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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GROUND FISH FORUM, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE; NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION;
GINA RAIMONDO, in her official capacity
as the United States Secretary of Commerce;
and JANET COIT, in her official capacity as
Assistant Administrator, National Oceanic
and Atmospheric Administration,

Defendants.

Case No. 3:23-cv-00283-HRH

COMPLAINT AND PETITION FOR REVIEW
(42 U.S.C. §§ 4321-4347; 16 U.S.C. §§ 1801-1891d; 5 U.S.C. §§ 701-706)

SUMMARY OF ACTION

1. Plaintiff Groundfish Forum, Inc. (“GFF” or “Plaintiff”) challenges the National Marine Fisheries Service’s (“NMFS”) decision to approve and implement a Pacific halibut bycatch reduction measure in Amendment 123 to the Fisheries Management Plan for the Groundfish of the Bering Sea and Aleutian Islands (“BSAI”) Management Area (the “Groundfish FMP”), pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). The record demonstrates that Amendment 123 violates the MSA and the National Environmental Policy Act (“NEPA”), and is a politically motivated, arbitrary, and unlawful allocation of fishing privileges that unfairly singles out Plaintiff’s members for punishing restrictions that, according to NMFS’s own findings, will cause Plaintiff’s members significant economic losses, potentially exceeding \$100 million annually.

2. The MSA is the primary statute governing the management of the Nation’s fishery resources. Under the MSA, Congress established regional fishery management councils charged with the obligation to create fishery management plans (“FMPs”) that establish conservation and management measures for each fishery within a council’s regional jurisdiction. These conservation and management measures are subject to review and approval by NMFS, and they are limited and guided by specific provisions of the MSA, including its 10 “National Standards.”

3. The North Pacific Fishery Management Council (“NPFMC” or “Council”) developed the Groundfish FMP to provide management measures for numerous fishing sectors and fishing gear types that operate in the BSAI. Plaintiff’s members represent just

one sector operating under the Groundfish FMP, typically referred to as the “Amendment 80” sector.

4. Every commercial fishery has bycatch. Bycatch occurs when fishery participants targeting one or more species, or one or more stocks of fish, incidentally catch and discard other non-target species, or non-target stocks of fish, in the process. The U.S. National Bycatch Report estimates the average bycatch rate across all United States commercial fisheries to be over 11% of the total catch. Bycatch can be wasteful, particularly when it results in mortality of a species with limited or no economic value (called “economic discards”), or when regulations, for political reasons or otherwise, *require* valuable bycatch to be discarded (called “regulatory discards”). Pacific halibut is a regulatory discard under the Groundfish FMP because, although halibut is valuable and could be retained and sold, NMFS requires Groundfish FMP vessels to discard every halibut they catch, whether dead or alive.

5. Bycatch reduction measures can be economically burdensome to fishery participants and result in reductions in their harvest of target species. Accordingly, Congress instructed that such measures should only be imposed “to the extent practicable” and further required that if it becomes necessary to impose measures “which reduce the overall harvest of a fishery” (as does Amendment 123) that the FMP “allocate” the burden “fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” 16 U.S.C. § 1853(a)(1), (14). The MSA also requires every allocation of fishing privileges to be “fair and equitable” and “reasonably calculated to promote conservation,” and to not “discriminate between residents of

different States.” *Id.* § 1851(a)(4). All FMP measures must achieve “on a continuing basis, the optimum yield from each fishery for the United States fishing industry,” which reflects “the amount of fish that will provide the greatest overall benefit to the Nation.” *Id.* § 1851(a)(1); 50 C.F.R. § 600.310(e)(3)(i)(A). As set forth in this Complaint, Amendment 123 runs afoul of all these requirements and more.

6. Like all BSAI groundfish sectors and gear types, the Amendment 80 sector unavoidably catches some Pacific halibut when fishing for targeted species. Over almost three decades, however, the Amendment 80 sector has dramatically reduced Pacific halibut bycatch and mortality through the implementation of numerous operational measures and regulatory bycatch caps that limit the amount of halibut bycatch mortality that is permitted. Most recently, in 2016, NMFS reduced Pacific halibut bycatch caps on many BSAI fishing sectors, with the most stringent cap imposed on the Amendment 80 sector. In response, the fleet implemented numerous operational and mitigative tools (as contemplated by Amendment 111) to comply with the cap. This helped to preserve the fleet’s fishing opportunities for its target species. By 2022, the Amendment 80 fleet’s halibut bycatch mortality ratio had been reduced to only *one* pound of halibut for every 214 pounds of groundfish (or 0.46%).

7. Despite these improvements, NMFS approved Amendment 123, which creates a new “abundance-based” limit on halibut bycatch that is a significant reduction from the limit imposed on the Amendment 80 sector by Amendment 111. Unlike prior bycatch reduction efforts, Amendment 123 singles out the Amendment 80 fleet for this new abundance-based limit, while all other BSAI groundfish sectors continue to use

bycatch caps that are not tied to estimates of abundance. Some sectors in the BSAI continue to operate without any halibut bycatch limits. And also unlike prior bycatch reduction efforts, there are no known additional mitigation measures that the Amendment 80 sector can practicably or reasonably employ to avoid halibut bycatch or mortality. Therefore, this new “abundance-based” cap will force the Amendment 80 fleet to reduce its fishing for target species, which will have immediate and drastic economic consequences.

8. NMFS considered no alternatives that could have produced different results because NMFS and the Council decided ahead of time that this action would be specifically and solely targeted at the Amendment 80 fleet. The Council’s October 2020 amended “purpose and need” for Amendment 123 targets only the Amendment 80 sector. NMFS and the Council adopted an unduly narrow purpose and need statement and failed to consider alternatives that would apply to all groundfish sectors, taking an admittedly “narrowed” focus that “eliminat[ed] the other sectors for the action and analysis.” Final Environmental Impact Statement for Amendment 123 (“Final EIS”) at 85. This was entirely improper and unlawful. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (“As a result of this unreasonably narrow purpose and need statement, the [agency] necessarily considered an unreasonably narrow range of alternatives.”).

9. Unlike the rulemaking that implemented bycatch caps in 2016, there was no analysis of alternatives to further reduce halibut bycatch fairly and equitably across the many BSAI groundfish sectors. Instead, the Council and NMFS bowed to the halibut

fisheries' interests, who view halibut bycatch as wasteful (which, due to NMFS's regulatory discard policy choice, it is) and claimed that more restrictions on the Amendment 80 sector would give them more halibut fishing opportunities.

10. It is no surprise, therefore, that NMFS's stated rationale for Amendment 123 was merely pretext. NMFS justified its decision with the assertion that the Pacific halibut stock is declining and Amendment 123's restrictions "*could* promote conservation of the halibut stock," and "*may* provide additional opportunities for the directed halibut fishery." Final EIS at 16 (emphases added). But these justifications are belied by the facts before the agency. The Pacific halibut stock has been stable for at least a decade and is not overfished or subject to overfishing. Amendment 123 will not "promote conservation" because it applies to only one sector, and any bycatch decreases can be offset by increases in bycatch or catch in other sectors or fisheries (as NMFS hopes and contemplates will happen). This is precisely why NMFS's prior regulations in 2016 comprehensively addressed halibut bycatch reduction across numerous BSAI groundfish sectors. Moreover, for the last several years, the directed halibut fishery has received ample halibut allocations (*i.e.*, "opportunity") that far exceed what that fishery has caught. In other words, Amendment 123 reallocates the ability to catch halibut (whether as bycatch or directly), such that the Amendment 80 sector has a smaller proportion and all other users of halibut have larger proportions than existed before Amendment 123.

11. Thus, Amendment 123 will substantially reduce catch of target species in the Amendment 80 fleet, have no conservation benefit for the Pacific halibut stock (in fact, NMFS concluded that Amendment 123 will result in no increase in the size of the

Pacific halibut spawning stock), and result—according to NMFS’s own finding—in a *net economic loss* to the Nation of hundreds of millions of dollars. This directly violates NMFS’s core obligations under National Standard 1 to ensure that FMPs achieve optimum yield on a continuing basis, by effectively crippling the ability of the Amendment 80 fleet to harvest target species based on (at best) speculative and undefined conservation benefits. To make matters worse, this disastrous result was a foregone conclusion because the Council and NMFS only considered options that had exactly the same purpose (reducing *only* the Amendment 80 sector’s allocated halibut bycatch) and exactly the same result (a *net economic loss* to the Nation).

12. NMFS’s approval and implementation of Amendment 123 violates the APA and numerous provisions of the MSA. Additionally, the Final EIS violates NEPA, which, among other things, required NMFS to evaluate a “reasonable range of alternatives” to inform federal decision-making. Plaintiff therefore respectfully requests that the Court declare that Amendment 123, its implementing regulations, the final rule promulgating those regulations (88 Fed. Reg. 82,740 (Nov. 24, 2023) (the “Final Rule”)), and the Final EIS are arbitrary, capricious, and an abuse of discretion; not in accordance with law; and in excess of statutory jurisdiction, authority, and limitations. Plaintiff further requests that the Court vacate NMFS’s decision approving Amendment 123 and its implementing regulations, the Final Rule, and the Final EIS, and remand to NMFS to address these serious errors.

PARTIES

Plaintiff

13. GFF is a non-profit section 501(c) trade association with its principal place of business in Seattle, Washington. GFF represents five companies and 17 trawl catcher-processors, which consist of all the vessels in the Amendment 80 sector. GFF was formed in 1996 to craft meaningful solutions to problems such as discards, incidental catches, and impacts on fish habitat. GFF member vessels fish according to their respective permits and allocations for varied portfolios of sole and flounder species, including yellowfin sole, rock sole, rex sole, flathead sole, arrowtooth flounder, Alaska plaice, Pacific cod, Atka mackerel, Pacific Ocean perch, and other species. None of these target stocks are overfished or subject to overfishing, as defined by the MSA. GFF members supply seafood to the United States and markets throughout North America, as well as markets in Asia and Europe. Fish species harvested by the Amendment 80 sector have received Responsible Fisheries Management and Marine Stewardship Council certification for environmental sustainability.

14. Since 2018, the Amendment 80 sector has operated under a single cooperative, the Alaska Seafood Cooperative, which receives all of the Amendment 80 sector allocations. The Amendment 80 cooperative, which is incorporated in the State of Washington, is a “person” under the MSA.

15. GFF and its members engaged in the Council process for developing Amendment 123 through participation in Council committees and by providing public testimony and written comments. GFF and its members commented extensively on

analyses and environmental review documents related to Amendment 123, including the proposed FMP amendment, the proposed rule to implement Amendment 123, and the draft and final EISs that preceded the final decisions challenged in this lawsuit. A true and correct copy of GFF's comment letter in response to the Amendment 123 proposed rule (without the exhibits) is attached to this Complaint as Exhibit A.

16. GFF has standing to bring this action. GFF's mission is to ensure the long-term viability of Amendment 80 fisheries while promoting sustainable harvests on safe vessels, providing economic prosperity to the maritime communities in which we operate, minimizing fishery impacts on habitat, and reducing bycatch. GFF's members are directly and adversely impacted by Amendment 123 and its implementing regulations, which reduce allowable halibut bycatch mortality levels (*i.e.*, halibut not returned to the sea alive, also referred to as "halibut PSC") for all vessels in the Amendment 80 sector, which, in turn, causes those vessels to forgo fishing opportunities for target catch species and, as a consequence, lose significant revenue. As NMFS has recognized, the revenue loss to the fleet in a single year could exceed \$100 million and force some Amendment 80 vessels to exit the fishery (*i.e.*, go bankrupt). Indeed, multiple GFF members are already being forced to mothball fishing vessels for the 2024 season as a result of Amendment 123 and the Final Rule, which results not only in a significant loss of revenue but also a significant loss of jobs. GFF and its members have strong interests in ensuring functioning marine ecosystems and healthy stocks of fish in Alaska, including halibut, as part of maintaining a sustainable and lasting fishery. GFF and its members are also adversely impacted by Defendants' failure to comply with the procedural

requirements of NEPA and the MSA. The challenged agency decisions are final and ripe for review by this Court.

Defendants

17. NMFS is an agency of the National Oceanic and Atmospheric Administration (“NOAA”) of the U.S. Department of Commerce. NMFS is sometimes referred to as “NOAA Fisheries.” Among its duties, NMFS is responsible for managing commercial marine fisheries to ensure sustainable harvests that provide the greatest overall benefit to the Nation pursuant to the MSA.

18. Gina Raimondo is the Secretary of the U.S. Department of Commerce and is sued in her official capacity. Secretary Raimondo directs all business of the Department of Commerce, including NOAA and NMFS. Through these agencies, Secretary Raimondo is responsible for the approval of Amendment 123, its implementing regulations, the Final Rule, and the Final EIS, and for the associated violations of the MSA, NEPA, and the APA, as alleged in this Complaint.

19. Janet Coit is the Assistant Administrator for NMFS and is sued in her official capacity. The Secretary of Commerce has delegated responsibility to the NOAA Administrator to ensure compliance with NEPA, the MSA, and the APA, and to promote effective management and stewardship of the Nation’s fisheries resources and assets to ensure sustainable economic opportunities. The NOAA Administrator, in turn, has subdelegated this responsibility to NMFS.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. §§ 1855(f) and 1861(d) (MSA).

21. Defendants have waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1855(f).

22. Plaintiff has exhausted all administrative remedies.

23. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because the activities, species, and geographic areas at issue in and affected by Amendment 123, its implementing regulations, the Final Rule, and the Final EIS are located in this district, and a substantial part of the acts or omissions giving rise to this controversy occurred in this district.

STATUTORY FRAMEWORK

The Administrative Procedure Act

24. The APA provides for judicial review of final agency action. 5 U.S.C. § 702. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” *Id.* § 706(2)(D). Decisions by NMFS

to approve fishery management plan amendments and issue final rules and regulations implementing those plans under the MSA are subject to judicial review under the APA.

The Magnuson-Stevens Fishery Conservation and Management Act

25. The MSA is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801–1891d. The MSA’s purpose is to place national fishery resources under “sound management” and “to realize the full potential of the Nation’s fishery resources.” *Id.* § 1801(a)(5)–(6).

26. The MSA created eight regional fishery management councils that are primarily charged with preparing FMPs and plan amendments for each managed federal fishery. *Id.* § 1852(a)(1). The NPFMC manages fisheries in the EEZ off Alaska’s coast, including the BSAI groundfish fisheries.

27. The MSA requires an FMP for each fishery under the regional council’s jurisdiction “that requires conservation and management.” *Id.* § 1852(h)(1). The FMP is the foundational document for management of each fishery and provides the framework for ensuring that fisheries are managed in a manner consistent with the requirements of the MSA and its National Standards.

28. Fishery management councils submit proposed FMPs and FMP amendments to the Secretary of Commerce for review and approval. *Id.* §§ 1853, 1854. All FMPs, and FMP amendments, must be consistent with the requirements of the MSA, including the MSA’s 10 National Standards.

29. The MSA enumerates certain “required provisions” of FMPs and FMP amendments. *Id.* at § 1853(a). For example, FMPs and FMP amendments must “contain

the conservation and management measures” that are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” *Id.* § 1853(a)(1). They also must “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable . . . minimize bycatch” and “minimize the mortality of bycatch which cannot be avoided.” *Id.* § 1853(a)(11). Additionally, “to the extent that . . . conservation and management measures which reduce the overall harvest in a fishery are necessary,” FMPs and FMP amendments must “allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” *Id.* § 1853(a)(14).

30. The MSA’s National Standards guide all FMPs and MSA regulations. For example, National Standard 1 requires FMPs to prevent overfishing while achieving the optimum yield on a continuing basis from each fishery for the U.S. fishing industry. *Id.* § 1851(a)(1). National Standard 2 requires that all conservation measures be based on the best scientific information available. *Id.* § 1851(a)(2). National Standard 4 requires that any allocation of fishing rights be “fair and equitable” to fishermen and “reasonably calculated to promote conservation,” and “shall not discriminate between residents of different States.” *Id.* § 1851(a)(4). National Standard 5 requires conservation and management measures to “consider efficiency in the utilization of fishery resources.” *Id.*

§ 1851(a)(5). National Standard 6 requires conservation and management measures to “take into account and allow for variations among, and contingencies in” fisheries. *Id.* § 1851(a)(6). National Standard 7 requires conservation and management measures to, “where practicable, minimize costs and avoid unnecessary duplication.” *Id.* § 1851(7). National Standard 9 requires that all bycatch reduction measures must be “practicable.” *Id.* § 1851(a)(9).

31. The Secretary of Commerce, acting through NMFS, must disapprove an FMP amendment to the extent it is inconsistent with provisions of the MSA or any other applicable law.

32. The Secretary of Commerce must also approve all regulations that implement an FMP. *Id.* § 1854(b). The Secretary must give notice of proposed rulemaking and provide an opportunity for public comment on proposed regulations. *Id.*

33. Any fishery management regulation implementing an FMP must be consistent with all requirements of the MSA, including the 10 National Standards for fishery management and conservation, and all other applicable laws. *Id.* §§ 1854(b), 1851(a).

34. Regulations promulgated and certain actions taken by the Secretary of Commerce under the MSA “shall be subject to judicial review to the extent authorized by [the APA’s judicial review provisions] if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register.” *Id.* § 1855(f)(1).

The National Environmental Policy Act

35. Approvals of FMPs, FMP amendments, and implementing regulations are subject to NEPA requirements, 42 U.S.C. § 4321, *et seq.*; 16 U.S.C. § 1854(i).

36. The purpose of NEPA is to ensure that federal decision-making is fully and publicly informed through a reasonably thorough and thoughtful analysis of the probable impacts to the human environment resulting from a proposed federal action, and through identification and analysis of a reasonable range of alternative actions, including the no-action alternative. In enacting NEPA, Congress sought to ensure that federal agencies take a hard look at the environmental consequences of any proposed action and required agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.

37. NEPA requires that a federal agency proposing a major federal action with significant environmental effects prepare a detailed statement, which must include the environmental impacts of and alternatives to the proposed action. *Id.* § 4332(C)(i)(iii). This detailed written statement is an EIS. *See* 40 C.F.R. § 1508.1(j) (2020).

38. An EIS must evaluate reasonable alternatives to the proposed action, identify a “no action” alternative, discuss in detail each alternative considered, and discuss the reasons alternatives were eliminated from detailed study. *Id.* § 1502.14(a)–(f) (2020). This analysis of alternatives, which is the “heart” of an EIS, must discuss “each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.” *Id.* § 1502.14(b). Reasonable alternatives “means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.” *Id.* § 1508.1(z).

39. The EIS must also “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” *Id.* § 1502.13. Agencies enjoy “considerable discretion” to define the purpose and need of an action. *Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir.1998). However, “an agency cannot define its objectives in unreasonably narrow terms.” *City of Carmel-By-The-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997). An agency’s purpose and need statement violates NEPA where it is “so narrowly drawn as to foreordain” the outcome or results in the agency necessarily considering an “unreasonably narrow range of alternatives.” *Nat’l Parks & Conservation Ass’n*, 606 F.3d at 1072.

40. An agency must prepare a supplement to either a draft or final EIS if “a major Federal action remains to occur” and, *inter alia*, “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1)(ii).

41. An EIS issued by a federal agency under NEPA is subject to judicial review pursuant to the APA, 5 U.S.C. §§ 702, 706.

STATEMENT OF FACTS

The Pacific Halibut Stock

42. Pacific halibut (*Hippoglossus stenolepis*) is a wide-ranging species and managed as a single stock extending from Northern California to the Aleutian Islands and Bering Sea. The harvest of halibut has been managed jointly by the United States and Canada through what is now known as the International Pacific Halibut Commission

(“IPHC”) since approximately 1923. The United States may establish domestic regulations that are in addition to, but not in conflict with, the rules established by the IPHC. Over several decades, NMFS has implemented numerous measures to manage the harvest and bycatch of halibut.

43. The abundance of the Pacific halibut stock has fluctuated widely over the more than 100 years that data on the stock have been collected. Following a once-in-a-century recruiting event, the Pacific halibut stock declined from record-high abundance in the 1990s until approximately 2012. After 2012, the stock’s spawning biomass, which is the portion of the stock contributing to the conservation of the stock, stabilized around 100,000 metric tons (“mt”) and has remained stable since 2012. The stock is not overfished or subject to overfishing.

44. Total fishing mortality of Pacific halibut consists of directed (targeted) commercial fishery landings, discard halibut mortality (bycatch or wastage) in directed commercial and recreational fisheries, recreational harvest, subsistence harvest, and discard halibut mortality (bycatch or prohibited species catch) in non-directed fisheries (*i.e.*, fisheries that target other species and are required by law to discard halibut). For decades, NMFS and the IPHC have limited the retention of halibut in both fisheries that target halibut and those that do not target halibut. For fisheries that do not target halibut, NMFS has made a policy choice to require those vessels to discard halibut that would otherwise be retained and sold (*i.e.*, regulatory discards). It is this policy choice that results in “bycatch” of halibut in the Amendment 80 fleet, as that term is used in the MSA.

45. Annual Pacific halibut mortality across all fisheries (directed and non-directed) ranges from 15,000 mt to 45,000 mt, with an annual average of 29,000 mt. In its 2023 stock assessment report, the IPHC stated that “[o]verall, spawning biomass estimates remain highly consistent with those of recent stock assessments.” The IPHC’s 2022 stock assessment explains that “[t]he 2022 stock assessment estimates a lower level of fishing intensity and higher relative stock status compared to previous assessments....”

46. Pacific halibut is not fully utilized in the BSAI. For example, the directed halibut commercial fleet’s catch allocations have increased in recent years, but a growing and significant percentage of that allocation goes unused, particularly in the area defined as “Area 4,” which roughly corresponds to the same geographic area as the BSAI. For example, 2022 represented the highest harvest allocation for Area 4 over the last 10 years. Despite this high allocation, the directed halibut fleet only used 67% of that allocation. And, in 2023, the directed halibut fleet only harvested 56% of their total allocation, leaving 2,056,410 net pounds (44%) of their allocation unharvested.

47. Halibut is incidentally caught and discarded (*i.e.*, as bycatch) in groundfish fisheries by vessels using longline (also referred to as “hook-and-line”), pot, and trawl gear. For some, but not all, groundfish fisheries, NMFS has limited participants’ fishing operations by defining limits on the maximum amount of halibut bycatch mortality, also referred to as a prohibited species catch limit (“PSC limit”).

The Amendment 80 Sector

48. In 2007, NMFS issued a final rule implementing Amendment 80 to the Groundfish FMP. 72 Fed. Reg. 52,668 (Sept. 14, 2007). The Amendment 80 program

was an initiative “by the Council and NMFS to reduce bycatch and discard of fish species [including Pacific halibut] in the BSAI non-pollock trawl groundfish fisheries.” With respect to BSAI trawl fisheries, the Amendment 80 program “allocate[d] crab and halibut PSC to the Amendment 80 and BSAI trawl limited-access sectors to accommodate PSC use by these sectors based on past PSC use with specific consideration given to possible future requirements.”

49. The Amendment 80 sector has taken numerous actions over many years to reduce its halibut bycatch, which is just a small fraction of the total fishery removals from the Pacific halibut stock. Numerous other groundfish sectors and fisheries also have halibut bycatch.

50. The Amendment 80 sector, as it has existed pre- and post-Amendment 80, has a long history of operating under bycatch limits, including limits for halibut bycatch. In 1993, 3,775 mt of halibut PSC was assigned to all vessels using trawl gear, including vessels now operating in the Amendment 80 sector. At that time, NMFS assigned a PSC limit to each fishery on a seasonal basis. When the Western Alaska Community Development Quota program was implemented in the late 1990s, the trawl halibut PSC limit was reduced to 3,675 mt. Upon implementation of Amendment 80 in 2008, the halibut PSC limit was initially further reduced to 2,525 mt for the sector, followed by a series of annual stair-step reductions, reducing the halibut PSC limit to 2,475 mt in 2009, 2,425 mt in 2010, 2,375 mt in 2011, and 2,325 mt in 2012. Most recently, the Amendment 80 halibut PSC limit was further reduced by 25% to 1,745 mt in 2016, under Amendment 111 to the Groundfish FMP.

51. For the most recent full year (2022), the Amendment 80 fleet harvested over 335,000 mt of target groundfish species, while operating within the 2016 halibut PSC limit. This represents a halibut bycatch mortality rate of roughly 1 kg of halibut for 214 kg of groundfish, or 1 pound of halibut for 214 pounds of groundfish. These target groundfish harvests provide hundreds of millions of dollars to U.S. businesses, support thousands of crew members and numerous communities throughout Alaska and the Pacific Northwest, and feed millions of people.

52. The Amendment 80 fleet's ability to continue to operate despite these repeated regulatory reductions in halibut PSC levels is largely the result of numerous tools implemented and utilized by the Amendment 80 fleet to reduce both halibut bycatch rates and halibut mortality rates. These include the use of agreed-upon fishing strategies within the Amendment 80 cooperative Halibut Avoidance Plan, fleet communication, the use of small test tows, reduced night fishing, the use of gear modifications that help keep halibut out of trawl nets (*e.g.*, halibut excluders), and deck sorting.

53. Deck sorting in particular has been very effective in reducing halibut mortality by allowing halibut that are incidentally caught to be sorted and returned to the sea alive as soon as possible, thereby reducing bycatch mortality. The Amendment 80 sector developed the deck sorting program and applied for an exempted fishing permit ("EFP") to test its innovation. In 2015, NMFS granted an EFP for all Amendment 80 vessels to test the conditions necessary to effectively conduct deck sorting.

54. Based on the success of the EFP, NMFS issued a series of annual EFPs intended to collaboratively continue to develop halibut catch handling and accounting

protocols. In 2020, NMFS published regulations implementing deck sorting. 84 Fed. Reg. 55,044 (Oct. 15, 2019) (codified at 50 C.F.R. pt. 679). The Final EIS estimates a fleetwide achievable deck sorting rate of 80% of halibut caught. Deck sorting also has consequences for fishing operations as fishing vessels that utilize deck sorting have an average loss of production of one tow per day, or roughly a 20% reduction in fishing effort on a typical, five-tow day. Deck sorting cannot be conducted during certain fishing conditions, such as certain rough weather conditions or if crew safety is at risk.

55. All of the bycatch mitigation innovations and strategies mentioned above occurred *before* the development of Amendment 123 and have been fully implemented for several years. Neither NMFS nor the Amendment 80 sector have identified new tools that are available to the Amendment 80 fleet to further reduce halibut bycatch, other than forgoing catch or exiting the fishery. Minimizing halibut bycatch imposes a considerable cost on the Amendment 80 sector and, even under current halibut bycatch limits, vessels have been retired from the fishery due in large part to challenges in meeting current bycatch control limits.

Amendment 111

56. In 2016, NMFS issued a final rule implementing Amendment 111 to the Groundfish FMP. 81 Fed. Reg. 24,714 (Apr. 27, 2016). Amendment 111 and its implementing regulations reduced halibut PSC limits for four sectors in the BSAI groundfish fisheries, including the Amendment 80 sector, which received the “largest reduction for any of the four groundfish sectors” affected by Amendment 111.

57. NMFS explained that “Amendment 111 seeks to minimize halibut PSC to the extent practicable while maintaining, on a continuing basis, the potential to achieve optimum yield from the groundfish fishery” and that it “achieves that objective fairly and equitably by decreasing halibut PSC limits by sector and by establishing the PSC reduction for each sector based on an evaluation of what is practicable for that sector.” NMFS further justified the allocations in Amendment 111 as “fair and equitable” on the basis that “[t]he impact of reduced PSC limits under the Preferred Alternative differs among the various groundfish sectors, but this is equitable in that it reflects both the degree to which each sector contributes to overall halibut PSC, and also the tools available to each sector to reduce halibut PSC.”

58. NMFS also based its determination that the Amendment 111 bycatch reductions were “practicable” on the impacts of the reduced limits on each of the various sectors of the groundfish fisheries and the tools available to each of those sectors to reduce halibut bycatch, along with other factors. NMFS specifically found that the reduced halibut PSC limit for the Amendment 80 sector was “achievable and practicable” through the use of the new tools available to the fleet. The Council and NMFS concluded that larger reductions in halibut bycatch limits than those enacted by Amendment 111 were “not practicable” and “would reduce the net benefit to the nation.”

59. The Council prepared and NMFS finalized an environmental assessment (“EA”) to analyze the impacts of Amendment 111 under NEPA. The EA states:

The purpose of the proposed action is to minimize halibut PSC in the commercial groundfish fisheries to the extent practicable, while preserving the potential for the optimum

harvest of the groundfish TACs assigned to the trawl and non-trawl sectors. The proposed action aims to minimize halibut PSC to the extent practicable in consideration of the regulatory and operational management measures currently available to the groundfish fleet, and the need to ensure that catch in the trawl and non-trawl fisheries contributes to the achievement of optimum yield in the groundfish fisheries.

60. Based on this statement of purpose and need, the Amendment 111 EA evaluated a range of three alternatives—a no-action alternative and two action alternatives—that were “designed to allow the Council to consider parity among the groundfish sectors in terms of the impact of PSC reductions.” Each of the two action alternatives contained six different options for implementing the limits. The two action alternatives considered various levels of halibut bycatch reductions for numerous BSAI groundfish sectors.

Amendment 123 and the Final EIS

61. In September 2019, the Council released an “Initial Review Draft” of an EIS that evaluated the use of “abundance-based” management for halibut PSC (the “2019 Initial Review Draft”). The “statement of purpose and need” discussed the supposed need to use abundance-based management to reduce halibut PSC across BSAI groundfish sectors and included two action alternatives (Alternatives 2 and 3) that imposed abundance-based limits on all the sectors, including the BSAI trawl limited-access sector, the Amendment 80 sector, longline catcher vessels, longline catcher-processors, and the Community Development Quota sector. The 2019 Initial Review Draft proposed “gear specific” abundance-based limits on all these sectors and explained that “[a]llocations of the gear-specific PSC limits under Alternatives 2 and 3 are intended to reflect the current

(Status Quo) allocation proportions to the extent possible.” 2019 Initial Review Draft at 15.

62. In February 2020, the Council changed course. It passed a motion stating that, moving forward, it would only consider applying abundance-based management to the Amendment 80 sector.

63. In September 2020, the Council released a new Initial Review Draft (the “2020 Initial Review Draft”). The 2020 Initial Review Draft kept the same statement of purpose and need as the 2019 Initial Review Draft, but the alternatives were revised to focus only on abundance-based management for the Amendment 80 sector. The 2020 Initial Review Draft states that “[t]he Council may also wish to revisit their purpose and need statement and objectives in light of changing this action to only directly modify PSC limits for the Amendment 80 sector.” 2020 Initial Review Draft at 41. The 2020 Initial Review Draft *deleted* the discussion from the 2019 Initial Review Draft that addressed the “allocation” impacts of abundance-based management.

64. In September 2021, the Council released a new draft of the analysis, which included the Council’s new statement of purpose and need—retrofitted to match the narrowed scope of “alternatives.”

65. In December 2022, NMFS issued the Final EIS. In March 2023, NMFS issued its record of decision for the Final EIS and formally approved Amendment 123. On November 24, 2023, NMFS issued the Final Rule, which implements Amendment 123 with the promulgation of federal regulations. The new regulations become effective on January 1, 2024. However, NMFS concluded—in December 2022, before approving

Amendment 123 and before receiving and considering public comment on the proposed rule to implement Amendment 123—that “Amendment 123 is consistent with the Magnuson-Stevens Act, including the ten national standards.”

66. GFF and its members participated, through verbal testimony, written testimony, and written comments, at every stage of the Council and NMFS processes leading up to final decisions to approve and implement Amendment 123 and the Final EIS. GFF and its members consistently objected to the new halibut bycatch limits on the bases that the limits, among other things, constitute an unjustified allocation, are not practicable, fail to achieve optimum yield on a continuing basis, and are not based on the best scientific information available.

67. Amendment 123 and its implementing regulations establish “abundance-based” limits on halibut bycatch applicable only to the Amendment 80 sector. No other fishery or sector is subject to “abundance-based” limits on halibut bycatch.

68. The Amendment 123 halibut PSC limit is established annually based on the results of the most recent IPHC setline survey and Alaska Fishery Science Center Eastern Bering Sea shelf trawl survey. The best available scientific information demonstrates that neither of those surveys produces data that are correlated with the halibut encounter rates of the Amendment 80 sector. As the Council’s Scientific and Statistical Committee found, “the groundfish fleet’s ability to avoid halibut is poorly related to indices of abundance.” Thus, NMFS’s repeated statements and justification that Amendment 123 “links” the Amendment 80 halibut PSC limits to halibut abundance are contradicted by the best scientific information available.

69. Moreover, in December 2022, the IPCH supported reducing the number of survey stations in the Area 4 IPHC setline survey in 2023 by over 90% and future surveys are in serious doubt due to budget constraints. In 2023, no survey stations were sampled in Area 4. Effectively, there was no IPHC setline survey in Area 4, even though NMFS purports to “link” the Amendment 123 halibut PSC reductions with the IPHC’s setline survey in Area 4. Thus, the design, function, purpose, and reliability of the IPHC setline survey are fundamentally and materially different than they were before 2023. The changes to the IPHC setline survey have a substantive and direct impact on the calculation of the survey index used to establish the halibut PSC limits under the Final Rule. In a letter dated May 19, 2023, Plaintiff’s counsel notified NMFS of these changes and the significant and substantial resulting implications for Amendment 123 and the proposed rule to implement Amendment 123. NMFS took no action in response to the survey changes or the letter, and proceeded to issue the Final Rule with no changes and no rational or reasonable evaluation of the survey changes.

70. Nevertheless, Amendment 123 uses the results of the surveys described in a regulatory formula that produces the annual halibut PSC limit for the Amendment 80 fleet. That formula relies on “breakpoints” to establish whether the IPHC setline survey index represents a “high,” “medium,” “low,” or “very low” level of halibut abundance and whether the Eastern Bering Sea shelf trawl survey index reflects a “high” or “low” level of halibut abundance. These breakpoint categories are then placed on a “look-up table” to establish the annual halibut PSC limits for the Amendment 80 sector. The breakpoints were determined by “visual inspection of relative trends in the survey indices

historically.” Neither the Council nor NMFS provided an explanation for how that “visual inspection” was conducted, who conducted that visual inspection, what “trends” were used, or how the Council and NMFS determined the “historically” valid range to use. Nor were any alternatives to these breakpoints considered. The breakpoints have no rational basis.

71. None of the possible limits under Amendment 123 are higher than the limit applicable to the Amendment 80 sector under Amendment 111, and almost all scenarios under Amendment 123 result in significantly reduced limits. For example, with similar halibut abundance levels, Amendment 123 reduces the Amendment 111 limit by 349 mt. The lowest limit possible under Amendment 123 represents a 611 mt reduction from the Amendment 111 limit.

72. Amendment 123 does not reduce or constrain the halibut PSC limits for any other BSAI groundfish sector or gear type. Amendment 123’s reduction of the halibut PSC limit for the Amendment 80 sector therefore directly and deliberately reallocates the halibut PSC available to the BSAI groundfish sectors and gear types by reducing the proportional amount available to the Amendment 80 sector and increasing the proportional amount available to other BSAI groundfish sectors and gear types. Amendment 123 also directly and deliberately reduces the Amendment 80 sector’s halibut PSC limit for the purported purpose of increasing the halibut fishing opportunity for the directed halibut fishery and the recreational halibut fishery.

73. There are no known tools or other measures available to the Amendment 80 sector (other than what was already considered, analyzed, and relied upon in

Amendment 111) to further reduce the sector's halibut bycatch and mortality levels. Thus, further reducing halibut bycatch and mortality levels in the Amendment 80 sector must be accomplished by vessels in the sector forgoing fishing opportunities. The new limits imposed by Amendment 123 will therefore significantly reduce target species catch levels. This, in turn, will have substantial negative economic consequences to the Amendment 80 fleet and to the Nation.

74. Although NMFS underestimated the economic consequences of Amendment 123, NMFS states that the economic impact resulting from lost target catch could be over \$100 million in a single year. NMFS also states that the imposition of Amendment 123 could cause Amendment 80 sector companies to "exit the fishery" (*i.e.*, go bankrupt). Amendment 123 therefore results in a net loss to the Nation.

75. There are substantially more harvest opportunities for the directed halibut fleet now than there were when Amendment 111 was developed. NMFS assumed that Amendment 111 "could result in increased commercial fishery harvests in Area 4 ranging from 315,000 pounds to 353,000 pounds each year compared to current levels of harvests over the 10-year period used for the Analysis." In 2015, the commercial IFQ and CDQ catch limits in Area 4 were 3.815 million net pounds. In 2022, the commercial IFQ and CDQ catch limits in Area 4 were 5.1 million net pounds. This improved harvest opportunity is nearly four times greater than the harvest opportunities envisioned under Amendment 111, even though the overall abundance of halibut on a coastwide basis has not changed substantially since 2015.

76. Amendment 123's economic impact to the Amendment 80 sector is many times greater than the impacts assessed by NMFS for Amendment 111, even though halibut harvesting opportunities in Area 4 are 60% higher than they were in 2015 when Amendment 111 was implemented and even though halibut bycatch in the Amendment 80 sector is 35% lower than it was in 2015.

77. Amendment 123 will have no effect on the conservation of the Pacific halibut stock that is any different from the pre-Amendment 123 *status quo*. For example, NMFS found that "[i]mpacts to the halibut biomass under all of the alternatives are expected to be similar and result in no impact to spawning stock biomass" and that "there is likely to be little difference among the average future halibut spawning biomass under levels of PSC anticipated across all of the alternatives including the preferred alternative (Alternative 5)." Amendment 123 does not require any "savings" of halibut that will remain unused or unharvested because Amendment 123 does not preclude other sectors or fisheries from taking more halibut.

78. The Final EIS's purpose and need statement provides that the sole purpose of Amendment 123 is to establish "abundance-based" halibut PSC limits for only the Amendment 80 sector. This, in turn, prevented the inclusion in the Final EIS of alternatives that would reduce halibut PSC limits across all sectors in the BSAI groundfish fisheries or for any other NMFS-managed fishery that has halibut bycatch. The Final EIS's purpose and need statement is also premised on numerous errors, such as the mistaken assumption that there is a "continued decline in the halibut stock."

79. An alternative analyzing halibut PSC limits applicable to all sectors in the BSAI groundfish fisheries, such as was analyzed (and adopted) in Amendment 111 and analyzed in the 2019 Initial Review Draft, was both viable and reasonable and should have been considered and evaluated in the draft EIS and Final EIS. Instead, NMFS and the Council improperly rejected that alternative by narrowing the statement of purpose and need to exclude that alternative. The reason given by the Council and NMFS for not including such an alternative in the Final EIS was that the Amendment 80 sector “comprises the majority [52%] of halibut PSC mortality.” Numerous other viable and reasonable action alternatives were presented to the Council and NMFS, and all of them were rejected without any rational justification.

80. The Final EIS does not include any data from 2021 or 2022 and, for some important datasets, does not include data for 2020 either.

81. The Final EIS’s cumulative effects analysis identifies only one “reasonably foreseeable future action.” There are other actions that are reasonably foreseeable and bear upon the effects of Amendment 123 that are not analyzed in the Final EIS. These reasonably foreseeable actions were identified in public comments but were not included in the Final EIS. This is due, in part, to NMFS’s decision to narrow its consideration of reasonably foreseeable future actions to only actions that have effects on Pacific halibut.

82. The Final EIS does not include or analyze available scientific information regarding how climate change in the Bering Sea will affect the Amendment 80 sector’s ability to catch its target species under the lower halibut PSC levels of Amendment 123. This information is documented in numerous comments submitted by GFF and its

members, but it is not included in the Final EIS. For example, those comments provided data showing how a halibut PSC limit reduction is likely to adversely impact the Amendment 80 sector's ability to operate under reasonably foreseeable warmer ocean conditions. Those comments also provided data demonstrating the effects of 2018 and 2019 record-warm seafloor temperatures. NMFS's own Bering Sea climate projections indicate that fishing conditions experienced in 2018 and 2019 are likely to be the predominant future fishing conditions, but that data is also not included or analyzed in the Final EIS. The Final EIS does not include any of the models and analyses created by NMFS showing how a warming Bering Sea will affect fisheries.

83. In public comments, including in response to the draft EIS and Final EIS and in the May 19, 2023 letter referenced above, GFF and its members identified numerous sources of significant new information relevant to NMFS's analysis and consideration of Amendment 123. NMFS ultimately considered none of this information and ignored GFF's request that NMFS prepare a supplement to the Final EIS to address the significant new information. NMFS provided no analysis or other rational explanation for why it did not supplement the Final EIS, as required by NEPA's implementing regulations.

FIRST CLAIM FOR RELIEF

(Violation of the MSA and APA)

84. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

85. The MSA allows judicial review pursuant to the APA, 5 U.S.C. § 706(2)(A), (B), (C), or (D). 16 U.S.C. § 1855(f)(1)(B). Those provisions of the APA authorize reviewing courts to set aside federal agency action that is arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, or without observance of the procedures required by law.

86. MSA section 304(a) and (b), 16 U.S.C. § 1854(a)–(b), requires Defendants to ensure FMPs, FMP amendments, and implementing regulations are consistent with the requirements of the MSA.

87. Based on the facts and reasons stated above, and those additional reasons stated below, Amendment 123, its implementing regulations, and the Final Rule (collectively referred to below as “Amendment 123”) violate the MSA and the APA, as follows:

a. Because Amendment 123 reduces the overall harvest of a fishery, NMFS was required to “allocate” the burden of Amendment 123 (*i.e.*, halibut PSC reduction) “fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” 16 U.S.C. § 1853(a)(14). NMFS’s failure to do so violates the MSA and the APA.

b. NMFS is required to affirmatively make a determination that a conservation or management measure is an “allocation” and complies with all requirements applicable to allocations. 16 U.S.C. §§ 1851(a), 1853(a); 50 C.F.R. § 600.325. NMFS violated the MSA by irrationally determining that Amendment

123 is not an “allocation,” as that term is used in the MSA, or, alternatively, by failing to make any determination as to whether Amendment 123 is an allocation.

c. Amendment 123 is an “allocation” under the MSA. Amendment 123 violates the MSA because it is not “fair and equitable” to U.S. fishermen or “reasonably calculated to promote conservation,” and because it discriminates between residents of different states. 16 U.S.C. § 1851(a)(4); 50 C.F.R. § 600.325. NMFS violated the MSA by failing to sufficiently address the statutory and regulatory requirements applicable to allocations or rationally explain why they are satisfied.

d. Conservation and management measures intended to minimize bycatch or bycatch mortality must be “practicable.” 16 U.S.C. § 1851(9). Amendment 123 imposes bycatch reduction measures that are not “practicable” and, therefore, violates the MSA. NMFS also violated the MSA by failing to sufficiently address the statutory and regulatory requirements applicable to “practicability” determinations or rationally explain why those requirements are satisfied here, and by arbitrarily applying a new, undefined, and unexplained “case-by-case” practicability standard. That violation is premised, in part, on NMFS’s change in policy regarding what measures are “practicable” in the context of BSAI halibut PSC reduction. Specifically, NMFS applied a “practicability” standard for Amendment 123 that directly contradicts the standard it applied for Amendment 111. NMFS’s failure to explain its reversal in position also renders Amendment 123 arbitrary and capricious.

e. In the Final Rule, NMFS claims, for the first time in this rulemaking process, that “[n]ew bycatch reduction tools are not necessary for this action to be practicable.” 88 Fed. Reg. at 82,755. This claim is unsupported by the record and was otherwise not considered or analyzed by NMFS or the Council in the process leading up to approval of Amendment 123 or issuance of the Final Rule. This claim also directly contradicts the Council’s and NMFS’s findings made during the Amendment 111 rulemaking. This claim is therefore without a rational explanation and is arbitrary and capricious.

f. The MSA requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). Amendment 123 violates this requirement because it will cause the BSAI groundfish fisheries to not achieve optimum yield on a continuing basis, has no conservation benefit, and creates a net economic loss to the Nation. Additionally, NMFS interpreted and applied National Standard 1 in a manner that violates the MSA and its implementing regulations.

g. The MSA requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). In approving and implementing Amendment 123, NMFS failed to consider and analyze, and made determinations that are contrary to, the best scientific information available. For example, NMFS ignored that the Pacific halibut stock has been in a stable condition for at least a decade, ignored that the

directed halibut fishery underutilizes the Pacific halibut stock, failed to account for the fact that Amendment 123 has no conservation benefit to the Pacific halibut stock, failed to account for information demonstrating significant and environmental and climatic effects bearing directly upon the effects of Amendment 123, incorrectly determined that Amendment 123 “links” halibut PSC limits in the Amendment 80 sector with halibut abundance, failed to consider significant changes made to the IPHC setline survey, and determined and approved statutory formulae for calculation of halibut PSC limits that are inconsistent with the best scientific information available and are otherwise arbitrary and unexplained.

h. Amendment 123 violates the MSA because it is not “necessary and appropriate for the conservation and management of the fishery” for all the reasons stated in this Complaint and in GFF’s and its members’ comments.

16 U.S.C. § 1853(a)(1)(A), (b)(14).

i. Amendment 123 violates the MSA because it does not consider “efficiency in the utilization of fishery resources.” *Id.* § 1851(a)(5). NMFS provided no rational explanation for how this requirement is satisfied and arbitrarily relied on a new and undefined term (“wise use”) in purporting to comply with this requirement.

j. Amendment 123 violates the MSA because it does not “take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” *Id.* § 1851(a)(6). NMFS provided no rational explanation

for how this requirement is satisfied. NMFS failed to consider, among other things, how Amendment 123 will address changing climate and ocean conditions, changing utilization rates in the directed halibut fishery, or the changing of either of the two survey methodologies upon which NMFS will establish bycatch caps under Amendment 123.

k. Amendment 123 violates the MSA because it does not “minimize costs and avoid unnecessary duplication.” *Id.* § 1851(a)(7). NMFS provided no rational explanation for how this requirement is satisfied.

l. NMFS justified many of its MSA determinations in the Final Rule on the basis that Amendment 123 “maximizes net benefits to the Nation.” This conclusion is unsupported by the record, directly contradicts NMFS’s conclusion that Amendment 123 is likely to result in negative net benefits to the Nation and will result in a net economic loss, and is therefore arbitrary and capricious. This conclusion is also an unexplained and unlawful change in position.

m. The MSA requires NMFS to take into account “information, views, and comments received from interested persons” as part of NMFS’s review of FMP amendments before making a consistency determination. *Id.* § 1854(a)(2)(A). However, NMFS expressly “concluded that Amendment 123 is consistent with the Magnuson-Stevens Act, including the ten national standards” in the proposed rule and in the Final EIS before receiving and considering “information, views, and comments” from interested persons, completing the required MSA consistency review, and issuing the Final Rule. In so doing, NMFS

unlawfully predetermined the result of the proposed action before completing the required process, and violated the MSA and the APA.

88. For all of the reasons stated in this Complaint and in GFF's and its members' comments, Amendment 123, its implementing regulations, and the Final Rule violate the MSA and are arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, and without observance of the procedures required by law, in violation of the APA. Accordingly, Amendment 123, its implementing regulations, and the Final Rule should be vacated.

SECOND CLAIM FOR RELIEF

(Violation of NEPA and APA)

89. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

90. NEPA requires agencies to evaluate a reasonable range of alternatives. An agency violates NEPA when the EIS's purpose and need statement is "so narrowly drawn as to foreordain" the outcome or result in the agency necessarily considering an "unreasonably narrow range of alternatives." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072.

91. The Final EIS's purpose and need statement violates this requirement by focusing strictly on "abundance-based" halibut PSC limits applied only to the Amendment 80 sector, to the exclusion of all other sectors and gear types and potential bycatch reduction strategies. After initially proposing to regulate all sectors through abundance-based management in 2019, NMFS and the Council changed their minds in

2020, revised the statement of purpose and need to narrowly focus on the Amendment 80 sector, and refused to consider reasonable alternatives, such as was originally proposed, based on that overly narrow statement of purpose and need. This foreclosed the Council and NMFS from considering other viable and reasonable alternatives to the proposed action and the public's ability to reasonably consider and provide input on the proposed action. The purpose and need statement is also premised on numerous false or unreasonable assumptions. Accordingly, the Final EIS violates NEPA.

92. Because all action alternatives in the Final EIS consider only "abundance-based" halibut PSC limits applied only to the Amendment 80 sector, the Final EIS fails to consider a reasonable range of alternatives. For example, an alternative, or alternatives, analyzing reduced halibut PSC limits applied to multiple sectors in the BSAI groundfish fisheries was viable and reasonable because, among other reasons, NMFS considered such alternatives in the Amendment 111 EA and in the 2019 Initial Review Draft. NMFS and the Council were presented with such alternatives, and other reasonable and viable alternatives, during the NEPA process for Amendment 123 but (a) failed to present and analyze them as action alternatives in the Final EIS and (b) failed to provide a rational explanation for not doing so. Instead, the Final EIS presents only variations on a single action alternative: application of abundance-based Pacific halibut limits to the Amendment 80 sector. Accordingly, the Final EIS violates NEPA.

93. NMFS violated NEPA because it failed to analyze Amendment 123 as an "allocation," as that term is defined under the MSA. As a result, NMFS performed no lawful NEPA analysis of the impacts of the allocation established by Amendment 123.

94. NMFS was required to evaluate the cumulative effects of its action, “which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” 40 C.F.R. § 1508.1(g)(3). The Final EIS considers only a single reasonably foreseeable future action. The Council and NMFS were presented with numerous other reasonably foreseeable future actions that should have been disclosed and analyzed as part of the Final EIS’s cumulative effects analysis, but those actions are omitted from the Final EIS. Accordingly, the Final EIS violates NEPA.

95. In an EIS, an agency must disclose where there is incomplete or unavailable information. If incomplete but available information is relevant to reasonably foreseeable significant adverse impacts and essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency “shall include the information in the [EIS].” *Id.* § 1502.21(b). NMFS failed to obtain and include available information in the Final EIS and failed to explain why the cost of obtaining the information was unreasonable. Indeed, much of the information, such as data and analyses regarding the effects of climate change in the Bering Sea, was already in NMFS’s possession. Additionally, if information cannot be obtained because the costs to do so are unreasonable or there is no means to obtain the information, then the agency is required to follow four specific requirements in the EIS, as prescribed by 40 C.F.R. § 1502.21(c). Nowhere in the Final EIS does NMFS reference or apply 40 C.F.R. §

1502.21, let alone address and discuss the four specific requirements of 40 C.F.R. § 1502.21(c). Accordingly, the Final EIS violates NEPA.

96. NMFS is required to prepare a supplemental EIS if “a major Federal action remains to occur, and . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1). Significant new circumstances or information were brought to NMFS’s attention before it issued the Final Rule, and throughout the NEPA process, but NMFS ignored it and did not prepare a supplement to the draft EIS or the Final EIS. NMFS failed to provide a rational explanation for why it did not supplement the draft EIS or Final EIS. Accordingly, the Final EIS violates NEPA.

97. For all of the reasons stated in this Complaint and in GFF’s and its members’ comments, Amendment 123, its implementing regulations, the Final Rule, and the Final EIS violate NEPA and are arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, and without observance of the procedures required by law, in violation of the APA. Accordingly, Amendment 123, its implementing regulations, the Final Rule, and the Final EIS should be vacated.

THIRD CLAIM FOR RELIEF

(Violation of APA)

98. The APA requires NMFS to examine the relevant data and articulate a satisfactory explanation for its decision to implement Amendment 123, including a rational connection between the evidence before the agency and the decisions it made.

99. NMFS did not rationally explain how Amendment 123, its implementing regulations, and the Final Rule comply with the requirements of the MSA and NEPA.

100. Amendment 123 and the Final Rule are based on numerous improper assumptions unsupported by the facts. NMFS failed to explain a rational basis, supported by the facts, for its conclusions, as set forth in this Complaint. Accordingly, NMFS failed to provide a rational basis, supported by the facts, for its decision to approve and implement Amendment 123. Amendment 123, its implementing regulations, and the Final Rule are therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law, and should be vacated.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Expedite this matter, as required by 16 U.S.C. § 1855(f)(4);
- B. Declare that Defendants violated the MSA, NEPA, and the APA, as set forth above;
- C. Declare that Defendants' actions were arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law, as set forth above;
- D. Vacate Amendment 123, its implementing regulations, the Final Rule, and the Final EIS;
- E. Remand Amendment 123, its implementing regulations, the Final Rule, and the Final EIS to NMFS to address the deficiencies identified in this Complaint;

F. Enjoin, as necessary, Amendment 123, its implementing regulations, and the Final Rule;

G. Maintain jurisdiction over this action until Defendants are in compliance with the MSA, NEPA, the APA, and every order of this Court;

H. Award Plaintiff its reasonable attorney fees, costs, expenses, and disbursements, including attorney fees associated with this litigation, pursuant to the Equal Access to Justice Act or other law; and

I. Award Plaintiff such other and further relief as this Court may deem just and equitable.

DATED: December 19, 2023.

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