UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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Litigation Updates for the
June 2026 Meeting of the North Pacific Fishery Management Council

Oceana v. NMFS et al.

Parties:

Plaintiff/Appellant: Oceana, Inc.

Federal Defendants/Appellees: 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/Appellees: At-Sea Processors Association, Alaska Groundfish Data Bank, Groundfish Forum, Inc.

Case Activity:

On August 16, 2024, Oceana filed suit against 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.

On September 30, 2025, the United States District Court for the District of Alaska issued its Decision and Order dismissing Oceana's claims with prejudice and denying its requests for relief (the Court entered final judgment on October 6, 2025) (the Court's Decision and Order is provided as an attachment to the NOAA General Counsel B3 Litigation Report Oceana v NMFS EFH - Supplemental Report on the October 2025 Council agenda). Oceana filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on December 5, 2025.

Status/Next Steps:

The parties are in the process of filing briefs with the United States Court of Appeals for the Ninth Circuit (see attachments), with the last brief (Plaintiff/Appellant's reply brief) due July 13, 2026. The Ninth Circuit has scheduled oral argument on the appeal for Monday, August 10, 2026, in Anchorage, Alaska. The argument also may be streamed online at https://www.ca9.uscourts.gov/ or viewed in the archive at https://www.ca9.uscourts.gov/cases/streams-videos/.

Attachments: Plaintiff/Appellant's Opening Brief (filed February 26, 2026)
Federal Defendants/Appellees' Answering Brief (filed May 22, 2026)

No. 25-7689

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCEANA, INC.,

Plaintiff-Appellant,

v.

NATIONAL MARINE FISHERIES SERVICE *et al.*,

Defendants-Appellees,

AT-SEA PROCESSORS ASSOCIATION *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

No. 3:24-cv-00180-SLG
Hon. Sharon L. Gleason

APPELLANT'S OPENING BRIEF

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February 26, 2026

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INTRODUCTION

At issue in this case is a simple legal question. In the Magnuson Stevens Fishery Conservation and Management Act ("Magnuson Stevens Act"), Congress recognized that sustainable fisheries depend on healthy habitat and therefore required the National Marine Fisheries Service ("Fisheries Service") to identify and protect "essential fish habitat" that is necessary to sustain healthy fish populations throughout all life stages. 16 U.S.C. § 1853(a)(7). To accomplish this, the Act obligates the Fisheries Service to "minimize to the extent practicable adverse effects on [essential fish habitat] caused by fishing . . . ." *Id.* That language is simple and unqualified—it requires evaluating and minimizing *any* adverse fishing effects *on all of the habitat* that has been identified as essential. The Fisheries Service's regulations likewise require the agency to identify essential fish habitat, evaluate the effects of fishing on all of that habitat, and minimize any adverse effects. 50 C.F.R. § 600.815(a). But the process it uses in the North Pacific is unlawful because it allows the agency to determine no adverse effects exist, and thereby avoid its obligation to protect habitat, based on only two criteria that do not ensure consideration of *all* adverse effects on *all* designated habitat.

Essential fish habitat offshore of Alaska includes slow-growing, long-lived coral and sponge gardens that are important for numerous species of fish and crustaceans and are particularly vulnerable to the impacts of trawl fishing. The

industrial trawl fisheries that operate off Alaska's coast are some of the largest fisheries in the world, and they scrape, crush, and mow down acres of bottom habitat every year, destroying tons of slow-growing corals and sponges that would otherwise provide homes to fish and invertebrates.

In 2023, the Fisheries Service completed a review of the effects of fishing on essential fish habitat offshore of Alaska. Instead of evaluating in its review how fishing affects *all* of the designated essential fish habitat, as required under the Magnuson Stevens Act and the Fisheries Service's implementing regulations, the Fisheries Service used two main criteria to identify adverse fishing effects: a population indicator that measures when a stock is overfished, and an evaluation of a narrow portion of the designated essential fish habitat. Under this process, if the Fisheries Service did not find adverse effects under these two criteria, it was not required to look any further or take any action to minimize adverse effects. As a result, the agency concluded that there were no adverse effects that required minimization or conservation measures for any of the 103 fish stocks it analyzed.

Neither of the criteria the Fisheries Service relied on is consistent with the language of the Magnuson Stevens Act and the Fisheries Service's implementing regulations. Because it unlawfully narrowed its analysis and relied on inappropriate criteria, the Fisheries Service's conclusion did not satisfy its statutory

obligations to identify and minimize adverse effects of fishing on all essential fish habitat and is therefore unlawful under the Administrative Procedure Act ("APA").

JURISDICTIONAL STATEMENT

Oceana's claims arise under the Magnuson Stevens Act, 16 U.S.C. §§ 1801-55, and the APA, 5 U.S.C. §§ 701-06. 5-ER-838–841. The district court had subject-matter jurisdiction to hear these claims and award appropriate relief under 28 U.S.C. § 1331 (federal question), *id.* § 1361 (mandamus), and *id.* § 2201-02 (declaratory judgment). The district court issued a final order and judgement dismissing Oceana's claims with prejudice on October 6, 2025. 1-ER-39; 1-ER-2.

Oceana filed its timely notice of appeal of the district court's order and judgment on December 5, 2025. 5-ER-895–900; *see also* Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction over Oceana's appeal of the district court's final order and judgment, which dispose of all claims, under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Can the Fisheries Service meet its obligation under the Magnuson Stevens Act to minimize, where practicable, any adverse effects from fishing to all designated essential fish habitat, if it evaluates fishing effects on only *some* of the designated habitat as one of two main criteria for determining whether adverse effects exist?

2. Can the Fisheries Service meet its obligation under the Magnuson Stevens Act to minimize, where practicable, all adverse effects to all designated essential fish habitat by using an overfished threshold that signifies the crash of a fish population as the other of the two main criteria for determining whether adverse effects exist?

STATEMENT REGARDING ADDENDUM

All pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF CASE

The action challenged in this litigation is the Fisheries Service's approval of five amendments to management plans for the federally managed groundfish, crab, and salmon fisheries in the Bering Sea and Aleutian Islands, Gulf of Alaska, and Arctic Ocean. 2-ER-182. The amendments are the conclusion of the Fisheries Service's five-year review of the components of those fishery management plans that identify and protect habitat essential for 103 fish stocks affected by the fisheries. As described below, in the five-year review, the Fisheries Service must review its description and identification of essential fish habitat for all fish stocks; evaluate the effects of fishing on all of the identified essential fish habitat to determine whether there are any adverse effects; minimize, to the extent practicable, any adverse effects to the identified essential fish habitat; and review

and update other essential fish habitat components of the plans. *See* 50 C.F.R. § 600.815. It is the second step of that process—the evaluation and determination of adverse fishing effects on essential fish habitat—that is at issue in this case.

The Fisheries Service evaluated the effects of fishing on essential fish habitat by considering disturbance to only a limited portion of the stock's designated essential fish habitat and looking at whether the stock was above or below its overfished threshold (referred to as the "minimum stock size threshold" or "MSST"). If, under these two criteria, the Fisheries Service determined that there were no adverse effects from fishing, the process it used did not require it to look any further or take any action to minimize effects. Even if a stock failed one of the two criteria (*i.e.*, there were adverse effects to a sufficient portion of the habitat the Fisheries Service considered, or the stock was overfished), the agency was not obligated under this process to adopt, and in this case did not adopt, minimization measures. Instead, it considered other information, such as life history parameters, to determine whether, even in the face of failing the primary tests for adverse effects, the agency could nevertheless avoid considering practicable minimization measures. Based on that evaluation, it adopted amendments that simply updated information and scientific references describing essential fish habitat, but did not take any action to minimize fishing effects or otherwise protect habitat. 2-ER-182.

I. Statutory and regulatory framework

A. The Magnuson Stevens Act and the 1996 Sustainable Fisheries Act amendments

The Fisheries Service is responsible for managing the federal fisheries at issue in this case under the Magnuson Stevens Act, with the North Pacific Fisheries Management Council ("Council") acting as an advisory body. 16 U.S.C. § 1854; *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (Magnuson Stevens Act gives the Fisheries Service "final responsibility for ensuring any [fishery management plan] is consistent with . . . the overall objectives of the Act" (citing *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 71-72 (D.D.C. 2007)); *see also Lofstad v. Raimondo*, 117 F.4th 493, 500 (3d Cir. 2024) (explaining that councils may only constitutionally exercise advisory powers).[1] Among the overarching purposes of the Magnuson Stevens Act is to create a "program for the conservation and management" of fishery resources, including ensuring conservation of fish stocks and protecting essential fish habitats. 16 U.S.C. § 1801(a)(6). To that end, the Council and the Fisheries Service develop

[1] While the Council assists in preparation of fishery management plans, evaluating effects of fishing on essential fish habitat, and making recommendations to protect that habitat, the Fisheries Service adopts regulations implementing those measures and ensures that fisheries management decisions comply with the law. *See* 16 U.S.C. § 1854(a)-(b). Because the Fisheries Service is the final decisionmaker, in this brief, "Fisheries Service" is used regardless of whether the regulations assign a duty to the Fisheries Service or the Council.

fishery management plans that describe the regulated fish stocks and their essential habitat, set rules to prevent overfishing and conserve and enhance essential habitat, and establish how the fishery will comply with other Magnuson Stevens Act requirements. *See id.* §§ 1852(h)(1), 1853(a). The Fisheries Service's approval of a fishery management plan or an amendment to a plan is subject to judicial review under the APA. *Id.* § 1855(f); *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 11 (D.D.C. 2000) (Secretary's approval of essential fish habitat amendments constitute "rules" under the APA and are reviewable actions); *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008) (Fisheries Service's actions to implement fishery management plans are subject to judicial review).

Among the Magnuson Stevens Act's most fundamental mandates is an obligation to protect habitat from the effects of fishing and from other detrimental activities. When Congress passed the original legislation in 1976, its conservation requirements focused mainly on overfishing as the driver of declining fish populations. *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. § 1801(a)(2)-(6)). In the 1996 Sustainable Fisheries Act, however, Congress overhauled the Magnuson Stevens Act to prioritize protecting habitat, recognizing that loss and degradation of habitat by fishing and other activities was a separate, and equally critical, threat to fish populations. *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 101, 110 Stat.

3559, 3560-61 (1996) (codified at 16 U.S.C. § 1801); *see also Oceana, Inc. v. Evans,* 384 F. Supp. 2d 203, 237 (D.D.C. 2005), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005) (the Sustainable Fisheries Act "amended the [Magnuson Stevens Act] to make protection of [essential fish habitat] a priority").

To that end, the Sustainable Fisheries Act added the concept of "essential fish habitat," defined as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." 16 U.S.C. § 1802(10). It also added a requirement for the Fisheries Service to "describe and identify essential fish habitat" and then "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).

The language Congress adopted is clear. The Fisheries Service must identify essential fish habitat, and once that habitat is identified, it must evaluate whether there are any adverse fishing effects to any of the identified habitat so that it can minimize those effects to the extent practicable. This mandate sets a low bar for determining whether there are adverse effects. It does not limit the requirement to only those effects that are significant or result in population declines, but requires the Fisheries Service to take practicable actions to minimize *all* adverse effects to *all* of the identified essential fish habitat.

This is consistent with Congress's finding in adopting the amendments that "[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats." *Id.* § 1801(a)(9). To address those threats, Congress directed that "[h]abitat considerations should receive increased attention for the conservation and management of fishery resources of the United States." *Id.* Notably, both the House and the Senate recognized the central importance of conserving fish habitat in their respective bills to amend the Magnuson Stevens Act. *See* H.R. 39, 104th Cong. (1995) & S. 39, 104th Cong. (1996) (enacted). As one of the Senate bill sponsors summarized: "[I]f you destroy the habitat, you destroy the nurseries and you destroy the ecosystem on which those nurseries are dependent, which then diminishes the ability to have a sustainable fishery." 142 Cong. Rec. S10794-02, S10812 (daily ed. Sep. 18, 1996) (statement of Sen. Kerry). Similarly, Representative Gilchrest explained, "If we did not include [the habitat provisions] into the legislation, even if we had all the best regulations concerning the coastal fisheries possible, we could still lose, without protecting the habitat where the fish spawn." 142 Cong. Rec. H11418-02, H11443 (daily ed. Sep. 27, 1996).

In the same set of amendments, Congress also strengthened the requirements to prevent overfishing and rebuild overfished stocks. *See* Pub. L. No. 104-297, §§ 109(a)(5), 110(e) (1996) (adding 16 U.S.C. § 1853(a)(10) and amending

§ 1854(e) related to overfishing and rebuilding plans). Overfishing is "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(34). In the 1996 amendments, Congress required the Fisheries Service to establish objective, measurable criteria to define when overfishing is happening and mandated rebuilding plans to end overfishing and ensure that overfished stocks recover as quickly as possible. *Id.* § 1853(a)(10); *see also* 50 C.F.R. § 600.310(j). Under the criteria the Fisheries Service has adopted, a stock is overfished when it drops below its minimum stock size threshold ("MSST" or "overfished threshold"), 50 C.F.R. § 600.310(e)(2)(i)(E), defined as "the level of biomass below which the capacity of the stock or stock complex to produce [maximum sustainable yield] on a continuing basis has been jeopardized." *Id.* § 600.310(e)(2)(i)(F); *see also Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1037 (N.D. Cal. 2013). Within two years of identifying a fishery as overfished or at risk of overfishing, the Fisheries Service and the Council must prepare a fishery management plan, amendment, or proposed regulations to prevent overfishing or to end it immediately. 16 U.S.C. § 1854(e).

Thus, Congress recognized two separate threats to fisheries in the Sustainable Fisheries Act amendments: overfishing, measured with reference to an overfished threshold, and destruction of habitat. It directed the Fisheries Service to

prioritize action addressing each of these threats and set a low bar that triggers the obligation for the Fisheries Service to adopt practicable measures to protect *all* of the habitat it identifies as essential fish habitat from *all* adverse effects.

B. Regulatory requirements for designating and protecting essential fish habitat

To implement Congress's directives in the Magnuson Stevens Act, the Fisheries Service adopted regulations that set out sequential requirements for meeting the obligation to protect habitat from fishing. First, the Fisheries Service must identify, describe, and map the habitat that is essential for each stock. 50 C.F.R. § 600.815(a)(1). Second, it must evaluate the adverse effects of fishing on all of the identified essential fish habitat. *Id.* § 600.815(a)(2)(i). Third, it must minimize to the extent practicable adverse effects from fishing on the identified habitat. *Id.* § 600.815(a)(2)(ii).

At the first step, the Fisheries Service must determine which habitat is essential for each life stage (*e.g.*, spawning, juvenile, adult) of a managed species, and then identify and describe that habitat in the fishery management plan. To do so, it analyzes ecological, environmental, and fisheries data and "assess[es] the relative value of habitats." *Id.* § 600.815(a)(1)(iv)(A). It must review and update those descriptions, along with all the other essential fish habitat components of the fishery management plans, at least once every five years. *Id.* § 600.815(a)(10).

At the second step, after the Fisheries Service has designated essential fish habitat, it must evaluate whether there are adverse fishing effects on that designated habitat. The Fisheries Service's regulations, consistent with the Magnuson Stevens Act, set a low bar for the initial determination of whether an effect is adverse. Under the regulations, an "adverse effect" is:

> *any impact that reduces quality and/or quantity of [essential fish habitat].* Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of [essential fish habitat].

Id. § 600.810(a) (emphases added). To evaluate potential adverse effects, the Fisheries Service "should consider the effects of each fishing activity" on essential fish habitat and "provide conclusions regarding whether and how each fishing activity adversely affects" that habitat. *Id.* § 600.815(a)(2)(i).

Finally, if the Fisheries Service's evaluation shows evidence that fishing is adversely affecting essential fish habitat, the agency must take practicable steps to minimize those effects. The regulations broadly require the Fisheries Service to "prevent, mitigate, or minimize *any* adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects [essential fish habitat] in a manner that is more than minimal and not temporary in nature." *Id.* § 600.815(a)(2)(ii) (emphasis added). As the Fisheries Service explained when

it adopted the regulations, the "more than minimal and not temporary" language is intended to clarify that changes that are merely "inconsequential" do not require minimization. *See* 67 Fed. Reg. 2343, 2354 (Jan. 17, 2002). Thus, if the Fisheries Service finds evidence of *any* adverse effects from fishing that are not inconsequential, it must identify and consider a range of measures to minimize those impacts and adopt any that are practicable. 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(2).[2]

II. Benthic habitat and the adverse impacts of fisheries

The federally managed fisheries offshore of Alaska include large industrial trawl fisheries that drag giant nets across the seafloor (bottom trawls) or through the water column (pelagic trawls). Both types of trawls frequently scrape the seafloor and can be more than two times the length of a football field. *See* 3-ER-377–378 (Gulf of Alaska trawl gear 193 meters wide); 3-ER-380 (Bering Sea trawl gear 259 meters wide). This can crush and damage the seafloor and the fish, crustaceans, and structure-forming animals that live there, including sponges, corals, sea pens, and sea whips. 5-ER-817; 2-ER-60–75. Coral and sponge gardens provide immense ecological value and vital support to crustaceans and fish

[2] In addition to considering the effects of fishing on essential fish habitat, the Fisheries Service must include several other components related to the protection of essential fish habitat in its fishery management plans and five-year reviews. 50 C.F.R. § 600.815(a).

at various life stages for breeding, spawning, feeding, sheltering, and growth. 3-ER-396 ("Seafloor habitat features create structural complexity, providing protection from predators and forage opportunities for benthic organisms."); 3-ER-311–315 (hard corals especially important habitat based on their large size and long life spans); 4-ER-487 (juvenile fish and crabs use coral habitat as refuge and for feeding); 3-ER-314 (sea whips provide food and shelter to Pacific ocean perch); 3-ER-315 (sea onions provide habitat for juvenile red king crab).

Of all federal fisheries, the groundfish pelagic and bottom trawl fisheries are the most damaging to seafloor habitat. Both types of trawls are dragged along the seafloor. Although pelagic trawls are sometimes referred to as "midwater" trawls, the Fisheries Service estimates that 40 to 100 percent of the width of a pelagic trawl can be in contact with the seafloor for the full duration of a tow, 3-ER-411, 3-ER-423; 3-ER-377 (contact adjustments for pelagic trawls, designated "PTR," in the Gulf of Alaska ranging up to 100 percent); *see also* 3-ER-292 (acknowledging that "pelagic trawls are sometimes fished on the bottom"). Fishing "change[s] the abundance or availability of certain habitat features (e.g., prey availability or the presence of living or non-living habitat structure) used by managed fish species to accomplish spawning, breeding, feeding, and growth to maturity." 2-ER-78. Trawl fisheries scrape up and damage fragile corals, sponges, and other epifauna by crushing, burying, exposing, or completely

removing them, which degrades the structure and diversity of the seafloor. *See, e.g.*, 2-ER-174–175; 4-ER-494; 3-ER-396–397.

In addition to destroying and pulling up epifauna, trawl gear smooths the seafloor, flattening the landscape. 4-ER-494. Gear research studies have shown that the first pass of a bottom trawl has the most harmful effect on benthic habitat. 3-ER-305; 2-ER-112 (about 27 percent of original hard coral volume was removed by a single trawl tow).

This damage can take centuries to repair. Some corals, for example, are very long-lived and can take over 100 years to reach their full size. *See* 3-ER-299 (gorgonian corals are "very long-lived, easily damaged by fishing gear, and slow to recover"); *see also* 3-ER-311–312 (red tree corals, common in the Gulf of Alaska, may live over 100 years); 4-ER-485 (medium-sized coral aged at 112 years in the Gulf of Alaska); 4-ER-515 (corals and sponges have long recovery times); 4-ER-522 (same).

Despite the importance of benthic habitat for fish and crab populations, and the harms that trawling causes to this habitat, trawling is broadly permitted offshore in the Gulf of Alaska. For instance, only about nine percent of the central and western Gulf of Alaska is protected year-round from bottom trawls. 2-ER-45; 2-ER-152 (map showing most of the western and central Gulf of Alaska open to bottom trawling). None of these Gulf of Alaska habitat conservation areas are

protected from pelagic trawls, even though the Fisheries Service acknowledges that these trawls also sweep and damage the seafloor. *See* 2-ER-152–153 (closures apply to bottom contact gear and nonpelagic trawls); 50 C.F.R. § 679.2 ("Bottom contact gear means nonpelagic trawl, dredge, dinglebar, pot, or hook-and-line gear.").

III. Essential fish habitat in Alaska

A. The Fisheries Service's prior actions on essential fish habitat

The Fisheries Service first attempted to carry out the essential fish habitat mandates of the Magnuson Stevens Act in 1998, 3-ER-298, but that effort was challenged and found unlawful in *American Oceans Campaign*, 183 F. Supp. 2d at 20-21. *See also* 2-ER-41. As a result, the Fisheries Service completed an environmental impact statement in 2005, 3-ER-286, to "examine "how fishing practices and gear may damage corals, disrupt fish habitat, and destroy benthic life that helps support healthy fish populations." *Am. Oceans Campaign*, 183 F. Supp. 2d at 20-21. It has reviewed and revised the essential fish habitat components of its fishery management plans three times since then, in 2010, 2017, and 2023. 2-ER-192–193.

From its first actions in 2005, the Fisheries Service has recognized the importance of benthic habitat to federally managed fisheries in Alaska by designating large portions of these seafloor ecosystems as essential fish habitat for

a variety of fish stocks under the relevant fishery management plans. Nearly the entire Gulf of Alaska has been designated as essential fish habitat for one or more of the 46 stocks or stock complexes managed under the Gulf of Alaska fishery management plan. 2-ER-197; *see also* 2-ER-201 ("almost all waters are identified as [essential fish habitat] for at least one species"). The Fisheries Service's essential fish habitat descriptions for several types of rockfish, Atka mackerel, Pacific ocean perch, crab, and octopus, all recognize the importance of sea whips, hard and soft corals, sea anemones, and sponges for sustaining these species. 5-ER-671–672 (yelloweye rockfish); 5-ER-673 (sharpchin rockfish); 5-ER-677–678 (Atka mackerel); 5-ER-680–681 (dusky rockfish); 5-ER-682–683 (northern rockfish); 5-ER-684–687 (octopus); 5-ER-688–689 (yelloweye rockfish); 5-ER-690 (pygmy rockfish); 5-ER-692–694 (Pacific ocean perch); 5-ER-695–697 (rougheye and blackspotted rockfish); 5-ER-698–700 (shortraker rockfish); *see also* 4-ER-636 (all Bering Sea and Aleutian Island crab species associated with corals); 4-ER-654–656 (showing coral associations for several species of rockfish, Atka mackerel, and Pacific ocean perch).

The Fisheries Service has long acknowledged that fishing causes impacts to essential fish habitat. In the 2005 essential fish habitat environmental impact statement, for example, the Fisheries Service recognized that fishing, and trawling in particular, can "alter or remove physical and biological structures, as well as

other organisms. These changes may affect the ability of fish to use these as prey, shelter from predators, spawning substrate or for other functions." 3-ER-318; *see also* 3-ER-327a (pelagic trawls in contact with bottom will likely damage animals anchored in the benthic substrate). In that review, the Fisheries Service recognized that fishing causes "persistent disturbance to certain habitats," 3-ER-282, and long-term effects on benthic features, 2-ER-202.

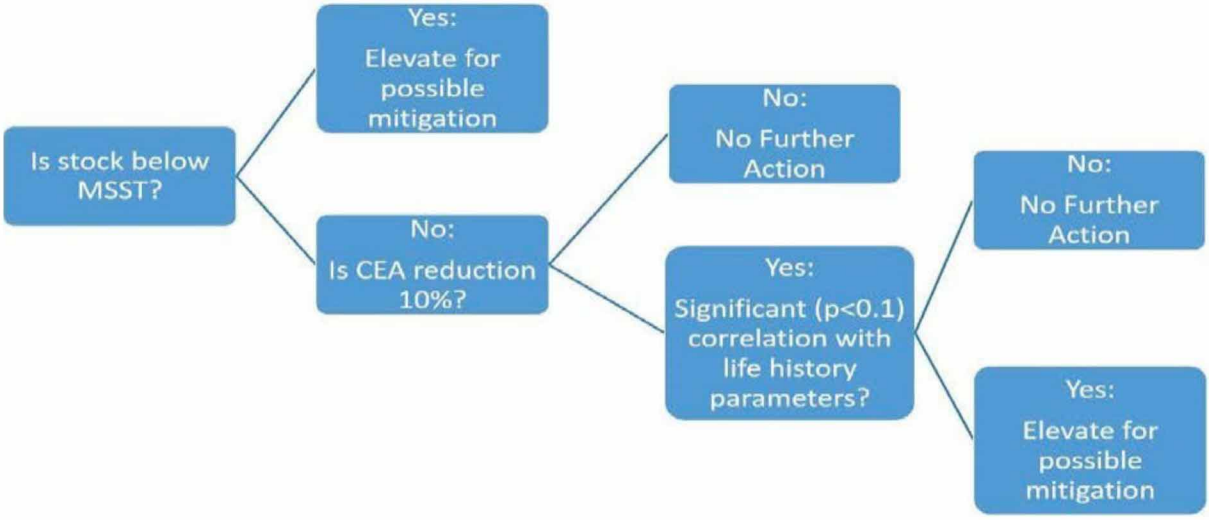
Despite having found these long-term, persistent effects in its 2005 review, the Fisheries Service concluded that those effects were minimal, and hence required no action to address them. The Fisheries Service explained that the effects "are minimal because the analysis found no indication that continued fishing activities at the current rate and intensity would alter the capacity of [essential fish habitat] to support healthy populations of managed species over the long term." 2-ER-202. Subsequent reviews have not resulted in different findings about the effects of fishing on habitat. 2-ER-190.

B. The 2023 five-year essential fish habitat review

At issue in this case is the most recent review of essential fish habitat for Alaska's federal fisheries, completed in 2023 and implemented through fishery management plan amendments adopted in July 2024 ("2023 review"). 2-ER-182–183. As with each prior five-year review, the Fisheries Service evaluated whether fishing was adversely affecting designated essential fish habitat, and did so using a

"fishing effects analysis." The central steps of that analysis asked two questions: (1) was the stock overfished (below its MSST), and, if it was not, (2) was more than ten percent of what the Fisheries Service deemed the "core" essential fish habitat adversely affected by fishing? If the answer to both of those questions was no, the Fisheries Service could determine that there were no adverse fishing effects based on these two inquiries alone; its process did not require consideration of any other information, including any effects on the remaining non-"core" designated essential fish habitat. 3-ER-356–357. If the answer to either question was yes, the Fisheries Service considered other information, but even in those circumstances it did not use this additional information to evaluate whether there were adverse fishing effects to designated essential fish habitat outside of the "core" area. 3-ER-356–357. Instead, it used these additional considerations to rule out minimizing adverse effects even when a stock failed the first two criteria. 3-ER-357 (describing additional analysis used to assess whether overfishing or disturbance to the "core" essential fish habitat warranted considering minimization measures).

The following Fisheries Service graphic illustrates its approach to evaluating the effects of fishing on essential fish habitat.

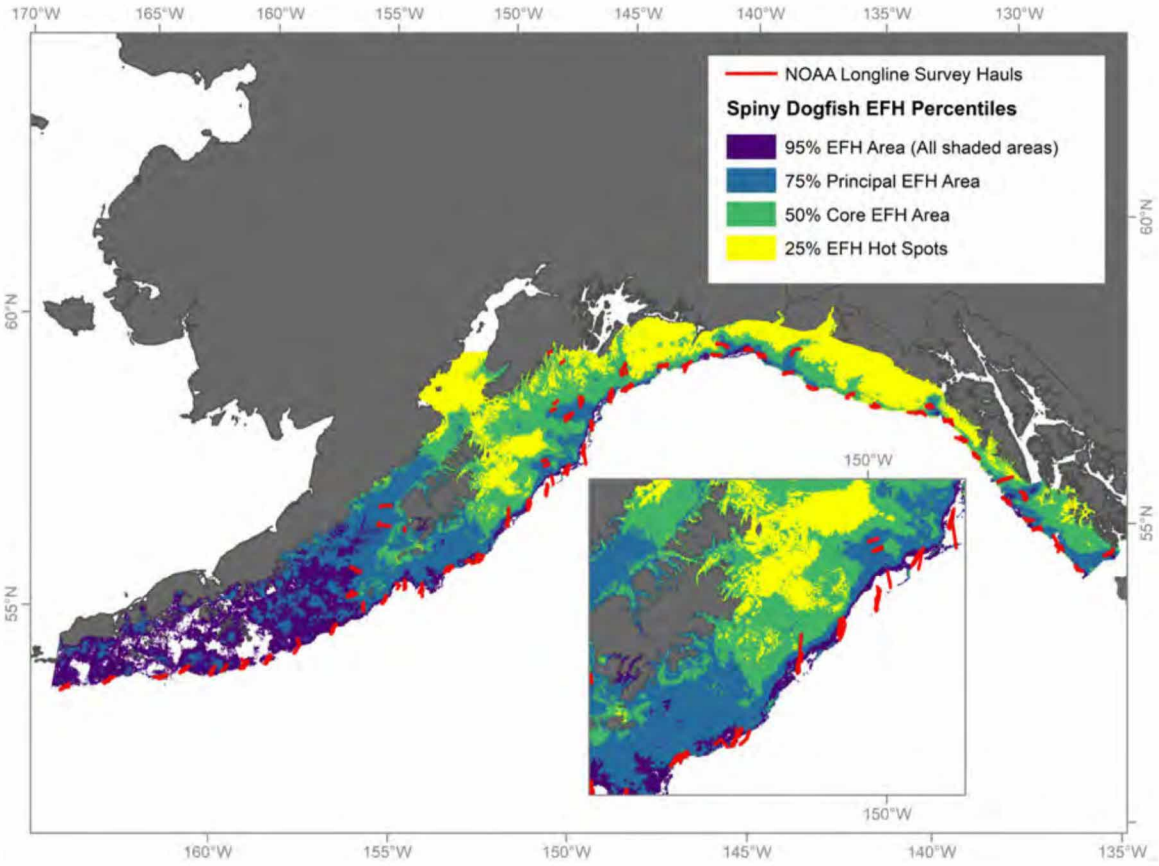


2-ER-91 ("CEA" means core essential fish habitat area).

Under the first step, the Fisheries Service considered whether the stock was overfished (below MSST). 3-ER-385. Although not described in the graphic, even if the stock was overfished, Fisheries Service analysts did not have to recommend mitigation. They first assessed whether the stock's collapse was correlated with habitat degradation. 3-ER-357; 2-ER-103. If it was, the analysts could recommend minimization measures. 2-ER-103; 3-ER-356–357.

For stocks that were not overfished, or for which the Fisheries Service had not established an overfished threshold, the agency proceeded to the next step, by looking at the effects of fishing on a limited *subset* of the designated essential fish habitat. 2-ER-229; 3-ER-384. The Fisheries Service called this subset the "core" essential fish habitat, defined as the portion of the essential fish habitat where half of the adult population occurs in the highest abundance during the summer.

3-ER-384; 4-ER-626 (defining quantiles of essential fish habitat). This area was generally about half of the designated adult summer habitat and may not include habitat designated for other life stages or other seasons. *See, e.g.*, 5-ER-821 (showing more extensive essential fish habitat for subadult rougheye blackspotted rockfish than for adults). For example, in the map below, all four colors combined depict the area the Fisheries Service designated as essential for spiny dogfish, but habitat impacts only needed to be assessed under the agency process in the green and yellow "core" areas. Under the agency's process, fishing impacts to the blue and purple areas did not need to be considered at all, even though the Fisheries Service also designated those areas as essential fish habitat.



4-ER-629.

The Fisheries Service evaluated fishing effects to this limited portion of the essential fish habitat by estimating whether trawling and other fishing was causing significant, lasting damage to more than ten percent of the habitat in that limited "core" area. 4-ER-629. If habitat disturbance (in other words, adverse fishing effects) within the "core" area did not exceed ten percent, no further analysis was required under the Fisheries Service's process. The Fisheries Service used ten percent because it made an "assumption" that impacts below that threshold "represented minimal disturbance." 3-ER-389; 2-ER-92. Even when the Fisheries Service found evidence that more than ten percent of the "core" area was disturbed, or adversely affected, by fishing, it did not recommend minimization measures. Instead, it considered the stock's life history parameters to decide whether to minimize that disturbance. 3-ER-357.

Fisheries Service analysts could also choose to consider other information for stocks below ten percent disturbance to the "core" area or for which there were data limitations, but this analysis was not required under the Fisheries Service's process. *See* 3-ER-356–357; 3-ER-263.

In the 2023 five-year review, the Fisheries Service assessed fishing impacts to habitat for 103 stocks. 3-ER-358. Of those, 87 stocks did not exceed ten percent habitat disturbance to the "core" half of the essential fish habitat, and 101

stocks were above their MSST, or overfished threshold (meaning they were not overfished). 3-ER-359, 3-ER-362–367, 3-ER-373. Thus, no analysis beyond "core" essential fish habitat and overfished thresholds was required for the vast majority of the stocks assessed. *See* 3-ER-263 (explaining that additional analysis was requested "in three situations: if [the] stock is below the minimum stock size threshold (MSST), if the estimated habitat disturbed by fishing in the ["core" essential fish habitat] was ≥ 10%, and/or if [the analyst] preferred a qualitative analysis of the effects of fishing on their species' habitat rather than the quantitative assessment."). The Fisheries Service did not recommend minimization measures to address adverse fishing effects for any of the 103 stocks, not even the 16 stocks that exceeded ten percent disturbance to "core" essential habitat or the two that fell below their overfished threshold. 3-ER-359.

Throughout the five-year review process, Oceana submitted comments to the Council and the Fisheries Service raising concerns about the fishing effects evaluation. In particular, Oceana argued that the fishing effects evaluation ignored important habitat, did not accurately represent the effects of fishing on sensitive corals, relied on inappropriately narrow areas to assess habitat disturbance, used the overfished threshold to unlawfully avoid minimizing adverse fishing effects that did not cause population-level harm, and failed to consider conservation and enhancement measures. *See, e.g.*, 2-ER-151; 3-ER-401–418; 3-ER-419–422;

3-ER-434; 3-ER-438–441; 4-ER-463–464. Oceana also offered a proposal to freeze the footprint of bottom trawling in the Gulf of Alaska to protect corals and other fragile benthic habitat from the adverse effects of fishing. 2-ER-43–57. The proposal would have protected 90 percent of the Gulf of Alaska, while displacing only five percent of current trawl fishing. 2-ER-43.

The Council and the Fisheries Service ignored Oceana's concerns and its proposal, instead adopting a final action that updated essential fish habitat maps, but made no changes to mitigation measures and did not consider any additional conservation and enhancement measures. 2-ER-182–183; 2-ER-197–198, 2-ER-204.

IV. Procedural history

The Fisheries Service adopted the final action amending five fishery management plans for federal fisheries and fish resources in the Bering Sea, Aleutian Islands, Gulf of Alaska, and the Arctic Ocean on July 19, 2024. 2-ER-182. Oceana filed a timely complaint challenging that action in Alaska district court on August 16, 2024. 5-ER-870–894. In the district court, Oceana challenged the Fisheries Service's fishing effects analysis as inconsistent with the Magnuson Stevens Act's requirements to evaluate adverse effects from fishing on all essential fish habitat, and the agency's failure to meet its separate obligation to conserve and enhance essential fish habitat. 4-ER-549–555. Oceana also argued

that the analysis was arbitrary because the agency failed to consider available evidence about coral depths and recovery times and information about habitat use of all life stages, and violated the National Environmental Policy Act by failing to consider a reasonable range of alternatives. 4-ER-555–562. The district court issued a decision on September 30, 2025, that deferred to the Fisheries Service and dismissed all of Oceana's claims. 1-ER-3–39.

Oceana timely filed a notice of appeal on December 5, 2025. 5-ER-896. On appeal, Oceana is pursuing only the argument that the Fisheries Service's method of evaluating adverse effects was inconsistent with the language and structure of the Magnuson Stevens Act.

SUMMARY OF ARGUMENT

The two main criteria the Fisheries Service used in the 2023 review for determining whether there were adverse fishing effects to essential fish habitat—one that considered only a limited subset of the designated essential fish habitat, and one that used overfished thresholds, a measure of stock population collapse—are inconsistent with the plain language and structure of the Magnuson Stevens Act. The first is unlawful because it does not meet the Magnuson Stevens Act's requirement to evaluate adverse fishing effects to *all* designated essential fish habitat. Instead, it focuses on only *some* of the designated habitat: the limited portion the Fisheries Service deems the "core" essential fish habitat. By limiting

its evaluation to only this narrow portion of the adult summer habitat, the Fisheries Service failed to consider whether there was damage to designated habitat areas outside the "core" area even though these non-"core" areas—areas the Fisheries Service apparently deemed non-essential essential fish habitat—may include habitat important for other life stages or fragile features like corals and sponges that take centuries to recover.

The second criteria is unlawful because using a measure of stock collapse as a trigger for minimizing adverse fishing effects conflates the Fisheries Service's obligation to address habitat degradation with its obligation to prevent overfishing, two distinct threats that are separately addressed under the Magnuson Stevens Act. Neither the statute nor the regulations permit the agency to decline—as it did here—to address adverse effects on designated habitat until the stock that relies on that habitat has collapsed.

Under the Fisheries Service's approach to evaluating adverse fishing effects, it could decline to consider any minimization measures on the basis of these two criteria alone. For most stocks, only if one of the two criteria were triggered did the Fisheries Service even consider minimizing adverse fishing effects. And even then, it first considered a stock's life history parameters to determine whether those criteria indicated adverse effects that should be minimized. It did not consider this

other information to evaluate whether there are adverse effects to the remaining non-"core" designated essential fish habitat.

Because it did not evaluate the effects of fishing on all essential fish habitat and used stock collapse as a substitute for an evaluation of habitat degradation, the Fisheries Service's did not meet its statutory duty to identify *any* adverse effects of fishing on *all* designated essential fish habitat. Its resulting decision that there were no adverse effects requiring minimization was therefore not in accordance with the law under the APA and the Magnuson Stevens Act. The Court should remand to the agency for a new analysis and decision consistent with the statute.

ARGUMENT

I. Standard of review

This Court reviews a district court's summary judgement decision de novo. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

Judicial review of agency decisions under the Magnuson Stevens Act is governed by the APA's standard of review. 16 U.S.C. § 1855(f)(1)-(2); *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006). An agency's actions violate the APA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004).

The issues on appeal are legal questions that relate to the meaning of the Magnuson Stevens Act and whether the agency action met the statutory obligation. When reviewing legal questions, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and must use the traditional tools of statutory interpretation to find the "single, best meaning" of the statute. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13, 400-01 (2024); *see also Alaska Dep't of Fish & Game v. Fed. Subsistence Bd.*, 139 F.4th 773, 781 (9th Cir. 2025). An agency action that is inconsistent with a statute is unlawful, or "not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927-29 (9th Cir. 2008) (affirming district court holding that agency action inconsistent with statute and implementing regulations is unlawful under APA); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 975-76 (9th Cir. 2021) (finding agency rule that was inconsistent with a statute was thus "not in accordance with law" and "in excess of statutory . . . limitations") (quoting 5 U.S.C. § 706(2)(A), (C)); *Midwater Trawlers Coop. v. Dep't of Com.*, 282 F.3d 710, 720-21 (9th Cir. 2002) (finding agency's fishery allocation decision unlawful under the APA because it conflicted with the Magnuson Stevens Act).

The district court erred by applying a deferential standard of review to the question of whether the two primary criteria the Fisheries Service used to identify

damage to habitat were consistent with the language of the Magnuson Stevens Act. 1-ER-31, 1-ER-32 (noting, with respect to the overfished threshold argument, that "deference is at its highest when reviewing" technical issues, and, with respect to core essential fish habitat argument, that agency's decision "is also entitled to substantial deference"). Whether an agency acts within its statutory authority is a question of law reviewed de novo. *Alaska Dep't of Fish & Game*, 139 F.4th at 781. The Court, on appeal, should apply its independent judgment to review the question and find the "best meaning" of the statute. *Loper Bright Enters.*, 603 U.S. at 400-01, 412-13; *see also A.P. Bell Fish Co. v. Raimondo*, 94 F.4th 60, 64 (D.C. Cir. 2024) ("in reviewing agency action directly," a court "affords no particular deference to the district court's view of the law" (citation modified)).

II. Oceana has standing.

The district court correctly held that Oceana has standing to bring this case. *See* 1-ER-28. Oceana's members have standing in their own right, their interests are germane to Oceana's organizational purpose, and the lawsuit does not require the participation of its individual members. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Oceana's mission is to protect and restore ocean habitat, including through the conservation of essential fish habitat. 4-ER-564, 4-ER-565–566. Its members include "conservationists, fishermen, subsistence harvesters, scientists, and other ocean enthusiasts" who rely

on Oceana to advocate for their interests. 4-ER-564. The Fisheries Service's unlawful analysis harms Oceana's members' "aesthetic, environmental, and recreational interests" because, had it applied a lawful analysis, it might have chosen to adopt measures more protective of habitat important to Oceana's members. *See Am. Oceans Campaign*, 183 F. Supp. 2d at 9-10.

To prove standing, Plaintiffs must show: "(1) they have suffered a concrete, personal, and particularized injury in fact to a legally protected interest; (2) a causal connection between the injury and the action of the defendant, fairly traceable to the challenged action; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision." *Id.* at 9 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Oceana's members and supporters live near and rely on areas of the North Pacific that are identified as essential fish habitat under the fisheries management plans at issue in this litigation. They boat, fish, scuba dive, conduct research, and enjoy observing coral gardens and watching marine mammals and seabirds in areas of the North Pacific ranging from Southeast Alaska to Dutch Harbor. *See* 4-ER-571–581; 4-ER-588–592; 4-ER-598–600. The fish and marine resources that Oceana's members harvest, including sablefish, crab, salmon, rockfish, and halibut, use a variety of habitats throughout their lives, including seamounts, corals, and nearshore and offshore waters. *See, e.g.*, 5-ER-675–676, 5-ER-671–

673; 4-ER-634–635; 2-ER-142; 2-ER-126, 2-ER-131, 2-ER-136, 2-ER-147; 3-ER-307, 3-ER-309.

The Fisheries Service's failure to adequately analyze the effects of fishing on these areas and its corresponding failure to consider any measures to minimize adverse fishing effects to these habitats harms Oceana's members and supporters. Continued trawling in essential fish habitat harms their interests in viewing healthy coral gardens, marine mammals and other ocean life, and in harvesting fish and other species to feed their families. *See, e.g.*, 4-ER-581–582, 4-ER-585–587; 4-ER-590–591, 4-ER-592–597; 4-ER-599–601.

These harms constitute concrete injury in fact, are fairly traceable to the actions taken by the Fisheries Service and challenged in this litigation, and are likely to be redressed by the relief sought. *See* 1-ER-28 (district court opinion finding that Oceana has standing); *see also Lujan*, 504 U.S. at 560-61; *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) ("Plaintiffs need not demonstrate that there is a guarantee that their injuries will be redressed by a favorable decision.") (citation modified); *Am. Oceans Campaign*, 183 F. Supp. 2d at 9-10 (finding harm to members' "aesthetic, environmental, and recreational interests" because of the Fisheries Service's failure to protect essential fish habitat).

III. The Fisheries Service violated the Magnuson Stevens Act by using a fishing effects analysis that is inconsistent with the plain language of the statute.

The Magnuson Stevens Act and its implementing regulations require the Fisheries Service to (1) identify and designate essential fish habitat, (2) evaluate if there are any adverse fishing effects on any of that habitat, and (3) take practicable measures to minimize any adverse fishing effects on any of that habitat. *See* 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815. This case does not concern the first step, designation of essential habitat. The only issue is what the agency, having designated those areas, must do to protect them from any adverse effects of fishing. On this, both the statute and the agency's regulations are clear—and they do not permit the type of analysis that the Fisheries Service conducted here.

The statute and regulations establish a low bar for identifying and minimizing harm to all designated habitat: any adverse fishing effects must be minimized to the extent practicable—not just significant effects or those large enough to cause a fish population collapse—and the obligation to minimize applies to all designated essential fish habitat, not just half, or a limited portion of it. *See supra* pp. 7-13. Contrary to the plain language of the statute, the Fisheries Service in its review of fishing effects on essential fish habitat used two criteria that set an impermissibly high bar that allowed the agency to conclude there are no adverse fishing effects if it answered "no" to two questions: (1) has the population

collapsed, and (2) has there been significant damage to the limited part of the designated essential fish habitat the Fisheries Service chose to look at? These criteria are inconsistent with the plain language and structure of the Magnuson Stevens Act and therefore unlawful. *See* 16 U.S.C. § 1853(a)(7) (requiring practicable minimization of adverse fishing effects on identified essential fish habitat); *see also Nat'l Wildlife Fed'n,* 524 F.3d at 927-29 (agency action inconsistent with a statute and implementing regulations was unlawful under APA). By following this unlawful process for determining whether there were adverse fishing effects, the agency avoided its obligation to adopt practicable minimization measures limiting the effect of fishing on essential fish habitat.

Importantly, the scope of the required analysis is not an issue involving scientific debate where a court might defer to an agency; it is a legal question the court can resolve. *See Loper Bright Enters.*, 603 U.S. at 412-13 (requiring that courts not defer to agencies in determining statutory obligations). The statute does not allow the Fisheries Service to evaluate fishing effects on habitat by asking whether a stock is overfished. Nor does it allow the Fisheries Service to completely ignore adverse effects on much of the habitat the agency has already designated essential.

A. The Magnuson Stevens Act and implementing regulations require the Fisheries Service to practicably minimize any adverse fishing effects on all designated essential fish habitat.

1. The statutory language and structure are clear.

In the Magnuson Stevens Act and Sustainable Fisheries Act amendments, Congress recognized the importance of habitat, separate and apart from fishing pressure, to support healthy fish stocks and required proactive protection of habitat the agency deems essential for fish stocks. *See supra* pp. 7-10. Accordingly, it required the Fisheries Service to consider measures to minimize, where practicable, *any* adverse effects to *all* designated essential fish habitat.

Under the Magnuson Stevens Act, the Fisheries Service must "minimize to the extent practicable adverse effects on [essential fish habitat] caused by fishing, and identify other actions to encourage the conservation and enhancement of [essential fish habitat]." 16 U.S.C. § 1853(a)(7). "In statutory interpretation, the 'plain meaning of a statute controls where that meaning is unambiguous.'" *Meyers v. Birdsong*, 83 F.4th 1157, 1160 (9th Cir. 2023) (en banc) (quoting *Khatib v. Cnty. of Orange*, 639 F.3d 898, 902 (9th Cir. 2011)). Here, Congress chose to use broad language and included no qualifiers, like "significant" or "major," before "adverse effects" that would limit the scope or degree of adversity required before the Fisheries Service considers minimization measures. 16 U.S.C. § 1853(a)(7); *see United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1062

(9th Cir. 2016) ("We ordinarily resist reading words or elements into a statute that do not appear on its face." (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). Nor does the language indicate the obligation to protect essential fish habitat is linked to the stock's population status.

To the contrary, in addition to the language, the structure and legislative history of the Magnuson Stevens Act demonstrate that Congress understood the importance of habitat to sustainable fisheries and the ecosystem at large. *Supra* pp. 7-10. In the Sustainable Fisheries Act amendments, Congress recognized that the loss of habitat is "[one] of the greatest long-term threats to the viability of commercial and recreational fisheries," 16 U.S.C. § 1801(a)(9). It added the requirements to identify essential fish habitat and protect it from adverse fishing effects to ensure that habitat would not continue to be damaged. *See supra* pp. 9-10 (discussing legislative history). In so doing, it mandated the protection of *all*, not just some, of the habitat deemed "essential," that is, the habitat "necessary . . . for spawning, breeding, feeding or growth to maturity." 16 U.S.C. § 1853(a)(7); *id.* § 1802(10).

In the same Act, Congress strengthened the distinct overfishing and stock rebuilding provisions that command the Fisheries Service to prevent the collapse of fish stocks from excessive fishing. Critically, however, the Sustainable Fisheries Act amendments separately required protection of essential fish habitat without

reference to measures of overfishing or stock population status. *See supra* p. 8. Thus, the statute directs the Fisheries Service to protect habitat, *and* to prevent overfishing, but Congress recognized these as distinct threats and did not link the Fisheries Service's duty to protect habitat to stock collapse. Rather, Congress required proactive habitat conservation measures to ensure that habitat degradation did not lead to that very situation. 16 U.S.C. § 1853(a)(7); *see also supra* pp. 9-10 (congressional statements explaining the importance of habitat protection, in addition to regulating fishing).

2. Agency regulations confirm that the statutory obligation to minimize adverse fishing effects applies to any adverse fishing effects and all designated essential fish habitat.

The Fisheries Service has long interpreted its obligation to protect essential fish habitat broadly. When it promulgated its final essential fish habitat regulations in 2002, it adopted a strong and unqualified definition of adverse effects consistent with its statutory obligation to minimize any adverse effects. 50 C.F.R. § 600.810(a). It specified that the term included "any impact that reduces quality and/or quantity of [essential fish habitat]." *Id.*; *see also* 67 Fed. Reg. at 2347. It rejected suggestions that would have narrowed or qualified the definition: "The [Fisheries Service] disagrees that only statistically significant adverse effects should be considered because the Magnuson Stevens Act contains no such limitations. A much more inclusive definition of 'adverse effect' is necessary in

the regulations to clarify what kinds of potential effects should be addressed in [fishery management plans]." *Id.* Further, the definition is not linked to the decline or collapse of a fish population; it is explicitly tied to reductions in quality or quantity of *habitat*. 50 C.F.R. § 600.810(a).

The unqualified definition of adverse effects is also reflected in the regulation explaining the duty to minimize adverse effects. That regulation requires the Fisheries Service to "prevent, mitigate, or minimize *any* adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects [essential fish habitat] in a manner that is more than minimal and not temporary in nature." 50 C.F.R. § 600.815(a)(2)(ii) (emphasis added). The initial proposal for this provision would have limited the agency's minimization obligation to only "substantial" adverse effects, *see* 62 Fed. Reg. 66531, 66538 (Dec. 19, 1997). In an interim final rule, the Fisheries Service recognized the modifier could imply a constraint not in the statute, and rejected the "substantial" modifier. *Id.* at 66531, 66538. The Fisheries Service also considered "identifiable" but in the end adopted a final rule with no modifier at all. 67 Fed. Reg. at 2354. Relevant here, the Fisheries Service also refused to require a link between habitat impacts and declining fish populations, explaining, "[i]t is not appropriate to require definitive proof of a link between fishing impacts to [essential fish habitat] and reduced stock productivity before [c]ouncils can take

action to minimize adverse fishing impacts to [essential fish habitat]" because "[s]uch a requirement would raise the threshold for action above that set by the [Magnuson Stevens Act]." *Id.*

The final rule includes explanatory language that effects must be "more than minimal and not temporary," 50 C.F.R. § 600.815(a)(2)(ii), but the agency clarified that language merely made clear that "inconsequential changes" did not require minimization efforts, *see* 67 Fed. Reg. at 2354. It did not raise the threshold for the obligation to minimize adverse fishing effects beyond that established in the adverse effects definition—"any impact that reduces the quality and/or quantity of [essential fish habitat]," *id.* at 2347. Any other interpretation of the regulation—one that imposes an additional threshold before minimization of adverse effects is required—would be flatly inconsistent with the statute. Thus, for almost 25 years, the Fisheries Service has recognized that the Magnuson Stevens Act commands it to take practicable steps to minimize fishing effects for "any impact that reduces the quality and/or quantity of [essential fish habitat]." 50 C.F.R. § 600.815(a)(2)(ii); 67 Fed. Reg. at 2354.

B. The Fisheries Service unlawfully narrowed its evaluation of fishing effects to include only a portion of the designated essential fish habitat and linked minimization of adverse fishing effects to overfished thresholds.

Despite the clear statutory and regulatory commands, in this case, the Fisheries Service has constrained its analysis by, on one hand, ignoring impacts to

much of the habitat it has already determined is essential to fish for their survival, and, on the other hand, tying an adverse effects conclusion to stock collapse or overfishing. Because it erected these impermissible barriers, the Fisheries Service failed in its obligation to practicably minimize any adverse effects on all essential fish habitat, and its decision is therefore inconsistent with the law. *See Nat'l Wildlife Fed'n*, 524 F.3d at 927-29 (agency action inconsistent with statute and implementing regulations was unlawful under APA).

1. The Fisheries Service cannot limit its review of fishing effects to a subset of "core" essential fish habitat.

Contrary to the Magnuson Stevens Act's command to practicably minimize any adverse effects to all designated essential fish habitat, the Fisheries Service ignored adverse effects to essential fish habitat outside the area it defined as "core." Instead, the Fisheries Service assessed the effects of fishing on only about *half* of the adult summer habitat for each stock instead of considering its effects on all of the designated essential fish habitat. 2-ER-229 (explaining that the "core" essential fish habitat is the upper 50th percentile of abundance for adult summer habitat).

As explained above, *see supra* pp. 7-13, the Magnuson Stevens Act requires protection of *all* essential fish habitat, not a portion of it. The first requirement of the essential fish habitat provisions is to identify and describe the habitat that is "*necessary* to fish for spawning, breeding, feeding or growth to maturity."

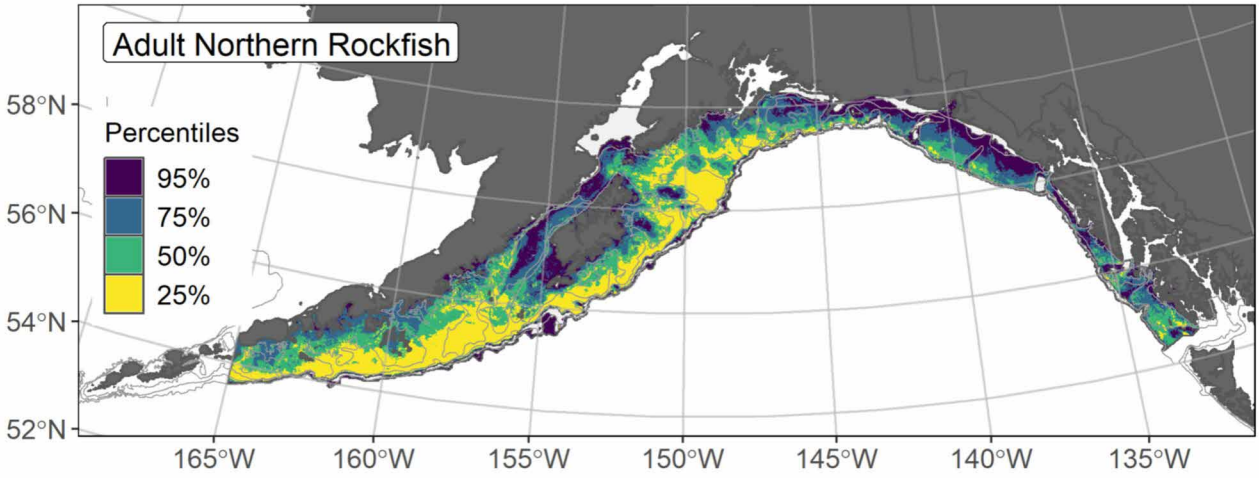
16 U.S.C. § 1802(10) (emphasis added); *id.* § 1853(a)(7); *see also* 50 C.F.R. § 600.815(a)(1). The Magnuson Stevens Act thus recognizes that different habitat areas may be important to fish at different life stages or for different purposes. Consistent with that recognition, the Fisheries Service's regulations direct it to consider information about habitat use at different life stages; identify the areas that are *necessary* to sustain the fishery and ecosystem; and explain what distinguishes the identified essential fish habitat from other habitat used by the species. 50 C.F.R. § 600.815(a)(1)(ii)-(iv)(A).

In Alaska, the Fisheries Service described essential fish habitat for each stock in the relevant fishery management plan and revised those descriptions in the five-year review. 2-ER-182. Having designated this essential fish habitat, the Fisheries Service was required to evaluate adverse impacts from fishing to all of the designated habitat. Without evaluating all of the designated habitat, the Fisheries Service could not meet its obligation to minimize effects to all of that habitat. The Magnuson Stevens Act and its implementing regulations are unequivocal on that point. *See* 16 U.S.C. § 1853(a)(7) (requiring the Fisheries Service to identify essential fish habitat and "minimize to the extent practicable adverse effects on such habitat caused by fishing"); 50 C.F.R. § 600.815(a)(2). Evaluating less than all designated habitat is tantamount to narrowing the essential fish habitat designations the Fisheries Service just made without justifying the

change and going through the required process of analyzing relevant information and describing and mapping that narrower range of habitat. 50 C.F.R. § 600.815(a)(1). It undermines Congress's key reasons for requiring the agency to identify essential fish habitat in the first place: to compel the agency to assess threats to that habitat and take actions to protect it. *See* 16 U.S.C. § 1853(a)(7).

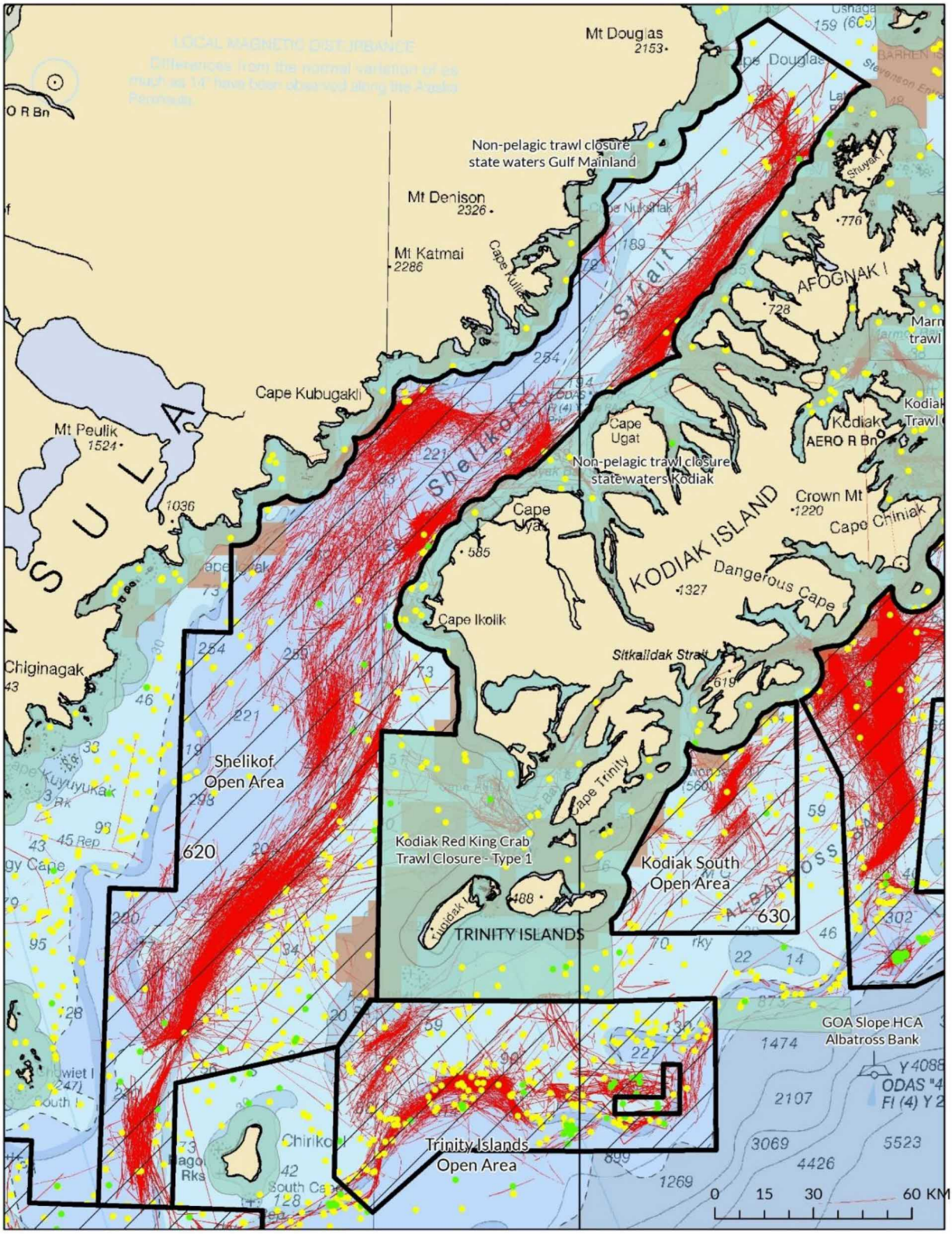
The Fisheries Service's narrow focus on "core" designated habitat means the agency did not look at adverse fishing effects in the rest of that habitat —even in cases where the overlooked habitat was known to contain important habitat types, was known to be intensively trawled, or both. The example of northern rockfish illustrates this deficiency. The essential fish habitat description for Gulf of Alaska northern rockfish states that juveniles use corals and sponges as refuge. 5-ER-806; 5-ER-683. As the maps below illustrate, the Fisheries Service's decision to consider only the half of northern rockfish essential fish habitat that it deems "core" excludes designated essential fish habitat where corals and sponges have been found in areas that are heavily trawled, like the Shelikof Strait region north and west of Kodiak Island. This fragile habitat is likely damaged by fishing, but those adverse effects to areas used for refuge by northern rockfish are not evaluated at all under the Fisheries Service's approach. *See* 3-ER-321–332 (2005 essential fish habitat environmental impact statement describing studies showing damage to sponges, sea whips, corals, and other benthic habitat from trawling).

This Fisheries Service map shows both the designated essential fish habitat for northern rockfish (all colors) and the "core" area—the yellow and green areas only—that was considered in the fishing effects analysis. Shelikof Strait, in blue and purple to the north and west of Kodiak Island (in the center of the map, between 56 and 59 degrees north latitude and 150 and 155 degrees west longitude) was not analyzed for adverse fishing effects because it is outside the "core" area.



5-ER-820.

But, as the following map illustrates, this is a heavily trawled area with documented corals and sponges, both of which provide essential habitat for northern rockfish and are easily damaged by trawling.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Non-pelagic trawl closure
state waters Gulf Mainland
Mt Denison
2326
Mt Katmai
2286
Cape Kubugakli
Mt Peulik
1524
Cape
Ugat
Non-pelagic trawl closure
state waters Kodiak
Cape
Uyak
KODIAK ISLAND
Crown Mt
1220
Cape Chiniak
Dangerous Cape
1327
Cape Ikolik
Sitkalidak Strait
Chiginagak
Shelikof
Open Area
620
Kodiak Red King Crab
Trawl Closure - Type 1
TRINITY ISLANDS
Kodiak South
Open Area
630
Cape Trinity
GOA Slope HCA
Albatross Bank
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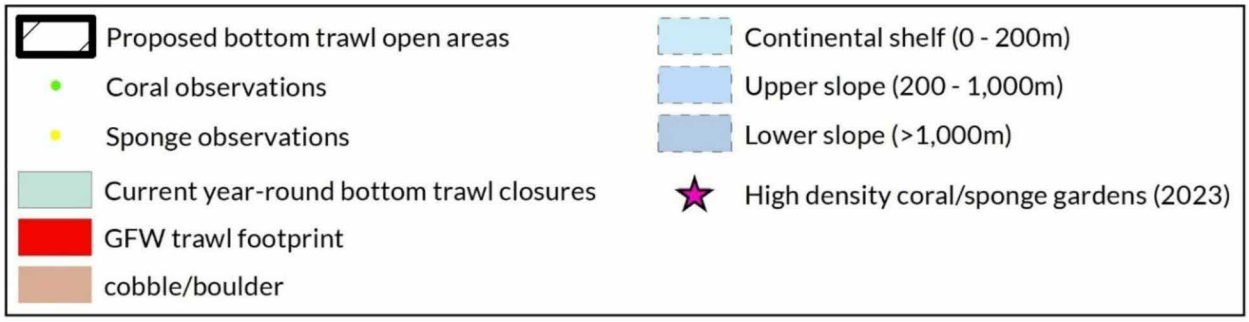

2-ER-43, 2-ER-53–54; *see also* 2-ER-104, 2-ER-106 (Fisheries Service maps confirming coral and sponge locations near Kodiak Island); 3-ER-316–317 (recognizing that various trawl fisheries take place around Kodiak Island).

By excluding this portion of the habitat, the Fisheries Service likely missed adverse effects from fishing and thus avoided its obligation to adopt practicable minimization measures for that habitat. Because the Fisheries Service only analyzed fishing effects to the "core" portion of the designated essential fish habitat, all of the habitat outside of the "core" half—plus ten percent of the "core"—could be entirely destroyed before the Fisheries Service even considered whether to recommend minimization measures.

This is inconsistent with the Magnuson Stevens Act's requirement to "minimize to the extent practicable adverse effects on [essential fish] habitat," 16 U.S.C. § 1853(a)(7), not a limited portion of the designated habitat. It is also inconsistent with the regulations' mandate that the Fisheries Service "evaluate the potential adverse effects of fishing on [essential fish habitat] designated under the

[fishery management plan]" and to the extent practicable "prevent, mitigate, or minimize any adverse effects from fishing" on that habitat that are not inconsequential. 50 C.F.R. § 600.815(a)(2)(i)-(ii); *see also* 67 Fed. Reg. at 2354. The Magnuson Stevens Act is broadly worded and does not allow a portion of a stock's essential fish habitat to be entirely destroyed while the harm is left unaddressed. *See supra* pp. 34-38.

The district court erred by giving a "high degree of deference" to the Fisheries Service's technical expertise rather than considering the plain language of the statute. 1-ER-31. The question at issue is not one of technical expertise; it is a question of statutory interpretation—whether the "best reading" of the Magnuson Stevens Act allows the Fisheries Service to take the approach it did. Instead of construing and applying the Magnuson Stevens Act's requirement to evaluate and minimize fishing effects to all designated essential fish habitat, the district court deferred to the Fisheries Service's factual explanation for why it ignored half the designated habitat. 1-ER-30–31. But the agency entirely failed to square its approach with the clear command of the statute: the Magnuson Stevens Act does not allow the Fisheries Service to effectively de-designate half the essential habitat by ignoring it in the evaluation of fishing effects. *See supra* pp. 34-38. The Fisheries Service's rationale—that considering only half the habitat would avoid excluding important areas or diluting effects, and that 90 percent of

the smaller, "core" area would remain undisturbed, 1-ER-30, is arbitrary and inconsistent with the statute. The Fisheries Service cannot pick and choose which designated essential fish habitat to consider. If effects are diluted or minimized when considering all essential fish habitat, it simply means the Fisheries Service has adopted a model that allows it to ignore adverse fishing effects by averaging them across a large area, instead of addressing all of the adverse fishing effects it identifies anywhere in the range of essential fish habitat. Its explanation does not address the legal problem with the Fisheries Service's approach—it fails to evaluate all of the designated habitat.

The district court also found the stock authors' discretion to consider other information important, 1-ER-29, but this option to consider other information does not remedy the unlawful evaluation framework the Fisheries Service adopted. As explained above, although analysts had discretion to consider other information, they were only required to do so under the Fisheries Service process if a stock failed one of the two primary criteria. *See supra* pp. 19-23. And, even then, the additional evaluation functioned as an off-ramp to avoid minimization measures, not as a broader consideration of designated essential habitat outside the "core."

In fact, according to the Fisheries Service's summary of the 2023 fishing effects evaluation, only 18 of the 103 stocks evaluated were either above ten percent disturbance to "core" essential fish habitat or below the overfished

threshold. *See supra* pp. 22-23. For any stock that did not meet one of these two criteria, no additional analysis was required. In the district court proceedings, the Fisheries Service was only able to point to one example of a fish stock, Kamchatka flounder, where neither criterion was met and additional analysis *was* performed. 4-ER-544. Allowing fisheries analysts discretion to consider other information does not rescue the Fisheries Service's unlawfully constrained analysis. *Cf. Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 111-12 (D.D.C. 2015) (rejecting agency's argument that its failure to meet Magnuson Stevens Act obligation to add stocks to a fishery management plan was cured by promising to consider adding them to the plan in a future action); *Oceana, Inc. v. Ross*, 483 F. Supp. 3d 764, 785 (N.D. Cal. 2020) (rejecting Fisheries Service's argument that unlawfully high fishing limits could be found lawful simply because actual fishing was lower than the limit and the target fish population had increased).

Nothing else the Fisheries Service considered as a part of its process—the overfishing threshold or any additional life history parameters—cures its failure to evaluate the entire area designated as essential fish habitat for adverse effects.

2. The Fisheries Service cannot lawfully use the overfished threshold to assess adverse effects on habitat.

The Fisheries Service's use of a stock's overfished threshold (MSST) as one of the criteria for determining whether there was damage to *habitat* is equally inconsistent with the plain language and structure of the Magnuson Stevens Act.

That approach conflated two distinct statutory requirements—one to protect essential fish habitat, and one to prevent overfishing—and failed to meet the agency's obligation to take practicable measures to minimize all adverse fishing effects, not just those that might cause population collapse. *See supra* pp. 34-38 (describing Magnuson Stevens Act's overfishing and essential fish habitat requirements). Under this criterion, the Fisheries Service did not consider minimizing adverse effects unless they had already led to stock collapse, a point when it may be too late to address the damage.

As described above, when Congress enacted the Magnuson Stevens Act, it chose broad language to require practicable minimization of adverse effects to essential fish habitat; it did not require minimization only for serious, substantial, statistically significant, or even identifiable adverse effects. Nor did it tie minimization to a stock's status, certainly not to population collapse. *See supra* pp. 36-38. Similarly, the Fisheries Service's regulations require practicable minimization of "any" adverse effect. 50 C.F.R. § 600.815(a)(2)(ii); *see also* 67 Fed. Reg. at 2354. The Fisheries Service explicitly rejected proposals to require "definitive proof of a link" between stock productivity and fishing impacts before considering minimization measures because that requirement would be inconsistent with the Magnuson Stevens Act. *See* 67 Fed. Reg. at 2354. By using overfished thresholds as one of two main criteria for deciding whether to minimize

adverse impacts to habitat, the Fisheries Service relied on a factor that the Act does not allow, and its decision was therefore inconsistent with the law. *See Nat'l Wildlife Fed'n*, 524 F.3d at 927-29 (agency action inconsistent with statue and implementing regulations was unlawful under APA).

This approach is also inconsistent with the structure of the Magnuson Stevens Act. Among the Fisheries Service's primary duties under the Act are the requirement to protect and conserve habitat and the mandate to prevent overfishing and rebuild overfished stocks. These are distinct obligations, and using a stock's overfished threshold—population collapse—as an indicator for adverse habitat effects improperly conflates them. *Compare, e.g.*, 16 U.S.C. § 1853(a)(7) (protecting essential fish habitat), *with id.* § 1853(a)(10), (15) (preventing and remedying overfishing). It is clear Congress prescribed these as separate duties by addressing their importance in distinct provisions of the Magnuson Stevens Act. *Compare id.* § 1801(a)(5) (discussing importance of preventing overfishing and maintaining optimum yield), *and id.* § 1801(b)(4) (discussing congressional purpose of achieving optimum yield "on a continuing basis"); *id.* § 1853(a)(10), (15) (requiring fishery management plans to specify objective and measurable criteria to identify when a fish stock is overfished, and annual catch limits that prevent overfishing), *and id.* § 1854(e) (requiring agency to adopt rebuilding plans for overfished stocks), *with id.* § 1801(a)(2)(C) (identifying habitat loss as a

distinct threat to fish stocks), *and id.* § 1801(a)(9) (prioritizing habitat considerations to protect the viability of all fisheries); *id.* § 1853(a)(7) (requiring fishery management plans to, among other things, identify and describe essential fish habitat and "minimize to the extent practicable adverse effects on such habitat caused by fishing").

Overfished thresholds—MSST—are not lawful or relevant indicators of *habitat* damage. The purpose of an overfished threshold is, by definition, to identify when a fish population is overfished, which triggers measures to prevent or to end overfishing. 50 C.F.R. § 600.310(e)(2)(i)(A), (E)-(F) (defining MSST as a threshold below which a stock is considered overfished); 16 U.S.C. §§ 1851(a)(1), 1853(a)(10), 1854(e). Substituting consideration of whether a fish population is overfished for consideration of whether a stock's essential habitat is harmed by fishing impermissibly renders the essential fish habitat requirement surplusage and nullifies the provision's effectiveness because no action will be taken to protect habitat until the stock has collapsed. *See, e.g.*, *Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (the canon against surplusage applies "with special force" when a proposed statutory construction "render[s] an entire subparagraph meaningless" (alteration in original) (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018))); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) (discussing "one of the most basic interpretive canons,

that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).[3]

These overfishing and habitat requirements are separate because Congress recognized that fishing pressure and habitat damage are distinct threats that may require different preventive actions. Stock collapse, for example, may be the result of fishing pressure or other causes and unrelated to habitat loss. But even when the stock's decline is caused by habitat degradation, using the overfished threshold as a decision criterion to consider protecting habitat means waiting until the damage is so severe that the stock has collapsed. *See* 50 C.F.R. § 600.310(e)(2)(i)(A), (E)-(F) (defining MSST, the overfished threshold). By the time the fish stock has reached this point, it may be too late to recover either the fish population or any habitat that has been adversely affected by fishing. *See* 4-ER-514 ("[I]t could be difficult to detect a habitat influence on the stock for a while after the habitat was damaged,

[3] Experts reviewing an earlier, substantially similar, iteration of the Fisheries Service's approach to evaluating fishing effects on essential fish habitat expressed the same view as Congress: MSST, or overfished thresholds, are "completely inappropriate" for addressing habitat, 4-ER-529, and "problematic to apply" because "there could be no sign of a decline in biomass until a precipitous collapse occurs." 4-ER-534. Instead, reviewers suggested that the Fisheries Service use reports of bycatch (*i.e.*, corals and sponges), and changes in benthic community diversity and species composition as criteria for identifying adverse effects. 4-ER-530–531, 4-ER-526–527.

perhaps until it was too late, i.e. too much of the habitat was destroyed."). It certainly fails to meet the proactive habitat protection requirement of the Magnuson Stevens Act.

The district court erred, again, because it applied a "highly deferential" standard to reviewing the Fisheries Service's decision rather than using its independent judgment to review whether the Fisheries Service's population collapse criterion is inconsistent with the statute. 1-ER-31. The district court found that the Fisheries Service's use of the overfished threshold was not arbitrary because the agency also considered disturbance to "core" essential fish habitat for stocks that are not overfished. 1-ER-29–31. But, as demonstrated above, *see supra* pp. 39-47, that criterion is also unlawful. Neither of the two required considerations meets the statutory obligation.

The Fisheries Service's reliance on a measure of stock collapse to determine whether fishing has harmed essential fish habitat is inconsistent with the plain language and structure of Magnuson Stevens Act and is therefore not in accordance with the law. *See Nat'l Wildlife Fed'n*, 524 F.3d at 927-29 (agency action inconsistent with statute and implementing regulations was unlawful under APA).

IV. The Court should remand the decision to the Fisheries Service to correct its unlawful analysis.

The Fisheries Service's decision approving the essential fish habitat amendments to the fishery management plans for federal fisheries off Alaska is unlawful because it conflicts with the Magnuson Stevens Act. Oceana therefore requests that the Court declare the Fisheries Service's decision adopting the amendments unlawful, vacate the district court opinion, remand to the Fisheries Service to conduct a new fishing effects analysis consistent with the Magnuson Stevens Act, and impose a deadline of 18 months for the Fisheries Service to complete the new analysis. *See, e.g.*, *Waterkeeper All. v. U.S. Env't Prot. Agency*, 140 F.4th 1193, 1228 (9th Cir. 2025) (remanding to agency to "reconsider its decision or provide more complete explanation"); *Glacier Fish Co. v. Pritzker*, 832 F.3d 1113, 1127 (9th Cir. 2016) (remanding to the Fisheries Service for action consistent with its own regulations); *Nat'l Wildlife Fed'n*, 524 F.3d at 937 (noting that the Fisheries Service did not "challenge the court's discretionary authority to impose a deadline for the remand proceedings"). The Fisheries Service's decision not to adopt any additional measures to protect essential fish habitat was based on an unlawfully narrow analysis. An analysis consistent with the requirements of the Magnuson Stevens Act could lead the Fisheries Service to conclude that there are adverse effects on essential fish habitat, triggering its obligation to impose

practicable mitigation measures benefiting fish stocks important to some of the nation's largest fisheries.

Although vacatur is the default remedy under the APA, *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 50 (9th Cir. 2025), Oceana is not asking for that remedy in this case. Instead, Oceana requests a remand for a new fishing effects evaluation and decision. The new evaluation must correct the errors in the 2023 review by considering the effects of fishing on *all* essential fish habitat for all stocks instead of narrowing that analysis to a subset of that habitat or linking minimization measures to population status. Leaving the amendments in place is appropriate because Oceana has not alleged errors in the essential fish habitat maps and descriptions that were adopted in the fishery management plan amendments. Leaving that updated information in place will allow the Fisheries Service to rely on the updated essential fish habitat identifications and information when it completes the new analysis. Because the amendments the Fisheries Service adopted simply update maps, descriptions, and scientific references to include the most recent information, leaving them in place may have some benefits and is not likely to cause environmental harm that would necessitate vacatur or interfere with a new, lawful analysis by the Fisheries Service. *Cf. Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532-33 (9th Cir. 2015)

(explaining that a court may choose not to vacate when equity demands, such as in certain instances where vacating could cause environmental harm).

CONCLUSION

For the foregoing reasons, Oceana respectfully requests that the Court reverse and vacate the district court opinion and remand the Fisheries Service's decision for completion of a new analysis consistent with the Magnuson Stevens Act.

Respectfully submitted this 26th day of February, 2026.

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EARTHJUSTICE

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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6 AND FORM 17

9th Cir. Case No. 25-7689

The undersigned attorney states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: *s/ Katharine S. Glover* **Date:** 2/26/2026

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case No. 25-7689

I am the attorney or self-represented party.

This brief contains 12,134 words, including 220 words manually counted in any visual images, and excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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- [ ] a party or parties are filing a single brief in response to multiple briefs.
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Katharine S. Glover* **Date:** 2/26/2026

No. 25-7689

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCEANA, INC.,
Plaintiff/Appellant,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants/Appellees,

and

AT-SEA PROCESSORS ASSOCIATION, et al.,
Intervenor-Defendants/Appellees.

Appeal from the United States District Court for the District of Alaska
No. 3:24-cv-00180-SLG (Hon. Sharon L. Gleason)

FEDERAL APPELLEES' ANSWERING BRIEF

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GLOSSARY

APA	Administrative Procedure Act
EFH	Essential Fish Habitat
MSA	Magnuson-Stevens Fishery Conservation and Management Act
MSST	Minimum Stock Size Threshold
NEPA	National Environmental Policy Act
SSC	Scientific and Statistical Committee

INTRODUCTION

For over 25 years, the National Marine Fisheries Service (Service) and the North Pacific Fishery Management Council have engaged in an iterative process to identify and update essential fish habitat (EFH) in Alaska based on the best available science, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA or Act). During this time, the Service has conserved and enhanced EFH across hundreds of thousands of nautical miles in the waters off Alaska.

To ensure its management measures are current, the Service regularly reviews EFH information in an iterative and exhaustive years-long process that involves the collection and study of copious data across numerous subjects. The Service most recently reviewed EFH in 2023, concluding that no managed species are experiencing adverse fishing effects to EFH that warrant additional mitigation. The Service adopted minor amendments to fishery management plans to incorporate updated scientific data and EFH descriptions.

In this case, Oceana does not challenge the Service's regulatory interpretation of any statutory term. Nor does Oceana argue that the Service failed to minimize adverse effects to EFH to the extent practicable, or even that the Service incorrectly found that there were no adverse effects requiring mitigation.

Instead, Oceana quibbles with the scientific model and method the Service used to make that factual finding.

Oceana lacks standing to challenge these minor amendments to fishery management plans that cause no injuries to its members. Oceana's alleged injuries are tied to the status quo (or "continued trawling"), but the amendments here do not authorize trawling. As Oceana concedes, the amendments themselves are "not likely to cause environmental harm."

If the Court reaches the merits, it should affirm. The MSA and its regulatory guidelines give the Service flexibility in adopting a scientific methodology to conduct reviews of EFH information and effects. The Service provided a rational explanation for its choice of methodology, and the district court appropriately deferred to the Service's expertise in this highly technical and scientific field.

STATEMENT OF JURISDICTION

(a) Oceana asserted jurisdiction below under 28 U.S.C. § 1331 because Oceana raised claims under the MSA, 16 U.S.C. §§ 1801 *et seq.*; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706. 5-ER-822-23. However, the district court lacked jurisdiction because Oceana lacks standing.

(b) The district court's judgment was final because it disposed of all claims against all defendants.1-ER-2; 1-ER-39. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on October 6, 2025. 1-ER-2. Oceana filed its notice of appeal on December 5, 2025. 5-ER-895-900. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Oceana lacks standing to challenge fishery management plan amendments that do not alter any management regime and merely update EFH information.

2. Whether the Service's choice of methodology for evaluating adverse effects to EFH is rational and warrants deference under the APA.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief or in the Addendum following Appellant's Opening Brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Magnuson-Stevens Act establishes a national program for the conservation and management of the United States' fisheries. 16 U.S.C. §§ 1801(a)(6), 1811(a). The Act seeks to "conserve and manage the fishery

resources found off the coasts of the United States" and "promote domestic commercial and recreational fishing under sound conservation and management principles." *Id.* § 1801(b)(1), (3). The Service, acting under authority delegated from the Secretary of Commerce (the Secretary), is the federal agency responsible for managing fisheries under the Act. *See generally Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1108 (9th Cir. 2006).

1. Regional Councils

The MSA established eight regional Fishery Management Councils that develop fishery management plans for fisheries within specific geographic regions. 16 U.S.C. § 1852(a). Each Regional Council includes federal, state, and territorial fishery management officials, as well as individuals "knowledgeable" about fishery resources in the relevant area, who are nominated by state governors and appointed by the Secretary. *Id*. § 1852(b)(1), (b)(2)(A). Each Region also has a scientific and statistical committee (SSC) that provides ongoing scientific advice to the council, as well as advisory panels that assist the council in carrying out its functions under the Act. *Id.* § 1852(g). At issue in this case is the North Pacific Fishery Management Council (Council), which makes recommendations concerning the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. *Id.* § 1852(a)(1)(G).

2. Fishery Management Plans

The Act directs each Regional Council to prepare fishery management plans and plan amendments for each fishery under its authority that requires conservation and management, and to submit those plans and amendments to the Service. 16 U.S.C. § 1852(h)(1). Fishery management plans identify the measures that are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." *Id.* § 1853(a)(1). The Act establishes plan requirements, *id.* § 1853(a)(1)-(15), and identifies other, optional elements, *id.* § 1853(b)(1)-(14).[1] Fishery management plans and implementing regulations must also "be consistent" with the Act's ten "national standards for fishery conservation and management." *Id.* § 1851(a).

After receiving a fishery management plan or amendment from a council and holding a public comment period, the Service must approve, disapprove, or partially approve the plan or amendment based on consistency with law. *Id.* § 1854(a)(3). Fishery management plans are not self-executing—the plans are not enforceable without implementing regulations. *See N.C. Fisheries Ass'n v.*

[1] Among the discretionary provisions is the option for a Council or the Secretary to limit fishing "in areas where deep sea corals are identified" and "to protect deep sea corals from physical damage from fishing gear . . . after considering long-term sustainable uses of fishery resources in such areas." 16 U.S.C. § 1853(b)(2)(B).

Gutierrez, 550 F.3d 16, 17 (D.C. Cir. 2008) (explaining that fishery management plans, even once approved by the Secretary, "do not themselves have any regulatory effect—implementing regulations must also be enacted in order to effectuate them").

3. Essential Fish Habitat

Among other requirements, a fishery management plan must "describe and identify essential fish habitat for the fishery based on the guidelines established" by the Service, "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." 16 U.S.C. § 1853(a)(7). The MSA defines "essential fish habitat" as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." *Id.* § 1802(10). This broad definition encompasses 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). *See, e.g.*, 2-SER-370-78. Altogether, EFH is the collection of necessary habitat features in a defined geographic area that a species needs to survive. *See* 50 C.F.R. § 600.815(a)(1).

The Act directs the Service to establish guidelines to assist in the identification and description of EFH and in the consideration of actions to

conserve and enhance EFH. 16 U.S.C § 1855(b)(1)(A). Accordingly, the Service established non-binding guidelines that require each fishery management plan to contain ten components, two of which are at issue in this appeal. 50 C.F.R. § 600.815(a); *Magnuson-Stevens Act Provisions; Essential Fish Habitat (EFH)*, 67 Fed. Reg. 2343 (Jan. 17, 2002).[2]

Component 2 requires fishery management plans to contain an evaluation of the potential adverse effects of fishing on EFH. 50 C.F.R. § 600.815(a)(2)(i). "Adverse effect" is defined as "any impact that reduces quality and/or quantity of EFH." *Id.* § 600.810(a). Plans must describe each fishing activity, review and discuss all available relevant information, and provide conclusions regarding whether and how each fishing activity adversely affects EFH. *Id.* § 600.815(a)(2)(i). If there is evidence that fishing adversely affects EFH more than minimally and in a non-temporary way, any such effects must be minimized or mitigated to the extent practicable. *Id.* § 600.815(a)(2)(ii). The preamble to the final rule adopting these guidelines explains that "[m]inimal impacts are those that may result in relatively small changes in the affected environment and insignificant changes in ecological functions." 67 Fed. Reg. at 2354. "Temporary impacts are

[2] In this appeal, Oceana does not challenge the Service's compliance the other components, including Component 1 (which directs the Service to identify and describe EFH) and Component 6 (which directs the Service to identify actions to encourage the conservation and enhancement of EFH). 50 C.F.R. § 600.815(a)(1) & (6).

those that are limited in duration and that allow the particular environment to recover without measurable impact." *Id.* In assessing the practicality of mitigation, councils "should consider the nature and extent of the adverse effect on EFH." 50 C.F.R. § 600.815(a)(2)(iii).

Component 10 encourages the councils and Service to periodically review and revise the EFH provisions in fishery management plans, and further directs a complete review of EFH information every five years. *Id.* § 600.815(a)(10); *see also* 16 U.S.C. § 1855(b)(1)(A) (MSA directing the Service to set a schedule for amending fishery management plans "to include the identification of [EFH]" and to "review[] and update[] such identifications based on new scientific evidence or other relevant information").

B. Factual Background

1. The Service's Identification and Conservation of Essential Fish Habitat in Alaska

For over two decades, the Service has regularly evaluated EFH in its fishery management plans for fisheries off the coast of Alaska. In 2005, the Service completed a comprehensive evaluation of EFH for Alaskan fisheries. *See* 2-SER-342-43. As part of that process, the Service prepared an environmental impact statement (2005 EIS) pursuant to NEPA that (1) described and identified EFH for the fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska; (2) addressed each of the ten EFH components; (3) adopted an approach for the Council to

identify habitat areas of particular concern within EFH; and (4) minimized to the extent practicable the adverse effects of fishing on EFH. *See* 3-ER-273-327b; 2-SER-507-94. Based on this environmental analysis, the Council amended five fishery management plans to implement precautionary measures to protect EFH from adverse impacts from fishing, including area closures, trawling prohibitions in certain areas, and trawl gear modifications. *See* 2-SER-510; 3-ER-277-78; 2-ER-201-02. The Service adopted those amendments fulfilling the mandatory provisions of the EFH guidelines. *See* 50 C.F.R. § 600.815(a).

Since 2005, the Service has implemented management measures to conserve and enhance EFH and minimize the effects of fishing on EFH in Alaska. *See* 3-ER-267-72; *see* 50 C.F.R. § 600.815(a)(2)(iv). The Service has closed or imposed restrictions on fishing in sensitive areas to protect habitat. *See* 3-ER-270-71. For example, nearly 13,000 square nautical miles off the Alaskan coast are designated as habitat areas of particular concern, where fishing and other bottom-contact restrictions and monitoring requirements conserve and enhance EFH. 3-ER-267-72. In the Bering Sea and the Aleutian Islands, bottom trawling gear is prohibited in certain areas to protect seafloor habitat (across 277,100 square nautical miles in the Aleutian Islands alone). 3-ER-267-68; 73 Fed. Reg. 43,362 (July 25, 2008). All bottom contact fishing gear (*i.e.*, longlines, pots, trawls) is also prohibited in areas designated as coral gardens. 3-ER-267-68. In the Gulf of Alaska, all trawl gear is

prohibited in the Southeast Outside district, 1-SER-133-35, and 1,892 square nautical miles in the Slope Habitat Areas are closed to bottom trawling. 1-SER-136; 3-ER-272. Marmot Bay is closed to all fishing except pelagic trawling for pollock (*i.e.*, mid-water trawl gear, *see* 50 C.F.R. § 679.2) to protect Tanner crab. 3-ER-268; 79 Fed. Reg. 2794 (Jan. 16, 2014). The Service and the Council have also worked with the fishing industry to develop gear modifications that reduce fishing impacts to EFH, including modified trawl gear that reduces impacts on sponges, corals, and crab species. *See* 3-ER-268-69.

2. The Service's Reviews of Essential Fish Habitat

Pursuant to Component 10's direction to review EFH components, the Service has completed three reviews of the EFH provisions for Alaskan fisheries since 2005. *See* 50 C.F.R. § 600.815(a)(10). 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 fishery management plans 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* 2-SER-339-44. Each EFH review takes three-to-five years to complete because of the amount of data and coordination involved. *See, e.g.*, 2-SER-339-44.

The Service completed its 2010 EFH review in 2012, *see* 2-SER-493-506; its 2017 review in 2018, *see* 2-SER-406-23; and the most recent review—which Oceana challenges here—in 2023, *see* 2-ER-186-247; *see also* 2-SER-338. During these reviews, the Service used the best available science and built upon analyses from prior reviews. At the conclusion of each review, the Council recommended fishery management plan amendments to update EFH information. *See* 2-SER-498; 2-SER-417-18; 2-ER-197-99. The Service then approved those amendments. *See, e.g.*, 2-ER-182-85.

a. The Service's Scientific Models

Consistent with the MSA and the Service's regulations, the Service uses the best available science to describe and map EFH and then determines if and where fishing is adversely affecting EFH. For the past two decades the Service and the Council have continually improved upon the scientific methods used to perform the fishing effects analysis and to describe and map EFH. *See* 2-SER-342-53; 2-SER-301-09; 2-SER-328-39; 3-ER-328-31. The Service uses this analysis to determine whether revisions to the fishery management plan EFH provisions are warranted. *See* 50 C.F.R. § 600.815(a)(10).

i. Long-Term Effects Index

In the 2005 EFH EIS review, the Service analyzed the potential adverse effects of fishing on EFH using the Long-Term Effects Index, a numerical model

that "estimated the proportional reductions in habitat features relative to an unfished state." 2-ER-79. The analysis indicated that fishing had long-term effects on seafloor habitat features but acknowledged that the consequences of such changes are uncertain. 2-SER-518. As a result, the Service adopted precautionary management measures to reduce adverse effects of groundfish fishing on habitat, including expanded closures for bottom-contact fishing gear in the Bering Sea, Aleutian Islands, and Gulf of Alaska. 3-ER-340; 2-SER-535-35; 2-SER-523. The Service reconsidered the effects of fishing on EFH in the 2010 EFH review and concluded that no changes to the 2005 conclusions were warranted based on new information. 2-ER-81.

ii. Fishing Effects Model

During the 2017 EFH Review, the Service worked with technical experts to develop a new model to modernize the fishing effects analysis for EFH in Alaska. 3-ER-341. The model uses spatial–temporal fishing data and incorporates habitat susceptibility and recovery data from scientific studies, 3-ER-344-49, producing estimates of habitat disturbance using 25-square-kilometer grid cells across the Aleutian Islands, Eastern Bering Sea, and Gulf of Alaska, 3-ER-342. The new model combined features from a number of existing cumulative fishing impacts models (including the Long-Term Effects Index) by using a discrete-time framework, providing monthly tracking of fishing impacts and habitat disturbance,

applying a more accurate system for mapping fishing locations and fishing gear, and incorporating more information to estimate habitat susceptibility and recovery dynamics. 3-ER-341; *see also* 3-ER-348-49 (noting that the prior index analyzed four habitat types, while the new model defines 26 habitat features, including coral and sponge communities). The model's output provides an estimate of the proportion of disturbed habitat in each grid cell for each month of the model run. 3-ER-342. The SSC reviewed the fishing effects model prior to the 2017 EFH Review and approved its use while also identifying areas for future improvement. *See* 2-ER-88; 3-ER-355 (also approving with updates for the 2023 EFH Review).

Starting with the 2017 EFH Review, the Service has used a multistep method provided by the SSC to assist in the determination of whether there are fishing effects on EFH that should be elevated to the Council for possible mitigation. *See* 2-SER-454-70. During the first step, the Service's stock assessment authors—experts for each species—evaluate each species' population status and estimates of EFH disturbance. The Service determines whether the managed fish stock is below the minimum stock size threshold (MSST) and whether there has been a 10% or more reduction in the species' core EFH area based on the results of fishing effects model. 2-SER-466. If either threshold is triggered, then the stock assessment author performs the second step of analyzing estimates of habitat disturbance. 2-SER-469-70. However, meeting these thresholds does not preclude

the stock assessment authors from completing further analyses if other data suggest impacts may be affecting the population. 3-ER-357. 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. 3-ER-357.

Throughout the process, stock assessment authors have the option to provide a qualitative analysis if there are any data limitations or if they believe additional analysis is warranted based on their expertise. 3-ER-356-58. At the conclusion of the 2017 EFH Review, Oceana commended the Service 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* 2-SER-453.

b. 2023 Essential Fish Habitat Review

For the 2023 review, the Service used a similar approach. The Service initiated the review process in April 2019. 2-SER-340. Over the next two years, the Service provided progress reports to the Council and obtained input from the Council's SSC. *See* 2-SER-340-41. In early 2021, the Service began meeting with thirty stock assessment authors and species experts who peer reviewed the best available science for 103 managed species and completed the evaluation of fishing effects on EFH. 2-SER-352-53; 2-SER-340-41. The stock assessment authors reviewed the updated EFH maps for each major life stage of the 103 managed species. *See* 2-SER-301-09. The stock assessment authors also reviewed the use of

updated adult life history stage EFH maps to overlay the estimates of habitat disturbance from the fishing effects model for each species. 3-ER-356. Most stock assessment authors determined that a quantitative assessment was the most appropriate approach. 3-ER-358-59.

After reviewing habitat disturbance from fishing events for 103 species or species complexes, the authors provided more detailed assessments for nineteen species: sixteen that exceeded 10% of the estimated disturbance in their core EFH area, two whose stock was below MSST, and one where the author chose to perform a qualitative assessment based on personal observations. 3-ER-358-59; 3-ER-373-74. For the sixteen species with more than 10% estimated disturbance in their core EFH area, the stock assessment authors looked for correlations between estimated disturbance in core EFH area and impacts on individual species throughout their life cycle, using life history parameters. 3-ER-357. Ultimately, no stock assessment author concluded that fishing effects were more than minimal and temporary for their species. 3-ER-359. None of the authors recommended any additional conservation and enhancement measures for EFH. 3-ER-359.

In February 2022, the Service presented the results of the stock assessment author reviews and the EFH fishing effects evaluation to the Council's SSC. *See* 3-ER-329; 2-SER-402. The SSC, Council, and the Service concurred with the

authors' determination that no additional EFH conservation and enhancement measures were warranted. *See* 2-ER-229; 1-SER-140.

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 fishery management plans: 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). 2-SER-348-49. The Council again concurred with the Service's recommendation that further measures to conserve and enhance EFH (Component 6) and identification of additional habitat areas of particular concern (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* 2-SER-348-49; 2-ER-229.

The Service and Council staff prepared an environmental assessment pursuant to NEPA to analyze whether to adopt the amendments. 1-SER-154; 2-SER-300. In December 2023, the Council voted unanimously to recommend that the Service amend the Council's fishery management plans "to incorporate the updated EFH information based on the new and best available science information identified in the [2023 EFH review]." *See* 1-SER-157; 1-SER-154; 2-ER-197.

None of the recommended changes required regulatory action, as they were updates to descriptions, maps, and EFH information in existing EFH provisions of the plans. 1-SER-148.

On April 23, 2024, the Service published a notice of availability for the proposed EFH amendments to the fishery management plans in the Federal Register with a sixty-day comment period ending on June 24, 2024. 1-SER-137. The Service issued its Notice of Agency Decision in July 2024, approving the EFH amendments. *See* 2-ER-182-85.[3]

C. Proceedings Below

Oceana brought claims under the MSA, NEPA, and the APA. 5-ER-822-49. For the MSA claims (a subset of which are at issue in this appeal), Oceana alleged that the Service violated the Act by inadequately analyzing adverse effects to EFH and failing to consider additional actions to minimize any adverse effects; violated its broader obligation to conserve and enhance EFH pursuant to the MSA; and failed to consider evidence about certain habitat features. *See* 1-SER-113-26. At-

[3] While the 2023 EFH Review was underway, Oceana submitted a "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." 2-ER-43. Oceana submitted the comment during an agenda item called "staff tasking"—not during an EFH review discussion and not as a petition for rulemaking. 2-ER-43. Oceana's proposal envisioned vast area closures and gear prohibitions that would require regulatory action to implement. *See* 2-ER-48-51. The Council chose not to task staff with developing a discussion paper on this proposal.

Sea Processors Association, Alaska Groundfish Data Bank, and Groundfish Forum, Inc. (Intervenors) successfully moved to intervene, and the parties filed cross-motions for summary judgment. On September 30, 2025, the district court granted summary judgment to the Service. After finding that Oceana had standing, 1-ER-28, the court rejected each of Oceana's claims on the merits.

First, the court held that the Service complied with the MSA. 1-ER-28-36. For the fishing effects analysis claim, the court rejected Oceana's assertion that the Service used "MSST as a proxy for habitat loss," finding that the Service employed a "multi-tiered approach" that directed stock assessment authors to consider "a specific habitat metric for all stocks, regardless of whether their populations are above MSST." 1-ER-29-30. Applying the APA's "highly deferential" standard, the court held that the Service's "implementation of its obligation to minimize adverse fishing effects—by using a fishing effects model that examines MSST and implements a 10% threshold for [core EFH area] disturbance in its fishing effects analysis—is warranted a high degree of deference." 1-ER-31. And the court noted that Oceana "does not offer an alternative method to determine when fishing impacts are more than minimal and not temporary," nor "challenge the regulation itself as being inconsistent with the [Act]." 1-ER-31.

As for Oceana's other claims, the court concluded that the MSA does not require the Service to consider long-lived habitat features, the Service's inclusion of habitat areas in the model was entitled to deference, the Service's use of adult stocks to determine core EFH area was reasonable, and the Service reasonably decided not to adopt additional conservation and enhancement measures based on its expertise and the restrictions already in place. 1-ER-31-36. Finally, the court rejected Oceana's NEPA claims. 1-ER-38-39.

Oceana appeals judgment on only a subset of its MSA claims—whether the Service violated the Act by considering MSST and core EFH area disturbance as part of its broader analysis for the 2023 EFH Review.

SUMMARY OF ARGUMENT

1. Oceana lacks standing. To establish standing, a plaintiff must demonstrate that it has suffered an injury caused by the challenged action and that the injury would likely be redressed by the requested judicial relief. Oceana has failed to show that the action challenged here—minor amendments to fishery management plans that update EFH information—causes any concrete injury to its members.

Oceana contends that its members are harmed by the status quo or, in its words, "continued trawling" off the Alaska coast. But in this suit, Oceana challenges amendments to fishery management plans that updated EFH maps and

information, not any agency action that authorized trawling or continued trawling. In effect, Oceana attempts to use this suit to challenge the Service's methodology for evaluating adverse effects—even where the Service has taken no new action that injures Oceana's members.

Moreover, because the amendments do not authorize trawling, Oceana has failed to show that its requested relief—a new analysis—will redress any injury from trawling. Even if the Court finds some deficiency in the Service's analysis, a possible outcome could be new recommendations, and any change to fishing activities would require additional regulatory action separate from the EFH five-year review process.

2. If the Court reaches the merits, it should affirm. In completing the 2023 EFH Review, the Service satisfied its duty under the MSA and its guidelines.

To begin, Oceana's challenge is properly characterized as one to the Service's methodology for evaluating adverse effects to EFH—not a dispute about the meaning of any statutory term. Oceana did not argue below that the Service misinterpreted any statutory term, nor does Oceana argue on appeal that the Service's EFH regulations conflict with the MSA. And both the MSA and the regulatory guidelines provide the Service with substantial discretion in evaluating EFH information as part of the five-year reviews. Thus, the district court

appropriately applied the APA's deferential standard in reviewing the Service's methodology and decisionmaking.

Like the 2017 EFH Review (which Oceana praised), the Service's 2023 EFH Review included a fishing effects evaluation that was robust and multi-tiered. The Service gathered extensive data about fishing activity and location, fishing gear, habitat type, habitat sensitivity, and habitat recovery time. The Service used an updated fishing effects model to estimate the percentage of habitat disturbance for each species' EFH. Stock assessment scientists and species experts then reviewed that data and those outputs and evaluated whether a species should be elevated for potential mitigation measures. The Service's approach relied on its technical expertise and was rational.

As part of its holistic evaluation, the Service reasonably considered whether a species was at or below MSST. Habitat disturbance can cause a decline in species population, so understanding possible links between gear impacts to EFH and a species' population health can provide insight into whether any adverse effects to EFH are more than minimal or temporary. And the Service considered MSST as one of several parameters in evaluating potential adverse effects, not as a threshold that conclusively determined whether further review was necessary, nor as a threshold that conclusively determined whether fishing effects were more than minimal and not temporary.

The Service also reasonably explained why it considered disturbance to a species' core EFH area and how it selected the appropriate quantitative metrics. The Service determined that focusing the fishing effects analysis on the habitat areas where species are most often found gives stock assessment authors a better understanding of where managed species obtain the most benefit from their habitat. In other words, use of the species' core EFH area for the fishing effects analysis avoids the likelihood that important areas are excluded (if using a smaller, more focused area) and avoids minimizing habitat reduction statistically by using a larger area (the full EFH area). Still, stock assessment authors applied their expertise throughout the evaluation and were not precluded from considering additional information if warranted.

In effect, Oceana asks the Court to determine what parameters agency experts should use, what weight those experts should give to different data, and what those experts should do in the face of incomplete data. The Court should defer to the Service's comprehensive and well-reasoned process for evaluating new EFH information.

3. Finally, if the Court finds any error in the Service's analysis, the Court should remand to the Service without vacatur and without a strict deadline for redoing the 2023 EFH Review. Oceana does not request vacatur, conceding that the amendments here do not cause any harm. And the Service has already initiated

the next five-year review of EFH information. Requiring the Service to reanalyze data that predates 2023 would conflict with the MSA's directive that the Service base reviews on new scientific evidence and with the guidelines' directive to use the best available information, and would unreasonably delay completion of the next review.

STANDARD OF REVIEW

This Court reviews the district court's jurisdictional rulings and grant of summary judgment de novo. *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 779 (9th Cir. 2019); *Save Bull Trout v. Williams*, 51 F.4th 1101, 1105-06 (9th Cir. 2022).

The Service's compliance with the MSA is reviewed under the deferential standard of the APA. *See Midwater Trawlers Co-op v. Dep't of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002); 16 U.S.C. § 1855(f). Under the APA, a court may set aside agency action if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA's standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1146 (9th Cir. 2016) (quotation omitted). This scope of review "is narrow and a court is not

to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

"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." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989)). This Court "afford[s] the agency discretion to choose among scientific models" and "reject[s] an agency's choice of a scientific model only when the model bears no rational relationship to the characteristics of the data to which it is applied." *Id.* (quotation omitted); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871 (9th Cir. 2004); *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 182 (2025).

ARGUMENT

I. Oceana lacks standing.

As a threshold matter, Oceana fails to establish standing to bring its claims because it fails to link any concrete injury to any action by the Federal Defendants and fails to establish that any injury would be redressable through its requested relief.

To establish standing, "a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be

caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). An association has standing "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Here, Oceana's complaint alleges 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 unreasonably delayed") and Section 706(2) (which authorizes claims "[t]o hold unlawful and set aside agency action, findings, and conclusions…"). *See* 5-ER-840-42; 5 U.S.C. § 706(1), (2). To support its claim of injury, Oceana cites its members' aesthetic, environmental, and recreational interests in Alaska's waters. 5-ER-825; Opening Br. 29-31. Oceana argues that the Service's "failure to adequately analyze the effects of fishing" and "its corresponding failure to consider any measures to minimize adverse fishing effects" harms its members. Opening Br. 31. Oceana fails to set forth any factual basis for finding an injury that is traceable to the non-regulatory action at issue in this case.

The only potential concrete harm Oceana ties to its members' interests is "[c]ontinued trawling." Opening Br. 31 (asserting that "[c]ontinued trawling in essential fish habitat harms their interests in viewing healthy coral gardens, marine mammals and other ocean life, and in harvesting fish and other species to feed their families"). But "continued trawling" is not the challenged action, nor is it authorized by the challenged action. The action challenged here is a series of minor non-regulatory amendments to various fishery management plans that include newly available EFH science and updated maps. 2-ER-182-86; 1-SER-140. Neither the Amended Complaint nor Oceana's Opening Brief explain how the Service's approval of updated science would injure Oceana or its members. In fact, Oceana concedes that "[l]eaving that updated information in place . . . may have some benefits and is not likely to cause environmental harm." Opening Br. 54. Oceana must establish injury caused by the government action it challenges, not some prior or separate government action. *See Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013) ("Plaintiffs must show that a causal connection exists between their asserted injuries and the conduct complained of."); *see also Hippocratic Med.*, 602 U.S. at 383-84 ("Without the causation requirement, courts would be virtually continuing monitors of the wisdom and soundness of government action." (quotation omitted)).

Nor can Oceana recast its claim as "agency action unlawfully withheld or unreasonably delayed" in order to rely on alleged injuries from "continued trawling" or from the failure to adopt additional conservation measures. *See* 5 U.S.C. § 706(1). First, Oceana must demonstrate standing for each of its claims, and it abandoned its § 706(1) claim in the district court. *See generally* 1-SER-082-131; Opening Br. (not citing Section 706(1)); *see also Kumar v. Koester*, 131 F.4th 746, 751 (9th Cir. 2025).

Second, failure to act claims (or claims designed to compel an agency to act) only prevail where a party demonstrates that the "agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 64 (2004). Oceana has not done so. Oceana identifies no facts or law to support a claim that the Service failed to take a required action, or even failed to consider specific, scientific data in its EFH review. 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. 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.

Oceana has similarly failed to establish that any concrete injury is likely redressable by its requested judicial relief. *See Hippocratic Med.*, 602 U.S. at 380 (noting that "causation" and "redressability" are "often flip sides of the same coin" (quotation omitted)). To establish that its members' injuries are redressable, Oceana must show that it is "likely, as opposed to merely speculative, that [its members'] injur[ies] will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotations omitted).

Here, Oceana asks the Court to declare the Service's decision adopting the amendment unlawful and remand to the Service to conduct a new EFH review. Opening Br. 53. But even if the Court remands for further analysis and that analysis leads to different scientific conclusions, the ultimate product would be—at most—a recommendation. Any changes to fishing activities (or trawling) would require a new regulatory action because fishery management plans are not self-executing and are not enforceable without implementing regulations. *See N.C. Fisheries Ass'n*, 550 F.3d at 17. The plans "do not themselves have any regulatory effect" and create no legally binding obligations for fishery participants. *Id.*[4]

[4] Although the causation and redressability requirements are relaxed where a plaintiff seeking to enforce a procedural requirement establishes a concrete injury, *see Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008), Oceana has abandoned its procedural claim pursuant to NEPA and it nowhere argues that the Service violated some procedural requirement in the MSA, such as a failure to engage in required notice and comment rulemaking, *contra Kāpa'a v. Trump*, 794 F. Supp. 3d 793, 807-08 (D. Hawaii 2025). In any event,

Because the EFH amendments neither "require" nor "forbid" 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—Oceana has failed to establish any concrete injury traceable to the challenged agency action. *See Hippocratic Med.*, 602 U.S. at 382; *Gulf Restoration Network v. Nat'l Marine Fisheries Serv.*, 730 F. Supp. 2d 157, 166 (D.D.C. 2010).[5]

II. The Service complied with the Magnuson-Stevens Act.

The Service's review of EFH information was consistent with the MSA and the agency's regulatory guidelines. In arguing otherwise, Oceana attempts to cast its criticism as a legal question of statutory interpretation and argues that the

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even where the causation and redressability requirements are relaxed, a plaintiff must still show that the "the *challenged* [agency] action will threaten their concrete interests." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (emphasis added). Updating the EFH information in fishery management plans does not injure Oceana's members.

[5] Because the fishery management plan amendments challenged here are merely updated information that may be used in future implementation decisions, Oceana's claims are also not ripe. The amendments provide further descriptions of EFH but do not propose where future implementation actions will occur or how this information will be used in reaching any future decisions. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729-30 (1998). For that reason, it is premature to evaluate the implications of the scientific information included in the amendments. *See id.* at 732. If and when the Service relies on the scientific information in the amendments to support future implementation actions, Oceana will have ample opportunity to bring a later challenge when its harm is more imminent and certain. *See id.* at 734. Delaying review to the appropriate time prevents courts from engaging in "premature review" of "abstract disagreements over administrative policies," as Oceana requests here. *See id.* at 735-36 (quotation omitted).

district court erred in deferring to the Service's technical expertise. This Court should reject this newly crafted argument because Oceana's claims target the methods the Service used to evaluate impacts from fishing—not a faulty interpretation of the MSA. Oceana also misunderstands the context of the Service's review here. In this EFH five-year review, the Service was evaluating whether—under the current management provisions—there are any adverse effects that are more than minimal and not temporary and whether any fishery management plan requires amending. The stock assessment authors, the Council, and the Service reviewed the best available science, applied their expertise, and determined that no amendment was needed. Finally, Oceana misunderstands the methodology the Service used, which incorporated extensive data and involved a holistic, multi-tiered analysis. In this highly technical and scientific evaluation, this Court should defer to the Service's choice of methodology.

A. The APA's deferential standard of review applies to the Service's analysis of adverse effects.

On appeal, Oceana argues that the Service's errors were ones of statutory interpretation, not methodology, and that the district court thus erroneously deferred to the Service's technical expertise. Opening Br. 32-36. The Court should reject this newly revamped argument because Oceana forfeited it by never developing it below. In any event, Oceana is wrong on the merits because the MSA

and the Service's unchallenged regulations provide flexibility in conducting EFH reviews.

1. Oceana did not raise a statutory-interpretation argument before the district court.

Before the district court, Oceana primarily argued that the Service failed to consider certain additional evidence that Oceana deemed important to the EFH review. *See, e.g.*, 1-SER117- 26 (Oceana's district court brief challenging the Service's consideration of specific metrics and failure to consider other evidence); *see also* 1-SER-043-45 (arguing that the Service's decision "to ignore evidence" was "arbitrary"). Oceana did not argue that the Service's guidelines conflicted with any statutory mandate or that the district court needed to interpret the MSA provisions anew.

On appeal, Oceana appears to shift course, arguing that the Court "should apply its independent judgment" and "find the 'best meaning' of the [MSA]." Opening Br. 29. As discussed more fully below, Oceana continues to attack the "type of analysis" and methodology used by the Service, not any statutory interpretation. *See* Opening Br. 32. The Court should decline to reach this new argument, which Oceana forfeited and which is unnecessary to resolve the present case. *See Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985) ("As a general rule, we will not consider an issue raised for the first time on appeal, although we have the power to do so." (citation omitted)).

2. Oceana challenges the Service's methodology and analysis, not its interpretation of any statutory term.

In any event, Oceana's argument is a criticism of the "type of analysis that the Fisheries Service conducted," not the Service's interpretation of the MSA. *See* Opening Br. 32. As such, the district court correctly deferred to the Service's reasonable and well-explained decision regarding how to conduct reviews of EFH information.

a. *Loper Bright* retained agency discretion in this context.

Rather than help Oceana's case, *see* Opening Br. 33, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), demonstrates why the Service is owed deference in evaluating new EFH information.

In *Loper Bright*, the Supreme Court overruled the deference framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), holding that courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" rather than deferring to an agency's reasonable construction of an ambiguous statute. *Loper Bright*, 603 U.S. at 412-13; *id.* at 394 (adding that courts may still "seek aid from the interpretations of those responsible for implementing particular statutes"). But the Court acknowledged that Congress can and does "confer discretionary authority on agencies." *Id.* at 404. The Court recognized specifically statutes that "'expressly

delegate[]' to an agency the authority to give meaning to a particular statutory term," or "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme" or to "regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'" *Id.* at 394-95 (citations omitted). And the Court emphasized that APA "Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential." *Id.* at 392.

Thus, after *Loper Bright*, courts have distinguished between challenges to an agency's interpretation of a statutory term and challenges to an agency's decisionmaking process. *See, e.g.*, *Lopez-Martinez v. U.S. Att'y Gen.*, 149 F.4th 1202, 1207 (11th Cir. 2025) (while *Loper Bright* supplies the standard for legal statutory interpretation questions, the APA continues to "prescribe[] a deferential 'arbitrary and capricious' standard to govern a court's review of an agency's decisionmaking process"); *Zimmer Radio of Mid-Missouri, Inc. v. F.C.C.*, 145 F.4th 828, 846 (8th Cir. 2025) (explaining that, where parties did not dispute the "*meaning*" of a statutory word but rather the "*degree*" of its application, the decision was "appropriately delegated 'to the responsible agency'" granted discretion by Congress).

b. The Service's review of essential fish habitat information is owed deference under the APA.

Oceana does not challenge any *legal* interpretation by the Service in the guidelines or in the amendments. Instead, Oceana argues that the "process" the

Service used was flawed, *see* Opening Br. 1; the Service used "inappropriate criteria" to evaluate whether fishing effects are minimal, *see* Opening Br. 2, 25-26; and the Court should "remand to the agency for a new analysis," Opening Br. 27, 54. This is a challenge to the agency's decisionmaking process and choice of methodology, which are owed substantial deference under the APA. *See Locke*, 776 F.3d at 994; *see also Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008) (en banc) (a court's role is to ensure the agency made no "clear error of judgment," not to "impose on the agency [its] own notion of which procedures are best," nor "impose procedural requirements not explicitly enumerated in the pertinent statutes" (cleaned up)), *rev'd on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

First, nothing in the MSA specifies what "process" or "criteria" the Service must use to review EFH information. The MSA directs the Service to "minimize to the extent practicable adverse effects on [EFH] caused by fishing"; "establish by regulation guidelines to assist the Councils" in identifying EFH and adverse impacts and in considering "actions to ensure the conservation and enhancement of such habitat"; and "set forth a schedule" for the review of EFH. 16 U.S.C. §§ 1853(a)(7), 1855(b)(1)(A). And while the MSA states that the Service should review EFH identifications "based on new scientific evidence or other relevant information," the Act does not prescribe any particular methodology for the

Service's review. *See* 16 U.S.C. § 1855(b)(1)(A). In this way, Congress directed the Service to adopt regulations to "fill up the details" of the MSA's statutory scheme, *Loper Bright*, 603 U.S. at 394-95, and gave the Service substantial discretion in deciding when adverse effects warrant minimization or mitigation. *See Conservation L. Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004) ("[B]y using the term 'practicable' Congress intended . . . to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.").

The Service exercised its discretion by adopting the unchallenged EFH guidelines. Those guidelines—like the MSA—do not require the Service to use any specific methodology in its EFH review. *See* 50 C.F.R. § 600.815(a)(2)(ii), (a)(10); *see also* 67 Fed. Reg. at 2348 (noting that the guidelines "provide[] sufficient flexibility to account for the variety of managed species and to address regional variations in the availability of scientific information and differences in Council operating procedures nationwide"). Accordingly, the Service has applied its expertise to develop a scientific model and iterative process to evaluate adverse fishing effects to EFH and has implemented vast closures and fishing restrictions in Alaska's fishery management plans. *See supra* pp.9-17. The "manner in which the Service implement[s] [this] established, but inherently discretionary, directive" is "'a garden variety APA arbitrary and capricious claim.'" *Conservation L. Found. v. Ross*, 374 F. Supp. 3d 77, 93 (D.D.C. 2019) (quoting *Chamber of*

Commerce of U.S. v. FEC, 76 F.3d 1234, 1235-36 (D.C. Cir. 1996); *see also Lands Council*, 537 F.3d at 1000; *Native Vill. of Point Hope v. Salazar*, 680 F.3d 1123, 1132 (9th Cir. 2012).

Second, to the extent Oceana disagrees with the Service's scientific conclusion that no managed species is experiencing more than minimal or non-temporary fishing effects on its EFH, such a "factbound determination" continues to receive "deferential review" after *Loper Bright*. *See Loper Bright*, 603 U.S. at 392; *see also Seven Cnty.*, 605 U.S. at 181-82 ("Black-letter administrative law instructs that when an agency" makes "predictive and scientific judgments in assessing the relevant impacts," a "reviewing court must be at its 'most deferential'").

In sum, Congress left to the Service the scientific task of determining whether fishing has caused adverse effects to EFH, and the Service has used its technical expertise to generate a scientifically robust model and rigorously synthesize large datasets to make that determination. The district court correctly held that the Service's technical choices here warrant substantial deference.

B. The Service rationally determined that adverse fishing effects are not more than minimal or temporary.

The Service's rigorous analysis was reasonable and adequately evaluated adverse impacts to EFH, and the Service "made no 'clear error of judgment' that would render its action 'arbitrary and capricious.'" *Lands Council*, 537 F.3d at 993

(quoting *Marsh*, 490 U.S. at 378). In arguing otherwise, Oceana provides an incomplete description of the Service's process and fails to offer any suitable alternative methodology. The Court should defer to the Service's expertise. *See Cascadia Wildlands v. U.S. Bureau of Land Mgmt.*, 153 F.4th 869, 906 (9th Cir. 2025) ("We are not to act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain every possible scientific uncertainty." (quotation omitted)).

1. Oceana misconstrues the Service's methodology.

To begin, Oceana misconstrues the framework used by the Service. Oceana contends that the Service "used two criteria that set an impermissibly high bar" and "allowed the agency to conclude there are no adverse fishing effects if it" determined that the species had not "collapsed" and there had been no "significant damage to the limited part of the designated [EFH] the Fisheries Service chose to look at." Opening Br. 32-33. This is an incorrect description of the Service's process for the 2023 EFH Review.

Fishing operations can change the abundance or availability of certain habitat features used by fish species. Those changes can reduce or alter the abundance, distribution, or productivity of the species. This in turn can affect the species' availability to support a sustainable fishery and contribute to a healthy ecosystem. 3-ER-338. This complex chain of events depends on several factors,

and evaluating the effects of fishing on EFH requires consolidating information from a wide range of sources and fields of study. 3-ER-338. Quantifying the effects of fishing on seafloor habitats also requires the application of professional judgment, particularly because of the number of unknown variables. 3-ER-338. As explained above, *supra* pp.11-16, the Service's fishing effects evaluation relies on extensive data and scientific research, outputs from the fishing effects model, and quantitative and qualitative analysis by expert stock assessment authors. 3-ER-342-58. The process is multi-tiered and takes several years to complete. *See* 2-SER-340-41 (showing timeline for 2023 review).

For the 2023 EFH Review, the Service's analyzed extensive data about fishing activity and effects. Inputs to the model included data about fishing gear (including size, depth, and type of trawls), 3-ER-377-82; spatial data showing where fishing occurs based on vessel monitoring system information and observer records, 3-ER-344-46; data about dozens of habitat types (including corals and sponges), how susceptible each habitat type is to different types of fishing activities, and how long it takes the habitat type to recover from disturbances from fishing activities, 1-SER-225-28; and data about where each habitat type occurs, 3-ER-346-47. Compared to the 2017 EFH Review, the Service in 2023 provided additional information to support assumptions about habitat recovery times, addressed concerns about unobserved fishing event data, and attempted to address

concerns about the readability of EFH data. 3-ER-353-55. The Service also included updated fishing data in the model, 3-ER-345, and used a new species distribution model ensemble approach to update the EFH maps used to analyze fishing effects on EFH, 2-SER-301-09; 2-SER-384; 2-SER-350-52. None of this data was restricted to core EFH area.

The Service incorporated these data about fishing activity and habitat susceptibility and recovery into the model, which estimates the habitat disturbance from fishing activities. 3-ER-341; 3-ER-344. The model tracks habitat transitions between disturbed and undisturbed states on a monthly basis within 25-square-kilometer grid cells across the North Pacific, taking into account overlapping fishing events for cumulative impacts. 3-ER-342. The primary output of the model is an estimated proportion of disturbed habitat in each grid cell for each month of the model run. 3-ER-342. The model produced maps showing all estimated habitat disturbance from fishing across the entire region. *See* 3-ER-342-43.

After the Service ran the model, the stock assessment authors used the model results to evaluate whether any species should be elevated for further review based on possible adverse fishing effects to EFH. 3-ER-357. The stock assessment authors followed the multi-tiered process used in the 2017 EFH Review. 3-ER-356. As part of this process, the stock assessment authors were asked to assess specific parameters, but nothing in the process precluded authors from engaging in further

analysis if any data suggested that habitat disturbance may be affecting the species. 3-ER-357.

First, the stock assessment authors reviewed whether each species is above or below MSST and conducted a written assessment for any stock below MSST to determine if EFH disturbance is a potential cause. 3-ER-356-57. Any written assessment was provided to the SSC and the Council for consideration of possible mitigation measures. 3-ER-385; *see also* 3-ER-391 (updated decision tree provided to stock assessment authors).[6]

Second, for all species—including those above MSST—the stock assessment authors reviewed maps showing estimated habitat disturbance to each species' EFH and time series data showing estimated habitat disturbance over time. 3-ER-356. Although the Service provided authors with results for the core EFH area (the upper 50th percentile of the EFH where the fish stocks are most concentrated), the Service offered authors the option to consider the upper 75th percentile, 3-ER-356, and authors had access to maps showing the upper 25th and 95th (full EFH area) percentiles as well, 3-ER-387.

[6] The graphic Oceana includes to "illustrate[]" the Service's "approach to evaluating the effects of fishing on [EFH]," *see* Opening Br. 19-20, is not the decision tree that was ultimately provided to the stock assessment authors for the 2023 EFH Review, *see* 3-ER-391.

For any species with more than 10% estimated habitat disturbance in its core EFH area, or for which the stock assessment author determined more analysis was needed, the author examined additional information, including time trends in the species' size at different ages, spawning success, breeding success, and feeding distributions. 3-ER-357. The author looked for any correlation between those additional parameters and trends in core EFH area disturbance estimates, and if a correlation was found, the author determined whether the correlation was significant and thus whether the species should be elevated for further review by the SSC. 3-ER-357. Had the SSC determined that any impacts were more than minimal and not temporary, it would recommend mitigation measures to the Council. 3-ER-357. Stock assessment authors were also asked to consider whether to elevate a species for possible mitigation based on other sources of information. 3-ER-357-58.

Finally, the stock assessment authors were asked if they had any concerns with the fishing effects model's adequacy in capturing effects on their species, what they considered to be the most appropriate approach to assessing fishing effect to their species' EFH, and whether they had any recommendations for future EFH research activities and priorities. 3-ER-391.

This process 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 adverse effects of fishing on EFH. The SSC found that the current EFH evaluation methodology is appropriate for the 2023 EFH Review, 3-ER-361, and this sort of "scientific determination" warrants the Court's "most deferential" review, *see Natural Resources Def. Council v. Haaland*, 102 F.4th 1045, 1067 (9th Cir. 2024) (quoting *Native Ecosystems Council v. Marten*, 883 F.3d 783, 791 (9th Cir. 2018)); *see also N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 80 (D.D.C. 2007) ("[C]ourts should generally 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 the appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors." (quotation omitted)).

Moreover, although Oceana now disclaims its prior support for this approach, it points to no alternative approach that has been shown to effectively detect fishing effects that necessitate mitigation measures. *See* 1-ER-31; 1-SER-008-09; 2-SER-453. Nor does it "show that any disregarded scientific evidence would materially affect the agency's conclusion." *Haaland*, 102 F.4th at 1067.

The Court should defer to the Service's expertise in designing and using this robust fishing effects evaluation. But, as explained more thoroughly below, the

Service also rationally considered specific parameters—MSST and habitat disturbance in core EFH areas—in evaluating whether there were any "more than minimal and not temporary" adverse effects from fishing activities.

2. The Minimum Stock Size Threshold is rationally related to evaluating fishing effects on essential fish habitat.

As noted above, the stock assessment authors begin their evaluation of fishing effects by considering whether each managed species is above or below the MSST, which represents the level at which a stock can no longer produce its maximum sustainable yield. 3-ER-356-57. If the stock is below the MSST, stock assessment authors are asked to provide a written assessment addressing whether disturbances to EFH could be a contributing cause. 3-ER-385.

Oceana argues that the Service's use of a stock's MSST "as one of the criteria for determining whether there was damage to *habitat*" is "inconsistent with the plain language and structure of the [MSA]." Opening Br. 47. In Oceana's view, the Service's use of this metric "conflated" the MSA's requirement to "protect" EFH and to "prevent overfishing." Opening Br. 48. But the Service appropriately recognizes the value of MSST in evaluating a species' health and rationally used this metric as one factor in a multi-tiered analysis. *See* 1-ER-29-30. The Court should defer to the Service's expertise in developing a layered scientific framework to evaluate effects on EFH.

First, using MSST as part of the fishing effects analysis is consistent with the MSA, which recognizes the common-sense 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). EFH is, by definition, tethered to the health and life history of managed species. *See id.* § 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, a species could fall below MSST due to overfishing, EFH degradation, or other environmental factors. *See* 50 C.F.R. § 600.310(e)(2). For that reason, it is appropriate to evaluate whether fishing may be adversely affecting EFH when a species falls below the MSST. *See* 2-SER-590; *see also* 50 C.F.R. § 600.815(a)(1)(iii) (recognizing that "[e]ssential habitats are those necessary to maintain fish production consistent with a sustainable fishery").

Nothing in the MSA or the guidelines restricts the Service's discretion to exercise its technical expertise and include MSST as one of several tools to evaluate fishing effects on EFH. *Contra* Opening Br. 48-49 (suggesting that the MSA "does not allow" the Service to rely on MSST but citing no statutory language that expressly curtails the Service's discretion to consider MSST). For example, although the guidelines do not "require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take

action to minimize adverse fishing impacts," the Service recognized that action to minimize adverse fishing effects may be "warranted to regulate fishing activities that reduce the capacity of EFH to support managed species." 67 Fed. Reg. at 2354; *see also* 50 C.F.R. § 600.815(a)(1)(iv) (stating that the Service and councils should use their judgment to identify EFH based on the habitat "necessary to maintain a sustainable fishery and the managed species' contribution to a healthy ecosystem"). Accordingly, the Service and the Council have used MSST as part of the fishing effects evaluation since 2005. *See* 2-SER-572; 2-SER-590-94 (2005 EIS discussing how a stock's MSST status "was one of several factors considered in the analysis" because it can aid in evaluating "whether habitat disturbance caused by fishing reduces the capacity of EFH to support [the] species").

Moreover, as noted above, *supra* Part II.B.1, Oceana incorrectly asserts that a stock's status above MSST precluded any further analysis of possible adverse effects on EFH. *See* Opening Br. 48 ("Under this criterion, the Fisheries Service did not consider minimizing adverse effects unless they had already led to stock collapse."). The stock assessment authors considered whether a stock was below MSST as one factor in their evaluations—not as a conclusive threshold to dictate whether any further analysis could occur. 3-ER-256-57; 3-ER-328-31; 3-ER-388-91; *see also* 1-ER-29-30 (describing the Service's process as "multi-tiered" and characterizing the MSST factor as a "starting point").

Under the framework, the authors applied their expertise and "conduct[ed] additional analyses for their stocks in three situations: if their stock is below the [MSST], if the estimated habitat disturbed by fishing in the [core EFH area] was ≥10%, and/or if they preferred a qualitative analysis of the effects of fishing on their species' habitat rather than the quantitative assessment." 3-ER-263. The use of MSST during the fishing effects analysis thus complemented the quantitative (and sometimes qualitative) habitat analyses that also occurred to evaluate EFH impacts. 3-ER-357; 2-SER-457 (noting that evaluations of effects are not limited to MSST but considered a full set of more detailed information on stock status).[7]

Finally, Oceana's characterization of MSST—as the threshold for stock "collapse"—is inconsistent with the MSA and its implementing regulations. *See* Opening Br. 51 (suggesting that the Service will not consider habitat degradation until the "damage is so severe that the stock has collapsed"). MSST represents the level at which a stock can no longer produce its maximum sustainable yield, which is "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery

[7] During the 2023 EFH Review, stock assessment authors identified two species with stocks below MSST and provided written fishing effects evaluations. 1-SER-231 (identifying the species as Eastern Bering Sea blue king crab and Eastern Bering Sea snow crab). After robust quantitative correlation analyses of habitat disturbance and population health, the stock authors concluded that there was no causal link between the fishing impacts to EFH and stock status warranting elevation to the SSC. 1-SER-231; 1-SER-282-86; 1-SER-290-94.

technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets." 50 C.F.R. § 600.310(e); *Id.* § 600.310(e)(2)(i)(F). Neither the MSA nor the Service has characterized a stock as "collapsed" solely because the stock fell below MSST. *See, e.g.*, 2-SER-539 ("Stocks below MSST are considered sufficiently small as to require an appropriate rate of rebuilding."). And, as discussed above, considering whether a stock has fallen below MSST can provide insight into species health.

In sum, the Service rationally evaluated whether habitat disturbance may have correlated with the health of the species as part of its holistic review of EFH information and potential adverse fishing effects.

3. The Service's use of the core EFH area was appropriate and adequately explained.

When pressed by the district court, Oceana conceded that an evaluation of core EFH area is an acceptable metric to assess impacts on EFH. *See* 1-SER-008-09 (stating that it would be "okay" if the Service "were allowed to use its current core essential fish habitat to assess habitat impacts" but arguing that it needs to consider additional other evidence about "corals and sponges at shallow depths").[8] Nevertheless, Oceana now criticizes the Service for failing to consider "all" EFH and argues that analyzing core EFH areas "missed" possible adverse effects.

[8] On appeal, Oceana has abandoned its argument that the Service ignored evidence about habitat features at shallow depths.

Opening Br. 39, 44. But nothing in the MSA dictates how the Service must conduct EFH reviews, *see supra* Part II.A.2.b, and the Service provided a "rational" explanation for why considering core EFH area disturbance assists experts in determining whether any adverse impacts are more than minimal or temporary. *See Locke*, 776 F.3d at 994.

A stock's entire EFH area is where 95% of the stock occurs. 2-SER-326. The core EFH area is where fish stocks are most concentrated and is defined as the top 50% of the EFH area. 2-SER-381; 2-ER-229. As discussed above, during the fishing effects analysis, if more than (or equal to) 10% of the core EFH area for a species is estimated to be disturbed, the stock assessment authors evaluate trends in the species' life history to look for correlations with habitat disturbance over time. 3-ER-385. All stock authors remain free to perform additional analyses and to recommend additional conservation measures independent of this threshold. *See* 2-ER-229; 3-ER-357 ("[T]he 10% threshold does not preclude stock assessment authors from completing the evaluation for levels of habitat disturbance less than 10%, if other data suggest that impacts may be affecting the population.").[9]

[9] Oceana suggests that core EFH areas is "half" of the entire EFH. *See, e.g.*, Opening Br. 45. But core EFH area represents the upper 50th percentile of the full EFH area, the area of occupied habitat where the fish population is most likely to be found, and does not equate to half of the EFH area or the area where half of the population is found. 2-SER-326.

The Service exercised its technical and scientific expertise in selecting the appropriate analytical percentages. In the 2017 review, the SSC considered using the upper 25% or 95% quantiles of EFH, rather than 50%. 3-ER-385. But after reviewing the information for several species, the SSC concluded that analyzing the upper 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." 2-SER-490; 3-ER-385. In other words, using a larger quantile, such as 95%, would understate impacts on the most important habitats and likely result in fewer species reaching the 10% threshold.

The Service also rationally explained why it selected a 10% threshold. The SSC determined that, 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 C.F.R. § 600.815(a)(2)(ii); 2-SER-452; 2-SER-469. Nevertheless, the Service ensured that stock assessment authors retain the ability to conduct additional evaluation if they determine that the 10% threshold does not appropriately capture potential adverse effects to their species' EFH. 3-ER-357.

In challenging the Service's consideration of core EFH area, Oceana asserts that the MSA "requires protection of *all* essential fish habitat," and suggests that

the Service failed to consider any potential adverse effects beyond the core EFH area. *See* Opening Br. 39. But nothing in the MSA requires the Service to "protect" "all" EFH in the review process, nor requires the Service to minimize "all" adverse effects from fishing. The MSA "require[s] [the Service] to balance conservation with yield, not favor one at the expense of the other." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1102 n.15 (9th Cir. 2012). Accordingly, the MSA directs the Service to minimize adverse effects "to the extent practicable," 16 U.S.C. §§ 1853(a)(7), and the guidelines direct councils to prevent, mitigate, or minimize adverse effects that are "more than minimal and not temporary," taking into account the "nature and extent of the adverse effect," 50 C.F.R. § 600.815(a)(2)(ii), (iii). Both standards require the Service to apply its expertise and discretion in determining whether adverse effects warrant mitigation. *See Conservation L. Found.*, 360 F.3d at 28 (noting that Congress used "to the extent practicable" to give the Service discretion in managing fishery resources). In the context of this five-year review and the existing fishery management plans, it was reasonable for the Service to consider the percentage of habitat disturbance in the species' most used areas when weighing whether any new information indicated that adverse fishing effects to EFH were more than minimal.[10]

[10] Oceana's contentions also reveal that it misunderstands the discrete issue before the Service in an EFH five-year review: whether to update the EFH provisions in fishery management plans based on new information. The fishery management

In any event, the Service *did* consider fishing effects in EFH more broadly, and nothing limited the stock assessment authors to considering only core EFH areas. The fishing effects model estimates habitat disturbance across the whole region, with data available for each 25-square-kilometer grid cell for each month of the model run. 3-ER-342-43 (showing maps of cumulative habitat disturbance). As part of the fishing effects evaluation, stock assessment authors are provided with habitat disturbance results for a species core EFH area, but the authors are also provided with the model's full results to get a comprehensive view of possible adverse effects. *See* 3-ER-342-43; 3-ER-387. And, if stock assessment authors have concerns about using the 50% core EFH area or if any species has limited data, the Service provided the authors with a mapped 75% quantile core EFH area as well. 3-ER-385; 3-ER-356.

The record establishes that the Service made no "clear error of judgment" in focusing the fishing effects evaluation on the top 50% of EFH, particularly because this approach gives stock assessment authors a better understanding of where managed species obtain the most benefit from their habitat. *See Marsh*, 490 U.S. at 378.

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plans in Alaska already contain EFH provisions and numerous measures to prevent, mitigate, and minimize adverse effects from fishing. *See supra* pp.9-10.

III. Vacatur is not appropriate.

If the Court finds any error in the EFH review's methodology, it should remand to the Service without vacating the amendments or remand to the district court to determine the appropriate remedy in light of the Service's ongoing review.

In its Opening Brief, Oceana does not ask the Court to vacate the amendments adopted by the Service after the 2023 review. Opening Br. 54. Instead, Oceana seeks an order declaring the Service's decision adopting the amendments unlawful and a remand to the Service to conduct a new fishing effects analysis within 18 months. Opening Br. 53-54.

The Service has already initiated the next five-year review of EFH information. This review will include an evaluation of fishing effects to EFH and will take years to complete. Even now, the agency is collecting and synthesizing new data for managed groundfish and crab species to inform its review. It would be contrary to the guidelines and the MSA to require the Service to redo the 2023 review with stale data, rather than newly collected information. *See* 16 U.S.C. § 1855(b)(1)(A) ("The Secretary shall set forth a schedule . . . for the review and updating of such identifications based on new scientific evidence or other relevant information"); 50 C.F.R. § 600.815(a)(10) (Councils should review EFH provisions and revise or amend them as warranted "based on available information").

Moreover, in the 2023 EFH Review, the SSC identified some potential updates to the process for the next review. *See* 3-ER-355. Specifically, the SSC recommended reporting species-specific estimates of habitat disturbance from the model by major gear classes and continuing to assess long-lived habitat features and whether current inputs in the model are appropriate. 3-ER-355. Requiring a new analysis for the 2023 EFH Review could delay improvements to the model, including some that Oceana has supported. *See, e.g.*, 5-ER-842 at ¶ 97. If the Court finds any error in the Service's analysis, the Service respectfully requests that the Court remand to the district court to address remedy and decline to impose an 18-month deadline.

CONCLUSION

For the foregoing reasons, the Court should dismiss for lack of standing or otherwise affirm the district court's judgment.

Respectfully submitted,

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ADDENDUM

16 U.S.C. § 1855(b)

(b) Fish habitat

(1)(A) The Secretary shall, within 6 months of October 11, 1996, establish by regulation guidelines to assist the Councils in the description and identification of essential fish habitat in fishery management plans (including adverse impacts on such habitat) and in the consideration of actions to ensure the conservation and enhancement of such habitat. The Secretary shall set forth a schedule for the amendment of fishery management plans to include the identification of essential fish habitat and for the review and updating of such identifications based on new scientific evidence or other relevant information.

> **(B)** The Secretary, in consultation with participants in the fishery, shall provide each Council with recommendations and information regarding each fishery under that Council's authority to assist it in the identification of essential fish habitat, the adverse impacts on that habitat, and the actions that should be considered to ensure the conservation and enhancement of that habitat.
>
> **(C)** The Secretary shall review programs administered by the Department of Commerce and ensure that any relevant programs further the conservation and enhancement of essential fish habitat.
>
> **(D)** The Secretary shall coordinate with and provide information to other Federal agencies to further the conservation and enhancement of essential fish habitat.

(2) Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.

(3) Each Council--

> **(A)** may comment on and make recommendations to the Secretary and any Federal or State agency concerning any activity authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or State agency that, in the view of the Council, may affect the habitat, including essential fish habitat, of a fishery resource under its authority; and

(B) shall comment on and make recommendations to the Secretary and any Federal or State agency concerning any such activity that, in the view of the Council, is likely to substantially affect the habitat, including essential fish habitat, of an anadromous fishery resource under its authority.

(4)(A) If the Secretary receives information from a Council or Federal or State agency or determines from other sources that an action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any State or Federal agency would adversely affect any essential fish habitat identified under this chapter, the Secretary shall recommend to such agency measures that can be taken by such agency to conserve such habitat.

(B) Within 30 days after receiving a recommendation under subparagraph (A), a Federal agency shall provide a detailed response in writing to any Council commenting under paragraph (3) and the Secretary regarding the matter. The response shall include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.