to the Council, in which it recommended that five of the nine EFH components be revised in four FMPs: description and identification of EFH (text and maps) (component 1), fishing activities that may adversely affect EFH (component 2), non-fishing activities that may adversely affect EFH (component 4), prey species (component 7), and research and information needs (component 9).[7] COUN02584-85. During the meeting, the Council voted to recommend FMP amendments to incorporate

[7] The Council also recommended a correction to the salmon FMP EFH maps. COUN03500.

the new information from the 2023 EFH review and adopted a purpose and need statement for the action, which recognized the need "to comply with" the MSA's requirements. *See* NMFS00652. The Council concurred with the Service's recommendation that further measures to conserve and enhance EFH (component 6) and additional HAPCs (component 8) were not warranted at this time based on a cumulative analysis of existing conservation measures and both fishing and non-fishing effects on EFH. *See* COUN02584-86 (Table 4); COUN02577.

Several months later, Oceana submitted its "freeze the footprint" proposal to the Council to "initiate a conversation around establishing protections for corals, sponges, and other essential habitat features in the central and western Gulf of Alaska." COUN05158. Oceana submitted the comment during an agenda item called "staff tasking"[8] – not during an EFH review discussion[9] and not as a petition for rulemaking.[10] *See id*. Oceana's proposal envisioned vast area closures and gear prohibitions that would require regulatory

[8] Staff tasking is where matters not specifically pertaining to the Council's published agenda may be proposed. *See* NPFMC, Statement of Organization, Practices, and Procedures (April 2023), Section 3.2.1, available at: https://www.npfmc.org/wp-content/PDFdocuments/membership/Council/NPFMC_SOPP.pdf.

[9] Oceana had many opportunities to submit its proposal as part of EFH agenda items. Council meetings: April 2019 (COUN00002), June 2020 (COUN00034-35), April 2021 (COUN00268-69), February 2022 (COUN00365-66), April 2022 (COUN00465), October 2022 (COUN00473), February 2023 (COUN02504-06), April 2023 (COUN05127). Ecosystem Committee meetings: April 2019 (COUN06037), January 2020 (COUN06213), January 2022 (COUN06293), October 2022 (COUN06643), January 2023 (COUN07173-74). SSC meetings: April 2021 (COUN09701), February 2022 (COUN09737), October 2022 (COUN12661), February 2023 (COUN13735).

[10] Oceana's proposal nowhere states that it was petitioning for rulemaking, in accordance with 5 U.S.C. § 553(e). See COUN05158-204. Instead, the proposal sought to "initiate a conversation." COUN05158.

action to implement. *See* COUN05163, COUN05166. The Council chose not to task staff with developing a discussion paper on this proposal.[11]

From February 2023 to November 2023, the Service and Council staff prepared the EA, analyzing whether to revise or amend the FMPs based on the EFH review. As in years' past, the alternatives considered were either to update the FMPs in accordance with the review, or take no action. *See* COUN05236; COUN03500; NMFS03379-80 (alternatives for 2010 review); NMFS03302-03 (alternatives for 2017 review). Following the EA, the Service chose to update the FMPs and issued a finding of no significant impact because the proposed FMP amendments were "largely technical or housekeeping changes" and would have no direct impacts on the environment. NMFS00662; NMFS00644.

In December 2023, the Council voted unanimously to recommend that the Service "[a]mend the Council's FMPs to incorporate the updated EFH information based on the new and best available science information identified in the [2023 EFH review]." *See* COUN05304; COUN05236; NMFS00652. None of the recommended changes required regulatory action, as they were updates to descriptions and maps in existing EFH provisions of the FMPs. COUN05224.

In February 2024, Oceana emailed the Service requesting feedback on the "freeze the footprint" proposal it submitted during staff tasking in June 2023. SUPP00329. In March 2024, the Service and Oceana met, and the Service provided a technical review of the science in Oceana's proposal. SUPP00326-30. In April 2024, the Service further

[11] *See* Agenda Item E: Staff Tasking for the June 2023 meeting. https://meetings.npfmc.org/Meeting/Details/2993.

collaborated with Oceana by sharing shapefiles for recreating EFH maps in an effort to help Oceana conduct scientific analysis to improve its proposal. *See* SUPP00331-34.

On April 23, 2024, the Service published a notice of availability for the proposed EFH amendments to the five FMPs in the Federal Register with a sixty-day comment period ending on June 24, 2024. FR00005. Oceana commented that its proposal to "freeze the footprint" was a reasonable and appropriate alternative that the Service should have considered in its EA. NMFS11161. The Service then finalized the EA for the proposed EFH amendments, including with responses to the comments it received. FR00003. The Service issued its Notice of Agency Decision in July 2024, approving the EFH amendments. *See* NMFS00644; FR00001.

IV. Existing Management Actions to Protect EFH

Consistent with the MSA regulations, the Service has previously implemented management measures to conserve and enhance EFH and minimize the effects of fishing on EFH. *See* NMFS00793-98; *see* 50 C.F.R. § 600.815 (a)(2)(iv).

The Service established fishing closures or other restrictions in sensitive areas to protect habitat. *See* NMFS00796-97 (Figures 4 and 5). In the EEZ off Alaska, nearly 13,000 square nautical miles (nm^2) are designated as HAPC, where fishing and/or other bottom contact restrictions and monitoring requirements conserve and enhance EFH. *See id*.; NMFS00794. Additional location-specific restrictions exist to protect EFH and managed species. For example, in the Bering Sea and the Aleutian Islands, bottom trawling gear is prohibited in certain areas to protect benthic habitat (across 277,100 nm^2 in the Aleutian Islands alone). *See id*.; 73 Fed. Reg. 43,362 (July 25, 2008); NMFS00793. All

bottom contact fishing gear (*i.e.*, longlines, pots, trawls) is also prohibited in areas designated as coral gardens. NMFS00793-94. In the GOA, the Southeast Outside Trawl Closure area prohibits all trawl gear in the entirety of the Southeast Outside district. COUN21145-47 (Figure 3-5). The GOA Slope Habitat Areas, which are multiple smaller areas but total 1,892 nm^2 are closed to bottom trawling. COUN21148 (Figure 3-6); NMFS00798. Marmot Bay (northeast of Kodiak Island) is closed to all fishing except pelagic trawling for pollock to protect Tanner crab. NMFS794; 79 Fed. Reg. 2,794 (Jan. 16, 2014).

The Service and the Council also worked with the fishing industry to develop gear modifications that reduce fishing impacts to EFH. For instance, modified trawl gear elevates equipment above the seafloor to prevent direct contact. *See* NMFS00794-95. This modification reduces impacts on sponges and corals and also reduces mortality of several crab species. *See id*.

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). This is especially the case where, as here, the dispute involves "highly technical and scientific determinations that are within the agency's expertise." *See N. C. Fisheries Ass'n*

v. Gutierrez, 518 F. Supp. 2d 62, 80 (D.D.C. 2007) (recognizing that fisheries regulation requires technical and scientific determinations that "are beyond the ken of most judges."); *see also, Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

ARGUMENT[12]

I. Oceana has failed to establish standing.

To satisfy Article III's case and controversy requirement, a plaintiff must establish that it has standing by proving three elements: (1) an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that is likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). To prevail, "a Plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2009) (citation omitted). At the summary judgment stage, the plaintiff must set forth specific facts to establish each element of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. at 561. The plaintiff bears the burden of establishing standing on claim-by-claim basis. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).

Oceana alleged that the Service's "actions and failures to act" violated both APA Section 706(1) (which authorizes claims to "compel agency action unlawfully withheld or

[12] Oceana waived all claims not pressed in its opening brief. *See Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 65 n.12 (D.D.C. 2014). Notably, Oceana did not raise Count III, ECF No. 16 ("Am. Compl.") ¶¶ 101-110, nor did it support any claims under Section 706(1) of the APA, *see id.* ¶¶ 100, 110, 115-16.

unreasonably delayed") and 706(2) (which authorizes claims "[t]o hold unlawful and set aside agency action, findings, and conclusions…"). *See* Am. Compl. ¶¶ 91, 100; *see* 5 U.S.C. § 706(1), (2).

Yet, Oceana failed to set forth any factual basis for finding an injury that is traceable to either the agency's action or failure to act. *see* Pl's Principal Br., ECF No. 22 ("Pl's Br."). Oceana identifies its members' aesthetic, environmental, and recreational interests in Alaska's waters but offers only a conclusory theory for how these interests could be harmed by the non-regulatory action at issue in this case. Plaintiff alleges that "[c]ontinued trawling in EFH harms their interests," Pl's Br. 22, but continued trawling is not the challenged action. Instead, Oceana challenges a series of minor amendments to various FMPs that include newly available EFH science and updated maps. NMFS00644. These are non-regulatory changes that do not authorize continued trawling. *See* FR00001-04, NMFS00008. Neither the Amended Complaint nor Oceana's opening brief explain how the Service's approval of updated science would injure Oceana or its members. *See* Pl's Br. 21-23, Am. Compl.

If generalized allegations of inadequate analysis alone were sufficient to confer standing under the APA, that would create an exception that would swallow the rule. It is telling that Plaintiff supports its standing with just one case where the plaintiffs alleged a procedural injury under NEPA due to being deprived an opportunity to comment on an EA. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003). Here, Plaintiff does not allege it was deprived of an opportunity to comment, or any other procedural injury, but solely a substantive injury to its members' "interests in viewing

healthy coral gardens, marine mammals and other ocean life, and in harvesting fish and other species to feed their families." Pl. Br. 22. Plaintiff cannot support standing for a substantive injury with a procedural injury case. The EFH amendments "neither forbid[] nor require[] any action" that could injure Oceana, and additional steps would need to occur before anyone (including Oceana) could be harmed by the actions at issue in this case. *See Gulf Restoration Network*, 730 F. Supp. 2d at 166.

Instead, Oceana frames its alleged injuries as traceable to inadequate EFH protection – or, in other words, the Service's failure to act to adopt *additional* EFH conservation measures to prevent "continued trawling." Pl. Br. 22. Yet, this is not traceable to the Service's approval of the EFH amendments. *See* ECF No. 16 ¶¶ 91, 100. And, even if it was, failure to act claims (or claims designed to compel an agency to act) are limited and the party asserting such a claim must demonstrate that the "agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*"). Oceana has not done so. Neither Oceana's Complaint nor its opening brief identify any facts or law to support a claim that specific, additional EFH must be subject to conservation measures or even that the Service failed to consider specific, scientific data in its EFH review. *See* Pl's Br.; Am. Compl. And Oceana's attempt to dress up its alleged failure to act injuries to support standing for its claims challenging agency actions is best viewed as a generalized attack designed to entangle the court in the day-to-day management decisions that Congress entrusted to the Service. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *SUWA*, 542 U.S. at 66-67.

Finally, even if Oceana properly identified a concrete injury traceable to the alleged MSA violations, Oceana's utter failure to identify how the relief it requests would redress these injuries proves fatal to Oceana's standing for its claims. *See* Pl's Br. 22-23.

II. The Service complied with the MSA by properly reviewing and updating EFH information and approving appropriate FMP amendments at the conclusion of the 2023 EFH review.

As described above, the MSA and EFH guidelines afford the Service flexibility and discretion in deciding how to conduct EFH reviews. Consistent with this flexible framework, the Service completed the 2023 EFH review and approved amendments to incorporate new scientific information and other relevant information into five FMPs. FR00001. For many species, the amendments revised FMP language to include more detailed EFH information (sometimes for species and life stages that previously had no EFH information). *See, e.g.*, NMFS00025-43 (BSAI FMP).

During the 2023 EFH review, the Service used the same methods and tools that it developed during the 2017 review but also incorporated several improvements based on the SSC's recommendations. NMFS05561-64. For instance, the Service provided additional information to support assumptions about recovery times, addressed concerns about unobserved fishing event data, and attempted to address concerns about the readability of EFH data. NMFS05565-67. The Service also included updated fishing effort data in the model. NMFS05557.

The Service also improved the quality of the maps that it uses to analyze fishing effects on EFH. Prior to the 2017 review, EFH in Alaska was mapped using individual

species catch (presence) locations from stock assessment surveys. COUN02578-80. During the 2017 EFH review, the Service significantly advanced how EFH is mapped by introducing species distribution models. *See id.*; NMFS07960. These new models use both survey data and habitat attributes to produce EFH maps for species' life stages and then identify the quality of habitat by percentile.[13] *See id*. The updated maps that the Service used for the 2023 EFH review also included an additional five years of distribution, abundance, and life stage data for FMP species. COUN02701; NMFS07672; COUN02586-639. And the maps relied on structure forming invertebrate data (e.g., coral, sponges, sea pens) to aid in the identification of potential EFH. *See e.g.*, NMFS4033; NMFS04050-58; NMFS04084 (Figure 2).

At the conclusion of their review, the stock assessment authors determined that fishing effects had no more than a minimal or temporary impact on the EFH for managed species, and the Council and the Service concurred. NMFS05571; NMFS00686. As a result, the Service, the Council, and the stock assessment authors all concluded that additional management measures were not necessary based on their review of the best available science during the 2023 EFH review. *See* NMFS00687; NMFS00008.

Thus, after developing, acquiring, and evaluating extensive new EFH analytical methods and data, and coordinating with experts to iteratively review the new information, the Council recommended and the Service approved amending the five FMPs to include

[13] The entire EFH area is where 95% of the stock occurs, NMFS01001, whereas lower percentile EFH areas (≥ 50%) and hotspots (≥ 25%) are where most of the fish stock is concentrated. *See* NMFS05028.

the updated EFH information without any accompanying regulatory action. *See* FR00001-04; NMFS00008. In reaching this decision, the Service's review appropriately "focused on the proposed action's consistency" with the MSA. *See N. C. Fisheries Ass'n*, 518 F. Supp. 2d at 72. Consistent with the MSA and the EFH guidelines, the Service and the Council updated the FMPs to reflect the best available scientific data and analyses. *Contra* Pl's Br. 33-36.

A. The Service rationally determined that the fishing effects on EFH are not more than minimal or temporary.

Although in 2017 Oceana commended the Service for its leadership in using effectively the same process and analytical tools to conduct the 2017 EFH review, COUN020254, Oceana now claims that the fishing effects approach is flawed and that the Service must implement additional conservation and enhancement measures. *See* Pls.' Br. 23-24. As an initial matter, Oceana misunderstands the role of the EFH review, which is to update EFH information to reflect the best available science. *See* 50 C.F.R. § 600.815(a), (b). The fishing effects evaluation method rationally assists the evaluation of EFH impacts by identifying high priority EFH (and dependent species) while also ensuring redundancy and flexibility for the Service, the Council, and the fisheries experts to quantitatively and qualitatively analyze the potential effects of fishing on EFH. And the SSC found that the current EFH evaluation methodology is appropriate for the 2023 EFH Review. NMFS05573. Importantly, stock assessment authors retain discretion to qualitatively evaluate fishing effects to EFH or to perform additional analyses if, based on their expertise, there may be impacts to EFH of a particular species that are otherwise

undetected. NMFS00687. Although Oceana proclaims that none of these longstanding approaches is sufficient to detect fishing effects that necessitate mitigation measures, it does not offer any solutions. *See* Pl's Br. 27-31.

Especially in technical areas, such as fisheries' regulation, courts must afford substantial deference to agency expertise in making difficult scientific and policy decisions. *See N. C. Fisheries Ass'n*, 518 F. Supp. 2d 62 at 80. As explained above and below, the Service selected appropriate scientific models and other tools to evaluate the fishing effects on EFH, and it is "well settled" that the Service may act even where "the available science is incomplete or imperfect, even where concerns have been raised about the accuracy of the methods or models employed." *See id*. at 85.

1. The Minimum Stock Size Threshold is appropriately tethered to the purpose of evaluating fishing effects on EFH.

Oceana claims that consideration of MSST during the fishing effects analysis is "unlawful" because MSST does not assess habitat impacts. Pl's Br. 28-30. But this myopic view overlooks MSST's importance in evaluating species' health at the population level (which is important for EFH)[14] and disregards the fact that MSST is just one of several tools to evaluate fishing effects on EFH.

The stock assessment authors begin their evaluation of fishing effects by considering whether each managed species is above or below the MSST.[15] NMFS07511.

[14] The Service and the Council have used the MSST as part of its fishing effects evaluation since 2005, and the Service has used MSST for decades as a basic indicator of species health. *See* NMFS01230.
[15] 50 C.F.R. § 600.310(e)(2)(F).

If the stock is below the MSST, stock assessment authors are asked to provide a written assessment as to whether it appears to result from reductions in EFH. NMFS05665.

Using MSST as part of the fishing effects analysis is consistent with the MSA, which recognizes the link between population status and EFH. The MSA identifies the need for a national program to prevent overfishing, rebuild overfished stocks, and facilitate protection of EFH, 16 U.S.C. § 1801(b)(1), (4), and (7), and EFH is by definition tethered to the health and life history of managed species. *See* 16 U.S.C. § 1802(10) (defining EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity"). Because MSST measures species health, low MSSTs could be due to either overfishing, EFH degradation, or other environmental factors. *See* 50 C.F.R. § 600.310(e)(2). For that reason, it is completely appropriate to evaluate whether fishing may be affecting EFH when a species falls below the MSST. NMFS07502.

During the 2023 EFH review, the stock assessment authors identified two species with stocks below MSST and provided written fishing effects evaluations for the relevant MSST. NMFS05674 (identifying the species as EBS blue king crab and EBS snow crab); NMFS05725-29; NMFS05733-37. After robust quantitative correlation analyses of habitat disturbance and population health, the stock authors concluded there was no causal link between the fishing impacts to EFH and stock status. *Id*. As these examples demonstrate, the use of MSST during the fishing effects analysis complements the quantitative (and sometimes qualitative) habitat analyses that also occur to evaluate EFH impacts. NMFS05569; NMFS07502.

2. The Service's use of the Core EFH Area in the evaluation of the effects of fishing to EFH was appropriate.

Oceana claims the Service's use of Core EFH Area in its fishing effects analysis fails to consider "all" EFH and, thus, misses possible harmful effects. Pl's Br. 30-31. This argument should be rejected because it fails to consider the scientific and statistical rationale for the Service's use of Core EFH Area in the evaluation of fishing effects.

The Core EFH Area represents areas where fish stocks are most concentrated and is defined as the top 50% of the EFH area. NMFS05028, NMFS00687. In the 2017 EFH review, the SSC established a 10% threshold for Core EFH Area disturbance because if more than 90% of the Core EFH Area is preserved, then impacts to the remaining < 10% likely represents a disturbance to EFH that is not more than "minimal" and "temporary." *See* 50 CFR 600.815(a)(2)(ii); COUN20013, NMFS07514. During the fishing effects analysis, if estimated disturbance is more than (or equal to) 10% of the Core EFH Area for a species, the stock assessment authors evaluate trends in the species' life history to look for correlations with habitat disturbance over time. NMFS05665. All stock authors remain free to perform additional analyses and to recommend additional conservation measures – independent of this threshold. *See* NMFS00687.

The SSC concluded that analyzing the 50% quantile was most appropriate "in order to avoid the likelihood that important areas are excluded (if using the smaller area, 25% quantile) and to avoid statistically minimizing the amount of habitat reduction by using the larger, 95% quantile." *Id.*; NMFS05028. Although the Core EFH Area focuses the fishing effects evaluation on the top 50% of EFH to help the stock assessment authors gain a better

understanding of where managed species obtain the most benefit from their habitat, nothing limits the stock authors' analysis to only those areas covered by the Core EFH Area. NMFS05665. For example, in the 2022 fishing effects evaluation, the Service offered stock assessment authors the option to request fishing effects model outputs for the top 75% of EFH area. One stock assessment author (for AI red king crab) requested that additional analysis and ultimately noted both percentiles captured the same key areas of habitat disturbance. *Id.*; NMFS05733.

During the fishing effects evaluation for the 2023 EFH review, the stock assessment authors reviewed an overlay of the fishing effects model results and the Core EFH Area maps to aid in their evaluation of whether fishing effects to EFH were more than minimal or temporary for each species. NMFS00687. The stock assessment authors evaluated the amount of disturbed Core EFH Area and examined the species' population trends. NMFS05664-67. The stock assessment authors determined that sixteen of the 103 species analyzed had habitat disturbance above the 10% threshold. NMFS05585. However, after additional analysis, none of the stock assessment authors concluded that fishing effects on their species' EFH were more than minimal and temporary, and therefore none recommended to elevate their species to the Council for discussion of possible mitigation measures to reduce fishing effects to EFH. *See* NMFS05571; NMFS00686-87.

One of the stock assessment authors chose to evaluate fishing effects for a species (EBS Kamchatka flounder) that had an estimated disturbance to Core EFH Area below the 10% threshold. NMFS05685. The author ultimately concluded that fishing effects were minimal and temporary. *Id*. This example underscores that the MSST and the Core EFH

Area 10% disturbance thresholds represent the floor – not the ceiling – for the EFH review's fishing effects analysis.

At bottom, Oceana seeks to prescribe what data and methodology the Service must use to evaluate fishing effects on EFH. Yet courts have repeatedly rejected such attempts to displace the Service's expertise in determining how to analyze the best available science. *See, e.g., Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 30–43 (D.D.C. 2021), *aff'd*, 35 F.4th 904 (D.C. Cir. 2022).

B. Oceana's claim that the Service failed to conserve and enhance EFH is without merit.

Oceana's claim that the Service failed to address its obligation to conserve and enhance EFH is also wrong on the facts and the law. *See* Pls.' Br. 31-33.

First, and most importantly, Oceana is wrong on the facts. As described above, the Council has recommended and the Service has implemented EFH conservation and enhancement measures across hundreds of thousands of square nautical miles of seafloor off Alaska (including prohibiting seafloor contact, fishing gear restrictions, time/area closures, and HAPC designations). *See* NMFS00793-98, COUN21141-49.

Secondly, Oceana is wrong on the law. Neither the MSA nor the EFH guidelines impose any obligation on the Service to include *new* conservation measures as part of its periodic EFH reviews. *See* 16 U.S.C. § 1855(b)(1)(A); 50 C.F.R. § 600.815(a)(10); *Am. Oceans Campaign*, 183 F. Supp. 2d at 13 (finding that the agency can consider prior management efforts "in analyzing whether additional ones are necessary" to comply with the MSA's EFH requirements). Notably, the statute merely suggests that the review should

update EFH "identifications based on new scientific evidence or other relevant information." *See* 16 U.S.C. § 1855(b)(1)(A). Likewise, the EFH guidelines do not prescribe adding conservation measures as an outcome of each EFH review. *See* 50 C.F.R. § 600.815(a)(10). A party may not ask a court to "impose on the agency [their] own notion of which procedures are best or most likely to further some vague, undefined public good" or "procedural requirements [not] explicitly enumerated in the pertinent statutes." *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (overruled on other grounds by *Winter v. NRDC*, 555 U.S. 7 (2008)) (cleaned up).

In sum, Oceana claims that the FMP amendments do not meet the MSA's requirements. Pl's Br. 31-33. But Oceana ignores the fact that the amendments update EFH information in existing plans that already contain language to satisfy the statutory and EFH guidance requirements to conserve and enhance EFH. *See* NMFS00644.

C. The Service considered the best available data in its fishing effects analysis.

Contrary to Oceana's claim that the Service failed to consider the best available science, Pl's Br. 33-36, the Service incorporated data about different life stages and long-lived features into the scientific tools it used to evaluate fishing effects on EFH.

1. The Service rationally considered available life stage data.

Although the MSA recognizes the importance of breeding and spawning habitat in its definition of EFH, it nowhere requires the granular life stage analysis that Oceana suggests. The EFH guidelines state that the Council needs "basic information" to understand species' habitat and that "FMPs should summarize the life history information

necessary to understand each species' relationship to, or dependence on, it various habitats, using text, tables, and figures, as appropriate." 50 C.F.R. § 600.815(a)(2)(ii)(A). The FMPs already include this information, and the FMP amendments updated these life stage descriptions, in some cases to include information about life stages where the agency previously had no data. *See, e.g.*, NMFS00026-43 (BSAI FMP).

The Service also considered species' life stages in its analysis for fishing effects on EFH. The fishing effects model evaluates impacts to EFH at the population level and, thus, captures all life stages. *See* COUN19240-60; NMFS07651 (Figure 1). The Service created distinct EFH maps based on species' life stages. NMFS07960; COUN02701; NMFS07672 COUN02586-639. And the stock assessment authors considered life stages when evaluating fishing effects on EFH. COUN07772-73; NMFS05568. Although the SSC identified improving life stage data as an area for improvement, *see* COUN03445, it nevertheless approved the fishing effect methods used for the 2023 EFH review.

The Service and the Council have both recognized that there is in some cases very limited data about life stages for managed species, in particular for sub-adult life stages. *See* FR00002-03, NMFS08218-19. But that is not grounds for invalidating the agency's conclusions in this case, as Oceana seems to suggest. *See* Pl's Br. 35. The EFH guidelines recognize that data may not be available for a particular life stage and identify data analysis levels according to the availability of information on a species and its life history. *See* 50 C.F.R. § 600.815(a)(1)(iii)(A), (B). Consistent with this, the Service uses these levels to classify data available for each species, NMFS02568-678, and has appropriately identified improving life stage data as an area for future research. *See* NMFS08218-19; NMFS08221.

The Service is in the best position to determine how to allocate resources for future research needs and is under no obligation to create life stage data that does not exist for an EFH review. *See Am. Oceans Campaign*, 183 F. Supp. 2d at 13 ("Since neither the statute nor the regulation requires the Councils to affirmatively conduct research to better identify EFHs and the adverse effects of fishing on them, reliance on the best *available* scientific information is sufficient.").

Although Oceana may prefer more life history data and a different approach to analyzing it, the Service considered the best available science concerning life stages and rationally included it in the analysis of fishing effects on EFH. The MSA requires nothing more.

2. The Service exercised its expert judgment to select recovery times to account for long-live organism.

As described above, EFH refers to physical, biological, and chemical features that fish need to spawn, breed, feed, and grow to maturity. Although the Service considers living organisms (e.g., coral and sponges) in its EFH reviews, neither the MSA nor its regulations expressly require the Service to consider long-lived habitat features or to do so in a particular manner. Nevertheless, the Service has repeatedly made improvements to incorporate recovery times for long-lived features into its fishing effects analysis. For instance, the Service added a deep/rocky habitat category to the fishing effects model in 2016 to represent long-lived corals and determined that the highest densities of such corals occurred at depths of 400 to 700 meters. NMFS05561. To be precautionary, the Service defined this deep/rocky habitat as areas deeper than 300 meters and added a new, longer

recovery interval (10-50 years) to that habitat category to account for long-lived species. *Id*. In contrast, for substrates associated with shallower corals, the Service maintained the shorter recovery rate. *Id*.

In sum, the Service properly exercised its expert judgment in accounting for various life stages and long-lived habitat when conducting the fishing effects analysis. This was "a choice rooted in the agency's technical expertise – for which it enjoys substantial deference." *State of New York v. Raimondo*, 84 F.4th 102, 109 (2d Cir. 2023).

III. The Service complied with NEPA by considering a reasonable range of an action and no-action alternative which flowed naturally from the EA's purpose and need.

The range of alternatives that the Service considered was reasonable considering the agency's purpose and need. "[A]n agency's obligation to consider alternatives under an EA is a lesser one than an EIS." *Native Ecosystems*, 428 F.3d at 1246; s*ee also* 40 C.F.R. § 1508.9(b) (requiring only a brief discussion of reasonable alternatives in an EA). Depending on the EA's purpose and need, consideration of only an action and a no-action alternative is sufficient to comply with NEPA. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147, 1153–54 (9th Cir. 2008) (holding "that the Agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA"); *Native Ecosystems*, 428 F.3d at 1245–49 (holding that the agency complied with NEPA's alternatives provision in preparing an EA when the agency considered only two alternatives: a no-action alternative and a preferred alternative); *San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Navy*,

2012 WL 4953115, at *7-8 (S.D. Cal. Oct. 17, 2012) (upholding EA's consideration of only one action alternative in light of scope and nature of proposed project). The substance of the alternatives, not the number of alternatives, is the metric for reasonableness. *Native Ecosystems*, 428 F.3d at 1246.

Succinctly put: the action's purpose of revising EFH provisions only as warranted by the EFH review dictated a reasonable range of an action and no-action alternative, and Oceana's sweeping regulatory proposal to "freeze the footprint" was not a reasonable alternative because the Service did not recommend additional conversation measures in its EFH review, and thus, Oceana's proposal does not meet the action's purpose and need.

A. The narrow purpose of this action was to revise or amend existing EFH provisions in FMPs only as warranted by the 2023 EFH review.

Plaintiff attempts to stretch the EA's purpose and need statement to broadly encompass any action on any EFH components, regardless of whether such action is warranted by the EFH review. However, this interpretation ignores the clear impetus for this action: the EFH review of the FMP EFH provisions in accordance with the MSA. See 50 C.F.R. § 600.815(a)(10). Plaintiff is wrong when it states that "the Service incorrectly suggests that the purpose of the action is restricted to updating the description and identification of EFH." Pl's Br. 39. It is the Service, not Plaintiff, that decides its purpose and need. *See League of Wilderness Defenders–Blue Mountain Diversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (agencies are afforded "considerable discretion to define the purpose and need of a project.") (quoting *Friends of Southeast's Future*, 153 F.3d at 1069 (internal quotations omitted)). And the Service identified the

purpose and need for its action as implementing the findings of its EFH review, not as considering and proposing any and all possible changes to its FMPs. COUN03500, COUN05304.

Plaintiff misinterprets the purpose of the Service's action by focusing only on the first sentence of the purpose and need statement. True, the purpose and need statement begins: "[t]he purpose of the proposed action is to comply with the Final Rule implementing the EFH provisions of the Magnuson-Stevens Act (MSA) (50 CFR Part 600, Subpart J)." NMFS00652. But the sentences that immediately follow give greater clarity and specification to that general opening sentence: "[t]he EFH Final Rule states that a review of the EFH components of the Council's FMPs should be completed at least every five years and the EFH provisions should be revised or amended, as warranted, based on the best available science contributing new information." *Id.* Thus, reading the entire purpose and need statement shows that the Service's purpose was to review and revise, if warranted, existing EFH components of its FMPs to comply with the EFH review provision in 50 C.F.R. § 600.815(a)(10).

The Service's intent to limit its action to amending FMPs as warranted by the EFH review is not only supported by the language of the purpose and need statement, but is also well-supported by the record. On February 11, 2023, the Council announced it had initiated "an analysis to incorporate the advancements in Essential Fish Habitat (EFH) from the 2023 EFH Review in the fishery management plans (FMPs)." COUN03500. The abstract to the final EA also makes its purpose perfectly clear: "[a] review of Essential Fish Habitat (EFH) components in the North Pacific Fishery Management Council's (Council's) fishery

management plans (FMPs) should be completed every 5 years, and the EFH provisions should be revised or amended, as warranted, based on the best available information." NMFS00644. Even Plaintiff recognizes that the Service has defined the purpose and need to accomplish the goal of "updating the description and identification of EFH, as required by section 305(b) of the Magnuson-Stevens Act." FR00004; *see also* Pl. Br. at 39 (referencing FR00004). The record is clear: the Service intended its action to narrowly comply with the tenth EFH provision, 50 C.F.R. § 600.815(a)(10), which encourages review of EFH components every five years, and to revise FMPs only as warranted by that review.

Plaintiff is correct that the MSA requires that each FMP "must identify actions to encourage the conservation and enhancement of EFH, including practicable measures to minimize adverse fishing effects," as this is the sixth EFH component. Pl. Br. at 38 (citing 50 C.F.R. § 600.815(a)(6) (internal quotations omitted)). But the FMPs have already done this: bottom trawling is prohibited throughout the Aleutian Islands, the BSAI FMP prohibits bottom trawl gear in certain areas, the GOA FMP establishes protected areas closed to most trawling, and each FMP identifies several HAPCs and modifications of trawl gear that reduce damage to seafloor habitat—all actions intended to encourage the conservation and enhancement of EFH. *See* COUN02653-58 (summarizing existing EFH conservation measures). The purpose and need of the action subject to Plaintiff's challenge is simply to review existing EFH components of FMPs and revise or amend them, as warranted by the EFH review. This does not require action on every single EFH

component, just those that need to be revised based on the new and updated information available from the EFH review.

B. The Service considered a reasonable range of alternatives that advance the agency's purpose and need.

Like the Service has done for every EFH review since 2005, it considered action and no-action alternatives: either amend the EFH provisions in the FMPs in accordance with the conclusions of the EFH review, or not. *See* NMFS03379-80; NMFS03302-03. Courts have held time and again that an action and no-action alternative may be a reasonable range of alternatives for an EA. *See N. Idaho Cmty. Action Network*, 545 F.3d at 1153–54; *Native Ecosystems*, 428 F.3d at 1245–49; *San Diego Navy Broadway Complex Coal*, 2012 WL 4953115, at *7-8.

The two alternatives are not "nearly identical," as Plaintiff alleges. Pl's Br. 37. In fact, they are polar opposites – action or no action. Plaintiff's assertion that these alternatives "differ[ed] very little" distorts a quote from the EA. Plaintiff references the Service's cumulative impact analysis in the EA, where the authors recognize that "[t]he actions contemplated in this amendment package differ very little from the actions that were comprehensively analyzed in the 2005 EFH EIS." NMFS00662. This quote does not speak to the similarity of the alternatives, but the impact of the preferred action alternative. In fact, the minimal impact of this action supports that a robust range of alternatives is not required under NEPA. *See Save Our Cumberland Mountains v. Kempthorne,* 453 F.3d 334, 336 (6th Cir. 2006) (when an agency has concluded that a proposed project will have minimal environmental consequences, the duty to consider environmentally-friendly

alternatives is less pressing than when it prepares an EIS). In any event, Plaintiff's reliance on *Western Watersheds Project*, 719 F.3d at 1051 to argue that the consideration of nearly identical alternatives is not a reasonable range is inapposite. The action and no-action alternatives are sufficiently distinct, even though the action alternative has a minimal environmental impact. Considering the project's scope to update or not update the EFH provisions of FMPs based on available information, the Service considered a reasonable and appropriate range of alternatives.

Furthermore, the Service did not "simply follow[] the Council's roadmap to update EFH descriptions," as Plaintiff alleges. Pl's Br. 38 (citing FR00003-04). The Council is an advisory body, and the Service reviewed and examined the Council's analysis, conclusions, and recommendations to ensure they were well-supported and complied with the law. *See* 16 U.S.C. § 1854(a). The scope of the project dictated a reasonable range of an action and a no-action alternative, and the action alternative was supported by a robust, iterative review process that incorporated the newest data and cutting-edge science that is leading the way for other the Service regions nationally. *See* COUN21685 (2/2023 Council Meeting Recording Time: 01:58:36-02:13:23). Plaintiff's allegation that the Service mindlessly followed the Council's decisions is baseless.

C. Oceana's proposal was not a reasonable alternative because it would not meet the Service's purpose and need.

Oceana's proposal to "freeze the footprint" is not a reasonable alternative considering the narrow purpose and need for which the Service was considering action: to amend EFH provisions based on its EFH review. An agency's purpose and need dictate

the range of alternatives; and alternatives are reasonable and appropriate if they advance the action's purpose. *See Native Ecosystems Council*, 428 F.3d at 1246. From the EFH review, the Service concluded that no additional conservation and enhancement measures were warranted. Instead, the Service concluded that only five of the EFH components warranted revision: description and identification of EFH (component 1), fishing activities that may adversely affect EFH (component 2), non-fishing activities that may adversely affect EFH (component 4), prey species (component 7), and research and information needs (component 9). *See* COUN03500. Oceana's proposal, on the other hand, is a conservation and enhancement measure. *See* Pl's Br. 38 (identifying Oceana's proposal as an action to encourage the conservation and enhancement of EFH). As such, it is outside the scope of this action because the EFH review did not recommend further conservation and enhancement measures.

While Plaintiff may believe that further EFH conservation and enhancement actions are currently warranted, the Service has determined otherwise at this time. When there are such conflicting views, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh*, 490 U.S. at 378. "The identification of what particular combination of alternatives protects EFH and therefore warrants detailed consideration lies within the Secretary's 'area of special expertise' and is entitled to deference." *Oceana, Inc. v. Evans*, No. CIV.A.04-0811(ESH), 2005 WL 555416, at *35 (D.D.C. Mar. 9, 2005) (quoting *Nat'l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 222 (D.D.C. 1990)); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) ("[C]ourts must also be mindful to defer to agency expertise, particularly

with respect to scientific matters within the purview of the agency."). The Service has determined, based on the best available science contributing new information in the EFH review, that further conservation and enhancement measures were not warranted. Oceana's proposal which identifies further conservation and enhancement measures is, therefore, outside the scope of this action and was not a reasonable or appropriate alternative.

"When the purpose [of an action] is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 546 (8th Cir. 2003)) (an agency is not ''required to explore alternatives that, if adopted, would not have fulfilled the project goals''). Oceana's proposal does not serve the agency's purpose and need, and so, the Service had no obligation to consider it as an alternative.

CONCLUSION

For all the foregoing reasons, the Court should deny Oceana's Motion for Summary Judgment and enter Summary Judgment for Federal Defendants.

Dated: June 20, 2025

Respectfully submitted,

ADAM R.F. GUSTAFSON
Acting Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Erika Furlong
ERIKA FURLONG (PA Bar No. 319350)
Wildlife & Marine Resources Section
JENNIFER SUNDOOK (DC Bar No. 241583.)
Natural Resources Section
Trial Attorneys
150 M Street NE
Washington, DC 2002
(202) 305-0424 (Furlong)
(202) 305-0239 (Sundook)
Fax: (202)305-0275
Erika.Furlong@usdoj.gov
Jennifer.Sundook@usdoj.gov

Attorneys for Defendants

James C. Feldman (AK Bar No. 1702003)
Eva Sharf Oliver (*Pro Hac Vice*)
SUMMIT LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Phone: (206) 676-7000
jamesf@summitlaw.com
evao@summitlaw.com

Attorneys for At-Sea Processors Association, Alaska Groundfish Data Bank, and Groundfish Forum, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC., Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants, and AT-SEA PROCESSORS ASSOCIATION, *et al.*, Intervenor-Defendants.	No. 3:24-cv-00180-SLG

AT-SEA PROCESSORS ASSOCIATION'S, ALASKA GROUNDFISH DATA BANK'S, AND GROUNDFISH FORUM, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT (L.R. 16.3(c)(2))

Oceana, Inc. v. Nat'l Marine Fisheries Serv.
Case No. 3:24-cv-00180-SLG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES:

STATUTES:

REGULATIONS:

OTHER AUTHORITIES:

GLOSSARY OF TERMS

AP	Advisory Panel
APA	Administrative Procedure Act
APU	Alaska Pacific University
BSAI	Bering Sea and Aleutian Islands
CEA	Core Essential Fish Habitat Area
EA	Environmental Assessment
EFH	Essential Fish Habitat
EIS	Environmental Impact Statement
FE	Fishing Effects
FMP	Fishery Management Plan
GMFMC	Gulf of Mexico Fishery Management Council
GOA	Gulf of Alaska
HAPC	Habitat Area of Particular Concern
LEI	Long-Term Effects Index
MSA	Magnuson-Stevens Fishery Conservation and Management Act
MSST	Minimum Stock Size Threshold
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SFA	Sustainable Fisheries Act
SSC	Scientific and Statistical Committee
VMS	Vessel Monitoring System

I. INTRODUCTION

Every five years, the North Pacific Fishery Management Council ("the Council") in consultation with the National Marine Fisheries Service ("NMFS") reviews the best available science to determine if updates to Essential Fish Habitat ("EFH") designations are necessary for the Fishery Management Plans ("FMPs") regulating fishing in U.S. Federal waters off the coast of Alaska. After completing the most recent five-year review in 2023, the Council and NMFS amended the EFH provisions of the Alaska FMPs to incorporate new scientific information. Upset that NMFS did not include its proposal to restrict fishing in ninety percent of the Gulf of Alaska as part of its EFH update, Plaintiff Oceana, Inc., challenges the adoption of the EFH amendments and alleges that NMFS violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and the National Environmental Policy Act ("NEPA").

At-Sea Processors Association, Alaska Groundfish Data Bank, and Groundfish Forum (collectively "Intervenor-Defendants") intervened in this case to defend the EFH amendments because Plaintiff's claims are irreconcilable with governing law and contradicted by an extensive administrative record that supports NMFS's reasoned scientific judgments. For the reasons discussed below, Intervenor-Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment and grant Intervenor-Defendants' and Federal Defendants' cross-motions for summary judgment.

II. BACKGROUND

A. The Magnuson-Stevens Act and Regional Fishery Management Council Framework.

Marine fisheries management in U.S. Federal waters is governed primarily by the MSA.[1] Management under the MSA has been an open, transparent, and effective process

[1] 16 U.S.C. § 1801 *et seq.*

guided by science and collaboration among professional resource managers, regulators, and the public. Enacted in 1976, the MSA established eight regional fishery management councils comprised of members from commercial and recreational fishing interests as well as environmental, academic, and government representatives.[2] Among other responsibilities, the regional councils develop FMPs that comply with the MSA's requirements to promote sustainable fisheries.[3] The North Pacific Fishery Management Council is the regional council with "authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska."[4] In consultation with the Council, NMFS manages the highly productive groundfish fisheries off the coast of Alaska and ensures that the Council's proposed management measures comply with the MSA and its implementing regulations.[5] The Council's fishery management program is widely considered to be among the best in the world and has resulted in over 40 years of sustainable fisheries.[6]

FMPs are subject to the MSA's ten "national standards."[7] These standards require, among other things, that conservation and management measures "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[8] The standards also require that conservation and management measures

---

[2] *Id.* § 1852.

[3] *Id.* §§ 1852-1853.

[4] *Id.* § 1852(a)(1)(G).

[5] *Id.* § 1854; 50 C.F.R. § 600.305(a)(2).

[6] *See* SUPP00272 (citing N. Pac. Conservation and Spatial Mgmt. Areas in Alaska's EEZ (March 2023) ("NPFMC Conservation and Spatial Management Areas"), https://www.npfmc.org/wp-content/PDFdocuments/Publications/Conservation_Area_Summaries.pdf.

[7] 16 U.S.C. § 1851(a)(1)-(10); NMFS00699-700.

[8] 16 U.S.C. § 1851(a)(1). The "optimum yield" is the quantity of fish that "will provide the greatest overall benefit to the nation, particularly with respect to food production and

"be based upon the best scientific information available."[9] Implementing FMPs that comply with the MSA's ten national standards is a complicated process that requires balancing multiple objectives.[10]

B. The Sustainable Fisheries Act and The Designation of Essential Fish Habitat.

Recognizing the significance of healthy habitats to productive commercial and recreational fisheries, in 1996 Congress passed the Sustainable Fisheries Act ("SFA"),[11] which expanded the MSA's scope to include conservation measures aimed at protecting fish habitat.[12] The SFA directed NMFS and the regional councils to describe and identify EFH for each FMP, defined as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity,"[13] as well as to minimize to the extent practicable the adverse effects of fishing on EFH and identify other actions to encourage the conservation and enhancement of EFH.[14] Once NMFS has designated EFH for a species, federal agencies are required to consult with NMFS when authorizing, funding, or undertaking actions that may adversely affect EFH.[15] During EFH consultations with federal action agencies, NMFS provides science-based non-binding conservation recommendations for mitigating potential project-related adverse effects on EFH.[16]

---

recreational opportunities, and taking into account the protection of marine ecosystems." *Id.* § 1802(33)(A).

[9] *Id.* § 1851(a)(2).

[10] *Conservation Law Found. v. Ross*, 374 F. Supp. 3d 77, 90 (D.D.C. 2019).

[11] Pub. L. 104-297, § 108, 110 Stat. 3559.

[12] NMFS00841.

[13] 16 U.S.C. § 1802(10); 50 C.F.R. § 600.810.

[14] NMFS00713.

[15] 16 U.S.C. § 1855(b)(2).

[16] NMFS00707; COUN05133.

After Congress enacted the SFA, NMFS developed regulations to assist the regional councils with describing and identifying as well as conserving and enhancing EFH.[17] The EFH regulations specified ten EFH components applicable to every FMP, several of which are particularly relevant to the current lawsuit.[18] For example:

- Component 1 requires that FMPs describe and identify EFH for each managed species using text and maps.[19]
- Component 2 directs councils "to prevent, mitigate, or minimize any adverse effects from fishing, *to the extent practicable*, if there is evidence that a fishing activity adversely affects EFH in a manner that is *more than minimal and not temporary in nature*."[20]
- Component 6 provides that "FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for the adverse effects… especially in habitat areas of particular concern."[21]
- Component 10 provides that "Councils and NMFS should periodically review the EFH provisions of FMPs and revise or amend EFH provisions as warranted based on available information,"[22] and recommends a complete review of all EFH information every five years.[23]

---

[17] 50 C.F.R. § 600.815; NMFS00933.

[18] 50 C.F.R. § 600.815(a)(1)-(10); NMFS00713.

[19] 50 C.F.R. § 600.815(a)(1).

[20] *Id.* § 600.815(a)(2)(ii) (emphasis added).

[21] *Id.* § 600.815(a)(6).

[22] *Id.* § 600.815(a)(10).

[23] NMFS00713.

Based on the five-year review, councils may recommend FMP amendments to revise one or more EFH components within any of the FMPs under review.[24] Significantly, the MSA's EFH provisions do not require that councils do everything they can to protect EFH, nor do they mandate that conservation of EFH take priority over the MSA's other management goals.[25]

C. Previous Five-Year EFH Reviews and Amendments to the Alaska FMPs.

1. The 2005 Essential Fish Habitat EIS.

NMFS and the Council completed the first EFH review for the Alaska FMPs in 2005.[26] The review was supported by a comprehensive Environmental Impact Statement ("EIS"),[27] which employed a new modelling tool, the Long-Term Effects Index ("LEI model"), to bring together available information on fishing gear types, fishing intensity, and gear impacts and recovery rates for different habitat types to help predict the effects of fishing on habitat.[28] Despite some limitations, NMFS, the Council, and the Council's Scientific and Statistical Committee ("SSC") concluded that the LEI model incorporated the best available science and provided a reasonable approach to estimate and understand the impacts of fishing on habitat.[29] The 2005 EIS considered numerous EFH management alternatives and the Council and NMFS ultimately adopted a series of FMP amendments. These amendments implemented a suite of EFH conservation measures restricting bottom

---

[24] NMFS04042A. Any change to an FMP, regardless of how minor, requires an FMP amendment. *Id.*

[25] *Ross*, 374 F. Supp. 3d at 91-92.

[26] NMFS00714.

[27] *See* NMFS00841-03290 (2005 EFH EIS and appendices).

[28] COUN09743-44.

[29] *Id.*

fishing in particularly sensitive habitat areas in the Bering Sea, Aleutian Islands, and in the Gulf of Alaska.[30]

2. The 2010 and 2017 Five-Year EFH Reviews.

NMFS completed subsequent five-year EFH reviews in 2010 and 2017.[31] Both reviews examined all ten EFH components and determined that new information justified updating some, but not all, of the components for the Alaska FMPs.[32] The 2010 review concluded that fishing was not affecting the capacity of EFH to support the life history processes of any species.[33] The 2010 review resulted in the Council and NMFS preparing an Environmental Assessment ("EA") and an omnibus amendment package in 2012 that revised the EFH sections for five of ten EFH components in the Alaska FMPs.[34]

The next five-year review was completed in 2017 and conducted in much the same way as the prior review, with the notable exception of two advances in the way that NMFS and the Council analyze fishing effects on habitat. First, NMFS collaborated with scientists at Alaska Pacific University ("APU") to develop the Fishing Effects model ("FE model"), an iterative modelling tool tracking habitat transitions between disturbed and undisturbed states.[35] Like the LEI model, the FE model estimates benthic habitat disturbance from commercial fishing activities, however several improvements in the FE model exponentially

---

[30] COUN09745; *see also* NMFS00841-850 (summarizing alternatives and implementing Alternative 5C with expanded closures in the Aleutian Islands and Gulf of Alaska).

[31] NMFS00714; COUN09745-46.

[32] *See* NMFS00720 (Table 3 Roadmap to Ten EFH Components).

[33] NMFS08502; COUN19243.

[34] NMFS04039A; *see also* NMFS03377 (2012 EFH EA updating EFH components 1, 2, 4, 8, and 9); 77 Fed. Reg. 66,564 (Nov. 6, 2012) (Final Rule approving EFH amendments for five Alaska FMPs).

[35] NMFS00781; NMFS08552; COUN09746; COUN19246.

increased the Council's and NMFS's ability to analyze the effects of fishing on habitat.[36] The FE model incorporated Vessel Monitoring System ("VMS") data that tracked nearly all commercial fishing vessels in the North Pacific allowing for a more accurate evaluation of fishing effort, distribution, and the effects of fishing.[37] The FE model also made significant advancements in habitat categorization,[38] incorporated updated fishing gear parameters and information regarding habitat susceptibility and recovery dynamics, and allowed scientists to evaluate fishing effects and recovery over specific time intervals.[39] The FE model was reviewed by the Council and its subcommittees,[40] submitted for public comment,[41] and ultimately celebrated by NMFS for having "greatly enhanced our ability to estimate and understand fishing impacts."[42]

The second significant improvement in the 2017 five-year review involved the development and adoption of a hierarchal "three-tiered" approach to evaluate whether fishing is adversely effecting EFH in a manner that is more than minimal and not temporary—the legal threshold for whether mitigation measures are needed.[43] This methodology was developed by an SSC subcommittee comprised of scientists and managers from the Alaska Fisheries Science Center, NMFS Alaska Region Office, and APU, and was

[36] NMFS00781; NMFS08561. The term "benthic" refers to anything associated with or occurring on the bottom of a body of water.

[37] NMFS05556; NMFS08561; COUN19246.

[38] The FE model divided habitat into 26 unique features as opposed to the four features of the LEI model. COUN19246.

[39] COUN19246; NMFS04100A; NMFS03363.

[40] NMFS04107A; COUN09749.

[41] *See* COUN19218 (summarizing public testimony on the FE model and noting the SSC's support for the FE model).

[42] NMFS03363.

[43] NMFS08559; COUN19277.

approved by the Council.[44] The hierarchal approach considers impacts of commercial fishing, first, at the population level, and then uses objective criteria at the second and third levels to determine whether additional analysis is warranted to evaluate if habitat impacts are more than minimal or not temporary.[45]

To assist with this analysis, NMFS's stock assessment authors—the agency's foremost experts tasked with monitoring the health of a particular fish population—first consider the overall health of the population by examining the Minimum Stock Size Threshold ("MSST"). Next, the authors examine whether fishing activity is predicted to disturb more than ten percent of the species' most important "core" EFH area ("CEA"). Finally, the authors evaluate any relationships or plausible connections between species health (as measured by indices of growth-to-maturity, spawning success, breeding success, and feeding success) and reductions in habitat.[46] If any of the three levels indicate a correlation between fishing impacts to EFH and effects on species health, stock assessment authors can elevate the relevant species to the SSC and the Council's Plan Teams for development of mitigation measures.[47]

After completing the 2017 five-year review and utilizing the new FE model and hierarchal methodology, NMFS and the Council determined "the effects of fishing on EFH do not currently meet the threshold of more than minimal and not temporary, and mitigation action is not needed at this time."[48] Nevertheless, the Council and NMFS concluded that the best available science still warranted updating several of the other EFH components and

[44] COUN09755; COUN19280.

[45] NMFS08559.

[46] COUN09755-56.

[47] COUN19249-51.

[48] NMFS08561.

NMFS prepared an EA and omnibus amendment package updating the relevant EFH components for the Alaska FMPs.[49]

D. The 2023 Five-Year EFH Review.

In April 2019, NMFS and the Council began the fourth comprehensive five-year EFH review process.[50] Like the previous reviews, the primary objective was to survey the ten EFH components for each of the Alaska FMPs and revise or amend those components as warranted based on available information.[51] Building on the foundation of the prior reviews, NMFS completed the review in February 2023. NMFS and Council staff prepared a 205-page analysis evaluating fishing effects on EFH and explaining several advancements in the FE model parameters.[52] These advancements included incorporating additional VMS fishing effort data, updating species distribution models and maps to more accurately reflect the waters where managed species live, improving gear tables to better reflect the fishing gear types used in Alaska's commercial fisheries, and revising sediment and habitat information to incorporate longer recovery times.[53] The improved FE model resulted in robust information on fishing impacts, susceptibility, and recovery time for 103 species.[54]

With a wealth of new data and applying the hierarchal approach, none of the stock assessment authors concluded that fishing effects on their species were more than minimal and not temporary.[55] Accordingly, none of the authors recommended elevating any

---

[49] *See* NMFS03301 (2018 EA updating EFH components 1, 2, 4, 8, and 9); 83 Fed. Reg. 31,340 (July 5, 2018) (Final Rule approving EFH amendments for five Alaska FMPs).

[50] FR00002; NMFS00706-840.

[51] COUN05289.

[52] NMFS05540-5744.

[53] NMFS00783-85; NMFS05554-64.

[54] NMFS05541.

[55] NMFS00780; NMFS05542.

managed species for possible mitigation.[56] After reviewing this comprehensive analysis of fishing effects, the SSC recommended "the current EFH methodology and FE estimates as a reasonable basis for the determination of fishing impacts," and concurred "that no species needs to be elevated for mitigation due to fishing impacts."[57] The SSC concluded that the fishing effects evaluation "supports the continued conclusion that the adverse effects of fishing activity on EFH are minimal and temporary in nature."[58]

E. The 2024 EFH Omnibus Amendments to the Alaska FMPs and Oceana's Lawsuit.

Based on the 2023 five-year EFH review, "the Council concurred with the Plan Team and SSC consensus that the effects of fishing on EFH do not currently meet the threshold of more than minimal and not temporary, and that mitigation action is not needed at this time."[59] The Council also concluded that substantial new information was available to revise the EFH text and maps and several other EFH components for five of the Alaska FMPs and directed NMFS to prepare corresponding amendments for those FMPs.[60]

Just as it did after the previous five-year reviews, NMFS prepared a detailed EA for the EFH omnibus amendments, incorporating by reference the 2005 EFH EIS.[61] And just like the prior two EAs, the 2024 EA included two alternatives: (1) a preferred action alternative updating the applicable FMPs with the best available science from the five-year review process, and (2) a "no action" alternative which would maintain the status quo and

---

[56] NMFS00780.

[57] COUN01700.

[58] *Id.*

[59] NMFS00687; COUN05297.

[60] NMFS00652.

[61] NMFS00644-705; NMFS00654.

not update the relevant FMPs with new EFH information.[62] NMFS published a proposed rule for the EFH amendments in April 2024 and after notice and comment, adopted the final EFH amendments in July 2024.[63] Plaintiff filed this lawsuit in August 2024.[64]

III. STANDARD OF REVIEW

"Challenges under both the MSA and NEPA proceed under the Administrative Procedure Act's ("APA") familiar 'arbitrary and capricious' standard of review."[65] The APA directs courts to "hold unlawful and set aside" an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[66] "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[67] APA review is highly deferential and the agency's decision is entitled to a presumption of regularity.[68] "This traditional deference to the agency is at its highest where a court is reviewing an agency action that required a high level of technical expertise."[69] "In addition, courts pay agencies an extreme degree of deference when decisions involve complex judgments about sampling methodology and data analysis that are within the agency's technical expertise."[70]

---

[62] NMFS00655.

[63] FR00002; FR00005.

[64] Dkt. 1.

[65] *Ross*, 374 F. Supp. 3d at 88.

[66] 5 U.S.C. § 706(2)(A).

[67] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[68] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

[69] *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

[70] *Ross*, 374 F. Supp. 3d at 89 (internal quotations omitted).

IV. ARGUMENT

Primarily attacking the methodology and metrics underlying NMFS's scientific judgments, Plaintiff alleges the agency's approval of the EFH amendments for the five FMPs violates the MSA and NEPA.[71] Specifically, Plaintiff contends that NMFS (1) improperly concluded that effects of fishing were minimal and temporary and therefore do not require mitigation; (2) neglected to adopt measures to enhance and conserve EFH; (3) ignored available evidence related to long-lived habitat features and species life stages; and (4) did not consider a reasonable range of alternatives in adopting the EFH amendments.[72] Plaintiff's arguments are factually flawed and legally incorrect. The voluminous administrative record demonstrates that the Council's and NMFS's adoption of the EFH amendments was well-reasoned, relied on the best available science, and complied with all relevant requirements of the MSA and NEPA. NMFS's expert determinations are entitled to substantial deference, and the Court should decline Plaintiff's invitation to second-guess the methodology and data NMFS used to support its decision-making.

A. Oceana Has Waived Any Claims Not Raised in Its Opening Brief.

Count III of the First Amended Complaint alleges that NMFS violated NEPA by failing to analyze the impacts of the EFH amendments in an EIS.[73] Plaintiff's opening brief does not pursue this claim, and it is therefore waived.[74]

---

[71] *See* Dkt. 16 (Amended Complaint) ¶¶ 1-2.

[72] Dkt. 31 at 23-40.

[73] Dkt. 16 ¶¶ 101-110.

[74] *See Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 65 n.12 (D.D.C. 2014) ("But because Oceana does not invoke this theory in its briefing, and because APA cases are decided entirely on cross-motions for summary judgment, the Court will consider Oceana's EIS theory waived.").

B. NMFS Rationally Concluded Based on the Best Available Science that the Impacts from Fishing on EFH are Minimal and Temporary.

Plaintiff alleges that NMFS violated the MSA when it concluded that adverse effects from fishing on EFH are minimal and temporary and therefore do not require mitigation.[75] Plaintiff disagrees with two of the metrics—MSST and CEA—that NMFS used to help analyze the effects of fishing on EFH. Plaintiff's criticisms are misguided. NMFS is entitled to deference in selecting the appropriate methodology and metrics to assess fishing effects and Plaintiff's difference of opinion as to their suitability does not render the analysis arbitrary or capricious.

1. NMFS appropriately used Minimum Stock Size Threshold as one of several metrics to evaluate fishing effects.

Plaintiff asserts that NMFS's reliance on MSST to evaluate adverse fishing effects is unlawful.[76] Rehashing 20-year-old criticisms, Plaintiff contends that "MSST is not a habitat indicator,"[77] and that by using MSST as part of its analysis of fishing impacts, NMFS has conflated an obligation to prevent overfishing with its responsibilities to conserve EFH.[78] Plaintiff's argument misapprehends the role of MSST in the hierarchal impact assessment methodology and disregards the substantial deference afforded to agencies in selecting the metrics and data analysis that are within the agency's technical expertise.

At the first step of the hierarchal analysis, NMFS's stock assessment authors consider whether the population is above or below the MSST—the level below which a stock is in jeopardy of not being able to produce its maximum sustainable yield on a continuing basis.[79]

---

[75] Dkt. 31 at 23-30.

[76] *Id.* at 28-30.

[77] *Id.* at 12-14, 28.

[78] *Id.* at 28-29.

[79] NMFS08560; EML04056; *see also* NMFS05568-70 (Stock Author Fishing Effects Assessment Process). The MSA regulations define maximum sustainable yield as "the

If the population is below MSST and there is a plausible connection to reductions of EFH as the cause, the stock assessment author recommends that the SSC and Plan Teams develop mitigation measures.[80]

Plaintiff's MSST argument resurrects the decades-old criticisms of three individuals who were involved in the peer review of the EFH EIS's fishing effects evaluation in 2004.[81] NMFS explained at length at the time why it disagreed with those criticisms—primarily because the reviewers mistakenly assumed that MSST was the *only* metric used to assess impacts to habitat.[82] In response, NMFS noted, "the evaluations of habitat effects *were not limited to a[n] assessment of stock status relative to MSST, but considered a full set of more detailed information on stock status*," including detailed information that was not provided to the reviewers who had criticized MSST.[83] NMFS also noted that downward trends in MSST related to poor recruitment can provide valuable information to scientists about habitat disturbances long before a stock is on the verge of collapse.[84] NMFS ultimately made changes to the draft EIS to address the misconception that the fishing effects evaluation would rely on MSST alone.[85]

---

largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics…, and the distribution of catch among fleets." 50 C.F.R. § 600.310(e)(1)(i)(A).

[80] COUN19293.

[81] Dkt. 31 at 12-13.

[82] COUN19284; *see also* NMFS03256-57 (NMFS response to comment regarding MSST as a tool to evaluate present sustainability of managed fisheries).

[83] COUN19284 (emphasis added).

[84] *See* NMFS03257 ("considering the ability of a stock to remain above MSST is not an insensitive measure of the response of the stock to habitat perturbations.").

[85] *See* NMFS02034 (2005 EFH EIS explaining "[g]iven the apparent confusion some commenters expressed over how [NMFS] considered stock status in the analysis, NMFS

Despite NMFS's response to comments explaining the utility of MSST, Plaintiff nonetheless argues that MSST is only useful for determining if a species is overfished and that, by using MSST, NMFS has reduced the MSA's EFH requirements to surplusage.[86] This argument reflects a fundamental misunderstanding of the hierarchal approach to assessing fishing impacts. MSST is not a proxy for determining habitat disturbance. It is one tool in a holistic and multilayered approach that looks at several quantitative and qualitative factors to assess fishing impacts. The administrative record explains "[t]he Fishing Effects analysis considers impacts of commercial fishing first at the *population level* [MSST]," precisely because "EFH is defined for *populations* managed by Council FMPs."[87] Significantly, the analysis of fishing impacts does not end with the consideration of MSST—the fishing effects analysis "then uses objective criteria to determine whether additional analysis is warranted to evaluate if habitat impacts caused by fishing are adverse and more than minimal or not temporary."[88] These objective criteria include the consideration of reductions to CEA, which are calculated by the sophisticated FE model and which, itself, considers multiple inputs including fishing intensity, habitat categorization (sediment type), susceptibility and recovery, and gear parameters.[89]

The Council and NMFS have determined that MSST is a useful criteria for evaluating impacts to EFH.[90] Tellingly, Plaintiff does not identify a metric that is better-suited to help

---

modified the analytical approach in the final EIS to address whether stock status and trends indicate any potential influence of habitat disturbance due to fishing.").

[86] Dkt. 31 at 29.

[87] COUN09755, 09757 (emphasis added).

[88] COUN09755.

[89] COUN09757-59.

[90] *See, e.g.*, COUN19292-93 (SSC recommending three-tiered methodology utilizing MSST); NMFS03257 (noting utility of MSST in gauging stock response to habitat disturbance).

decisionmakers evaluate fishing effects.[91] "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."[92] "In addition, courts pay agencies an extreme degree of deference when decisions involve complex judgments about sampling methodology and data analysis that are within the agency's technical expertise."[93] NMFS has more than adequately explained why MSST is a useful tool to evaluate fishing effects on EFH.

2. NMFS appropriately used "Core EFH Area" to evaluate fishing effects.

If the population is above MSST, the stock assessment authors next examine trends in the amount of disturbed habitat in the CEA—the top 50% of suitable habitat for each species and life stage based on its summer distribution.[94] To accomplish this, NMFS overlays species distribution models on the updated FE model to estimate species-specific habitat disturbance from fishing.[95] Based on this modelling, authors determine whether ten percent or more of the CEA for a given species would be impacted by commercial fishing activities.[96] "The 10 percent threshold was selected based on the assumption that impacts to less than 10 percent of CEA means more than 90% of the CEA … was undisturbed, and therefore represented minimal disturbance."[97] If ten percent or more of the CEA is impacted, stock assessment authors examine the several indices described above to determine whether there are any correlations between those parameters and the proportion of CEA impacted by

---

[91] *See* COUN19016 (noting alternative metrics are the subject of ongoing discussions).

[92] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989).

[93] *Ross*, 374 F. Supp. 3d at 89 (internal quotations omitted).

[94] NMFS00687; EML03534.

[95] NMFS00687.

[96] NMFS08560.

[97] COUN20013.

fishing.[98] If a statistically significant correlation exists, the authors elevate the affected species for development of mitigation measures.[99]

Plaintiff criticizes NMFS's use of CEA as inconsistent with the MSA.[100] Plaintiff contends that CEA is a deficient metric because it (1) only analyzes fishing impacts to half of identified EFH, and (2) means that up to ten percent of the CEA can be affected without triggering an obligation to consider minimization of those effects.[101] Plaintiff is mistaken on both counts.

First, the CEA metric does not ignore fishing impacts to half of EFH but rather focuses on disturbances to the *most* suitable habitat for each species.[102] Almost all waters off the coast of Alaska are EFH for at least one species.[103] NMFS and the Council considered using other percentages (25%, 50%, and 95%) for CEA and, after applying these different thresholds for several species, concluded that the 50% threshold was most reliable in terms of neither overstating nor understating habitat disturbance.[104] Based on these observations,

---

[98] COUN09756; NMFS08560.

[99] COUN09756; COUN10131.

[100] Dkt. 31 at 30-31.

[101] *Id.*

[102] By focusing on the most important EFH areas for each species, the CEA metric effectively *lowers* the habitat disturbance threshold for elevating a species for mitigation. For example, if a species had a total EFH area of 100 square miles, and mitigation were triggered by 10% habitat disturbance, 10 square miles of habitat would need to be disturbed before a species was automatically elevated for mitigation. The CEA—making up the most important EFH areas for that same species—would be 50 square miles and automatic mitigation would be triggered if only 5 square miles of EFH is disturbed, making it a more sensitive metric that lowers the threshold for elevating a species for mitigation.

[103] NMFS00659.

[104] *See* COUN19293-95 (applying 25%, 50%, and 95% CEA quantiles to Pacific Ocean perch and red king crab); *see also* COUN19295 ("[t]he lower levels of apparent impact for the 25% and 50% quantiles are more representative of levels of impact to habitat truly essential for [the sampled species].").

the Council's Fishing Effects Subcommittee "continue[d] to recommend the 50% quantile to represent the 'core EFH' area to avoid the likelihood that important areas are excluded (if using the smaller area, 25% quantile) and to avoid statistically minimizing the amount of habitat reduction by using the larger, 95% quantile."[105]

Second, contrary to Plaintiff's contention, consideration of mitigation is not solely contingent on more than ten percent reduction in CEA. While exceeding the ten percent disturbance threshold results in a stock automatically being elevated for additional analysis and mitigation recommendations, stock assessment authors have the discretion to elevate a species for additional analysis and mitigation *even if less than ten percent of a species' CEA is projected to experience habitat disturbance*.[106] Indeed, "[t]he SSC subcommittee noted that the 10% threshold does not preclude stock assessment authors from completing the evaluation for levels of habitat disturbance less than 10%,"[107] leaving stock assessment authors free "to perform additional analysis if other data suggested that impacts may be affecting the population."[108]

Courts have previously rejected Plaintiff's efforts to dictate the data and metrics that NMFS uses to make highly technical management decisions implicating the agency's

[105] COUN19293-96; COUN19217.

[106] NMFS00687; NMFS00786.

[107] NMFS00687.

[108] *Id.*; *see also* NMFS780 (noting additional analysis available for species if CEA disturbance was greater than 10% "*or if the stock author chose to*") (emphasis added); NMFS05569 ("[Stock Authors] were not precluded from elevating a potential impact if they felt it was necessary for species below the ≥ 10% threshold.").

scientific expertise.[109] Here, the Council and NMFS have rationally explained why MSST and CEA are useful metrics for evaluating habitat disturbance. Nothing more is required.[110]

C. NMFS Reasonably Concluded that Current Management Measures are Sufficient to Conserve and Enhance EFH.

Plaintiff alleges that NMFS was required to develop and implement additional conservation and enhancement measures to compensate for adverse effects from fishing and non-fishing activities, irrespective of whether any such measures are actually necessary.[111] According to Plaintiff, NMFS "was obligated to identify *other* measures to conserve and enhance EFH, but did not do so."[112] Plaintiff's argument that the MSA requires every EFH amendment to include *new* conservation and enhancement measures is contrary to the plain text of the EFH regulations and disregards the agency's expert determination that existing management measures are sufficient to conserve and enhance EFH.

1. The EFH regulations do not require *new* conservation and enhancement measures.

Plaintiff's assertion that each round of EFH amendments requires *new* conservation and enhancement measures in addition to existing measures is irreconcilable with the plain text of the EFH regulations.[113] The MSA requires that FMPs "minimize to the extent

---

[109] *See Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 30-32 (D.D.C. 2021) (rejecting Oceana's argument that NMFS should have relied on different data to assess dusky shark bycatch); *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005) (noting the deference due to the agency when it provides a reasoned explanation for its choice of data).

[110] *See Nat. Res. Def. Council v. Evans*, 254 F. Supp. 2d 434, 441 (S.D.N.Y. 2003) (deferring to NMFS's expertise, supported by the record, that fishing activity did not have identifiable adverse effects on EFH).

[111] Dkt. 31 at 31-33.

[112] *Id.* at 32 (emphasis added).

[113] *Id.*

practicable adverse effects on habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat."[114] The EFH regulations in turn provide that "FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for [] adverse effects…."[115] Plaintiff attempts to graft onto the EFH regulations a nonexistent requirement that NMFS identify *new* conservation and enhancement measures in addition to existing measures with each new round of EFH amendments.[116] But the plain language of the MSA and the EFH regulations contains no such requirement so long as the relevant FMP "identifies actions to encourage the conservation and enhancement," of EFH.[117] Plaintiff cannot credibly argue that the five FMPs subject to the challenged EFH amendments do not identify conservation and enhancement measures.[118]

Conspicuously absent from Plaintiff's argument is citation to *any* caselaw supporting its novel interpretation of the EFH regulations.[119] Indeed, several courts have considered

---

[114] 16 U.S.C. § 1853(a)(7).

[115] 50 C.F.R. § 600.815(a)(6).

[116] Dkt. 31 at 32.

[117] 50 C.F.R. § 600.815(a)(6); *see also* 50 C.F.R. § 600.815(a)(2)(ii) (stating that "[a]mendments to the FMP or to its implementing regulations must ensure that the FMP *continues to minimize* to the extent practicable adverse effects on EFH caused by fishing.") (emphasis added).

[118] *See* NMFS00793-98 (identifying existing EFH habitat conservation measures); EML01161-65 (EFH Areas Protected from Fishing in the U.S. North Pacific); COUN21119-171 (Gulf of Alaska FMP Conservation and Management Measures); COUN20702-704 (Bering Sea and Aleutian Islands FMP EFH and HAPC conservation measures); COUN20272-305 (Arctic FMP Conservation and Management Measures); COUN20412-430 (Crab FMP Management Measures); COUN21558-651 (Salmon FMP EFH and HAPC Appendix).

[119] *See* Dkt. 31 at 31-33 (citing no cases supporting Argument III).

and rejected variations of Plaintiff's argument. In *American Oceans Campaign v. Daley*,[120] the District Court rejected Plaintiff's argument that the EFH amendment developed by the Gulf of Mexico Fishery Management Council ("GMFMC") and NMFS failed to minimize the adverse effects of fishing, holding NMFS's "conclusion that the EFH Amendment did not need to adopt new measures to mitigate the adverse effects of fishing, since existing management measures sufficiently mitigated those effects, and since the GMFMC lacked evidence of the adverse effects of a particular fishing practice on EFHs, was reasonable."[121]

In *Oceana, Inc. v. Raimondo*,[122] the District Court rejected Plaintiff's argument that NMFS was required to initiate consultation regarding adverse effects to EFH where the agency had already determined that existing management measures were sufficient.[123] Other courts have similarly concluded that NMFS need not impose additional conservation measures where existing measures are adequate or where there is no indication of adverse effects.[124] Plaintiff's opening brief offers no legal authority to the contrary.

---

[120] 183 F. Supp. 2d 1 (D.D.C. 2000). In 2002, Oceana merged with American Oceans Campaign. *See* Oceana–About Us, https://usa.oceana.org/about-us/.

[121] *Id.* at 13-14.

[122] No. 21-CV-05407-VKD, 2024 WL 3236723 (N.D. Cal. June 28, 2024).

[123] *See id.* at *14 ("NMFS need not adopt measures to minimize effects on EFHs when the available scientific evidence suggests no such measures are required or that sufficient measures are already in place.").

[124] *See, e.g. Nat. Res. Def. Council*, 254 F. Supp. 2d at 442 ("The Court finds that it was reasonable for Defendants not to impose new restrictions on bottom-tending mobile gear given the lack of evidence that the gear had an identifiable adverse effect."); *Friends of Del Norte v. Cal. Dep't of Transp.*, No. 18-CV-00129-JD, 2023 WL 2351649, at *4, *11 (N.D. Cal. Mar. 3, 2023) (rejecting argument that project sponsor violated MSA's EFH provisions where NMFS concluded that mitigation measures were sufficient to protect EFH and no additional practical measures could be taken).

2. NMFS rationally concluded that existing management actions taken over the last two decades sufficiently conserve and enhance EFH.

As part of the 2023 five-year EFH review, NMFS and the Council surveyed an extensive suite of existing habitat conservation and enhancement measures and considered whether new conservation and enhancement recommendations were warranted as part of the EFH amendments.[125] These existing measures include the establishment of numerous Habitat Protection Areas, Habitation Conservation Areas, Research Areas, Conservation Zones, and modified gear zones across vast areas of the North Pacific where bottom contact trawl gear is prohibited.[126] These measures encompass substantial management actions to protect EFH in the Gulf of Alaska.[127]

For example, the Council and NMFS implemented the Gulf of Alaska Slope Habitat Conservation Area establishing bottom trawl closure areas for vast stretches (totaling 2,112 square nautical miles) of slope from Yakutat to Unalaska to provide protection for vulnerable deep sea coral and sponge habitats.[128] In response to surveys revealing dense aggregations of Primnoa (red tree) corals in southeast Alaska, the Council and NMFS created the Gulf of Alaska Coral Habitat Protection Area.[129] Recognizing the significance of these corals in providing breeding areas, refuge, and rich feeding grounds for a wide variety of species including rockfish and crabs, this management action designated the coral area as a Habitat Area of Particular Concern ("HAPC") and prohibited the use of all bottom contact fishing

---

[125] *See* NMFS00793-98 (Existing EFH Habitat Conservation Measures).

[126] *See* EML01161-65 (EFH Areas Protected from Fishing in the U.S. North Pacific); *see also* NPFMC Conservation and Spatial Management Areas *supra* n.6.

[127] EML01164.

[128] 50 C.F.R. § 679.22(b)(10); EML01162; NPFMC Conservation and Spatial Management Areas at 11.

[129] 50 C.F.R. § 679.22(b)(9); EML01162-64; NPFMC Conservation and Spatial Management Areas at 10.

gear.[130] All told, the Council and NMFS have enacted over a dozen different management measures closing hundreds of thousands of square nautical miles to bottom trawling off the coast of Alaska.[131]

NMFS rationally concluded that these comprehensive existing management measures are sufficient to conserve and enhance EFH, noting "[t]he Council and NMFS have several management measures in place, including habitat area closures and [HAPCs], which meet the requirements of EFH component 6."[132] This determination implicates NMFS's scientific expertise and the Court should decline Plaintiff's invitation to second-guess the adequacy of these measures.[133]

---

[130] *Id.*

[131] EML01161-65.

[132] FR00003. Plaintiff's suggestion that the Council disregarded the Advisory Panel's ("AP") recommendation to adopt new conservation and enhancement measures mischaracterizes the record. Dkt. 31 at 32. The language cited by Plaintiff is from the rationale supporting an amendment to an AP motion recommending that the Council initiate the process of updating the FMPs based on the 2023 five-year review. COUN03497. The AP declined to include this language when it recommended that the Council adopt the EFH amendments ten months later. COUN05302.

[133] *See Pritzker*, 24 F. Supp. 3d at 59 ("[I]n the context of judicial review of an FMP, [i]t is therefore especially appropriate for the Court to defer to the expertise and experience of those individuals and entities—the Secretary, the Councils, and their advisors—whom the [MSA] charges with making difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors.") (internal quotations omitted); *see also Oceana, Inc. v. Raimondo*, 2024 WL 3236723, at *14 (finding NMFS's assessment that sufficient measures were in place to protect EFH was rationally connected to evidence in the record and consistent with the MSA).

D. NMFS Properly Relied on the Best Available Science to Support its Fishing Effects Assessment.

Plaintiff alleges that NMFS violated the MSA by disregarding available evidence in its fishing effects assessment.[134] Specifically, Plaintiff contends that NMFS neglected to consider information demonstrating subadult and juvenile fish rely on benthic habitat features.[135] Plaintiff also asserts that NMFS ignored evidence that important structure forming habitat features reside at depths shallower than 300 meters and take more than 50 years to recover.[136] Plaintiff's arguments ignore extensive explanations in the administrative record detailing why the Council and NMFS used the data and methodology that it did, and misconstrues the best available science standard and the deference afforded to the agency in determining what the best available science is.

1. The MSA and EFH regulations require that NMFS and the Council use the best available scientific information.

The MSA and the EFH regulations both require that conservation and management measures be based upon the best scientific information available.[137] "The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise. Under this standard, an agency must not disregard available scientific evidence that is in some way better than the evidence [it] relies on. The standard does not, however, require an agency to conduct new tests or make decisions on data that does not yet exist."[138] The best available science standard "does not

---

[134] Dkt. 31 at 31-36.

[135] *Id.* at 35-36.

[136] *Id.* at 33-35.

[137] 16 U.S.C. § 1851(a)(2); 50 C.F.R. § 600.815(a)(2)(i).

[138] *Locke*, 776 F. 3d at 995 (internal quotations and citations omitted, brackets in original); *see also Gutierrez*, 394 F. Supp. 2d. at 157 ("[T]he [NMFS must] utilize the best scientific data *available,* not the best scientific data *possible.*") (emphasis in original).

require the NMFS to rely upon perfect or entirely consistent data, but rather is a practical standard requiring only that fishery regulations be diligently researched and based on sound science."[139] "[W]hat constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference."[140]

2. NMFS considered information regarding the effects of fishing on EFH across multiple life stages and rationally explained its decision to combine data for certain life history stages.

Plaintiff's argument that NMFS neglected to consider the effects of fishing on habitat essential for subadults and juvenile fish disregards the administrative record and misinterprets the best available science standard.[141]

The EFH regulations specify four different levels (1 through 4) for regional management councils and NMFS to use for organizing the information necessary to describe and identify EFH.[142] Each level corresponds to the availability of data about a particular species or life stage with Level 4 representing the highest quality data in terms of detail.[143] Councils strive to describe habitat based on the highest level of detail available.[144] To the extent possible, NMFS identifies the level of information for each species at the early juvenile, subadult, and adult life stages, however, where information on a given species or life stage is lacking, "and habitat usage cannot be inferred from other means, *such as information on a similar species or another life stage*, EFH should not be designated."[145]

---

[139] *Raimondo*, 530 F. Supp. 3d at 29 (internal quotations omitted).

[140] *Locke*, 776 F. 3d at 995.

[141] Dkt. 31 at 35.

[142] 50 C.F.R. § 600.815(a)(1)(iii); NMFS00726-27; *see also* NMFS08221 (App'x A Definitions of EFH Levels).

[143] NMFS08221; 50 C.F.R. § 600.815(a)(1)(iii)(A)(1)-(4).

[144] 50 C.F.R. § 600.815(a)(1)(iii)(B).

[145] *Id.* (emphasis added).

Selectively citing out of context the SSC's observation of "the apparent mismatch between the multiple life stages for which EFH has been defined and the evaluation of fishing effects for only adult life stages,"[146] Plaintiff misleadingly suggests that NMFS disregarded information about subadult and juvenile fish life stages in designating EFH. Placed in context, the cited document *explains* that data limitations for juvenile and subadult life stages necessitated combining data across species' life history to adequately determine EFH and the SSC's *support* for this approach.[147] Indeed, the SSC acknowledged that additional information was needed for certain species and life stage combinations that were poorly represented in survey data, but that "changing [species distribution models] was not possible under the proposed timeline due to resource limitations."[148] Accordingly,

> **[t]he SSC suggests consideration during the next 5-year EFH review cycle of whether subsequent evaluation should consider other life stages for which EFH has been defined,** with explicit consideration of whether [species distribution model]-based EFH definitions for other life stages are sufficiently representative for FE evaluation given potential limitations in the data available to inform EFH definitions for earlier life stages.[149]

NMFS heeded the SSC's advice, noting in its response to comments that collecting and incorporating additional data about juveniles and subadults was an "ongoing research priority for future reviews."[150]

---

[146] Dkt. 31 at 35 (citing COUN03445).

[147] *See* COUN03437 (noting additional information is needed for some species and life stages that are poorly represented in survey data and determinations for juvenile and subadult life stages may not be possible); *see also* NMFS03445 ("The SSC supports EFH and FE evaluation for species complexes or by combining data across species' life history stages as necessary to adequately determine EFH and evaluate fishing effects.").

[148] COUN03437.

[149] COUN03445 (bold in original).

[150] FR00002-03.

Plaintiff mischaracterizes the agency's response as a "future promise of compliance with the law,"[151] but this criticism is misplaced and misconstrues the best available science standard. NMFS is not required to have perfect data on all species across all life stages, nor is the agency required to perform additional science or modelling that it lacks the time and resources to complete.[152] NMFS complied with the MSA's requirements to use the best scientific information available as part of the EFH review process. The administrative record rationally explains why NMFS combined data across species' life stages to account for data limitations for certain species at the juvenile and subadult life stages.[153] This comports with the best available science standard and with the EFH regulations' guidance that EFH can properly be inferred from another life stage where information is lacking.[154]

3. NMFS appropriately used its scientific expertise to incorporate longer recovery times and the depths of benthic features into the Fishing Effects model.

Plaintiff argues that NMFS's fishing effects analysis failed to properly account for longer recovery times and the depths of benthic features.[155] Plaintiff contends that the agency's FE model disregarded the presence of certain corals, sponges, and sea pens at depths shallower than 300 meters, and that these habitat features are slower to recover from disturbance than the FE model accounts for.[156] According to Plaintiff, these supposed shortcomings underrepresent the impacts of fishing and render the entire fishing effects

[151] Dkt. 31 at 35.

[152] *See Nat. Res. Def. Council*, 254 F. Supp. 2d at 440 ("Since neither the [MSA] nor the [EFH] regulation requires the Council to affirmatively conduct research to better identify EFHs and the adverse effects of fishing on them, reliance on the best *available* scientific information is sufficient.") (citation omitted, emphasis in original).

[153] COUN03437-45.

[154] 50 C.F.R. § 600.815(a)(1)(iii)(B).

[155] Dkt. 31 at 33-35.

[156] *Id.* at 33-34.

analysis arbitrary and capricious.[157] Again, the administrative record provides reasoned explanations for the depths, recovery times, and substrates that NMFS used in the FE model. While Plaintiff may prefer that NMFS use different metrics to make the effects of fishing seem greater than they actually are, such scientific judgments related to the FE model are squarely within the agency's expertise and are entitled to deference.

The incorporation of longer recovery times was one of several advancements in the FE model from the prior five-year EFH review.[158] In response to SSC concerns that the longest recovery time incorporated into the prior version of the FE model may not capture the recovery time needed for long-lived species—in particular hard corals found on rocky substrate at deep depths—NMFS added a deep and rocky substrate category with a recovery time of 10-50 years to the updated FE model.[159] Nevertheless, Plaintiff argues that NMFS should have instead used more conservative recovery times to account for coral that may need 100 years or more to fully recover.[160] But the administrative record explains in technical detail the calculations used by NMFS to determine the proper recovery interval and why this interval is appropriately representative for the long-lived species category in the FE model.[161] This scientific determination is precisely the type of judgment that NMFS is entrusted to make and for which it is entitled to substantial deference.[162]

---

[157] *Id.* at 34-35.

[158] NMFS00784.

[159] COUN09752-53; COUN10126-27.

[160] Dkt. 31 at 8, 34.

[161] *See* COUN09794 (incorporation of longer recovery time into FE model formula); COUN10126-27 (inclusion of long-lived species on deep and rocky habitats); COUN10157-59 (explaining how the FE model computes the amount of recovery time based on sediment class); COUN10159 (noting the mean recovery time for long-lived species is 22.5 years).

[162] *See Ross*, 374 F. Supp. 3d at 110 ("The weighing of relevant factors is a judgment left to the Agency. That [plaintiff] would have reached a different conclusion is of little moment under [the arbitrary and capricious] standard of review.").

Plaintiff's argument that NMFS discounted evidence of long-lived habitat features at depths shallower than 300 meters similarly fails.[163] Again, NMFS rationally explained why it used a 300-meter depth, finding the highest density of long-lived corals at depths of 400–700 meters, but nonetheless using a more conservative depth of 300 meters to be precautionary.[164] Significantly, NMFS's assumptions regarding coral and sponge distribution depths were "validated with visual observations in the field that confirmed that coral and sponge ecosystems occur at predictable locations."[165]

Plaintiff contends that NMFS should have incorporated unvalidated "evidence" of corals and sponges occurring at depths shallower than 300 meters.[166] But agency experts explained that Plaintiff's preferred coral and sponge distribution models for the Gulf of Alaska had not yet been validated.[167] While Plaintiff may favor incorporating unvalidated deep sea coral and sponge distribution models into the FE model,[168] it is within the agency's

[163] Dkt. 31 at 34.

[164] NMFS00784; COUN09752; NMFS05561.

[165] EML00897; *see also* NMFS00784 (noting video analysis of NMFS surveys confirmed highest densities at depths from 400–700 meters with bedrock or cobble substrates).

[166] Dkt. 31 at 33-34.

[167] *See* EML00894-95 (responding to Oceana's inquiry about the FE model's coral depth metrics by noting Gulf of Alaska coral and sponge distribution models have not been systematically validated to same extent as the Bering Sea and requesting Oceana's support for validating GOA models); *see also* COUN09765 (Validation of Coral and Sponge Modeling in the GOA); COUN03443 (SSC recommendation that NMFS "incorporate results from the 2020-2024 Alaska Deep-Sea Coral and Sponge Initiative, *when available*…") (emphasis added); COUN05002, 05011 (updating Council on 2020-2024 Deep Sea Coral & Sponge Initiative and GOA model validation progress).

[168] *See* NMFS11166 (Oceana comment letter noting "we disagree with the analysts' recommendation that integrating the coral and sponge habitat models for the Gulf of Alaska should be postponed."); *see also* EML01158 (email from NMFS scientist noting Oceana "want[s] best available science, except waiting for validated coral and sponge models is a no go.").

discretion to determine what constitutes the best available science.[169] NMFS appropriately used its expertise to incorporate validated data into the FE model indicating the highest density of corals and sponges at depths of 400–700 meters. "The fact that the Service plainly has a rational basis for its determination supported by facts found and explained in the record, even if its conclusion is not the one [plaintiff] prefers, is sufficient to uphold this action."[170] Accordingly, summary judgment in favor of Intervenor-Defendants and Federal Defendants is appropriate on this claim.

E. NMFS's Environmental Assessment Considered a Reasonable Range of Alternatives.

The EA supporting the EFH Amendments evaluated two alternatives: (1) a preferred alternative that would amend the applicable FMPs to incorporate the updated EFH information based on the best available science identified during the 2023 five-year review, and (2) a "no action" alternative, which would maintain the status quo, and not update the EFH provisions of the FMPs with new information.[171] Disappointed that the Council and NMFS did not advance Oceana's proposal to restrict bottom trawling in *ninety percent* of the Gulf of Alaska as part of the effort to update EFH information for the relevant FMPs,[172] Plaintiff contends that NMFS failed to consider a reasonable range of alternatives in violation of NEPA.[173] Extensive legal authority provides that an EA considering only a preferred alternative and a no action alternative complies with NEPA, especially where the agency determines that the action will not have significant environmental impacts. Further,

---

[169] *Locke*, 776 F. 3d at 995.

[170] *Ross*, 374 F. Supp. 3d at 110.

[171] NMFS00655.

[172] *See* COUN05170 ("…with this proposal 90% of the Gulf of Alaska proposal area would be protected year-round from groundfish bottom trawling, totaling 871,556km^2.").

[173] Dkt. 31 at 36-40.

NEPA does not require that agencies consider unreasonable alternatives that do not meet the purpose or need of the proposed action.

1. An agency's obligation to consider alternatives in an Environmental Assessment is less rigorous than in an EIS, and NMFS appropriately considered a preferred alternative and a no action alternative.

Under NEPA, "[j]udicial review of the range of alternatives considered by an agency is governed by a rule of reason that requires an agency to set forth only those alternatives necessary to permit a reasoned choice."[174] There is no "minimum number of alternatives that an agency must consider,"[175] and the Ninth Circuit has "join[ed] our sister circuits in holding that an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS."[176] In reviewing the sufficiency of the alternatives considered in an EA, the Ninth Circuit has "repeatedly held that an agency satisfies NEPA when it considers only two alternatives—action and no action."[177]

An EA's consideration of just two alternatives is especially appropriate where the agency determines that the action would not have significant environmental effects.[178] In *Earth Island Institute v. United States Forest Service*,[179] the Ninth Circuit held that "it makes little sense to fault an agency for failing to consider more environmentally sound alternatives to a project which it has properly determined, through its decision not to file an impact statement, will have no significant environmental effects anyway."[180] That is precisely the

---

[174] *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014).

[175] *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005).

[176] *Id.*

[177] *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1065 (9th Cir. 2023) ("*Earth Island II*").

[178] *Id.* at 1066.

[179] 697 F.3d 1010 (9th Cir. 2012) ("*Earth Island I*").

[180] *Id.* at 1023.

situation here. After completing its EA, NMFS prepared a Finding of No Significant Impact ("FONSI") for the EFH amendments,[181] concluding that the action was minor in scale, was not expected to result in any significant impacts to marine resources or parts of the human environment, and would simply benefit species and fisheries management by incorporating more accurate EFH information.[182] Plaintiff does not challenge this determination or the issuance of a FONSI.[183] The Ninth Circuit has consistently held that agencies comply with NEPA when they consider only two alternatives in similar circumstances, and this Court should do the same.[184]

In addition to satisfying the requirements of NEPA, the EA's consideration of two alternatives is consistent with prior agency practice for the 2012 and 2018 EFH amendments, where NMFS prepared EAs considering preferred and no action alternatives that are functionally identical to the alternatives in the 2024 EA.[185] Ironically, in 2018 Plaintiff found these same two alternatives sufficient and *encouraged* NMFS to select the preferred alternative.[186] The Ninth Circuit has cautioned, "[a] court should hesitate before construing

---

[181] NMFS00011-16.

[182] NMFS00012.

[183] *See* Part IV.A *supra*.

[184] *See Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 602 n.11 (9th Cir. 2010) ("[t]o the extent that [Plaintiff] is complaining that having only two final alternatives—no action and a preferred alternative—violates [NEPA's] regulatory scheme, a plain reading of the regulations dooms that argument.").

[185] *See* NMFS03310 (description of alternatives in 2018 EA); NMFS03385 (description of alternatives in 2012 EA).

[186] *See* COUN20254 ("Oceana recommends that the Council select Alternative 2 for each of the 8 action items in the EFH Omnibus Amendment package…. We support the EFH conservation actions taken by the NPFMC thus far, and urge the agency to select Alternative 2.").

a statute in a way that renders years of consistent agency practice unlawful,"[187] and this Court should decline Plaintiff's invitation to do so here.

2. Oceana's proposal to restrict fishing in the Gulf of Alaska does not meet the purpose and need of the EFH amendments action.

Even if NEPA obliged NMFS to consider more than two alternatives in the EA, NMFS still had no obligation to consider Plaintiff's proposal because it does not meet the purpose and need of the EFH amendments action. Courts analyze the reasonableness of an alternative with reference to the stated purpose and need of the agency action and an "agency need only evaluate alternatives that are reasonably related to the purposes of the project."[188] "The identification of what particular combination of alternatives protects EFH and therefore warrants detailed consideration lies within the Secretary's 'area of special expertise' and is entitled to deference."[189]

The purpose of the EFH omnibus amendments is to comply with the MSA's EFH provisions by updating the five Alaska FMPs to reflect new information from the 2023 five-year review.[190] Plaintiff does not dispute the purpose and need statement is appropriate.[191] Rather, Plaintiff argues that its proposal to restrict fishing in 90 percent of the Gulf of Alaska is reasonable because it invokes a single EFH component.[192] Plaintiff is mistaken.

---

[187] *Cnty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1024 (9th Cir. 2017).

[188] *League of Wilderness Defs. v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (internal quotations omitted).

[189] *Oceana, Inc. v. Evans*, CIV.A.04-0811(ESH), 2005 WL 555416, at *35 (D.D.C. Mar. 9, 2005).

[190] *See* NMFS00652 (Purpose and Need Statement).

[191] Dkt. 31 at 38-40.

[192] *Id.* at 38-39.

Here, NMFS examined all ten EFH components as part of the five-year review process.[193] That review ultimately reflected a need to update several, but not all, EFH components for five different FMPs.[194] Notably, the best available science *did not* reflect a need for additional conservation measures beyond the extensive habitat protection measures already in place.[195] Plaintiff's proposal, however, offered only conservation measures—and extreme ones at that—for a single FMP making it pertinent to only a tiny fraction of the issues addressed though the five-year review process and irrelevant to the components that the review indicated actually needed updating.[196] Courts have observed "[t]he [MSA's EFH] provision does not require Councils to do everything they can to protect essential fish habitat"[197] and have previously cautioned "Oceana's singular focus on alternatives that close fishing grounds in order to protect EFH ignores [the MSA's] statutory mandates and effectively reads 'practicable' out of the MSA."[198] This Court should similarly reject the argument that NMFS violated NEPA by not advancing Plaintiff's misguided proposal that does not satisfy the purpose or need of the EFH amendments action.[199]

---

[193] *See* FR00003 (noting the five-year review examined "each of the 10 EFH components in detail" and "focused on issues ripe for decision during this review period.").

[194] *See* NMFS00649 (ES Table 1) (identifying new information warranting updates to EFH Component 1 (EFH descriptions and identification), Component 2 (fishing activities that may adversely affect EFH), Component 4 (non-fishing activities that may adversely affect EFH), Component 7 (prey species lists and locations), and Component 9 (research and information needs) for the five FMPs).

[195] *See* NMFS00793-98 (surveying existing conservation and enhancement measures); FR00003 (concluding existing management measures satisfy the conservation and enhancement requirements of EFH component 6).

[196] *Id.*; COUN05158.

[197] *Ross*, 374 F. Supp. 3d at 91 (citations omitted).

[198] *Oceana, Inc. v. Evans*, 2005 WL 555416, at *35.

[199] *See Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 240, 243-44 *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) ("plaintiff is essentially arguing that the 'reasonable range of

Oversimplifying complex fisheries management decisions, Plaintiff also contends that its proposal to restrict fishing in the Gulf of Alaska is reasonable because the Council and NMFS previously implemented closures in the Bering Sea and Aleutian Islands ("BSAI").[200] Plaintiff ignores the specific circumstances justifying the conservation measures established for the BSAI, as well as the contemporaneous decision to implement closures—albeit narrower ones—for sensitive habitat areas in the Gulf of Alaska.[201] EFH conservation measures are not one-size-fits-all and what might be suitable in the BSAI is not necessarily appropriate for management in the Gulf of Alaska's unique ecosystem. Indeed, the significant differences between the ecosystems of the Gulf of Alaska and the BSAI are reflected by the fact that the groundfish fisheries for these two distinct regions are managed under two separate FMPs.[202]

In sum, the EA considered a reasonable range of alternatives and NMFS was not obliged to consider Plaintiff's proposal that does not meet the purpose and need of the EFH amendments action. Summary judgment in favor of Intervenor-Defendants and Federal Defendants on Plaintiff's NEPA claim is appropriate.

F. Vacatur Is Not the Appropriate Remedy.

Walking back the relief requested in its Amended Complaint (vacatur of the EFH amendments and supporting EA, and a new NEPA analysis to be completed within one year of the Court's decision),[203] Plaintiff's opening brief instead seeks remand to the agency with

---

alternatives' required under NEPA must include Oceana's proposals…. a failure to implement Oceana's exact proposals is not sufficient to invalidate the EIS.").

[200] Dkt. 31 at 37.

[201] EML01162.

[202] *See* COUN20581 (BSAI FMP); COUN21101 (GOA FMP).

[203] Dkt. 16 at 25.

instructions from the Court that NMFS rectify any deficiencies within 18 months.[204] In the event that the Court finds any merit to Plaintiff's claims—and it should not—Intervenor-Defendants agree that remand to the agency without vacatur would be appropriate.[205]

V. CONCLUSION

NMFS rationally exercised its expertise to evaluate the effects of fishing on EFH and its methodology, metrics, and reasoned scientific judgements are entitled to substantial deference. Furthermore, the EA considered a reasonable range of alternatives and NMFS was not obliged to advance Plaintiff's proposal that does not meet the purpose and need of the action. For the reasons set forth above, Intervenor-Defendants respectfully request the Court deny Plaintiff's motion for summary judgment and grant Intervenor-Defendants' and Federal Defendants' cross-motions for summary judgment.

DATED this 20th day of June, 2025.

SUMMIT LAW GROUP, PLLC

s/ James C. Feldman
James C. Feldman (AK Bar No. 1702003)
jamesf@summitlaw.com
Eva Sharf Oliver (*Pro Hac Vice*)
evao@summitlaw.com

Attorneys for At-Sea Processors Association, Alaska Groundfish Data Bank, and Groundfish Forum, Inc.

[204] Dkt. 31 at 40-41.

[205] *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.").

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 9,993 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(1).

s/ James C. Feldman
James C. Feldman

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2025, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF system. Participants in this Case No. 3:24-cv-00180-SLG who are registered CM/ECF users will be served by the CM/ECF system.

SUMMIT LAW GROUP, PLLC

s/ Denise Brandenstein
Denise Brandenstein, Legal Assistant
deniseb@summitlaw.com

Charisse Arce
Maile Tavepholjalern
EARTHJUSTICE
310 K Street, Suite 508
Anchorage, AK 99501
T: 907.277.2500
E: carce@earthjustice.org
E: mtave@earthjustice.org

Katharine S. Glover
Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: kglover@earthjustice.org
E: ejorgensen@earthjustice.org

Andrea A. Treece (*pro hac vice*)
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
T: 415.217.2089
E: atreece@earthjustice.org

Attorneys for Plaintiff Oceana, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC., *Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE *et al.*, *Defendants*, and AT-SEA PROCESSORS ASSOCIATION *et al.*, *Intervenor-Defendants.*	)	Case No. 3:24-cv-00180-SLG

PLAINTIFF'S REPLY BRIEF UNDER LOCAL CIVIL RULE 16.3(c)(3)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

The Service violated the MSA and APA when it failed to consider measures to protect designated EFH from the known destructive impacts of trawl fishing. The Service fails to justify using a population failure metric to assess habitat impacts or assessing adverse fishing effects to only half of designated EFH to meet its statutory obligations under the MSA. Its misplaced argument that scientists *could have* considered other factors does not save a process that allows the Service to conclude no adverse fishing effects based solely on two factors that do not comply with the MSA. The Service also arbitrarily failed to consider available information about adverse effects in its determination. Separately, the Service ignores its broader duty to conserve and enhance EFH as part of its five-year review, pointing to decades-old conservation measures. Finally, the Service fails to justify its limited consideration of alternatives under NEPA based on its unlawful and arbitrary adverse fishing effects determination.

ARGUMENT

I. Oceana has standing.

The Service incorrectly states that Oceana lacks standing because its interests are not harmed by the agency's failure to act. Doc. 35 at 30-32. To the contrary, Oceana has a right to challenge the Service's actions and inactions because its interests are injured by the Service's failure to properly assess adverse fishing effects, its unlawful approval of EFH amendments that do nothing to fulfill its broader obligation to consider additional conservation and enhancement measures for designated EFH, and its failure to consider a

reasonable range of alternatives. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (discussing challenges to the legality of government action or inaction). Similar to *American Oceans Campaign v. Daley*, the Service's actions and inactions have caused actual or imminent injury to Oceana because EFH is not being properly protected from ongoing trawl fishing activity the Service exclusively manages. 183 F.Supp.2d 1, 10 (D.D.C. 2000) (standing based on affiants' claim that "without better protections, the EFHs will deteriorate, preventing them from enjoying their beauty…lead to very low fish populations, preventing them from recreationally fishing"); *see also Flaherty v. Bryson*, 850 F.Supp.2d 38, 48-49 (D.D.C. 2012) (standing where plaintiffs claimed their ability to harvest bass was harmed by the Service's failure to adopt adequate conservation measures to protect fish upon which bass feed).

Here, Oceana's members have listed specific locations in the areas managed by the Service where they fish, scuba dive, view marine life, and recreate that face substantial risk of harm due to inadequate EFH protections. Doc. 31-1, ¶¶18-26, 29; Doc. 31-2, ¶¶1, 3-10; Doc. 31-3, ¶¶1, 4-5, 7. Continued trawling in EFH harms Oceana members' interests in viewing healthy coral gardens, various marine life, and harvesting fish and other species to feed their families. *See* Doc. 31-1, ¶¶30, 35-36; Doc. 31-2, ¶¶8, 11, 13-17; Doc. 31-3, ¶¶5-6, 8, 10; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 183 (2000).

Contrary to the Service's assertion of attenuated harm, the injuries to Oceana's and its members' interests are traceable to the Service's unlawful actions and inactions.

The Service argues those injuries are attenuated because "additional steps" would need to occur before Oceana is harmed. Doc. 35 at 31. But it is the Service's failure to take the steps required by the MSA that causes harm: the Service's arbitrary analysis led it to adopt amendments that do not adequately protect EFH and instead allow harm to continue unmitigated, which increases the risk that marine habitat and wildlife Oceana's members and supporters use and enjoy will continue to be harmed by ongoing trawling activities. *See N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F.Supp.2d 62, 83 (D.D.C. 2007) (finding causal connection between an FMP amendment that increased the probability that plaintiffs would catch less fish and endure potential economic harm). Contrary to the Service's assertion, Doc. 35 at 31, Plaintiff's harms are not several steps removed like the plaintiffs in *Gulf Restoration Network, Inc. v. National Marine Fisheries Service*, who challenged an FMP alleging harm from aquaculture facilities that had yet to be permitted, constructed, or operated. 730 F.Supp.2d 157, 166-67 (D.D.C. 2010) (plaintiffs could not challenge FMP because it "merely construct[ed] a framework within which [the Service] may permit an entirely new activity that has yet to occur"). Here, because the EFH amendments do not comply with the MSA's mandates to protect EFH, ongoing fishing activities are allowed to continue at the same levels, in the same areas, and using the same gear. NMFS00662 (citing no changes to fishery operations or fishing activity as a result of the EFH review). Oceana's injuries are therefore traceable to the Service's failure to consider or adopt in the EFH amendments measures to restrict fishing activities to minimize adverse fishing effects on EFH. *Am. Oceans Campaign*,

183 F.Supp.2d at 5, 9-10 (standing found for plaintiffs to challenge Council's failure to adopt measures to limit fishing activities).

Oceana's injuries are also likely to be redressed by a favorable decision. *Cf.* Doc. 35 at 32. Decreased opportunities to fish and view marine life are caused by the conditions the EFH review process is intended to address if rooted in a lawful analysis. An order directing the Service to abide by all its statutory obligations—properly assess adverse fishing effects as part of its EFH review, consider available evidence, and complete an EA or EIS that identifies measures to minimize adverse effects from trawling and other additional measures to encourage the conservation and enhancement of EFH—will likely redress Oceana's injuries. *See Parravano v. Babbitt*, 861 F.Supp. 914, 929 (N.D. Cal. 1994) (standing found based on claim of decreased fishing opportunities which a statute seeks to address, and an order directing defendant to implement measures to improve fish runs would likely redress their injury), *aff'd*, 70 F.3d 539 (9th Cir. 1995). Had the Service complied with the MSA and NEPA, it could have conclude that additional protective management of designated EFH is appropriate.

Further, the Secretary's approval of the arbitrary FMP amendments is subject to judicial review under the APA. Doc. 31 at 12.

II. The Service has not justified its failure to meet its continuing obligation to consider minimization measures, and its broader obligation to consider conservation and enhancement measures.

A. A five-year EFH review includes obligations to assess adverse fishing effects and consider conservation measures.

Before addressing the core deficiencies of the Service's process for evaluating adverse effects, a few obfuscating points raised in the responses deserve clarification. First, the Service and Intervenor-Defendants focus their responses on a straw man argument—that the Service is obligated to impose new conservation measures at every five-year review—which Oceana did not raise. Doc. 35 at 39; Doc. 34 at 26. Oceana instead argues the Service must lawfully assess adverse fishing effects on designated EFH and, if there is evidence that fishing adversely affects EFH beyond the low threshold established by Congress, it must consider establishing measures to minimize them. Doc. 31 at 35-36. In addition, Oceana argues that separate and apart from the obligation to minimize adverse fishing effects, the Service must assess whether it could take actions to meet its broader obligation to conserve and enhance EFH. *Id.* at 40-41. All of which the Service did not lawfully do.

Second, though the Service and Intervenor-Defendants appear to suggest in places that past actions[1] to protect EFH suffice to meet the Service's obligations or that review

[1] Contrary to the Service's and Intervenor-Defendants' suggestions, Doc. 35 at 39; Doc. 34 at 26-30, Oceana does not dispute that the Service has taken action in the past to protect EFH, albeit most of it many years ago. *See* EML01161-65; NMFS01002. The dispute here centers on its failure in *this five-year EFH review* to conduct a proper fishing effects analysis or consider EFH conservation and enhancement measures.

of adverse fishing effects and necessary additional conservation measures are not required in the five-year EFH review, *see* Doc. 35 at 39-40, neither is consistent with the law. The agency's own record reflects its awareness of its obligation to assess possible adverse fishing effects and conservation measures in its EFH reviews. MSA regulations make clear that the role of the EFH review includes both an adverse fishing effects analysis and consideration of possible conservation and enhancement measures. Specifically, one of the purposes of the EFH five-year review is for the Service to consider the most recent data on fishing impacts indicates such impacts are more than minimal and not temporary, and, if so, to consider measures to minimize those impacts. 50 C.F.R. § 600.815(a)(2)(ii). The Service is also required to assess whether past actions are effectively minimizing adverse fishing effects and consider whether new ones are warranted. *Id.* § 600.815(a)(2)(i). Contrary to the Service's suggestion, its obligation to "update EFH information", Doc. 35 at 16-17, 34 (summarizing role of EFH review), does not eliminate its obligation to assess fishing effects and consider conservation measures in its five-year review. Section 600.815(a)(10) incorporates every preceding provision of the subsection. It provides that a complete review of "all EFH information"—that is, the previously listed EFH components, including adverse fishing effects and additional conservation measures—should be conducted at least once every five years by reviewing new information relevant to each, and outlines some types of information that should be considered as part of the review. *See* 50 C.F.R. § 600.815(a)(10); *see also* COUN00018 (role of 2022 EFH review is to "broadly evaluate all EFH components" in FMPs).

Further, the structure of the MSA regulations underscores that the duty to evaluate and minimize adverse fishing effects is separate from the duty to identify conservation and enhancement measures. *See* 50 C.F.R. § 600.815(a)(2) ("[f]ishing activities that may adversely affect EFH"), 600.815(a)(6) ("[c]onservation and enhancement").

The regulations at section 600.815 implement the statutory requirements of the MSA charging the Service with minimizing adverse effects on EFH caused by fishing, and identifying other actions to encourage the conservation and enhancement of EFH. 16 U.S.C. § 1853(a)(7). Contrary to the Service's assertion that it need only update EFH "identifications" in its five-year reviews, Doc. 35 at 39-40 (citing 16 U.S.C. § 1855(b)(1)(A)), the statute is clear its duties do not end there. *See* 16 U.S.C. § 1855(b)(1)(A) (directs the Secretary to promulgate regulations to implement statutory duties); 50 C.F.R. § 600.815(a)(10) (complete review of all EFH information should occur every five years). The Service also fails to acknowledge its ongoing obligation under the statute, *see* Doc. 35 at 39-40, which requires it to provide recommendations regarding "the adverse impacts on [EFH], and the actions that should be considered to ensure the conservation and enhancement of [EFH]." 16 U.S.C. § 1855(b)(1)(B). Finally, as discussed below, *infra* pp. 10, 25, the record shows the Service recognized that its obligation in the five-year review is to assess anew potential adverse fishing effects (component 2), and if found, consider practicable measures to minimize them, and to consider other conservation measures for EFH (component 6).

The cases cited by the Service, Doc. 35 at 39, and Intervenor-Defendants, Doc. 34

at 28, are factually distinguishable. In *Natural Resources Defense Council v. Evans*, the court found the record supported the Council's conclusion there were no "identifiable" adverse fishing effects to tilefish EFH, 254 F.Supp.2d 434, 440-41 (S.D.N.Y. 2003), therefore it was reasonable not to impose new restrictions on bottom-tending mobile gear. *Id.* at 442.[2] In *American Oceans Campaign*, the court upheld EFH amendments approved by two councils because the record showed the Service had actually considered mitigation measures but rationally decided they were not needed. 183 F.Supp.2d at 7-8, 15-16. Likewise, in *Friends of Del Norte v. California Department of Transportation*, the court found the project proponent had considered measures to minimize adverse effects and incorporated them into the project and the Service reviewed the project proponent's proposal and concluded "no additional practical measures [] could be taken to minimize or avoid [the] effects." 2023 WL 2351649, at *11 (N.D. Cal. Mar. 3, 2023). In *Oceana, Inc. v. Raimondo,* 2024 WL 3236723, at *14-15 (N.D. Cal. June 28, 2024), the court found that the record showed the Service did consider effects on EFH and found they would be minimal because the directed sardine fishery was closed and predators could switch to other prey while sardine levels were low. None of the cases cited by the Service, Doc. 35 at 39, or Intervenor-Defendants, Doc. 34 at 28, therefore, support an argument that past actions are sufficient or that review of adverse effects or conservation

[2] The MSA regulations at issue in this case no longer include the provision that limited the agency's minimization obligation to "identifiable" effects. 50 C.F.R. § 600.815(a)(2)(ii); *see* Doc. 31 at 34-35 (explaining the evolution of the final EFH regulations).

measures is not required in a five-year review. Nor do any of the cases support the unlawful primary criteria the Service employed here to assess adverse effects.

Prior management actions do not absolve the Service of fulfilling its statutory and regulatory obligations to continue to assess, during every five-year EFH review, whether existing measures are enough to minimize the ongoing harms to EFH caused by trawl fishing, and, at a minimum, separately consider whether additional measures to more broadly conserve and enhance designated EFH are warranted. What was appropriate in the past may not be sufficient today to protect EFH, considering new information that confirms ongoing trawl fishing is harming benthic habitats and fragile seafloor despite the measures put in place in 2005. Doc. 31 at 18-20. Finally, the identification of conservation and enhancement measures is not dependent on conclusions from the adverse fishing effects assessment. *Supra* p. 6. The record shows the Service improperly hinged its consideration of proposed actions for either obligation on the outcome of its arbitrary fishing effects analysis. *Infra* pp. 10, 25. Any suggestion in the government's brief that the Service lacks the obligation in its five-year EFH reviews to consider adverse fishing effects and conservation measures, Doc. 35 at 46, conflicts with the statute and regulations and, even if it were the agency's interpretation, warrants no deference. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024) ("[c]ourts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority").

Intervenor-Defendants' suggestion that the Service reviewed past conservation

actions and decided they were sufficient, Doc. 34 at 29-30, fails because they are unable to point to any document in the record that contains any such analysis. *See* 50 C.F.R. § 600.815(a)(2)(i) (FMPs must describe benefits of past management actions); *id.* § 600.815(a)(2)(ii) (rationale for relying on past measures should be provided). To the contrary, the Council's rationale for not proposing any adverse fishing effects minimization measures was that "[n]one of the Fishing Effects evaluations concluded that fishing effects were more than minimal and temporary." COUN05303; *see also* NMFS00793-95 (stating the "Council may wish to identify additional recommendations to minimize effects from fishing" and listing existing conservation measures). There was no rationale at all cited for failing to propose additional, broader conservation and enhancement measures under component 6. COUN05302-03; *see* 50 C.F.R. § 600.815(a)(6).

B. The two primary factors the Service uses to determine adverse effects are unlawful.

With these basic obligations clarified, we turn to the responses to Oceana's fundamental argument—the adverse fishing effects conclusion is arbitrary because it rests on a process that relies on two main criteria: one that is unlawful because it finds adverse effects only when they are extreme, and one that is unlawful because it conflicts with the statutory command to minimize adverse effects to *all* designated EFH. Neither the Service nor Intervenor-Defendants rebut Oceana's argument that the structure and legislative history of the MSA and its implementing regulations set a low threshold to

trigger minimization measures. *See* Doc. 31 at 33-36; Doc. 35 at 34-39; Doc. 34 at 20-26. Yet its process allows the Service to rely only on two factors, neither of which meet the low and precautionary threshold established by Congress. Both metrics only catch some impacts to EFH—those that are severe enough to cause a population to collapse, and those to half of designated EFH the agency believes is most used by species during the adult life stage. The Service does not offer any substantial defense to either threshold, relying mostly on the discretion it retains to consider other factors. However, this discretion, which the Service does not demonstrate is typically used, is not sufficient to save a process that concludes "no adverse effects" based solely on unlawful factors.

1. The use of MSST fails to meet the legal standard required by the MSA.

The Service's use of MSST as one of the two factors sufficient to support a no adverse effects conclusion is inconsistent with the plain reading of the MSA and governing regulations, which set a low threshold for the determination of adverse effects. *See* Doc. 31 at 33-37. The purpose of MSST is to assess whether a stock is overfished, *see* Doc. 31 at 37 (describing statutory construction of MSST-related provisions in the MSA), not to be used as a primary indicator assessing habitat damage. Notably, the Service and Intervenor-Defendants do not refute Oceana's assessment that the MSA views MSST and the protection of EFH as two different things. *Id.* at 37-39 (describing and comparing statutory construction which explicitly distinguishes between overfishing and habitat protection).

Oceana does not dispute that habitat effects are one of many factors that may influence a stock's abundance. *See* Doc. 35 at 36 (Service asserting MSST provides link between population status and EFH); EML04027 ("habitat effects are only one of many factors that influence the stock abundance"). The Service, however, cannot rationally justify its reliance on MSST as a primary indicator in its habitat disturbance analysis because the use of MSST effectively raises the threshold to trigger potential agency action, beyond Congress' intent. Doc. 31 at 35-39. While Oceana does not dispute "it is completely appropriate" to evaluate whether fishing is affecting EFH when a species falls below its MSST, Doc. 35 at 36, the Service cannot allow adverse fishing effects to continue unabated until a stock reaches the point of being deemed overfished. Yet that is the result of using MSST as a primary indicator of fishing effects as the agency does here.

MSST remains an important factor in the adverse fishing effects analysis. NMFS01628 (in 2005, MSST was the primary consideration to evaluate fishing effects); COUN14267 (in 2023 EFH review, MSST is the first threshold question for fishing effects assessment). Contrary to Intervenor-Defendants' suggestion, Doc. 34 at 20-21, nothing in the record resolves the 20 years of criticisms directed at the use of MSST. In 2005, reviewers did not assume that MSST was the only metric used to assess impacts to habitat, Doc. 34 at 21; they evaluated multiple factors including MSST and concluded MSST is inappropriate. COUN14256 (CIE evaluated the fishing effects model and the general approach employed to evaluate adverse fishing effects on EFH); EML04056-57

(information reviewed by panel). Further, the criticisms were not just of "three individuals," Doc. 34 at 21, but were broadly shared by the entire six-person independent peer review panel. *See* EML04030 (members of review panel); EML04048 ("The panel felt [MSST] is not an appropriate [criterion] because it is largely insensitive to habitat changes"). The record demonstrates the Service has received suggestions for better suited metrics to analyze habitat impacts, but still opts to rely on MSST. *See, e.g.*, SUPP00641 ("replace MSST criterion with consideration of fishery impact on the EFH itself as the primary criterion"); *see also* EML00977-80 (Oceana comment to improve fishing effects model by using accurate estimates of recovery rates and examining the full extent of EFH); SUPP00412-13 (coral bycatch data can assess fishing effort and habitat impacts).

2. Congress did not give the Service discretion to assess impacts to only some of the EFH it has designated.

The Service does not justify its use of the other primary criterion in its analysis—an assessment of habitat disturbance to a portion of the species' "core" area. This is the portion of designated EFH the Service believes is most used by adult species. However, the Service's decision to apply its adverse fishing effects assessment to only half of the identified EFH violates the MSA's statutory mandate to assess impacts on *all* of the EFH it designates, for *all* life stages. *See* 16 U.S.C. § 1853(a)(7) (assess adverse effects on the EFH it has identified); *id.* § 1802(10) (EFH includes habitat necessary for spawning, breeding, feeding, or growth to maturity); *id.* § 1855(b)(1)(B) (provide recommendations

to the Council regarding adverse impacts on the EFH it has identified and actions to consider to ensure its conservation and enhancement).

Rather than analyzing effects on all habitat it has designated as "essential," the Service only assessed fishing impacts to *half* of its designated EFH, where species at the adult life stage are most concentrated. NMFS00687 (the upper 50th percentile core EFH area from the EFH maps for adults or combined life stages); NMFS05723-24 (example of combined life stage information used for Spiny dogfish due to data limitation concerns). In other words, the Service did not assess whether fishing was affecting the other half of designated EFH, and virtually ignored all areas it deemed essential for subadults, juvenile, and larvae.

Contrary to Intervenor-Defendants' arguments, only assessing adverse fishing impacts to half of the habitat used by adults does not lower the threshold for impacts, because trawl fishing occurring outside the "core" area is ignored. Doc. 34 at 24-25 & n.102. Nor does it "statistically minimize[e]" habitat reduction, as argued by the Service. Doc. 35 at 37. That is merely an artifact of the Service's decision to use a 10 percent threshold. The Service can use a lower percentage if it considers the whole of EFH, or, more consistently with the statute, move to an evaluation of practicable minimization measures if any designated EFH is adversely affected. The Service's justification for deciding it need only assess impacts to 50 percent of the area occupied by adult species, *id.* at 37-38, is arbitrary because the MSA unequivocally directs fishing effects be assessed for all EFH, not some portion of it.

3. The discretion to consider other information does not rescue the process.

In defense of its use of MSST and "core" area, the Service asserts the discretion it retains to consider other factors makes its process lawful. Doc. 35 at 34-35, 39. However, consideration of other factors is not required by the Service's process, and the Service makes no argument that additional factors are considered in the majority of cases. Instead, it cites to one example, *id*. 35 at 38 (EBS Kamchatka flounder), where a stock did not exceed the 10 percent of "core" area or MSST thresholds, and the stock author chose to consider other factors. NMFS05685. The other examples cited by the Service relate to instances when stocks were either below MSST or exceeded the 10 percent threshold. Doc. 35 at 36 (two stocks below MSST received additional analysis); *id.* at 38 (16 species that exceeded 10 percent disturbance level received additional analysis). This hardly demonstrates that the Service consistently exercises its discretion to consider other factors in its fishing effects analysis when it is not required to. *See* COUN19220 (two examples included to demonstrate fishing effects method, but "neither of these examples would normally go through the entire exercise" being that less than 10 percent of the "core" area was impacted). Thus, the discretion nominally afforded to consider other factors cannot save the arbitrary process the Service has created which allows it to rely solely on two inappropriate factors when assessing adverse fishing effects—neither of which meet the demanding standard of the MSA.

The Service's fishing effects analysis is incomplete and significantly underrepresents the effects of destructive fishing practices on EFH. The Service used an

unlawful metric and limited its analysis to only a portion of EFH. Even for the effects it did consider, it ignored available evidence in the record about life stages of managed species, as well as recovery times and depths of sensitive habitat features that are components of EFH (*e.g.*, corals and sponges). Any one of those errors would be enough to find the Service's decision arbitrary. However, the combination shows serious disregard for statutory requirements and undermines the Service's conclusion that no Council-managed fishing activities have more than minimal and temporary adverse effects on EFH.

C. The Service's fishing effects decision is arbitrary because it ignored available evidence.

Separate and apart from its unlawful process to assess fishing effects, the Service's fishing effects analysis is also arbitrary because it ignored relevant record evidence in making its determination. Specifically, it disregarded record evidence of recovery times for long-lived benthic habitat features, *see, e.g.*, NMFS01070-71; SUPP00384; NMFS00951; NMFS08558, especially in shallow waters less than 300 meters deep, *see, e.g.*, SUPP00361-66; SUPP00386; NMFS01070-71; SUPP00388, and failed to assess habitat impacts to EFH important to all species' life stages. *Infra* pp. 19-20. The Service cannot articulate a rational connection between the facts in the record and the decision it made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Here, the record plainly demonstrates the Service made a "clear error in judgment," *id.* (citation omitted), by disregarding available evidence in its fishing

effects assessment, which caused it to fall short of its obligations under the MSA and its implementing regulations.

Instead of addressing Oceana's argument that the Service failed to fulfill its statutory obligation to assess adverse fishing impacts to the EFH it has designated for all life stages and ignored available evidence in this process, Doc. 31 at 42, Intervenor-Defendants quarrel with an argument Oceana has not made that the Service "disregarded information about subadult and juvenile fish life stages in *designating* EFH." Doc. 34 at 33 (emphasis added). Oceana does not dispute this information was considered in *designating* EFH; the failure Oceana asserts is this information was not considered in *assessing* adverse effects to designated EFH.[3]

1. The Service failed to consider available evidence showing benthic habitat features are long-lived and exist at shallow depths.

Despite acknowledging that corals and sponges are EFH for numerous species, *see, e.g.*, NMFS00306; COUN21188-89 (Gulf of Alaska FMP stating that EFH for settled early juvenile, subadults, and adult yelloweye rockfish includes "areas of vertical relief, such as…coral, and larger sponges"), the Service argues it is under no obligation to consider long-lived habitat features in its EFH reviews or do so in any particular way.

[3] It is true, that Oceana commended the Service in 2017 for designating EFH. *See* Doc. 35 at 11, 21, 34; COUN19084. However, throughout the 2023 EFH review, Oceana has consistently maintained its concerns with the fishing effects analysis, the Service's disregard of evidence for long-lived habitat features at shallow depths, and the failure to assess impacts to EFH for juvenile and sub-adult species. *See* Doc. 31 at 26-27.

Doc. 35 at 42. To the contrary, benthic habitat features like corals and sponges are part of designated EFH, and adverse fishing effects must be assessed for each type of habitat found within EFH. 16 U.S.C. § 1802(10) (definition of EFH); 50 C.F.R. § 600.815(a)(2)(i) (FMP must evaluate potential adverse fishing effects on each type of habitat found within EFH).

The Service has long acknowledged that the recovery rates of structure-forming organisms like corals and sponges are "very influential in estimating fishing effects." NMFS01229. Though in 2005, the Service asserted recovery rates were "not well known." *Id.* The record demonstrates, to the contrary, that there is substantial current information documenting recovery rates of more than 100 years for these habitat features. *See, e.g.*, EML00978-79; SUPP00207-08; SUPP00057-59; NMFS11139-43; NMFS01070-71; SUPP00384; NMFS00951; NMFS08558. The Service was made aware of published studies as early as 2002 that trawling damages marine flora and fauna, SUPP00468, and some corals require centuries to recover. SUPP00475-76. The Service's decision to use a 50-year recovery rate in its fishing effects model, NMFS05561, was arbitrary because it ignores available evidence.

The Service has also acknowledged that many species are associated with habitat-forming invertebrates at depths less than 300 meters. NMFS08475; COUN21280-83 (for example, other Rockfish Complex at the adult, subadult, settled early juvenile, and larvae life stages found at depths of 1 to 200 meters and associated with anemones, soft corals, and sponges); COUN20506. Oceana submitted numerous comments citing published

studies documenting the existence of corals and sponges at shallow depths that are subject to damage from trawling. NMFS11139-43; EML00979-80; EML03913-15; EML06885; SUPP00208-09; EML07368 (study validating coral and sponge distribution models based on including sampling stations at depths of 20 to 200 meters). Yet the Service did not consider this evidence. And just because the Service added a new habitat category, *see* Doc. 35 at 42-43, its assessment is not "precautionary" if it failed to consider the available evidence showing vulnerable long-lived habitat features at depths less than 300 meters. The Service cannot use arguments of agency deference to defend its failure to consider available evidence. *See id.* at 43. The choice to ignore evidence is not rooted in the agency's technical expertise, it is plainly a failure to consider an important aspect of the problem and the Service's "explanation [] runs counter to the evidence before the agency." *Env't Def. Ctr. v. BOEM*, 36 F.4th 850, 871 (9th Cir. 2022) (citation omitted).

2. The Service failed to assess adverse effects to the habitat species of all life stages use.

Contrary to the Service's assertion, Doc. 35 at 41, the fishing effects model does not capture all life stages because it only assessed fishing impacts to the habitat used by *adult* species or combined life stages when not enough data for adults was available. NMFS05574-79 (tables 3 to 5 showing the Service looked at the fishing effects almost exclusively on "adult" groundfish, with only a few exceptions where they looked at "all" life stages); NMFS05723-24 (due to data limitations, analysts combined subadult and

adult life stages to assess habitat impacts for Spiny dogfish). That the analysis is done at a population level, as the Service asserts, is immaterial if the analysis is done for adults only (or for combined life stages only when adult habitat is unknown). For example, there is EFH information available for subadult, juvenile, larvae, and egg for Alaska plaice, Arrowtooth flounder, Atka mackerel, and countless other species. NMFS00663-65 (listing levels of EFH information by life stage for species in the Bering Sea and Aleutian Islands); *see also* NMFS00672-74 (listing levels of EFH information by life stage for species in the Gulf of Alaska). Nevertheless, the Service only assessed fishing impacts for habitat used by adults. NMFS05574-40 (listing habitat disturbance percentages for over 85 different adult species and adult species complexes). Contrary to Intervenor-Defendants' assertion that Oceana cites the SSC's comments out of context, Doc. 34 at 33, the SSC specifically flagged that it had identified there was a "mismatch between the multiple life stages for which EFH has been *defined* and the evaluation of fishing effects for only adult life stages." COUN03445 (emphasis added). The Service's decision to disregard available life stage data in its fishing effects analysis was arbitrary, because the MSA requires it evaluate adverse fishing effects to the EFH it has designated. *See Sierra Club v. U.S. EPA*, 671 F.3d 955, 968 (9th Cir. 2012) (agency action arbitrary and capricious when it relied on old data and provided no meaningful comment on significance of new data).

III. The Service arbitrarily failed to consider a reasonable range of alternatives in violation of NEPA and the APA.

The Service and Intervenor-Defendants assert incorrectly that Oceana's proposal is beyond the action's stated purpose and need. The purpose and need statement, however, reflects a broad purpose to comply with the EFH final rule, including its conservation and enhancement provisions and requirements to minimize adverse fishing effects. Oceana's proposal falls squarely within that purpose. Further, the Service's unlawful and arbitrary conclusion of no adverse effects does not justify its failure to consider additional conservation and enhancement measures, including Oceana's proposal—or any similar proposal.

A. Oceana's proposal is consistent with the Service's stated purpose and need.

The Service inappropriately advances a circumscribed reading of its purpose and need for the action. Doc. 35 at 43-47. Courts look first to the purpose and need statement to determine whether an agency considered a reasonable range of alternatives. *E.g.*, *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246-47 (9th Cir. 2005). In evaluating the sufficiency of the stated purpose and need, courts examine whether they are consistent with relevant statutory obligations. *E.g.*, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 2025 WL 1669344, at *8 (9th Cir. June 13, 2025) (finding as a preliminary matter that the purpose and need was consistent with the statute). Here, the Service's stated purpose is to comply with the EFH final rule. NMFS00652; *see also* 50 C.F.R. § 600.805(a) (purpose of final rule includes identifying

EFH, minimizing adverse effects, and actions to conserve and enhance EFH). As the EA acknowledges, including in its purpose and need statement, the final rule includes review of all EFH components every five years. *E.g.*, NMFS00652; *see also* 50 C.F.R. § 600.815(a)(10). The final rule also includes a requirement to amend FMPs as warranted based on the review of available information. 50 C.F.R. § 600.815(a)(10); NMFS00652.

The Service incorrectly asserts that later clauses in the purpose and need statement narrow its meaning. Doc. 35 at 45. To the contrary, the statement's text regarding amendment of FMPs "as warranted," NMFS00652, attempts to restate a portion of the EFH final rule and is consistent with compliance with the EFH final rule and the MSA. The Service has a continuing obligation to conserve and enhance EFH, including by adopting minimization measures for adverse fishing effects to the extent "practicable." 50 C.F.R. § 600.815(a)(2)(ii); Doc. 31 at 10, 33-36, 40-42, 47. Revising and amending FMPs as warranted is consistent with these two requirements of the MSA and Oceana has not suggested otherwise. This is also consistent with the agency's discussion throughout the EA. NMFS00644, 00648, 00650. Neither does the third sentence in the statement, discussing available information, limit the purpose and need statement to something narrower than to comply with the EFH final rule. *See* NMFS00652.

Accordingly, Oceana's proposal falls well within the stated purpose and need for

the action.[4] It advances the stated purpose and need to comply with the EFH final rule, which contains 10 components, including the obligation to assess fishing effects and identify additional conservation and enhancement measures. Doc. 31 at 47. Oceana's proposal is therefore reasonable. *See Ctr. for Biological Diversity*, 2025 WL 1669344, at *9 (citing *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1065 (9th Cir. 2023)). Notably, Oceana's proposal would maintain the vast majority of current fishing at recent levels while protecting significantly more EFH. Doc. 31 at 27-28, 46. While Intervenor-Defendants suggest that Oceana's proposal may not be appropriate in the Gulf of Alaska, they cite no evidence to contradict the fact that Oceana's proposal would protect significantly more EFH—and the species that rely on it. *See* Doc. 34 at 42. Closing new areas to bottom trawling, as Oceana proposed, is something the Service has adopted in other areas of the North Pacific and there is no dispute that the Service may do so here. *See, e.g.,* Doc. 35 at 27-28, 46.

Intervenor-Defendants incorrectly argue that Oceana's proposal focused solely on a single EFH component. *See* Doc. 34 at 40-41. Oceana's proposal, however, addressed both conservation and enhancement (component 6) and fishing activities that could adversely affect EFH (component 2). Doc. 31 at 27-28; 50 C.F.R. § 600.815(a)(2), (6). Moreover, the proposed alternative would minimize adverse fishing effects only to the

[4] Even if the stated purpose could be read to apply only to the five-year review, there is no dispute the Service must still examine all components, including (1) the requirement to minimize adverse effects to EFH and (2) identify actions to conserve and enhance EFH. *See* 50 C.F.R. § 600.815(a)(1)-(10); Doc. 35 at 45-46; Doc. 34 at 41.

extent practicable by being structured to minimize effects on the existing fisheries. Doc. 31 at 27-28; *contra* Doc. 34 at 40-41. More importantly, there is no dispute that the Service did not consider Oceana's proposal or any other proposal that includes similar measures. Doc. 31 at 47-48; Doc. 34 at 37, 40-42; Doc. 35 at 47-50.

B. The Service's exclusion of Oceana's proposal was arbitrary.

The Service asserts that the Service appropriately narrowed its review to a subset of EFH components. Doc. 35 at 46, 48. This argument, however, ignores the law—EFH regulations require agency review of all EFH components, including conservation and enhancement. *Supra* pp. 6-7; 50 C.F.R. § 600.815(a)(1)-(10). Even without a finding of adverse effects, there is no dispute that MSA places on the Service an ongoing obligation to conserve and enhance EFH. *Supra* pp. 6-7; Doc. 31 at 40-41; Doc. 35 at 46. In other words, the Service's exclusion of Oceana's proposal because it is a conservation and enhancement measure is premised on the agency misreading the MSA's requirements. *See* 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(6). Additionally, Oceana's proposal, whether viewed as a conservation and enhancement measure or a fishing effects minimization measure, is well within the purpose and need. *Supra* pp. 21-24.

To the extent the agency excluded Oceana's proposal as a result of its prior adverse effects finding, that decision rests on an arbitrary premise. Specifically, in response to a comment that it needed to analyze a reasonable range of alternatives, the Service stated that it "followed the Council's roadmap." FR00003. The Service now suggests that the agency excluded Oceana's proposal from consideration based on the

agency's finding that fishing effects were minimal. *See* Doc. 35 at 49-50 (from EFH review, no additional conservation and enhancement measures warranted). As demonstrated above, however, that finding was unlawful and arbitrary. *Supra* pp. 10-20. Additionally, the record shows the Council's process encompassed consideration of conservation and enhancement measures, including actions to minimize fishing effects, once the fishing effects analysis had been completed. *See* NMFS00725 ("Council may wish to identify additional recommendations to minimize effects from fishing based on the FE evaluation"); *see also* NMFS00793; *see also* COUN05964 (February 2024 report noting upcoming presentation on trawl seafloor impacts to evaluate whether additional management actions are needed). Accordingly, the adverse effects finding cannot serve as a basis to exclude consideration of Oceana's proposal. The Service's exclusion of Oceana's proposal is therefore arbitrary.

C. The Service's and Intervenor-Defendants' other arguments concerning alternatives lack merit.

The Service misleadingly implies Oceana's proposal was not timely or appropriately offered. Doc. 35 at 25-26. To the contrary, Oceana suggested the Council freeze the trawl footprint as early as January 2022. COUN00454; Doc. 31 at 27-28. In January 2023, the Council declined to initiate a call for proposals to conserve and enhance EFH, COUN13825, but later indicated that fishery management proposals could be submitted under staff tasking, which Oceana did in June 2023. COUN05158 n.2 (citing Council February 2023 newsletter); COUN05158-204. Oceana's specific

proposal was offered long before the final EA was published in December 2023, and the FMP amendments were published in July 2024. This allowed the Service ample time to consider Oceana's proposal to freeze the trawl footprint. *See, e.g.*, *Hualapai Indian Tribe v. Haaland*, 755 F.Supp.3d 1165, 1193-94 (D. Ariz. 2024) (tribe's proposed alternative submitted several months before final EA supported likelihood of prevailing on alternatives claim).

The Service's assertion that Oceana agrees with the narrow interpretation of its purpose and need is wrong. Doc. 35 at 46. Far from agreement, the Service points to a portion of Oceana's brief that critiques the agency's later construction of the stated purpose and need. Doc. 31 at 47-48.

The Service also unhelpfully misconstrues Oceana's characterization of alternatives. Doc. 35 at 47-48. Oceana explained that the record reflected that both the alternatives examined by the Service, and their impacts, are similar. Doc. 31 at 28-29, 45-46. Regardless, courts have viewed the similarity in alternatives and in impacts as supporting a failure to consider an adequate range of alternatives. *E.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008) (alternatives range and impact range were both narrow).

CONCLUSION

For the foregoing reasons, Oceana respectfully requests the Court remand to the Service the decision adopting the EFH amendments and the supporting EA for completion of new EFH amendments and a new EA or EIS that comply with the law.

Respectfully submitted this 18th day of July, 2025.

s/ Charisse Arce

Charisse Arce (Alaska Bar No. 2303017)
Maile Tavepholjalern (Alaska Bar No. 1611094)
EARTHJUSTICE

Katharine S. Glover (Alaska Bar No. 0606033)
Eric P. Jorgensen (Alaska Bar No. 8904010)
EARTHJUSTICE

Andrea A. Treece (California Bar No. 237639)
(*pro hac vice*)
EARTHJUSTICE

Attorneys for Plaintiff Oceana, Inc.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 6,758 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits set in Court's text order granting Plaintiff's unopposed motion to file overlength reply, Doc. 37.

Dated: July 18, 2025.

s/ Charisse Arce
Charisse Arce

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2025, a copy of the foregoing PLAINTIFF'S REPLY BRIEF UNDER LOCAL CIVIL RULE 16.3(c)(3) was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Charisse Arce
Charisse Arce