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,

v.

21 Civ. 304 (MKV)

GINA RAIMONDO, in her official capacity as the Secretary of the United State 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.

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
BACKGROUND 2
A. The Magnuson-Stevens Act 2
B. Regulation of the Summer Flounder Fishery 5
1. The Mid-Atlantic Council 5
2. The Atlantic Coastal Fisheries Cooperative Management Act 6
3. Summer Flounder Fishery FMP 7
C. Amendment 21 and the 2020 Allocation Rule 8
D. Summer Flounder Annual Specifications and the 2021 Specifications 12
ARGUMENT 14
A. Legal Standards 14
B. The 2020 Allocation Rule Is Not Contrary to Law 15
1. NMFS Is Afforded Discretion in Application of the Magnuson-Stevens Act Standards 15
2. The 2020 Allocation Rule Is Based upon the Best Scientific Information Available 16
3. The 2020 Allocation Rule Is Fair and Equitable 18
4. The 2020 Allocation Rule Properly Considers Cost and Efficiency 21
5. The 2020 Allocation Rule Properly Considers the Importance of Fishery Resources to Fishing Communities 22
C. The 2020 Allocation Rule Is Not Arbitrary or Capricious 23
D. The 2021 Specifications Rule Is Not Arbitrary or Capricious 24
E. The Court Should Not Vacate the Challenged Rules 25
CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Factory Trawler Ass'n v. Baldridge,
831 F.2d 1456 (9th Cir. 1987) 21
Allied-Signal, Inc. v. U.S. Nuclear Reg. Com'n,
988 F.2d 146 (D.C. Cir. 1993) 25
Ass'n of Proprietary Colls. v. Duncan,
107 F. Supp. 3d 332 (S.D.N.Y. 2015) 14
Balt. Gas & Electric Co. v. NRDC,
462 U.S. 87 (1993) 15
Blassingame v. Sec'y of Navy,
866 F.2d 556 (2d Cir. 1989) 24
Boatmen v. Gutierrez,
429 F. Supp. 2d 543 (E.D.N.Y. 2006) 15
C&W Fish Co. v. Fox,
931 F.2d 1556 (D.C. Cir. 1991) 3
Camp v. Pitts,
411 U.S. 138 (1973) 14-15
Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 14
Conservation L. Found. v. Evans,
360 F.3d 21 (1st Cir. 2004) 15
Conservation L. Found. v. Pritzker,
37 F. Supp. 3d 234 (D.D.C. 2014) 15
Conservation L. Found. v. Ross,
374 F. Supp. 3d 77 (D.D.C. 2019) 15-16
Ctr. for Biological Diversity v. Blank,
933 F. Supp. 2d 125 (D.D.C. 2013) 18
Damus v. Nielsen,
313 F. Supp. 3d 317 (D.D.C. 2018) 24-25
Fertilizer Inst. v. EPA,
935 F.2d 1303 (D.C. Cir. 1991) 25
Fishermen's Finest, Inc. v. Locke,
593 F.3d 886 (9th Cir. 2010) 18
Guan v. Gonzales,
432 F.3d 391 (2d Cir. 2005) 14
Guindon v. Pritzker,
31 F. Supp. 3d 169 (D.D.C. 2019) 18
J. Andrew Lange, Inc. v. FAA,
208 F.3d 389 (2d Cir. 2000) 15
J.H. Miles & Co. v. Brown,
910 F. Supp. 1138 (E.D. Va. 1995) 21

Limnia, Inc. v. U.S. Dep't of Energy,
347 F. Supp. 3d 25 (D.D.C. 2018) 24-25
Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989) 14
Massachusetts v. Daley,
170 F.3d 23 (1st Cir. 1999) 18, 20
Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 23, 24
N.C. Fisheries Ass'n, Inc. v. Gutierrez,
518 F. Supp. 2d 62 (D.D.C. 2007) 16-17, 18
Nat'l Fisheries Inst. v. Mosbacher,
732 F. Supp. 210 (D.D.C. 1990) 15
New York v. Locke,
No. 08 Civ. 2503, 2009 WL 1194085 (E.D.N.Y. 2009) 15
NRDC v. EPA,
808 F.3d 556 (2d Cir. 2015) 25
Ocean Conservancy v. Gutierrez,
394 F. Supp. 2d 147 (D.D.C. 2005) 16
Oceana, Inc. v. Pritzker,
24 F. Supp. 3d 49 (D.D.C. 2014) 16, 23
Oceana, Inc. v. Ross,
483 F. Supp. 3d 764 (N.D. Cal. 2020) 18
Residents for Sane Trash Sols. v. U.S. Army Corps of Eng'rs,
31 F. Supp. 3d 571 (S.D.N.Y. 2014) 14
Tutein v. Daley,
43 F. Supp. 2d 113 (D. Mass. 1999) 5
Village of Grand View v. Skinner,
947 F.2d 651 (2d Cir. 1991) 14

Statutes

5 U.S.C. 706(2)(A) 14
16 U.S.C. § 1801 .... 1, 3
16 U.S.C. § 1851 .... *passim*
16 U.S.C. § 1852 .... 3, 5, 6
16 U.S.C. § 5101 6
16 U.S.C. § 5103 6
16 U.S.C. § 5104 7

Rules

Federal Rule of Civil Procedure 56 14

Regulations

50 C.F.R. § 602.15 22
50 C.F.R. § 625.20 8

50 C.F.R. § 648.2 7
50 C.F.R. § 648.100 .... 1, 13
50 C.F.R. § 648.102(c) 12, 13, 25
50 C.F.R. § 600.305 5
57 Fed. Reg. 57,358 .... 7, 8
79 Fed. Reg. 55,432 8
84 Fed. Reg. 54,041 13
85 Fed. Reg. 45,571 11
85 Fed. Reg. 48,660 11
85 Fed. Reg. 73,253 13
85 Fed. Reg. 80,661 12
85 Fed. Reg. 82,946 14

PRELIMINARY STATEMENT

The National Marine Fisheries Service ("NMFS") sets annual quotas limiting each year's summer flounder catch, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("the Magnuson-Stevens Act" or the "Act"), 16 U.S.C. §§ 1801 *et seq.* For summer flounder, those annual quotas are allocated between commercial and recreational fishermen and amongst the states in accordance with the regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan. 50 C.F.R. §§ 648.100-648.102. In 1992, the NMFS promulgated regulations establishing the percentage shares allocated to each Eastern state for commercial summer flounder fishing, followed by a slight adjustment the following year (the "1993 Allocation"). The 1993 Allocation was the result of a complex process that began with two intergovernmental bodies making recommendations and ultimately ended with a decision by NMFS. Every state involved in the process, including New York, voted for the Allocation at the time. For each year since then, NMFS has promulgated a "Specification," which specifies the total catch for the season, and—using the Allocation—the portion that may be landed in each state.

After a similarly extensive process that began in December 2013, NMFS in December 2020 promulgated a revised formula to allocate percentage shares to Eastern states (the "2020 Allocation"). Following recommendations by the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission, NMFS made its ultimate decision following agency review and public notice and comment. The revised allocation formula assigns shares below a certain threshold according to the 1992 formula (in which New York is assigned 7.65% of the catch), but in years where the overall quota exceeds that threshold (including 2021) the additional quota is allocated according to a revised formula in which active states split the extra catch equally (such that New York is assigned 12.375% of the additional catch). This allows more northerly states with lower allocations to capture a greater share of the fishery in abundant years,

due to the northward shift in the flounder fishery. In crafting the revised allocation, NMFS followed its statutory mandate to balance the reliance interests of fishing communities, economic considerations, and the location of the summer flounder fishery.

At each stage of these proceedings, New York made clear its view, which Plaintiffs repeat here: proximity to the summer flounder fishery should be the sole or dominant factor, and decades of reliance interests developed by Virginia and North Carolina fishing communities should be given little or no weight. That is contrary to the mandates of the Magnuson-Stevens Act, which requires in part that fishery management plans "take into account the importance of fishery resources to fishing communities." 16 U.S.C. § 1851(a)(8).

The Court should grant summary judgment in favor of the Secretary with respect to the 2020 Allocation Rule. Plaintiffs' blinkered interpretation of isolated statutory factors does not establish that the Secretary's decision was contrary to law. Nor can Plaintiffs establish that the decision was arbitrary or capricious where the NMFS carefully considered all of the arguments and evidence that New York raises here, and in its discretion chose to balance competing interests in a manner contrary to New York's preferences.

Plaintiffs also challenge the Secretary's mechanical application of the 2020 Allocation to the 2021 summer flounder catch—the 2021 Specifications Rule. But Plaintiffs do not dispute that the Secretary simply applied the allocation formula that is set forth in the applicable regulations. The Secretary's action in applying the applicable regulations should be upheld as consistent with law and not arbitrary or capricious.

BACKGROUND

A. The Magnuson-Stevens Act

The Magnuson-Stevens Act establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the exclusive

economic zone ("EEZ"). 16 U.S.C. §§ 1801(a)(6), 1811(a). For purposes of the Act, the EEZ extends from the seaward boundary of each coastal State out to 200 nautical miles. *Id.* § 1802(11). Among the key purposes of the MSA are to implement fishery management plans ("FMPs") "which take into account the social and economic needs of the States." *Id.* § 1801(b)(5). The NMFS, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries pursuant to the Magnuson-Stevens Act.

To assist in fishery management, the Act established eight regional fishery management councils (Councils). 16 U.S.C. § 1852(a). "Each Council is granted authority over a specific geographic region [within the EEZ] and is composed of members who represent the interests of the states included in that region." *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1557–58 (D.C. Cir. 1991) (citing 16 U.S.C. § 1852). Voting members of the Councils include federal, state, and territorial fishery management officials, and individuals nominated by state governors and appointed by the Secretary who are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of fishery resources within the Councils' geographic areas. 16 U.S.C. § 1852(b). Each Council has a scientific and statistical committee (SSC) that provides ongoing scientific advice for fishery management decisions, as well as advisory panels to assist the Council in carrying out its functions under the Act. *Id.* § 1852(g). Councils, SSCs and advisory panels conduct their business in public meetings, pursuant to procedures prescribed by the MSA and written procedures established by each council. *Id.* §§ 1852(e), (f)(6), (h), (i).

A Council is required to prepare and submit to NMFS an FMP "for each fishery under its authority that requires conservation and management," as well as proposed regulations that the Council "deems necessary or appropriate" to implement the FMP. *Id.* §§ 1852(h)(1), 1853(c). FMPs are developed through a public process that may take several years and that includes notice

of meetings of Councils, SSCs, and advisory panels; opportunity for interested persons to submit oral and written statements during those meetings; and public hearings. *Id.* § 1852(h)(3), (i)(2). When a Council transmits an FMP to NMFS, the agency publishes a notice of availability in the Federal Register announcing a 60-day comment period. *Id*. § 1854(a)(1)(B). Within 30 days of the end of the comment period, NMFS must approve, disapprove, or partially approve the FMP based on consistency with law. *Id*. § 1854(a)(3). NMFS reviews proposed regulations for consistency with the FMP and applicable law, and pursuant to a process set forth in the MSA, publishes proposed rules, solicits public comment, and promulgates final rules. *Id.* § 1854(b).

The MSA sets forth required provisions for FMPs, including that all FMPs and their implementing regulations must be "consistent with" the ten "national standards" set out at 16 U.S.C. § 1851(a), including but not limited to:

> (2) Conservation and management measures shall be based upon the best scientific information available.
> . . .
> (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.
> (5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.
> . . .
> (7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.
> (8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities. . . .

Id. Advisory guidelines for the NSs are set forth at 50 C.F.R. §§ 600.305 *et seq*. These NS

guidelines do not have the force and effect of law. 16 U.S.C. § 1851(b). *See Tutein v. Daley*, 43 F. Supp. 2d 113, 121-25 (D. Mass. 1999) (holding that NS1 advisory guidelines are not subject to judicial review under the MSA and Administrative Procedure Act).

B. Regulation of the Summer Flounder Fishery

Summer flounder is an important commercial and recreational species. Its geographical range encompasses the shallow estuarine waters and outer continental shelf from Nova Scotia to Florida. AR[1] 2516. Summer flounder exhibit strong seasonal inshore-offshore movement. AR 2562. They normally inhabit shallow coastal and estuarine waters during the warmer months and remain offshore during the fall and winter. *Id.* The summer flounder fishery takes place both in the EEZ and in waters within the three-nautical-mile limit subject to state regulations. AR 2568. Thus, the regulation of the summer flounder fishery involved both state and federal actors, as well as private citizens. Two bodies are particularly involved in establishing the regulations relevant to the fishery—including those being challenged by Plaintiffs—the Mid-Atlantic Fishery Management Council and Atlantic States Marine Fisheries Commission, both described below.

1. The Mid-Atlantic Council

The commercial summer flounder fishery is the responsibility of the Mid-Atlantic Fishery Management Council (the "Council"), which is responsible for recommending management plans to the Secretary for federal fisheries in the Atlantic Ocean seaward of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina. *See* 16 U.S.C. § 1852(a)(1)(B). The Council has statutorily prescribed membership, consisting of appointed, ex officio and non-voting members. 16 U.S.C. § 1852(a)-(b). The Council has 21 voting members; 7 represent the

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[1] "AR" refers to the administrative record submitted to the Clerk of Court and the counsel of record on March 5, 2021 on CD-ROM.

constituent states' fish and wildlife agencies, 13 are private citizens knowledgeable about fishing or marine conservation, and one represents NMFS. *See*, http://www.mafmc.org/about (last visited Dec. 18, 2019). The voting members currently include a representative from New York' State's Department of Environmental Conservation, Division of Marine Resources, and three private individuals from New York. http://www.mafmc.org/members (last visited April 2, 2021).

The Council's operation is governed by its Statement of Organization, Practices, and Procedures ("SOPP"), available on the Council's webpage. http://www.mafmc.org/council-member-resources. Each of the Council's 21 voting members may individually vote on matters at Council meetings, with decisions of the Council made by a majority vote. SOPP at 3, 19.

2. The Atlantic Coastal Fisheries Cooperative Management Act

In 1993, the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101 *et seq.* (the "Atlantic Coastal Act"), was enacted to "support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." *Id.* § 5101(b). The Atlantic Coastal Act addresses the problem of fishery stocks common to waters under exclusive state jurisdiction (*i.e.*, within 3 miles of the coast) and waters in the EEZ, which is under exclusive federal jurisdiction. The Atlantic Coastal Act establishes a federal-state management scheme providing for the participation of the Atlantic Coastal states in the Atlantic States Marine Fisheries Commission ("Commission"). The Commission was originally created by an interstate compact that was approved by Congress in 1942. Pub. L. No. 77-539, 54 Stat. 261 (1942). The Atlantic Coastal Act requires cooperation of federal and state efforts for the regulation of inter-jurisdictional fisheries. 16 U.S.C. § 5103(a).

The Atlantic Coastal Act provides that in preparing coastal FMPs for a fishery located in both state waters and the EEZ, the "Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plan[s] may complement Council fishery

management plans." 16 U.S.C. § 5104(a)(1). The Commission's operation is governed by its Compact and Rules and Regulations. *See* http://www.asmfc.org/files/pub/CompactRulesRegs_Feb2016.pdf (last visited April 2, 2021). Each Atlantic coastal state is represented by three Commissioners, with one vote from each state as determined by the majority of that state's Commissioners. *Id.* at 6.

3. Summer Flounder Fishery FMP

The initial summer flounder management plan was prepared by the Commission in 1982, followed by a Council FMP in 1988 that was based on the Commission's plan. *See* AR 2568. Since that time, the Council's Summer Flounder FMP[2] has been amended a number of times. *See* AR 2568-2560. Amendment 2 to the FMP was jointly developed and adopted by the Council and the Commission. *See* 57 Fed. Reg. 57,358 (Dec. 4, 1992). This amendment contained a number of management measures, including the commercial summer flounder state-by-state allocation to which New York now objects, which distributed a percentage of the total allowable catch to each state from North Carolina to Maine. *See id.* at 57,373. Specifically, New York was allocated 7.7486% of the annual quota. *Id.*

Each state's allocation—the percentage that may be "landed" in each state—was based on the state's percentage of the landings in the years 1980 through 1989. 57 Fed. Reg. at 57,359. Under the state-by-state quota system, all summer flounder landed for sale in a state is applied against that state's annual commercial quota, regardless of where (or by whom) the summer flounder were harvested. *Id.* at 57,365, 57,373. All member states of the Commission, including New York, voted in favor of the state-by-state quota system in 1992. *Id.* at 57,359.

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[2] In 1996, the Summer Flounder FMP was amended to include scup and black sea bass, both species that the Commission and Council manage, creating a Summer Flounder, Scup, and Black Sea Bass FMP.

In 1992, the Secretary adopted Amendment 2 to the FMP for summer flounder which included, in relevant part, state-by-state allocation for the commercial summer flounder fishery. 57 Fed. Reg. at 57,373. In 1993, the state-by-state quotas were revised based on new information provided by the State of Connecticut, and finalized by the Council and the Commission and adopted by the Secretary in Amendment 4 (then codified at 50 C.F.R. § 625.20; now found at 50 C.F.R. § 648.102(c)(1)(i)) as follows: Maine 0.04756; New Hampshire 0.00046; Massachusetts 6.82046; Rhode Island 15.68298; Connecticut 2.25708; New York 7.64699; New Jersey 16.72499; Delaware 0.01779; Maryland 2.03910; Virginia 21.31676; North Carolina 27.44584. 50 C.F.R. § 648.102(c)(1)(i). This is what New York refers to in its brief as the "1993 Allocation Rule."

C. Amendment 21 and the 2020 Allocation Rule

In September 2014, the Council announced its intent to prepare an EIS for a broad management action addressing several categories of issues related to summer flounder. *See* 79 Fed. Reg. 55,432; AR 234-236. This amendment, known as the "Comprehensive Summer Flounder Amendment," was initiated jointly with the Commission. 83 Fed. Reg. at 13,478-13,479; AR 1053-1054. On March 29, 2018, NMFS advised the public of changes on the scope of the amendment. Specifically, while the amendment had initially sought to address recreational and commercial issues relating to summer flounder, the Council had now decided to peel away the recreational issues from the amendment and focus on commercial issues. *Id.* Among the issues now under Council consideration in the amendment were summer flounder fishery management plan goals and objectives, along with the commercial allocation and commercial framework provisions that would be considered and analyzed in an EIS. NMFS advised that the Council was soliciting comments on what was now referred to as the "Summer Flounder Commercial Issues Amendment." *Id.*

The draft EIS was issued in April 2018. AR 1111-1309. The draft EIS stated that the

Council was considering "whether modifications to the commercial quota allocation are appropriate, and if so, how the quota should be re-allocated." AR 1112. It explained that there was a perception "by many" that the state-by-state quotas, which had not been modified since 1993, were outdated because they were based on 1980-1989 landings data. *Id.* The draft EIS noted that summer flounder distribution, biomass, and fishing effort have changed and "some believe initial allocations may not have been equitable or were based on flawed data; therefore, stakeholders requested evaluation of alternative allocation systems." *Id.* The draft EIS proposed four alternatives to the commercial summer flounder state-by-state quotas. AR 1144-1165. In August 2018, the Commission published a draft amendment, and set a comment period concluding October 12, 2018. AR 2507-2677. The draft EIS and the draft amendment considered four alternatives to the commercial summer flounder state-by-state quotas, AR 1144-1165, 2588-2615: first, no action (status quo), which would leave New York's allocation at 7.65%, AR 2589; second, adjusting the regional distribution of quotas between northern (New York to Maine) and southern (North Carolina to New Jersey) states, but leaving each state's proportion of its regional share the same, which would increase New York's allocation to 9.1% or 10.7% depending upon the method of calculation, AR 2595, 2597; third, leaving quota distribution under either the five- or ten-year average to be based upon the prior formula, but allowing quota above that trigger point to be distributed evenly between states with more than 1% allocation (this, the eventual rule, is described in more detail below), AR 2598; and fourth, adopting the model used for scup and differentiating between the summer period and two winter periods. AR 2606.

On October 12, 2018, New York submitted detailed comments to the Council, the Commission, and NMFS objecting to the implementation of any of these alternatives. AR 1831. New York proposed two alternatives of its own: (1) that NMFS adopt a coastwide allocation for

an interim period (i.e., eliminate the state-by-state allocations) and use that period to gather updated data about the summer flounder catch, or (2) that NMFS update the allocation formula to reflect the current summer flounder catch distribution. AR 1834.

At a joint meeting in March 2019, the Council and Commission voted to approve an amendment to the FMP that would revise the commercial summer flounder state-by-state quotas. AR 1929. The Council and Commission adopted a modified form of the third alternative considered, selecting a trigger point of 9.55 million pounds. In years where the summer flounder catch quota exceeded 9.55 million pounds, states would receive shares of that additional quota according to a modified formula. All states except Maine, Delaware, and New Hampshire (which, being largely inactive, would split one percent of the additional quota) would split equally 99 percent of the additional quota, such that New York would receive 12.375% of any quota in excess of 9.55 million pounds.

This amendment was submitted to NMFS by the Council, which triggered the agency's review and public notice and comment process. On May 7, 2020, a final Environmental Impact Statement ("EIS") was submitted to NMFS. AR 2875. The EIS noted that the recommended proposal—equal-shares allocation above 9.55 million pounds—set a quota threshold that had been exceeded in 21 of the preceding 26 years, and in a high-quota year (17.9 million pounds in 2005) would increase New York's share of the catch from 7.65% to 9.85%. AR 2944. Importantly, there is no "ceiling" to the proportional share increases. As the EIS explained its rationale:

> Alternative 2C is intended to increase equity in the allocations amongst the states when annual coastwide quotas are about average or above average, while minimizing the economic loss to states with a higher proportion of the current summer flounder quota. This means that when the stock is in better condition, the benefits are shared more equally amongst states. In years with annual quotas well below the time series average, the allocations revert to status quo, providing some economic protections to states with historically higher dependence on the summer flounder fishery.

AR 2496. The EIS considered in detail the impacts of the proposed alternatives, examining their ecological, economic, and social effects. AR 2932-2961. The EIS also noted that several proposal had been rejected, including those put forward by New York, and explained the concerns that New York's proposals elicited:

> Council and Board members from the state of New York requested consideration of two additional commercial quota allocation options, including 1) negotiated quota shares amongst the states in the management unit and 2) coastwide quota management for a period of a few years in order to set a new baseline of state-by-state landings. These options had been proposed by the state of New York in a March 23, 2018 petition for rulemaking, and were reiterated again by New York representatives and stakeholders during the amendment public comment process in the fall of 2018. At the April 30, 2018 joint meeting, the Council and Board considered a motion to include these two options in the draft amendment, but this motion failed due to lack of majority. There was concern with the concept of negotiated quota shares given the political nature of this approach and the undefined process and basis for negotiation. A coastwide quota was not favored given the potential to create derby fishing conditions, the expected difficulty in developing coastwide management measures, and the potential to create an influx of latent effort.

AR 2967.

A notice of availability for the amendment published in the Federal Register on July 29, 2020, with a comment period ending on September 28, 2020. *See* 85 Fed. Reg. 45,571. The proposed rule was published in the Federal Register on August 12, 2020, with a comment period ending on September 11, 2020. *See* 85 Fed. Reg. 48,660. On September 11, 2020, New York submitted public comments reiterating its opposition to the proposed amendment on the same grounds it had articulated in prior comments (and articulates in this litigation). AR 3733-3736. In its October 15, 2020 Record of Decision, NMFS noted that New York's was the only public comment in opposition to Amendment 21. AR 4022. NMFS pointed out that New York had failed to identify any superior landings data: commercial landings since 1993 had been constrained by the allocations established by 1980-89 landings data, and would thus reflect the same results. AR 4023. NMFS also explained that it had rejected New York's proposal to base the allocation largely

or entirely on biomass distribution:

> Substantial reductions in allocation for states, resulting in quotas below historical averages, that have historically depended on the summer flounder fishery would increase their operation costs, and the cost of the infrastructure relative to the value of the fishery overall. Along the coast, there is substantial variability in the mobility of each state's fleet, the traditional areas of operation for each state's fleet, the targeted species and economic dependence on summer flounder by state. The Council selected the proposed allocation formula to balance preservation of historical state access and infrastructure at recent quota levels, with an intent of providing equitability among states when the stock and quota are at higher levels.

Id.

Following this process, NMFS approved Amendment 21, or the 2020 Allocation Rule. The rule was published in the Federal Register on December 14, 2020, to take effect on January 1, 2021. 85 Fed. Reg. 80,661 (codified at 50 C.F.R. § 648.102(c)); AR 4082.

D. Summer Flounder Annual Specifications and the 2021 Specifications

The state-by-state allocations outlined above do not in and of themselves establish the number of fish that can be landed by fishermen in each state in a particular year. Those numbers are set through the "specifications process." *See* 50 C.F.R. § 648.102(a).

The Summer Flounder, Scup, and Black Sea Bass FMP[3] is cooperatively managed by the Council and the Commission. The Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (the "Board") meet jointly each year to consider the recommendations of the Council's Scientific and Statistical Committee ("SSC") and Summer Flounder, Scup, and Black Sea Bass Monitoring Committee (the "Monitoring Committee") before making recommendations for annual commercial quotas, recreational harvest limits, and other commercial and recreational management measures, such as minimum size limits, possession

[3] In 1996, as part of Amendments 8 and 9, the Scup and Black Sea Bass FMPs were incorporated into the Summer Flounder FMP. AR 717.

limits, seasons, gear requirements and restrictions and any other necessary measures. *See* 50 C.F.R. § 648.100, 101, 102(b); *see, e.g.,* AR 118-19. Based on these recommendations, NMFS publishes a proposed rule to among other things implement a coast-wide commercial quota, which the regulations require to be distributed in accordance with the state-by-state allocations set forth above. *See* 50 C.F.R. § 648.102(c) (allocating shares of quota above and below 9.55-million-pound threshold). The proposed rule is subject to public comment and after considering public comment, NMFS publishes a final rule in the Federal Register setting for the annual specifications for a particular year or years. *Id.*

Although NMFS had previously implemented summer flounder specifications for 2020 and 2021, *see* 84 Fed. Reg. 54,041, NMFS put forward a new 2021 Specifications Rule based in part upon a revised risk formula (not at issue in this litigation). *See* 85 Fed. Reg. 73,253, 73,254, AR 4025-4026. The proposed rule noted that, as Amendment 21 was pending, the quota established by the proposed rule could be allocated according to the revised formula. Based upon the commercial quota of 12.49 million pounds, the proposed rule noted that New York's quota would increase from 955,109 pounds under the then-existing formula to 1,094,113 pounds under the Amendment 2021 formula. AR 4027.

On December 2, 2020, New York submitted a comment in opposition to the proposed specifications rule.[4] AR 4610. New York did not point to any error in applying either the previous or Amendment 21 allocation formulas, but reiterated its objection that both the old and revised allocation formulas did not afford sufficient weight to the northward shift in the summer flounder fishery. *See* AR 4610-11.

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[4] The only other comment received was from "Jean Public" in opposition to the overall increase in the commercial fishing quotas. AR 4612.

On December 21, 2021, NMFS published the final 2021 Specifications Rule. 85 Fed. Reg. 82,946; AR 4627.

ARGUMENT

A. Legal Standards

Where, as here, "a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332, 344 (S.D.N.Y. 2015) (internal quotation marks and footnotes omitted). "[W]hile the usual summary judgment standard under Federal Rule of Civil Procedure 56 does not apply in such cases, summary judgment nonetheless is 'generally appropriate,' as '[t]he question whether an agency's decision is arbitrary and capricious . . . is a legal issue amenable to summary disposition.'" *Id.* (footnotes omitted).

Under the APA, the standard for judicial review is whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991). This deferential standard presumes the agency's action to be valid. *Residents for Sane Trash Sols. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 587-88 (S.D.N.Y. 2014). Review is "searching and careful" but "narrow;" the court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Overton Park*, 401 U.S. at 416); *see also Overton Park*, 401 U.S. at 416 ("[T]he ultimate standard of review is a narrow one[: t]he court is not empowered to substitute its judgment for the agency.")).

In evaluating whether an agency's action is arbitrary or capricious, the reviewing court should not "engage in an independent evaluation of the cold record." *Guan v. Gonzales*, 432 F.3d 391, 394-95 (2d Cir. 2005); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial

review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Instead, the court should decide only whether the agency has "considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action." *J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 391 (2d Cir. 2000).

Where, as here, the agency's scientific or technical expertise is involved, "a reviewing court must generally be at its most deferential." *Balt. Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1993). As to fishery management decisions, "it is . . . especially appropriate for the Court to defer to the expertise and experience of those individuals and entities—the Secretary, the Councils, and their advisors—whom the Act charges with making difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors." *Nat'l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 223 (D.D.C. 1990) (citations omitted); *see New York v. Locke*, No. 08 Civ. 2503, 2009 WL 1194085, at *12 (E.D.N.Y. 2009) (Sifton, J.) ("The court's review of agency actions is particularly deferential 'where the agency's particular technical expertise is involved, as is the case in fishery management.'" (quoting *Boatmen v. Gutierrez*, 429 F. Supp. 2d 543, 547-48 (E.D.N.Y. 2006))).

B. The 2020 Allocation Rule Is Not Contrary to Law

1. NMFS Is Afforded Discretion in Application of the Magnuson-Stevens Act Standards

At the outset, courts have acknowledged that the Magnuson-Stevens Act standards—while setting forth ten standards with which FMPs "shall" be consistent, 16 U.S.C. § 1851(a)—is intended "'to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.'" *Conservation L. Found. v. Pritzker*, 37 F. Supp. 3d 234, 251 (D.D.C. 2014) (quoting *Conservation L. Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004)). While Plaintiffs briefly acknowledge the existence of ten standards, *see* Pl. Br. 4, they only discuss four

of the standards in their brief. This omission is important, because "several of these statutory goals stand in some tension." *Conservation L. Found. v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019). "The upshot of this statutory structure is that Congress did not intend any of these specified goals . . . to take priority over the others." *Id.* Rather, "[t]he somewhat conflicting nature of these standards shows that Congress delegated to NMFS the discretion to strike an appropriate balance, and that there is no statutory mandate that one National Standard be maximized at the expense of others." *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 68 (D.D.C. 2014).

Plaintiffs' challenge—which analyzes each factor as though it is wholly independent and dispositive—is thus out of step with how courts interpret the Magnuson-Stevens Act. Accordingly, while the Government discusses the statutory factors separately in response to the challenge raised by New York, the Court should be mindful that the individual factors cannot be considered in isolation, but at times must be balanced against one another in the agency's discretion, as the NMFS did in crafting the challenged regulations.

2. The 2020 Allocation Rule Is Based upon the Best Scientific Information Available

National Standard 2 states that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). This standard "requires that rules issued by the NMFS be based on a thorough review of all the relevant information available at the time the decision was made, and insures that the NMFS does not disregard superior data in reaching its conclusion." *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005) (internal quotation marks omitted), *aff'd*, 488 F.3d 1020 (D.C. Cir. 2007). This standard is a "practical" one "requiring only that fishery regulations be diligently researched and based on sound science," and the NMFS is not obliged "to rely upon perfect or entirely consistent data." *Id.* Because of this practicality, "[l]egal challenges to the Secretary's compliance with

National Standard 2 are frequent and frequently unsuccessful." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007). "Absent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency's collection of and reliance on scientific information will fail." *Id.* (collecting cases).

New York's challenge to the 2020 Allocation Rule fails to clear this high bar. New York argues that NMFS ignored data showing the northward shift in the summer flounder fishery. But NMFS did not ignore this data; to the contrary, it is extensively discussed in the administrative record. *See, e.g.*, AR 2877 (identifying shift in biomass as underlying purpose of rulemaking); AR 2977-2979 (discussing scientific evidence of shift). And NMFS explicitly deliberated whether it should dramatically shift the allocation northward to follow this shift in the geographic location of the fishery. *See, e.g.*, AR 3100-3101. Ultimately, however, "[t]he Council selected the proposed allocation formula to balance preservation of historical state access and infrastructure at recent quota levels, with an intent of providing equitability among states when the stock and quota are at higher levels." AR 4023. In other words, NMFS carefully considered the precise data New York points to regarding the location of the summer flounder fishery and determined that it must be weighed against preexisting infrastructure and community reliance, which was in turn based upon historical landings data and the resulting 1993 Allocation formula.[5]

New York argues that recent fishery data "are more current, relevant, and reliable than the 1980s data." Pl. Br. 19. But this argument conflates two sets of data measuring entirely different phenomena: fishery location versus landings. NMFS did not disregard a superior version of the

[5] Nor can New York point to more recent or superior landings data; as NMFS noted, in its Record of Decision, "[l]andings since 1993 have been constrained by the allocation formulas, so more recent data would simply reflect the same percentages as the 1980-1989 data."

same data,[6] but rather made a choice between prioritizing historical landings data and current fishery location data in deciding upon the management approach here. "[I]t is well established that NMFS 'may choose' between 'conflicting facts and opinions,' so long as it 'justifies the choice.'" *Ctr. for Biological Diversity v. Blank*, 933 F. Supp. 2d 125, 149 (D.D.C. 2013) (brackets omitted) (quoting *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 890 (9th Cir. 2010)).

New York's cited cases are revealingly inapposite. In *Guindon v. Pritzker*, 31 F. Supp. 3d 169 (D.D.C. 2019), the Court found that NMFS had violated National Standard 2 when it disregarded the most recent landings data in favor of older and less accurate *landings data*. *Id.* at 195. And in *Oceana, Inc. v. Ross*, 483 F. Supp. 3d 764 (N.D. Cal. 2020), NMFS by its own admission "wholly disregard[ed]" two recent peer-reviewed studies on anchovy biomass in setting anchovy catch limits. *Id.* at 780-81. These cases demonstrate the limited circumstances in which a National Standard 2 challenge can succeed: where there is "some indication that superior or contrary data was available and that the agency ignored such information." *N.C. Fisheries Ass'n*, 518 F. Supp. at 85. Plaintiffs' challenge, by contrast, falls into the larger category of "frequent and frequently unsuccessful" challenges, *id.*, characterized by disagreement with how NMFS chose to use the data available to it.

3. The 2020 Allocation Rule Is Fair and Equitable

National Standard 4 provides that, "[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable

[6] To the extent that New York would take issue with the accuracy of 1980s landings data used to formulate the 1993 Allocation, which could represent a National Standard 2 concern, New York has provided no such evidence, and in their comments on the proposed rule seem to acknowledge that no such information exists. AR 4084. Thus, New York presents no competing scientific information to support their claim here. *See Massachusetts v. Daley*, 170 F.3d 23, 30 (1st Cir. 1999) (rejecting National Standard 2 challenge because Massachusetts had failed to point to or supply superior data).

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." 16 U.S.C. § 1851(a)(4). New York does not appear to challenge that it is necessary to allocate quotas among the states, only that the present allocation is unfair. Yet New York's one-dimensional view of fairness—that fishermen should receive quotas solely based upon proximity to the fishery—finds no support in regulation or caselaw.

In making allocations, "[t]he 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." 50 C.F.R. 600.325(c)(3)(i)(B). The Council should also consider, inter alia, "dependence on the fishery by present participants and coastal communities." *Id.* § 600.325(c)(3)(iv). That is precisely what occurred here. In its EIS, the Council carefully considered the impact of various alternative proposals, including the status quo, on human communities. AR 3099-3114. The Council acknowledged that

> New York in particular has reported negative socioeconomic impacts of their current allocation as the result of a) perceived problems with the original 1980-1989 landings data used to set current allocations, b) relatively higher availability in waters off of New York relative to their current allocation shares, and c) a disparity in their allocation compared to two nearby states, Rhode Island and New Jersey.

AR 3100. However, "Other states have experienced long-term positive socioeconomic impacts from the existing quota allocations, in particular Rhode Island, New Jersey, Virginia, and North Carolina . . . ." *Id.*

Considering a drastic shift of the quota allocation to northern states (though less drastic than New York's preferred solution would seem to contemplate), the EIS noted that such a shift would have "high positive" impacts for northern states such as New York, but also "moderate to high negative impacts" in southern states such as Virginia and North Carolina. AR 3107. In

comparison to this more drastic shift, the plan ultimately adopted was "likely to have a lower magnitude of positive or negative impacts (depending on the state), as allocation changes would not be permanent. In addition, alternative 2C could result in costs/benefits to each state that would be shared more equally over time as the quota fluctuates above and below the trigger points." AR 3112. As the EIS elaborated, under the ultimately adopted framework "[t]he potential negative economic impacts associated with states that lose share of the overall quota could be somewhat mitigated by the fact that this loss would only happen in relatively higher quota years, meaning revenues for these states may be more stable than what would be expected under a permanent reallocation." AR 283.

NMFS indisputably gave careful consideration to the fairness interests at stake here, acknowledging that any redistribution of the summer flounder quota allocation would create winners and losers. The rule it ultimately adopted allowed for a moderate shift in favor of northern states such as New York, while making sure to cushion the blow for small businesses and fishing communities in southern states by ensuring that their relative loss in share would occur only in high-catch years, such that they would get a smaller piece of a larger pie. New York offers no justification for why this is not "fair," except that it is less advantageous than it could be to more proximate New York fishermen.[7]

Here, the record reveals that "[t]he Council considered the socioeconomic impacts of the

[7] Plaintiffs suggest that *Massachusetts v. Daley*, 170 F.3d 23 (1st Cir. 1999), offers support for this position. Yet in *Daley* the First Circuit found that the Secretary had failed to justify the use of state-by-state quotas at all, *id.* at 31-32—a challenge not raised by New York. Though not challenged by Plaintiffs here, the Council's determination to establish state-by-state quotas is justified by the administrative record. Specifically, the Council noted that "[a] coastwide quota was not favored given the potential to create derby fishing conditions, the expected difficulty in developing coastwide management measures, and the potential to create an influx of latent effort." AR 2967; *see also* AR 3139 (explaining need for state-by-state allocations).

proposed allocation scheme including the dependence on the summer flounder fishery by present participants and coastal communities, and the relative benefits and hardships imposed by the allocation," and adopted a solution intended to "balanc[e] the needs and priorities of different user groups to achieve the greater overall benefit to the nation." AR 3140. There is nothing in the record to suggest that NMFS exceeded its discretion in interpreting this decision to be consistent with the Magnuson-Stevens Act's fairness mandate.

4. The 2020 Allocation Rule Properly Considers Cost and Efficiency

National Standards 5 and 7 require FMPs, "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). Importantly, the Magnuson-Stevens Act explicitly states "that no such measure shall have economic allocation as its sole purpose." *Id.* § 1851(a)(5). Courts have noted that "[t]he statute says only that the Secretary shall *promote* efficiency '*where practicable*.' It is permissive; it does not require absolute efficiency. Nor does the Secretary have to conduct a formal 'cost/benefit' analysis." *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1155 (E.D. Va. 1995) (emphasis in original) (internal citations omitted) (citing *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987); 50 C.F.R. § 602.15(b)(1) (management measures should result in "as efficient a fishery as is practicable or desirable" but may conflict with other "legitimate social or biological objectives of fishery management")). The National Standard 5 guidelines further direct that inefficient measures may be included in an FMP if they contribute to other social or economic objectives; it is only when no other such benefits are present that efficiencies should be considered obligatory. 50 C.F.R. § 600.330(b)(2)(ii).

NMFS carefully considered efficiency and acknowledged that, to some extent, a greater northward shift in allocation would increase efficiency by allotting more of the catch to more geographically proximate fleets. However, NMFS also took seriously its obligation not to consider

efficiency at the expense of all other factors:

> National Standard 5 states that management measures should not have economic allocation as its sole purpose. The proposed action considers not only the resulting efficiency of the summer flounder fishery, but the impacts on communities, and the equity of the allocations. While the Council considered other alternatives that would possibly more directly address biomass distribution and its impacts on efficiency . . . , the Council determined that this was not the best option to balance meeting other FMP objectives and national standards.

AR 3141.

New York offers no response to the NMFS's consideration of the countervailing "impacts on communities" and "equity of the allocations." Accordingly, New York has failed to demonstrate that NMFS departed from its mandate to increase efficiency and reduce cost "where practicable" while ensuring that economic allocation not be the "sole purpose" of any fishery management plan.

5. The 2020 Allocation Rule Properly Considers the Importance of Fishery Resources to Fishing Communities

Plaintiffs' brief entirely fails to mention National Standard 8, which states that "[c]onservation and management measures shall . . . take into account the importance of fishery resources to fishing communities . . . in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8). As noted in the EIS, "[t]hroughout the development of this action, the Council and Board placed a high priority on accounting for historical participation and the importance of the summer flounder resource to fishing communities, while developing options to consider whether the allocations should be modified to increase equitability and/or incorporate more modern data." AR 3142. NMFS determined to "provide for the sustained participation of fishing communities that have depended on the summer flounder resource," in "an attempt to balance the needs of many fishing communities up and down the coast." *Id.*

New York's preferred alternative—an allocation that directly reflects the current location of the summer flounder fishery—ignores the reliance interests of southern fishing communities that have developed around the historical landings patterns, in clear violation of National Standard 8. As noted *supra*, "there is no statutory mandate that one National Standard be maximized at the expense of others." *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d at 68. The Court should reject New York's attempt to mandate consideration of geographical proximity and economic efficiency to the exclusion of all else, and should instead defer to NMFS's careful consideration of all ten national standards, and expert weighing of their competing interests and mandates.

C. The 2020 Allocation Rule Is Not Arbitrary or Capricious

First, NMFS relied upon the appropriate factors, explicitly considering and applying all ten Magnuson-Stevens Act standards and evaluating them against the proposed alternatives. *See, e.g.*, AR 3137-3143. Second, NMFS clearly considered the northward shift in the summer flounder fishery, undertaking a rulemaking process designed to address this shift and considering it throughout the process. And third, NMFS offered an explanation that was consistent with the evidence before it, but based upon a balanced consideration of multiple factors and multiple pieces of evidence—this explanation was certainly not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has 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 the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). New York cannot make such a showing.

New York argues that the 2020 Allocation Rule "fails to articulate a connection between

the facts found and the conclusions reached" because it is not "based on" the most recent biomass distribution data. But NMFS carefully examined these data and made the reasoned conclusion to balance the resulting efficiency considerations against fairness consideration and the reliance interests of fishing communities, as the statute mandates. In arguing that this Court should strike down this determination, New York urges the Court to do precisely that which *State Farm* forbids: "substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Arbitrary and capricious review does not empower a plaintiff or a court to select a single piece of evidence from a voluminous record and demand that the agency base its consideration solely upon those data, particularly when the statutory framework demands precisely the opposite.

D. The 2021 Specifications Rule Is Not Arbitrary or Capricious

Plaintiffs' challenge to the 2021 Specifications Rule is derivative of its challenge to the 2020 Allocation Rule; they do not actually take issue with NMFS's substantive analysis or the overall calculated commercial quota. Rather, Plaintiffs' sole challenge to the 2020-2021 Summer Flounder Specifications is that NMFS should not have applied the FMP's state-by-state percentage allocations to the commercial summer flounder quota to set each state's quota for 2020 and 2021. *See* Pls' Br. 17-24; Compl. ¶¶ 101-112. That, however, is not a basis for invalidating the action.

As noted *supra*, the 2020 Allocation Rule amended regulations that set forth precisely how the overall summer flounder commercial quota is to be allocated among the states. *See* 50 C.F.R. § 648.102(c)(1). A federal agency cannot simply disregard substantive regulatory requirements. Indeed, a failure to abide by substantive direction explicitly set forth in an agency's regulations would be the hallmark of an arbitrary and capricious action. *Blassingame v. Sec'y of Navy*, 866 F.2d 556, 560 (2d Cir. 1989) ("It is axiomatic that an agency of the government must scrupulously observe its own rules, regulations, and procedures."); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 335 (D.D.C. 2018) ("[E]ven in areas of expansive discretion, agencies must follow their own existing

valid regulations." (internal quotation marks and citations omitted)). Absent a replacement or modification of regulations, an agency cannot simply ignore the requirements of its existing regulations. *See Limnia, Inc. v. U.S. Dep't of Energy*, 347 F. Supp. 3d 25, 36-37 (D.D.C. 2018). Because there is no dispute that the 2020-2021 Specifications apply the state-by-state allocations set forth in the currently governing regulations, Plaintiffs' APA challenge to the state-by-state quotas generated by that application must be denied.

E. The Court Should Not Vacate the Challenged Rules

Even if Plaintiff's prevail (which they should not, for the reasons discussed above), the relief they seek—vacatur of the 2020 Allocation Rule and the 2021 Specifications Rule—is inappropriate. If the 2020-2021 commercial summer flounder Specifications were struck down, this would eliminate most of the restrictions on summer flounder fishing, undermining the statutory purpose and damaging this natural resource. There is no backstopping regulation in the FMP that would allow catch and landing limits to roll over from one year to the next; Defendants must set the annual specifications.

That is a result that Plaintiffs cannot seriously be advocating. Because of how disruptive vacatur would be in this case, remand without vacatur would be the only appropriate remedy. *See Allied-Signal, Inc. v. U.S. Nuclear Reg. Com'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (considering "the disruptive consequences of vacating" when choosing appropriate remedy in challenge to regulations); *see also NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (recognizing that "when equity demands a regulation can be left in place while the agency follows the necessary procedures" (alteration omitted) (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)). Plaintiffs appear to recognize this necessity by acknowledging that the Court may need to stay vacatur, which would seem to be the functional equivalent of remand without vacatur. In any event, Defendants request the opportunity to brief remedy if necessary.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgement should be denied, and Defendants' cross-motion for summary judgment should be granted.

Date: New York, New York
April 2, 2021

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