UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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, Plaintiffs, - against - GINA RAIMONDO, in her 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.	Case No. 1:21-cv-00304 [rel. 1:19-cv-09380]

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 commercial fishermen may "land"—transfer from a boat to land—at east coast ports and then allocate that coastwide quota among east coast states. The Magnuson-Stevens Act requires Commerce to allocate the quota based on the best data available about the summer flounder fishery. Commerce instead ignores the best available data. Even though the center of the fishery is now located off Long Island, Commerce's "2020 Allocation Rule" allocates most of the coastwide quota among the states using a formula established in 1993 that is based on obsolete data ("1993 formula"), with any surplus split evenly between the states. *See* 85 Fed. Reg. 80,661 (Dec. 14, 2020). Plaintiffs (together, "New York") are harmed by that allocation and seek summary judgment invalidating the rule.

Before the 2020 Allocation Rule, Commerce's "1993 Allocation Rule" split the entire coastwide quota among the states using the 1993 formula, which is based on summer flounder landings data from the 1980s. *See* 58 Fed. Reg. 49,937 (Sept. 24, 1993). The summer flounder fishery has geographically shifted over the intervening three decades, with the center of the fishery moving dramatically northeast to the waters off Long Island. Yet under the 1993 formula New York continued to receive only 7.65% of the coastwide quota each year, while Virginia and North Carolina

together received nearly 50%. The result has been devastating to New York fishermen, who frequently fish off Long Island within sight of boats from southern ports that are permitted to land far more summer flounder than the New Yorkers.

The new 2020 Allocation Rule keeps in place the 1993 formula except for any surplus fish in years of abundance, which are distributed evenly among active states in the fishery ("2020 surplus formula"). New York receives only marginal quota increases, and only in abundant years. Like the 1993 Allocation Rule, the 2020 Allocation Rule ignores the substantial changes in the summer flounder fishery.

Under the Magnuson-Stevens Act, fishery rules must be based upon the best scientific information available and must be fair and efficient. 16 U.S.C. § 1851(a)(2), (4), (5), (7). The 2020 Allocation Rule violates these standards because it retains the 1993 formula, which is based on obsolete 1980s data reflecting a summer flounder fishery that no longer exists, rather than the current distribution acknowledged by Commerce. Moreover, the 2020 surplus formula also has no basis in current—or indeed, any—scientific information. It simply allocates additional quota on an even basis among states, regardless of proximity to the fishery.

New York therefore seeks summary judgment that the 2020 Allocation Rule is arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). For the same reasons, Commerce's "2021 Specifications Rule," 85 Fed. Reg. 82,946 (Dec. 21, 2020), which establishes the 2021 state-by-state quotas based on the 2020 Allocation Rule, is arbitrary, capricious, and not in accordance with law. Accordingly, the Court should vacate the 2020 Allocation

Rule and the state-by-state quota allocation in the 2021 Specifications Rule and remand for proceedings consistent with its opinion. In doing so, the Court should not reinstate the 1993 Allocation Rule or the 2021 state-by-state allocation that applied it because the 1993 Allocation Rule is based on the obsolete 1993 formula.

BACKGROUND

A. THE MAGNUSON-STEVENS ACT

Congress enacted the Magnuson-Stevens Act to conserve and manage fishery resources. 16 U.S.C. § 1801(b). Measures to manage fisheries are generally proposed to Commerce by regional councils in the form of management plans and implementing regulations. *Id.* § 1853. The council that manages summer flounder 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).[1]

Commerce is the final decision-maker on fishery management plans, plan amendments, and regulations that implement the plans. Commerce reviews plans and amendments submitted by regional councils for consistency with the Act and, after public notice and comment, approves or disapproves them. *Id.* § 1854(a). As necessary to comply with the Act, Commerce may also directly amend a plan or adopt temporary regulations. *Id.* §§ 1854(c), 1855(c). Management plans are implemented

[1] The Magnuson-Stevens Act manages fisheries between three miles and two hundred miles off the U.S. coast ("federal waters"), while states retain authority up to three miles offshore of their coastlines ("state waters"). *See* 16 U.S.C. § 1856(a). Atlantic coast fisheries in state waters are regulated by a state-based commission under an interstate compact. 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.* Summer flounder quotas (among other management measures) approved by Commerce apply to all commercial landings, whether the fish are caught in federal or state waters.

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 the Act's ten "national standards." 16 U.S.C. § 1851(a); *see also Massachusetts v. Daley*, 170 F.3d at 28 (plans and regulations must be "consistent with the national standards"). The second national standard requires that fishery management measures "shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). The fourth standard requires 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 to "minimize costs." *Id.* § 1851(a)(5), (7); *see also* 50 C.F.R. §§ 600.305 *et seq*. (Commerce's "National Standards Guidelines" explaining the national standards).

B. QUOTAS FOR THE SUMMER FLOUNDER FISHERY

Summer flounder is a bottom-dwelling flatfish ranging from Maine to North Carolina. Pursuant to the Magnuson-Stevens Act, the summer flounder fishery is governed by a management plan and implementing regulations, 50 C.F.R. §§ 648.100 *et seq*. Under these regulations, Commerce issues rules to set annual "specifications" for the fishery based on recommendations made by the Mid-Atlantic Council

pursuant to the management plan. *Id.* § 648.102. Annual specifications begin with the total pounds that can be caught that year, which are 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).

The state-by-state quotas limit the summer flounder that may be landed at the ports in each state regardless of where the fish are caught. 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 the state's annual quota into seasons and imposes daily and weekly limits so landings do not exceed the seasonal quota. N.Y. Comp. Codes R. & Regs. tit. 6, § 40.1(i), (*l*).

Between 1993 and 2020, the coastwide commercial quota was distributed among the states in the fishery using the formula in the 1993 Allocation Rule. The 1993 formula is based on commercial landings of summer flounder reported by states from 1980 to 1989. It allocates 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. 58 Fed. Reg. 49,937 (Sept. 24, 1993) (with de minimis shares for three other states). The management plan amendments implemented by the 1993 Allocation Rule 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 reliably track catch and landings locations for summer flounder, among other data. These data have been compiled since. *See* AR 3744 (Ex. G).[2]

C. 2020 RULEMAKINGS AND ADMINISTRATIVE RECORD

Since the 1980s landings data were collected, summer flounder distribution and fishing activity have shifted markedly northeast toward the waters off Long Island, as documented by Commerce in its most recent report assessing the summer flounder stock. AR 3865–66, 3672–87 (Ex. B). Yet New York continued to receive only 7.65% of the annual quota, and North Carolina and Virginia nearly 50%. New York has long advocated for Commerce and the Mid-Atlantic Council to apply the best available science standard and bring about greater equity for New York fishermen—using Commerce's latest data and other current information about the northeast shift in the fishery—to develop a new state-by-state formula to allocate the commercial quota. Instead, the Council proposed and Commerce promulgated the 2020 Allocation Rule, which essentially ignored that data.

1. Proposed 2020 Allocation Rule and EIS

In spring 2020, the Mid-Atlantic Council proposed the 2020 Allocation Rule to Commerce as an amendment to the summer flounder management plan. With the Rule, the Council proposed to continue using the 1993 formula to allocate any coastwide quota up to 9.55 million pounds, which represents a rough average of recent annual coastwide quotas. In years of abundance, when the coastwide quota exceeds 9.55 million pounds, quota beyond that amount would be distributed evenly between

[2] Citations to the administrative record are designated with the abbreviation "AR." Cited portions of the administrative record are excerpted and attached as exhibits to this memorandum of law.

active states in the fishery, with each active state in the fishery receiving an equal 12.375% share of the surplus (North Carolina, Virginia, New Jersey, Rhode Island, New York, Massachusetts, Connecticut, and Maryland). AR 2951–54 (Ex. A).

In support of the amendment, the Council prepared an environmental impact statement in cooperation with Commerce. AR 2875 *et seq.* (Ex. A, the "2020 Allocation Rule EIS" or "EIS"). The EIS declares that the rulemaking's purpose is to "[c]onsider modifications to [the] commercial quota allocation" because the "[c]urrent commercial allocation was last modified in 1993 and is perceived by many as outdated given its basis in 1980–1989 landings data" and "[s]ummer flounder distribution, biomass, and fishing effort have changed since then." AR 2877, 2913–14, 2925 (Ex. A). The EIS also confirms that landings data collected before 1994 were unreliable. AR 3024 (Ex. A).

The EIS documents the substantial northeast shift in the fishery that has occurred since the 1993 formula was adopted. By the 1980s, summer flounder had been overfished and were severely depleted, with fewer fish reaching older age (and larger size). AR 2918, 2978 (Ex. A). Commerce data indicate that the remaining summer flounder stock at that time was roughly split between the waters off Delaware, Maryland, and Virginia and the waters off Long Island and south of Rhode Island—with fishing for that stock following a similar geographic pattern. *See* AR 3742–43 (Ex. G); *see also* Answer (ECF No. 20) ¶¶ 44–45 (admitting these facts).

Management measures have allowed the stock to rebound since the 1980s. AR 2969–72 (Ex. A). The EIS documents that, as the summer flounder stock has recovered, it has shifted distinctly northeast up the Atlantic coast. AR 2914, 2977–

79 (Ex. A); *see also* AR 3679–87 (Ex. B); 3744–46 (Ex. G). This shift is believed to be due to the fact that a far higher percentage of the restored fishery consists of older and larger summer flounder that live further northeast in the species' range, and/or due to ocean warming. *See* AR 2914, 2925, 2977–79 (Ex. A).[3]

The increase in summer flounder abundance and size in waters near New York has driven a dramatic increase in commercial fishing there for summer flounder. AR 2914, 3032–37 (Ex. A), 3746–47 (Ex. G), 3690–3732 (Ex. C); *see also* Answer ¶ 51 (admitting shift in stock has driven shift in fishing). According to Commerce data, 87% of 2016–2019 commercial landings were caught in northern mid-Atlantic and southern New England waters proximate to Long Island, while only 10% were caught in the waters off the North Carolina and Virginia coast, even though Commerce allocates around half of all landings to those southern states. AR 3746 (Ex. G), 3770 (Ex. E); *see also* AR 3027 (Ex. A). Data presented in the EIS reflect that boats landing summer flounder in southern ports have been catching those fish increasingly northward. AR 3027–31 (Ex. A); *see also* AR 3746–47 (Ex. G), 3646–57 (Ex. C).

Despite acknowledging the northeast shift in the fishery toward the waters off Long Island, the EIS proposed that the 2020 Allocation Rule retain the 1993 formula—in which New York continues to receive only 7.65% of the coastwide quota each year, compared to nearly 50% for North Carolina and Virginia—except in years

[3] To illustrate the shift in biomass, the EIS includes a link to a video on Commerce's website that shows the increase over time in distribution of summer flounder in the waters proximate to Long Island. AR 2979. Although the link provided in the EIS is no longer active, an archived version of the page is available at https://web.archive.org/web/20170522183723/https://www.nefsc.noaa.gov/ecosys/climate-change/summer-flounder.html (archived May 22, 2017).

of abundance, when surplus quota would be split evenly among active states using the 2020 surplus formula. AR 2879, 2942–54 (Ex. A). As the EIS concedes, the 1993 formula is based on 1980s data, rather than more recent information that comprises the best scientific information available about the distribution of the summer flounder fishery. *See* AR 2914, 3138–39 (Ex. A). Moreover, the EIS puts forward no scientific information to support the 2020 surplus formula, which allocates surplus quota evenly and without relation to the distribution of the fishery. Because any surplus is not expected to be consequential, New York would receive only around 1% or 2% in additional quota share in years of moderate to significant abundance, and no additional quota share in years without surplus. AR 2953–54 (Ex. A).

2. New York's Comments to Commerce on the 2020 Allocation Rule

On July 29, 2020, Commerce posted notice of the proposed amendment and EIS for the 2020 Allocation Rule, and on August 12, 2020, posted proposed implementing regulations. In doing so, Commerce acknowledged that "summer flounder distribution, center of biomass, and location of fishing effort has changed over time" and requested public comment on the amendment and regulations' consistency with the Magnuson-Stevens Act's national standards. 85 Fed. Reg. 45,571; 85 Fed. Reg. 48,660. On September 11, 2020, New York timely filed comments opposing the 2020 Allocation Rule as contrary to the Act's requirements that fishery management measures be based on the best available scientific information (National Standard 2) and be fair (National Standard 4) and cost-efficient (National Standards 5, 7). AR 3733–66 (Ex. G); *see also* 16 U.S.C. § 1851(a).

As New York's comments explained, the 2020 Allocation Rule fails to meaningfully account for the shift in the fishery since the 1980s, and instead perpetuates the scientifically-outdated 1993 formula that is unfair to New York and woefully inefficient. The Rule continues to constrict landings of summer flounder on Long Island near where the fish now are being caught in greatest numbers, and greatly limits permissible catch by Long Island boats that are based closest to the heart of the fishery. New York also explained that the 2020 surplus formula has no scientific basis and fails to account for the shift in the fishery because it only applies to surplus fish in abundant years. The minor quota increase that New York would see in those years does not reflect the substantial increase in summer flounder and fishing activity in the waters off Long Island and fails to achieve any semblance of fairness for New York fishermen or cost-efficiency in the fishery. AR 3756–66 (Ex. G).

New York noted that the Commerce data presented in the latest stock assessment and 2020 Allocation Rule EIS verify the major northeast shift of the summer flounder fishery toward the waters near Long Island. AR 3742–47 (Ex. G). The comments also explained the impact that unfairly restrictive quotas have had on New York's commercial fishing industry. Summer flounder has historically been an essential component of that industry, yet under the 1993 formula, summer flounder fishing has ceased to be economically viable for many fishermen based in New York. Because of the state's disproportionately small quota, DEC must impose limits that result in catches that are too small to offset the costs of fishing, including fuel, time, and vessel wear-and-tear. AR 3747–49 (Ex. G).

In colder months, when summer flounder are further offshore, it makes little economic sense for New York fishermen to travel to and from port under the daily or weekly limits that DEC must impose to keep New York's catch within quota. This limits many fishermen to making small day trips in the warmer months—rarely worth the cost for larger vessels—or to landing summer flounder as a secondary catch on trips for other species. For those New York fishermen who continue to fish for summer flounder, they must often do so in direct sight of vessels licensed out of Virginia or North Carolina—pursuing the same fish at the same time, in the waters off Long Island—except that the southern boats 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. AR 3839–50 (Ex. F).

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. Fishermen who are able to purchase out-of-state licenses are constrained to 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. 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 id.*

Summer flounder that is landed in New York is highly sought after by dealers there. *See* AR 3851–53 (Ex. F). 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* AR 3749 (Ex. G). 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 estimated in 2018, 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. AR 3851–53 (Ex. F).

3. Proposed 2021 Specifications Rule

On November 17, 2020, Commerce proposed the 2021 Specifications Rule that distributes the 2021 coastwide quota among the states using the 2020 Allocation Rule. 85 Fed. Reg. 75,253. Commerce proposed these state-by-state quotas to replace previously established 2021 quotas that had been based on the 1993 Allocation Rule. *See* 84 Fed. Reg. 54,041 (Oct. 9, 2019) ("2020–2021 Specifications Rule").[4] On December 2, 2020, New York submitted comments to Commerce explaining that the proposed state quotas for 2021 and the application of the 2020 Allocation Rule to calculate those quotas are contrary to the Magnuson-Stevens Act for the same reasons that the 2020 Allocation Rule itself violates the Act. AR 4610–11 (Ex. H).

[4] New York challenged its 2020 and 2021 quotas in the 2020–2021 Specifications Rule and the application of the 1993 Allocation Rule to set those quotas in a related action that remains pending before this Court. *New York v. Raimondo*, Case No. 1:19-cv-09380-MKV (S.D.N.Y. filed Oct. 10, 2019). New York also previously challenged its 2019 quota and the application of the 1993 Allocation Rule to set that quota. *New York v. Ross*, Case No. 2:19-cv-00259-SJF-ARL (E.D.N.Y. filed Jan. 14, 2019). That case was dismissed without a decision. *Id.*, Order dated July 30, 2019.

4. Final 2020 Allocation Rule and 2021 Specifications Rule

On December 14, 2020, Commerce promulgated the 2020 Allocation Rule as proposed. 85 Fed. Reg. 80,661 (codified at 50 C.F.R. § 648.102(c)(1)). On December 21, 2020, Commerce published the 2021 Specifications Rule, which sets a coastwide quota of 12.49 million pounds in 2021 and applies the 2020 Allocation Rule to set state-by-state quotas. The 2021 Specifications Rule uses the 1993 formula to allocate the first 9.55 million pounds and—because the coastwide quota in 2021 is higher than average for recent years—it uses the 2020 surplus formula to allocate the 2.94 million pounds of surplus quota evenly among the active states. 85 Fed. Reg. 82,946. Based on that allocation, fewer than 1.1 million pounds of summer flounder may be landed at New York ports in 2021 (8.6% of the coastwide quota) while nearly 5.4 million pounds may be landed at ports in North Carolina and Virginia together (43.11% of the coastwide quota). *Id.* at 82,947.

D. NEW YORK'S INTEREST IN THE CHALLENGED RULES

Because the State of New York owns the summer flounder in New York waters, N.Y. Envtl. Conserv. Law § 11-0105, it has a proprietary and sovereign interest in summer flounder in its waters. As a result, New York is injured by the 2020 Allocation Rule and New York's quota in the 2021 Specifications Rule because they deprive the state of its fair and reasonable share of summer flounder in New York waters. The allocation and quota 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* N.Y. Comp. Codes R. & Regs. tit. 6, § 40.1(i), (*l*).

Furthermore, New York has a sovereign and quasi-sovereign interest in ensuring that the state-by-state landings allocation for summer flounder is fair, reasonable, and compliant with the Magnuson-Stevens Act. New York, its fishermen, and its broader fishing industry are injured by the 2020 Allocation Rule and New York's quota in the 2021 Specifications Rule because they do not treat New York fairly and reasonably as compared to other states and are inconsistent with the Act.

E. THIS ACTION

New York's complaint (ECF No. 1) makes four claims for relief: first, that the 2020 Allocation Rule is not in accordance with law because it violates the Magnuson-Stevens Act; second, that the 2020 Allocation Rule is arbitrary and capricious because it ignores important and relevant data; third, that the 2021 Specifications Rule is not in accordance with law because its state-by-state quota allocation violates the Act; and fourth, that the 2021 Specifications Rule is arbitrary and capricious because its quota allocation ignores important and relevant data.

The complaint requests that the Court vacate the 2020 Allocation Rule and the state-by-state quotas in the 2021 Specifications Rule and remand them to Commerce but not reinstate the 1993 Allocation Rule or state-by-state quotas from the 2020–2021 Specifications Rule, which rely upon the obsolete 1993 formula and would not

bring Commerce into compliance with the Magnuson-Stevens Act or provide appropriate relief for New York.

STANDARD OF REVIEW

The Magnuson-Stevens Act provides that "regulations promulgated by [Commerce] under [the Act]" 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 2020 Allocation Rule, which is a regulation under the Act that implements the summer flounder management plan, and the 2021 Specifications Rule, which is an action taken pursuant to the 2020 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).

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)). Summary judgment is appropriate here because the administrative record establishes that Commerce's 2020 Allocation Rule and its application of that Rule in the 2021 Specifications Rule 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, 200–01 (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 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 regulations implementing fishery management plan developed by two regional councils and approved by Commerce because they were inconsistent with the second, fourth, and fifth national standards).

The Rules challenged in this action 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. The Rules 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

THE 2020 ALLOCATION RULE AND 2021 SPECIFICATIONS RULE ARE NOT IN ACCORDANCE WITH THE MAGNUSON-STEVENS ACT'S NATIONAL STANDARDS

The 2020 Allocation Rule and New York's 2021 quota in the 2021 Specifications Rule 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. THE 2020 ALLOCATION RULE AND 2021 SPECIFICATIONS RULE 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 fishing quotas for red snapper. *Id.* at 195–96; *see also Oceana, Inc. v. Ross*, 2020 U.S. Dist. LEXIS 160448, at *36–46 (N.D. Cal. Sep. 2, 2020) (in setting anchovy catch limits, Commerce violated second standard by ignoring recent studies). 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, Commerce disregarded available and superior data about the summer flounder fishery when it promulgated the 2020 Allocation Rule and implemented it in the 2021 Specifications Rule.

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).

As demonstrated by the administrative record, the 2020 Allocation Rule is not based upon the best scientific information available because the Rule uses the 1993 formula to allocate the coastwide quota up to 9.55 million pounds. 85 Fed. Reg. at 80,661, 80,666. Commerce admits that the 1993 formula is based on data from 1980 to 1989, *id.* at 80,662, when the summer flounder fishery was much more concentrated in the southern mid-Atlantic than it is today. Commerce also admits (Answer ¶ 51) and the administrative record documents (*see* pp. 6–10 above) that the summer flounder stock has moved northeast since the 1980s toward the waters proximate to Long Island, in turn driving a shift in commercial fishing toward those

waters. In fact, recent Commerce data show that only approximately 10% of commercially caught summer flounder now come from southern mid-Atlantic waters, while over 87% come from northern mid-Atlantic and southern New England waters. *See* p. 8 above. Recent fishery data reflecting the northeast shift—which Commerce does not contest—are more current, relevant, and reliable than the 1980s data.[5]

In addition, as New York's comments demonstrated, the 2020 surplus formula, which allocates any surplus quota above 9.55 million pounds, is not based upon the best scientific information available. In fact, the administrative record provides no scientific basis for the 2020 surplus formula, which simply allocates surplus evenly among states without reference to a state's proximity to the fish, fishing, or any other scientific information. Moreover, the minor quota increase that New York would see only in abundant years (1–2%) does not reflect the dramatic northeast shift of the summer flounder stock, and fishing activity, toward Long Island.

Because the 2020 Allocation Rule is not based on the best scientific information available, it is inconsistent with the Magnuson-Stevens Act's second national standard and should be set aside as not in accordance with law under 5 U.S.C. § 706(2)(A). For the same reasons, the state-by-state quotas in the 2021 Specifications Rule—which apply the 2020 Allocation Rule in the 2021 fishing season—are inconsistent with the second national standard and should be set aside.

[5] In fact, the management plan amendments that established the 1993 formula acknowledged that past data were inconsistent and implemented a reporting system specifically to collect more accurate information to inform future adjustments to management measures. *See* p. 7 above; *see also* 57 Fed. Reg. 57,358, 57,360, 57,364 (Dec. 4, 1993). But instead of relying on data collected through that standardized reporting system, the 2020 Allocation Rule allocates the commercial quota based on the 1993 formula.

B. THE 2020 ALLOCATION RULE AND 2021 SPECIFICATIONS RULE 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 various states differently, as does the allocation of the coastwide quota to states in the 2020 Allocation Rule and 2021 Specifications Rule, it must be fair and equitable. However, the allocation is not fair and equitable to New York fishermen.

When the 1993 formula was adopted—and found by Commerce to be fair and equitable, *see* 57 Fed. Reg. 57,358, 57,368 (Dec. 4, 1993) (finding that the formula met the national standards)—it allocated the coastwide formula among the states and gave North Carolina and Virginia a significantly larger share based on landings that reflected the fishery that existed at the time, according to then-available data. Now that the fishery has shifted substantially northeast and is centered in the waters off Long Island, *see* pp. 6–10 above, it is unfair for Commerce to retain an allocation formula that is based on a now-nonexistent fishery. *See Massachusetts v. Daley*, 10 F. Supp. 2d 74, 78 (D. Mass. 1998) (fishery rules cannot rely on data that is known to be "seriously flawed," which is "particularly true when doing so will have a discriminatory effect"), *aff'd*, 170 F.3d at 31–32. Nor is the 1993 formula remedied by the 2020 surplus formula, which distributes surplus quota evenly and without regard to a state's proximity to the fishery, resulting in only minor and contingent

adjustments in state shares. North Carolina and Virginia will together continue to receive several times New York's quota share each year for a resource that is now centered in the waters off Long Island, where most fishing activity now takes place.

Fairness and equity require that, after decades of change in the fishery, New York fishermen finally receive the chance to catch a share of summer flounder that is commensurate with the increase in fish off their coast. Instead, they will continue to be forced to fish in the same waters as—often in direct sight of—boats licensed in southern states who may catch far more summer flounder only to steam hundreds of miles south to land them. *See* pp. 10–12 above.

Because the 2020 Allocation Rule perpetuates unfairness and inequity to New York's fishermen and the rest of its summer flounder supply chain, including port-side businesses such as pack houses, the Rule is inconsistent with the Act's fourth national standard and thus not in accordance with law under 5 U.S.C. § 706(2)(A). For the same reasons, the state-by-state quotas in the 2021 Specifications Rule, which apply the 2020 Allocation Rule, are not in accordance with law.

C. THE 2020 ALLOCATION RULE AND 2021 SPECIFICATIONS RULE FAIL TO 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 Allocation Rule and 2021 Specifications Rule are inconsistent with these standards for the same reasons that they are unfair to New York fishermen.

With the northeast shift in the fishery, 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. In addition, some New York boats catch summer flounder off Long Island and—because they have purchased North Carolina or Virginia licenses—travel to those states to land the fish. These boats travel significantly further than if 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 wholesale seafood market in the Bronx. *See* pp. 8–12 above.

Instead of recognizing and addressing these inefficiencies, the 2020 Allocation Rule perpetuates them by continuing to use the 1993 formula to allocate most of the coastwide quota, contrary to the current geographic distribution of the fishery. Moreover, because the 2020 surplus formula splits any surplus evenly among the states—making adjustments to the 1993 formula that are marginal and apply only when there is a surplus—it does little to improve efficiency, as the 2020 Allocation Rule EIS itself concedes. *See* AR 3141 (Ex. A) (efficiency increases "are expected to be minor" and are "not expected to substantially alter costs for fishery participants").

Thus, instead of minimizing labor, capital, and fuel inputs, and increasing cost-efficiency by allowing more summer flounder caught near New York to be landed in New York ports, the 2020 Allocation Rule perpetuates inefficiency by causing a disproportionate share of that flounder to be landed in distant southern ports. For similar reasons, the Rule fails to minimize costs in the summer flounder industry. Therefore, the 2020 Allocation Rule—and the 2021 Specifications Rule, which applies it in 2021—are inconsistent with the fifth and seventh national standards and thus not in accordance with law under 5 U.S.C. § 706(2)(A).

POINT II

THE 2020 ALLOCATION RULE AND 2021 SPECIFICATIONS RULE 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 "offered an explanation for its decision that runs counter to evidence before the agency," or if it fails to "articulate a rational connection between the facts found and the conclusions reached." *Oceana*, 2020 U.S. Dist. LEXIS 160448, at *44–45 (internal quotation marks and citations omitted).

In proposing the 2020 Allocation Rule, Commerce admitted that "summer flounder distribution, center of biomass, and location of fishing effort has changed over time." 85 Fed. Reg. at 48,660. However, as shown by the administrative record and discussed above (pp. 6–10, 17–19) the 2020 Allocation Rule is not based on

relevant data showing that the summer flounder fishery is now concentrated near Long Island. Rather, the 1993 formula continues to rely on 1980s data, while the 2020 surplus formula relies upon no scientific information whatsoever. Therefore, Commerce failed to "examine the relevant data" about the current fishery. And in approving the 2020 Allocation Rule as consistent with the Magnuson-Stevens Act in spite of uncontested evidence regarding the substantial shift in the fishery, Commerce has "offered an explanation for its decision that runs counter to evidence before the agency" and has failed to "articulate a rational connection between the facts found and the conclusions reached."

Therefore, the 2020 Allocation Rule is arbitrary and capricious under 5 U.S.C. § 706(2)(A), as are the state-by-state quotas in the 2021 Specifications Rule that apply the 2020 Allocation Rule in 2021.

POINT III

THE COURT SHOULD VACATE THE 2020 ALLOCATION RULE AND STATE QUOTAS IN THE 2021 SPECIFICATIONS RULE BUT NOT REINSTATE THE FORMER RULES

"When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *New York v. Azar*, 2019 U.S. Dist. LEXIS 193207, at *190 (S.D.N.Y. Nov. 6, 2019) (internal quotation marks omitted). Accordingly, when courts rule that Commerce has taken action contrary to the Magnuson-Stevens Act's national standards, the typical remedy is vacatur. *See, e.g.*, *Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 92 (D.D.C. 2019). Because the 2020 Allocation Rule and the state-by-state quotas in the 2021 Specifications Rule are inconsistent with multiple standards under the Act, they must be vacated.

In vacating the 2020 Allocation Rule and state-by-state quotas in the 2021 Specifications Rule, the Court should not revert to the status quo and reinstate the 1993 Allocation Rule or the former state-by-state quotas based upon it. "[T]he better course is generally to vacate the new rule without reinstating the old rule." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983). Indeed, the 1993 Allocation Rule is based on the obsolete 1993 formula and so its reinstatement would not bring Commerce into compliance with the Magnuson-Stevens Act or provide appropriate relief for New York. *See id.* (irrational to reinstate an old rule where the new rule was invalid for being too stringent, and the old rule was even more so).

In the alternative, New York submits that it may be appropriate to stay vacatur of the 2020 Allocation Rule and 2021 quotas for a brief period to allow Commerce to establish interim or replacement measures. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 415 (D.D.C. 2018) (vacating invalid regulation and staying vacatur to allow agency to establish replacement); *see also Coastal Conservation Ass'n v. Gutierrez*, 512 F. Supp. 2d 896, 902 (S.D. Tex. 2007) (same).

CONCLUSION

For the reasons stated above, the 2020 Allocation Rule and the state-by-state quotas in the 2021 Specifications Rule are not in accordance with law and arbitrary and capricious under 5 U.S.C. § 706(2)(A), so the Court should vacate and remand them to Commerce for further proceedings consistent with the Court's opinion.

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