UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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Litigation Updates for the
October 2024 Meeting of the North Pacific Fishery Management Council

Association of Village Council Presidents v. NMFS

Parties:

Plaintiffs: Association of Village Council Presidents and Tanana Chiefs Conference.

Plaintiff-Intervenor: City of Bethel, Alaska.

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

Defendant-Intervenors: At-Sea Processors Association and United Catcher Boats.

Case Activity:

On April 7, 2023, Plaintiffs filed a complaint in the United States District Court for the District of Alaska challenging NMFS Alaska Region's implementation of the 2023 and 2024 final groundfish harvest specifications for the Bering Sea and Aleutian Islands management area (BSAI). The complaint alleges NMFS violated the National Environmental Policy Act (NEPA). Federal Defendants filed the answer on May 30, 2023. The complaint and answer were included in the NOAA General Counsel B3 Report for the June 2023 Council meeting.

In July 2023, the district court granted a motion by the At-Sea Processors Association and United Catcher Boats to intervene as Defendants. In September 2023, the district court granted a motion by the City of Bethel, Alaska, to intervene as a Plaintiff. Federal Defendants filed the administrative record on August 9, 2023, and filed a supplement to the administrative record on September 20, 2023.

On October 9, 2023, Plaintiffs filed a motion for summary judgment in this case on the merits (attached), and the Plaintiff-Intervenor joined that motion. On November 22, 2023, Ocean Conservancy, SalmonState, Native Peoples Action, Kuskokwim River Inter-Tribal Fish Commission, and Alaska Marine Conservation Council filed a motion to submit an amicus curiae brief in support of Plaintiffs, which the district court granted on December 11, 2023.

On April 10, 2024, Plaintiffs filed a motion to file a supplemental complaint to incorporate allegations that the 2024 and 2025 final BSAI groundfish harvest specifications also violate NEPA. Plaintiff-Intervenor filed a motion to join Plaintiffs' request. The district court granted Plaintiffs' request, and Federal Defendants filed their answers to Plaintiffs' and Plaintiff-Intervenor's complaints on May 30, 3024. The supplemental complaint of Plaintiffs Association of Village Council Presidents and Tanana Chiefs Conference and Federal Defendants' answer to that complaint were included in the NOAA General Counsel B3 Report for the June 2024 Council meeting. On June 12, 2024, Federal Defendants filed a supplemental administrative record for the 2024 and 2025 final BSAI groundfish harvest specifications.

On July 15, 2024, Plaintiffs filed an amended supplemental brief based on their supplemental complaint (attached). On July 19, 2024, Federal Defendants filed an opposition to Plaintiffs' motion for summary judgment and a cross-motion for summary judgment (attached). On the same day, Defendant-Intervenors also filed an opposition to Plaintiffs' motion for summary judgment and a cross-motion for summary judgment (attached). Plaintiffs filed their reply to these motions on August 16, 2024 (attached).

Status/Next Steps:

The parties have briefed the merits of the case. Since this case involves review of an agency action under the Administrative Procedure Act, the judge will decide the case based on the parties' briefs and oral argument.

Oral argument has been scheduled for Thursday, September 26, at 9:00 a.m. Alaska local time. The public may listen to the hearing for oral argument by dialing 571-353-2301 and using Call ID 275666327.

Attached: Plaintiffs' opening brief and motion (Doc. 32, filed October 9, 2023) and amended supplemental brief (Doc. 66, filed July 15, 2024)
Federal Defendants' (Doc. 68) and Defendant-Intervenors' (Doc. 67) response briefs and cross motions (filed July 19, 2024)
Plaintiffs' reply brief (Doc. 71, filed August 16, 2024)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS and TANANA CHIEFS CONFERENCE, *Plaintiffs*, CITY OF BETHEL, *Intervenor-Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE *et al.*, *Defendants*, AT-SEA PROCESSORS ASSOCIATION and UNITED CATCHER BOATS, *Intervenor-Defendants.*	Case No. 3:23-cv-00074-SLG

PLAINTIFFS' PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1)

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INTRODUCTION

The Bering Sea and Aleutian Islands ecosystem is one of the most productive ecosystems in the world, but it is undergoing extreme change. After an unprecedented, multi-year heatwave and record low sea ice over the last decade, this ecosystem may be less productive and resilient than it once was.

The National Marine Fisheries Service (Service) manages some of the world's largest fisheries in the Bering Sea, authorizing the removal of 4.4 billion pounds of pollock and other groundfish from the ocean each year. The majority of those fish are caught in trawl nets that bring up everything in their path, including salmon. The tens of thousands of salmon caught as bycatch are casualties of the trawl fishery and never return to their natal rivers to spawn. At the same time salmon from now depleted populations are caught in the trawl fishery, people in western and interior Alaska have been unable to fish for the salmon they have depended on for thousands of years.

This case challenges the Service's annual harvest specifications decision—a decision that establishes parameters for the annual fishery. When the Service adopted the 2023-2024 harvest specifications for the groundfish fisheries, it did not prepare an environmental impact statement (EIS) to analyze the effects of the decision. The Service last analyzed the environmental consequences of its harvest specifications process in an EIS completed in 2007 that, in turn, relies on an even older analysis from 2004. By adopting harvest specifications this year without completing an EIS for this specific decision that considers the effects of the harvest specifications in the context of the

current, radically different environment, or a supplemental EIS for the harvest specifications strategy as a whole that does the same, the Service violated the National Environmental Policy Act (NEPA).

BACKGROUND

I. The harvest specifications decision and the fisheries management process.

The federal pollock trawl fishery off the coast of Alaska is the largest trawl fishery in the world. *See* SUPP00179. It is the largest of the Bering Sea groundfish fisheries, which, combined, catch up to two million metric tons—4.4 billion pounds—of fish each year. NMFS06099. In addition to their commercial value, pollock are an important food source for other groundfish, seals, whales, seabirds, and Chinook and sockeye salmon. NMFS23908; SUPP00165; NMFS05534.

Pollock is caught exclusively with pelagic trawls, NMFS00081, a method of fishing that involves dragging large nets through the ocean. NMFS18089. Pelagic trawls are cone-shaped nets with openings between 160 and 400 feet wide, roughly the size of a football field. NMFS00081. While pelagic trawls are also called mid-water trawls, they frequently contact the ocean floor. *E.g.*, NMFS06770; NMFS24174; NMFS26322; SUPP05184. The nets scoop up everything they encounter, including non-target fish, deep sea corals, crabs, and other invertebrates. *See, e.g.*, NMFS24110-11; NMFS06770; SUPP05184-85. Pollock and salmon swim in the same areas, NMFS18089, and pollock trawls catch tens to hundreds of thousands of Chinook and chum salmon as bycatch every year. SUPP00013 (1991-2022 Chinook bycatch ranging from 8,342 to 130,011 fish);

SUPP00015 (1991-2022 non-Chinook bycatch ranging from 13,283 to 711,520 fish annually);[1] NMFS00078 (majority of non-Chinook bycatch is chum salmon annually); SUPP00062 (Barry, Chum Genetics) (similar).[2] Many of these salmon originate from western Alaska rivers, where multiple stocks of salmon have collapsed. NMFS05453.

In addition, benthic, or bottom-dwelling, species like shellfish and invertebrates are caught in trawls. Even when they are not captured in the nets, they can be injured by the nets. *See*, *e.g.*, NMFS18770-01 (crabs); NMFS24183-84 (damage to seastars, bivalves, and sponges). Trawls disturb spawning and nursery habitat for crabs, NMFS2628-69, and reduce benthic habitat productivity for forage fish important to species ranging from seabirds to marine mammals, *see, e.g.*, NMFS26322-23 (cormorants), NMFS26328 (eiders), NMFS26357 (seals), NMFS26369 (gray whales); NMFS06761 (eider habitat). Damage to long-lived, slow-growing species can be irreversible. NMFS23561, NMFS24569, NMFS26545.

The Service and the North Pacific Fisheries Management Council (Council) jointly manage the groundfish fisheries under the Magnuson Stevens Act.[3] Among the overarching purposes of the Magnuson Stevens Act is to provide for "conservation and

[1] Both charts show "0" fish for 2023 because they are dated January 9, 2023. The vast majority of salmon bycatch is caught by the pollock trawl fishery. SUPP00301.
[2] Four record documents, SUPP00060.pdf through SUPP00081.pdf, have overlapping bates numbers. One of these documents is cited in this brief. It is identified with the following parenthetical: (Barry, Chum Genetics). Counsel for Plaintiffs are working with Counsel for the Service to resolve this issue.
[3] Under the Magnuson Stevens Act, the Council recommends management measures and the Service is responsible for ensuring they comply with the law and approving them. 16 U.S.C. § 1854; 50 C.F.R. § 600.305(a)(2).

management of the fishery resources…." 16 U.S.C. § 1801(a)(6). To that end, the Council and the Service develop fishery management plans employing various tools to control who can fish and where, for what species, and with what gear. NMFS23807; *see also* 16 U.S.C. § 1853; *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 156-57 (D.D.C. 2005).

The groundfish fisheries at issue are managed under the groundfish fisheries management plan for the Bering Sea and Aleutian Islands. NMFS00083. The current fishery management plan, adopted before the changes in the environment of today, set a range for the total annual catch for all groundfish species combined between 1.4 and 2.0 million metric tons. 50 C.F.R. § 679.20(a)(1)(i)(A); NMFS23811.

The Service analyzed the effects of the plan in a 2004 programmatic EIS for the groundfish plan. NMFS23604-26827. It reviewed that analysis in 2015 in a supplemental information report considering whether an update to the 2004 EIS was warranted. In that 2015 supplemental information report, the Service concluded that, although there were some resources for which experts indicated a new analysis could lead to different conclusions about fishery impacts, on the whole, the "status of the resources can be considered within the range of variability analyzed in the 2004 [programmatic EIS]…." NMFS23444.

Each year, the Service and the Council make a variety of fisheries management decisions that implement the groundfish plan and rely on the analysis in the 2004 programmatic EIS that supports it. *See* NMFS26843-45 (describing tiering to

programmatic EIS). The adoption of the harvest specifications each year is one important decision under the plan. This decision follows a process required under the groundfish plan and analyzed in a 2007 EIS that considers alternative "harvest strategies" for the groundfish fisheries. NMFS06536. In that EIS, the Service describes the harvest specifications as "a project-level action within the fishery management program[] under the … [Bering Sea and Aleutian Island] groundfish [fishery management plan]." NMFS06565. The annual specifications establish catch limits and other parameters for the annual fishery. *See* NMFS06556-57, NMFS06563-64; NMFS00018-48.

In March 2023, the Service published the final 2023-2024 harvest specifications for the Bering Sea and Aleutian Islands. NMFS00018-48; NMFS00049-53. The decision set the catch limit, or total allowable catch, for all groundfish at 2.0 million metric tons for 2023 and 2024. NMFS00018. For pollock, the catch limit was set at 1.3 million metric tons, a 17 percent increase above the 2022 limit. *Compare* NMFS0020-21 *with* 87 Fed. Reg. 11,626, 11,628 (Mar. 2, 2022).

The Service did not complete an EIS or environmental assessment for the 2023-2024 harvest specifications decision. Instead, it completed a supplementary information report to consider whether additional NEPA analysis was necessary to support its decision. NMFS00587. In this 2023 supplementary information report, the Service concluded that any new information was either addressed through the annual harvest specifications process or within the scope of effects analyzed in the 2007 EIS. NMFS00635. The Service therefore determined that no further NEPA documentation

was required to support its decision. *Id.*

The 2007 harvest specifications strategy EIS is now 16 years old and the 2004 programmatic EIS that it relies on is nearly two decades old. There has been no cumulative analysis of the effects of the harvest specifications strategy since that time.

II. The rapidly changing Bering Sea and Aleutian Islands ecosystem.

The last decade has been a time of upheaval in the Bering Sea and Aleutian Islands, with significant changes cascading across the ecosystem. The Bering Sea entered a warm period from 2014 through at least 2021 that, according to the Service's own experts, was "unprecedented in terms of magnitude and duration." NMFS05440. The breadth and extent of change is staggering: unprecedented collapse of multiple species of salmon, unprecedented marine heatwaves, disappearance of the cold pool, record low sea ice extent, changes in recruitment, shifts in size and condition of fish, changing physical and chemical ocean conditions, seabird die-offs, and unusual marine mammal mortality events. *See* NMFS05437; NMFS05440; NMFS26855-56; NMFS15080; NMFS06272; SUPP00318-20; SUPP00722; SUPP01060. While ocean temperatures in the last year have cooled somewhat, the changes from these warm years are expected to continue: "[T]here is increasing evidence from ongoing responses of species to the [marine heat wave] that climate shocks and long-term warming are likely to impact future distribution and productivity of stocks in the region." NMFS01280; *see also, e.g.*, SUPP00921 (more normal sea ice extent "appeared to have only minimal mitigating effects on the warmth in the upper water column"). The new, post-heat wave

ecosystem may have "reduced resiliency" and lower carrying capacity. SUPP00337-38, SUPP00335.

Sea ice is an integral part of the resilience of the Bering Sea ecosystem, and its loss is a foundational change. *See* NMFS23887. Sea ice not only affects the temperature of the water column, but also salinity and density, vertical mixing, and nutrient transport. NMFS23888. This affects energy flow within the ecosystem, availability of high-quality prey for fish, including juvenile salmon, seabirds, and marine mammals, and the overall productivity of the ecosystem. NMFS05438-42; NMFS05453-55; NMFS23887-88. Sea ice extent declined steeply in the Bering Sea from 2012 through 2018, with the two lowest years on record in 2017-18 and 2018-19. NMFS05438; SUPP01057. In 2018, there was no cold pool in the southeastern Bering Sea and the two following years it was historically small. SUPP01284; NMF05438; NMFS26855. The Aleutian Islands have similarly experienced persistently warm surface and bottom water temperatures since 2013. NMFS26855; NMFS03404; NMFS01280.

These warmer temperatures increase the metabolic needs of many species, including forage fish. NMFS05442; SUPP00591. At the same time, warmer ocean temperatures result in lower production of zooplankton, a normally abundant food source, and a shift to small, less nutrient-dense types of zooplankton. *E.g.*, SUPP01138-39; SUPP01289; NMFS05439, NMFS05481. These changes in the building blocks of the food chain are important for food web dynamics and carrying capacity. SUPP00335; NMFS05504; SUPP00207-09. The reduction in high-quality food sources means that, at

a time when fish need more food to meet metabolic needs, less food is available and it is of lower quality. SUPP01289; SUPP00338. This can result in a mismatch of prey available for some species, including seabirds and juvenile salmon, "exacerbat[ing] increased metabolic demands under increased thermal conditions." SUPP00337-38; *see also* NMFS03404. The decline in productivity at the base of the food chain is likely to continue in a changing climate "with uncertain outcomes for major fisheries." SUPP00213-14.

These food supply changes also affect forage fish and groundfish. Forage fish biomass "declined steeply" from 2015 through 2017 and was still below average in 2022. SUPP00331; NMFS05435. In 2021, pelagic foragers were at their second lowest biomass. SUPP00338. Pollock biomass dropped by nearly 60 percent between 2014 and 2018, though juvenile biomass increased in 2017. SUPP01284; SUPP00338. Groundfish body condition generally deteriorated between 2019 and 2021. SUPP00338. These declines have cascading effects for other species that prey on forage fish and groundfish. *See* SUPP00337 (shifts in food web decrease resiliency).

While the warming began around 2014, SUPP00334, there was an "abrupt and dramatic change" in the northern Bering Sea in 2017: "2018 was extraordinarily different in the [Northern Bering Sea] than in the past experience of scientists visiting the region or in the oral histories of local residents." SUPP01288; SUPP00335. High numbers of dead pollock washed ashore in Bristol Bay, something that subsistence and commercial fishers had never seen before. SUPP01292-93. With warmer ocean

temperatures, Pacific cod moved north, leading to the first ever stock assessment for northern Bering Sea Pacific cod. SUPP00722-23; SUPP01289. The northward movement of boats following groundfish also led to the first reported interaction between groundfish boats and threatened spectacled eiders. SUPP00336; *see also* NMFS26328-30.

These changes in ecosystem dynamics are linked with seabirds die-offs and unusual mortality events for marine mammals. In 2018 and 2019, there were seabird die-offs "unprecedented in terms of spatial and temporal scale," and, even in colonies where birds survived, catastrophic reproductive failures occurred. SUPP01290, SUPP01293; SUPP01075. Over 11,000 seabird carcasses of multiple species were counted in the region, SUPP01196, with starvation identified as the predominant cause of death. SUPP01290; SUPP01075, SUPP01194.

There were also unusual mortality events for large whales, including fin and humpback whales, in 2015-2016, SUPP03852-53, followed by an unusual mortality event in 2019 for gray whales—an "ecosystem sentinel for the North Pacific"— with 49 found in Alaskan waters, SUPP01083-84; SUPP1060. Preliminary studies identified emaciation as a cause of death for gray whales. SUPP01083. Similarly, an unusual mortality event was declared for ice seals in 2018 and 2019, with 282 seal carcasses counted along the Bering and Chukchi seas. SUPP01060; SUPP01083-84. The loss of sea ice pupping habitat was cited as one factor in the deaths, with "follow-on ecosystem effects such as competition for prey from northward shifts in distribution of large fish

predators" as another possibility. SUPP01084.

Warming ocean conditions further exacerbated western Alaska Chinook salmon declines, which started around 2007, and contributed to the collapse of chum and coho salmon stocks in the last three years. SUPP01995; SUPP00292-97. There have been significant restrictions and closures of subsistence harvests since 2013 in the Yukon, Kuskokwim, and Norton Sound regions, with the lowest Chinook runs on record for the Kuskokwim in 2010-2013. NMFS18165; SUPP00292. In 2022, the Chinook run on the Yukon River was the lowest on record and no escapement goals were met.[4] NMFS06531. Chinook salmon escapement for the Unalakleet River weir was the lowest on record in 2022. NMFS06530-31. Federal disasters were declared in multiple years and amounts necessary for subsistence have not been met since 2010. *See* SUPP00294; NOAA Fisheries, Fishery Disaster Determinations (Oct. 8, 2023), https://www.fisheries.noaa.gov/national/funding-and-financial-services/fishery-disaster-determinations. Several factors contribute to the decline, including marine and river conditions, bycatch in commercial groundfish fisheries, competition with hatchery fish, and nutritional stress. NMFS33837 (Chinook); NMFS05453 (Chinook); NMFS33420 (chum); SUPP00242 (Chinook, chum); SUPP00169 (chum); SUPP00163-69 (Chinook). Juvenile Chinook and chum salmon at sea show poor body condition and empty stomachs resulting from diet shifts forced by warm seas. NMFS0543; SUPP00171-73.

Because of the steep decline across multiple species of salmon, western and

[4] Escapement is "the annual estimated size of the spawning salmon stock." NMFS18159.

interior Alaska communities have had to curtail salmon harvests to meet escapement goals and allow stocks to rebuild. Western Alaska communities have depended on salmon for thousands of years; their ways-of-life are intertwined with salmon. Families gather at fish camps each year to process and store fish, while passing down cultural traditions. *See infra* pp. 13-14. This loss of salmon is both a food security crisis and a cultural crisis.

While communities are unable to feed themselves or carry on their cultures, these same salmon are caught as bycatch in the groundfish fisheries. On average, about half the Chinook salmon caught as bycatch in the groundfish fisheries originate from western Alaska rivers. In 2020, over 56 percent of the Chinook salmon caught as bycatch were from coastal western Alaska and the Yukon River. SUPP00009. From 2011 through 2020, the groundfish fisheries caught approximately 77,052 total western Alaska Chinook salmon as bycatch. SUPP00027. Over the same time period, the groundfish fisheries caught an estimated *annual* average of 49,290 chum salmon that originated from western Alaska rivers. SUPP00061 (Barry, Chum Genetics). While all these fish may not have returned to rivers as adults to spawn, bycatch takes several thousand fish out of the spawning stock, a loss of 3,000 to 14,000 eggs for each female Chinook alone. NMFS18156.

Multiple species of crab stocks have also collapsed. Between 2020 and 2023, the Secretary of Commerce approved fishery disaster declarations for the Bristol Bay red king crab, Bering Sea snow crab, and Norton Sound red king crab fisheries.

NMFS18836. Since 2014, Bristol Bay red king crab have been decreasing in abundance. SUPP00471-72; SUPP01280. The Service declared Eastern Bering Sea snow crab overfished in 2021. NMFS18720; NMFS00615. Climate change, reduced ice cover, the smaller size of the cold pool, and distributional shifts all suggest "a challenging future for the [Eastern Bering Sea] snow crab stock," NMFS28974, which "require[s] the use of a forward-looking perspective for managing snow crab and other Bering Sea fisheries…." NMFS18757.

These changes, individually and cumulatively, significantly affect subsistence. Without salmon, communities in western and interior Alaska are unable to meet their subsistence needs or practice long-held traditions. Both seabird eggs and birds are also important for subsistence, but with massive die-offs and reproductive failures, some communities have been unable to gather eggs or harvest birds. SUPP01061; SUPP01290, SUPP1293. On St. Lawrence Island, "local people were stunned and there was a complete lack of harvest" of murres in 2018 because the birds were not there. SUPP01291. Similarly, on St. Paul and St. George Islands, residents could not collect murre eggs or auklets and took only low numbers of kittiwakes for elders. SUPP01293. Likewise, in coastal communities that harvest marine mammals, harvest opportunities are changing as seals are stranded or out of range with decreased ice. *See* SUPP01291.

These changes in the ecosystem present a significantly different picture of the marine and human environment than that analyzed by the Service in 2007 and 2004.

ARGUMENT

I. Plaintiffs have standing.

Association of Village Council Presidents (AVCP) and Tanana Chiefs Conference (TCC) have standing to bring this case because their members have standing in their own right, the interests at stake are germane to AVCP's and TCC's organizational purposes, and the lawsuit does not require the participation of their individual members. *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 181 (2000).

Members and citizens of AVCP's and TCC's tribes and communities depend on—and will continue to depend on—a healthy Bering Sea and Aleutian Islands ecosystem because their traditions and cultures are intertwined with salmon and the resources of the Bering Sea. AVCP and TCC are Alaska Native non-profit regional tribal organizations that, together, support the interests of 98 member tribes and communities stretching from the southern shore of Norton Sound to Kuskokwim Bay and from Nunivak Island to Eagle, an area with a population of about 45,000 people. *See* Ex. 1, ¶¶6-8; Ex. 5, ¶¶8-9. A central part of AVCP's and TCC's missions is to protect and enhance traditional and cultural values, including subsistence. Ex. 1, ¶¶10, 13, 16, 17-21; Ex. 5, ¶¶10-12, 18-26.

Citizens and members of AVCP's and TCC's tribes and communities are located along the Yukon and Kuskokwim rivers, their tributaries, and the Bering Sea coast. Ex. 1, ¶8; Ex. 5, ¶9. The culture and traditions of citizens and members of AVCP's and TCC's tribes and communities are fundamentally linked with salmon and have been for thousands of years: they are salmon people. Harvesting salmon and other traditional

foods "is fundamental to our cultural traditions, maintaining traditional language, and sustaining communities." Ex. 1, ¶12; *see also* Ex. 2, ¶13; Ex. 3, ¶11; Ex. 4; ¶¶9-13; Ex. 5, ¶37; Ex. 6, ¶¶8-11. Salmon is the most important subsistence fish for households in these regions and the collapse of three species of salmon has had devastating effects. *See* Ex. 1, ¶¶13, 24; Ex. 2, ¶¶19, 21; Ex. 5, ¶12; Ex. 6, ¶15. Citizens and members of AVCP's and TCC's tribes and communities have been unable to meet their subsistence needs for many years, affecting their ability to provide food for their families and pass traditions to their children. Ex. 2, ¶¶19-20; Ex. 4, ¶13; Ex. 5, ¶¶13, 16, 35; Ex. 6, ¶15. It has also led to social and public health issues, including suicide, alcohol, and substance abuse. Ex. 1, ¶¶28, 31; Ex. 2, ¶21; Ex. 3, ¶¶22-23, 31.

In addition to salmon, members of AVCP's and TCC's tribes and communities depend on other marine resources not only as food, but as integral parts of their cultures. Residents of coastal communities hunt seals, walruses, seabirds, crabs, and other animals that depend on the ocean ecosystem. *See* Ex. 1, ¶14; Ex. 3, ¶¶12-13, 18; Ex. 4, ¶¶17-19; Ex. 5, ¶11. They use these marine resources to feed their families and to share with others. Ex. 2, ¶¶16-17; Ex. 3, ¶¶14, 17; Ex. 4, ¶17. The changes in the ocean have negatively affected marine mammals, seabirds, crabs, and other ocean resources on which citizens and members of AVCP's and TCC's member tribes and communities depend. *See supra* pp. 7-12.

The harms to these interests in the Bering Sea ecosystem and the marine wildlife it sustains are imminent, concrete, and particularized. *See Ctr. for Biological Diversity v.*

Kempthorne, 588 F.3d 701, 707-08 (9th Cir. 2009) (standing established where plaintiffs viewed polar bears across broad geographic region affected by regulation).

The Service's decision to authorize the groundfish fisheries across the Bering Sea and Aleutian Islands directly and irreparably harms the subsistence, economic, and cultural interests of citizens and members of AVCP's and TCC's tribes and communities. *See supra* p. 14. For example, citizens and members of AVCP's and TCC's tribes and communities face imminent harm to their interests in salmon because authorization of the groundfish fishery results in bycatch that reduces the number of salmon returning to western Alaska rivers. *See Flaherty v. Bryson*, 850 F. Supp. 2d 38, 48 (D.D.C. 2012) (finding standing in challenge to herring fishery management plan because plaintiffs were less likely to be able to fish for striped bass if fewer herring were available for bass to eat). The decision also affects when, where, and how much fishing is authorized, and those decisions affect marine resources—including salmon, marine mammals, and seabirds—on which citizens and members of AVCP's and TCC's tribes and communities depend. *See* Ex. 2, ¶¶24, 26; Ex. 6, ¶16.

The Service's authorization of the groundfish fishery, including the bycatch of salmon, using outdated analyses means that the Service has not analyzed the effects of its management choices on salmon and other marine resources in the context of today's dramatically changed ecosystem. This uninformed decision-making increases the risk to marine resources, and therefore, to citizens and members of AVCP's and TCC's tribes and communities. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971

(9th Cir. 2003) (recognizing injury in the form of "added risk to the environment" when decisionmakers do not make decisions based on an adequate analysis (quoting *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n.14 (9th Cir. 2000))).

These harms constitute concrete injury in fact, are fairly traceable to the actions taken by the Service challenged in this litigation, and are likely to be redressed by the relief sought. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also 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.") (quotation marks and citation omitted).

II. Standard of review.

This challenge arises under the Administrative Procedure Act, which directs courts to "set aside" agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(1), (2)(A) & (D). An agency action is arbitrary if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

III. The Service violated NEPA because it did not prepare either an EIS for its 2023-2024 harvest specifications decision or a supplemental EIS for the harvest specifications strategy.

By authorizing fishing for up to two million metric tons of fish without completing any NEPA document disclosing the effects of that decision in the context of today's environment, Defendants violated NEPA. The 2023-2024 harvest specifications decision is a major federal action with potentially significant effects on the environment. When the Service adopted that decision, it did not prepare an EIS. Instead, it completed a supplementary information report pointing to the EIS for the 2007 harvest specifications strategy as providing the necessary NEPA analysis. The 2007 EIS does not analyze the effects of the 2023-2024 harvest specifications in the context of today's environment. The Service acted arbitrarily, in violation of NEPA, by adopting the annual harvest specifications without producing an EIS.

Even if the 2023-2024 harvest specifications decision does not, itself, require an EIS, the Service violated NEPA by declining to supplement the 2007 harvest specifications strategy EIS. The annual harvest specifications decision is an implementation of the harvest specifications strategy adopted in 2007. The Service concluded, in its 2023 supplementary information report, that it need not prepare a supplemental EIS because there is no new information not analyzed in either the 2007 EIS or through the harvest specifications process. That conclusion is arbitrary. The dramatic changes in the Bering Sea and Aleutian Islands ecosystem are significant, and must be analyzed in an EIS; considering this substantial new information outside a NEPA

process is insufficient. The Service's adoption of the 2023-2024 harvest specifications decision without either a project-specific EIS or a supplemental EIS for the harvest specifications strategy violated NEPA.

A. The 2023-2024 harvest specifications decision is a major federal action with potentially significant environmental effects and there is no EIS analyzing it in the current environmental context.

The adoption of harvest specifications authorizing the removal of up to two million metric tons of fish from the ocean is a major federal action with significant environmental effects. NEPA requires agencies to prepare an EIS for every major federal action that may have significant effects on the human environment. 42 U.S.C. § 4332(2)(C) (2022). If an action is not categorically excluded from NEPA, an agency must generally either prepare an environmental assessment and determine the effects of the action are not significant or it must prepare an EIS. 40 C.F.R. §§ 1501.3, 1501.4; *Solar Energy Indus. Ass'n v. Fed. Energy Regulatory Comm'n*, 80 F.4th 956, 991-92 (9th Cir. 2023). This requirement serves to ensure that agencies take a "hard look" at the environmental effects of a proposed action, consider alternatives to it, and "inform the public in an EIS of the relevant factors that were considered in the decision-making process." *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (citations omitted).

The requirement to complete an EIS is triggered when "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562

(9th Cir. 2006) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). It is not necessary to "show that significant effects *will in fact occur*," it is enough that there are "substantial questions whether a project may have a significant effect"; this is a low standard. *Id.* (quoting *Idaho Sporting Cong.*, 137 F.3d at 1150); *see also Solar Energy Indus.*, 80 F.4th at 991 (9th Cir. 2023). "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)).

1. The harvest specifications decision is a major federal action.

The 2023-2024 harvest specifications decision is a major federal action because it is a final rule approving fishing subject to federal control. Regulations implementing NEPA define a major federal action as "an activity or decision subject to Federal control and responsibility." 40 C.F.R. § 1508.1(q). The definition includes "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; [and] new or revised agency

rules, regulations, plans, policies, or procedures…." *Id.* § 1508.1(q)(2).[5] Authorizing commercial fishing is a major federal action. *See Ramsey v. Kantor*, 96 F.3d 434, 443-44 (9th Cir. 1996) (concluding that issuing an incidental take statement for salmon "is functionally equivalent to a permit," allowing fishing to happen and therefore a major federal action).

The Service apparently recognized the adoption of the harvest specifications is a major federal action because it completed a supplementary information report to consider whether NEPA analysis was required, but erroneously concluded there was no significant new information to assess. *See infra* pp. 26-36. The adoption of the harvest specifications each year is necessary to allow fishing to proceed, consistent with the fishery management plan. *See* NMFS00018 (rule "establish[es] harvest limits for groundfish"); NMS06609-10. In this decision, the Service determines how many fish can be removed from the ocean, making adjustments for social and economic factors, NMFS00018; chooses which of six analytical "tiers" to use for determining limits for each stock, *id.*; uses those tiers to set overfishing limits and acceptable biological catch levels, *id.*; divides catch limits among seasons and sectors, NMFS00020-32; may split or combine groupings of fish species, NMFS00119; establishes annual prohibited species

[5] Former NEPA regulations included a similar definition for "major federal action," but specified that "[m]ajor reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18(2020); *see also id.* § 1508.27 (defining "significantly"). In 2020, the regulations were replaced and the new definition of "major federal action" appears at 40 C.F.R. § 1508.1(q). In adopting the regulations, the Council on Environmental Quality specified that "major" and "significant" should have independent meanings. *See* 85 Fed. Reg. 43,304, 43,345 (July 16, 2020).

catch limits for crab and herring, NMFS00033; and puts into effect the prohibited species catch limit for Chinook salmon based on prior year's abundance estimates.[6] NMF00032-33; *see also* NMFS00119-28 (describing process); 50 C.F.R. §§ 679.20-.26. The harvest specifications process adopted in the fishery management plan establishes a structure for making these decisions, but it leaves the Council and the Service with considerable discretion to make critical choices about what type of boats can fish for how many fish of each kind in a given year. *See League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir. 2008) (where the agency "has statutory authority to regulate the environmental consequences of the Project," it must comply with NEPA).

In other fisheries, the Service has prepared, at a minimum, environmental assessments to consider whether the adoption of catch limits and similar fisheries management tools may have significant environmental effects. *See, e.g.*, *Nw. Env't Def. Ctr. v. Brennen*, 958 F.2d 930, 933, 936 (9th Cir. 1992) (Service prepared EA for amendment to regulations setting abundance-based limits for annual salmon escapement goals); *Oceana v. Locke*, 831 F. Supp. 2d 95, 104, 125 (D.D.C. 2011) (Service prepared EIS for amendment to plan modifying trip limits, establishing mechanism for specifying catch limits, and calculating control rule, but concurrently adopted annual catch limits with an EA); *see also* 75 Fed. Reg. 18,356, 18,356 (Apr. 9, 2010) (final rule and notice of

[6] Salmon bycatch is regulated under 50 C.F.R. § 679.21(f), which sets a range of limits for Chinook bycatch and establishes a savings area, but no overall cap, for chum bycatch

EA for concurrent adoption of annual catch limits and other specifications discussed in *Oceana*); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1327-28 (9th Cir. 1992) (new EA prepared before reopening fishery for final quarter of a season). In this case, the Service did not even prepare an environmental assessment to consider the significance of the action.

2. The 2023-2024 harvest specifications may have significant effects.

These choices made in the harvest specifications decision have significant effects. To determine whether the effects of an action may be significant, "agencies shall analyze the potentially affected environment and degree of the effects of the action." 40 C.F.R. § 1501.3(b). This requires considering the affected environment and its resources, including short and long-term effects, beneficial and adverse effects, and public health and safety. *Id.*; *see also Blue Mountains Biodiversity Project*, 161 F.3d at 1213 (citing former regulation listing relevant factors for significance under NEPA); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 569 U.S. 139, 157 (2010) (significance requires considering context and intensity). If a project *may* have significant effects, the agency must prepare an EIS. *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 562 (citing *Idaho Sporting Cong.*, 137 F.3d at 1150). Authorizing fishing for the largest trawl fishery in the world, SUPP00179, is likely to have significant effects, particularly when considered in the context of a dramatically altered, potentially less-

resilient ecosystem.

The authorization of fishing under the harvest specifications affects targeted and non-targeted fish, habitat, marine mammals, and other ecosystem components. As the Service recognized in its 2007 EIS for the harvest specifications strategy,

> [a]nnual target species harvests, conducted in accordance with the annual specifications, will impact the stocks of the target species themselves. Annual harvest activity may change total mortality for the stocks, may affect stock characteristics through time by selective harvesting, may affect reproductive activity, may increase the annual harvestable surplus through compensatory mechanisms, may affect the prey for the target species, and may alter [essential fish habitat].
>
> The annual target species harvests also impact the environmental components described in this EIS: nontarget fish species, seabirds, marine mammals, living and nonliving benthic habitat, and a more general set of ecological relationships.

NMFS06621. Some of the effects of fishing may be irreversible. NMFS19126 (biological opinion for fisheries stating models show species will not recover pre-fishing biomass over a 100-year timeframe). These acknowledged effects of harvests conducted under the annual specifications are both short- and long-term effects that may have consequences for marine resources and the people who depend on them, and they should be considered in an EIS. *See Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 562.

Because, "as a practical matter, the volume of a fishery's total annual catch is inextricably linked to the amount of its bycatch," the authorization of fishing affects the amount of bycatch in the fishery. *Oceana*, 831 F. Supp. 2d at 108. Trawling is non-selective and bycatch is inevitable; at higher levels of fishing, more bycatch is likely.

See NMFS06713 (projecting higher bycatch under higher catch limits); NMFS26847 (similar). Trawling for pollock results in bycatch of tens to hundreds of thousands of Chinook and chum salmon, some of which would otherwise return to western Alaska rivers to spawn and produce more salmon. *See supra* pp. 10-11; *see also* NMFS18142 ("Any additional fish returning to those rivers improves the ability to meet escapement goals, which is necessary for long-term sustainability of the stocks and the people reliant on this fishery."). Crabs, including from stocks that have recently collapsed, are also caught as bycatch. *See supra* pp. 2-3, 11-12. With the collapse of salmon and crab stocks, added bycatch may have a greater impact. *See Pac. Marine Conservation Council v. Evans*, 200 F. Supp. 2d 1194, 1206 (N.D. Cal. 2002) (finding "unpersuasive" the agency's argument that serious decline in a fish population caught as bycatch in groundfish fishery was not significant where fishery contributed to decline).

Trawling and other groundfish fishing can also "influence the structure and function of marine ecosystems," NMFS24544, remove top predators, NMFS26434, change predator-prey relationships, NMFS00233-34, damage bottom habitat and kill benthic organisms, NMFS00234, affect food web dynamics, "alter the amount and flow of energy in an ecosystem," NMFS26436, influence species diversity, NMFS26436-37, and cause direct stress to marine mammals and birds. NMFS00118. While the Service may have concluded that some of these impacts were not significant in 2004 or 2007, it cannot make that conclusion now without analyzing the effects of fishing in the context of today's dramatically changed environment. The removal of 2.0 million metric tons of

fish—without considering spatial shifts, changes in abundance of forage fish, increased metabolic needs, or how these changes affect subsistence—could exacerbate the ecosystem-wide impacts of these changes. *See Or. Natural Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (understanding baseline conditions is critical to assessing effects of agency action); *see also All. for the Wild Rockies v. Cooley*, No. CV 21-136-M-DWM, 2023 WL2522945, at *10-11 (D. Mont. Mar. 14, 2023), *appeal filed*, No. 23-35436 (9th Cir. June 26, 2023) (presence of grizzly bears in locations they previously did not exist was a significant new circumstance).

The agency itself acknowledges, in its 2007 EIS for the harvest specifications strategy, that authorizing fishing under the annual harvest specifications process affects many components of the ecosystem. *See supra* p. 23. These effects are significant and should have been considered in an EIS. *See Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 562.

B. The 2007 EIS for the harvest specifications strategy does not analyze the effects of the 2023-2024 harvest specifications decision in the context of the current environment.

In an attempt to justify its failure to comply with NEPA, the Service completed a supplementary information report for the 2023-2024 harvest specifications in which it concluded 1) the effects of the 2023-2024 specifications fall "within the scope of those analyzed and disclosed in the [2007 harvest specifications] EIS"; and 2) there is no information or circumstances "not addressed through the annual process of using the preferred harvest strategy to set the harvest specifications." NMFS00592, NMFS00635.

The Service did not actually consider any new information about the status of the ecosystem and explain its significance, or lack thereof, in the supplementary information report, as NEPA requires. *See Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1024 (9th Cir. 1980). Its explanation does not constitute a "reasoned decision," because 1) new information about collapsing salmon stocks and the state of the ecosystem is not within the scope of effects previously disclosed and, 2) the Service cannot rely on an evaluation outside the NEPA process to consider significant new information. *See Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) ("[O]nce an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute."); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).

The last decade has been a time of turbulence in the North Pacific ecosystem, with unprecedented, record-setting events and the most restrictive subsistence fishing seasons in living memory for salmon-dependent communities in western and interior Alaska. *See supra* pp. 10-11. These events—described as unexpected and unprecedented by the Service's own scientists—did not occur until years after the 2004 and 2007 EISs were

completed and were not analyzed in either of those documents.[7] *See Blue Mountains Biodiversity Project*, 161 F.3d at 1214 (when a significant event occurred several years after the completion of an EIS, the EIS "does not, and could not, evaluate the impacts of" the event).

1. Changed ocean conditions.

Warming ocean temperatures and loss of sea ice over the last decade drove changes in physical oceanography affecting productivity of the overall marine ecosystem and its ability to support a variety of organisms. *See supra* pp. 6-12. The 2004 programmatic EIS and 2007 harvest specifications EIS discuss normal variability in the North Pacific and historical warm and cold periods, but do not analyze the type of upheaval that has characterized the past decade. The 2007 EIS for the harvest

[7] Although, in the 2023-2024 harvest specifications decision, the Service states that the 2004 programmatic EIS is "outside the scope of this action," NMFS00042, the annual harvest specifications decision is a central component of groundfish management that is both an implementation of and constrained by the harvest specifications strategy and the fisheries management plan. NMFS06565 (harvest specifications strategy is "a project-level action within the fishery management programs under the . . . groundfish FMPs"). Further, the 2007 harvest specifications EIS relies extensively on the 2004 programmatic EIS, incorporating it by reference and relying on the 2004 EIS as the "overarching analytical framework" and "baseline analysis for evaluating subsequent management actions." NMFS06565-66; *see also* NMFS06621 (explaining that all future harvest specifications will be part of the management process "subject to" the 2004 programmatic EIS). In the 2007 harvest specifications EIS's analysis of subsistence, for example, the Service stated that a "description of subsistence use of natural resources potentially affected by commercial groundfish fisheries was outlined in detail in the [2004 programmatic EIS]…." NMFS06862; *see also, e.g.*, NMFS06720, NMFS06577, NMFS06645, NMFS06658, NMFS06680, NMFS06684, NMFS06690, NMFS06701, NMFS06705, NMFS06738, NMFS06742, NMFS06752, NMFS06754, NMFS06759, NMFS06761, NMFS06783, NMFS6786, NMFS06790, NMFS06802, NMFS06825.

specifications strategy, for example, includes a short overview of regime shifts, warming ocean conditions, and acidification, but does not anticipate the accelerated rate of change now occurring. NMFS006632-35. It does not, for example, discuss shifts in zooplankton production and corresponding metabolic stress for different species, or shifts in abundance and spatial distribution. *See id.*; *supra* pp. 6-8 (describing these changes).

The 2004 programmatic EIS includes even less information related to today's ocean conditions. In it, the Service similarly describes historical interannual fluctuations in atmospheric and oceanic parameters. NMFS23888-92. The analysis postulates that climate drivers have a greater effect on the ecosystem than fisheries, but also concludes "groundfish management areas generally exhibit sustainable ecosystem-level characteristics with regard to overall productivity and the ability to maintain structural and functional patterns in the face of disturbance." NMFS24555. In the 2015 supplemental information report, the expert analysis of ecosystem factors described then-recent changes as within the "short- or medium-term (3 to 5 year) range of natural variability, as measured over the last 30 years" and concluded that ecosystem indicators were within one standard deviation of the mean. NMFS23435, NMFS23415.

Today, agency reports describe the current warming as "greater in both magnitude and duration than that of the early 2000s," SUPP00723, and explain that recent warm years "have been warmer than average throughout the year," where earlier warming was more limited. SUPP01061. They also show many ecosystem indicators more than one standard deviation above or below the mean, NMFS05437, in direct contrast to the

conclusion in the 2015 supplemental information report that all indicators were within one standard deviation. According to the Service's own reports, the changes suggest that structural and functional patterns of the ecosystem changed during this warming, affecting productivity across all levels of the food web with "ongoing responses" to "climate shocks and long-term warming…." NMFS01280; *see also* SUPP00331-38; NMFS05439-42. These concerns about productivity and never-before-seen events do not fall within the range analyzed in the Service's 2004 and 2007 EISs and call into question the Service's conclusions about the ability of the ecosystem to maintain structural and functional patterns in the face of disturbance. SUPP00337 (discussing inability to recover from heatwave); SUPP00336 ("[S]ome linkages across these collapses may help inform the need for near-term precautionary management decisions."). If considered in an updated EIS, this information could lead the Service to consider changes in the harvests specifications process to mitigate the effects of fishing in this new environment. *See Warm Springs Dam Task Force*, 621 F.2d at 1024-25 (information that undermines agency's assumptions may require supplementation of EIS).

2. Seabird and marine mammal mortality events.

Changes in ocean temperature and productivity are linked with seabird die-offs, "unprecedented in terms of spatial and temporal scale," SUPP01289, and large-scale unusual mortality events for humpback whales, gray whales, and ice seals. SUPP01060; SUPP01289; SUPP03852-53; *supra* p. 9. These recent events are not discussed in either the 2004 programmatic or 2007 harvest specifications strategy EISs because events of

this scale have not occurred previously.

The 2007 harvest specifications strategy EIS recognized that fisheries can reduce or disperse prey species for birds, NMFS06753, NMFS06759-60, result in direct mortality through bycatch, NMFS06753-56, and affect foraging habitat, NMFS06761-62. With respect to habitat, the EIS acknowledged that fishing can affect habitat for spectacled and Steller's eiders that feed on the ocean bottom, but stated that fishing effects were unlikely because there is little spatial overlap between groundfish fisheries and eider critical habitat. NMFS06761.

Since that time, however, seabirds have experienced massive die-offs. *See supra* p. 9. In addition, the Service acknowledged, in a report for the 2020 harvest specifications, that "[s]eabird bycatch rates are influenced, in part, by prey supply and a link exists between poor ocean conditions and peak bycatch years." SUPP00720. In the context of recent die-offs and ongoing disruption in the marine ecosystem, this information could be significant to fisheries management choices. The Service has also recently documented the first interactions between fishing vessels and eider habitat. *See supra* p. 9. This information contradicts the Service's previous analysis and should be considered in an EIS. *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937-38 (9th Cir. 2010) (new information showing sage grouse habitat in project area was significant where agency had previously concluded there was none).

With respect to marine mammals, the 2007 harvest specifications EIS is similarly silent regarding unusual mortality events. *See* NMFS06724-37. It discusses how many

Steller sea lions, seals, whales, and walruses are killed by fisheries annually, either directly or indirectly, and determines fishing is having limited effect on these animals because fisheries do not exceed specified mortality goals for most species. *See* NMFS06725-37. For western North Pacific humpbacks, however, the level of fishery-caused mortality at the time the 2007 EIS was written exceeded this goal. NMFS06737. In 2015, the Service declared an unusual mortality event for large whales that included 22 humpbacks. SUPP03852-53. The deaths were linked with warm ocean conditions. NMFS03853. This information is significant because increased mortality outside of fisheries could affect the Service's assessment of the significance of fishery-related mortalities.

3. Multi-species salmon collapse.

The precipitous decline of Chinook salmon began around 2007, when the harvest specifications strategy EIS was produced, and has steadily heightened with the collapse of chum and coho stocks. *See supra* pp. 10-11.

In contrast with the current situation, when the 2007 harvest specifications EIS was produced, western Alaska Chinook and chum salmon stocks were meeting or exceeding escapement goals. The 2007 EIS stated that western Alaska Chinook and chum salmon met or exceeded escapement goals in 2004, 2005, and 2006 and "escapement in excess of minimum needs has generally increased in recent years as well, allowing for subsistence use, recreational fishing, and commercial fishing activities." NMFS06712, NMFS06704. The EIS characterized Kuskokwim chum stocks as

"rebuilt", NMFS06826, and predicted "continued strong production" of Chinook. NMFS06825. While Yukon stocks were not doing as well, "continued improvement in run size" was expected for chum salmon. NMFS06826.

The 2004 programmatic EIS estimated an annual subsistence harvest of over 50,000 Chinook and 160,000 chum for the Yukon region, NMFS24473, and over 77,000 Chinook and 47,000 chum salmon in the Kuskokwim area. NMFS24474. There were "approximately 300,000 chinook salmon" harvested on average for commercial and subsistence use from 1998 through 2000. NMFS26248. By contrast, in 2022, there were only half as many salmon returning to the Upper Yukon, Unalakleet, and Kuskokwim rivers combined as were harvested on an annual basis when the 2004 programmatic EIS was produced. NMFS06530 (three-system index for 2022 was 158,646 Chinook). In 2022, run sizes were at record, or near record, lows on two of the three rivers. Although the programmatic EIS described western Alaska Chinook salmon as depressed, subsistence and commercial fishing were still happening. NMFS26250, NMFS26253. Today, there is no commercial salmon fishing in the Yukon and Kuskokwim rivers and subsistence fishing is closed or severely restricted.

Both the 2004 programmatic EIS and the 2007 harvest specifications strategy EIS recognized that "[i]f individual stocks become so depressed that full closure of direct fisheries is insufficient to enable a rebound in the population, then any additional mortality, including bycatch, could negatively impact the stock." NMFS24475; NMFS06866; NMFS24544. There have now been full and partial closures of directed

Chinook fisheries for many years in western Alaska rivers. SUPP00228-29. Instead of "continued improvement" or "continued strong production," NMFS06825-26, salmon stocks hit record lows, leading to an ongoing and worsening subsistence crisis. SUPP00292-97; NMFS05453-54. At the same time, juvenile Chinook ocean abundance started declining around 2013, and both Chinook and chum salmon at sea have shown poor body condition and empty stomachs during recent warm years. SUPP00163-68, SUPP00170-73. The precipitous, ongoing decline of salmon stocks is significant information that must be analyzed in a supplemental EIS. *See Friends of the Clearwater*, 222 F.3d at 557 (supplemental EIS is required where new information shows the action "will affect the quality of the human environment in a significant manner or to a significant extent not already considered" (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989))).

4. The need to evaluate fisheries management in light of significant change.

These changes undermine numerous assumptions in the 2007 harvest specifications strategy EIS and the 2004 programmatic EIS. Fisheries management decisions can either exacerbate environmental changes or support a more resilient ecosystem in the face of unprecedented changes. As the Service recognized in 2004, "[b]oth climate and commercial fishing activity currently influence the structure and function of the North Pacific Ecosystem." NMFS24545. If the Service considered the effects of fisheries management decisions in the context of significant changes across the

ecosystem, it could lead the Service to consider new approaches to management to better address these concerns. For example, the information could be important not only for incorporating ecosystem considerations into the existing process for calculating total allowable catch, but also for considering alternatives to that process in an EIS, potentially including spatiotemporal changes to the process for setting catch limits, reconsidering harvest control rules, or changing how subsistence and ecological factors are considered. *See* 50 C.F.R. § 600.310(e)(1)(v)(C) ("ecological and environmental information should be taken into account" in specifying maximum sustained yield); *id.* § 600.310(e)(3)(A)(i), (e)(3)(A)(iii), (f)(4)(iv) (requiring consideration of economic, social, and ecological factors).

C. The Service cannot substitute the harvest specifications process for an analysis of significant information in a NEPA document.

The Service's second conclusion in its 2023 supplementary information report—that it did not need to consider new information because it was considered through the harvest specifications process—is also erroneous. NMFS00590-92. While an agency may use a non-NEPA document to consider the significance of new information, it may not substitute a non-NEPA process or document for a supplemental EIS if the information is significant. *Idaho Sporting Cong. v. Alexander*, 222 F.3d at 566. Allowing agencies to use non-NEPA documents to assess significant information would subvert NEPA's "twin aims" of achieving "active public involvement and access to information." *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505,

1511 (9th Cir. 1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

The stock assessments the Service considers during the annual harvest specifications process are not NEPA documents and are not a substitute for a supplemental EIS. *Idaho Sporting Cong. v. Alexander*, 222 F.3d at 565-66. An EIS provides a detailed discussion of the environmental consequences of a proposed action along with a comparison of alternatives to the action so that the agency and the public can consider the environmental trade-offs of these different approaches. *See Price Rd. Neighborhood Ass'n*, 113 F.3d at 1511; 40 C.F.R. § 1502.14; *see id.* § 1503.1. By contrast, stock assessments consider the status of individual groundfish stocks and are focused on identifying the overfishing limits and catch levels for those stocks, following the parameters of the current harvest specifications process and fisheries management plan. *See, e.g.*, NMFS01264-315 (summarizing stock assessment reports); NMFS06563-64 (describing harvest specifications process). The reports focus on how the ecosystem affects the fishery rather than how the fishery affects components of the ecosystem. The 2022 pollock stock assessment for the Eastern Bering Sea, for example, includes only three paragraphs assessing the effects of the pollock fishery on the ecosystem, while the remainder of the report focuses on how the ecosystem affects pollock. *Compare* NMFS02531 (effects of pollock fishing on ecosystem) *with, e.g.*, NMFS02526 (concluding declining western Alaska salmon stocks could mean less competition for pollock prey); *id.* (suggesting declining fur seal populations could reduce

pollock consumption). This is not a substitute for the effects analysis required under NEPA.

Critically, stock assessment reports do not consider any alternative approaches to the existing harvest specifications process. They do not, for example, consider whether more precautionary approaches to setting catch limits would have ecosystem benefits in light of unprecedented ecosystem change. Nor do they consider how the catch limits they recommend interact with different management measures to affect the ecosystem or whether additional set-asides or reserves may be needed to provide a buffer for decreased resiliency. *See, e.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv*., 55 F. Supp. 2d 1248, 1273-74 (W.D. Wash. 1999) (discussing need to assess interaction of fisheries management measures together in an EIS). The stock assessment reports do not satisfy NEPA's purpose of informed agency decision-making and public participation and cannot be used as a substitute for a supplemental EIS. *Idaho Sporting Cong. v. Alexander*, 222 F.3d at 566.

IV. The Service violated NEPA by declining to complete a supplemental EIS analyzing the effect of its harvest specifications decision in the current environment.

Even if the Service was not required to complete a NEPA analysis for the 2023-2024 harvest specifications decision, it violated NEPA by failing to complete a supplement to the 2007 EIS for the harvest specifications strategy. When major federal action "remains to occur," an agency must supplement its EIS to address significant new information. 40 C.F.R. § 1502.9(d). In view of NEPA's "'action-forcing' purpose",

Marsh, 490 U.S. at 371, an agency "that has prepared an EIS cannot simply rest on the original document." *Friends of the Clearwater*, 222 F.3d at 557. The agency "must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.'" *Id.* (quoting *Marsh*, 490 U.S. at 374). Thus, an agency "[s]hall prepare," 40 C.F.R. § 1502.9(d)(1), a supplement to its EIS when, among other things, "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id*. § 1502.9(d)(1)(ii). Agency guidance provides that "[a]s a rule of thumb,… if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if" a supplemental EIS is needed.[8] 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981) (question 32); *see also Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1070-71 (D. Alaska 2014); Env't Prot. Agency, *Reviewing Environmental Impact Statements for Fishery Management Plans* at 20 (Sept. 2005). An agency may not rely on or tier to an *outdated* programmatic EIS to support a site-specific or project-level action. *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1245 (D.C. Cir. 2018); *see also Blue Mountains Biodiversity Project*, 161 F.3d at 1214.

The harvest specifications strategy is an ongoing action that provides direction for

[8] This has now been codified at 42 U.S.C. § 4336b (2023), which provides that agencies may rely on programmatic environmental reviews after five years only if "the agency reevaluates the analysis in the programmatic environmental document and any underlying assumption to ensure reliance on the analysis remains valid."

the annual harvest specifications decisions. *See Marsh*, 490 U.S. at 374 (agency need only supplement an EIS if there "remains federal action to occur"). While agencies may not need to supplement environmental analyses for actions, like land use plans, that are complete when approved, they must supplement environmental analyses for ongoing actions where there is remaining federal action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004). When an agency retains ongoing oversight in administering the action, there is action remaining to occur. *See Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006). A management plan that requires an agency to take specific actions, in contrast to a policy-level document, is ongoing. *See Cottonwood Env't L. Ctr. v. Bernhardt*, 796 F. App'x 368, 370-71 (9th Cir. 2019) (distinguishing between bison management plan and policy-level land management plan); *see also All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 606 n.10 (9th Cir. 2014) (assuming, without deciding, that bison management plan is ongoing action).

The harvest specifications strategy "is the choice of a harvest strategy for the federally managed groundfish fisheries" and "determine[s] annual harvest specifications in compliance with" federal laws and the fishery management plans. NMFS06556. It is a "project-level action," NMFS06565, "that will take place in every one of the years considered" in the 2007 harvest specifications strategy EIS. NMFS06620; *see also* NMFS00586 (description of process). The harvest specifications strategy is not a policy-level document like the land use plan considered in *Norton*. It creates a specific process and defines the parameters within which the Service must make its annual management

decisions. *See* NMFS06577-78. To operate the fishery, the Service must continue to make distinct decisions on an annual basis: "A harvest strategy is needed for the management of the groundfish fisheries and the conservation of marine resources…. Each year the harvest strategy uses the best scientific information available in the annual [stock assessment and fishery evaluation] reports to derive the annual harvest specifications…." NMFS00041. Recognizing the ongoing nature of the action, the Service completed a supplementary information report for the 2023-2024 harvest specifications decision, relying on the 2007 harvest specifications strategy EIS to support its annual decision.[9] *See* NMFS000584.

In deciding whether to prepare a supplemental EIS for an ongoing action, the agency "must 'ma[ke] a reasoned decision based on … the significance—or lack of significance—of the new information'…." *Friends of the Clearwater*, 222 F.3d at 557 (quoting *Marsh*, 490 U.S. at 378). An agency may prepare a supplemental information report to determine whether new information requires the preparation of a supplemental EIS, but if the information is significant, it must prepare a supplemental EIS. *Idaho Sporting Cong. v. Alexander*, 222 F.3d at 566; *see also Price Rd. Neighborhood Ass'n*, 113 F.3d at 1510. "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project*, 161 F.3d at 1212 (quoting *Save the Yaak Comm.*,

[9] By contrast, the Service argued that the 2004 programmatic EIS is outside the scope of the annual decision. NMFS00042; *but see supra* n.9.

840 F.2d at 717).

The changes to the Bering Sea and Aleutian Islands ecosystem in the last decade constitute significant changes to every aspect of the marine ecosystem. *See supra* pp. 25-34. They are relevant to fisheries management decisions, including the harvest specifications strategy, and, if considered in a supplemental EIS, could lead the Service to consider different approaches to setting the harvest specifications, including more precautionary management. *See supra* pp. 33-34. The Service's reasons for not completing a supplemental EIS—that any new information is not significant or that it was considered in the harvest specifications process—are arbitrary for the reasons described above. *See supra* pp. 25-36. The Service therefore violated NEPA.

CONCLUSION

The Service's refusal to complete any NEPA analysis to analyze the effects of its fisheries management choices in the context of today's environment was arbitrary and violates NEPA. Plaintiffs ask the Court to remand the 2023-2024 harvest specifications decision to the Service and order the parties to submit supplemental briefing to address the appropriate remedy. *See* Doc. 25 at 2.

Respectfully submitted this 9th day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 9,997 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(1).

Respectfully submitted this 9th day of October, 2023.

s/ Katharine S. Glover
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2023, a copy of foregoing PLAINTIFFS' PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1), with attachments, was served electronically through the CM/ECF system on the following counsel of record: Jennifer Sundook, James C. Feldman, Jeffrey M. Feldman, and Elizabeth M. Bakalar.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS and TANANA CHIEFS CONFERENCE, *Plaintiffs*, CITY OF BETHEL, *Intervenor-Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE *et al.*, *Defendants*, AT-SEA PROCESSORS ASSOCIATION and UNITED CATCHER BOATS, *Intervenor-Defendants.*	Case No. 3:23-cv-00074-SLG

PLAINTIFFS' SUPPLEMENTAL BRIEF (AMENDED)

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INTRODUCTION

Pursuant to the Court's Order, Doc. 53, Plaintiffs AVCP and TCC submit this brief addressing the 2024-2025 groundfish harvest specifications challenged in their Supplemental Complaint, Doc. 52. Defendants' 2024-2025 decision violates NEPA for the same reasons the 2023-2024 groundfish harvest specifications violate NEPA. *See* Doc. 1 (Complaint); Doc. 32 at 25-26 (Opening Brief). In adopting the 2024-2025 groundfish harvest specifications, the Service followed the same process as it used for the 2023-2024 decision, relying on outdated environmental analyses that do not consider the effects of the harvest specifications in light of dramatic environmental changes, including significant declines in western Alaska salmon populations.

BACKGROUND

As explained in Plaintiffs' Opening Brief, Doc. 32 at 11-13, each year, the Service adopts harvest specifications to authorize the annual Bering Sea and Aleutian Islands groundfish fisheries. *See generally* 2SUPP00020-54.[1] In March, the Service adopted the 2024-2025 specifications. 2SUPP00020. The new decision, like the 2023-2024 decision, implements the fisheries management plan; authorizes fishing for two million metric tons of groundfish, including 1.3 million metric tons of pollock; and implements choices regulating bycatch. 2SUPP00020, 00023; *see also* Doc. 32 at 12-14 (explaining harvest specifications).

[1] Pursuant to Doc. 56 at 4 n.1, Plaintiffs are filing this amended version of their brief to replace exhibit citations with citations to the supplemental record filed at Docs. 62 & 63.

The Service adopted the 2024-2025 groundfish harvest specifications following the same harvest specifications strategy and process as the previous specifications and did not produce any NEPA analysis to support the decision. Instead, the Service reviewed stock assessment and fishery evaluation reports to assess the health of the groundfish stocks and completed a Supplementary Information Report (SIR). *See* 2SUPP00021, 00051-52 (describing harvest specifications process and SIR). As with the 2023-2024 decision, the Service concluded in the SIR that there was no new information relevant to the decision not considered through either the harvest specifications process (including the stock assessment reports) or the 2007 EIS for the harvest specifications strategy. *Compare* NMFS00592, 00635 (2023 SIR) *with* 2SUPP00079, 00143 (2024 SIR). These conclusions were arbitrary, in violation of NEPA.

ARGUMENT

The Service's 2024-2025 groundfish harvest specifications suffer from the same defect as the 2023-2024 groundfish harvest specifications: there is no NEPA analysis considering the effects of these decisions in the context of the current environment. Because the Service did not complete either an EIS analyzing the effects of the annual groundfish harvest specifications or a supplemental EIS analyzing the harvest specifications strategy in light of the radical changes that have occurred in the Bering Sea and Aleutian Islands in the 17 years since the 2007 harvest specifications EIS was completed, both of the Service's groundfish harvest specifications decisions are arbitrary, in violation of NEPA. *See* Doc. 32 at 25-48.

I. The annual harvest specifications decision is a major federal action and there is no EIS analyzing its effects in the current environmental context.

As explained in Plaintiffs' Opening Brief, the annual harvest specifications decision is a major federal action with potentially significant effects on target and non-target fish, habitat, marine mammals, and other components of the marine ecosystem. Doc. 32 at 26-33. Just as the Service did not complete an EIS for the 2023-2024 groundfish harvest specifications, it did not complete an EIS for the 2024-2025 groundfish harvest specifications. *See id.* at 25-26. Instead, the Service completed another SIR, in which it came to the same conclusions that it did in the 2023 SIR: 1) "there is no additional or new information that falls outside the scope of the Harvest Specifications EIS's process for the consideration of new information[,]" 2SUPP00079; and 2) "the information presented does not indicate that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 2SUPP00143; *see also* NMFS00592, 00635 (2023 SIR). These conclusions were arbitrary with respect to the 2023-2024 groundfish harvest specifications decision and, for the same reasons, are arbitrary with respect to the 2024-2025 decision.

The changes that have occurred in the Bering Sea ecosystem over the last decade are relevant to the harvest specifications decision and are not within the scope of effects previously disclosed. Doc. 32 at 33-42. These trends have continued over the past year, with continued indications of reduced carrying capacity and uncertainty in the ecosystem. *See* 2SUPP39516-21; 2SUPP37637A-39A. When new information is significant, an

agency must prepare a supplemental EIS; a non-NEPA document, such as an SIR, is not a substitute. *See Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000); *see also* Doc. 32 at 42-44 (arguing an EIS is required).

This ecosystem still has not recovered from the last decade's ecosystem-wide shifts, including catastrophic salmon declines. *See* Doc. 32 at 14-20. The 2023 summer cold pool in the southeastern Bering Sea remained "significantly below the large cold pool extents that were common prior to the recent warm stanza" despite moderation in sea surface temperatures in some areas. 2SUPP06363-64; *see also* 2SUPP06610-12 (Aleutian Islands returned to persistent marine heatwave conditions in late summer). "[B]iological metrics like zooplankton and fish dynamics have lagged in their expected response to cooler conditions[,]" with potential effects on the ecosystem's carrying capacity and productivity. 2SUPP06363, 06365; *see also* 2SUPP06611 (suggesting "lower productivity across the ecosystem, concomitant with increased bioenergetic needs for fish, faster growth rates for zooplankton and larvae, and shorter incubation periods for eggs due to the warm conditions"). For example, while primary productivity indicators were expected to increase with more moderate heatwave conditions, instead, they have continued to decline. 2SUPP06365. Other indications of the ongoing effects of changed ocean conditions include a 34 percent drop in pelagic forager biomass between 2022 and 2023, 2SUPP06362, low large copepod abundance, an important nutrient source at the base of the food chain, 2SUPP06361, 06366, and below-average crab biomass, 2SUPP06361.

Western and interior Alaska salmon stocks remain depressed, with multiple Chinook runs projected to be below escapement goals. *See* 2SUPP06474, 06485. In 2023, the three-river index for Chinook salmon included "extremely low run size[s]" for the Unalakleet River and the Upper Yukon River, with limited subsistence fishing opportunities across all three river systems. 2SUPP05192-93. Abundance of juvenile Chinook and chum salmon in the northern Bering Sea remained well below average in 2023, correlating to expected below average adult returns to the Yukon in three to four years. 2SUPP06475-77.

As explained in Plaintiffs' Opening Brief, these changes to the marine environment are significant and were not analyzed in the 2007 EIS for the harvest specifications strategy or the 2004 programmatic EIS, nor did the Service prepare an EIS for the 2023-2024 groundfish harvest specifications to analyze them. *See* Doc. 32 at 33-41. Nothing in the past year changes those conclusions; the agency has once again not prepared an EIS for the 2024-2025 groundfish harvest specifications, and the decision therefore violates NEPA for the reasons described in Plaintiffs' Opening Brief. *Id.*

II. The Service violated NEPA by failing to supplement the 2007 harvest specifications strategy EIS to consider the effects of the strategy in the current environmental context.

Even if the Service was not required to complete a new EIS for the 2023-2024 or 2024-2025 groundfish harvest specifications decisions, the Service violated NEPA by failing to supplement the 2007 harvest specifications strategy EIS to consider the strategy's effects in light of significant changes to the marine ecosystem. *See* Doc. 32 at

44-48. The 2007 EIS that the Service relies on—which in turn relies on the 2004 programmatic EIS—is severely outdated and the Service's rationale for failing to supplement it is arbitrary for the reasons described in Plaintiffs' Opening Brief. *Id.*

CONCLUSION

In addition to the relief requested in their Opening Brief, Doc. 32, AVCP and TCC ask the Court to determine the 2024-2025 groundfish harvest specifications decision violates NEPA, remand the decision to the Service, and consider supplemental briefing to address appropriate additional remedies. *See* Doc. 53 at 2; Doc. 47 (providing for separate remedies briefing).

Respectfully submitted this 15th day of July, 2024.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 1,330 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits set in the Court's Order, Doc. 53.

Respectfully submitted this 15th day of July, 2024.

s/ Katharine S. Glover
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024, a copy of the foregoing PLAINTIFFS' SUPPLEMENTAL BRIEF (AMENDED) was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Katharine S. Glover
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, *et al*., Plaintiffs, and CITY OF BETHEL, Intervenor-Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, *et al*., Defendants, and AT-SEA PROCESSORS ASSOCIATION, *et al.,* Intervenor-Defendants.	Case No. 3:23-cv-00074-SLG **FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Federal Defendants – National Marine Fisheries Service ("NMFS"), United States Department of Commerce, Gina M. Raimondo, in her official capacity as Secretary of Commerce, and Samuel D. Rauch, III, in his official capacity as Deputy Assistant Administrator for Regulatory Programs – respectfully cross-move under Federal Rule of Civil Procedure 56 for summary judgment on all claims in Plaintiffs' and Intervenor-Plaintiff's Complaints and Supplemental Complaints. *See* ECF Nos. 1, 29, 52, and 54.

Federal Defendants are entitled to summary judgment because NMFS complied with the requirements of the National Environmental Policy Act (NEPA) in adopting the 2023-2024 and 2024-2025 harvest specifications for the groundfish fisheries of the Bering Sea and Aleutian Islands. This cross-motion is supported by the previously filed Administrative Records (ECF Nos. 19, 30, 35, 62, and 63), the accompanying Federal Defendants' Brief in Support of Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment, and upon such oral and/or documentary evidence as may be presented in any hearing on this motion.

Dated: July 19, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, *et al*., Plaintiffs, and CITY OF BETHEL, Intervenor-Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, *et al*., Defendants, and	Case No. 3:23-cv-00074-SLG FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

AT-SEA PROCESSORS ASSOCIATION, *et al.,*	)
	)
Intervenor-Defendants.	)

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ABC	Acceptable biological catch
AP	Advisory Panel
APA	Administrative Procedure Act
AVCP	Association of Village Council Presidents
BSAI	Bering Sea and Aleutian Islands
EA	Environmental Assessment
EBS	Eastern Bering Sea
EEZ	Exclusive economic zone
EFH	Essential fish habitat
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESP	Ecosystem and Socioeconomic Profile
ESR	Ecosystem status report
FEIS	Final Environmental Impact Statement
FMP	Fishery Management Plan
FMU	Fishery management unit
GOA	Gulf of Alaska
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NS	National Standards
OFL	Overfishing level
OY	Optimum Yield
PSC	Prohibited species catch
PSEIS	Programmatic Supplemental Environmental Impact Statement
SAFE	Stock Assessment and Fishery Evaluation
SEIS	Supplemental Environmental Impact Statement
SIR	Supplementary Information Report
SSC	Scientific and statistical committee
TAC	Total allowable catch
TCC	Tanana Chiefs Conference

I. INTRODUCTION

The question of when the impact of climate change on an ecosystem is significant enough to require supplemental process under the National Environmental Policy Act (NEPA) "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989).

The foundation of Plaintiffs'[1] challenge to the annual harvest specifications decision is that changes to the Bering Sea and Aleutian Islands (BSAI) ecosystems required new or supplemental process under NEPA. However, National Marine Fisheries Service ("NMFS" or the "Service") agency experts have concluded these changes are not significant in the context of the impact of the harvest strategies on the environment. This decision was supported by a tremendous amount of science. In the annual Supplemental Information Reports (SIR), NMFS considered the need for supplemental NEPA documentation by reviewing the most recent and best scientific information available concerning the past, present, and possible future conditions of fish stocks, fish habitat, marine ecosystems, physical oceanography, climate data, biological data, and socio-ecological dimensions. NMFS rationally concluded, based on the best science available and most up-to-date data on climate change, that no supplemental NEPA process was required to implement the annual BSAI groundfish harvest specifications.

This decision was reasonable and well-supported. NMFS implements the annual groundfish harvest specifications based on one of the harvest strategies analyzed in the

[1] For brevity, this brief uses the term "Plaintiffs" to also include Amici Curiae.

Harvest Specifications EIS. When the Harvest Specifications EIS was finalized, climate change was a present phenomenon. This EIS analyzed the potential environmental impacts of alternative harvest strategies and considered the effects of warming oceans, rising surface air temperatures, and decreases in sea ice on the BSAI ecosystems. Plaintiffs attempt to overwhelm the Court with a litany of changes in the BSAI ecosystems, generally divorced from the context of the annual harvest specifications decision. But NMFS agency experts reviewed comprehensive, current data on the BSAI ecosystems and concluded that the changes Plaintiffs describe do not represent a significant change relative to the environmental impacts of the harvest strategies analyzed in the Harvest Specifications EIS. This Court should defer to this scientific determination supported by agency expertise.

II. BACKGROUND

Each year, the harvest specifications decision is the result of a robust process that assesses the most current scientific data to specify the catch limits that govern the commercial harvest of groundfish in the BSAI. In addition to complying with NEPA, the process must conform to the standards of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which governs the development of fishery management plans (FMP). NMFS implements the annual BSAI groundfish harvest specifications in conformance with the BSAI FMP's preferred harvest strategy analyzed in the Harvest Specifications EIS. Consequently, the harvest specifications decision and its effect on salmon and other marine resources in the BSAI is best understood within the context of these many interrelated authorities and processes.

A. The Magnuson-Stevens Act

The MSA, 16 U.S.C. §§ 1801–1891d, establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the U.S. exclusive economic zone (EEZ). *Id.* §§ 1801(a)(6), 1811(a). NMFS, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries pursuant to the MSA.

Regulation of fisheries is accomplished through FMPs, plan amendments, and implementing regulations. *Id.* §§ 1852(h)(1), 1853, 1854(a)–(c). The MSA sets forth required provisions for FMPs, including that FMPs must contain measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." *Id.* § 1853(a)(1)(A). To address and prevent overfishing, FMPs must establish mechanisms for annual catch limits and accountability measures. *Id.* § 1853(a)(15).

In addition, all FMPs and their implementing regulations must be consistent with ten National Standards (NS). *Id.* § 1851(a). NS1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." *Id.* § 1851(a)(1). NS2 requires that measures be based on the "best scientific information available." *Id.* § 1851(a)(2).

To assist in fishery management, the MSA established eight regional fishery management councils. 16 U.S.C. § 1852(a). Councils are "simply advisory bodies and

have no legal authority." *United Cook Inlet Drift Ass'n v. NMFS*, No. 21-cv-0025, 2022 WL 2222879, at *19 (D. Alaska June 21, 2022). Ultimately, NMFS is responsible for implementing and ensuring compliance with the MSA and other laws. *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 57 (1st Cir. 1993); *Flaherty v. Bryson,* 850 F. Supp. 2d 38, 54 (D.D.C. 2012). The council here is the North Pacific Fishery Management Council (the Council), with jurisdiction over the fisheries in federal waters of the Arctic Ocean, Bering Sea, and Pacific Ocean, extending from the seaward boundary of Alaska to the outer boundary of the EEZ. 16 U.S.C. § 1852(a)(1)(G); *id.* § 1802(11).

Voting members of the councils include federal, state, and territorial fishery management officials, and individuals nominated by state governors and appointed by the Secretary who are knowledgeable regarding the conservation and management of fishery resources within the councils' geographic areas. *Id.* § 1852(b). Each council has a scientific and statistical committee (SSC) that provides ongoing scientific advice for fishery management decisions, as well as a fishing industry advisory committee and other advisory panels to assist the council in carrying out its functions under the Act. *Id.* § 1852(g). Councils, SSCs, fishing industry advisory committees, and advisory panels conduct their business in public meetings, pursuant to procedures prescribed by the MSA and written procedures established by each council. *Id.* § 1852 (f)(6), (h), (i).

B. The Fishery Management Plan and Measures to Reduce Salmon Bycatch

The BSAI FMP and implementing regulations govern the groundfish fisheries of the BSAI. The BSAI groundfish fishery is widely considered to be among the best

managed fisheries in the world. 2SUPP06169; NMFS05829. This fishery produces high levels of catch, revenue, exports, employment, and other economic activity while maintaining ecological sustainability. 2SUPP06169; NMFS05829.

The Council's management approach for the BSAI groundfish fisheries is "to apply judicious and responsible fisheries management practices, based on sound scientific research and analysis, proactively rather than reactively, to ensure the sustainability of fishery resources and associated ecosystems for the benefit of future, as well as current generations." NMFS00108. The BSAI FMP sets forth management objectives, including: adopting conservative harvest levels, promoting conservation while providing for optimum yield, adjusting acceptable biological catch levels to account for uncertainty and ecosystem factors, incorporating ecosystem-based considerations into decisions, reducing bycatch, avoiding impacts to seabirds and marine mammals, and increasing Alaska Native participation in fishery management. NMFS00108-00111. Under the FMP and implementing regulations, the optimum yield range for groundfish in the BSAI is 1.4 to 2.0 million metric tons. NMFS00118-119; 50 C.F.R. § 679.20(a)(1)(i)(A). The BSAI FMP also sets out the annual harvest specifications process the Council and NMFS follow, consistent with the preferred harvest strategy analyzed in the Harvest Specifications EIS. NMFS00119-00123.

There have been several amendments to the FMP to address and reduce salmon bycatch. In 2009, NMFS implemented Amendment 91, the Chinook salmon bycatch management program, to minimize, to the extent practicable, Chinook salmon bycatch in the Bering Sea pollock fishery. Then, in 2016, NMFS implemented Amendment 110 to

improve the management of Chinook and chum salmon bycatch. Under current regulations implementing Amendments 91 and 110, the Bering Sea pollock fishery is subject to a bycatch limit, also known as a prohibited species catch (PSC) limit, that is based on past bycatch performance, participation in NMFS-approved Chinook salmon bycatch incentive plan agreements, and whether NMFS determines it is a low Chinook salmon abundance year, which is based on the State of Alaska's three-system index. 50 C.F.R. § 679.21(f); 2SUPP00043-00045; 2SUPP05192; NMFS00038-39. Other than these threshold determinations, the regulations do not give NMFS discretion to set a different bycatch limit.[2] NMFS updates and announces the bycatch limit and performance standard for the Bering Sea pollock fishery in the annual harvest specifications. NMFS00032-33; 2SUPP00035-00036.

These amendments to the FMP have been effective in reducing salmon bycatch. NMFS00614. The 2022 data showed the lowest number of Chinook salmon bycatch in the BSAI groundfish fisheries since 2000. 2SUPP01450-01451. The 2023 data showed the lowest number of chum salmon bycatch in the BSAI groundfish fisheries since 2012. 2SUPP01447-01448. NMFS experts have further concluded that the number of salmon caught as bycatch in the BSAI groundfish fisheries that would have returned to western Alaska would be relatively small. NMFS00040; 2SUPP00048-00049. The majority of

[2] The same applies for bycatch limits for crab and herring. Regulations specify that NMFS use the most recent information available on abundance to determine the annual bycatch limit. *See* 50 C.F.R. § 679.21(e)(1). The regulations do not give NMFS discretion to set a bycatch limit for crab and herring different from the limits prescribed in regulation.

chum bycatch is of Asian hatchery origin, and thus would not have returned to Alaska rivers. NMFS00039. NMFS experts have also found that the numbers of salmon caught as bycatch in the ocean that would have returned to western Alaska rivers would be slight due to ocean mortality and the large proportion of salmon in the Bering Sea from other river systems. 2SUPP00048-00049; NMFS00040. Due to these factors, NMFS experts concluded that the bycatch expected to have returned to western Alaska rivers is less than 2-3 percent of the run size for Chinook salmon. NMFS00040; 2SUPP00048-00049.

NMFS and the Council continue to examine ways to minimize salmon bycatch and recently initiated an action to modify chum salmon bycatch management measures, with ongoing work to develop and evaluate potential alternatives to further reduce chum bycatch. NMFS00613; 2SUPP00044; 2SUPP00105. Any action recommended by the Council and implemented by NMFS to regulate chum bycatch will be analyzed under NEPA, but is separate from the harvest specifications process. 2SUPP00105.

C. The Harvest Specifications

In the BSAI, harvests of groundfish are managed by NMFS subject to annual limits for each target species. These annual limits are "harvest specifications" and the process of establishing them is the "harvest specifications process." 2SUPP00072. NMFS designed the process be flexible and responsive to the best, most current scientific information available to inform the harvest specifications for the upcoming fishing years in compliance with applicable law. Under the MSA, the harvest specifications must achieve optimum yield on a continuing basis and prevent overfishing. 16 U.S.C. § 1851(a)(1). Additionally, the harvest specifications implement FMP objectives including

adopting conservative harvest levels, promoting conservation while providing for optimum yield, and incorporating ecosystem-based considerations into decisions. *See* NMFS00108-00111.

1. The Harvest Specifications EIS

NMFS implements the harvest specifications annually in reliance on the Harvest Specifications EIS, which examines the effects of five alternative harvest strategies. NMFS00644; NMFS00045; NMFS01254; 2SUPP00051-00052; 2SUPP00067. In addition to a no-action alternative that would have set total allowable catch (TAC) at zero, the EIS evaluates the impacts of four action alternatives. NMFS00644. These alternatives are high-level management strategies ranging from a more aggressive strategy of specifying the maximum permissible TACs (Alternative 1) to a less aggressive strategy of specifying TACs to sum 1.4 million metric tons, the lower boundary of the optimum yield range set by the FMP and implementing regulations. (Alternative 4). *Id.*; 50 C.F.R. § 679.20(a)(1)(i)(A). Importantly, although the harvest specifications process determines the annual TAC for each target species, the sum of which must fall within the optimum yield range (1.4 to 2.0 million metric tons), changes to the optimum yield range are outside the harvest specifications process. NMFS00040; 2SUPP00048; NMFS00123; 50 C.F.R. § 670.20(a)(2).

The Harvest Specifications EIS thoroughly evaluates the consequences of each harvest strategy on the ecosystem and its components. Specifically, the EIS considers impacts on marine resources in the BSAI including target species, non-specified species, forage fish species, prohibited species (including salmon, Pacific halibut, and crab),

marine mammals, seabirds, essential fish habitat, and the ecosystem, as well as social and economic impacts and environmental justice impacts. *See* NMFS00644-00649 (summary of impacts).

In analyzing the affected environment, the Harvest Specifications EIS recognizes that the action area for the harvest strategy is subject to periodic climatic and ecological "regime shifts" that impact ecosystem relationships. NMFS00737-00745. The EIS considers warming trends in the BSAI and makes predictions for future regime shifts. NMFS00738-00740. The EIS further considers the impacts of the loss of sea ice and ocean acidification on abundance, distribution, recruitment, and prey for target species, salmon, crab stocks, and ice-dependent seals. NMFS00740-00741.

The EIS examines "systemic ecosystem impacts" on three categories of ecosystem attributes: predator-prey relationships, energy flow and balance, and diversity. NMFS00885-00886. Specifically, the EIS considers the availability of prey species relative to predator demands, the spatial and temporal impacts of the fisheries on foraging for marine mammals and seabirds, removal of top predators, introduction of non-native species, energy redirection and removal, and species functional and genetic diversity. NMFS00883-00903 (Ecosystem Chapter).

Against this background analyzing the affected environment, NMFS disclosed and assessed the impacts of alternative harvest strategies on target species and non-specified species (like jellyfish and grenadiers), forage fish, and prohibited species. NMFS00750-00757; NMFS00764-00779; NMFS00788-00791; NMFS00798-00801; NMFS00815-00821. For crab and salmon, the EIS analyzes impacts of the alternative harvest strategies

on mortality, genetic structure of the populations, reproductive success, prey availability, and habitat. NMFS00815-00821. Based on the then-current conditions for salmon and crab, the EIS noted recent "collapsed salmon runs" and a decline in the biomass of all crab stocks in the Bering Sea. NMFS00740; NMFS00971.

For marine mammals, the EIS discloses and assesses the potential impacts of the harvest strategies on incidental take of marine mammals, impacts to their prey species, and disturbance from vessel traffic, nets, and underwater sound that could modify marine mammal behavior. NMFS00828-00849. The EIS contemplates that incidental take would continue to occur and that harvests of marine mammal prey species may limit foraging success through localized depletion and dispersion of prey, making it more energetically costly for foraging marine mammals to obtain necessary prey. NMFS00842.

The Harvest Specifications EIS includes a similar assessment for seabirds, examining impacts on prey availability and habitat. NMFS00857-00867. The EIS contemplates that fishing under the alternative harvest strategies would reduce or disperse the biomass of prey species available to seabird populations or otherwise displace or interfere with normal seabird foraging. NMFS00858.

In its chapter on environmental justice, the Harvest Specifications EIS considers the potential effects of salmon bycatch on subsistence salmon fisheries in Alaska. NMFS00971. The EIS recognizes and considers collapsed salmon runs that had occurred at that time, specifically in the Yukon and Kuskokwim areas, when considering the impact of alternative harvest strategies on salmon bycatch. *Id.*; NMFS00805-00822.

2. The Harvest Specifications Process

Under the preferred harvest strategy, NMFS sets TACs for each target species within the acceptable biological catch (ABC) amounts recommended through the harvest specifications process. NMFS01094. TACs—which are the annual catch target for each target species—are set equal to or lower than the ABCs—which are set equal to or lower than the overfishing levels (OFL).[3] NMFS00117; NMFS00119-00123. Put simply: TAC ≤ ABC ≤ OFL. NMFS00040; 2SUPP00048. In addition, the sum of all TACs must fall within the optimum yield range of 1.4 to 2.0 million metric tons. NMFS00040; 2SUPP00049; NMFS00123; 50 C.F.R. § 670.20(a)(2).

The harvest specifications process is designed to prevent overfishing of each target species while achieving optimum yield in the BSAI groundfish fishery on a continuing basis, consistent with the MSA and the FMP's objectives. 16 U.S.C. § 1851(a)(1). The annual harvest specifications process also sets the criteria necessary for NMFS to determine if a stock is overfished or subject to overfishing. *Id*. §§ 1853(a)(10), 1854(e); NMFS00127-1128.

The harvest specifications process involves numerous stages of review by the Plan

[3] OFL is the amount of annual catch determined by abundance that if exceeded would result in overfishing; the ABC is reduced from OFL and is the amount of annual catch that accounts for scientific uncertainty in the estimate of OFL, while TAC is reduced from ABC and accounts for management uncertainty and social and economic factors. *See* NMFS00117; NMFS00119-00123; 2SUPP05281; 50 C.F.R. § 679.20(a)(3)(ii) (listing socioeconomic considerations that inform TACs); 2SUPP00048; 50 C.F.R. § 600.310(f)(3), (f)(4); MSA Provisions, 74 Fed. Reg. 3178, 3180 (Jan. 16, 2009) (codified at 50 C.F.R. pt. 600) (Figure 2).

Team, SSC, Advisory Panel (AP), and the Council.[4] The Plan Team and SSC review and recommend the OFLs and ABCs, and the Council's AP then reviews and recommends TACs, which informs the Council's recommendations to NMFS. NMFS00120; NMFS01266; 2SUPP00020-00021. NMFS implements the Council-recommended TACs if consistent with the MSA and other applicable law and publishes the harvest specifications in the Federal Register. 2SUPP00072; 50 C.F.R. § 679.20(a)(2), (c).

The harvest strategy establishes an annual process that incorporates the best scientific information available consistent with requirements of the MSA and implementing regulations. 16 U.S.C. § 1851(a)(2); 50 C.F.R. § 600.315. For the groundfish harvest specifications, the best scientific information available is compiled annually in the Stock Assessment and Fishery Evaluation report (SAFE).

> [The SAFE is] a public document or a set of related public documents, that provides [NMFS] and the Councils with a summary of scientific information concerning the most recent biological condition of stocks, stock complexes, and marine ecosystems . . . . Each SAFE report summarizes, on a periodic basis, the best scientific information available concerning the past, present, and possible future condition of the stocks, EFH [essential fish habitat], marine ecosystems, and fisheries being managed under Federal regulation.

50 C.F.R. § 600.315(d); *see e.g.*, 2SUPP5276-2SUPP06693 (2023 SAFE).

The SAFE includes the stock assessments for each stock, the Economic Status Report, stock-specific Ecosystem and Socioeconomic Profiles, and the Ecosystem Status Reports for the Bering Sea and Aleutian Islands. Most stock assessments are drafted by

[4] Members of the SSC include federal and state employees, academics, and independent experts with strong scientific or technical credentials and experience. 16 U.S.C. § 1852(g)(1)(B). The AP is made up of individuals representing commercial, recreational, and other interests who are knowledgeable about the fisheries. *Id*. § 1852(g)(4).

scientists at the Alaska Fisheries Science Center, a component of the National Oceanic and Atmospheric Administration (NOAA) charged with the scientific research that informs management decisions, and the assessments are updated to reflect the most recent information. NMFS00591.

The Ecosystem Status Reports for the BSAI, which are drafted by scientists and staff from NOAA, other federal and state agencies, academic institutions, tribes, and nonprofits, compile and summarize information about the status of Alaska marine ecosystems and represent the best scientific information available. *See* NMFS00043; NMFS00606; 2SUPP00045; 2SUPP00096-00098; NMFS05430-05656 (Eastern Bering Sea (EBS) 2022); NMFS05661-05799 (Aleutian Islands (AI) 2022); 2SUPP06354-06594 (EBS 2023); 2SUPP06598-06690 (AI Islands 2023). The Ecosystem Status Reports are updated annually and include physical oceanography, climate and biological data, ecosystem trends, and socio-ecological dimensions to provide context for the specification of OFL, ABC, and TAC. NMFS00043; 2SUPP00045; 2SUPP00096-00098; 2SUPP00106. Ongoing research incorporated into the Ecosystem Status Reports has increased NMFS's understanding of the interactions among ecosystem components, including impacts from changing environmental conditions related to climate change. NMFS00043.

Each year, the Plan Team, and then the SSC, review the Ecosystem Status Reports and the stock assessments that comprise the SAFE. The Plan Team, SSC, Council, and NMFS apply the preferred harvest strategy in the BSAI FMP and analyzed in the Harvest Specifications EIS based on the most up-to-date science. The updated SAFEs result in a

new OFL and ABC for the stocks—which limits the specification of TAC, as TAC cannot exceed ABC and ABC cannot exceed OFL. *See* NMFS00591; NMFS01266; 2SUPP00078; 2SUPP05278. NMFS implements the OFLs, ABCs, and TACs through rulemaking. NMFS00018-19; NMFS00045; 2SUPP00021; 2SUPP00051-00052; 2SUPP00045-00047.[5] NMFS confirms each year's groundfish harvest specifications are consistent with the BSAI FMP's preferred harvest strategy analyzed in the Harvest Specifications EIS, do not constitute a change from that strategy, and are within the scope analyzed in the EIS. NMFS00588; NMFS01254; 2SUPP00074; 2SUPP00067.

Based on the most current scientific data, the Council recommended a pollock TAC of 1.3 million metric tons for 2023. NMFS00020-21. While this was a reduction from a 2023 ABC of 1.91 million, it was an increase from the 2022 TAC of 1.111 million and reflected an increase in recruitment and spawning biomass estimates from the previous year. NMFS27303-27306; NMFS00040. For 2024, the Council recommended the same TAC from 2023 of 1.3 million metric tons, a significant reduction from a 2024 ABC of 2.313 million metric tons.[6] 2SUPP00023; 2SUPP37600-37604.

[5] Plaintiffs assert NMFS has discretion to divide catch limits among seasons and sectors and decide what types of boats can fish. Pls.' Principal Brief Under Local Rule 16.3(c)(1) ("Pls.' Br.") 20–21, ECF No. 32. Allocations among different gears and sectors, and season dates and allowances, are prescribed in regulations that were implemented in rulemakings separate from the harvest specifications process. *See* 50 C.F.R. §§ 679.20, 679.23.

[6] The TACs for all species sum to 2 million metric tons, which is within the required optimum yield range for the BSAI. NMFS00021; 2SUPP00023. Actual harvest in recent years has been less than the amount authorized. 2SUPP06184.

3. Comments on the BSAI Groundfish Specifications

In addition to reviewing the information presented in the SAFEs, Council bodies and the Council invite public comment at every stage of the Council process, and NMFS publishes the specifications for public comment and considers tribal consultation. 50 C.F.R. § 679.20(c). In responding to comments received regarding the final harvest specifications for both 2023-2024 and 2024-2025, NMFS acknowledged "the western Alaska salmon crisis and the impact it is having on culture and food security throughout western Alaska" and explained that "[s]cience indicates climate change as the primary driver of poor salmon returns in western Alaska." NMFS00039; 2SUPP00044; *see* 2SUPP00048-00049. NMFS further responded by recognizing "the significant importance of salmon for Alaska Native people and tribes in terms of food security, cultural practices, and a way of life." NMFS00039; *see also* 2SUPP00043. NMFS explained that the pollock TACs are higher to reflect an observed increase in pollock abundance, but noted that the TACs were still specified well below the ABCs, which is the upper limit for specification of TACs. NMFS00040; 2SUPP00048. In terms of salmon bycatch, NMFS explained that the best science available does not indicate that a reduction in pollock TAC would measurably increase salmon escapement to western Alaska. NMFS00040.

More comments alleged that the harvest specifications "use an outdated EIS" which "does not consider climate change." NMFS00040; NMFS00042; 2SUPP00045. NMFS responded to these comments by stating that the Harvest Specifications EIS examined physical and oceanographic conditions in the BSAI and addressed regime

shifts, warming and loss of sea ice, and acidification. NMFS00043; 2SUPP00047. NMFS noted that the framework process for the preferred harvest strategy under the BSAI FMP and Harvest Specifications EIS allows for the effects of climate change to be considered in the annual process for setting the harvest specifications. NMFS00043; 2SUPP00047-00048; *see also* 2SUPP00045.

NMFS further responded by pointing out that it has not changed the harvest strategy or specifications process from what was analyzed in the Harvest Specifications EIS. NMFS00041; 2SUPP00046. The Harvest Specifications EIS evaluates the consequences of alternative harvest strategies on ecosystem components and on the ecosystem as a whole. Each year, the harvest strategy uses the best scientific information available in the annual SAFEs to derive the annual harvest specifications. NMFS00041; 2SUPP00046. Furthermore, each year, NMFS considers new information and circumstances with the purpose of evaluating the need to supplement the EIS and documents that evaluation in a Supplemental Information Report (SIR). NMFS00040-43; 2SUPP00044-00047. To date, no SIR has concluded there is new, significant information or circumstances that requires a supplement to the EIS. 2SUPP00046.

4. **The Supplemental Information Reports**

Separate from the annual harvest specifications process, NMFS considers new information and circumstances to evaluate the need to supplement the EIS. NMFS documents this evaluation in a SIR, which NMFS has prepared every year for the agency's annual implementation of the groundfish harvest specifications. NMFS00040-43; 2SUPP00044-00047. The conclusions in the SIR are informed by the best available,

most recent information, primarily contained in the most recent SAFEs, which (1) summarize the best available scientific information concerning the past, present, and possible future condition of the stocks, marine ecosystems, and fisheries that are managed under Federal law; (2) document significant trends or changes in the resource, marine ecosystems, and the fisheries over time; and (3) assess the relative success of existing State of Alaska and Federal fishery management programs. NMFS00591; 2SUPP00078.

In the SIRs, NMFS examines new information on species abundance and condition, environmental and ecosystem factors, and socio-economic conditions to determine if the information presents a seriously different picture of the impacts considered by the Harvest Specifications EIS. See NMFS00592; 2SUPP00081. NMFS also reviews whether any new circumstances would change the analysis in the Harvest Specifications EIS of the impacts of the harvest strategy on the human environment.

Each year, NMFS's review in the SIRs is informed by a plethora of environmental and ecosystem data presented in stock-specific risk tables, stock assessments, and Ecosystem Status Reports that comprise the SAFEs. For example, the 2023 EBS pollock risk table "assessed several environmental and ecosystem considerations that warranted an elevated level of concern, including environmental/oceanographic factors related to climate change, status in fish condition over year classes, declining trends in northern fur seal pup production on St. Paul Island, and mixed trends in the status of potential competitors like jellyfish and salmon." 2SUPP00045; 2SUPP05838-05846; 2SUPP05970-05975. The risk tables for 2022 EBS pollock, as well as other species like EBS Pacific cod and BSAI yellowfin sole, included a similar discussion of

"environmental/ecosystem" considerations. *See* NMFS02524-02527; *see also* NMFS02407-02410 (2022 AI pollock); 2SUPP05697-06702 (2023 EBS Pacific cod); NMFS02116-02120 (2022 EBS Pacific cod); 2SUPP06067-06068 (2023 BSAI yellowfin sole); NMFS03067-03068 (2022 BSAI yellowfin sole).

The Ecosystem Status Reports (ESRs) provide comprehensive information on current oceanographic conditions, such as sea-ice extent and thickness, sea surface and bottom temperatures, cold pool extent, surface winds and air temperatures, warm periods and marine heatwaves, and ocean transport, as well as emerging stressors like ocean acidification and harmful algal blooms. 2SUPP06384-06425; 2SUPP06538-06548 (2023 EBS); 2SUPP06628-06649; 2SUPP06662-06664 (2023 AI). The ESRs examine the condition of the ecosystems across a multitude of relevant components that include primary biological production, e.g., phytoplankton and zooplankton, 2SUPP06429-06460; biomass of species like jellyfish, forage fish, and herring, 2SUPP06461-06473; groundfish condition as indicators of prey availability and habitat condition within the systems, 2SUPP06490-06498; patterns in foraging and energetics of key target species, 2SUPP06499-06505; and groundfish recruitment predictions. 2SUPP06512-06518.

As reviewed in the SIRs, the ESRs also assess the status of prohibited species like salmon. The 2023 ESRs addressed Northern Bering Sea juvenile salmon abundance, EBS juvenile salmon condition and trends, abundance of the annual inshore run size of Bristol Bay sockeye salmon, factors affecting the Yukon and Kuskokwim chum salmon runs and subsistence harvests, and trends in commercial salmon catch in the Bering Sea, as well as increasing abundance and changing role of Eastern Kamchatka pink salmon in the AI

ecosystem. 2SUPP06474-064892; 2SUPP06650-06652. In addition to the ESRs, the SIR examined salmon bycatch numbers and trends and the ecosystem considerations presented in the EBS pollock stock assessment. 2SUPP00103-00107.

For crab, the SIR looked at impacts analyzed in the EIS on crab and crab bycatch and the most recent information on crab and crab bycatch. 2SUPP00109-00112. The ESR noted that trends are variable but the biomass of several species decreased or remained depressed. 2SUPP06522-06524. The SIR noted no crab bycatch limits in the BSAI were exceeded in 2023. 2SUPP00109-00112. The SIR also provided an overview of actions to address management of Bristol Bay red king crab and EBS snow crab, including the overfished declaration for ESB snow crab and development of a rebuilding plan. *Id.*

For seabirds, the SIR looked at the impacts analyzed in the EIS and information from the ESRs, which examined information regarding time of breeding; breeding and reproductive success; distribution, diet, and mortality; and connections between seabirds, physical environmental conditions, climate change, biological indicators, availability of prey in the ecosystem, and foraging conditions. 2SUPP06525-06531 (2023 EBS ESR); 2SUPP06653-06661 (2023 AI ESR).

For marine mammals, the SIR assessed their current status relative to the impacts analyzed in the EIS. 2SUPP00113-00117; 2SUPP00120-00136. For example, the SIR noted humpback whale take does occur incidental to the BSAI groundfish fisheries, but that federal fisheries off Alaska do not target humpback whale primary prey species and collisions with fishing vessels are rare. 2SUPP000124-00125. The SIR includes a similar analysis for sperm, fin, and killer whales. 2SUPP00125-000127; 2SUPP00132-00135.

The SIR also reviewed information and circumstances concerning ribbon, ringed, bearded, and spotted seals ("ice seals"). 2SUPP00120- 2SUPP00123. For ESA-listed ice seals, the 2024 SIR noted that groundfish fishing operations do not directly compete for primary prey resources for bearded seals, nor do they have a nexus to the primary threats affecting ringed seals, and the takes of listed seals incidental to fishing operations are very low relative to the total population. 2SUPP00122.

Ultimately, the SIRs used the most recent data available, including all components of the SAFEs, to support the agency's determination that supplementation of the Harvest Specifications EIS was not required because (1) the 2023-2024 and 2024-2025 harvest specifications, which were set according to the preferred harvest strategy, do not constitute a substantial change in the action; (2) the information presented does not indicate that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; and (3) the 2023-2024 and 2024-2025 harvest specifications will result in environmental, social, and economic impacts within the scope of those already analyzed and disclosed in the Harvest Specifications EIS. NMFS00635; NMFS01254; 2SUPP00143; 2SUPP00067.

III. STANDARD OF REVIEW

Judicial review of administrative actions is governed by the APA, 5 U.S.C. § 706(2). *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, reviewing courts may set aside an agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. (citation omitted). This standard of review is narrow and "[t]he court is not

empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Courts are at their most deferential "where, as here, the challenged decision implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).[7]

IV. ARGUMENT

A. Plaintiffs fail to satisfy the causation and redressability elements of standing.

To establish standing, a plaintiff bears the burden of establishing three elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). First, plaintiffs must have "suffered an 'injury in fact'" which is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Id.* at 560 (citations omitted). Next, plaintiffs must show "a causal connection between the injury and the conduct complained of" which is directly traceable "to the challenged action" and not the result of an "independent action of [a] third party not before the court." *Id.* (citation omitted). Finally, plaintiffs must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). "Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir.

[7] The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* does not affect this analysis. 144 S. Ct. 2244 (2024). There, the Court distinguished agency policymaking and factfinding from legal questions and explicitly stated: "Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential." *Id.* at 2261 (emphasis original).

2001). However, "a claim of procedural injury does not relieve Plaintiffs of their burden—even if relaxed—to demonstrate causation and redressability." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir.), *cert. denied*, 142 S. Ct. 713 (2021).

The injury of which Plaintiffs complain is a lack of marine resources. Simply put, climate change, not the harvest specifications decision, is the driving force affecting the availability of these marine resources in the BSAI ecosystem. Plaintiffs themselves recognize this: "The changes in the ocean have negatively affected marine mammals, seabirds, crabs, and other ocean resources on which citizens and members of AVCP's and TCC's member tribes and communities depend." Pls.' Br. 14. NMFS agency experts have also come to this conclusion, specifically regarding salmon: "Science indicates climate change as the primary driver of poor salmon returns in western Alaska." NMFS00039; *see also* 2SUPP00048-00049. Climate change is, thus, an intervening cause that has substantially contributed to Plaintiffs' injury.

In this case—where Plaintiffs primarily complain of a lack of marine resources due to the BSAI groundfish fishery's bycatch or attenuated effects on the ecosystem—the causal chain between the harvest specifications decision and the lack of marine resources available to Plaintiffs is too weak. When an independent third party is responsible for a plaintiff's injury, the causal chain may be so attenuated it cannot support standing. *See Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1143–44 (9th Cir. 2013) (finding no standing because "a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696

F.3d 849, 867 (9th Cir. 2012) (Pro, J., concurring) (same). Like in *Bellon*, "Plaintiffs offer only vague, conclusory statements" that there is a link between changed ocean conditions and the harvest specifications decision that in turn "result[s] in their purported injuries." 732 F.3d at 1142.

Plaintiffs cite to a District of Columbia district court case to support standing, but that case is distinguishable from the facts presented here. In *Flaherty v. Bryson*, the court found standing because "[t]he harm caused by depletion of river herring by commercial fishing is clearly traceable to Defendants' decision not to restrict river herring catch" and "there is no doubt that increased regulation of river herring catch would contribute to the rebuilding of that stock." 850 F. Supp. 2d 38, 50 (D.D.C. 2012). Neither is true here. "While salmon bycatch in the pollock fishery may be a contributing factor in the decline of salmon, NMFS expects the numbers of the ocean bycatch that would have returned to western Alaska would be relatively small due to ocean mortality and the large number of other river systems contributing to the total Chinook or chum salmon bycatch." NMFS00040; 2SUPP00048-00049. This applies with even more force to chum salmon because "annual genetic data show the majority of chum bycatch is of Asian hatchery origin, and thus does not affect returns to western Alaska rivers." NMFS00039. Thus, most of the salmon bycatch in the BSAI groundfish fishery would not have returned to Alaska river systems where Plaintiffs reside. Unlike in *Flaherty*, the decline of salmon and other marine resources experienced by Plaintiffs is not clearly traceable to the harvest specifications decisions.

Plaintiffs' argument for redressability is even weaker. The "relatively small"

number of salmon that would return to western Alaska if not caught as bycatch would not remedy Plaintiffs' injury. This number is too insignificant to make a meaningful impact on the marine resources "on which citizens and members of AVCP's and TCC's tribes and communities depend." Pls.' Br. 15. As such, "[r]educing the pollock TAC likely would have an extremely small effect on salmon returns, and therefore on in-river harvest opportunities, because of the low level of bycatch of salmon in the pollock fishery." NMFS00039.

What's more, "[w]hile it seems plausible that, for any given set of environmental conditions, including salmon abundance, bycatch would decline if pollock TACs and harvest were lower, it is not clear that they would decline proportionately." NMFS00931. In the last decade, "Chinook and chum bycatch has varied independently of stable pollock TACs." NMFS00040. Significantly, regulations set limits on how many Chinook salmon can be caught in the pollock fishery, such that the pollock fleet is constrained by the limit of Chinook salmon set in regulation, regardless of the size of the pollock TAC and harvest. If NMFS decreased the TAC in any given year, the Bering Sea pollock fleet could still catch salmon up to the bycatch limit set in regulation. 50 C.F.R. § 679.21(f). This means that even if NMFS decreased the pollock TAC in any given year, the number of salmon bycatch may not decrease because it could continue up to the limits prescribed in regulation, which are outside of the scope of the annual harvest specification process. 50 C.F.R. § 679.21(f).

Plaintiffs' speculation that a change in the harvest specifications decision would increase their access to marine resources "lengthens the causal chain beyond the reach of

NEPA." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983). A reduction in the harvest specifications' catch limit is unlikely to increase the number of marine resources available to Plaintiffs. Even under this relaxed standard, Plaintiffs have failed to carry their burden to show causation and redressability.[8]

B. Any argument relating to the lack of an EIS specific to the annual harvest specifications decision is waived.

"Persons challenging an agency's compliance with NEPA must 'structure their participation so an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [persons'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) (omission in original) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 553 (1978)) (holding that parties forfeited the objection that an Environmental Assessment (EA) failed to consider proposed alternatives by not identifying alternatives during EA's public comment period). Absent exceptional circumstances, plaintiffs have an obligation to present their

[8] This Court also lacks jurisdiction to hear Plaintiff-Intervenor's claim under the MSA. The MSA provides for judicial review in accordance with the APA of "actions that are taken by the Secretary under regulations which implement a fishery management plan" but only if "a petition for such review is filed within 30 days." 16 U.S.C. § 1855(f). This thirty-day time limit applies whenever a party challenges "[r]egulations promulgated by the Secretary under the [MSA]." *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 438 F.3d 937, 940 (9th Cir. 2006) (first alteration in original) (citation omitted). The harvest specifications decision is action taken under regulations that implement the FMP and was published on March 10, 2023. Plaintiff-Intervenor moved for intervention on July 28, 2023, 140 days after the harvest specifications decision was published. Its petition was thus not within 30 days as required by the MSA. Because its initial petition is untimely, its Joinder to the Supplemental Complaint, ECF No. 54, is also untimely.

criticisms of a proposed project to the agency whenever the agency affords the public the opportunity to participate in the decision-making process. *See Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991); *Johnson v. Dir., Off. of Workers' Comp. Programs*, 183 F.3d 1169, 1171 (9th Cir. 1999) (finding exceptional circumstances warranted review when agency subsequently decided the same issue, so there was no risk to usurping the agency's authority).

During the public comment period for the 2023-2024 harvest specifications, NMFS received six comment letters, including from AVCP, raising seventeen distinct comments and responded to each comment in the final harvest specifications posted in the Federal Register. NMFS00018; NMFS00038-00045. While NMFS received and responded to a comment that the harvest specifications "use an outdated EIS," it did not receive a comment that alleged that the harvest specifications required its own "project-specific EIS." NMFS00040-00042; Pls.' Br. 17–18.[9]

Because Plaintiffs failed to raise the argument during the comment period that NMFS must prepare an EIS for each annual harvest specifications, NMFS was deprived of the opportunity to consider whether NEPA requires an entirely new process for each harvest specifications decision. This objection to NMFS's compliance with NEPA was

[9] For the 2024-2025 harvest specifications, NMFS received five comment letters, raising seventeen distinct comments during the comment period and responded to each in the final harvest specifications. 2SUPP00020; 2SUPP00043-00051. AVCP and TCC did not submit a comment letter, but one comment did allege that the Harvest Specifications EIS is outdated and NMFS must prepare a new or supplemental EIS. 2SUPP00045-00047. No comments alleged that each annual harvest specifications decision requires its own EIS.

not fairly included in the comments regarding an outdated EIS. Those comments assumed that the harvest specification decision had an EIS. NMFS00040; 2SUPP00045. This new argument that the harvest specifications decision entirely lacks any supporting NEPA document was not considered by NMFS.

Nor does this argument concern "a flaw so obvious that there was no need for petitioners to point it out specifically in order to preserve their ability to challenge [it]." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1134–35 (9th Cir. 2011) (internal quotations omitted). The Ninth Circuit has interpreted the "so obvious" standard to require that the agency had "independent knowledge of the issues that concern petitioners." *Id.* at 1132 (citing *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006)). While NMFS was clearly aware of the concern that the Harvest Specifications EIS was outdated, it was not on notice of the allegation that the annual harvest specifications decisions had no EIS at all.

Plaintiffs allege that the harvest specifications decisions require an entirely new EIS "analyzing it in the current environmental context." Pls.' Br. 18. This argument is novel. There is no specific requirement under NEPA that every major federal action be continually analyzed "in the current environmental context." As discussed *infra* ¶ C, supplementation is only required when there are substantial changes in the proposed action or relevant significant new circumstances or information. *See N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1090 (9th Cir. 2020); 40 C.F.R. § 1502.9(d)(1). No public comments suggested to NMFS that each harvest specifications decision entirely lacked any supporting NEPA process, particularly when NMFS

implements the annual harvest specifications decision in reliance on an EIS—the Harvest Specifications EIS. NMFS00045; 2SUPP00051-00052.

The Ninth Circuit has held that "a party's failure to make an argument before the administrative agency in comments on a proposed rule barred it from raising that argument on judicial review." *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019–1020 (9th Cir. 2004). There are no exceptional circumstances warranting review of this argument. Plaintiffs' argument that the harvest specifications decisions lack an EIS analyzing it in the current environmental context is therefore waived.

C. NEPA does not require a new EIS each year for the annual harvest specifications decision.

Even if this Court finds the issue has not been waived, Plaintiffs' argument is without merit because the annual harvest specifications decision is within the scope of a completed NEPA analysis—the Harvest Specifications EIS. NEPA "does not . . . require the agency to take a new look every time it takes a step that implements a previously-studied action, so long as the impacts of that step were contemplated and analyzed by the earlier analysis." *N. Alaska Env't Ctr.*, 983 F.3d at 1091 (omission in original) (quoting *Mayo v. Reynolds*, 875 F.3d 11, 14–15 (D.C. Cir. 2017)). The appropriate inquiry is "whether the initial EIS defined its scope as including the subsequent action." *Id.* at 1086.

The Harvest Specifications EIS was clearly intended to encompass future harvest specifications decisions that used one of the five harvest strategies it analyzed. The Harvest Specifications EIS analyzes the impacts of "a harvest strategy . . . for the

management of the groundfish fisheries and the conservation of marine resources, as required by the Magnuson-Stevens Act and as described in the management policy, goals, and objectives in the FMPs." NMFS000643. The 2023-2024 and 2024-2025 harvest specifications decisions implement, and are consistent with, the preferred harvest strategy in the Harvest Specifications EIS. NMFS00018-00019; NMFS00045; 2SUPP00021; 2SUPP00051-00052; 2SUPP00045-00047. Thus, the harvest specification decision is explicitly contemplated in the defined scope of the Harvest Specifications EIS and the agency's record of decision.[10]

The 2023-2024 and 2024-2025 harvest specifications decisions are still within the scope of the Harvest Specifications EIS, regardless of whether the "current environmental context" has changed. Pls.' Br. 18. What matters is whether the potential *impact* of the harvest strategies has changed. Plaintiffs assume that if there have been changes to the environment, the potential impacts of the harvest strategies must have also changed. However, NMFS experts specifically considered that possibility in the SIRs and concluded that these environmental changes are not significant in the context of the

[10] To the extent that Plaintiffs claim the Harvest Specifications EIS should have included additional analysis of certain information or alternatives in order to cover future harvest specifications decisions, or that NMFS erroneously concluded in that EIS that some impacts were not significant, that is a challenge to the Harvest Specifications EIS itself, which is time-barred. *See* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *cf. N. Alaska Env't Ctr.,* 983 F.3d at 1085, 1096 (concluding that where NEPA coverage for a lease sale came from an EIS covering multiple sales, Plaintiffs could challenge whether supplementation was necessary, but not the adequacy of the original EIS because it was outside the statute of limitations).

potential impacts of the harvest specifications decision. NMFS00592; 2SUPP00081; *see* 40 C.F.R. § 1502.9(d)(1). But even if these environmental changes were significant new information (they are not), "the appropriate rubric for considering these allegations—given the existence of an initial EIS—is supplementation," not an entirely new environmental analysis. *N. Alaska Env't Ctr.*, 983 F.3d at 1081.

NEPA does not force federal agencies "to behave like Penelope, unravelling each day's work to start the web again the next day." *W. Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984). As the Supreme Court recognized, "[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989) (in the context of supplementation to an existing EIS). In short, the harvest specifications decisions do not require an annual EIS because they are within the scope of the Harvest Specifications EIS and meet NEPA's procedural requirements.

D. The Service reasonably determined that the harvest specifications decisions did not require supplemental NEPA analysis.

1. Legal Standard

When a major Federal action remains to occur, NEPA requires agencies to supplement an existing EIS when "(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) There are substantial new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1). A new or supplemental EIS is

not required unless "the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374 (cleaned up). Courts have approved of using SIRs and other similar non-NEPA documents to consider whether new information or changed circumstances require the preparation of a supplemental EIS. *See, e.g., Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997); *Marsh*, 490 U.S. at 383–85; *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp*., 42 F.3d 517, 529–30 (9th Cir. 1994).

A court reviewing a determination that supplemental NEPA analysis is not required applies the arbitrary and capricious standard. *Marsh*, 490 U.S. at 375–76. An agency's determination whether supplementation is required "implicates substantial agency expertise" and courts defer to "the informed discretion of the responsible federal agencies." *Id.* at 376–77 (citation omitted). A court's review of whether an agency action is arbitrary and capricious should be "searching and careful," but "narrow," as a court may not substitute its judgment for that of the administrative agency. *Id.* at 378 (citation omitted). Courts will generally "uphold agency decisions so long as the agencies have 'considered the relevant factors and articulated a rational connection between the factors found and the choices made.'" *See Protect Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1034 (9th Cir. 2019) (quoting *City of Sausalito v. O'Neill,* 386 F.3d 1186, 1206 (9th Cir. 2004)).

2. NMFS appropriately used the SIRs to consider whether new information is significant and would require a supplemental EIS.

NMFS thoroughly and thoughtfully considered whether a supplement to the Harvest Specifications EIS was needed due to ecosystem changes. In the annual SIRs for the harvest specifications, the Service considered the most recent SAFEs, which "summarize the best available scientific information concerning the past, present, and possible future condition of the stocks, marine ecosystems, and fisheries" in addition to documenting "significant trends or changes in the resource, marine ecosystems, and the fisheries over time." NMFS00591; 2SUPP00078. Based on this review, the Service reasonably concluded there is no significant, new information concerning ecosystem conditions that was not already considered in the scope of the original EIS. NMFS00592; 2SUPP00081. NEPA does not require more.

Plaintiffs allege the 2023 SIR is insufficient because it "did not actually consider any new information about the status of the ecosystem and explain its significance, or lack thereof . . . as NEPA requires." Pls.' Br. 26 (referencing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980)). This is inaccurate. The SIRs did, in fact, evaluate new information about the status of the BSAI ecosystems and concluded this information was not "of such significance as to require implementation of formal NEPA filing procedures." *Warm Springs Dam*, 621 F.2d at 1024; *see* NMFS00635; 2SUPP00143. The *Warm Springs Dam* case, cited by Plaintiffs, is distinguishable from this case. *See* Pls.' Br. 26, 29. There, the relevant agency had not

prepared a SIR or other document to consider whether new information regarding the location of a fault line near the proposed dam was significant enough to warrant supplemental NEPA analysis. *Warm Springs Dam*, 621 F.2d at 1025. Here, NMFS *did* complete a SIR for each annual harvest specifications decision where it evaluated the contemporary changes in the BSAI ecosystems and concluded supplementation was not required.

Plaintiffs also challenge the SIR, alleging NMFS used it as "an evaluation outside the NEPA process to consider significant new information." Pls.' Br. 26. However, Plaintiffs put the cart before the horse—NMFS did not conclude information was significant. Plaintiffs cite to *Idaho Sporting Congress, Inc. v. Alexander* for the requirement that "once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute." 222 F.3d 562, 566 (9th Cir. 2000); Pls.' Br. 26. The Service does not disagree. However, Plaintiffs are missing the requisite first step. In this case, NMFS did *not* use the SIR as a substitute for an EIS. Rather, it used the SIR to determine whether new information presented each year, including the information in the 2022 and 2023 SAFEs, was significant. Having determined it was not significant, no further NEPA documentation or process was required.[11]

[11] *Idaho Sporting Congress* and *Friends of the Clearwater v. Dombeck,* 222 F.3d 552 (9th. Cir. 2000), also cited by Plaintiffs, are further distinguishable from this case because the agencies waited until litigation had commenced—years after the new information came to light—to evaluate the need for supplemental NEPA. *Warm Springs Dam*, 621 F.2d at 1025; *Friends of the Clearwater,* 222 F.3d at 558 (finding the Forest Service had violated NEPA, "which demands timely and reasoned agency action"). Here, NMFS

3. NMFS did not use the harvest specification process as a substitute for analyzing whether significant information required supplemental NEPA analysis.

In a similar vein, Plaintiffs' assertion that NMFS concluded "that it did not need to consider new information because it was considered through the harvest specifications process," Pls.' Br. 34, is also without merit. The SIRs considered the data used to implement the harvest specifications—i.e., the SAFEs and its components—to analyze whether there is significant new information that requires supplementation to the EIS. The SIR concluded that the data used to implement the harvest specifications was not significant new information because it is within the scope of the potential environmental impacts considered by the Harvest Specifications EIS.

The preferred harvest strategy in the EIS "anticipated that information on changes in species abundance would be used each year in setting the annual harvest specifications." NMFS00592. The harvest specifications process's flexibility was "designed to adjust to new information" and dually ensures compliance with both the MSA and NEPA. 2SUPP00079; NMFS00592. The flexibility of the process serves NMFS's obligation under the MSA to "use the best scientific information available" for each annual harvest specifications decision. 2SUPP00079; NMFS00592; 16 U.S.C. § 1851(a)(2). The harvest specifications process implements the most up-to-date information on the relevant ecosystem factors analyzed in the Harvest Specifications EIS. Consequently, the changed ecosystem factors referenced in Plaintiffs' briefs have been

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annually considered the significance of new information, before publication of the annual harvest specifications decision, and before the commencement of litigation.

thoroughly and thoughtfully integrated into the harvest specifications process.[12] The integration of new information on changed ecosystem factors is consistent with the Harvest Specifications EIS, which expressly contemplates that such factors would inform the specification of OFL, and that ABC could be reduced "to take account of special circumstances, including ecosystem considerations." NMFS00884; *see also* 2SUPP00096-00098. Thus, because this new data is within the scope of information the EIS contemplated would be used to inform the harvest specifications decision, it "does not represent a significant change relative to the environmental impacts of the harvest strategy analyzed in the Harvest Specifications EIS." NMFS00592; 2SUPP00081.

To assess significance, NMFS specifically focused on the new information presented each year to support the harvest specifications decision and found that "the new information available is not of a scale and scope that require an SEIS." NMFS00592; *see also* 2SUPP00077-2SUPP00081. NMFS recognizes that, in any given year, there could be significant new information that falls outside the scope of the Harvest Specifications EIS which would require a supplement. Ultimately, NMFS evaluated the significance of the updated data gathered in the harvest specifications process and concluded that this information "does not present a seriously different picture of the likely environmental harms of the remaining action to occur—the implementation of the [ ] groundfish harvest

[12] *See, e.g.,* 2SUPP05840-05846 and 2SUPP05970-05975 (2023 EBS pollock); NMFS02524-02531 (2022 EBS pollock); NMFS02408-02409 and NMFS02412-02415 (2022 AI pollock); 2SUPP05699-06701 and 2SUPP00490-00515 (2023 EBS Pacific cod); NMFS02118-02120 and NMFS02235-02260 (2022 EBS Pacific cod), 2SUPP06067-06068 (2023 BSAI yellow fin sole); NMFS03067-03068 (2022 BSAI yellowfin sole).

specifications—beyond what was considered in the Harvest Specifications EIS." 2SUPP00081.

4. NMFS's conclusion that changes in the BSAI ecosystems do not present significant new circumstances or information is reasonable and well-supported.

Plaintiffs assert that the Harvest Specifications EIS does not analyze the effects of the "harvest specifications in the context of today's environment." Pls.' Br. 17. However, this is not the standard under NEPA. Supplementation of an EIS is required only if "[t]here are substantial new circumstances or information relevant about the significance of adverse effects that bear on the analysis." 40 C.F.R. § 1502.9(d)(1). To determine the significance of new information, the appropriate test is whether the new information presents a "seriously different picture of the likely environmental harms." *Tri-Valley CAREs v. U.S. Dep't of Energy,* 671 F.3d 1113, 1130 (9th Cir. 2012) (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 416–417 (7th Cir. 1984)). In determining that ocean conditions and other indicia of climate change did not warrant supplemental NEPA analysis, NMFS thoroughly reviewed up-to-date data on species abundance and condition, environmental and ecosystem factors, and socio-economic conditions and rationally concluded it did "not represent a significant change relative to the environmental impacts of the harvest strategy analyzed in the Harvest Specifications EIS." NMFS00592; 2SUPP00081; 2SUPP00098.

Climate change was a reality in 2007 and was considered in the Harvest Specifications EIS. The EIS recognized that ocean conditions change and the action area for the harvest strategy "is subject to periodic climatic and ecological 'regime shifts'"

that can lead to changes in ecosystem relationships and the relative success of different species. NMFS00737. The EIS further specifically considered the impacts of the alternative harvest strategies on salmon, crab, marine mammals, and seabirds. *See* NMFS00815-NMFS00821; NMFS00828-NMFS00849; NMFS00857-NMFS00867.

As the effect of climate change and the impact of different strategies on other marine animals were considered in the Harvest Specifications EIS, the authority Plaintiffs rely upon is inapposite. In *Blue Mountains Biodiversity Project v. Blackwood*, "the largest fire in the history of [the region] dramatically altered the forest ecosystem . . . several years after the EIS for the Forest Plan was prepared." 161 F.3d 1208, 1214 (9th Cir. 1998) (cited by Pls.' Br. 27). Unlike the fire in *Blue Mountains Biodiversity Project*, climate change is not a singular, catastrophic event that occurred after the EIS and therefore could not have been considered by it.[13] The Harvest Specifications EIS did, in fact, consider possible ecosystem changes in the context of the impact of the harvest specifications decision on the environment.

[13] Plaintiffs reference interactions between fishing vessels and spectacled eiders as contradicting NMFS's analysis in the Harvest Specifications EIS. Pls.' Br. 30. However, in that EIS, NMFS recognized that eiders existed in the action area, though the overlap between their foraging areas and groundfish fisheries was slight. NMFS00864. Documented interactions between spectacled eiders and their habitat and fishing vessels does not contradict this analysis. Additionally, the authority that Plaintiffs cite to support that this information necessitates a new EIS concerned using a "proxy-on-proxy" approach when the species—the sage grouse, in that case—was not in the action area. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 935 (9th Cir. 2010). The court found this approach to be unreliable when the sage grouse did not exist in the area at the time it was used. *Id.* at 935–36. As there is no flawed "proxy-on-proxy" approach in the instant case, this authority is inapposite.

Furthermore, NMFS used the SIR to consider whether to supplement the Harvest Specifications EIS based on the current ecosystem by reviewing up-to-date data on species abundance and condition, environmental and ecosystem factors, and socio-economic conditions.[14] The SIR analyzed a wealth of data and information on ocean conditions, climate change, the status of marine resources, and impacts on marine resources like target species, bycatch species, marine mammals, and seabirds—i.e., the ecosystem data Plaintiffs present. *See, e.g.,* Pls.' Suppl. Br. (Am.) 3–5, ECF No. 66; 2SUPP06598-06615; 2SUPP06354-06368; 2SUPP06474-06489. NMFS rationally concluded this information did "not represent a significant change relative to the environmental impacts of the harvest strategy analyzed in the Harvest Specifications EIS." NMFS00592; 2SUPP00081; 2SUPP00098. Like in *Marsh*, NMFS "carefully scrutinized the proffered information" and reasonably concluded it "did not present significant new information requiring supplementation" of the EIS. *Marsh*, 490 U.S. at 383.

Plaintiffs' argument assumes that "changed ocean conditions," "seabird and marine mammal mortality events," and "multi-species salmon collapse," is new information "sufficient to show that the [harvest specifications decision] will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered[.]" *Marsh*, 490 U.S. at 374 (second alteration in original and citation

[14] *See, e.g.,* NMFS05430-05656 (2022 EBS ESR); NMFS05661-05799 (2022 AI ESR); NMFS01264-03163 (2022 stock assessments); NMFS05803-06089 (Economic SAFE); 2SUPP06354-06594 (2023 EBS ESR); 2SUPP06598-06690 (2023 AI ESR); 2SUPP5276-6149 (2023 stock assessments); 2SUPP06150-06353 (Economic SAFE).

omitted). Plaintiffs provide a laundry list of changes in the BSAI ecosystems and speculate that these changes must affect the harvest specifications decisions' impact on the environment beyond what the Harvest Specifications EIS considered. However, through the SIRs, NMFS reviewed up-to-date data on species abundance and condition, environmental and ecosystem factors, and socio-economic conditions and concluded they were not significant changes that would require a new EIS.

At best, Plaintiffs present the conflicting views of specialists. When there are such conflicting views, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. As the Ninth Circuit recognized in *Greenpeace Action v. Franklin*, a case similarly involving a challenge to NMFS's harvest specifications, "[t]o set aside the Service's determination in this case would require us to decide that the views of [Plaintiffs'] experts have more merit than those of the Service's experts, a position we are unqualified to take." 14 F.3d 1324, 1333 (9th Cir. 1992); *see also N. C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 80 (D.D.C. 2007) ("Fisheries regulation requires highly technical and scientific determinations that are within the agency's expertise, but are beyond the ken of most judges."). The *Greenpeace Action* court additionally concluded that an EIS is not required "whenever qualified experts disagree[.]" *Greenpeace Action*, 14 F.3d at 1335; *see also Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) ("NEPA does not require that we decide whether an [EIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to

methodology."); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) ("[C]ourts must also be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency."); *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004) (same); *Nw. Env't Advocs. v. Nat'l Marine Fisheries Serv*., 460 F.3d 1125, 1133 (9th Cir. 2006) (same).

Plaintiffs assume that the passage of time proves that environmental conditions have changed significantly enough to require further NEPA process. However, the passage of time alone is not enough to require supplementation to an EIS. *See Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin*., 126 F.3d 1158, 1184 (9th Cir. 1997) ("We note that significant circumstantial change is the triggering factor requiring a new or supplemental EIS, not the passage of time alone[.]"); *Sierra Club v. U.S. Army Corps of Eng'rs,* 701 F.2d 1011, 1036 (2d Cir. 1983) ("[T]he mere passage of time rarely warrants an order to update the information to be considered by an agency."). While it is true that agency guidance recommends that an EIS more than 5 years old should be carefully reexamined, Pls.' Br. 37 (citing Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981) (codified at 40 C.F.R. pts. 1500–08)), NMFS has done just that through its annual SIRs. NMFS has concluded, based on voluminous data informed by the most up-to-date science, that the new circumstances described by Plaintiffs are not significant in the context of the impact of the harvest specifications decisions on the environment. [15]

[15] For this reason, Plaintiffs' attack on the 2004 Programmatic Supplemental EIS (PSEIS) is also unwarranted. *See* Pls.' Br. 27, n.7. The age of the EIS is inapposite; what matters

In the end, Plaintiffs' dispute "involves primarily issues of fact" which require "a high level of technical expertise[.]" *Marsh*, 490 U.S. at 376–77 (citation omitted). As the Supreme Court has cautioned, in these situations, courts must defer to "the informed discretion of the responsible federal agencies." *Id.* (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). NMFS has thoroughly considered the most current data using the best fishery science and has concluded changes in the BSAI ecosystems does not present significant new information or circumstances in the context of the 2023-2024 and 2024-2025 harvest specifications decisions. NEPA does not require more.

V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Federal Defendants on all claims and deny Plaintiffs' motion for summary judgment in its entirety.

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is whether new information affects the potential environmental impacts on the action. Furthermore, this EIS is outside of the scope of Plaintiff's challenge. When determining what action an EIS supports, the relevant question is what the NEPA document states. *N. Alaska Env't Ctr*, 983 F.3d at 1093–1094. The stated action that the Harvest Specifications EIS analyzes is the "choice of a harvest strategy for the federally managed groundfish fisheries in the Gulf of Alaska (GOA) and the Bering Sea and Aleutian Islands (BSAI) management areas." NMFS00661. Therefore, the Harvest Specifications EIS is the correct NEPA document to evaluate in this case challenging the implementation of that harvest strategy in the 2023-2024 and 2024-2025 BSAI groundfish harvest specifications.

Respectfully submitted on this 19th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 11,400 words as counted using the word count feature of Microsoft Word, excluding the caption, table of contents, table of authorities, signature blocks, certificate of compliance, and certificate of service.

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

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, *et al.*, Plaintiffs, and CITY OF BETHEL, Intervenor-Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants, and AT-SEA PROCESSORS ASSOCIATION, *et al.*, Intervenor-Defendants.	NO. 3:23-cv-00074-SLG

AT-SEA PROCESSORS ASSOCIATION'S AND UNITED CATCHER BOATS' RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT (L.R. 16.3(c)(2))

Ass'n of Vill. Council Presidents, et al. v. National Marine Fisheries Serv., et al.
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GLOSSARY OF TERMS

ABC	Acceptable Biological Catch
AP	Advisory Panel
APA	Administrative Procedure Act or At-Sea Processors Association
BLM	Bureau of Land Management
BSAI	Bering Sea and Aleutian Islands
EA	Environmental Assessment
EIS	Environmental Impact Statement
FMP	Fishery Management Plan
IPA	Incentive Plan Agreement
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
OFL	Overfishing Level
PSC	Prohibited Species Catch
SAFE	Stock Assessment and Fishery Evaluation
SSC	Scientific and Statistical Committee
SIR	Supplementary Information Report
TAC	Total Allowable Catch
UCB	United Catcher Boats

I. INTRODUCTION

The Bering Sea and Aleutian Islands ("BSAI") groundfish fishery is one of the most sustainable and productive fisheries in the world. For over forty years, the National Marine Fisheries Service ("NMFS") has meticulously managed the BSAI groundfish fishery in consultation with the North Pacific Fishery Management Council in accordance with the Magnuson-Stevens Fishery Conservation and Management Act and the comprehensive Fisheries Management Plan for the fishery. As part of this comprehensive management process, NMFS issues annual harvest specifications establishing the total allowable catch ("TAC") for several species of groundfish. NMFS and the Council establish these annual specifications through an iterative public process guided by the best available science.

The BSAI harvest specifications process has proved to be a model of sustainability and good fishery management practices—NMFS has determined that no groundfish stocks are overfished or approaching an overfished condition,[1] and the BSAI Alaska pollock fishery is regarded as one of the cleanest fisheries in the world and is independently certified by the Marine Stewardship Council and the Alaska Responsible Fisheries Management Program.[2]

Unhappy that NMFS increased the TAC for pollock from previous years while correspondingly decreasing the TAC for other species, Plaintiffs have challenged NMFS's issuance of the annual BSAI harvest specifications for 2023 and 2024, and through a supplemental complaint for 2024 and 2025, alleging that the process by which the agency arrived at the harvest specifications violated the National Environmental Policy Act ("NEPA"). Specifically, Plaintiffs claim (1) that there was no NEPA document associated with the decision and, therefore, NMFS was required to produce a new, standalone Environmental Impact Statement ("EIS") or (2) alternatively, that NMFS was required to

[1] NMFS00592; 2SUPP00079.

[2] Dkt. 10-1 ¶ 11; Dkt. 10-2 ¶ 10.

supplement the applicable Harvest Strategy EIS and failed to do so. Plaintiffs' arguments are contrary to applicable law and the extensive administrative record supporting NMFS's decision.

As for their first claim, Plaintiffs ignore that NMFS issued the annual harvest specifications pursuant to a NEPA document: the Harvest Strategy EIS. NEPA does not require the agency to produce a new standalone EIS for the annual harvest specifications. In any event, Plaintiffs waived this claim by failing to raise it before the agency.

The only issue properly before the Court is whether NMFS followed the correct process in determining there was no need to supplement the Harvest Strategy EIS. It did. In compliance with NEPA, NMFS prepared a Supplementary Information Report ("SIR") to evaluate the significance of new information and, accordingly, the need to supplement the existing EIS. The voluminous administrative record reflects that NMFS considered the very same environmental conditions Plaintiffs wield in this appeal—including changed ocean conditions, seabird and marine mammal mortality events, and declining salmon runs in Western Alaska—and concluded a Supplemental EIS was not necessary. This decision was reasonable and is entitled to deference.

At-Sea Processors Association ("APA") and United Catcher Boats ("UCB") intervened in this case to defend the BSAI Harvest Specifications from claims that are irreconcilable with applicable law and the extensive administrative record supporting NMFS's decision. For the reasons articulated below, APA and UCB respectfully request that the Court deny Plaintiffs' motion for summary judgment and grant Federal Defendants' and APA's and UCB's cross-motions for summary judgment.

II. BACKGROUND

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

Marine fisheries management in U.S. Federal waters is governed primarily by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").[3] Fisheries management under the MSA is a transparent, public process guided by science and collaboration. Enacted in 1976, the MSA established eight regional fishery management councils with representation from coastal states and fishery stakeholders.[4] These regional councils are comprised of members from commercial and recreational fishing interests as well as environmental, academic, and government representatives.[5] Among other responsibilities, the regional councils develop fishery management plans ("FMPs") that comply with the MSA's requirements to promote sustainable fisheries.[6] The North Pacific Fishery Management Council ("the Council") is the regional council with "authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska."[7] In consultation with the Council, NMFS manages the BSAI groundfish fisheries and ensures that the Council's proposed management objectives and measures comply with the MSA and its implementing regulations.[8]

[3] 16 U.S.C. § 1801 *et seq.*

[4] *Id.* § 1852.

[5] *Id.* § 1852(h).

[6] *Id.*; *see also* 16 U.S.C. § 1853 (contents of fishery management plans).

[7] 16 U.S.C. § 1852(a)(1)(G).

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

B. The Bering Sea and Aleutian Islands Fishery Management Plan and the Harvest Specifications Strategy EIS.

NMFS implements fisheries management decisions, including the BSAI Harvest Specifications, pursuant to two management tools that ensure compliance with the MSA, NEPA, and other Federal laws: (1) the Fishery Management Plan for the Groundfish of the Bering Sea and Aleutian Islands Management Area ("BSAI FMP") and (2) the 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement ("Harvest Strategy EIS"). Both documents are important to understanding the process underlying the annual BSAI harvest specifications; each is briefly described below.

1. The Bering Sea and Aleutian Islands Groundfish Fishery Management Plan.

The BSAI FMP and its implementing regulations govern commercial fishing for groundfish in the BSAI.[9] NMFS, in consultation with the Council, issued the most recent BSAI FMP in November 2020.[10] The BSAI FMP facilitates a sustainable and productive fishery by establishing adaptive management and conservation policies based on sound scientific research and analysis.[11] Significant to this litigation, the BSAI FMP requires that the Council recommend and NMFS approve the annual catch limits, or TAC, for each species of groundfish targeted by the BSAI groundfish fishery.[12] The sum of all TACs for all groundfish species in the BSAI fishery must be within the optimum yield—which is set by regulation at a range of 1.4 million to 2.0 million metric tons ("mt") annually.[13] This

[9] NMFS00085; 50 C.F.R. § 679.1(b); 16 U.S.C. § 1854.

[10] NMFS00083-257; *see also* NMFS00258-583 (BSAI FMP Appendices).

[11] SUPP03969. Like all FMPs, the BSAI FMP conforms to the MSA's ten national standards for fishery conservation and management. 16 U.S.C. § 1851 (national standards for fishery conservation and management); 50 C.F.R. § 600.305 *et seq.*

[12] NMFS00018; 50 C.F.R. § 679.20(a)(2).

[13] 50 C.F.R. § 679.20(a)(1)(i)(A). The MSA and its implementing regulations define "optimum yield" as the amount of fish that "will provide the greater overall benefit to the

optimum yield range is purposefully conservative and serves to reduce impacts of the fishery by limiting fishing even if the fishery can support a substantially larger harvest of groundfish.[14] The BSAI FMP also requires that the Council and NMFS set forth regulation-based allowances for prohibited species catch ("PSC") which, if reached, result in the closure of the target fishery for the remainder of the year or season.[15]

Because fisheries management is dynamic, FMPs are regularly amended to adjust management policies based on new circumstances and new information about the environment.[16] For example, in 2010 the Council recommended establishing a Bering Sea Chinook Salmon Bycatch Management Program to reduce Chinook bycatch in the groundfish fishery.[17] NMFS accepted that recommendation and adopted Amendment 91 to the BSAI FMP to create the program. Amendment 91 imposed PSC limits on the amount of Chinook salmon that may be incidentally caught as bycatch in the groundfish fishery and established a performance standard and Incentive Plan Agreements ("IPAs") creating strong financial incentives for vessels to avoid approaching the Chinook bycatch limit.[18]

Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems." 16 U.S.C. § 1802(33)(A); 50 C.F.R. § 600.310(e)(3).

[14] *See* 2SUPP00048 (Response to Comment 8).

[15] NMFS00148; 50 C.F.R. § 679.20(c)(1)(iv). Although the harvest specifications identify the PSC limits for a particular species, the limits are set according to the FMP's implementing regulations, and NMFS and the Council have no discretion in setting the PSC. *See* NMFS00032; 50 C.F.R. § 679.21(f)(2).

[16] The BSAI FMP has been amended over 120 times since the first iteration of the FMP was adopted in 1982. *See* NMFS00262-280 (BSAI FMP App'x A – History of the BSAI FMP).

[17] NMFS00275; NMFS00611; 2SUPP01433.

[18] NMFS00039. To the extent possible, food grade salmon captured as bycatch are processed for donations through the Prohibited Species Donation program and distributed to rural communities in Alaska. NMFS00083.

In 2016, the Council and NMFS adopted Amendment 110, further strengthening salmon bycatch avoidance by reducing the PSC limit for Chinook salmon in years of low Chinook abundance and by incorporating chum salmon avoidance incentives into IPAs.[19] Each FMP amendment is accompanied by its own NEPA environmental review document—in the case of Amendment 91, a 760-page EIS;[20] and in the case of Amendment 110, a 356-page Environmental Assessment ("EA").[21] Each comprehensively examined the impacts of the BSAI groundfish fishery on salmon. These measures effectively "reduced salmon bycatch in the pollock fishery compared with what they would have been without the measures."[22]

2. The Harvest Specifications Strategy EIS established the framework for setting annual harvest specifications and reviewing new information.

Annual harvest specifications for the BSAI management area also are guided by the Harvest Strategy EIS.[23] Issued in 2007, the Harvest Strategy EIS provided decision-makers and the public with a comprehensive evaluation of the environmental, social, and economic effects of alternative harvest strategies for the groundfish fisheries in the BSAI and the Gulf of Alaska management areas.[24] Through this document, NMFS and the Council established the Harvest Strategy—the dynamic process and methodology that NMFS and the Council

[19] NMFS00278; NMFS00613.

[20] 2SUPP36147-36906; 2SUPP00104 n.63.

[21] NMFS18062-417; NMFS00613.

[22] NMFS00038; *see also* NMFS17565 (Chinook salmon mortality in BSAI groundfish fisheries from 1991-2023).

[23] NMFS00639-1093.

[24] NMFS00641.

use to set the annual harvest specifications in a manner that balances a sustainable groundfish harvest with ecosystem needs.[25]

The Harvest Strategy EIS is *not* a static review of environmental conditions as they existed in 2007. It established a framework by which NMFS and the Council continually evaluate the BSAI groundfish fishery in the context of current environmental conditions.[26] In fact, the Harvest Strategy EIS "anticipated that changes in information would be used each year in setting the annual harvest specification since the process is flexible to adjust to new information on stock abundance and environmental and socioeconomic factors (like climate change)."[27]

As for NEPA process, each year since the Harvest Strategy EIS was published in 2007, NMFS has prepared an SIR which analyzes new information and changed circumstances with the primary purpose of evaluating the need to supplement the Harvest Strategy EIS.[28] The annual SIR process surveys the best available science—namely, continuously-updated reports assessing the health of the ecosystem and the groundfish fishery.[29] As a result, "the annual process of setting the harvest specifications accounts for new information and circumstances on bycatch species like salmon, ecosystem factors, and climate change."[30]

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[25] *Id.* The annual harvest specifications establish harvest limits for groundfish for a two-year period; however, NMFS promulgates new specifications annually. When issued, the new specifications supersede the harvest limits set for the second year of the preceding specifications. NMFS00019; 2SUPP00020.

[26] *See* NMFS01096 ("The Council and NMFS continually evaluate the fisheries to identify potential ecosystem issues, and the Council process addresses new issues as they arise.").

[27] NMFS00041; NMFS00614.

[28] NMFS00041; 2SUPP00046.

[29] *Id.*

[30] NMFS00614.

C. The Annual Harvest Specifications Are Set Through an Iterative Public Process Guided by the Best Available Science.

The Council and NMFS develop the annual harvest specifications through a collaborative and transparent public process guided by the best available scientific information on the BSAI ecosystem and the health of the fisheries.[31] This process begins with the Council's BSAI Groundfish Plan Team—composed of scientists from NMFS, academia, and state fish and wildlife agencies.[32] Each year, the Groundfish Plan Team prepares a series of Stock Assessments, Ecosystem Status Reports, and Economic Status Reports, collectively called the Stock Assessment and Fishery Evaluation ("SAFE") Reports. The annual SAFE Reports comprehensively evaluate the overall health of the BSAI ecosystem and environment. These reports constitute the best available science and serve as the foundation of the Council's decision-making for the annual harvest specifications.[33] For each stock managed under the BSAI FMP, these reports include a recommendation from the Plan Team for (1) the Acceptable Biological Catch ("ABC"), the measure of the size of the acceptable target harvest level the ecosystem can sustain,[34] and (2) the Overfishing Level ("OFL"), the harvest level in excess of a prescribed maximum allowable rate above which overfishing is occurring.[35] The ABC and OFL inform the Council's TAC

[31] NMFS00018; 2SUPP00048.

[32] *Id.*; *see also* North Pacific Fishery Management Council, BSAI and GOA Groundfish Plan Teams, https://www.npfmc.org/about-the-council/plan-teams/bsai-and-goa-groundfish/.

[33] NMFS01266; *see* NMFS01264-5429 (Draft and Final 2022 SAFE Reports); *see also* NMFS27307 (December 2022 Action Memo); 2SUPP00043; 2SUPP06150-6693 (2023 Economic and Ecosystem Status Reports).

[34] NMFS00662.

[35] NMFS00117; NMFS01270; *see also* NMFS27295 (BSAI Groundfish Plan Team's Recommended OFL and ABC for Groundfish for 2023-2024).

recommendations—the total tonnage of fish that may be harvested in a particular year.[36] The catch limits represented by the TAC cannot exceed the ABC, and the ABC, in turn, cannot exceed the OFL.[37]

Next, the Groundfish Plan Team's recommendations and the updated draft SAFE Reports are presented to the Council's Scientific and Statistical Committee ("SSC") and Advisory Panel ("AP") during the October Council meeting.[38] The SSC is composed of leading experts in biology, economics, statistics, and social science, and advises the full Council on scientific and technical matters.[39] The AP's membership represents various fishing industry sectors and conservation groups and provides "a direct link to fishermen, processors, communities, subsistence harvesters, and other stakeholders with interest in the ecosystems, fishing industry, and fishery management issues."[40] The AP advises the Council on how fisheries management alternatives will affect the industry and local economies.[41]

After reviewing the SAFE Reports, hearing from experts, and considering public testimony, the SSC recommends OFLs and ABCs for each species group to the full

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[36] NMFS00040.

[37] *Id.*; 50 C.F.R. § 600.310(f)(3)-(4); 2SUPP00043.

[38] The Council meets five times a year. Each Council meeting lasts for approximately eight days: https://www.npfmc.org/how-we-work/navigating-the-council-process/.

[39] Like the Groundfish Plan Team, the SSC's members are composed of members from state and federal government and academia. North Pacific Fishery Management Council, Scientific and Statistical Committee, https://www.npfmc.org/about-the-council/advisory-groups/scientific-and-statistical-committee/.

[40] *See* North Pacific Fishery Management Council, Advisory Panel Handbook, https://www.npfmc.org/wp-content/PDFdocuments/membership/AP/AdvisoryPanelHandbook.pdf at 3.

[41] *Id.*

Council.[42] At its December meeting, the Council considers the SAFE Reports; recommendations from the Groundfish Plan Team, SSC, and AP; and public testimony. With few exceptions, all Council, SSC, AP, and Groundfish Plan Team meetings are open to the public and there are numerous opportunities for public participation and testimony during each step of the process.[43] Based on this robust, science-driven, and transparent public process, the Council votes to recommend ABCs, OFLs, and TACs for each species of groundfish.

In addition to setting the ABCs, OFLs, and TACs, the harvest specifications allocate the pollock TAC among the various participants in the groundfish fishery and identify the PSC limits for non-target species.[44] Both PSC limits and pollock TAC sector allocations are established by law and are not dependent on recommendations made by the Council.[45]

After the full Council recommends annual harvest specifications, NMFS reviews the Council's recommendations to ensure that they comply with the MSA, the BSAI FMP, the Harvest Strategy EIS, and all applicable regulations.[46] Once NMFS confirms these requirements are met, the agency publishes draft harvest specifications in December, which

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[42] NMFS00043.

[43] North Pacific Fishery Management Council, https://www.npfmc.org/how-we-work/navigating-the-council-process/.

[44] NMFS00032; 2SUPP00026, 2SUPP00035; *see also* 50 C.F.R. § 679.21(b) (halibut limits), *id.* § 679.21(e) (crab and herring limits), *id.* § 679.21(f) (salmon limits).

[45] NMFS00024; 2SUPP00035. The TAC allocations are proscribed by a formula set in the American Fisheries Act and its implementing regulations, and apportion the pollock TAC among (1) the Inshore Sector that processes the harvest received from catcher vessels at shoreside processing facilities, (2) the Catcher-Processor Sector made up of vessels that both catch and process their harvest onboard, and (3) the Mothership Sector made up of vessels that have onboard processing capabilities but do not catch their own fish.

[46] Contemporaneously with this process, NMFS prepares its SIR to assess whether changes to the action or new information causing significantly different effects from those already studied require that the Harvest Strategy EIS be supplemented. NMFS00587.

provide another opportunity for public comment.[47] After reviewing comments, NMFS makes any necessary adjustments before issuing final harvest specifications in late February or early March, bringing this exhaustive public process to culmination—but only temporarily, as by that point the process of conducting surveys and collecting fishery data and ecosystem information to update the SAFE Reports for the upcoming year's harvest specifications has already begun.

D. The 2023-2024 and 2024-2025 BSAI Harvest Specifications and Procedural History.

The 2023-24 and 2024-25 Harvest Specifications were adopted pursuant to the process described above—in much the same way as each of the annual harvest specifications for the prior fifteen years. NMFS issued draft BSAI Harvest Specifications in December.[48] The Groundfish Plan Team and the SSC recommended OFLs and ABCs for each species of groundfish using the most recent SAFE Reports.[49] Based on significantly increased recruitment and spawning biomass estimates for pollock than in previous years, the Council recommended a pollock TAC of 1.3 million mt in 2023 and 2024 (up from 1.111 million mt in 2022).[50] These increases were offset by corresponding reductions in the TACs for several other groundfish species to maintain the total TAC for all groundfish harvested in the BSAI within the Optimum Yield range specified by the BSAI FMP.[51] None of the TACs recommended by the Council exceeds the ABC for any species or species group, and the

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[47] *See, e.g.* NMFS00001 (soliciting public comments on draft 2023-24 Harvest Specifications).

[48] NMFS00001-17; 2SUPP00001-19.

[49] NMFS00020; 2SUPP00021.

[50] *See* NMFS00020-21 (Table 1a); 87 Fed. Reg. 11,626, 11,628 (Mar. 2, 2022) (2022-23 Harvest Specifications); 2SUPP00023 (Table 1).

[51] NMFS00020. The pollock TAC for 2023 and 2024 is also 18,000 mt below the past ten-year average of Bering Sea pollock TACs. NMFS00040.

total TACs for all species of groundfish for the 2024-25 Harvest Specifications represent a 42 percent reduction below total ABCs.[52] The Bering Sea pollock TAC of 1.3 million mt is well below the ABC and OFL for pollock, set at 2.313 million mt and 3.162 million mt respectively.[53] NMFS determined that the Council's recommended Harvest Specifications were consistent with the MSA, the BSAI FMP, and the Harvest Strategy; the agency issued final Harvest Specifications in March of 2023 and 2024.[54]

In conjunction with the annual harvest specifications, NMFS prepares comprehensive SIRs to "evaluate[] the need to prepare a Supplemental EIS (SEIS) for the [annual] groundfish specifications."[55] The SIRs rely on and incorporate into their appendices thousands of pages of scientific analysis,[56] including the 2022 and 2023 BSAI SAFE Reports (Appendix A),[57] the 2022 and 2023 Ecosystem Status Reports (Appendix C),[58] and the most recent Groundfish Economic Status Reports (Appendix D).[59] After careful consideration of the best available science and whether new circumstances or information warrant preparation of a Supplemental EIS, NMFS determined that "the new information available is not of a scale and scope that require an SEIS."[60]

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[52] 2SUPP00049.

[53] *See* NMFS00020-21 (Table 1); *see also* 2SUPP00023 (Table 1).

[54] NMFS00018-19; 2SUPP00020-21.

[55] NMFS00587; 2SUPP00073.

[56] *See* NMFS00637; 2SUPP00146 ("These documents are included by reference.").

[57] *See* NMFS01264-3047; 2SUPP05276-6353 (Final SAFE Reports).

[58] *See* NMFS05430-5802; 2SUPP06345-6693 (2022 and 2023 Ecosystem Status Reports for Eastern Bering Sea and Aleutian Islands).

[59] *See* NMFS06090-6230; 2SUPP06150-6353 (2021 and 2023 Economic Status of the Groundfish Fisheries Off Alaska).

[60] NMFS00592; *see also* 2SUPP00143 ("At this time, the available information does not indicate a need to prepare additional supplemental NEPA documentation for the 2024 and 2025 harvest specifications. Therefore, a supplemental EIS is not necessary…").

Unhappy with the relatively modest increase in pollock TAC, and mistakenly believing it necessarily would increase incidental salmon bycatch,[61] Plaintiffs filed this action alleging NMFS relied on stale environmental analyses in issuing the 2023-24 and 2024-25 Harvest Specifications.[62]

III. STANDARD OF REVIEW

The Administrative Procedure Act ("APA") directs courts to "hold unlawful and set aside" an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[63] "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[64] Additionally, APA review is highly deferential and the agency's decision is entitled to a presumption of regularity.[65] "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."[66]

IV. ARGUMENT

Plaintiffs contend NMFS violated NEPA because the agency did not prepare a standalone EIS for the 2023-24 and 2024-25 Harvest Specifications or, alternatively, a Supplemental EIS to the Harvest Strategy EIS. Plaintiffs contend these additional NEPA documents were required because of recent ecosystem changes stemming from global

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[61] *See* Part IV.C.3.c *infra*.

[62] Dkt. 1 ¶¶ 44-45; Dkt. 66 at 1; *see also* NMFS01113 ("These harvest specifications propose to increase this TAC in the 2023 and 2024 seasons").

[63] 5 U.S.C. § 706(2)(A).

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

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

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

climate change and declining salmon returns.[67] Plaintiffs' contentions are factually incorrect, legally flawed, and ignore a voluminous administrative record demonstrating that NMFS carefully considered climate change and the health of the BSAI ecosystem in issuing the 2023-24 and 2024-25 Harvest Specifications. Considering the best available science, NMFS reasonably determined that the condition of the BSAI ecosystem did not present significant new information requiring preparation of a Supplemental EIS. This expert determination is both reasonable and entitled to deference.

A. Plaintiffs Have Waived Any Argument that the Annual Harvest Specifications Require Preparation of a Standalone EIS By Failing to Raise It in Comments Before the Agency.

Plaintiffs assert that the 2023-24 and 2024-25 Harvest Specifications require a standalone EIS or EA.[68] This is a new argument that Plaintiffs never raised in comments to NMFS during the lengthy administrative process for the 2023-24 or 2024-25 Harvest Specifications and is advanced for the first time in Plaintiffs' opening brief. By failing to raise this issue before the agency, Plaintiffs have waived their right to judicial review of this argument.

"A participant in an administrative process must alert the agency to their position and contentions. Failure to raise such particular objections may result in forfeiture of any objection to the resulting regulation."[69] This rule serves to "protect[] the agency's

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[67] Dkt. 32 at 12.

[68] Dkt. 32 at 18-25; Dkt. 66 at 3-5.

[69] *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 710 (9th Cir. 2009) (brackets, internal quotation marks, and citations omitted); *see also Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1036 (9th Cir. 2019) ("Plaintiffs must structure their participation in the agency's decisionmaking process so as to alert[ ] the agency to the parties position and contentions, in order to allow the agency to give the issue meaningful consideration. Otherwise, the issue is waived.") (internal quotation marks and citations omitted).

prerogative to apply its expertise, to correct its own errors, and to create a record for [the court's] review."[70] "Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision."[71]

Only five substantive written comments were submitted on the 2023-24 and 2024-25 Harvest Specifications, none of which contend that the annual harvest specifications decision requires a standalone EIS or EA.[72] The Association of Village Council Presidents' comment letter on the 2023-24 Harvest Specifications shares a common refrain with the four other comments, generally criticizing the Harvest Strategy EIS (and a related but separate 2004 Programmatic Supplemental EIS) as outdated and urging NMFS to *revisit and supplement* those comprehensive NEPA documents.[73] NMFS was fairly on notice that Plaintiffs believed the Harvest Strategy EIS required supplementation, and the agency thoroughly responded to this comment.[74] But nowhere in their comments do Plaintiffs—or any of the commenters—assert that the annual harvest specifications require a *standalone*

[70] *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007).

[71] *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991).

[72] *See* NMFS01112-16 (AVCP Comment Letter); NMFS01110 (Salmon State Comment Letter); NMFS01099 (Ocean Conservancy Comment Letter); NMFS01104 (Alaska Bering Sea Crabbers Comment Letter); NMFS01106 (Kuskokwim River Inter-Tribal Fish Commission Comment Letter). Plaintiffs did not submit a comment letter to NMFS on the draft 2024-25 Harvest Specifications, and none of the letters submitted contend that NMFS must prepare a new standalone NEPA document. *See also* 2SUPP01453-62 (At-Sea Processors Comment Letter); 2SUPP01463 (Center for Biological Diversity Comment Letter); 2SUPP05183 (Salmon State Comment Letter); 2SUPP05185-91 (two public comment submissions).

[73] NMFS01112. This argument is also pursued by Plaintiffs and is addressed in Part IV.C *infra*.

[74] *See* NMFS00040-42 (Response to Comment 6).

NEPA document.[75] NMFS could not reasonably have been expected to respond to this specific criticism that Plaintiffs raise for the first time in their opening brief.

Nor would the "so obvious" exception to the waiver rule apply.[76] As explained in Part IV.B.3 *infra*, NMFS prepared the annual Harvest Specifications without a separate NEPA document following the *exact same process* it engaged in for each of the previous fifteen iterations of the annual BSAI harvest specifications. It would not be "so obvious" to NMFS that its standard, longstanding practice of issuing annual harvest specifications without a separate NEPA document was being challenged. Plaintiffs have waived this argument, and it cannot provide a basis for reversing the agency's decision.[77]

B. The 2023-2024 and 2024-2025 Harvest Specifications Do Not Require a Standalone EIS.

Even had Plaintiffs properly preserved this argument, NMFS did not violate NEPA by declining to prepare a standalone EIS for the annual harvest specifications. NEPA does not require an agency to produce a standalone EIS for actions like the BSAI harvest specifications that are within the scope of an existing EIS. Plaintiffs' argument ignores the defined purpose of the Harvest Strategy EIS, disregards seventeen years of past agency practice of issuing annual harvest specifications without a standalone NEPA document, and

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[75] *See* n.72 *supra*.

[76] Courts sometimes find an exception to the waiver rule if "[a] flaw is 'so obvious' that it does not result in waiver 'where the agency had independent knowledge of the issues that concerned Plaintiffs.'" *Cook Inletkeeper v. Raimondo*, 533 F. Supp. 3d 739, 752 (D. Alaska 2021).

[77] *See Portland Gen. Elec.*, 501 F.3d at 1023 ("Petitioners have waived their right to judicial review of these final two arguments as they were not made before the administrative agency, in the comment to the proposed rule, and there are no exceptional circumstances warranting review.") (internal quotation marks and citations omitted); *see also Cook Inletkeeper*, 533 F. Supp. 3d at 752 (plaintiffs waived challenge to NMFS's "small numbers" determination by failing to raise it during administrative proceedings).

badly misapprehends the process—preparing an EIS takes years to complete and could not be accomplished annually.

1. NEPA does not require a new EIS where the agency's decision falls within the scope of an existing EIS.

NEPA requires agencies to prepare a "detailed statement" of the environmental impact of "major Federal actions significantly affecting the quality of the human environment."[78] NEPA "is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process."[79] NEPA does not mandate particular results or substantive outcomes.[80] NEPA's implementing regulations provide that the "purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action."[81]

Consistent with this purpose, NEPA does not require agencies to prepare a *new* EIS for actions supported by an existing NEPA document. In such cases, an agency may rely on

[78] 42 U.S.C. § 4332(C).

[79] 40 C.F.R. § 1500.1.

[80] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) ("[I]t is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.").

[81] 40 C.F.R. § 1500.1; *see also* 40 C.F.R. § 1502.1 ("The primary purpose of an environmental impact statement…is to ensure agencies consider the environmental impacts of their actions in decision making."); 40 C.F.R. § 1500.4 (directing agencies to "reduce excessive paperwork").

an already-prepared NEPA analysis.[82] The "only remaining hard look obligation" is "to analyze new circumstances and new information under the supplementation rubric."[83]

For example, in *Mayo v. Reynolds*,[84] the D.C. Circuit rejected an argument that "the Park Service was required to issue a new EA or EIS every year" before authorizing recreational elk hunting—including the number of elk authorized for hunting in a given year.[85] The court held that "even if each hunting authorization is a 'major Federal action' which may 'significantly affect' the environment, the 2007 EIS relieved the Park Service of the obligation to prepare fresh NEPA documentation each year it implements the elk-reduction program in conformity with the 2007 Plan."[86]

Likewise, in *Northern Alaska Environmental Center v. U.S. Department of the Interior*,[87] the Ninth Circuit affirmed this Court's grant of summary judgment in favor of the Bureau of Land Management ("BLM") against a challenge to the NEPA analysis for oil and gas lease sales in the National Petroleum Reserve-Alaska. In so doing, the Ninth Circuit rejected the argument that NEPA required BLM to prepare an entirely new EIS to support the lease sale, holding that because the agency action fell within the scope of an existing EIS, NEPA's supplementation framework provided the proper rubric for evaluating whether

[82] *N. Alaska Envtl. Ctr. v. U.S. Dep't of Interior*, 983 F.3d 1077, 1096 (9th Cir. 2020).

[83] *Id.*

[84] 875 F.3d 11 (D.C. Cir. 2017).

[85] *Id.* at 19.

[86] *Id.* at 19-20; *see also N. Alaska Envtl. Ctr.*, 983 F.3d at 1091-93 (endorsing the D.C. Circuit's conclusion in *Mayo*, although disagreeing with the D.C. Circuit's decision to examine the adequacy of the earlier NEPA analysis where the statute of limitations had run).

[87] 983 F.3d 1077 (9th Cir. 2020).

the agency complied with NEPA.[88] The Court further held, "[I]n deciding whether a previous EIS *is* the EIS for a subsequent action, we find it appropriate to rely on an EIS's defined scope."[89] If the scope of the initial EIS is "ambiguous with regard to whether it does or does not include the precise subsequent action at issue," courts defer to the agency's interpretation of the EIS, so long as it is reasonable.[90]

2. The Harvest Strategy EIS is the EIS for the annual Harvest Specifications.

The annual BSAI harvest specifications undoubtedly fall within the scope of the Harvest Strategy EIS—a point Plaintiffs acknowledge.[91] The first page of the Federal Register notice for the 2023-24 and 2024-25 Harvest Specifications identifies the Harvest Strategy EIS as the primary document supporting those decisions.[92] The Harvest Strategy EIS's full title is the "Alaska Groundfish *Harvest Specifications* Final Environmental Impact Statement"[93] and its defined scope is "adopt[ing] a harvest strategy *to determine the annual harvest specifications* for the federally managed groundfish fisheries in the GOA and BSAI

[88] *See id.* at 1093 ("If the defined scope of the initial EIS included the subsequent action, NEPA requirements for the subsequent action would fall under the supplementation rubric.").

[89] *Id.*

[90] *Id.* at 1094.

[91] *See* Dkt. 32 at 37-38 ("The harvest specifications strategy is an ongoing action that provides direction for the annual harvest specifications decisions.").

[92] NMFS00018; 2SUPP00020.

[93] NMFS00639 (emphasis added).

management areas."[94] Moreover, even if the defined scope were ambiguous, courts defer to an agency's reasonable interpretation.[95]

Because the Harvest Strategy EIS *is* the EIS for the annual harvest specifications challenged here, the only issue properly before the Court is whether the agency acted arbitrarily and capriciously in deciding not to *supplement* the Harvest Strategy EIS.[96]

3. For the previous seventeen years, NMFS has consistently issued annual BSAI Harvest Specifications without a separate NEPA document.

Plaintiffs also ignore that for seventeen years, NMFS has issued the annual harvest specifications without preparing a standalone NEPA document, instead analyzing whether changed circumstances or new information require the agency to supplement the Harvest Strategy EIS.[97] The Harvest Strategy EIS, being the NEPA document covering the annual harvest specifications, shifted the agency's inquiry from whether to prepare a NEPA document in the first instance to whether to supplement the existing one. Thus, since adopting the Harvest Strategy EIS in 2007, NMFS has followed the same procedure *every year* in issuing the annual BSAI harvest specifications: NMFS has relied on the analysis and framework established by the Harvest Strategy EIS while also preparing SIRs to examine

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[94] NMFS00643 (emphasis added); *see also* NMFS00661-62 ("The alternative harvest strategies determine annual harvest specifications.… The harvest strategies are applied to the best available scientific information to determine the harvest specifications, which are the annual limits on the amount of each species of fish, or of each group of species, that may be taken.").

[95] *N. Alaska Envtl. Ctr.*, 983 F.3d at 1094.

[96] *See id.* at 1096 (holding supplementation was the proper rubric to evaluate sufficiency of agency decision supported by prior EIS).

[97] *See* 2SUPP00046 ("A SIR for the Final EIS is prepared each year to take that "hard look" and document the evaluation and decision whether a supplemental EIS (SEIS) is necessary to implement the annual groundfish harvest specifications…").

changed conditions and determine whether supplementation is necessary.[98] NMFS issued the 2023-24 and 2024-25 Harvest Specifications in exactly the same manner as the prior fifteen iterations. NMFS has also followed the identical procedure for issuing the annual harvest specifications for the Gulf of Alaska groundfish fishery.[99]

Tellingly, in the fifteen prior iterations of the annual BSAI harvest specifications, Plaintiffs have never suggested this process violates NEPA or that the annual harvest specifications require a separate NEPA document. If Plaintiffs' argument was correct, then NMFS has violated NEPA with every annual harvest specification it has issued for the BSAI *and* the Gulf of Alaska fisheries for the last seventeen years. As the Ninth Circuit has cautioned, "[a] court should hesitate before construing a statute in a way that renders years of consistent agency practice unlawful."[100] Plaintiffs fail to offer a compelling argument as

[98] *See* 87 Fed. Reg. 11,626 (Mar. 2, 2022) (2022-23 Harvest Specifications rely on the Programmatic Alaska Groundfish Harvest Specifications Final EIS and Supplementary Information Reports to the Final EIS); 86 Fed. Reg. 11,449 (Feb. 25, 2021) (2021-22 Harvest Specifications); 85 Fed. Reg. 13,553 (Mar. 9, 2020) (2020-21 Harvest Specifications); 84 Fed. Reg. 9,000 (Mar. 13, 2019) (2019-20 Harvest Specifications); 83 Fed. Reg. 8,365 (Feb. 27, 2018) (2018-19 Harvest Specifications); 82 Fed. Reg. 11,826 (Feb. 27, 2017) (2017-18 Harvest Specifications); 81 Fed. Reg. 14,773 (Mar. 18, 2016) (2016-17 Harvest Specifications); 80 Fed. Reg. 11,919 (Mar. 5, 2015) (2015-16 Harvest Specifications); 79 Fed. Reg. 12,108 (Mar. 4, 2014) (2014-15 Harvest Specifications); 78 Fed. Reg. 13,813 (Mar. 1, 2013) (2013-14 Harvest Specifications); 77 Fed. Reg. 10,669 (Feb. 23, 2012) (2012-13 Harvest Specifications); 76 Fed. Reg. 11,139 (Mar. 1, 2011) (2011-12 Harvest Specifications); 75 Fed. Reg. 11,778 (Mar. 12, 2010) (2010-11 Harvest Specifications); 74 Fed. Reg. 7,359 (Feb. 17, 2009) (2009-10 Harvest Specifications); 73 Fed. Reg. 10,160 (Feb. 26, 2008) (2008-09 Harvest Specifications); 72 Fed. Reg. 9,451 (Mar. 2, 2007) (2007-08 Harvest Specifications).

[99] *See, e.g.*, 88 Fed. Reg. 13,238 (Mar. 2, 2023) (2023-24 Gulf of Alaska Harvest Specifications premised on 2007 Harvest Strategy EIS and annual SIR); 76 Fed. Reg. 11,111 (Mar. 1, 2011) (same for 2011-12 Gulf of Alaska Harvest Specifications).

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

to why the Court should find unlawful nearly two decades of consistent agency practice in issuing annual harvest specifications.

4. The resource-intensive process of completing a new EIS is impractical and ill-suited for annual BSAI Harvest Specifications.

Finally, Plaintiffs' position that the 2023-24 and 2024-25 Harvest Specifications required NMFS to prepare a separate EIS is also impractical and unrealistic given the time and agency resources needed to prepare an EIS. An EIS is a massive undertaking, involving numerous procedural steps starting with a notice of intent, scoping period, public comment period, draft EIS, and an additional round of public comment, followed by the agency's consideration and response to comments, final EIS, and eventually a Record of Decision.[101] This process typically takes several years.[102] If NMFS was required to produce a standalone EIS before issuing annual harvest specifications, NMFS would be engaged in a never-ending process of constantly preparing new NEPA documents each year for each of the fisheries that it oversees. Such a scenario is not feasible, and the Supreme Court has declined to interpret NEPA as a "paperwork" exercise requiring agencies to engage in such "intractable" decision making.[103]

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[101] Council on Environmental Quality, A Citizen's Guide to the NEPA, *available at* https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf (Dec. 2007).

[102] The Council on Environmental Quality found that across all Federal agencies the average EIS completion time from Notice of Intent to Record of Decision was 4.5 years. *See* Environmental Impact Statement Timelines (2010-2018), *available at* https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf (June 12, 2020).

[103] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989) ("An agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable."); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.").

In short, whether NMFS was obligated to supplement the Harvest Strategy EIS is the only claim for the Court's consideration.[104]

C. NMFS Carefully Considered Current Environmental Conditions in Issuing the 2023-2024 and 2024-2025 Harvest Specifications and Determined that Supplementing the Harvest Strategy EIS Was Not Necessary.

Plaintiffs argue in the alternative that NMFS violated NEPA by deciding not to supplement the Harvest Strategy EIS.[105] This argument is similarly flawed and is premised on Plaintiffs' incorrect assertion that NMFS "last analyzed the environmental consequences of its harvest specifications process in an EIS completed in 2007."[106] Plaintiffs' argument disregards the flexible framework established by the Harvest Strategy EIS by which new information is continuously evaluated, ignores NMFS's extensive analysis of current BSAI ecosystem conditions documented in the SIR, and elevates Plaintiffs' subjective judgments over the agency's expert determination regarding the significance of new scientific information. Ultimately, Plaintiffs simply disagree with the agency's reasoned determination that—having considered the significance of changed environmental conditions—a Supplemental EIS was not necessary. But this determination is left to the sound discretion of NMFS as the expert agency.[107]

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[104] Plaintiffs suggest that for certain fisheries NMFS has prepared at least an EA. Dkt. 32 at 21. The examples Plaintiffs provide, however, involved decisions for which there was no existing NEPA document. *See, e.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992) (reviewing the "agency's decision not to prepare an initial EIS").

[105] Dkt. 32 at 36-40; Dkt. 66 at 5-6.

[106] Dkt. 32 at 1.

[107] *See Sierra Club v. Army Corps of Eng'rs*, 701 F.2d 1011, 1037 (2d Cir. 1983) ("[T]he ultimate determination as to whether a SEIS is required is left to the agency."); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) ("Deference is particularly important when the agency is making predictions, within its area of special expertise, at the frontiers of science.") (internal quotation marks and citation omitted).

1. Legal standard for supplementation of an EIS.

NEPA's implementing regulations provide that a Supplemental EIS should be prepared if (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information exist relevant to environmental concerns bearing on the proposed action or its impacts.[108] Agencies are required "to take a hard look at the new information to assess whether supplementation might be necessary."[109] However, "not every change requires a supplemental EIS."[110] Significantly, "[a]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable."[111]

The environmental analysis contained in an EIS does not have an expiration date, and there are no specific time limits mandating when an EIS must be supplemented. The Council on Environmental Quality's NEPA guidance provides "[a]s a rule of thumb… if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in [40 C.F.R. §] 1502.9 compel preparation of an EIS supplement."[112] However, the "mere passage of time rarely warrants an order to update the information to be considered by the agency."[113] Courts have upheld an agency's continued

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[108] 40 C.F.R. § 1502.9(d)(1).

[109] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004); *see also LaCounte*, 939 F.3d at 1040.

[110] *Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004).

[111] *Marsh*, 490 U.S. at 373.

[112] 40 Most Asked Questions Concerning the CEQ's National Environmental Policy Act, at 32 (Supplements to Old EISs) *available at* https://www.energy.gov/nepa/articles/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.

[113] *Sierra Club*, 701 F.2d at 1036.

reliance on an older EIS where the agency determines that new information or circumstances do not rise to a level of significance warranting the preparation of a Supplemental EIS.[114]

"[T]he ultimate determination as to whether a SEIS is required is left to the agency."[115] "An agency must document its decision that no SEIS is required to ensure that it remains alert to new information that may alter the results of its original environmental analysis, and continue[s] to take a hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval."[116] "Accordingly, as long as the [agency's] decision not to supplement the [EIS] was not 'arbitrary or capricious,' it should not be set aside."[117]

2. NMFS properly used Supplementary Information Reports to evaluate the need to supplement the Harvest Strategy EIS.

Plaintiffs criticize NMFS for using SIRs to evaluate the significance of new information and mistakenly argue that the agency "cannot rely on an evaluation outside the NEPA process to consider new information."[118] Settled law provides otherwise.

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[114] *See Coker v. Skidmore*, 941 F.2d 1306 (5th Cir. 1991) (upholding agency's reliance on 15-year-old EIS over Plaintiffs' claims that the analysis was outdated); *Sierra Club*, 701 F.2d at 1036 (rejecting "the district court's feeling that the January 1977 EIS 'is probably seriously out-of-date' as a valid basis for ordering that a nonfisheries SEIS be prepared.").

[115] *Sierra Club*, 701 F.2d at 1037; *see also Kunaknana v. U.S. Army Corps of Eng'rs*, 3:13-CV-00044-SLG, 2015 WL 3397150, at *3 (D. Alaska May 26, 2015) ("A dispute as to whether an SEIS is required must be resolved in favor of the expert agency so long as the agency's decision is based on a reasoned evaluation of the relevant factors.") (internal citations and quotations omitted).

[116] *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013) (internal quotations and citations omitted).

[117] *Marsh*, 490 U.S. at 377.

[118] Dkt. 32 at 26.

NMFS properly used SIRs to take a "hard look" and determine whether new information or circumstances are "significant" such that a Supplemental EIS is required.[119] Both the Supreme Court and the Ninth Circuit routinely have approved an agency's use of SIRs or similar "non-NEPA" documents to evaluate whether supplemental NEPA documentation is required.[120] "Specifically, courts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS."[121] National Oceanic and Atmospheric Administration policies—which are applicable to its sub-agency NMFS—also authorize use of SIRs for this purpose.[122] The use of SIRs helps avoid a scenario where "the threshold decision not to supplement an EIS would become as burdensome as preparing

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[119] *See Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 565-66 (9th Cir. 2000) (listing cases).

[120] *Marsh*, 490 U.S. at 383-85 (upholding decision of Army Corps of Engineers to proceed with dam project without supplementing existing NEPA documents where Corps used an SIR to analyze significance of new reports questioning environmental impact of project); *Kimbell*, 709 F.3d at 855 ("the Forest Service often presents this threshold determination in a supplemental information report[.]"); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000) (rejecting argument that Forest Service should have supplemented an EIS where agency used SIRs to document whether new information warranted supplementation); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 529-30 (9th Cir. 1994) (upholding use of "Memorandum of Record" to assess significance of recent wildfires in project area); *see also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997) (upholding decision of Forest Service to proceed with logging project without supplementing existing NEPA documents where agency used an SIR to evaluate significance of new information about area to be logged); *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004) ("As stated, agencies may use non-NEPA procedures to determine whether new NEPA documentation is required.").

[121] *Idaho Sporting Cong.*, 222 F.3d at 566.

[122] NMFS00041; Companion Manual for NOAA Admin Order 216-6A, Policy and Procedures for Compliance with NEPA, https://www.noaa.gov/sites/default/files/2021-10/NOAA-NAO-216-6A-Companion-Manual-03012018%20%281%29.pdf at App'x C-14 (Jan. 13, 2017).

the supplemental EIS itself, and the continuing duty to gather and evaluate new information . . . could prolong NEPA review beyond reasonable limits."[123]

Plaintiffs mistakenly suggest that "significance" is a threshold determination an agency must make before using an SIR.[124] It is *through an SIR* that the agency properly determines whether new information is significant.[125] Only then—"once *an agency determines* that new information is significant"—must it "prepare a supplemental EA or EIS; SIRs cannot serve as a substitute."[126] Plaintiffs' contention that NMFS cannot use an SIR to consider new information misunderstands the very purpose of an SIR and is without merit.

3. The Supplementary Information Reports and their appendices comprehensively considered new information about the BSAI ecosystem.

NMFS properly determined that new information did not require a Supplemental EIS. Plaintiffs' substantive attack on the agency's analysis fails for several reasons:

1) Plaintiffs are factually incorrect that NMFS did not consider any new information about the status of the ecosystem in the SIRs;[127]
2) NMFS thoroughly considered the very same changing ocean conditions, seabird and marine mammal mortality events, and declining salmon returns that Plaintiffs claim the agency ignored; and

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[123] *Dombeck*, 222 F.3d at 560.

[124] Dkt. 32 at 25-26.

[125] *See Dombeck*, 222 F.3d at 560 ("[C]ourts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS . . . . We have permitted agencies to use SIRs for this purpose, in part, because NEPA and the CEQ regulations are silent on the issue of how agencies are to determine *the significance of new information*.") (emphasis added).

[126] *Id.* at 566.

[127] Dkt. 32 at 26.

3) The agency's reasoned decision that new information did not necessitate a supplemental EIS is entitled to deference.

To begin, Plaintiffs misapprehend the SIRs, asserting the agency concluded "that it did not need to consider new information because it was considered through the harvest specifications process."[128] NMFS never concluded it did not need to consider new information.[129] Indeed, the agency considered new information, including in the very pages Plaintiffs cite, concluding, "*according to this new information*, there has been no change in any stock's status relative to the established status determination criteria . . . . [T]he new information available is not of a scale and scope that require an SEIS."[130] Likewise, the SIRs never suggest, as Plaintiffs contend, that the agency views stock assessments as a substitute for a NEPA document.[131] Rather, NMFS appropriately utilized the SIRs to analyze the information contained in 2022 and 2023 SAFE Reports and Ecosystem Status Reports.[132]

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[128] *Id.* at 34.

[129] Of course, the agency *also* considers new information during the harvest specifications process, as contemplated by the Harvest Strategy EIS. To set annual harvest specifications using the best available science, NMFS and the Council continuously evaluate the BSAI groundfish fishery in the context of current environmental conditions. *See* NMFS01096. The Harvest Strategy EIS "anticipated that changes in information would be used each year in setting the annual harvest specification since the process is flexible to adjust to new information on stock abundance and environmental and socioeconomic factors (like climate change)." NMFS00041. But the agency *also* prepares an SIR yearly to evaluate whether, applying NEPA, new information requires supplementing the Harvest Strategy EIS. *Id.*

[130] NMFS00592; *see also* 2SUPP00081 (concluding new "information presented on species abundance and condition, environmental and ecosystem factors, and socio-economic conditions used to set the 2024 and 2025 harvest specifications does not represent a significant change relative to the environmental impacts of the harvest strategy analyzed in the Harvest Specifications EIS.").

[131] Dkt. 32 at 35.

[132] NMFS00587; *see also* 2SUPP00046 ("The SIR prepared each year for the annual harvest specifications analyzes the information contained in the most recent SAFE reports

Plaintiffs also erroneously argue that NMFS failed to consider (a) changing ocean conditions, (b) seabird and marine mammal mortality events, and (c) declining salmon returns in Western Alaska.[133] Again, Plaintiffs disregard the SIRs and their appendices, which reflect the considerable attention NMFS paid to each of these topics before issuing the 2023-24 and 2024-25 Harvest Specifications.[134]

a. NMFS considered changing ocean conditions.

Plaintiffs contend that the Harvest Strategy EIS does not account for changed ocean conditions and speculate that if NMFS considered changing ocean conditions in a Supplemental EIS, it "could lead the Service to consider changes in the harvests specifications process to mitigate the effects of fishing in this new environment."[135] Cherry-picking statements out of context, Plaintiffs argue that current ocean conditions differ from those considered in the Harvest Strategy EIS.[136] But this criticism fundamentally misunderstands the flexible framework provided by the Harvest Strategy EIS to evaluate new information and ignores the extensive science related to climate change and current ocean conditions considered by NMFS in issuing the 2023-24 and 2024-25 Harvest Specifications, and considered by NMFS through annual SIRs.

As NMFS explained in its response to comments, "the framework process for the preferred harvest strategy under the Final EIS allows for the effects of climate change to be

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and all information available to NMFS and the Council to determine whether an SEIS must be prepared to implement the annual harvest specifications.").

[133] Dkt. 32 at 27-33.

[134] The Appendices to the SIR incorporate by reference the 2022 Ecosystem Status Reports, the 2022 SAFE Reports, and the 2021 Economic Status Report. NMFS00637 ("These documents are included by reference.").

[135] Dkt. 32 at 29.

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

considered in the annual process for setting the harvest specifications."[137] Significantly, the annual SAFE Reports and particularly the Ecosystem Status Reports developed to support the annual harvest specifications contain a comprehensive discussion of changing environmental conditions informing the Council's annual recommendations and NMFS's consideration and approval of the same.[138] Indeed, the SSC and Groundfish Plan Teams have responded to information regarding climate change and changing ocean conditions by recommending reduced ABCs on which the TAC is based.[139] Contrary to Plaintiffs' suggestion, "the annual harvest specifications process, which implements the preferred harvest strategy under the EIS, allows for the consideration of the best scientific information available on climate change."[140] Having surveyed current ecosystem conditions including those related to changed ocean conditions, NMFS determined "[t]he new information available is not of a scale and scope that require an SEIS."[141]

b. NMFS considered seabird and marine mammal mortality events.

Plaintiffs are similarly mistaken in their contention that NMFS did not account for seabird and marine mammal mortality events in issuing the harvest specifications.[142] The

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[137] NMFS00043; 2SUPP00047.

[138] *See, e.g. id.* (noting ongoing ecological factors like climate change are addressed annually in the SAFE Reports); *see also* NMFS27385-88 (2022 Eastern Bering Sea Ecosystem Status Report in Brief); NMFS05438-42 (ecosystem assessment of the "recent warm stanza" and physical and biological responses to the same); NMFS05456-59 (High Resolution Climate Change Projections for the Eastern Bering Sea); NMFS05686-710 (surveying climate and temperature conditions in the Aleutian Islands).

[139] *See* NMFS00043 ("In some instances, the Plan Teams and SSC have recommended ABC reductions based on climate change considerations."); *see also* 2SUPP00048 (explaining how changing ocean conditions impact the risk tables used for TAC setting).

[140] NMFS00043; 2SUPP00048.

[141] NMFS00592; 2SUPP00143.

[142] Dkt. 32 at 29-31.

voluminous administrative record demonstrates that NMFS did consider seabird and marine mammal mortality events.[143] Directly rebutting Plaintiffs' suggestion that NMFS ignored the health of seabirds, the NMFS Ph.D. biologist responsible for coordinating with other experts and assembling the Seabird Status Report section of the 2022 Ecosystem Status Report remarked, "I am blown away (and I know the SSC and Council will be as well) by the quantity AND quality of information that is provided in real time (i.e., 2022 data) for the fisheries managers to consider in their decision making!"[144] This same wealth of information is incorporated into the SIRs and demonstrates that NMFS evaluated the health of seabirds in issuing the annual harvest specifications in a manner consistent with the framework established by the Harvest Strategy EIS.

The same is true for marine mammals. Plaintiffs contend that the Harvest Strategy EIS is "silent regarding unusual mortality events."[145] But the 2023-24 Harvest Specifications clearly state that "[a]dverse impacts on marine mammals . . . resulting from fishing activities conducted under this rule are discussed in the Final EIS *and its accompanying annual SIRs*."[146] The SIRs evaluate the status of Steller Sea Lions,[147] Pacific walruses,[148] seals,[149] and whales.[150] The Ecosystem Status Reports for the Eastern Bering

[143] *See, e.g.* NMFS05571-77 (2022 ESR's discussion of "Integrated Seabird Information"); NMFS05574 (2022 Seabird Report Card); NMFS05575-77 (discussion of seabird mortality); SUPP3613 (2022 Marine Mammal Stock Assessment); 2SUPP00117-120 (seabirds); 2SUPP06525-31 (2023 ESR's discussion of "Integrated Seabird Information").

[144] NMFS34245.

[145] Dkt. 32 at 30.

[146] NMFS00047 (emphasis added).

[147] NMFS00617-18; *see also* NMFS05744; NMFS19727; NMFS20091; NMFS21541; NMFS21824.

[148] NMFS00619; *see also* NMFS21885.

[149] NMFS00622-24; *see also* NMFS22273; NMFS22404.

[150] NMFS00624-26.

Sea and Aleutian Islands, which are incorporated into the SIRs by reference,[151] discuss the health of Steller Sea Lions, the status and trends in marine mammal strandings as well as unusual mortality events for ice seals and gray whales.[152] Additionally, the SIRs rely on and are supported by annual Alaska Marine Mammal Stock Assessments.[153] Plaintiffs' contention that NMFS did not consider contemporaneous information about the health of seabirds and marine mammals in issuing the 2023-24 and 2024-25 Harvest Specifications is simply incorrect.

c. NMFS considered current Chinook and chum salmon abundance.

Plaintiffs argue NMFS neglected to consider the current Chinook and chum salmon abundance in establishing the 2023-24 and 2024-25 Harvest Specifications.[154] Once again, the voluminous administrative record and the SIRs demonstrate otherwise. Plaintiffs also make several misleading statements about the BSAI pollock fishery and salmon bycatch which warrant clarification. It bears mentioning that while the annual harvest specifications identify the limit on bycatch of Chinook salmon and several other protected species, the harvest specifications themselves do not regulate salmon bycatch or industry efforts to minimize bycatch—the BSAI FMP and its implementing regulations do.[155] Notably, substantive measures geared towards minimizing salmon bycatch (or bycatch of any species) are addressed through amendments to the FMP—with its own separate NEPA process—and not through the annual harvest specifications.[156]

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[151] *See* NMFS000637 (2023 SIR App'x C: 2022 Ecosystem Status Report).

[152] NMFS05578-80 (Eastern Bering Sea); NMFS05744-48 (Aleutian Islands).

[153] NMFS00623 n.77; NMFS22408-806; 2SUPP29786-884.

[154] Dkt. 32 at 31-33.

[155] NMFS00039; 50 C.F.R. § 679.21(f)(2).

[156] *See* NMFS00039 ("Chinook and chum salmon limits and conditions that affect the limits are set in regulations, and changes to those regulations are outside the scope of the

Presenting decades' worth of aggregated bycatch data without context, Plaintiffs disingenuously suggest that the BSAI groundfish fishery is to blame for declining salmon returns in Western Alaska.[157] This of course disregards the comprehensive measures to reduce bycatch over the last seventeen years and ignores that most salmon bycatch in the pollock fishery are Asian hatchery chum salmon not destined for Western Alaska rivers.[158]

Plaintiffs misleadingly contend that the modest increase in the pollock TAC for 2023 and 2024—which is still below the 10-year average TAC for Bering Sea pollock—will result in more salmon bycatch, claiming "at higher levels of fishing, more bycatch is likely."[159] While this may sound intuitive, NMFS concluded no such correlation existed, noting "[t]he best scientific information available does not suggest that a reduction in the pollock TAC would measurably increase salmon escapement to western Alaska."[160]

In fact, NMFS found that the level of fishing effort represented by the pollock TAC did *not* predictably impact salmon bycatch in either direction. NMFS observed that "[w]hile pollock catches have been consistent from year to year since 2011, Chinook and chum bycatch has varied independently of stable pollock TACs."[161]

Furthermore, the overall TAC for pollock does not affect allowable bycatch. As mentioned above, "the pollock fleet is constrained by the limit of Chinook salmon set in regulation, regardless of the size of the pollock harvest."[162] For example, the PSC limit for

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annual harvest specification process."); 2SUPP00044; *see also* NMFS00611-14 (detailing NEPA review for salmon bycatch management measures).

[157] Dkt. 32 at 2, 11.

[158] NMFS00038-39; NMFS00079-80.

[159] Dkt. 32 at 23; NMFS00040.

[160] NMFS00040.

[161] *Id.*

[162] NMFS00039; 2SUPP00044.

Chinook salmon for 2023 and 2024 would be 45,000 fish regardless of whether the pollock TAC was set at 1.3 million mt or some lesser amount. NMFS reasonably concluded that "reducing the pollock TAC would not meaningfully increase salmon returns to Western Alaska given the small percentages of salmon stocks taken as bycatch in the pollock fishery and the constraining PSC limit that applies at any level of pollock harvest."[163]

Still, the 2023-24 and 2024-25 Harvest Specifications and SIRs consider Chinook and chum salmon abundance. The agency "acknowledge[d] the western Alaska salmon crisis and the impact it is having on culture and food security throughout western Alaska."[164] Indeed, consistent with regulation and the BSAI FMP, the PSC limits for Chinook salmon are based on past bycatch performance, whether approved Chinook salmon bycatch IPAs have been formed, and whether or not it is a low Chinook salmon abundance year.[165] Utilizing the State of Alaska's 3-System Index for Western Alaska,[166] NMFS determined that 2022 and 2023 were low Chinook abundance years, resulting in a downward adjustment

[163] NMFS00040; *see also* NMFS00039 ("[r]educing the pollock TAC likely would have an extremely small effect on salmon returns, and therefore on in-river harvest opportunities, because of the low level of bycatch salmon in the pollock fishery.").

[164] NMFS00039; 2SUPP00044.

[165] NMFS00038; 2SUPP00044.

[166] NMFS00038-39. Plaintiffs cite "extremely low" Chinook salmon runs in 2023 measured by the State of Alaska's 3-System Index, Dkt. 66 at 5, but neglect to mention that the Unalakleet River weir used to count salmon was out of operation for nine days corresponding to the normal peak passage of Chinook salmon, making total escapement estimates "highly uncertain." 2SUPP34154-55. Additionally, three of the four weirs on the Kuskokwim River were inoperable, resulting in extended periods of missed passage and the "inability to produce escapement estimates." 2SUPP34155-56.

of the PSC limit for 2023 and 2024 to 45,000 Chinook salmon and a bycatch performance standard of 33,318 Chinook salmon.[167]

In issuing the 2023-24 and 2024-25 Harvest Specifications, NMFS noted that existing measures implemented through Amendment 91 and Amendment 110 to the BSAI FMP "have reduced salmon bycatch in the pollock fishery compared with what they would have been without these measures."[168] As a result of these salmon avoidance measures, the entire BSAI pollock fishery has been well below the 45,000-fish PSC limit for Chinook salmon, catching 8,342 Chinook salmon in 2022 and 11,855 Chinook salmon in 2023—no small feat considering the fishery harvests over a million metric tons of pollock annually.[169] Significantly, bycatch Chinook are from stocks across Alaska as well as the Pacific Northwest and Russia and are not all destined for western Alaska rivers.[170]

Although avoidance of chum salmon must not come at the expense of Chinook salmon, NMFS noted that the agency and the Council "are currently engaged in a comprehensive process to evaluate existing measures and develop alternatives that may be necessary to further reduce chum salmon bycatch."[171] Further, NMFS determined that "[c]onsistent annual genetic data show the majority of chum bycatch is of Asian hatchery origin, and thus does not affect returns to western Alaska rivers,"[172] and that bycatch from

[167] *Id.*; 2SUPP00036, 2SUPP00044. The bycatch performance standard is less than the overall PSC limit and if exceeded in three of seven years will reduce the overall PSC limit in future years, thereby incentivizing reduced bycatch below the performance standard.

[168] NMFS00038; 2SUPP00044.

[169] NMFS17565; NMFS00039; 2SUPP01363.

[170] 2SUPP00049.

[171] NMFS00039; 2SUPP00044.

[172] NMFS00039; NMFS00079-80.

the pollock fishery effects "less than 1 percent of the chum salmon returns in Western Alaska."[173]

The SIRs and their appendices address salmon bycatch management measures employed since the adoption of the Harvest Strategy EIS[174] as well as current concerns related to declining salmon runs.[175] The extensive administrative record demonstrates that NMFS, in issuing the 2023-24 and 2024-25 Harvest Specifications, carefully considered the health of the salmon stocks in Western Alaska and set the PSC limit for Chinook salmon in accordance with lower salmon abundance as required by the FMP. Plaintiffs' suggestions to the contrary are unavailing.

D. NMFS's Decision Not to Supplement the Harvest Strategy EIS is Based on the Best Available Science and Entitled to Deference.

The process undertaken by the Council and NMFS to set the annual harvest specifications is transparent and driven by science.[176] Unhappy with the outcome, Plaintiffs seek to elevate their own subjective opinions above the agency's expert determinations. But the decision to prepare or not prepare a Supplemental EIS is in the sound discretion of the agency.[177] Here, the administrative record reflects that NMFS, with input from the public and the Council's expert panels, carefully evaluated the best available science and took the requisite "hard look" at new information including updated information on climate change, ocean conditions, and the health of Western Alaska salmon runs.[178] NMFS prepared detailed

[173] NMFS00078-79.

[174] NMFS00611-14; 2SUPP00103-08; 2SUPP01433.

[175] *See, e.g.* NMFS05439-40 (noting declining adult salmon runs throughout the Arctic and Yukon-Kuskokwim region in recent years); NMFS05453-55 ("Noteworthy topics: Factors Affecting 2022 Western Alaska Chinook Salmon Runs & Subsistence Harvest").

[176] *See* Part II.C *supra*.

[177] *Sierra Club*, 701 F.2d at 1037.

[178] *S. Utah Wilderness Alliance*, 542 U.S. at 72-73.

SIRs and determined "the new information available is not of a scale and scope that require an SEIS."[179] This determination is reasonable, consistent with NEPA, and is entitled to deference.[180]

V. CONCLUSION

For the reasons set forth above, APA and UCB respectfully request that the Court deny Plaintiffs' motion for summary judgment and grant the Federal Defendants' and APA's and UCB's cross-motions for summary judgment.

DATED this 19th day of July, 2024.

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[179] NMFS000592; NMFS00045; 2SUPP00046.

[180] *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 ("Deference is particularly important when the agency is making predictions, within its area of special expertise, at the frontiers of science.") (citations and internal quotations omitted).

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 10,475 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(1) and the Court's Scheduling Order at Docket 65.

s/ James C. Feldman
James C. Feldman

CERTIFICATE OF SERVICE

I, **Lisa Britton,** hereby certify that on July 19, 2024, I filed a true and correct electronic original of the foregoing document with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF system. Participants in this Case No. 3:23-cv-00074-SLG who are registered CM/ECF users will be served by the CM/ECF system.

DATED this 19th day of July, 2024, at Seattle, Washington.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS and TANANA CHIEFS CONFERENCE, *Plaintiffs*, CITY OF BETHEL, *Intervenor-Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE *et al.*, *Defendants*, AT-SEA PROCESSORS ASSOCIATION and UNITED CATCHER BOATS, *Intervenor-Defendants.*	Case No. 3:23-cv-00074-SLG

PLAINTIFFS' REPLY BRIEF UNDER LOCAL RULE 16.3

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INTRODUCTION

The Bering Sea and Aleutian Islands ecosystem is in the midst of rapid, unprecedented change, but the Service continues to employ a business-as-usual approach to fisheries management, relying on outdated environmental analyses to support decision-making. With the Service's own experts warning of decreased resilience and reduced productivity, an updated analysis is critical. Yet the Service refuses to undertake that analysis. It attempts to circumvent the requirements of NEPA by deferring to the harvest specifications process, a narrower, non-NEPA process focused on assessing the status of single species or stocks.

Just as egregiously, the Service argues that AVCP and TCC—whose Tribes and communities depend on the resources of the Bering Sea for their survival and ways-of-life—do not have standing to challenge fisheries management decisions affecting those resources. Climate change does not excuse the Service from meeting its NEPA responsibilities; it makes it even more important for the Service to consider the effect of its decisions in a changing world.

ARGUMENT

I. AVCP and TCC have standing.

Contrary to the Service's arguments, AVCP's and TCC's injuries are not solely related to salmon. Doc. 68 at 34-35. Members of AVCP's and TCC's tribes and communities also rely on other marine resources. Doc. 32 at 15-20; Doc. 32-1, ¶32; Doc. 32-5, ¶¶14, 39; Doc. 32-6, ¶¶12, 14. The Service does not—and cannot—dispute that

they have suffered a concrete injury; instead it alleges AVCP and TCC failed to satisfy the causation and redressability elements of standing. Doc. 68 at 32-36. AVCP and TCC have more than met the reduced procedural requirements for causation and redressability in a NEPA case. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) ("Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed"); *W. Watershed Project v. Karyyenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (NEPA is a procedural right, so a procedural standing analysis is applied to claims that an agency violated NEPA). Defendants' reliance on outdated analyses to authorize the removal of 2.0 million metric tons of fish from the Bering Sea and Aleutian Islands ecosystem directly harms AVCP's and TCC's interests in subsistence resources and a healthy marine environment. Doc. 32 at 21-22; Doc. 32-1, ¶14; Doc. 32-3, ¶¶11-13; Doc. 32-4, ¶¶17-19; Doc. 32-6, ¶16 (recognizing salmon spend a significant part of their lifecycle in the ocean).

With respect to causation, while the decline in marine resources is multi-faceted, AVCP and TCC are not required to show that the agency's actions are the sole cause of their injuries. *WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1157 (9th Cir. 2015) ("a litigant challenging an agency action 'need not eliminate any other contributing causes to establish its standing'" (citing *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011)); *see also Ocean Advocs. v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 860 (9th Cir. 2005) (finding the injury fairly traceable to the defendant, even though "other factors may also cause" the injury, because "the link

between the [challenged action] and [the alleged injury] is not tenuous or abstract"). The Service's attempt to fault climate change as the only cause of diminishing ocean resources flouts its stewardship responsibility. The agency itself acknowledges that "[l]arge-scale commercial fishing has the potential to influence ecosystems in several ways," NMFS00233-34; Doc. 32 at 31-33, and admits that "bycatch in the" groundfish fisheries, along with climate warming, "may be factors" in causing decreased Chinook salmon returns. NMFS27678.

AVCP's and TCC's injuries related to salmon declines are traceable to the Service's authorization of fisheries because fishing, through bycatch, directly reduces the number of fish that return to western Alaska rivers to spawn. In 2023 alone, the groundfish fisheries removed 14,616 Chinook salmon, 2SUPP01450, and 116,714 non-Chinook salmon from the Bering Sea and Aleutian Island ecosystem. 2SUPP01447-49.[1] Additively from 2007 to the end of 2023, the groundfish fisheries have removed 471,660 Chinook salmon and over 3.7 million non-Chinook salmon from the ocean, many of which could have made it back to western Alaska rivers to spawn.[2] 2SUPP01450-51; 2SUPP01447-49. This injury is directly traceable to the Service's decision—it authorized the groundfish fisheries to fish in the Bering Sea and Aleutian Islands, and those fisheries killed thousands of salmon. The Service recognized in 2004 that "[i]f

[1] The number of salmon caught as bycatch are found in the first column on the left entitled "Annual with CDQ" on the cited pages.
[2] The last report in the record on salmon mortality is dated March 21, 2024. The numbers cited above do not include the 2024 salmon mortality numbers.

individual [salmon] stocks become so depressed that full closure of direct fisheries is insufficient to enable a rebound in the population, then *any additional mortality, including bycatch*, could negatively impact the stock." NMFS24475 (emphasis added). The injury traceable to the Service's actions is even more pronounced 20 years later in light of a markedly changed ecosystem and weakening salmon returns.

Contrary to the Service's assertion, the legal reasoning in *Flaherty v. Bryson* applies here because the Service's yearly harvest specification decision increases the probability of AVCP's and TCC's injuries. In *Flaherty*, the plaintiffs claimed (1) they were not able to fish for or observe river herring, and (2) due to the decline in river herring as forage, they were less able to fish for or observe striped bass. 850 F. Supp. 2d 38, 48 (D.D.C. 2012). This harm was traceable to the agency's actions even though the decline of the fishery began before the proposed amendment took effect. *Id.* at 50. Further, the court found the depletion of river herring by commercial fishing was clearly traceable to the agency's decision not to restrict river herring catch in the proposed amendment. *Id.* So too here. Every year, the Service's uninformed decision-making materially increases the risk of harm to AVCP's and TCC's subsistence, economic, and cultural interests, and the ability of these resources to rebuild. This harm is traceable to the Service's harvest specification decision, despite the fact the harm began before the 2023-2024 and 2024-2025 harvest specifications were adopted. Additionally, the harm is traceable to the Service's failure to analyze the effects of its management choices on salmon and other marine resources in the context of today's dramatically changed

ecosystem.

The Service's attempt to analogize the facts in *Washington Environmental Council v. Bellon* to the facts here also fails. There, the court found the causal connection between the plaintiffs' injuries and the agency action lacking because the amount of greenhouse gas emissions from oil refineries in Washington state was "scientifically indiscernible" from numerous other independent sources around the world. *Bellon*, 732 F.3d 1131, 1144 (9th Cir. 2013). Here, AVCP and TCC do not allege general injuries caused by the independent action of countless entities globally; the injuries are alleged to be caused in part by the Service's specific decision to authorize the groundfish fisheries in the Bering Sea and Aleutian Islands.

The Service's attempts to diminish its role in AVCP's and TCC's injuries do not defeat redressability. Doc. 68 at 24. As the Service has previously recognized, when salmon stocks are so depressed that direct fishing is closed, as is the case today, the additional bycatch from the groundfish fisheries "negatively impact[s] the stocks[s]." NMFS24475; *see also* Doc. 32 at 39-41 (explaining precipitous declines in salmon stocks that are not meeting escapement goals). Further, its attempt to argue the merits is premature. *See* Doc. 68 at 34-35 (arguments regarding degree of harm). "Requiring the plaintiff to show actual environmental harm as a condition of standing confuses the jurisdictional inquiry [] with the merits inquiry" because "an increased risk of harm can itself be injury in fact sufficient for standing." *Ecological Rts. Found. v. Pac. Lumber Co*., 230 F.3d 1141, 1151 (9th Cir. 2000). Further, "the causal connection . . . need not

be so airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Id.* at 1152.

AVCP and TCC have established redressability because a favorable decision could alleviate some of their injuries related to a lack of marine resources. *See Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) ("a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury"). While there may be multiple causes contributing to the decline in marine resources, the "mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury." *WildEarth Guardians,* 795 F.3d at 1157. For example, allowing any additional salmon to return to western Alaska rivers to spawn alleviates some of AVCP's and TCC's injuries related to declining salmon.

AVCP and TCC have also established redressability for the procedural injury they have alleged—the harm that results when an agency makes an uninformed decision based on outdated NEPA analysis. They are not required to show that further analysis *would* result in a different conclusion; it is enough that it *could*. *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) ("It suffices that, as NEPA contemplates, the [agency's] decision could be influenced by the environmental considerations that NEPA requires an agency to study."). If the Service conducted an EIS for the harvest specifications or an updated supplemental EIS for the strategy overall, it could lead the Service to consider different approaches to setting the harvest specifications, including more precautionary

management. *See, e.g., Ctr. for Biological Diversity v. Blank,* 933 F.Supp.2d 125, 136-38 (D.D.C. 2013) (granting environmental group standing to challenge bluefin tuna management measures, even where quota was not reduced).

II. AVCP and TCC have a right to challenge the lack of an up-to-date environmental analysis.

To determine if an argument is preserved for judicial review, courts examine whether agencies were on notice of the parties' positions and contentions. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006); '*Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1091-1092 (9th Cir. 2006). The requirement's purpose is to give agencies a chance to correct the alleged problems. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002). Parties need not use magic words or a specific legal formulation to ensure the courtroom doors remain open to their claim. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

Defendants misconstrue the record to assert that AVCP and TCC waived their argument that a new EIS was required to remedy the lack of an up-to-date EIS. Doc. 68 at 36 to 39; Doc. 67 at 23-25. A fair reading of the record shows that AVCP and TCC preserved this argument. In their comments, AVCP, TCC, and others specifically raised the lack of any NEPA analysis of the impacts of the agency's harvest specifications decision with a view to the current, drastic changes to the environment. 2SUPP39523-24; 2SUPP37637A; *accord* 2SUPP39516-17. AVCP, TCC, and others explained that there is "no" NEPA document that supplies that analysis. 2SUPP39523; 2SUPP39523-24

(existing EISs "do not consider the dramatic ecosystem transformations . . . during the intervening decade"); 2SUPP01487 ("new or supplemental EIS" legally required). These comments, identifying the lack of an up-to-date NEPA analysis, were sufficient to put the agency on notice of AVCP's and TCC's two legal claims addressing this issue—that either a new EIS or a supplemental EIS is required. *See Dombeck*, 304 F.3d at 898-900 (permitting more refined legal argument on appeal).

Further, contrary to the Defendants' assertions, Doc. 68 at 38-39; Doc. 67 at 25, the agency had independent knowledge of the lack of an up-to-date NEPA analysis to support the harvest specifications decision such that AVCP and TCC would not have needed to raise the issue, *see* Doc. 68 at 38 (acknowledging the agency was "clearly aware of the concern" that the EIS was outdated). Defendants' suggestion that comments alleging an EIS is outdated translate solely into requests for a supplemental EIS misconstrues comments AVCP, TCC, and others submitted. Doc. 68 at 26-27; Doc. 67 at 24-25. The Service's apparent preference to focus on a single remedy for the noticed problem does not amount to waiver of AVCP's and TCC's argument for a new EIS. Neither does the agency's year-over-year practice negate the agency's knowledge of the alleged problem, *see* Doc. 67 at 25.

III. The Service violated NEPA by failing to either prepare an EIS for the annual harvest specifications decisions or a supplemental EIS for the harvest specifications strategy.

Defendants do not dispute that the annual harvest specifications decision is a major federal action for which an EIS is required; instead, they argue that it is considered

in the 2007 harvest specifications EIS. *See* Doc. 68 at 39-41; Doc. 67 at 25-29. While AVCP and TCC agree that an agency may rely on an existing EIS to support the annual decision, the 2007 EIS is severely outdated and does not provide an analysis of the effects of the strategy or annual decision in light of significant ecosystem changes. *See* Doc. 32 at 33-41.

A. There is no EIS analyzing the annual harvest specifications in the context of the significantly changed Bering Sea ecosystem.

Defendants argue the 2007 harvest specifications EIS "was clearly intended to encompass future harvest specifications decisions" applying the harvest strategy. Doc. 68 at 39; Doc. 67 at 28-29. By its own terms, however, the 2007 harvest specifications EIS does not cover specific annual decisions. Even if it did, the 2007 EIS and the 2004 programmatic EIS it relies on are significantly outdated and do not provide an analysis of the effects of authorizing fisheries on the radically changed environment of today. *See* Doc. 32 at 33-41, 45-48; Doc. 66 at 5-8; *see also W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1245 (D.C. Cir. 2018) (recognizing agency may not rely on an outdated EIS when "major federal action" remains).[3]

The 2007 harvest specifications EIS itself states that it does not analyze specific

[3] The Service argues there is no requirement to consider an action in the current environmental context. *See* Doc. 68 at 38. But NEPA plainly requires agencies to analyze the effects of their actions in the context of the environmental conditions existing at the time of the action. *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 409 n.20 (1976) (EIS will consider effect of a project "upon the existing environment"); 40 C.F.R. § 1502.15(b) (EIS must include a description of the "affected environment, including existing environmental conditions").

catch limits or annual decisions beyond 2015. NMFS06557. The fact that an action is in conformity with an initial plan or program is not the end of the inquiry under NEPA. *See N. Alaska Env't Ctr. v. U.S. Dep't of Interior*, 983 F.3d 1077, 1091-92 (9th Cir. 2020); *see also Protect Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1039 (9th Cir. 2019) (EIS may be sufficient as to programmatic assessment but insufficient as to project-level decision). Rather, the court looks to the language in the EIS to determine whether the action analyzed includes a subsequent decision. *See Protect Our Cmtys. Found.*, 939 F.3d at 1039. In this case, although the 2007 harvest specifications EIS analyzes the overall strategy, it explicitly does not consider the effects of annual decisions: "Specific [catch limits] . . . are not the action analyzed in the EIS." NMFS06557; *see also* NMFS06621 (2007 EIS stating "[e]ach year's specifications are subject to a NEPA review"). In fact, the EIS specifically limited its analysis to the effects of applying the harvest specifications strategy only in years "out to, and including, 2015." NMFS06620; *see also* NMFS06627, 06628, 06687, 06797, 06798, 06841. Annual decisions, like the 2023-2024 and 2024-2025 harvest specifications, beyond the 2015 "cumulative impacts horizon," NMFS06620, are not addressed in the 2007 EIS.

Intervenor-Defendants make much of the Service's practice of using SIRs for its annual harvest specifications decisions, arguing it is impractical to complete an EIS each year. Doc. 67 at 29-32. These arguments misconstrue AVCP's and TCC's position. All parties agree the Service is required to analyze its annual harvest specifications decision in an EIS. *See* Doc. 68 at 39 (arguing no EIS is needed for the annual decision because it

is addressed in the 2007 EIS); Doc. 67 at 28-29 (same); Doc. 32 at 26. The Service could either produce an EIS for the annual harvest specifications decisions or it could produce a broader, supplemental EIS for the overall strategy—similar to the 2007 harvest specifications strategy EIS or the 2004 programmatic EIS for the fisheries management plans—as long as that document also analyzes the effects of the annual harvest specifications decisions. In either case, the Service could tier to the EIS in future years, so long as there are not significant changes requiring supplemental NEPA analysis. *See* 40 C.F.R. § 1501.11(b) (2020) (allowing agencies to tier analysis of a project-level decision to a higher-level EIS). Complying with NEPA is neither impractical nor unrealistic.

Although Defendants point to the 2007 harvest specifications EIS to support their annual decisions, they do not address the contents of the 2004 programmatic EIS on which it relies, stating that the 2004 EIS is beyond the scope of the annual harvest specifications decisions. Doc. 68 at 51-52 n.15.[4] But, as they acknowledge, many of the decisions implemented in the annual harvest specifications decision, including the optimum yield range and rules for allocating catch limits, are made in the fisheries management plans, which are analyzed in the 2004 EIS. Doc. 68 at 17, 19; Doc. 67 at 19, 41. Furthermore, as discussed in AVCP's and TCC's opening brief, the 2007 EIS incorporates the 2004 EIS by reference and relies extensively on its analysis. Doc. 32 at

[4] Intervenor-Defendants acknowledge that the 2004 programmatic EIS is "related," but do not address its contents. Doc. 67 at 24.

35 n.7. Because the 2004 EIS is central to the 2007 analysis that Defendants argue is also the EIS for the annual harvest specifications decisions, it is not beyond the scope of this action. *See Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003) (explaining the nature of a programmatic analysis), *opinion clarified*, 366 F.3d 731 (9th Cir. 2004).

B. The Service's reliance on the outdated 2007 harvest specifications EIS was arbitrary.

Even if the 2007 harvest specifications EIS included the 2023-2024 and 2024-2025 harvest specifications decisions, the Service's decision to rely on the 2007 EIS was arbitrary because 1) neither the SIRs nor the harvest specifications process considered the relevant NEPA question—whether conditions today are significantly different from conditions in 2007; and 2) the record shows changes since 2007 are significant and must be analyzed in a supplemental EIS.

1. The Service did not consider whether environmental changes are significant in either the SIRs or the harvest specifications process.

Defendants argue that no supplemental EIS is necessary because the harvest specifications process is designed to consider new information, but this answers the wrong question. Doc. 68 at 45-47, 49; Doc. 67 at 38-41, 45-46.[5] NEPA requires a

[5] Contrary to Defendants' assertions, AVCP and TCC do not argue that an agency may not use a SIR to consider *whether* new information is significant. Doc. 68 at 44; Doc. 67 at 35-36. Rather, AVCP and TCC argue—and NEPA requires—that if new information is significant, it must be analyzed in an EIS. Doc. 32 at 47.

supplemental EIS if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts." *See* 40 C.F.R. § 1502.9(d)(1)(ii) (2020). Neither the SIRs nor the annual harvest specifications documents address this because they do not provide any analysis of how current conditions compare to those in 2007 and explain whether changes in those conditions are significant to the harvest specifications decision. The SIRs state the Service's overall conclusion that a supplemental EIS is not needed because "there is no additional or new information that falls outside the scope of the Harvest Specifications EIS's process for the consideration of new information," but this misses the point. NMFS00592; 2SUPP00079; *see also* NMFS00635. Nowhere has the Service addressed whether changes its own experts described as unprecedented are significant and explained its conclusion. Its decision is therefore arbitrary. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 380-85 (1989) (upholding decision not to supplement where agency reviewed new studies and specifically responded to concerns they raised); *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F.Supp.3d 1063, 1089-90 (D. Alaska 2014).

Instead of providing the required analysis of significance, in the discussion of "new information," the SIRs merely summarize how information is considered during the harvest specifications process. NMFS00590-92; 2SUPP00077-78. The Service quotes from the 2023 SIR, arguing it considered various conditions that "did not represent a significant change relative to the environmental impacts of the harvest strategy analyzed in the Harvest Specification EIS." Doc. 68 at 47 (quoting NMFS00592). The quote,

however, refers only to changes in stock status for target fish stocks, not to any other resources. NMFS00592. Where the 2007 EIS is mentioned in the "new information" section of the 2024 SIR, the Service merely lists—in one sentence—categories of resources considered in the EIS without explaining whether information relevant to those resources has changed significantly. 2SUPP00081. Nowhere in the SIRs does the Service address the significance of marine heatwaves, changes in food web dynamics, or decreasing productivity throughout the ecosystem.

Similarly, in discussing "new circumstances," the SIRs provide a list of amendments to the fisheries management plans, changes to seabird bycatch measures, and Endangered Species Act actions, but do not discuss what information has changed since 2007 related to the regulated resources and why it is, or is not, significant. NMFS00593-627; 2SUPP00081-135. With respect to seabirds, for example, the SIRs discuss seabird avoidance and bycatch measures, and refer to the ecosystem status reports. *See* NMFS00619-21; 2SUPP00117-20. The 2023 SIR does not mention the 2007 EIS or its assessment of seabirds at all. *See* NMFS00619-21. Although the 2024 SIR concludes, in its discussion of seabirds, that the annual harvest specifications will not affect the environment in a manner significantly different from that considered in the 2007 EIS, it does not support that conclusion with any explanation. 2SUPP00117. Without addressing recent information about seabird die offs and explaining whether, for example, the importance of prey interactions with fisheries are different when birds are nutritionally stressed, the Service has not met its NEPA obligation to make a reasoned

decision about the significance of the information. *See Marsh*, 490 U.S. at 378; *see also* Doc. 32 at 38 (discussing significance of seabird information).

For marine mammals, the SIRs limit their discussion to direct interactions with fishing gear (entanglements, collisions, bycatch), and endangered species actions. *See* NMFS00617-19, 00622-28; 2SUPP00113-117, 00120-36. There is no mention of recent, large-scale unusual mortality events. Neither SIR describes whether they are significant or affect the 2007 analysis of harvest specifications.

Similarly, the discussion of salmon describes changes in bycatch measures and explains that salmon status and bycatch is considered in stock assessments and ecosystem reports. NMFS00611-14; 2SUPP00103-08. But there is no comparison of salmon stock status or subsistence needs today with that of 2007. Although the 2024 SIR asserts that information about salmon indicates the harvest specifications will not have significantly different effects than those considered in the 2007 EIS, it does not support this conclusion with an analysis of what has changed since that time. 2SUPP00106-07. Without a reasoned explanation, the decision is arbitrary. *See Marsh*, 490 U.S. at 378.

Nor do the stock assessments and ecosystem reports themselves, cited by Defendants and relied on in the SIRs, analyze the significance of new information relative to the 2007 analysis. *See* Doc. 68 at 46 n.12 (stock assessments); *id*. at 49 n.14 (ecosystem status reports and economic assessments); Doc. 67 at 39 n.138 (ecosystem status reports); *id*. at 41 n.151-153 (ecosystem status reports and marine mammal stock assessments). While AVCP and TCC agree that the ecosystem status reports provide a

"wealth of information" about current conditions in the Bering Sea and Aleutian Islands, Doc. 67 at 40, these reports do not even mention the 2007 harvest specifications EIS. *See, e.g.*, NMFS05430-656; 2SUPP06354-94. Nor do the stock assessments. *See, e.g.*, NMFS01264-315; NMFS02496-655; 2SUPP05276-325; 2SUPP05803-991. Instead, the stock assessments focus on the status of single target species to calculate catch limits under current rules. *See* Doc. 32 at 43-44. In fact, the "risk tables" Defendants cite are not used to consider the significance of the fisheries' effects on the ecosystem, but to assess the "risk of the [acceptable biological catch] exceeding the true [overfishing limit]" for that stock or complex. NMFS35867-68. Neither the stock assessments nor the ecosystem status reports analyze how current ecosystem information compares to 2007 or state any conclusion about the significance of those changes to the overall harvest specifications strategy or the specific annual decisions. The Service must complete that analysis somewhere and explain its decision. *See Marsh*, 490 U.S. at 378.

2. New information describing unprecedented ecosystem change is significant and must be considered in an EIS.

If the Service had compared the current state of the Bering Sea and Aleutian Islands ecosystem with that described in the 2007 harvest specifications EIS and the 2004 programmatic EIS it relies on, the agency could not rationally have concluded the changes were insignificant or irrelevant. While Defendants attempt to cast this case as AVCP's and TCC's disagreement with the Service's experts, Doc. 68 at 52; Doc. 67 at 45, it is the Service's own experts who described the changes in the Bering Sea and

Aleutian Islands ecosystem as unprecedented and unforeseen. *See, e.g.*, NMFS05440; SUPP01288; Doc. 32 at 14, 16-18 (describing instances where Service experts described unprecedented, dramatic, or record-setting changes). These ecosystem shifts and record low salmon runs do not fall within the range of effects analyzed in the 2007 harvest specifications EIS or the 2004 programmatic EIS it relies on. They are significant and relevant to the harvest specifications decision and must be analyzed in a supplemental EIS. 40 C.F.R. § 1502.9(d)(1)(ii) (2020).

a. Changed ocean conditions.

The Service argues that climate change is not new and was considered in the 2007 harvest specifications EIS. Doc. 68 at 47-48. It is true that the 2007 EIS discussed climate change and regime shifts, but it did not—and could not—discuss the unprecedented, unanticipated loss of sea ice and changes in physical oceanography that have occurred since that time. *See* Doc. 32 at 35-37; *see also* 2SUPP02536 ("Recent years have included . . . the lowest Bering Sea ice extent in 5500 years . . . ."). Furthermore, when the Service looked at ecosystem changes in a 2015 SIR assessing whether the 2004 programmatic EIS should be supplemented, one of the key factors it used to identify significant change related to a resource was whether changes fell "within the range of variability." NMFS23452-54, 23444. It concluded that changes in ecosystem indicators were not significant at that time because they were within the three-to-five-year range of natural variability and generally "within one standard deviation of the historic mean." NMFS23415; *see also* NMFS23444, 23435. Whether or not this

conclusion was correct at the time, recent changes in ecosystem indicators fall outside the range of natural variability, with many indicators more than one standard deviation above or below the mean.[6] *See* Doc. 32 at 35-37; *see also* NMFS05437; NMFS03398-99; 2SUPP06359-60. By the Service's own standard, these changes are significant. As agency experts explained, they have far-reaching effects for fisheries management decisions and could require a more precautionary approach to fisheries management. *See* SUPP00336 (research about recent collapses "may help inform the need for near-term precautionary management decisions"); *see also* Doc. 32 at 14-17, 37 (describing ecosystem changes); Doc. 66 at 7 (same).

The Service attempts to distinguish *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998), which recognized the common-sense proposition that an EIS prepared before a significant event occurs could not analyze that event. Doc. 68 at 48. In that case, the Forest Service attempted to rely on a programmatic EIS for a forest plan to support a later timber sale. The court rejected the attempt because the programmatic EIS did not analyze the effects of a fire—the largest fire in the history of the forest—that occurred after the EIS was completed. *Blue Mountains Biodiversity Project*, 161 F.3d at 1214. Similarly, in this case, the 2007 and 2004 EISs recognize trends in ocean conditions, but they do not—and cannot—address the effects of the unprecedented, unforeseen, record-setting events that have occurred

[6] The standard the Service employed in the 2015 analysis applied a more stringent standard than NEPA, but even under that elevated standard, the changes today are plainly significant.

recently and are continuing to affect the ecosystem's productivity and resilience. *See* Doc. 32 at 35-37; Doc. 66 at 7.

b. Seabird and marine mammal mortality.

With respect to seabirds and marine mammals, the Service makes only a general statement that the 2007 EIS considered the impacts of the harvest strategy on seabirds and marine mammals, Doc. 68 at 48, but does not explain how the EIS could have considered the die-offs and mortality events the Service's own experts described as unprecedented in scale.[7] *See* Doc. 32 at 17, 37-39. In multiple years since 2007, measures of seabird breeding success have been below the mean at the same time large die-offs occurred, with starvation identified as the cause of death. *See* NMFS05437 (multivariate seabird breeding index); SUPP01285, 01329. Marine mammal deaths were likewise attributed to malnutrition for whales, SUPP01083, and, for seals, to loss of sea ice and competition for prey, SUPP01084. Notably, some species of groundfish are important prey for ice seals. NMFS23431. As explained in AVCP's and TCC's opening brief, the 2007 EIS acknowledges that fisheries can affect seabirds and marine mammals, not only through bycatch or collisions, but also by dispersing or removing prey. Doc. 32

[7] The Service also argues that the interaction between eiders and fishing vessels is not new because the 2007 EIS recognized a slight overlap in eider range and groundfish fisheries. Doc. 68 at 48 n.13. The 2007 EIS predicted there would be "no overlap" between eider habitat and groundfish fisheries and therefore found fishing effects unlikely. NMFS26330; *see also* Doc. 32 at 38. The 2023 SIR acknowledges two fatal collisions between eiders (spectacled and Steller's) and fishing vessels are the first recorded, which triggered reinitiation of Endangered Species Act consultations. NMFS00620. Nonetheless, the SIR did not explain whether the information is significant. *Id.*

at 38-39. Those effects may have different or more severe consequences in light of recent stresses on seabird and marine mammal populations and must be considered in a supplemental EIS.

c. Salmon declines.

Finally, with respect to salmon declines, Defendants attempt to deflect responsibility for even analyzing how fishing affects depleted salmon stocks, asserting that bycatch is not the sole cause of declines and is regulated—points that are not in dispute. *See* Doc. 68 at 16-18; Doc. 67 at 42-45.[8] A comparison of the status of salmon stocks at the time the 2004 and 2007 EISs were written with the state of salmon today shows significant change. *See* Doc. 32 at 39-41. In 2007, escapement goals were generally being met and subsistence, recreational, and commercial fishing were permitted. NMFS06712, NMFS06704. The 2004 EIS reported an average of 300,000 Chinook salmon harvested annually for commercial and subsistence use from 1998-2000. NMFS26249. Today, there is almost no subsistence or commercial Chinook fishing in western and interior Alaska; by comparison, bycatch is a significant source of the catch of Chinook salmon from these regions. *See* Doc. 32 at 18; Doc. 37-1 at 16 n.33; *see also* 2SUPP00238 (western Alaska adult run abundance for chum salmon "declined to record low levels during 2020-2022"). In addition, despite the Service's own studies identifying ocean conditions among the causes of salmon declines, the Service has not analyzed at all

[8] Intervenor-Defendants take issue with AVCP's and TCC's characterization of bycatch in the pollock fishery. Doc. 67 at 41. But AVCP and TCC cite the same regulations as Intervenor-Defendants to explain how bycatch is regulated. Doc. 32 at 29 n.6.

whether its fisheries management decisions, including the harvest specifications, exacerbate these problems or support greater resilience. Doc. 32 at 41-42. These changes paint a significantly different picture than the Service analyzed in 2007.

In the context of these severe declines, as the Service has previously recognized, all sources of mortality are important: when salmon stocks are "so depressed that full closure of direct fisheries is insufficient to enable a rebound in the population, then *any additional mortality, including bycatch*, could negatively impact the stock." NMFS24475 (emphasis added); *see also* NMFS18142 (acknowledging "[a]ny additional fish returning to those rivers improves the ability to meet escapement goals"). It is in that context that the Service must analyze the effect of its fisheries. Changes in salmon abundance are significant and bycatch exacerbates declines. *See Blue Mountains Biodiversity Project*, 161 F.3d at 1213 ("The proper evaluation should identify the impact . . . from [the project] on the fisheries habitat in light of the documented increases" from other sources, not whether the project's effect is greater or lesser than other effects).

CONCLUSION

For the foregoing reasons, AVCP and TCC respectfully ask that the Court 1) declare the 2004 programmatic EIS and the 2007 harvest specifications EIS are outdated, and the Service may not rely on them as the sole NEPA analysis for future harvest specifications decisions, 2) remand the 2023-2024 and 2024-2025 groundfish harvest specifications decisions to the Service to complete a new or supplemental EIS,

and 3) consider supplemental briefing to address appropriate relief relating to fishing activities pending the completion of a new or supplemental EIS.

In addition, the parties were not able to resolve the merits or remedies in settlement. AVCP and TCC anticipate working with the other parties to propose a modification of the current briefing schedule to allow the Court to consider the merits and full relief issues together.

Respectfully submitted this 16th day of August, 2024.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 5,700 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(1).

s/ Katharine S. Glover
Katharine S. Glover

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, a copy of the foregoing PLAINTIFFS' REPLY BRIEF UNDER LOCAL RULE 16.3 was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Katharine S. Glover
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