

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, BASIL SEGGOS, as  
Commissioner of the New York State Department of  
Environmental Conservation, and the NEW YORK  
STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION,

Case No. 1:19-cv-09380

Plaintiffs,

- against -

WILBUR ROSS, in his official capacity as Secretary of  
the United States Department of Commerce, the  
UNITED STATES DEPARTMENT OF COMMERCE,  
the NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION, and the NATIONAL MARINE  
FISHERIES SERVICE, a/k/a NOAA Fisheries,

Defendants.

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**NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF  
ITS MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

Summer flounder, or “fluke,” is one of the most sought after saltwater fish on the mid-Atlantic seaboard and has long been a mainstay of the commercial fishing industry on Long Island. To manage the fishery, defendants (together, “Commerce”) establish an annual coastwide quota setting the total pounds of summer flounder that may be “landed”—transferred from a boat to land—at east coast ports by commercial fishermen. Once Commerce sets that coastwide quota, it splits the quota among the States in the fishery based on a state-by-state allocation formula that has remained unchanged for over twenty-five years.

In this action, plaintiffs (together, “New York”) challenge New York’s annual commercial landings quotas of approximately 880,000 pounds of summer flounder for 2020 and 2021, which were established in Commerce’s “2020–2021 Specifications Rule,” 84 Fed. Reg. 54,041 (October 9, 2019). New York’s quotas were based on Commerce’s “1993 Allocation Rule,” 50 C.F.R. § 648.102(c)(1), which allocates to New York only 7.65% of the coastwide quota each year.

The 1993 Allocation Rule, which New York also challenges as applied to establish the 2020 and 2021 quotas, relies on landings data from the 1980s, when a much greater share of summer flounder fishing occurred in the southern part of the mid-Atlantic region than does today, and fails to consider current data showing that the center of the summer flounder fishery has shifted in the past three decades to the waters off Long Island. New York’s 2020 and 2021 quotas and 1993 allocation harm

New York fishermen by significantly limiting the pounds of summer flounder they can catch off Long Island and land at ports in New York.

New York seeks summary judgment that New York's 2020 and 2021 quotas and 1993 allocation as applied to establish those quotas are not in accordance with law and arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The quotas and allocation are not in accordance with the "national standards" for fishery management measures in the Magnuson-Stevens Fishery Conservation and Management Act because they are not based on current information about the summer flounder fishery, are not fair to fishermen in New York, create inefficiency, and lead to excessive costs by preventing summer flounder from being landed at ports on Long Island near where the fish now are being caught in greatest numbers. *See* 16 U.S.C. § 1851(a). They are also arbitrary and capricious because they ignore relevant data regarding the fishery. For these reasons, the Court should vacate New York's 2020 and 2021 quotas in the 2020–2021 Specifications Rule and New York's 1993 allocation of 7.65% in the 1993 Allocation Rule as applied to establish the quotas, and remand the 2020 and 2021 state-by-state quotas and 1993 allocation formula to Commerce for further proceedings.

## **BACKGROUND**

### **A. THE MAGNUSON-STEVENSONS ACT**

The Magnuson-Stevens Act is designed to conserve and manage fishery resources in United States waters and coastal areas. 16 U.S.C. § 1801(b). In general, fishery management measures are proposed to Commerce by regional fishery

management councils in the form of fishery management plans (known as “FMPs”) and implementing regulations. *Id.* § 1853. The council for the mid-Atlantic region is the Mid-Atlantic Fishery Management Council (“Mid-Atlantic Council”), composed of voting members from the mid-Atlantic States and Commerce. *See id.* § 1852(a)(1).<sup>1</sup>

Commerce is the final decision-maker on fishery management plans, plan amendments, and regulations that implement these plans. Commerce reviews plans and amendments submitted by regional councils for consistency with the Act and, after public notice and comment, either approves, partially approves, or disapproves them. *Id.* § 1854(a). The Act also gives Commerce authority to directly prepare a plan or amendment as necessary to comply with the statute and to adopt temporary fishery regulations. *Id.* § 1854(c), 1855(c). Management plans are implemented through regulations approved and promulgated by Commerce. *Id.* § 1854(b); *see also Massachusetts v. Daley*, 170 F.3d 23, 27–28 (1st Cir. 1999) (“[Plans] are proposed by state Councils but the final regulations are promulgated by [Commerce]”).

Commerce is required to ensure that management plans, amendments, and implementing regulations are consistent with ten national standards established by the Magnuson-Stevens Act. 16 U.S.C. § 1851(a); *see also Massachusetts v. Daley*, 170 F.3d at 28 (management plans and regulations must be “consistent with the national

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<sup>1</sup> The Magnuson-Stevens Act manages fisheries between three miles and two hundred miles off the U.S. coast, known as the Exclusive Economic Zone or “federal waters,” while States retain authority up to three miles offshore of their coastlines, or “state waters.” *See* 16 U.S.C. § 1856(a). Fisheries in state waters off the Atlantic coast are regulated by the Atlantic States Marine Fisheries Commission under an interstate compact. Pub. L. No. 77-539 (1942), *as amended* by Pub. L. No. 81-721 (1950). Because summer flounder migrate between state and federal waters, the States Commission jointly regulates the fishery with Commerce and the Mid-Atlantic Council. *See id.* §§ 5101 *et seq.*

standards”). The second national standard provides that fishery management measures “shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). The fourth standard provides that measures “shall not discriminate between residents of different States” and that “[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen,” the allocation shall be “fair and equitable to all such fishermen.” *Id.* § 1851(a)(4). The fifth and seventh standards require measures, “where practicable,” to “consider efficiency in the utilization of fishery resources” and “minimize costs and avoid unnecessary duplication.” *Id.* § 1851(a)(5), (7); *see also* 50 C.F.R. §§ 600.305 *et seq.* (Commerce’s “National Standards Guidelines” explaining the national standards).

The Act provides that regulations issued by Commerce and “actions that are taken by [Commerce] under regulations which implement a fishery management plan” are reviewable under the APA and that the Court, upon motion, “shall expedite the matter in every possible way.” 16 U.S.C. § 1855(f)(1)–(2), (4). The APA provides that agency actions “shall” be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

## **B. QUOTAS FOR THE SUMMER FLOUNDER FISHERY**

Commerce issues rules that set the annual “specifications” for the summer flounder fishery based on recommendations made by the Mid-Atlantic Council pursuant to the summer flounder management plan. 50 C.F.R. § 648.102. Annual specifications begin with the total pounds that can be caught that year, which is allocated between the commercial and recreational sectors. Commerce then



establishes a coastwide quota for the pounds of summer flounder that can be landed by commercial vessels that year, which is allocated among the States in the fishery. *Id.* § 648.102(c). Because summer flounder are jointly managed in federal and state waters due to their seasonal migratory patterns, the commercial landings quota and state-by-state quotas approved by Commerce for each year apply to all commercial landings, whether the fish are caught in federal or state waters.

For nearly three decades, the coastwide quota has been allocated among the States based on the 1993 Allocation Rule, which implemented amendments made to the management plan for summer flounder in 1993. The 1993 allocation was based on commercial landings of summer flounder reported for the respective States from 1980 to 1989 and allocated 27.45% of the coastwide quota to North Carolina; 21.32% to Virginia; 16.72% to New Jersey; 15.68% to Rhode Island; 7.65% to New York; 6.82% to Massachusetts; 2.26% to Connecticut; and 2.04% to Maryland.<sup>2</sup> *Id.* § 648.102(c)(1).

Once the annual state quotas are established, each State implements measures to ensure that landings in the ports of that State do not exceed the State's quota. In New York, the Department of Environmental Conservation ("DEC") divides New York's annual quota into seasonal periods and imposes trip limits and/or weekly limits so that landings in New York do not exceed the period quota. New York Comp. Codes R. & Regs. tit. 6, § 40.1(i), (l).

In March 2018, New York submitted a petition to Commerce and the Mid-Atlantic Council requesting that the allocation of state quotas in the 1993 Allocation

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<sup>2</sup> Maine, Delaware, and New Hampshire also receive de minimis shares totaling 0.07%.

Rule be updated based on current data. Comments 21–176.<sup>3</sup> In March 2019, the Council voted to propose an amendment to Commerce that would continue using the 1993 allocation formula with minor adjustments in years of great abundance. The Council has yet to submit the amendment to Commerce for review.<sup>4</sup>

### C. THE PROPOSED 2020–2021 SPECIFICATIONS RULE

On July 26, 2019, Commerce published the proposed 2020–2021 Specifications Rule. 84 Fed. Reg. 36,046. The rule proposed an annual coastwide commercial landings quota for summer flounder of 11,530,000 pounds for both 2020 and 2021. *Id.* at 36,047–48. The rule also allocated the commercial quota among the States for 2020 based on the 1993 Allocation Rule and, using New York’s allocation of 7.65%, proposed a quota for New York of approximately 880,000 pounds. *Id.* The proposed rule did not expressly allocate the 2021 annual coastwide quota among the States but stated that “[t]he 2020 and 2021 specifications are identical to what is currently in place for 2019.” The 2019 specifications allocated the annual coastwide quota among the States based on the 1993 Allocation Rule. 83 Fed. Reg. 64,482 (Dec. 17, 2018).

New York submitted comments on the proposed rule explaining that, because the summer flounder fishery had shifted significantly to the northeast, the proposed 2020 and 2021 quotas for New York and the other States and the 1993 allocation were not consistent with the Magnuson-Stevens Act’s national standards. Comments 1–4;

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<sup>3</sup> New York’s petition is an exhibit to its comments on the 2020–2021 Specifications Rule (“Comments”), which are necessarily part of the administrative record on the Rule and are attached.

<sup>4</sup> See <http://www.mafmc.org/news> (providing meeting updates, summaries, and recordings). Because the Council’s actions are outside the administrative record, New York does not rely on them here and notes them only for the Court’s information.

*see also* 16 U.S.C. § 1851(a).

New York's comments explained that the 1993 allocation was based on the commercial summer flounder landings reported for each State in the 1980s, when—compared to the present—a greater proportion of the summer flounder stock was located in the waters off Virginia, Delaware, and Maryland and as a result, a greater proportion of fishing took place in those waters. Comments 3, 12–13. The comments also explained that recent data collected by Commerce about the fishery, along with independent studies utilizing those data, show that summer flounder and fishing for summer flounder are now concentrated in the waters off Long Island. *See id.*

Based on this significant change in the summer flounder fishery, New York's comments requested that Commerce adopt a 2020–2021 rule “that allocates commercial summer flounder fishing rights between the States in a manner that is consistent with the [Magnuson-Stevens] Act.” Comments 3–4. New York also requested that the 1993 Allocation Rule be amended to base state shares upon current data. Comments 4.

New York presented the following information about the changes in the fishery and the impacts of the 1993 allocation and 2020 and 2021 quotas on New York fishermen:

*The summer flounder fishery in the 1980s.* Summer flounder range from Maine to North Carolina. As they age and grow, they move up the Atlantic coast, so older and larger fish are more abundant toward northern latitudes. Comments 98. By the 1980s, the species had been overfished and was severely depleted, with fewer fish

reaching older age and larger size. Comments 28. Commerce data indicate that the remaining summer flounder stock at that time was split between the waters off Delaware, Maryland, and Virginia and the waters off Long Island and south of Rhode Island. *See* Comments 28–29.

Data showing where summer flounder were caught and landed in the 1980s reflected this distribution. According to Commerce data, in 1983–89, 46% or more of commercial summer flounder were caught in waters south of New Jersey. Meanwhile, 41% or less were caught in the northern mid-Atlantic and southern New England waters proximate to Long Island. The remaining approximately 13% were caught further to the east or north of these waters. Landings of summer flounder by state during the 1980s—which formed the basis for the 1993 allocation—followed a similar geographic pattern. *See* Comments 29–31.<sup>5</sup>

In 1988 Commerce adopted a management plan for summer flounder to address the depletion of the fishery. *See* 50 C.F.R. §§ 648.100–110. Amendments made to the plan in 1993, which established the 1993 allocation, acknowledged that data collection methods used to set the allocation were not uniform between the States and established a new standardized reporting system to allow regulators to

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<sup>5</sup> The distribution of landings among the States may have been further influenced by lower size limits in southern states in the fishery that made it easier for fishermen in those states to land summer flounder. Landings in New York in the 1980s were also underreported as a result of the infiltration of organized crime in parts of the State’s seafood industry (the onshore purchase and wholesale level), which infiltration has since been eradicated. *See, e.g., United States v. Local 359, United Seafood Workers*, 1994 U.S. Dist. LEXIS 1101 \*2 (S.D.N.Y. 1994) (“It is a well known and most unfortunate fact that organized crime has a long history of involvement in the Fulton Fish Market. Federal and local law enforcement authorities have been engaged over many years in attempting to remedy this situation. A great deal has been accomplished towards this end.”).

reliably track catch and landings locations for summer flounder, among other data. *See* Comments 31. These data have been compiled ever since.

*The current summer flounder fishery.* Measures implemented to address the depleted, overfished condition of the summer flounder fishery in the 1980s have allowed the stock to rebound. Summer flounder has increased in abundance, with more fish surviving to become older and larger. *See* Comments 31–32. Because older and larger summer flounder live further northeast in the species’ range, and likely due to other factors including ocean warming, the center of biomass of the summer flounder stock has shifted northeast since the 1980s and are now concentrated in the waters near Long Island. Comments 95, 98. Commerce has acknowledged this geographic stock shift. In April 2019, Commerce issued an updated stock assessment report for summer flounder stating in plain terms that “there are apparent changes in spatial distribution of summer flounder over the last four decades with a general shift northward and eastward.” Comments 303.

The increase in summer flounder abundance and size in waters offshore of New York has been accompanied by an increase in commercial fishing for summer flounder in these waters, as reflected in catch data collected by Commerce: in 2015–2016, more than 80% of the commercial summer flounder catch was taken from northern mid-Atlantic and southern New England waters, while only approximately 12% was taken from southern mid-Atlantic waters. Comments 79–80. Indeed, researchers using Commerce data have found that the average commercial catch location for summer flounder has shifted from the waters offshore of Delaware, Maryland, and Virginia in

the mid-late 1990s to the waters south of eastern Long Island in the early-mid 2010s, and that in 2014, the average commercial catch location was approximately 90 miles from Montauk, NY. *See* Comments 103–121. The updated stock assessment issued by Commerce acknowledges that since regulators began collecting standardized catch location data in 1994, there has been a “northerly trend of offshore commercial catches” that has “continued through the present decade.” Comments 298.

Notwithstanding the current distribution of the summer flounder population, a significant portion of the fish caught off Long Island are caught by southern boats that haul their catch to southern ports, because—pursuant to the 1993 Allocation Rule—nearly 50% of commercial landings are still allocated to North Carolina and Virginia, compared with 7.65% to New York.

*Impacts on New York fishermen.* Historically, summer flounder has been an essential component of New York’s commercial fishing industry. Yet under New York’s allocation and annual quotas, summer flounder fishing is no longer economically viable for many fishermen based in New York because the limits on how many summer flounder can be landed cannot offset the costs of fishing, including fuel, time, and vessel wear-and-tear. *See* Comments 160–161.

In colder months, when summer flounder are further offshore, it makes little economic sense to travel round trip to and from port under the daily or weekly limits that DEC must impose to meet New York’s landings quota. This effectively limits many fishermen to making small day trips in the warmer months—rarely worth the cost or effort for larger vessels—or to landing summer flounder as a secondary catch

or bycatch on trips for other fish species. For those New York fishermen who continue to fish for summer flounder in waters near Long Island, they must often do so in direct sight of vessels licensed to land summer flounder at ports in Virginia or North Carolina—pursuing the same fish at the same time—who are not subject to the same stringent catch limits and thus may catch those same fish and land them in their home ports in far greater quantities. *See id.*

Some New York fishermen purchase licenses to land summer flounder in States with larger quotas like North Carolina and Virginia, although the price of such licenses—often in the range of multiple tens of thousands of dollars—has been prohibitive for many. *See* Comments 160, 168, 173. Fishermen who are able to purchase out-of-state licenses catch summer flounder in the waters near Long Island—the center of the fishery—and then travel for as many as several days to out-of-state ports to land their catch, only to return to their home ports in New York. *See* Comments 168–169, 173–175. If these New York fishermen were able to land more of their summer flounder catch in their home ports, the time and cost savings would be substantial. The fishermen would also be able to support more downstream industries in their port communities, such as pack houses that pack landed fish to be shipped. *See* Comments 170.

Summer flounder that is landed in New York is highly sought after by dealers in New York. *See* Comments 164–165. Indeed, within the seafood industry, Commerce’s data show that New York has among the largest wholesale, distribution, and retail sectors of any State in the summer flounder fishery. *See* Comments 35.

Much of the seafood supplied to the New York City metropolitan area passes through the New Fulton Fish Market in the Bronx. Yet as one Fulton seller estimates, no more than 5% of summer flounder he handles has been landed in New York, while a majority has been landed in Virginia, North Carolina, or New Jersey. Comments 164.

**D. THE FINAL 2020–2021 SPECIFICATIONS RULE**

On October 9, 2019, Commerce issued the final 2020–2021 Specifications Rule. 84 Fed. Reg. 54,041. The rule adopted the proposed coastwide commercial landings quota for summer flounder of 11,530,000 pounds in 2020 and 2021 and the proposed 2020 New York commercial landings quota of approximately 880,000 pounds, as based on New York’s 1993 allocation of 7.65% of the coastwide quota. *Id.* at 54,042. Like the proposed rule, the final rule did not expressly allocate the 2021 annual coastwide quota among the States but stated that the 2021 specifications would be identical to the 2019 specifications, which allocated the annual coastwide quota among the States based on the 1993 Allocation Rule. *See id.*

Commerce acknowledged that New York’s comments explained that “the 2020 and 2021 specifications will be applied to outdated state quota share percentages.” *Id.* Commerce declined to consider the current data discussed in New York’s comments because:

The current regulations governing the [fishery management plan] require that quota allocations be distributed based on the percentages [from the 1993 Allocation Rule]. Adjustments to these quota allocations must be developed through an amendment to the [fishery management plan]. The [Mid-Atlantic] Council and [States Commission] took final action on an amendment considering such adjustments at their March 2019 meeting and will forward their recommendations to NMFS for Secretarial review and approval later this fall. Adjustments to these state quota allocations are



outside the scope of this specifications action and will be addressed in the rulemaking for the amendment.<sup>6</sup>

*Id.*

**E. NEW YORK'S INTEREST IN THE 2020 AND 2021 QUOTAS AND 1993 ALLOCATION**

Because the State of New York owns the summer flounder in New York waters, N.Y. Env'tl. Conserv. Law § 11-0105, the State has a proprietary and sovereign interest in summer flounder in its waters. As a result, the State is injured by New York's 1993 allocation and 2020 and 2021 quotas because they deprive the State of its fair and reasonable share of summer flounder in New York waters. The allocation and quotas also impose a greater regulatory burden on DEC because they require DEC to impose and enforce more stringent measures on the summer flounder fishery in order to keep New York landings in compliance with New York's small share of summer flounder. The more stringent measures include smaller limits on how many fish can be landed per trip or per week, closer monitoring of catch by New York boats, and more frequent closures of the fishery when the quota for a period is reached. *See* New York Comp. Codes R. & Regs. tit. 6, § 40.1(i), (l).

Furthermore, as a State, New York has a sovereign and quasi-sovereign interest in ensuring that the allocation among the States of landings of summer flounder is fair, reasonable, and compliant with the Magnuson-Stevens Act. New

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<sup>6</sup> As noted at p. 6 above, the Council has voted to propose a plan amendment that would continue using the 1993 allocation formula, with minor adjustments in certain years. Commerce has not yet received or acted upon that recent amendment proposal. As also noted above, the Council's recent actions are outside the administrative record and New York does not rely upon them here.

York, New York fishermen, and the broader New York fishing industry are injured by New York's 1993 allocation and 2020 and 2021 quotas because they do not treat New York fairly and reasonably as compared to other States and are inconsistent with the Act.

#### **F. THIS ACTION**

New York's complaint (ECF No. 1) makes four claims for relief: first, that the 2020–2021 Specifications Rule is not in accordance with law because New York's quotas in 2020 and 2021 are inconsistent with the Magnuson-Stevens Act; second, that the 2020–2021 Specifications Rule is arbitrary and capricious because New York's quotas in 2020 and 2021 are based on obsolete data; third, that the 1993 Allocation Rule as applied to establish the 2020 and 2021 quotas is not in accordance with law because New York's percentage allocation is inconsistent with the Act; and fourth, that the 1993 Allocation Rule as applied to establish the 2020 and 2021 quotas is arbitrary and capricious because New York's percentage allocation is based on obsolete data. The complaint requests that the Court declare the 2020–2021 Specifications Rule and 1993 Allocation Rule to be arbitrary, capricious, and not in accordance with law under 5 U.S.C. § 706(2)(A), partially vacate them, and remand the state-by-state quotas in the 2020–2021 Specifications Rule and the state-by-state allocations in the 1993 Allocation Rule to Commerce.<sup>7</sup>

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<sup>7</sup> On January 14, 2019, New York filed an action in the Eastern District of New York challenging the 2019 Specifications Rule and the 1993 Allocation Rule as applied in 2019. C.A. No. 2:19-cv-00259-SJF-ARL. After the parties' dispositive motions were briefed, the court requested that Commerce provide a projected rulemaking timeline for an anticipated amendment to 1993 Allocation Rule developed by the Mid-Atlantic Council, as discussed

## STANDARD OF REVIEW AND TIMELINESS

The Magnuson-Stevens Act provides that regulations promulgated by Commerce and “actions that are taken by [Commerce] under regulations which implement a fishery management plan” are reviewable under the APA. 16 U.S.C. § 1855(f)(1)–(2). Thus, the 1993 Allocation Rule, which implements the summer flounder management plan, and the 2020–2021 Specifications Rule, which is an action taken pursuant to the 1993 Allocation Rule, are subject to review under the APA, which provides that agency actions “shall” be set aside if, among other reasons, they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

The Magnuson-Stevens Act requires a party to seek judicial review of a regulation implementing a fishery management plan within 30 days of its publication in the Federal Register. 16 U.S.C. § 1855(f)(1). However, the Act was amended in 1990 to provide that “actions that are taken by [Commerce] under regulations which implement a fishery management plan” may also be challenged within 30 days of their publication. *See id.* § 1855(f)(1)–(2); *Or. Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1112–14 (9th Cir. 2006) (discussing the legislative history). Therefore, when a Commerce action like an annual quota is based on a regulation, the underlying

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above (pp. 6, 12–13). *Id.*, ECF No. 45. In response, Commerce projected that if it approves the amendment, it would be finalized by March or April 2020 and would go into effect in 2021. *Id.*, ECF No. 46. On July 30, 2019, the court issued an order dismissing the case and stating that “[t]his case is closed with a right to reopen, upon ten (10) days’ notice, by no later than April 30, 2020” (emphasis in original). As a result of the dismissal and closure, the court did not rule on the validity of New York’s 2019 quota—which will expire at the end of 2019—or the 1993 Allocation Rule as applied to establish that 2019 quota. The case remains closed.

regulation may also be challenged as applied in the annual management measure within 30 days of the publication of that measure. *See id.* at 1112–16 (in a timely challenge to an action under a regulation implementing a fishery management plan, the plaintiffs could also challenge the underlying regulation); *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (unless precluded by the governing statute, a plaintiff may challenge a regulation when an agency takes action applying the regulation, regardless of the limitations period for a direct facial challenge to the regulation). Because the 2020–2021 Specifications Rule was published on October 9, 2019 and the complaint was filed the next day, this action is timely as to both New York’s quotas in the 2020–2021 Specifications Rule and the 1993 Allocation Rule as applied to establish New York’s 2020 and 2021 quotas.<sup>8</sup>

### ARGUMENT

Summary judgment should be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a)–(b). “Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency.” *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 405 (S.D.N.Y. 2005) (quoting Wright, Miller & Kane, Federal Practice & Procedure § 2733 (3d ed. 1998)). “When a court reviews a final agency decision, the summary judgment standard also takes into account 5 U.S.C. § 706(2) of the Administrative Procedure Act.” *Id.* Summary judgment is appropriate here because the

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<sup>8</sup> As discussed above (pp. 14–15 n. 7), Commerce may amend the 1993 Allocation Rule in 2020 but has indicated that the amendment, if approved, will apply to only starting in 2021.

administrative record establishes that New York's 2020 and 2021 quotas—approximately 880,000 pounds of commercially landed flounder annually—and its 1993 allocation of 7.65% upon which the quotas are based are not in accordance with law and are arbitrary and capricious under 5 U.S.C. § 706(2)(A).

Courts review fishery management measures for their consistency with the Magnuson-Stevens Act's national standards. *See, e.g., Massachusetts v. Daley*, 170 F.3d at 31–32 (affirming district court finding that quota allocation in scup fishery was inconsistent with the fourth national standard); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 195–97, 200–1 (D.D.C. 2014) (holding that red snapper regulations were inconsistent with two national standards). Accordingly, courts have set aside fishery regulations promulgated by Commerce—including regulations originating with a regional council—if they are inconsistent with any national standards. *See, e.g., Guindon v. Pritzker*, 240 F. Supp. 3d 181, 193–95, 203 (D.D.C. 2017) (vacating and remanding Commerce regulations implementing plan amendment developed by regional council and approved by Commerce because they were inconsistent with the fourth national standard); *Hall v. Evans*, 165 F. Supp. 2d 114, 117–18 (D.R.I. 2001) (vacating Commerce regulations implementing fishery management plan developed jointly by two regional councils and approved by Commerce because they were inconsistent with the second, fourth, and fifth national standards).

New York's quotas and allocation are not in accordance with law because they are inconsistent with four of the national standards. As a result, New York is entitled to summary judgment on its first and third claims for relief. New York's 2020 and

2021 quota and 1993 allocation are also arbitrary and capricious under 5 U.S.C. § 706(2)(A) because they ignore relevant data showing significant changes to the summer flounder fishery. As a result, New York is entitled to summary judgment on its second and fourth claims for relief.

## POINT I

### **NEW YORK'S 2020 AND 2021 QUOTAS AND 1993 ALLOCATION AS APPLIED TO ESTABLISH THOSE QUOTAS ARE NOT IN ACCORDANCE WITH THE MAGNUSON-STEVEN'S ACT'S NATIONAL STANDARDS**

New York's 2020 and 2021 quotas and the application of its 1993 allocation to establish those quotas are inconsistent with the Magnuson-Stevens Act's second national standard because they are not based on the best scientific information available, inconsistent with the fourth national standard because they are unfairly discriminatory to New York fishermen, and inconsistent with the fifth and seventh standards because they do not consider efficiency and minimize costs.

#### **A. NEW YORK'S 2020 AND 2021 QUOTAS AND 1993 ALLOCATION AS APPLIED TO ESTABLISH THOSE QUOTAS ARE NOT BASED UPON THE BEST SCIENTIFIC INFORMATION AVAILABLE.**

The second national standard provides that fishery management measures must be "based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Under this standard, Commerce must do "a thorough review of all the relevant information available at the time" and may not "disregard superior data in reaching its conclusion." *Guindon v. Pritzker*, 31 F. Supp. 3d at 195–97 (citations and internal quotation marks omitted). In *Guindon*, the District Court for the District of Columbia ruled that Commerce had violated the second standard by disregarding more current

and reliable landings estimates in setting recreational fishing quotas for red snapper. *Id.* at 195–96. In *Massachusetts v. Daley*, the First Circuit also recognized that state-by-state fishery quotas must be based on “the best data currently available” but found that the plaintiffs had failed to demonstrate the existence of better data about the scup fishery than those relied upon by Commerce. 170 F.3d at 30 (but setting aside the quotas based on another national standard). Here, New York has demonstrated that Commerce disregarded available and superior data about the summer flounder fishery when it set New York’s 2020 and 2021 quotas based on New York’s 1993 allocation.

Commerce’s National Standards Guidelines explain that “relevance” and “timeliness” are among the “[c]riteria to consider when evaluating best scientific information.” The Guidelines elaborate that “[s]cientific information should be pertinent to the current questions or issues under consideration and should be representative of the fishery being managed” and that “the temporal gap between information collection and management implementation should be as short as possible.” 50 C.F.R. § 600.315(a)(6).

New York’s comments on the 2020–2021 Specifications Rule demonstrated that New York’s 1993 allocation of 7.65%—and thus New York’s 2020 and 2021 commercial quotas of approximately 880,000 pounds of summer flounder based on that allocation—is not based upon the best scientific information available. As New York explained, the 1993 allocation is based on data from 1980 to 1989, when the summer flounder fishery was much more concentrated in the southern mid-Atlantic

than it is today. As New York also explained, current Commerce data show that the fishery has moved northeast since the 1980s and that summer flounder and fishing for summer flounder are now concentrated in the waters proximate to Long Island. Indeed, those data show that only approximately 12% of commercially caught summer flounder now come from southern mid-Atlantic waters, while over 80% come from northern mid-Atlantic and southern New England waters, with the average commercial catch location in 2014 approximately 90 miles from Montauk, New York. *See pp. 7–10 above.*<sup>9</sup>

This reliable, up-to-date information comes from better—and in particular, more timely and relevant—data on the geographic distribution of the fish stock and fishing activity, than do the 1980–89 landings data upon which the 1993 allocation is based. The 1993 management plan amendments that established New York’s 7.65% allocation (implemented by the 1993 Allocation Rule) acknowledged that past data were inconsistent and implemented a uniform reporting system specifically to collect more accurate information to inform future adjustments to management measures. *See pp. 9–10 above.* But instead of relying on data collected through that standardized reporting system, Commerce continues to set state quotas based on

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<sup>9</sup> In *New York v. Locke*, C.A. No. 1:08-cv-2503, (E.D.N.Y. June 30, 2010), New York challenged its 2008 recreational flounder quota (not its commercial quota, as it does here) on the ground that the fishery had shifted north since 1998, the year on which the quota was based. The court found that the record showed that there were more older flounder as compared to 1998 and that older flounder migrate north but also found “scant evidence in the record to support the further conclusion that substantially greater number of flounder are now present in *New York* waters.” *Id.* ECF No. 151 at 16–17 (emphasis in original). Here the data in the record—which were collected after New York’s earlier challenge—show that substantially greater number of flounder are in waters proximate to New York than in the 1980s. *See pp. 7–10 above.*



1980s data that the fishery management plan acknowledged were deficient even when those data were current, which they no longer are.

By failing to rely on timely and current data, New York's 2020 and 2021 quotas and its 1993 allocation as applied to establish those quotas fail to ensure that the temporal gap between information collection and management implementation is as short as possible, as required by Commerce's National Standards Guidelines. Moreover, because the summer flounder fishery has changed over the decades, the historical 1980s data are simply not representative of the current fishery, as also required by the Guidelines. Thus, New York's 2020 and 2021 quotas in the 2020–2021 Specifications Rule and New York's 7.65% allocation in the 1993 Allocation Rule as applied to establish those quotas are inconsistent with the second national standard because they are not based on the best scientific information available. As a result, they should be set aside as not in accordance with law under 5 U.S.C. § 706(2)(A).

**B. NEW YORK'S 2020 AND 2021 QUOTAS AND 1993 ALLOCATION AS APPLIED TO ESTABLISH THOSE QUOTAS ARE UNFAIR TO NEW YORK FISHERMEN.**

The fourth national standard provides that management measures “shall not discriminate between residents of different States” and that “[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen,” the allocation shall be “fair and equitable to all such fishermen.” 16 U.S.C. § 1851(a)(4). Thus, when a measure treats residents of different States differently, as do New York's 2020 and 2021 quotas and 1993 allocation, it must be fair and equitable.

Under this standard, fishermen in New York are entitled to a share of the coastwide quota that is proportional to the actual, current geographic distribution of the fish stock. *See Massachusetts v. Daley*, 10 F. Supp. 2d 74, 78 (D. Mass. 1998) (fishery rules cannot rely upon data that is known to be “seriously flawed,” and that “[t]his is particularly true when doing so will have a discriminatory effect”), *aff’d*, 170 F.3d at 31–32.

New York’s 1993 allocation of 7.65% and 2020 and 2021 quotas of approximately 880,000 pounds of summer flounder based on that allocation are not fair and equitable to New York fishermen because they are not proportional to the current geographic distribution of summer flounder. Although the summer flounder fishery is now concentrated in the waters proximate to Long Island, North Carolina’s share of the annual coastwide quota remains at 27.4% based on the 1993 allocation and as a result its 2020 and 2021 quotas are approximately 3.2 million pounds, almost four times New York’s 2020 and 2021 quotas; similarly, Virginia’s 1993 allocation is 21.3% and 2020 and 2021 quotas are approximately 2.5 million pounds. 84 Fed. Reg. at 54,042. As a result, North Carolina and Virginia fishermen travel to the waters off Long Island to fish and then return to their home ports, where they can land far more commercial summer flounder than New York fishermen can land in their home ports. That is not fair and equitable to New York’s fishermen or to the rest of its summer flounder supply chain, including port-side businesses such as pack houses. *See pp. 10–12 above.*

For these reasons, New York’s quotas in the 2020–2021 Specifications Rule and New York’s 7.65% allocation in the 1993 Allocation Rule as applied to set those quotas are inconsistent with the fourth national standard and thus not in accordance with law under 5 U.S.C. § 706(2)(A).

**C. NEW YORK’S 2020 AND 2021 QUOTAS AND 1993 ALLOCATION AS APPLIED TO ESTABLISH THOSE QUOTAS DO NOT CONSIDER EFFICIENCY OR MINIMIZE COSTS.**

The fifth and seventh national standards require management measures, “where practicable,” to “consider efficiency in the utilization of fishery resources” and “minimize costs and avoid unnecessary duplication.” 16 U.S.C. § 1851(a)(5), (7). The National Standards Guidelines explain that “efficiency” includes the minimization of “economic inputs such as labor, capital, interest, and fuel.” 50 C.F.R. § 600.330(b). The Guidelines further explain that “[m]anagement measures should not impose unnecessary burdens on the economy[ or] on individuals.” *Id.* § 600.340(b).

The 2020 and 2021 quotas and 1993 allocation are inconsistent with these standards for the same reasons that they are unfair to New York fishermen. Because North Carolina and Virginia boats travel to the waters off Long Island to catch summer flounder and then return to their home ports to land the fish, those boats travel significantly further than if—as is entirely practicable—those same flounder could be landed in New York. Besides greater travel time, this longer trip requires more fuel and results in more wear-and-tear on vessels. These inefficiencies are exacerbated when summer flounder are then trucked from southern ports to northern markets such as Fulton, the major seafood processing market in the Bronx. New

York's low annual quotas have also driven some New York fishermen to obtain southern licenses: after fishing for summer flounder in the prime waters off Long Island, they spend days traveling to and from southern ports to land summer flounder that cannot be landed in New York. *See* p. 11 above.

Thus, instead of minimizing labor, capital, and fuel inputs by allowing summer flounder caught near New York to be landed in New York ports, the 2020 and 2021 quotas and 1993 allocation as applied in 2020–2021 create inefficiency by causing a significant share of that flounder to be landed only in southern ports. For similar reasons, the quotas and allocation fail to minimize costs, imposing an unnecessary burden on the summer flounder industry. For these reasons, New York's quotas in the 2020–2021 Specifications Rule and New York's allocation in the 1993 Allocation Rule as applied to set those quotas are inconsistent with the fifth and seventh national standards and not in accordance with law under 5 U.S.C. § 706(2)(A).

## POINT II

### **NEW YORK'S 2020 AND 2021 QUOTAS AND 1993 ALLOCATION AS APPLIED TO ESTABLISH THOSE QUOTAS ARE ARBITRARY & CAPRICIOUS**

Agency rulemaking must be “based on a consideration of the relevant factors” and “examin[ation of] the relevant data.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). A regulation is arbitrary and capricious if the agency “has relied on factors which Congress has not intended it to consider” or has “entirely failed to consider an important aspect of the problem.” *Id.*

As shown by the administrative record and discussed above (pp. 7–10, 18–21) New York’s 2020 and 2021 quotas and 1993 allocation as applied to set those quotas are not based on relevant data showing that the summer flounder fishery is now concentrated near Long Island. In continuing to rely upon 1980s data, Commerce failed to “examine the relevant data” about the current fishery and it “entirely failed to consider an important aspect of the problem”: significant changes to the fishery that implicate the national standards. Because New York’s quotas in the 2020–2021 Specifications Rule and New York’s 7.65% allocation in the 1993 Allocation Rule as applied to set those quotas are based upon obsolete landings data and ignore substantial fishery changes since those data were compiled, they are arbitrary and capricious under 5 U.S.C. § 706(2)(A).

### **CONCLUSION**

For the reasons stated above, New York’s quotas in the 2020–2021 Specifications Rule, 84 Fed. Reg. at 54,041, and New York’s 7.65% allocation in the 1993 Allocation Rule, 50 C.F.R. § 648.102(c)(1), as applied to set those quotas are not in accordance with law and arbitrary and capricious under 5 U.S.C. § 706(2)(A), so the Court should vacate them and remand the 2020 and 2021 state-by-state quotas and 1993 state-by-state allocation formula to Commerce for further proceedings consistent with the Court’s opinion.

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