



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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**Litigation Updates for the
June 2024 Meeting of the North Pacific Fishery Management Council**

Groundfish Forum v. NMFS

Parties:

Plaintiff: Groundfish Forum, Inc.

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

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

Case Activity:

On December 19, 2023, Plaintiff filed a complaint in the United States District Court for the District of Alaska challenging NMFS Alaska Region's implementation of Amendment 123 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area. On April 26, 2024, Plaintiff filed its opening brief.

Status/Next Steps:

Federal Defendants and Defendant-Intervenors must file their respective answering briefs by June 27, 2024. Plaintiff may file an optional reply brief 14 days later. Since this case involves review of an agency action under the Administrative Procedure Act, the judge will decide the case based on the parties' briefing, and oral argument if requested by a party and scheduled by the court.

Attached: Plaintiff Groundfish Forum's Opening Brief.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GROUND FISH FORUM, INC.,

Plaintiff,

v.

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

Defendants.

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

OPENING BRIEF BY PLAINTIFF

(Local Civil Rule 16.3)

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Table of Abbreviations

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

I. INTRODUCTION

The National Marine Fisheries Service (“NMFS”) violated the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) and the National Environmental Policy Act (“NEPA”) by approving Amendment 123 to the fishery management plan (“FMP”) for groundfish in the Bering Sea and Aleutian Islands (“BSAI”) Management Area (the “Groundfish FMP”). Amendment 123 singles out one sector operating under the Groundfish FMP—called the “Amendment 80” sector—and imposes new and novel halibut bycatch restrictions on that sector alone, at an *annual* cost of up to \$100 million.¹ NMFS’s analysis confirms Amendment 123 is a net economic *loss* to the nation and provides no conservation benefit to the halibut stock. NMFS’s decision shirks, evades, and outright disregards its statutory obligations under the MSA and NEPA.

Bycatch is an unavoidable part of every fishery. The MSA requires each FMP to include measures to “minimize” bycatch, but only “to the extent practicable.” 16 U.S.C. § 1853(a)(11) (Required Provision 11). If those bycatch measures grant or restrict fishing privileges, an “allocation” occurs, and the MSA requires NMFS to allocate the grant or restriction of privileges “fairly and equitably” among an FMP’s fishing sectors. *Id.* §§ 1851(a)(4) (National Standard 4), 1853(a)(14) (Required Provision 14).

Harvest limits for targeted fishing for halibut (often called the “directed halibut fishery”) are not set by the MSA or the Groundfish FMP, but are set by the International Pacific Halibut Commission (“IPHC”) pursuant to treaty. Under the Groundfish FMP,

¹ Plaintiff Groundfish Forum represents the Amendment 80 sector.

halibut caught by the groundfish sectors is considered bycatch, or “prohibited species catch” (“PSC”). By regulation, halibut PSC must be discarded—dead or alive.

The Groundfish FMP allocates the harvest of target stocks (such as Pacific cod) to various sectors in the fishery. The Groundfish FMP also allocates halibut PSC limits to the four primary groundfish sectors: Amendment 80, the trawl limited access sector, the non-trawl sector, and the Community Development Quota (“CDQ”) Program. 50 C.F.R. § 679.21(b) (allocating halibut PSC limits by sector). When a sector exhausts its halibut PSC allocation, that sector is shut down for the season. *Id.* § 679.21(b)(4).

In 2016, NMFS and the North Pacific Fishery Management Council (the “Council”) finalized Amendment 111 to the Groundfish FMP to comprehensively reduce halibut PSC limits across the four primary sectors. NMFS treated Amendment 111 as “an allocation of fishing privileges [that] must be consistent with National Standard 4.” NOAA036973-74. Amendment 111 imposed the largest PSC reduction (25%) on the Amendment 80 sector, recognizing that new tools voluntarily developed by the fleet made these reductions possible but that “greater reductions were *not practicable* for the Amendment 80 sector.” NOAA001594 (emphasis added). Those tools have significantly minimized halibut bycatch, which is now less than 1% of the Amendment 80 sector’s total catch. NOAA053022. Halibut bycatch from all groundfish fisheries represents only about 10% of all halibut caught annually. NOAA059414.

Unfortunately, NMFS and the Council decided to “send[] a message that no good deed goes unpunished.” NOAA055166. Rather than stop with the practicable limitations

of Amendment 111, they proceeded to approve Amendment 123—the subject of this litigation. Amendment 123 started with a Council proposal to impose new “abundance-based” halibut PSC restrictions that would apply to all of the primary sectors in the Groundfish FMP. The concept was that in years where halibut abundance was lower, there be a corresponding reduction in each sector’s halibut PSC allocation. The Council hoped this new approach would protect the halibut stock and provide more opportunity for the directed halibut fishery. NOAA035106.

But these “hopes” failed to “find a ‘science based’ answer.” *Id.* Four years into evaluating the idea, NMFS and the Council, in 2019, released modeling results in a preliminary environmental impact statement (“EIS”) showing that abundance-based management would “have very little impact on Pacific halibut spawning biomass” and “the implementation of abundance based management of halibut PSC is an allocation decision rather than a conservation decision.” NOAA042367. NMFS’s analysis also showed that any hypothetical benefit to the directed halibut fishery was offset by much greater losses to the groundfish sectors. *Id.* In short, the benefits did not justify the burden and that should have been the end of abundance-based management.

But the Council forged ahead anyway, goaded by halibut groups seeking more bycatch restrictions. *See* NOAA035106, 035118. Claiming a need for “simplifications,” the Council pivoted to placing the entire burden of abundance-based management on the Amendment 80 sector. NOAA043184. But these “simplifications” did not fix the identified flaws. They just papered them over. The *revised* EIS erased inconvenient

conclusions (*e.g.*, “abundance based management is an allocation decision rather than a conservation decision”), “excised” all discussion of allocating the new restrictions across the sectors, proposed *only* alternatives that allocated the entire burden to the Amendment 80 fleet, and then retrofitted the EIS’s purpose and need statement to match those single-minded alternatives. NOAA001966, 001979, 002110. NMFS then approved the decision, pronouncing that “this action is *not* an allocation.” NOAA001139 (emphasis added).

NMFS’s action is patently arbitrary and violates the MSA and NEPA. *First*, NMFS has a statutory duty under National Standard 4 and Required Provision 14 of the MSA to ensure that any allocation of fishing privileges or restrictions is “fair and equitable.” 16 U.S.C. §§ 1851(a)(4), 1853(a)(14). NMFS shirked that duty by singling out the Amendment 80 sector to bear the entire burden of its new “abundance-based” approach and then arbitrarily pretending that its decision was “not an allocation.” This alone warrants vacatur of Amendment 123.

Second, Amendment 123’s restrictions are impracticable. In Amendment 111, NMFS *already* concluded that additional restrictions were “not practicable” for the Amendment 80 sector. The record here demonstrates that no new tools are available to the fleet, meaning that Amendment 123’s new halibut PSC restrictions can only be achieved by significantly reducing fishing for target stocks. NMFS’s own analysis confirms the costs will be hundreds of millions of dollars, causing some Amendment 80 firms to “exit the fishery” (*i.e.*, go bankrupt). NOAA054918. “Practicability” has no

meaning or limit if it can be satisfied by ratcheting down a fishery’s effort to the point of insolvency. For this reason, too, Amendment 123 should be vacated.

Third, NMFS violated NEPA. ““The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”” *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (citation omitted). There should be no dispute that a reasonable alternative—indeed, a required alternative—for Amendment 123 was to spread the burden of any necessary abundance-based halibut PSC restrictions fairly and equitably across all the sectors in the Groundfish FMP, as was done in the Amendment 111 NEPA process. Instead, NMFS arbitrarily “excised” all such alternatives from the EIS. Deleting viable alternatives from an EIS does not provide the “[i]nformed and meaningful consideration of alternatives” required by NEPA. *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

For these reasons, and those set forth below, Amendment 123 is arbitrary, capricious, and contrary to law, and it should be vacated.

II. BACKGROUND

A. The MSA’s Fishery Management Framework.

The MSA creates a “national program for the conservation and management of the fishery resource.” 16 U.S.C. § 1801(a)(6). The Act establishes eight Regional Fishery Management Councils, each of which prepares FMPs (and amendments to FMPs) for each fishery under its authority. *Id.* § 1852(a), (h)(1). The Secretary of Commerce, acting through NMFS, reviews each FMP or amendment “to determine whether it is consistent

with the [Act’s] national standards, the other provisions of th[e] chapter, and any other applicable law.” *Id.* § 1854(a)(1).

All FMPs and amendments “shall be consistent” with the MSA’s 10 “National Standards” (*id.* § 1851(a)(1)-(10)) and must include the MSA’s 15 “Required Provisions” (*id.* § 1853(a)(1)-(15)). As relevant here, National Standard 4 and Required Provision 14 address the obligation to allocate fishing privileges and restrictions fairly and equitably among an FMP’s sectors. *Id.* §§ 1851(a)(4), 1853(a)(14). National Standard 9 and Required Provision 11 address the requirement to minimize bycatch to the extent practicable. *Id.* §§ 1851(a)(9), 1853(a)(11).

B. The Amendment 80 Sector and Halibut Bycatch Reduction Measures.

The Groundfish Forum is a nonprofit trade association based in Seattle, Washington, representing five companies that collectively operate all the vessels in the Amendment 80 sector.² Groundfish Forum members supply seafood to the United States and other markets worldwide. NOAA053016. The Amendment 80 sector has received Responsible Fisheries Management and Marine Stewardship Council certification for environmental sustainability. *Id.*

The Amendment 80 sector is one of several fishing sectors governed by the Groundfish FMP. NOAA000510. These fishing sectors “cannot be prosecuted without some level of halibut bycatch because groundfish and halibut occur in the same areas at

² Groundfish Forum’s members are directly regulated by Amendment 123 and have standing to challenge NMFS’s decision and faulty environmental analysis. *See* Declaration of Christopher Woodley ¶¶ 2-22.

the same times and no fishing gear or technique has been developed that can harvest commercial quantities of groundfish while avoiding all halibut bycatch.” NOAA000447.

The Amendment 80 program was created in 2008 as an initiative “by the Council and NMFS to reduce bycatch and discard of fish species in the BSAI non-pollock trawl groundfish fisheries.” 72 Fed. Reg. 52,668, 52,669 (Sept. 14, 2007). Among other things, the Amendment 80 program establishes “allocations” of both target catch and PSC. *Id.* at 52,671-72. In 2008, the Amendment 80 halibut PSC allocation was reduced to 2,525 mt, followed by a series of additional annual stair-step reductions to 2,325 mt in 2012, NOAA053313, followed by an additional 25% reduction (more than any other sector) in Amendment 111 to 1,745 mt in 2015. NOAA001589.

The reductions implemented by Amendment 111 were made possible by a “suite of tools to reduce halibut bycatch” developed by the Amendment 80 sector in cooperation with the Council. NOAA038181. These strategies include fleet communication, the use of small test tows, reduced night fishing, the use of excluders, and “deck sorting.” *Id.* Deck sorting, in particular, has been very effective at reducing halibut bycatch mortality by allowing halibut that are incidentally caught to be sorted on deck and returned to the sea as soon as possible. *See* NOAA001988; NOAA002058. Amendment 111 recognized that these measures imposed significant costs on the industry and that further bycatch reductions were “not practicable and would reduce the net benefit to the nation.” NOAA001590; NOAA001594 (“The Council considered, and rejected, alternatives that would have adopted greater reductions in the PSC limit for the Amendment 80 sector.”).

Consistent with Amendment 111, the Amendment 80 sector has indeed minimized bycatch to the extent practicable. In 2022, the Amendment 80 sector was able to catch approximately 335,000 mt of target groundfish, with a bycatch rate of only about 1 kg of halibut for every 214 kg of groundfish (or about a 0.4% bycatch rate). NOAA053022. The Pacific halibut stock has been stable since 2012, at around 100,000 mt, and is not overfished. NOAA053020-21.

C. Amendment 123’s Abundance-Based Management.

In 2015, the Council started “exploring ways” to link halibut abundance to halibut PSC levels. NOAA038263. The Council established a working group (the “ABM Workgroup”), which produced a discussion paper in April 2016. NOAA038674. The paper explained that current PSC limits “are allocated amongst” the BSAI sectors and that “[a] policy decision in the development of alternatives will be to either retain the Status Quo sectors, allocations and structure or to modify them.” NOAA038698-99. The Council reviewed this paper, prepared a draft statement of purpose and need, and directed the ABM Workgroup to describe “the potential implications of abundance-based halibut PSC allocations using the proportional allocations to the four sectors defined under Amendment 111 as the basis for structure and comparison.” NOAA038894.

Over time, the ABM Workgroup produced multiple revised discussion papers. *See* NOAA039089 (September 2016); NOAA040097-98 (October 2017); NOAA040445 (March 2018). Each paper utilized the status quo allocation of halibut PSC to the BSAI sectors. *See* NOAA0039133; NOAA040145-46; NOAA040086; NOAA040476-77. In

October 2018, the Council revised the alternatives presented in the discussion paper explaining that “[t]he analysis should clearly demonstrate the effects of the alternatives on the resulting allocations to the Amendment 80, BSAI trawl limited access, non-trawl, and CDQ sectors.” NOAA040849. The Council and NMFS considered “allocating additional PSC to good performers or reallocating PSC from poor performers”—a decision requiring “close scrutiny.” NOAA041469. In September 2019, the ABM Workgroup produced a preliminary draft EIS. *See* NOAA041691. The draft explored a no-action alternative and two alternatives for indexing PSC limits to halibut abundance for all BSAI groundfish sectors based on status quo allocations. NOAA041741-42.

This preliminary draft EIS also showed that abundance-based management was not likely to have any measurable impact on halibut biomass. NOAA041940. As a result, abundance-based management would be “an allocation decision rather than a conservation decision.” NOAA01490. The Council’s scientific and statistical committee (“SSC”) “concur[red] with the analysts’ conclusion” that abundance-based management “is an allocation decision rather than a conservation decision.” NOAA042893. The SSC also raised serious concerns about the premise of the Council’s abundance-based method, finding that “the groundfish fleet’s ability to avoid halibut is poorly related to indices of abundance.” *Id.* Instead, the relationship between bycatch levels and halibut surveys of biomass “ranges from moderate to non-existent.” *Id.*

It was in December 2019—directly after reviewing the analysis in the preliminary draft EIS—that the Council reversed course and explored avenues to “streamline” and

“simplify” the action. *See* NOAA043046; NOAA035122. In February 2020, the State of Alaska’s Council representative proposed a motion, passed by the Council, that singled out the Washington-based Amendment 80 sector for abundance-based management. NOAA043160-62; *see also* NOAA035146 (discussing “aggressive campaign by some stakeholders to dismiss impacts to Amendment 80 sector as only affecting five corporations in Seattle”). The intent was that “[t]he action will now focus exclusively on the Amendment 80 sector.” NOAA043184.

By the October 2020 Council meeting, Council staff had prepared a revised preliminary draft EIS with alternatives focused solely on reductions to the Amendment 80 sector. NOAA044498; NOAA044280. In addition to deleting the alternatives related to other sectors, the revised draft deleted the discussion of status quo allocation of PSC across the sectors. *See* NOAA044498-800. On October 13, 2020, the Council passed a motion to revise the purpose and need statement, to match (in retrospect) the already-prepared Amendment 80-only alternatives. NOAA045065. In April 2021, the Council reviewed a revised preliminary draft EIS and made modifications to the options under the alternatives. *See* NOAA046377-80. Finally, in December 2021, the Council took final action, imposing the new abundance-based halibut PSC restriction solely on the Amendment 80 sector. *See* NOAA047600; NOAA047812-14. On November 24, 2023, NMFS published the final rule implementing Amendment 123, reducing the Amendment 80 sector’s halibut PSC allocation by as much as 35%. NOAA001093.

III. STANDARD FOR JUDICIAL REVIEW UNDER THE MSA

“Actions taken by the Secretary under regulations implementing fishery management plans are ‘subject to judicial review to the extent authorized by, and in accordance with,’ the Administrative Procedure Act (APA).” *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (quoting 16 U.S.C. § 1855(f)). “Judicial review under the APA allows courts to ‘hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A)). “To determine whether the agency’s decision was arbitrary and capricious, the court must consider whether the decision was based on a consideration of the relevant factors required by the statute” *Id.* An agency’s decision may “be found to be arbitrary and capricious ‘if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency’s expertise.’” *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1067 (9th Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“*Motor V.*”), 463 U.S. 29, 43 (1983)).

IV. ARGUMENT

A. **Amendment 123 Improperly Allocates the Entire Burden of Abundance-Based Management to the Amendment 80 Sector.**

1. **Amendment 123 Is an Allocation.**

In the final rule, NMFS disavows the application of National Standard 4 (and says

almost nothing about Required Provision 14), claiming instead that Amendment 123 “is not an allocation under National Standard 4.” NOAA001139. NMFS is wrong.

National Standard 4 applies to conservation and management measures that “allocate or assign fishing privileges among various United States fishermen.” 16 U.S.C. § 1851(a)(4). “An ‘allocation’ is a ‘direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals.’” *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at *13 (D. Alaska June 21, 2022) (quoting 50 C.F.R. § 600.325(c)(1)). Allocations “include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational and commercial fishermen, assignment of ocean areas to different gear users, and limitation of permits to a certain number of vessels or fishermen.” *Id.* (quoting *Nat’l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 131 (D.D.C. 2002)).

Amendment 123 is an allocation. It applies to an “identifiable, discrete user group”—the Amendment 80 sector—and imposes abundance-based restrictions exclusively on that sector. 50 C.F.R. § 600.325(c)(1). These restrictions subject the Amendment 80 sector to different prohibited species “catch limits” (PSC) or “different quotas.” *Id.* If reached, these limits require the sector to stop fishing, eliminating the “opportunity to participate” in the groundfish fishery for the rest of the year. *Id.*

Indeed, NMFS determined in Amendment 111 that the assignment of halibut PSC is “an allocation of fishing privileges and must be consistent with National Standard 4.”

NOAA036973-74. It rigorously applied National Standard 4 to that allocation of halibut PSC to ensure it was fair and equitable. *See* NOAA001592. Even in the Amendment 123 process, NMFS and the Council both consistently referred to the assignment of PSC as an “allocation”—up and until their pivot to single out the Amendment 80 sector.³

NMFS’s conclusion that Amendment 123 is “not an allocation” is therefore a complete reversal from Amendment 111 and its stated positions during the Amendment 123 process. NMFS reversed course without even acknowledging its prior contrary positions or explaining why it reached the exact opposite conclusion at the end of the Amendment 123 process. This is a hallmark of arbitrary agency action. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.”); *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (“Unexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change.” (quotations and citation omitted)).

Nor could there be a reasoned explanation for NMFS’s new position. NMFS’s own EIS still explains—despite the efforts to “excise” discussions about “allocation”—

³ In addition to altering the halibut PSC allocations, Amendment 123 also allocates halibut catch from the Amendment 80 sector to the directed halibut fishery. The Council’s original “objectives” for abundance-based management include “providing opportunity for the directed halibut fishery,” NOAA040249-30, and this is “ultimately an allocation issue” driven by “directed halibut fishery users” who sought to benefit from a larger reduction in the Amendment 80 sector’s halibut PSC allocation. NOAA035106.

that Amendment 123 “allocate[s] fishing privileges (in this case, a halibut PSC that varies with abundance),” NOAA004140, and is “intended” to “allocate fishing privileges,” NOAA003876. As one Council member explained when voting for Amendment 123: “we’re trying to . . . allocate fishing privileges” NOAA055172; NOAA035101 (“ABM is primarily an allocative action.”). Indeed, NMFS *continues* to refer to its apportionment of halibut PSC as “allocations of PSC.” 89 Fed. Reg. 17,287, 17,303 (Mar. 11, 2024). In short, NMFS’s conclusion that Amendment 123 “is not an allocation” is contrary to the record, all applicable law, and NMFS’s prior (and current) practice. Amendment 123 should be vacated for this error alone.

2. Amendment 123 Is Not Fair and Equitable.

After concluding that Amendment 123 is “not an allocation,” NMFS summarily claimed that “even if it were” an allocation “it is fair and equitable and consistent with National Standard 4 . . . due to the high proportion of the halibut PSC used in that sector.” NOAA001139. This, too, is arbitrary, capricious, and contrary to law.

NMFS’s obligation under National Standard 4 and Required Provision 14 is to ensure that the Amendment 123 allocation is “fair and equitable to all such fishermen,” 16 U.S.C. § 1851(a)(4), and that the burden of the restriction is allocated “fairly and equitably among the commercial, recreational, and charter fishing sectors,” *id.* § 1853(a)(14); *Yakutat*, 407 F.3d at 1059. This requires an “analysis” of “[a]llocation schemes considered, but rejected by the Council,” how the allocation scheme is “rationally connected to the achievement of [Optimum Yield] or with the furtherance of a

legitimate FMP objective,” and how the allocation results in “the advantaging of one group to the detriment of another” that is justified by the need to achieve the “objectives of the FMP.” 50 C.F.R. § 600.325(c)(2)-(3)(i)(A). The allocation “may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups.” *Id.* § 600.325(c)(3)(i)(B). This requires “an initial estimate of the relative benefits and hardships imposed by the allocation, and [a comparison of] its consequences with those of alternative allocation schemes[.]” *Id.*

None of that required analysis occurred for Amendment 123. Instead, NMFS and the Council decided halfway through the process to single out the Amendment 80 sector for the new “abundance-based” restrictions. Although their own analysis concluded that abundance-based management was just an allocation to the directed halibut fishery (an allocation that had no conservation benefit and net negative economic consequences), they simply deleted that conclusion. *Compare* NOAA017429 *with* NOAA004121. They also excised the alternatives that would have allocated the burdens of abundance-based management across the other Groundfish FMP sectors, with the intended result that “[t]hose other sectors would no longer be directly regulated by the alternatives under consideration.” NOAA004016. Because no other alternatives were on the table, there was not even a basis in the record for an analysis of the “fairness” or “equities” of NMFS’s action. In other words, a “fair and equitable” analysis can only occur by evaluating and comparing impacts and benefits *across the relevant sectors*. *See United Cook*, 2022 WL 2222879, at *15 (National Standard 4 violated where “an explanation as to why

recreational fisherman have carte blanche to fish for salmon stocks covered by the FMP is noticeably absent” and “[a]n assessment of those privileges as compared to the prohibition applied to commercial fisherman also was not considered”). In any event, singling out and imposing hundreds of millions of dollars of costs on *one* sector under a multi-sector FMP cannot in any true sense of the term be “fair and equitable.”

Before Amendment 123, Amendment 111 allocated halibut PSC across the primary Groundfish FMP sectors, and that allocation was “fair and equitable . . . for each sector based on an evaluation of what is practicable for that sector.” NOAA001592; NOAA053985 (Amendment 111 “assign[ed] allocations of halibut PSC limits” across Groundfish FMP sectors “in a manner that is fair and equitable and consistent with National Standard 4”). Amendment 123 alters that prior equitable allocation, substantially reducing the Amendment 111 allocation for *only* the Amendment 80 fleet, with no analysis of what was practicable, possible, or reasonable for other sectors. The Council’s own analysis showed that any decision “allocating” or “reallocating” PSC by sector was “an action by NMFS that is subject to close scrutiny.” NOAA041469. Yet no such scrutiny is in the record. NMFS cannot plausibly find—and did not, in fact, find—that Amendment 123 allocates halibut PSC restrictions fairly or equitably among sectors. NMFS therefore “entirely failed to consider an important aspect of the problem”—another hallmark of arbitrary and capricious agency action. *Motor V.*, 463 U.S. at 43.

Finally, NMFS gave a half-hearted nod to Required Provision 14, claiming that it was “equitable” to “require lower bycatch levels during times of low abundance given

that the directed [halibut] fishery is expected to have lower harvest levels at times of low abundance.” NOAA001145. But this misses the point of Required Provision 14: NMFS “*must* allocate the restrictions equitably among commercial, recreational and charter fishing sectors.” *Yakutat*, 407 F.3d at 1059 (emphasis added). NMFS’s rationale (brief as it is) says nothing about *whether, how, and why* the restriction is equitably allocated across the groundfish sectors (because, in fact, it isn’t). Besides, NMFS has no plausible explanation for why it is fair and equitable to allocate a \$100 million per year burden to the Amendment 80 sector, when that burden has no conservation benefit and no meaningful economic benefit to the directed halibut fishery (whether in times of “low” abundance or not). Amendment 123 is not fair or equitable, and thus violates the MSA.

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

In addition to being fair and equitable, allocations must be “[r]easonably calculated to promote conservation.” 50 C.F.R. § 600.325(a)(2); 16 U.S.C. § 1853(a)(14) (applying to “necessary” conservation and management measures); *see Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 89 (D.D.C. 2019) (“[I]f the Service decides to allocate fishing privileges to a specific group, that allocation must actually ‘promote’ a conservation purpose—that is, advance or further it—rather than just avoid jeopardizing one.”); *United Cook*, 2022 WL 2222879, at *15 (FMP amendment that was “not rationally related to conservation” violated National Standard 4). Amendment 123 fails this standard as well.

NMFS’s own analysis confirms that “the implementation of abundance-based

management of halibut PSC is an allocation decision rather than a conservation decision” because it has “very little impact on Pacific halibut spawning biomass and recruitment.” NOAA042367; NOAA0042542 (SSC concurring). As one Council member explained, “our purpose and need statement does not mention conservation as an objective” and instead only “notes that this action *could* promote conservation,” a possibility that is not well supported by the scientific evidence. NOAA055183 (emphasis added); NOAA003873 (“This action *could* also promote conservation of the halibut stock and *may* provide additional opportunities for the directed halibut fishery.” (emphasis added)). An allocation decision violates National Standard 4 when, as here, it is premised on “potential” and contingent “biological benefits.” *Sustainable Fisheries Coal. v. Raimondo*, 589 F. Supp. 3d 162, 172 (D. Mass. 2022) (“potential” and contingent “biological benefits” provided “lackluster support for . . . conclusion that the final rule promotes conservation”), *appeal dismissed*, 2022 WL 17349184 (1st Cir. June 30, 2022).

In sum, NMFS violated National Standard 4 and Required Provision 14, and Amendment 123 should be vacated.

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

1. The MSA Requires Practicable Bycatch Reduction Measures.

In 1996, Congress amended the MSA to clarify that “the policy of the Congress” was to “assure that the national fishery conservation and management program . . . encourages development of *practical measures* that *minimize* bycatch and avoid unnecessary waste of fish.” 16 U.S.C. § 1801(c)(3) (emphasis added). Congress added

National Standard 9, which states that “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” *Id.* § 1851(a)(9). Congress also added Required Provision 11, mandating “conservation and management measures that, to the extent practicable and in the following priority – (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.” *Id.* § 1853(a)(11).

Importantly, Congress considered, but ultimately did not adopt, stronger versions of National Standard 9 and Required Provision 11 that would have required bycatch reduction to the “maximum extent practicable.” H.R. Rep. No. 104-171, 1995 WL 390916, at *27 (1995). The word “maximum” was struck from the Senate version ultimately adopted into law, resulting in bycatch restrictions that “are not as strong” as some members of Congress might have liked. 142 Cong. Rec. H11418 at H11436, 1996 WL 565494 (1996) (Statement of Rep. Young). Instead, both “the standard and the required provision make clear that bycatch be avoided where practicable,” and the “use of the term ‘to the extent practicable’ was chosen deliberately by both the Senate and the House.” *Id.* at H11437. This was intended to instruct councils to “make reasonable efforts in their management plans to prevent bycatch,” which “requires an analysis of the costs of imposing a management action,” but “Congress [did] not intend that this provision will be used to allocate among fishing gear groups, nor to impose costs on fishermen and processors that cannot be reasonably met.” *Id.*

2. Amendment 123 Improperly Uses Bycatch Reduction as a Guise to Reallocate to the Direct Halibut Fishery.

NMFS and the Council stated early in the Amendment 123 process that they wanted to “provide an opportunity for the directed halibut fishery” to catch more halibut. NOAA040175. The Council could not directly authorize increased halibut harvest (as that is under the authority of the IPHC). But the IPHC could theoretically provide “opportunities for directed halibut fishing” as an “indirect result of any action taken to establish abundance based limits.” NOAA040176-77. Thus, “[t]he Council’s objectives include[d] . . . (indirectly) providing opportunity for the directed halibut fishery,” NOAA040249-30, and NMFS believed that “the direct effect of reduced PSC limits is increased catch limits for directed halibut fishing,” NOAA017429.

But bycatch restrictions are supposed to be “practical measures that minimize bycatch and avoid unnecessary waste of fish” (16 U.S.C. § 1801(c)(3)), not “indirect” allocation decisions to benefit specific user groups. 142 Cong. Rec. at H11437 (National Standard 9 and Required Provision 11 are not intended to be “used to allocate among fishing gear groups”). The Council was hoping that it “could find a ‘science based’ answer” showing that its allocation decision was actually based on conservation, but was unable to do so, making Amendment 123 “ultimately an allocation issue.” NOAA035106. And even if this was a legitimate bycatch measure, NMFS still must demonstrate that the measure is both “necessary” and “fair and equitable” (which as set forth above, it is not). *See Yakutat*, 407 F.3d at 1059 (bycatch measures must be allocated fairly and equitably). Bycatch reduction cannot be a pretext for allocation, and NMFS thus “relied on factors

which Congress has not intended it to consider.” *Motor V.*, 463 U.S. at 43.

3. Amendment 123 Is Not a Practicable Bycatch Measure.

The restrictions imposed by Amendment 123 are also not “practicable.” In order to determine practicability, NMFS and the Council are required to have “thoroughly reviewed the relevant scientific data on bycatch and consulted with participants in the fishery to determine whether the proposed regulations would be effective and practical.” *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 59 (D.D.C. 2012) (citations omitted). Here, the evidence is unequivocal that Amendment 111 *already* imposed all the available practicable tools and “greater reductions were not practicable.” NOAA001594. Throughout the Amendment 123 process, the Amendment 80 sector repeatedly explained that it “has *already* reduced halibut PSC usage to the maximum extent practicable using all available tools” resulting in a reduction of “nearly 35% since 2014,” that there are “[n]o new tools available,” that lower PSC limits will come as the result of substantial loss of harvest, and that some member companies “may not survive under substantially lower PSC limits.” NOAA053060.⁴

These concerns are confirmed in the record. NMFS’s own draft EIS explains: “[b]ecause of the efforts and expenditures already undertaken by the sector, dramatic increases in halibut avoidance or reductions in mortality are not expected with the tools

⁴ See also NOAA048357-58 (discussing “enormous costs with very little benefit,” “staggering” economic losses of \$68 million to \$138 million per year to the Amendment 80 sector, and “132 sole, mackerel and flounder meals being lost for every 1 halibut meal gained”); NOAA060247 (Advisory Panel minutes explaining “all PSC reduction tools (e.g., excluders and decksorting) are currently being maximized”).

that are currently available to the fleet.” NOAA001997. Instead, “[i]f substantial reductions in halibut mortality are realized, they are likely to be derived from the development and implementation of *new technologies that are not currently available or practicable.*” *Id.* (emphasis added). As one Council member explained:

So we’re not creating any new tools or flexibility for the Amendment 80 fleet, and so I find cuts at the levels in the motion to be punitive cuts to the Amendment 80 fleet to reallocate halibut from one user group to another with no real conservation benefit. And cuts at these levels could put some Amendment 80 companies out of business, and I don’t think that’s the right thing to be doing here.

NOAA055162. Put another way, “this action does not solve any problems while it imposes significant harm to the Amendment 80 fleet.” *Id.*

Despite this record, NMFS approved Amendment 123, summarily concluding that “while NMFS agrees that there may be costs associated with the action, those costs do not exceed what is practicable.” NOAA001155. But NMFS does not explain this assertion or make any effort to address the directly contrary evidence. Indeed, if “practicability” can be justified against any “costs” without explanation, then the term has no limit or meaning. NMFS could simply reduce a fishery to the point of insolvency because NMFS deemed it “practicable” to do so.

NMFS therefore “offered an explanation for its decision that runs counter to the evidence before the agency” and “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor V.*, 463 U.S. at 43.

Amendment 123 is arbitrary and capricious, and it should be vacated.

C. NMFS Violated NEPA by Failing to Consider Alternatives That Spread the Burden of Amendment 123 Bycatch Reductions Across Sectors.

An agency must produce an EIS that is “intended to be used to guide decisionmaking” and “the alternatives analysis is naturally ‘the heart’” of that EIS. *Or. Nat. Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010). Every EIS “must ‘[r]igorously explore and objectively evaluate all reasonable alternatives,’ and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” *Id.*; 42 U.S.C. § 4332(2)(C)(iii). “‘The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’” *Westlands*, 376 F.3d at 868 (citation omitted).

The Amendment 123 EIS violates NEPA by excluding plainly viable—indeed, required—alternatives. There can be no real dispute that it was “viable” to consider an alternative that applied abundance-based restrictions to many sectors in the groundfish fishery. NMFS’s 2019 preliminary draft EIS did precisely that, considering alternatives that imposed “gear-specific PSC limits” across the sectors, using the existing PSC “allocation proportions to the extent possible.” NOAA017194. The Amendment 111 EIS also spread new PSC allocations across the Groundfish FMP sectors. But, here, NMFS “excised” those alternatives from the EIS altogether. NOAA004016.

The final EIS eliminates these viable alternatives because “the Council narrowed the focus of the action and accompanying analysis to only the Amendment 80 sector, eliminating the other sectors from the action and analysis[.]” NOAA003942. But NEPA does not allow agencies to unilaterally “narrow[] the focus of the action” to avoid

inclusion of viable alternatives. Quite the opposite. “NEPA requires . . . full and meaningful consideration [of] *all viable alternatives*.” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 878 (9th Cir. 2022) (quotations and citation omitted; emphasis added). The EIS is intended to serve “as an instrument for airing the issue of resource demand,” and an agency violates NEPA where—as NMFS did here by deleting viable alternatives—it “shroud[s] the issue from public scrutiny behind the claim of administrative expertise.” *State of California v. Block*, 690 F.2d 753, 768 (9th Cir. 1982).

NMFS’s actions here are particularly egregious because it has a *statutory duty* to “allocate the [bycatch] restrictions equitably among commercial, recreational and charter fishing sectors.” *Yakutat*, 407 F.3d at 1059. Instead of taking a hard look at how it could achieve a result consistent with that mandate, NMFS only considered alternatives that singled out one sector to bear the entire burden of the new abundance-based restrictions. An agency violates NEPA when it “fail[s] to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813-14 (9th Cir. 1999). Alternatives that comply with NMFS’s plain statutory duties under the MSA are feasible alternatives “that [cannot] be ignored.” *Id.* at 814.

Finally, and relatedly, the EIS’s purpose and need statement is unlawful. “An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a

foreordained formality.” *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quotations and citation omitted). That is exactly what happened here. After the Council and NMFS decided to single out the Amendment 80 sector, they retrofitted the purpose and need statement to match that decision. *See* NOAA045065; NOAA044514; NOAA044538 (expressing need to “revisit purpose and need statement and objectives *in light of changing this action* to only directly modify PSC limits for the Amendment 80 sector” (emphasis added)).

That, too, is the opposite of what the law requires. The purpose and need statement must be both consistent with the agency’s statutory authority and broad enough to *guide* the agency’s selection of *viable* alternatives. *Nat’l Parks*, 606 F.3d at 1070; *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (in formulating the purpose and need “an agency should always consider the views of Congress, expressed . . . in the agency’s statutory authorization to act”). Here, the purpose and need statement was just an afterthought—edited to reflect an unexplained decision to single out the Amendment 80 sector and to match new, already-prepared alternatives, crafted to focus on one sector.

V. CONCLUSION

For the foregoing reasons, Amendment 123, the associated final rule and implementing regulations, and the EIS are arbitrary, capricious, and contrary to law, and should therefore be vacated. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (“ordinary practice is to vacate unlawful agency action.”).

DATED: April 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will electronically serve a copy of the foregoing on counsel of record.

/s/ Ryan P. Steen
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ADDENDUM

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1	16 U.S.C. § 1802 – Definitions	A-1
2	16 U.S.C. § 1851 National Standards for Fishery Conservation and Management	A-2
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4	42 U.S.C. § 4332 Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts	A-4
5	50 C.F.R § 600.325 National Standard 4—Allocations.	A-5 to A-7

16 U.S.C. § 1802 – Definitions

As used in this Act, unless the context otherwise requires—

* * *

(2) The term “bycatch” means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.

* * *

(9) The term “economic discards” means fish which are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for other economic reasons.

* * *

(38) The term “regulatory discards” means fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell.

* * * *

16 U.S.C. § 1851 National Standards for Fishery Conservation and Management

(a) IN GENERAL.—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

* * *

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

* * *

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

* * * *

16 U.S.C. § 1853 Contents of Fishery Management Plans

(a) REQUIRED PROVISIONS.— Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

* * *

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

* * *

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;

* * * *

42 U.S.C. § 4332 Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) consistent with the provisions of this chapter and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) reasonably foreseeable environmental effects of the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

* * * *

50 C.F.R § 600.325 National Standard 4—Allocations.

(a) Standard 4. Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be:

- (1) Fair and equitable to all such fishermen.
- (2) Reasonably calculated to promote conservation.
- (3) Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

* * *

(c) Allocation of fishing privileges. An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, and if the measures conform with paragraphs (c)(3)(i) through (c)(3)(iii) of this section.

(1) Definition. An “allocation” or “assignment” of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4. Adoption of an FMP that merely perpetuates existing fishing practices may result in an allocation, if those practices directly distribute the opportunity to participate in the fishery. Allocations of fishing privileges include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational and commercial fishermen, assignment of ocean areas to different gear users, and limitation of permits to a certain number of vessels or fishermen.

(2) Analysis of allocations. Each FMP should contain a description and analysis of the allocations existing in the fishery and of those made in the FMP. The effects of eliminating an existing allocation system should be examined. Allocation schemes considered, but rejected by the Council, should be included in the discussion. The analysis should relate the recommended allocations to the FMP's objectives and OY specification, and discuss the factors listed in paragraph (c)(3) of this section.

(3) Factors in making allocations. An allocation of fishing privileges must be fair and equitable, must be reasonably calculated to promote conservation, and

must avoid excessive shares. These tests are explained in paragraphs (c)(3)(i) through (c)(3)(iii) of this section:

(i) Fairness and equity.

(A) An allocation of fishing privileges should be rationally connected to the achievement of OY or with the furtherance of a legitimate FMP objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. For instance, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of long-time participants in the fishery. On the other hand, there is a rational connection between an objective of harvesting shrimp at their maximum size and closing a nursery area to trawling.

(B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as “fair and equitable,” if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo. Where relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.

(ii) Promotion of conservation. Numerous methods of allocating fishing privileges are considered “conservation and management” measures under section 303 of the Magnuson-Stevens Act. An allocation scheme may promote conservation by encouraging a rational, more easily managed use of the resource. Or, it may promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product. To the extent that rebuilding plans or other conservation and management measures that reduce the overall harvest in a fishery are necessary, any harvest restrictions or recovery benefits must be allocated fairly and equitably among the commercial, recreational, and charter fishing sectors of the fishery.

(iii) Avoidance of excessive shares. An allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.

(iv) Other factors. In designing an allocation scheme, a Council should consider other factors relevant to the FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery by present participants and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GROUND FISH FORUM, INC.,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF CHRISTOPHER J. WOODLEY

I, Christopher J. Woodley, hereby declare and state as follows:

1. I am the Executive Director of the Groundfish Forum (“GFF”), a non-profit Washington trade association with its principal place of business in Seattle, Washington. The purpose of this declaration is to demonstrate GFF’s standing in the above-captioned case. This declaration is based on my personal knowledge and experience as the Executive Director of GFF.

2. GFF is a trade association that represents five member companies, who also are members of the Alaska Seafood Cooperative (“AKSC”). GFF’s five member companies are Fishermen’s Finest, North Star Fishing Co., Ocean Peace, Inc., O’Hara Corporation, and United States Seafood (collectively “GFF Members”). GFF Members are currently operating a total of 15 trawl catcher-processors, and fish for and take deliveries of multiple species of groundfish in the Bering Sea and Aleutian Islands (“BSAI”). GFF Members supply seafood to the United States and markets throughout North America, Asia, and Europe. Specifically, GFF Members’ groundfish operations and harvests provide hundreds of millions of dollars to U.S. businesses, support thousands of crew members and numerous communities throughout Alaska and the Pacific Northwest, and feed millions of people.

3. GFF was formed in 1996 to (a) craft collaborative solutions to fishery management and environmental issues, such as minimizing discards, avoiding unintended incidental catches, and reducing impacts to fish habitat; (b) inform government officials of the contributions made by the non-pollock trawl catcher processors to the economies of Alaska and the Pacific Northwest; and (c) conserve and sustain fishery resources while keeping the fishing industry economically viable.

4. The North Pacific Fishery Management Council (“Council”) developed the Fisheries Management Plan (“FMP”) for Groundfish of the BSAI Management Area

(“Groundfish FMP”) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), 72 Fed. Reg. 52,668 (Sept. 14, 2007). One of the sectors regulated by the Groundfish FMP is called the “Amendment 80” sector. GFF Members operate under the fisheries management structure created by Amendment 80 to the Groundfish FMP.

5. GFF Members collectively operate all of the vessels in the Amendment 80 sector. The Amendment 80 sector is only one of several sectors operating under the Groundfish FMP. The Amendment 80 sector has received Responsible Fisheries Management and Marine Stewardship Council certification for environmental sustainability.

6. GFF’s mission and purpose includes advocating for the Amendment 80 sector in regulatory and administrative matters, and, if necessary, representing the rights and interests of the Amendment 80 companies in litigation. These rights and interests include sensible and sound fishery conservation and management consistent with maintaining and ensuring maximum sustained yield and the economic viability of fisheries, and the protection of the ecosystem, fishery habitats, and fishery resources of the BSAI. GFF and its Members depend and rely upon a healthy and functioning ecosystem in the BSAI.

7. It is my understanding that the Council and the National Marine Fisheries Service (“NMFS”) created the Amendment 80 sector in order “to increase resource conservation and improve economic efficiency for harvesters who participate in the BSAI groundfish fisheries.” 72 Fed. Reg. at 52,668. Amendment 80 was “intended to promote the goals and objectives of the . . . [MSA], the [BSAI] FMP, and other applicable law.” *Id.* The Council and NMFS intended Amendment 80 to reduce bycatch, minimize waste, and improve fish resource utilization, “[i]n order to provide the maximum benefit to present and future generations of fishermen, associated fishing industry sectors, communities, and the Nation as a whole.” *Id.* Amendment 80 established a framework for

future fishing by the fleet and facilitated the formation of harvesting cooperatives (such as AKSC) among the vessels.

8. GFF Members fish according to their respective permits and allocations for varied portfolios of groundfish. None of these target stocks are overfished or subject to overfishing.

9. To my knowledge, every commercial groundfish fishery in the BSAI has bycatch. Bycatch occurs when a fishery participant targets one or more species, or one or more stocks of fish, and incidentally catches other non-target species, or non-target stocks of fish, in the process.

10. Halibut is encountered while fishing for groundfish but harvest limits for *targeted* halibut (often called the “directed halibut fishery”) are not governed by the MSA or the Groundfish FMP, but are set by the International Pacific Halibut Commission (“IPHC”) under an international treaty. Under the Groundfish FMP and its implementing regulations, halibut caught by the groundfish sectors cannot be retained for harvest and is considered bycatch, specifically, “prohibited species catch” (“PSC”). Regulations require *non-targeted* halibut to be discarded and returned to the ocean. Total halibut bycatch throughout the range of the halibut stock accounts for less than ten percent of total halibut removals.

11. The Groundfish FMP and its implementing regulations allocate the harvest of target stocks (such as Pacific cod) to various sectors in the fishery (*i.e.*, Amendment 80 and fixed gear sectors). Halibut bycatch mortality is allocated to four groundfish sectors: Amendment 80, the trawl limited access sector, the non-trawl sector, and the Community Development Quota Program. *See* 50 C.F.R. § 679.21(b)(1)(i)(C).

12. Groundfish and halibut occupy overlapping habitat areas. Consequently, GFF members inevitably catch halibut while catching their respective target species, just like other sectors operating under the Groundfish FMP. For nearly two decades organized as the Amendment 80 sector (and another decade before that), GFF’s Members have

consistently and significantly reduced their halibut bycatch, including through the use of sustainable management tools developed by the Amendment 80 fleet. *See* 80 Fed. Reg. 71,650, 71,664 (Nov. 16, 2015).

13. When NMFS reduced halibut bycatch caps on several BSAI sectors in 2016 under Amendment 111 to the Groundfish FMP (with the largest reduction of 25% imposed on the Amendment 80 sector), GFF members worked cooperatively to develop and implement multiple operational and mitigation tools (as contemplated by Amendment 111) to reduce bycatch and bycatch mortality and ultimately to comply with the more stringent cap. Many of these efforts were supported or endorsed by NMFS and the Council. To avoid and minimize halibut bycatch, the Amendment 80 sector uses agreed-upon strategies (documented in a “Halibut Avoidance Plan”) including fleet communication, the use of small test tows, reduced night fishing, the use of gear modifications that help keep halibut out of trawl nets (*e.g.*, halibut excluders), and pre-sorting and releasing halibut from the deck (“deck sorting”).

14. Deck sorting has been particularly effective in reducing halibut bycatch mortality. This practice permits dumping the catch on the deck and allowing the crew to find live halibut and return them to sea as soon as possible. Under catch handling procedures in place prior to deck sorting, fishermen were not allowed to sort any catch from the net when the net was brought on board. This was in place to ensure observers collect data from the entire catch. But observer sampling methods also delayed getting halibut back into the water and increased halibut mortality rates. Deck sorting was developed to provide a way for observers to rapidly collect data on the amount and condition of the halibut on deck, thus allowing the crew to return the halibut to the sea with minimal delay so as to reduce mortality. The Amendment 80 sector developed the deck-sorting program and applied for an exempted fishing permit (“EFP”) to test its innovation. In 2015, NMFS granted an EFP for all Amendment 80 vessels to test the conditions necessary to effectively conduct deck sorting. Based on the success of the

EFP, NMFS issued a series of annual EFPs intended to collaboratively continue to develop halibut catch handling and accounting protocols. In 2020, NMFS published regulations allowing deck sorting. 84 Fed. Reg. 55,044 (Oct. 15, 2019) (codified at 50 C.F.R. pt. 679). Deck sorting also has consequences for fishing operations because fishing vessels that utilize deck sorting have an average loss of production of one tow per day, or roughly a 20% reduction on a typical, five-tow day.

15. Overall, the suite of operational and mitigation tools has significantly minimized halibut bycatch in the Amendment 80 sector. Since 2007, the Amendment 80 sector's halibut bycatch usage has been reduced by 49%, while the estimated coastwide halibut biomass and proportion of biomass in the BSAI have remained relatively stable, proving that the tools that GFF members have implemented are effective and actually contribute to GFF's overall mission to protect the marine ecosystem and sustain healthy stocks of fisheries.

16. To my knowledge, Amendment 111 concluded that any reduction in halibut PSC greater than 25% (from the pre-Amendment 111 level) was not practicable for the Amendment 80 sector. 81 Fed. Reg. 24,714, 24,721 (April 27, 2016). In fact, I do not believe that NMFS or the Amendment 80 sector has identified any new tools that can be incorporated into the Amendment 80 sector's current operations to *further* reduce halibut bycatch or bycatch mortality, other than the extreme measures of forgoing catch of target species or exiting the fishery.

17. GFF and its Members actively engaged in every step of the Council and NMFS process for developing Amendment 123 through participation in Council committees and by providing public testimony and written comments. For example, GFF and its members provided extensive comments on the analyses and environmental review documents related to Amendment 123, including the proposed FMP amendment, the proposed rule to implement Amendment 123, and the draft and final environmental impact statements ("EISs") that preceded the final decisions being challenged in this

lawsuit. GFF and its Members consistently objected to the new “abundance-based” halibut bycatch limits on numerous grounds, including (but not limited to) that Amendment 123 constitutes an unjustified allocation, is not practicable, fails to achieve optimum yield on a continuing basis, and is not based on the best scientific information available.

18. GFF has a direct stake in the outcome of this lawsuit. Amendment 123 and its implementing regulations directly injure GFF and GFF Members in multiple ways. For one, Amendment 123 and its implementing regulations cause a direct injury to GFF and its Members by imposing substantial halibut PSC reductions (as much as 35%) and will result in hundreds of millions of dollars in lost harvest opportunities. As the Final EIS acknowledges, the impacts may be so great that one or more of the GFF Member companies may have to “exit” the fishery (go bankrupt or sell out). Thus, financial injuries are likely and are directly caused by NMFS’s approval of Amendment 123 and its implementing regulations. Indeed, these injuries are already occurring as some GFF Members already have been forced to tie up fishing vessels for the 2024 season as a result of Amendment 123. The relief sought in this case—vacatur of Amendment 123—will redress those injuries by eliminating these unnecessary financial impacts and returning the fishery back to the reasonable (and lawful) *status quo* under Amendment 111.

19. In addition, Amendment 123 impacts GFF’s and its Members’ sustainability efforts and their interests in protecting the health of the marine ecosystem and the stocks of fish in the BSAI, including halibut. GFF’s and its Member’s goals to maintain a sustainable and lasting fishery and a healthy marine ecosystem are thwarted when an “abundance-based” halibut PSC restriction is not sensibly applied across all relevant sectors governed by the Groundfish FMP. Any alleged environmental benefit derived from an “abundance-based” halibut PSC restriction on only one sector is insignificant or counterproductive if another sector governed by the Groundfish FMP inevitably increases their halibut PSC catch (either directly or proportionally) while

targeting its intended species and is not required to comply with the same “abundance-based” halibut PSC restriction. Without being subject to the same or similar restrictions imposed by Amendment 123, other non-Amendment 80 sectors have no reason to implement operational and maintenance tools that will meaningfully reduce bycatch or bycatch mortality, as GFF Members have already implemented. They will also operate under Amendment 111’s fixed limits while GFF Members operate under Amendment 123’s “abundance-based” limits, creating a mixed management regime that will disrupt the balanced and consistent management regime struck by Amendment 111, with adverse consequences for the BSAI marine ecosystem and the halibut stock.

20. In addition, impracticable PSC halibut limits (such as those imposed here) can cause vessels to shift temporarily and spatially in their fishing efforts, which in turn can have a greater impact on other PSC species, such as depressed stocks of snow crab and red and king crab. Furthermore, Amendment 123 will have significant impacts on the amount of groundfish and the specific types of groundfish that can be harvested on an annual basis. Thus, the allocation of PSC across different sectors (or the decision to single out a single sector for PSC reductions) affects how those sectors prosecute their respective fisheries, which, in turn, may have different and significant impacts on the predator-prey relationships, ecosystem functions, and other components of the resource on which GFF Members rely. Simply put, alternatives that constrain halibut bycatch have a direct effect on how groundfish harvests are prosecuted, which in turn has differing effects on the health and dynamics of the marine ecosystem on which GFF Members rely.

21. GFF and its Members are particularly injured by NMFS’s decision to unreasonably constrain its analysis of alternatives under NEPA. GFF and its members have a strong interest in managing Alaska’s fishery in a sensible and sustainable way, and have invested significant time and resources in developing and implementing tools to reduce halibut bycatch and impacts to habitat. NMFS seriously undermines the sensible conservation-based framework put in place by Amendment 111 by failing to consider and

analyze reasonable alternatives that consistently apply practicable abundance-based management measures across all primary sectors in the Groundfish FMP. NMFS was required to evaluate those reasonable alternatives and its failure to do so has caused procedural and substantive injury to GFF's and its Members' interests in a sustainably managed fishery.

22. Unless Amendment 123, its implementing regulations, the Final Rule, and the Final EIS are vacated, GFF and its members will continue to be impacted by the effects of the "abundance-based" halibut bycatch limits. But if the Court grants GFF's requested relief, then the harm to the Amendment 80 sector's targeted fishing opportunities and sustainability efforts to minimize halibut bycatch will be mitigated or eliminated. Further, NMFS and the Council would be required to follow the numerous provisions of the MSA, consider and rely on the best scientific evidence, and comply with proper procedures to evaluate a "reasonable range of alternatives" to Amendment 123 for the continued health and viability of the halibut stock, the general health and sustainability of the fishery, and the Amendment 80 sector's fishing opportunities for target catch species. If GFF prevails in this lawsuit and the Court orders NMFS to address the deficiencies with Amendment 123, its implementing regulations, the Final Rule, and the Final EIS to comply with the principles set out in the MSA and NEPA, then the marine ecosystem will be better protected, any new management measures will comply with the MSA, and any new management measures and their related environmental consequences will have been properly considered and analyzed under NEPA. The relief that GFF seeks is vital to its members' ability to fish in the immediate future and years to come, to the Nation's economy, and to GFF's and its Member's interests in the health and sustainability of the marine ecosystem.

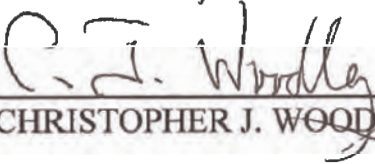
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 25th day of April 2024 at VASHON, WA.


CHRISTOPHER J. WOODLEY

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will electronically serve a copy of the foregoing on counsel of record.

/s/ Ryan P. Steen

Ryan P. Steen, AK Bar No. 0912084