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. 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.	21 Civ. 304 (MKV)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, New York 10007
Tel. No.: (212) 637-2737
Fax No.: (212) 637-2702

LUCAS ISSACHAROFF
DOMINIKA TARCZYNSKA
Assistant United States Attorneys
- Of Counsel -

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

PRELIMINARY STATEMENT

After a years-long process involving analysis of data, consideration of numerous proposed alternatives, and consultations with relevant stakeholders], NMFS[1] in December 2020 issued a final rule to adjust the allocation of the commercial summer flounder fishery among Atlantic states by maintaining a baseline determined by landings data, while allocating surplus shares equally among active states. The NMFS's determination resulted in a northward shift in the overall allocation in years of plenty.

New York's position, expressed throughout this administrative process, in its opening brief, and in its reply brief (Dkt. No. 28) ("Pl. Reply"), is that the formula should have been completely overhauled to reflect the northward shift in the fishery (with, it now concedes, perhaps a modest adjustment period), which would result in a drastic increase in New York's share of the summer flounder allocation at the expense of southern states.

But the allocation of summer flounder among the states is left to the discretion of NMFS. And New York cannot substitute its own judgment for the agency's. In determining the 2020 Allocation, NMFS carefully considered all of New York's arguments and found that the modest potential cost and efficiency gains (as well as the possible safety concerns raised by Suffolk County) of such a drastic reallocation did not overcome the severe imposition on shoreline communities that had developed reliance on the landings allocation as they had existed for nearly three decades. And while New York presses the argument that the current summer flounder fishery location is the only possible evidence NMFS was permitted to use in developing an allocation formula, NMFS was well within its discretion to rely upon historical landings data while

[1] Except where otherwise indicated, abbreviations are the same as those used in Defendants' prior brief (Dkt. No. 27) ("Def. Br.").

incorporating the reality of the shifting stock location into the allocation formula for years of abundance instead. As NMFS carefully determined and explained, such a decision balanced the reliance interests of fishing communities and onshore infrastructure against the modest potential efficiency gains from a northward shift in landings allocation.

Finally, as all parties now agree on the need for post-summary judgment briefing on remedy in the event the Court rules in Plaintiffs' favor, Defendants do not further address the question of remedy.

ARGUMENT

A. The 2020 Allocation Rule Abides by the Magnuson-Stevens Act

1. NMFS Acted Within Its Discretion in Primarily Basing the 2020 Allocation Rule on Existing Landings Data

The bulk of Plaintiffs' argument focuses on National Standard 2, which states that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Plaintiff makes two arguments based upon this standard. First, Plaintiff implies that National Standard 2 takes a preeminent position, most importantly trumping National Standard 8 (requiring that fishery measures "take into account the importance of fishery resources to fishing communities," *id.* § 1851(a)(8)). Second, Plaintiff argues that the "best scientific information available" is unequivocally data pertaining to the current location of the summer flounder fishery. Both arguments are wrong.

a. National Standard 2 Does Not Eclipse All Other Considerations

Courts have long recognized 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)). Plaintiffs, by contrast, suggest that the second standard—the "best scientific information available" standard, 18 U.S.C. § 1851(a)(2)—must take precedence over the nine additional standards. Yet "Congress did not intend any of these specified goals . . . to take priority over the others." *Conservation L. Found. v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019). 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 ignore these interpretive principles and cast National Standard 2 as a freestanding mandate. In particular, Plaintiffs suggest that National Standards 2 and 8 stand on unequal footing because National Standard 2 uses the language "shall be based" while National Standard 8 uses the language "shall . . . take into account." *See* Pl. Reply at 6. From this, Plaintiffs infer that that the eighth standard only "required NMFS to consider the interests of fishing communities." *Id.* This reading of the text ignores the full context of the Magnuson-Stevens Act and National Standard 8 itself.

First, "a statute is to be considered in all its parts when construing any one of them." *See United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000) (internal quotations omitted). The Magnuson-Stevens Act sets out ten standards with which FMPs "shall" be consistent, and does not create a hierarchy or suggest that some are more equal than others. Nothing in the statutory structure suggests that National Standard 8 gives way to National Standard 2.

Second, Plaintiffs attempt to minimize National Standard 8, claiming that the directive that fishery management measures "take into account" fishing communities amounts to a passing consideration which can ultimately be disregarded. This is wrong. Contrary to Plaintiffs' assertion,

National Standard 8 requires that the ultimate output of agency deliberation—the fishery management plans that NMFS develops—take community interests into account, not merely that the agency itself do so. And National Standard 8 specifies how that should happen: by utilizing data "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). In other words, the eighth standard requires that FMPs take into account community interests in order to achieve substantive results, not merely so that the communities may take comfort in knowing that NMFS considered their plight.

As courts have recognized, the Magnuson-Stevens Act's standards may sometimes come into conflict, and, when that happens, "Congress delegated to NMFS the discretion to strike an appropriate balance." *Oceana*, 24 F. Supp. 3d at 68. "[T]here is no statutory mandate that one National Standard be maximized at the expense of others," *id.*, and this Court should resist Plaintiffs' invitation to parse verb phrases in search of an implied hierarchy of statutory mandates.

b. NMFS Considered the Best Scientific Information Available

Turning to National Standard 2 itself, Plaintiffs argue that there can be only one source of the "best scientific information available" to be used in the development of the measures challenged here: current fishery location data. This argument misconstrues what National Standard 2 requires.

Different data will often point in different directions; as such, entities dissatisfied with an FMP frequently point to a data favorable to their position, argue that it should have formed the basis of the FMP, and claim that National Standard 2 is violated. Yet as courts have noted, "[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 certainly cannot demonstrate that NMFS "ignored" the current fishery location data, as this northward shift was the impetus for reconsideration of the allocation formula. *See, e.g.*, AR 2877 (identifying shift in biomass as underlying purpose of rulemaking). And New York acknowledges that NMFS is entitled to prioritize landings data over fishery location data. *See* Pl. Reply at 7-8; *accord Ctr. for Biological Diversity v. Blank*, 933 F. Supp. 2d 125, 149 (D.D.C. 2013) ("[I]t is well established that NMFS 'may choose' between 'conflicting facts and opinions,' so long as it 'justifies the choice.'"). But New York argues that because the fishery location data is more recent that the pre-1993 landings data upon which the base allocation remains based, fishery locations data is necessarily the "best," and must therefore take precedence over the landings data in the development of Amendment 21.

Yet New York provides no support for the assertion that, when two different types of data conflict, the more recent is necessarily the "best." That is particularly true in this case where the historical landings data and present landings data will be virtually identical because landings are determined by the 1993 Allocation Rule.[2] Accordingly, the choice is not between current fishery location data and "obsolete" landings data that no longer reflects current reality, but between current fishery location data and, in effect, current landings data.

New York responds by stating that "*if* there were more recent landings data that were not

[2] As NMFS noted, "The 1980-1989 landings data used in the base allocation formula represents the best available scientific information for commercial landings, by state, from that time period. Landings since 1993 have been constrained by the allocation formulas, so more recent data would simply reflect the same percentages as the 1980-1989 data."

tied to the 1993 formula, it is likely that those data would show significantly increased landings in New York." Pl. Reply at 8 (emphasis added). Yet what New York is arguing, in effect, is that NMFS must *create* new landings data—either by theorizing where an unallocated summer flounder would be landed in today's fishery, or by offering an unallocated season.[3] Courts have repeatedly held, however, that NMFS may rely upon imperfect data, and cannot be required to create superior data when some purported defect in the existing data is identified. *See*, *e.g.*, *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) ("[T]he Service must utilize the best scientific data *available*, not the best scientific data *possible*." (emphasis in original) (internal quotation marks and alterations omitted)); *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).

Here, moreover, NMFS *did* base Amendment 21 in part upon the fishery location data that New York urges. NMFS considered both landings data and fishery location data and, considering all of the factors required by the Magnuson-Stevens Act, struck a careful balance between competing interests. NMFS and the Council explicitly deliberated whether to shift the allocation dramatically 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. And this balance *did* shift the overall allocation northward in most years in recognition of

[3] Although New York does not explicitly propose this latter alternative in its brief, it advocated this proposal during the rulemaking process. *See* AR 1834. The Council determined that replacing state-by-state allocations with a coastwide allocation would likely create a "race to fish" situation, creating safety as well as conservation concerns. AR 2896, 4085; 50 CFR 600.355(c)(3).

precisely the fishery location data that New York urges reliance upon. The fact that NMFS did not prioritize this data to New York's satisfaction does not mean that "the agency ignored such information," *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 85. National Standard 2 does not allow a dissatisfied stakeholder to compel exclusive reliance upon a preferred metric.

2. NMFS Appropriately Considered Fairness

New York argues that NMFS failed to adopt an allocation that is "fair and equitable" under National Standard 4, 16 U.S.C. § 1851(a)(4). And again New York presses its own view of fairness defined solely by geographic proximity to the fishery. *See* Pl. Reply at 9-11.

But under the Act's implementing regulations, fairness and equity are less partial. 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). New York does not contest that this is precisely what occurred here, as the Administrative Record reflects detailed consideration of such consequences. *See* Def. Br. at 19-21 (discussing AR 283, 3099-3114).

"The Council considered the socioeconomic impacts of the 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.

3. NMFS Appropriately Considered 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). New York argues that NMFS violated these mandates by adopting an allocation that may result in a large portion of the catch to be landed at ports less geographically proximate to the catch.

Yet the Magnuson-Stevens Act explicitly states "that no such measure shall have economic allocation as its sole purpose." *Id.* § 1851(a)(5); *accord J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1155 (E.D. Va. 1995) ("The statute says only that the Secretary shall *promote* efficiency '*where practicable*.' It is permissive; it does not require absolute efficiency." (emphasis in original) (internal citations omitted)). The implementing regulations for National Standard 5 make clear 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 likely 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. *See* AR 3141.

With respect to cost, New York assumes (as, admittedly, is logical), that costs would be reduced by allocating the catch in accordance with geographic proximity. Yet the reality, as NMFS carefully considered, is somewhat more complex:

> It is difficult to determine how these possible changes in fishing location will affect fleet-wide costs. Inshore fishing requires less fuel consumption than offshore, but there may be more vessels active in the inshore fishery than offshore. It is possible that a reallocation that will result in more inshore fishing effort will result in lower costs per vessel, but fleet-wide summer flounder fishing related costs could

conceivably increase.

AR 3115. In other words, because the current fleet is oriented toward large offshore vessels—which, though they travel further, are more efficient—shifting the flounder allocation toward New York's fleet of smaller, less-efficient inshore vessels might negate any cost savings from decreased average trip length.

NMFS carefully considered efficiency and cost, in their full complexity, and also weighed them against other required considerations. By contrast, New York's myopic focus on average trip length demonstrates precisely why Congress has delegated the complex process of fishery management to the agency's expertise.

4. NMFS Appropriately Considered the Safety of Human Life at Sea

At the outset, the Court should decline to consider Amicus Suffolk County's argument that the 2020 Allocation Rule violates National Standard 10. Plaintiffs have not raised a claim under National Standard 10 in their Complaint or either of their briefs. "Once an amicus motion is granted, generally the Court may not consider legal issues or arguments not raised by the parties." *Perry-Bey v. City of Norfolk*, No. 08 Civ. 100, 2008 WL 11348007, at *2 (E.D. Va. Aug. 14, 2008) (internal quotation marks omitted); *accord Elektra Ent. Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 240 n.6 (S.D.N.Y. 2008) (declining to address legal argument raised only by amici and collecting authority); *see generally United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (discussing the party presentation principle). Though the Court need not reach the question, Defendants will respond to the substance of Suffolk County's argument below.

National Standard 10 provides that "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea." 16 U.S.C. § 1851(a)(10). Suffolk County argues that longer trips necessarily increase risk to human safety, and therefore that the 2020 Allocation Rule increases risk by requiring more trips from the fishery off of Long Island to

landing ports in Virginia and North Carolina. Dkt. No. 24-1 at 10.

Courts have repeatedly rejected challenges to a fishery management plan based on National Standard 10 where the "Plaintiff has not pointed to any record evidence showing that the . . . FMP fails to 'promote the safety of human life at sea,' as National Standard Ten requires." *Nat'l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 134 (D.D.C. 2002). Suffolk County cannot make such a showing here, where it cites to only a single paragraph of a declaration attached to a comment. *See* AR 3535.

Here, NMFS considered whether the proposed action satisfied National Standard 10, and concluded that the changes to the allocation formula were "not expected to alter fishery operations or conditions in a way that would reduce safety at sea." AR 3143. This conclusion is hardly surprising, as the action would not substantially change fishing areas or catch patterns. *Id.* Moreover, the Summer Flounder FMP's approach of state-by-state allocation reflects safety concerns related to "derby" fishing conditions that could occur with a coastwide commercial quota, providing for an orderly prosecution of the fishery and allowing flexibility for states to accommodate the dynamic nature of the fishery. AR 4085, 3143.[4] Likewise, the FMP's allowance for interstate transfers of quota based on short term emergency situations, often called "safe harbor" requests (e.g., when it is unsafe for a vessel to return to its intended port because of weather, mechanical breakdown of vessel, or an injured crew member) reflects the safety concerns of National Standard 10. AR 2923.

While the record does not reflect explicit consideration of whether New York's preferred

[4] "'Derby-style' fishing is 'a race to fish' in which fisherman are encouraged due to limitations on a fishery to attempt to catch as much of a species as quickly as possible in order to maximize their harvest before a season or fishery is closed. *State of New York v. Evans*, 162 F. Supp. 2d 161, 168 (E.D.N.Y. 2001) (citation omitted).

approach of a shift to fishery location-based allocation would provide a relative reduction or increase in safety of human life at sea compared to the approach that was adopted, New York's proposed alternatives had already been rejected for other reasons, and the agency was not obligated to consider the safety impacts of nonviable proposals. Ultimately, the record supports NMFS's conclusion that the 2020 Allocation Rule satisfies National Standard 10.

B. The 2020 Allocation Rule and the 2021 Specifications Rule Are Not Arbitrary or Capricious

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). It is not clear which element of the *State Farm* test New York believes that NMFS has violated; its argument ultimately boils down to claiming that it is "plainly irrational" for NMFS to have arrived at the allocation it did. Pl. Reply at 13.

But NMFS carefully examined the relevant data and considered the relevant factors. First, NMFS relied upon the appropriate factors, explicitly considering and applying all ten Magnuson-Stevens Act National 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 stock, 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." *State Farm*, 463 U.S. at 43. New York

simply disagrees with the conclusion that was reached and urges the Court to "substitute its judgment for that of the agency," *State Farm*, 463 U.S. at 43, a result that *State Farm* does not permit.

Finally, New York acknowledges that its challenge to the 2021 Specifications Rule is derivative of its challenge to the 2020 Allocation Rule. *See* Pl. Reply at 14 ("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."). Defendants agree that the 2021 state quota allocations under the Specifications Rule must stand or fall with the Allocation Rule, and in the latter event a determination should await supplemental briefing on remedy.

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 30, 2021

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: */s/ Lucas Issacharoff*
LUCAS ISSACHAROFF
DOMINIKA TARCZYNSKA
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, New York 10007
Tel: (212) 637-2737
Fax: (212) 637-2702
lucas.issacharoff@usdoj.gov
dominika.tarczynska@usdoj.gov