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 (MKV)

NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION TO COMMERCE'S MOTION FOR SUMMARY JUDGMENT, AND IN REPLY TO COMMERCE'S OPPOSITION TO NEW YORK'S MOTION FOR SUMMARY JUDGMENT

LETITIA JAMES
Attorney General of the State of New York
Attorney for Plaintiffs

Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, New York 10005
(212) 416-8082

CHANNING WISTAR-JONES
ANDREW J. GERSHON
MONICA WAGNER
of Counsel

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PRELIMINARY STATEMENT

As New York's opening brief in support of its motion for summary judgment explained, Commerce's (or NMFS's) 2020 Allocation Rule violates the Magnuson-Stevens Act's second national standard, which unequivocally provides that fishery management measures "shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). *See* ECF No. 23 ("NY Br."). Even though the summer flounder fishery has shifted northeast up the Atlantic coast and is now centered in the waters off Long Island, the Rule allocates the coastwide commercial quota using a formula established in 1993 that is based on data collected before the fishery had shifted ("1993 formula"). Only in years of abundant summer flounder, the Rule splits any surplus quota evenly between states ("2020 surplus formula").

NMFS acknowledges the northward shift in the fishery but, in opposition to New York's motion and in support of its cross-motion for summary judgment, argues that it complied with the second national standard by "discuss[ing]" the shift and deciding, in the exercise of its discretion, to continue to use the 1993 formula because fishing communities in two states at the southern end of the fishery rely on the shares of the catch their states have received under the formula. *See* ECF No. 27 ("NMFS Br.") at 17. The Act does not grant NMFS that discretion.

The second national standard is an unequivocal directive: NMFS "*shall base*" fishery management measures on the best scientific information available. 16 U.S.C. § 1851(a)(2) (emphasis added). In contrast, the eighth standard, upon which NMFS relies, provides that NMFS "*shall . . . take into account* the importance of fishery

resources to fishing communities." *Id.* § 1851(a)(8) (emphasis added). Thus, while NMFS was required to consider the interests of fishing communities—and could have added provisions that would address any impacts on them of an updated allocation formula that reflected the northward shift—it did not have discretion to adopt an allocation formula that did not take into account the northward shift.

NMFS also argues that it had the discretion to rely on historical landings data predating the fishery shift—which show the pounds of flounder landed at ports in each state in the 1980s and were the basis for the 1993 formula—and prioritize them over current data about the fishery. NMFS Br. at 17–18. Again, the second national standard directs NMFS to base fishery management measures on the best available scientific information and the 2020 Allocation Rule relies on the historical landings data to the exclusion of the undisputed data showing the significant shift of summer flounder to the northeast since the 1980s. As a result, New York's commercial fishermen must continue to eke out a living under the constraints of New York's restrictive quota, even with the fishery now centered off their coast—fishing in the prime waters off Long Island alongside boats licensed in southern states that may catch far more summer flounder in these same waters.

For these and other reasons discussed below, the 2020 Allocation Rule is arbitrary, capricious, and not in accordance with law, as are the state-by-state quotas in the 2021 Specifications Rule. New York supports NMFS's request to brief the remedy upon the Court's ruling on the merits.

ARGUMENT

As explained in New York's opening brief and unrefuted by NMFS, the 2020 Allocation Rule violates the Magnuson-Stevens Act's second national standard as well as several other national standards. The Rule is also arbitrary and capricious because it disregards the current summer flounder fishery. The 2021 quotas based on the Rule are invalid for the same reasons that the Rule is invalid. For these reasons, the Rule and the 2021 quotas should be vacated.

POINT I:

THE 2020 ALLOCATION RULE IS INVALID BECAUSE IT FAILS TO MEET THE MAGNUSON-STEVENS ACT'S NATIONAL STANDARDS.

A. THE SECOND AND EIGHTH NATIONAL STANDARDS DO NOT ALLOW NMFS TO DISREGARD THE BEST AVAILABLE SCIENTIFIC INFORMATION IN FAVOR OF THE INTERESTS OF SOME FISHING COMMUNITIES.

The Magnuson-Stevens Act's second national standard provides that fishery management measures "shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). As New York has explained, the 2020 Allocation Rule, and thus the 2021 quotas that apply the Rule, violate this standard because they are not based on the best scientific information available.

Before 2020, NMFS's "1993 Allocation Rule" split the entire coastwide quota for summer flounder among the states in the commercial fishery using the 1993 formula, which is based on landings data from the 1980s. *See* 58 Fed. Reg. 49,937 (Sept. 24, 1993). New York's opening brief explained—and NMFS does not dispute—that the summer flounder stock has geographically shifted over the intervening three decades, as has fishing for summer flounder, with the center of the fishery moving

dramatically northeast toward the waters off Long Island. Yet the 2020 Allocation Rule keeps in place the 1993 formula, under which New York continues to receive only 7.65% of the coastwide quota each year, while Virginia and North Carolina together receive nearly 50%. The only exception is that, in years of summer flounder abundance, the 2020 Allocation Rule distributes quota above 9.55 million pounds using the 2020 surplus formula, providing equal 12.375% shares of the surplus to all active states in the fishery and resulting in up to a 1% or 2% quota increase for New York in those years. *See* NY Br. at 4–12.[1]

NMFS responds that it did not violate the second national standard because it "did not ignore this data [showing the northward shift in the summer flounder fishery]; to the contrary, it is extensively discussed in the administrative record." NMFS Br. at 17 (citation omitted). NMFS contends that it "explicitly deliberated whether it should dramatically shift the allocation northward to follow this shift in the geographic location of the fishery" but "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." *Id.* (citations omitted). NMFS adds that it made its determination about the reliance interests of southern fishing communities pursuant to the eighth national standard. *Id*. at 23.

[1] NMFS states that coastwide quotas have exceeded 9.55 million pounds in 21 of the past 26 years. NMFS Br. at 10. However, coastwide quotas have been lower in recent years and the 9.55 million pound threshold amount is a rough average of coastwide quotas in the past 5–10 years. *See* AR 2942, 2945. There is thus no reason to believe that the threshold will be exceeded in most years in the future.

By its plain terms, the Act does not give NMFS the discretion to weigh the best available science against the interests of some fishing communities and adopt a fishery management measure that does not reflect the best available science. Instead, the Act requires NMFS to *base* fishery management measures on current data and *consider* means to address impacts on fishing communities. Thus, contrary to NMFS's claim that New York relies on a "blinkered interpretation of isolated statutory factors," NMFS Br. at 2, New York's argument is grounded in the plain language of the Act.

The second national standard provides that fishery management measures "*shall be based upon* the best scientific information available." 16 U.S.C. § 1851(a)(2) (emphasis added). *See also Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 719 (9th Cir. 2002) (the second standard "*dictates* that the NMFS base fishery conservation and management measures on the 'best scientific information available'") (citation omitted; emphasis added). A fishery management measure meets this unequivocal command only if it is "based upon" the best scientific information available. As a result, multiple cases have held NMFS actions invalid under the second national standard but no other national standards. *See, e.g.*, *Midwater Trawlers*, 282 F.3d at 718–21; *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346, 353–54, 356–57 (D.R.I. 2003); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1046–47 (N.D. Cal. 1993).

NMFS's discussion of the current scientific information about the summer flounder fishery followed by the decision *not* to base the 2020 Allocation Rule on that

information does not meet the second standard. Nor does the 2020 surplus formula bring the Rule into compliance with that standard. That formula allocates surplus quota equally to all states without regard for any scientific information; and it does so only in years when summer flounder are abundant. An updated allocation must reflect the significant shift in the fishery and the 2020 Allocation Rule violates the second national standard because it fails to do that.

In contrast to the second national standard, the eighth standard does not require that fishery management measures be based on the interests of fishing communities. Instead, that standard provides that fishery measures "*shall . . . take into account* the importance of fishery resources to fishing communities." 16 U.S.C. § 1851(a)(8) (emphasis added). *See also Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (the eighth standard obligates NMFS "*to consider* fishing communities") (emphasis added). Thus, while the eighth standard required NMFS to consider the interests of fishing communities—including communities in southern states, New York, and other states—it did not authorize NMFS to adopt an allocation here that was not based on the best scientific information available.

Indeed, because the commands of the second and eighth standards are plainly different, updating the allocation to reflect the northward shift would not have been, as NMFS claims, a "clear violation of National Standard 8," NMFS Br. at 23, but not updating the allocation to reflect that shift was a clear violation of National Standard 2. Nor was NMFS required to choose between the two standards: NMFS could have

updated the allocation as required by the second standard and taken into account the impacts on fishing communities as required by the eighth standard by adopting provisions to mitigate those impacts, as NMFS did in the rule at issue in *Pacific Coast Federation*. *See* 693 F.3d at 1093–94. While NMFS claims that New York has failed to recognize that the national standards should be balanced against each other, NMFS Br. at 16, NMFS adopted an allocation that entirely disregarded the second standard—with which it was required to comply—in favor of another national standard that it was only required to consider.

NMFS also argues that it had the discretion to choose "between prioritizing historical landings data and current fishery location data." NMFS Br. at 17–18. As support, NMFS cites *Center for Biological Diversity v. Blank* for the proposition that NMFS "may choose between conflicting facts and opinions, so long as it justifies the choice." 933 F. Supp. 2d 125, 149 (D.D.C. 2013) (internal quotation marks and alterations omitted). But in *Center for Biological Diversity*, NMFS had based a 2011 rule on current scientific information—"a recent 2010 bluefin stock assessment," *id.* at 132—as required by the second national standard. The plaintiffs argued that NMFS should have relied on an alternative stock assessment model that they preferred even though the model was not even published when the rule was issued, and the court deferred to NMFS's expertise on the appropriate model. *Id.* at 149–50.

The dispute here is not over which current model is more accurate but over whether NMFS has the discretion to rely on obsolete landings data to the exclusion of current fishery location data. New York does not argue that fishery location data

are inherently superior to landings data. Instead, it argues that historical landings data for summer flounder do not show the undisputed significant shift in this fishery and, as provided by NMFS's regulations, 50 C.F.R. § 600.315(a)(6)(v)(A), the second national standard requires NMFS to base fishery management measures on current data about the fishery. NMFS acknowledges that updated landings data that reflect the shift are not available because landings since 1993 have been constrained by the 1993 formula. *See* NMFS Br. at 17 n. 5. However, if there were more recent landings data that were not tied to the 1993 formula, it is likely that those data would show significantly increased landings in New York because NMFS's own data show that in recent years a far higher percentage of summer flounder has been caught in waters off Long Island, and a far lower percentage at the southern end of its range than in the 1980s.

NMFS fails to cite any authority—and there is none—that requires it to allocate fishing rights based solely on outdated landings data when it knows that a fishery has changed. Moreover, if that were the case, the 1993 formula would be locked in permanently because all available current landings data would always reflect the formula. *See id.* That is inconsistent with NMFS's own guidelines for the second national standard: "Science is a dynamic process, and new scientific findings constantly advance the state of knowledge. Best scientific information is, therefore, not static[.]" 50 C.F.R. § 600.315(a)(5). Indeed, the amendment that established the 1993 formula contemplated that the amendment's measures would be revised based on updated and more accurate data. *See* NY Br. at 5–6, 19; AR 3744.

To be clear, New York does not argue that NMFS may not consider historical landings data at all. For example, NMFS could consider those data in designing measures to address any impacts of an updated allocation on fishing communities. Such a measure has recently been considered with respect to black sea bass, which have also shifted northward. In that fishery, regulators have proposed measures to transition the state-by-state quota allocation away from shares based on historical data and toward shares that rely to a significant degree on fish distribution data. *See* Atl. States Marine Fisheries Comm'n, *Draft Addendum XXXIII: Black Sea Bass Commercial Management* at 11–14, 27–40.[2]

B. NMFS ALSO DISREGARDED THE FOURTH, FIFTH, AND SEVENTH NATIONAL STANDARDS.

NMFS has also failed to show that the 2020 Allocation Rule is consistent with the fourth, fifth, and seventh national standards. The fourth national standard requires 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). New York's opening brief explains that the 2020 Allocation Rule is unfair to New York fishermen because North Carolina and Virginia will together continue to receive

[2] Available at http://www.asmfc.org/files/PublicInput/BSB_DraftAddendumXXXIII_PublicComment.pdf (Aug. 2020). The Atlantic States Marine Fisheries Commission decided to a select a formula that allocates a portion of the black sea bass quota using historical shares and a portion using fishery distribution. *See id.* at 17–18. Although New York has objected to aspects of the methodology as adopted (currently on appeal before the Commission), it recognizes that an appropriate adjustment of historical shares based upon current fishery data would be valid.

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 now takes place. *See* NY Br. at 20–21.

In response, NMFS mischaracterizes New York's position as being that "fishermen should receive quotas solely based upon proximity to the fishery." *See* NMFS Br. at 19. New York has not asked the Court to rule that an allocation based solely on geographic distribution of the fishery is the only way to comply with the fourth national standard. Instead, New York asks the Court to conclude that the 2020 Allocation Rule is invalid because it fails to adjust the 1993 formula to allow New York fishermen a larger share of the summer flounder catch that is increasingly concentrated off their coast. *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 23, 31–32 (1st Cir. 1999).[3] As discussed above (p. 9), an approach that transitions from a sole basis in historical shares to one that reflects the shift in summer flounder may be an appropriate way for NMFS to manage the fishery.

[3] NMFS argues in a footnote that *Massachusetts v. Daley* is inapplicable here because the circuit court, in its affirmation of the district court's decision, held that NMFS had failed to justify the use of state-by-state quotas at all. *See* NMFS Br. at 20 n. 7. Although that was one aspect of the First Circuit's decision, the court also affirmed the District Court's finding that NMFS had failed to show that its quotas were not discriminatory. *See* 170 F.3d at 31–32. NMFS has not explained why the district court's holding—that NMFS may not rely on flawed data especially when its effect will be discriminatory—does not apply in this case, where NMFS has used flawed data to discriminatory effect.

NMFS argues that the rulemaking process considered impacts on different states in the fishery, and that the 2020 Allocation Rule reflects a decision to continue benefiting states that have long benefited under the status quo. NMFS Br. at 18–19. Yet NMFS has entirely failed to explain how, after decades of change in the summer flounder fishery, it is fair and equitable that North Carolina and Virginia will together continue to receive several times New York's quota share each year for a resource that is centered in the waters off Long Island. As a result, New York fishermen will continue to be forced to fish in the same waters as—often in direct sight of—boats licensed in southern states that may catch far more summer flounder only to travel hundreds of miles south to land them.

The fifth and seventh national standards require management measures, "where practicable," to "consider efficiency in the utilization of fishery resources" and "minimize costs." 16 U.S.C. § 1851(a)(5), (7). New York's opening brief explains that the 2020 Allocation Rule fails to consider efficiency or minimize costs because it allocates outsize shares of the coastwide quota to states with ports located far from the center of the fishery. *See* NY Br. at 21–23.

NMFS does not dispute that a state-by-state allocation that more closely aligns fishing shares with where fish live and are caught would result in savings of time, fuel, and other resources by reducing the distance between catch locations and ports of landing. Rather, NMFS states that it need not achieve "absolute efficiency" and that economics cannot be the "sole purpose" of an allocation. NMFS Br. at 22. New York has not asserted that the summer flounder allocation must achieve absolute

efficiency in order to comply with the Magnuson-Stevens Act or that economics must be the sole purpose of the allocation—only that the 2020 Allocation Rule violates the fifth and seventh standards because NMFS has failed to achieve (or even attempt) any alignment between state allocations and the geography of a substantially changed fishery. New York's request to NMFS that it adjust a system where boats catch millions of pounds of fish off Long Island, then land their catch hundreds of miles south (only for much of it to be trucked back north to the Bronx's Fulton Market) was not a demand for absolute efficiency—just a call for reasonable consideration of efficiency.

NMFS also argues that the fifth national standard only requires consideration of efficiency. NMFS Br. at 21–22. However, "[s]tating that a factor was considered is not a substitute for considering it." *Oceana, Inc. v. Ross*, 483 F. Supp. 3d 764, 782 (N.D. Cal. 2020) (internal quotation marks, citations, and alterations omitted). Here, NMFS failed to consider efficiency other than to concede that the 2020 Allocation Rule does not achieve it, *see* AR 3141, and thus has failed to meet the requirements of the fifth national standard. In any event, the seventh national standard does not require NMFS simply to consider costs of fishery measures but to actually "minimize costs" where practicable, which—for the reasons stated above and in New York's opening brief, NY Br. at 21–23—NMFS has failed to do.

POINT II:

THE 2020 ALLOCATION RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT DISREGARDS THE NORTHEAST SHIFT IN THE SUMMER FLOUNDER FISHERY.

There is no dispute that the 2020 Allocation Rule is arbitrary and capricious if NMFS has "offered an explanation for its decision that runs counter to evidence before the agency," or if it has failed to "articulate a rational connection between the facts found and the conclusions reached." *Oceana*, 483 F. Supp. 3d at 783 (internal quotation marks and citations omitted). New York has explained that the 2020 Allocation Rule is arbitrary and capricious because—despite the significant changes in the fishery since the 1980s, which NMFS acknowledges—the Rule allocates the commercial quota for summer flounder according to (a) the 1993 formula, which is based on 1980s data; and (b) the 2020 surplus formula, which is not based on any data or other scientific rationale. NY Br. at 23–24. In response, NMFS argues that it did consider recent information regarding the northeast shift in the fishery, and that its approval of the 2020 Allocation Rule represents a valid judgment that weighs relevant factors such as status quo interests. NMFS Br. at 23–24.

New York does not ask the Court to "substitute its judgment for that of the agency" as NMFS contends, *see id.*, but rather to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As New York has set forth in its opening brief (NY Br. at 17–24) and above (pp. 3–9), NMFS acknowledged the dramatic northeast shift in the summer flounder fishery yet determined to continue allocating the commercial quota based

upon data from the much different fishery of the 1980s, with minor adjustments under the surplus formula that lack any scientific basis and only occur in years of abundant summer flounder. It is plainly irrational for the 2020 Allocation Rule to rely almost exclusively on historical landings data when there have been momentous, decades-long changes in the summer flounder fishery that have rendered those data obsolete.

POINT III:

THE 2021 STATE QUOTAS IN THE 2021 SPECIFICATIONS RULE ARE INVALID BECAUSE THE 2020 ALLOCATION RULE IS INVALID.

New York has explained that the state-by-state quotas in the 2021 Specifications Rule are arbitrary, capricious, and not in accordance with law because they were calculated using the 2020 Allocation Rule, which is itself invalid. *See* NY Br. at 19, 21, 23, 24. NMFS argues that this does not provide a basis to set aside the 2021 Specifications Rule because New York has challenged only the 2021 state-by-state quotas and not other aspects of the 2021 Specifications Rule (such as the 2021 coastwide commercial quota). *See* NMFS Br. at 24. New York does not ask the Court to set aside any aspect of the 2021 Specifications Rule other than the 2021 state-by-state quotas that were based on the 2020 Rule. *See* Complaint ¶ 10, Prayer for Relief ¶ 4.

NMFS further argues that, in promulgating the 2021 Specifications Rule, it was required to apply the 2020 Allocation Rule to determine the states' 2021 quotas. NMFS Br. at 24–25. To extent that NMFS's brief can be read to suggest that the 2021 state-by-state quotas should be upheld even if the 2020 Allocation Rule is set

aside, NMFS is incorrect. It is axiomatic that an agency's application of an unlawful regulation is itself unlawful, and that an agency's duty to comply with a governing statute overrides any duty to comply with regulations promulgated under that statute. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117–20 (1994) (agency denial of disability benefits was unlawful where such denial was based on regulations found to be inconsistent with controlling statute). NMFS cites no authority for the position that the state-by-state quotas in the 2021 Specifications Rule may be valid even though the 2020 Allocation Rule is invalid.

POINT IV:

NEW YORK SUPPORTS NMFS'S REQUEST TO BRIEF THE REMEDY AFTER THE COURT DECIDES THE MERITS OF THIS CASE.

New York has explained that the proper remedy in this case is vacatur of the 2020 Allocation Rule and the state-by-state quotas in the 2021 Specifications Rule—without reinstating the 1993 Allocation Rule or the quotas based on that rule—although a limited stay of vacatur may be appropriate. *See* NY Br. at 24–25. NMFS has not argued that the 1993 Allocation Rule should be reinstated but argues that remand without vacatur is the appropriate remedy in this case, and requests the opportunity to brief the remedy. NMFS Br. at 25. New York supports NMFS's request for an opportunity to specifically brief the remedy upon the Court's ruling on the merits and requests an expedited schedule for such briefing pursuant to 16 U.S.C. § 1855(f)(4).

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).

Dated: New York, New York
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LETITIA JAMES
Attorney General of the State of New York
Attorney for Plaintiffs

By: /s/ Channing Wistar-Jones
Assistant Attorney General

Andrew J. Gershon
Senior Counsel for Enforcement

Monica Wagner
Deputy Bureau Chief

Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, New York 10005
(212) 416-8082
channing.jones@ag.ny.gov