UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFA INTERNATIONAL SEAFOOD, INC., et al.,

Plaintiffs,

v.

THE HONORABLE WILBUR ROSS, in his official capacity as Secretary of the United States Department of Commerce, et al.,

Defendants,

and

ALASKA BERING SEA CRABBERS,

Intervenor-Defendant.

No. 1:17-cv-00031-APM

Hon. Amit P. Mehta

INTERVENOR-DEFENDANT ALASKA BERING SEA CRABBERS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Intervenor-Defendant Alaska Bering Sea Crabbers ("ABSC") hereby moves for summary judgment on all of Plaintiffs' claims that defendants Wilbur Ross as Secretary of Commerce, et al. violated the Administrative Procedure Act, *see* 5 U.S.C. §§ 701-706, and the Regulatory Flexibility Act, *see* 5 U.S.C. § 611, when promulgating the Seafood Import Monitoring Program, 81 Fed. Reg. 88975 (Dec. 9, 2016). In support of this motion, ABSC submits a Memorandum of Points and Authorities attached hereto. A proposed order is also attached.

DATED this 9th day of May, 2017.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

K&L GATES LLP

By: *J. Timothy Hobbs*
Michael F. Scanlon (DC Bar # 479777)
Michael.Scanlon@klgates.com
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 661-3764
Facsimile: (202) 778-9100

J. Timothy Hobbs (*Pro Hac Vice*)
Tim.Hobbs@klgates.com
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Telephone: (206) 623-7580
Facsimile: (206) 623-7022

Attorneys for Intervenor-Defendant
Alaska Bering Sea Crabbers

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-DEFENDANT ALASKA BERING SEA CRABBERS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

K&L GATES LLP

By: *J. Timothy Hobbs*
Michael F. Scanlon (DC Bar # 479777)
Michael.Scanlon@klgates.com
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 661-3764

J. Timothy Hobbs (*Pro Hac Vice*)
Tim.Hobbs@klgates.com
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Telephone: (206) 623-7580

Attorneys for Intervenor-Defendant
Alaska Bering Sea Crabbers

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K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

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K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

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K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

I. INTRODUCTION

This case is a challenge to the Seafood Import Monitoring Program promulgated by the National Marine Fisheries Service and other defendants (collectively, "NMFS"). The program seeks to exclude from the U.S. market seafood products caught by illegal, unreported and unregulated ("IUU") fishing. Imports of seafood products caught by IUU fishing flood the U.S. market and decrease prices paid for legally caught products, including by domestic seafood harvesters. For example, members of Intervenor-Defendant Alaska Bering Sea Crabbers ("ABSC") face unfair competition from king crab caught illegally in Russian waters and then imported into the United States, costing ABSC's members estimated losses of over $45 million each year. IUU fishing is a global problem that harms domestic seafood harvesters who play by the rules and comply with extensive fishing regulations to maintain the sustainability of U.S. fish stocks.

The Seafood Import Monitoring Program requires seafood importers to document the source of their supplies of certain seafood products, from the point of entry into U.S. commerce back to the point of harvest, in order to exclude illegally caught products from the U.S. market. The program therefore helps protect domestic seafood harvesters from unfair competition from illegally caught seafood products. The program also benefits U.S. consumers by helping ensure they are not buying illegally caught seafood and contributing to overharvesting and other global problems caused by IUU fishing. The defendants promulgated the Seafood Import Monitoring Program after a multi-year process that began with a Task Force commissioned by President Obama to combat IUU fishing, and that involved expert working groups and took into account extensive public input through several different Federal Register notices, webinars, conference calls and meetings with stakeholders.

Plaintiffs are seafood importers who complain that the program will increase their costs and impose undue burdens and, thus, seek to vacate the program. Plaintiffs' legal

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

arguments ignore the defendants' broad statutory authority to promulgate the program and the record evidence in support of the rule.

Accordingly, because the Seafood Import Monitoring Program was duly promulgated, falls well within the scope of defendants' authority, was based upon proper analyses, and has a rational basis supported by extensive record evidence, ABSC respectfully urges the Court to grant summary judgment in its favor, deny Plaintiffs' motion for summary judgment, and dismiss this case.

II. STATEMENT OF FACTS[1]

Illegal, unreported and unregulated fishing is a global problem that threatens the sustainable management of fish stocks and causes distinct economic harms in the United States. *See* AR 002665 (79 Fed. Reg. 75536, 75537 (Dec. 18, 2014)).[2] Fish and seafood products are among the most widely traded commodities in the world. *Id*. Complex global trade systems and co-mingling of illegally caught product with legally caught product make it difficult to identify seafood caught by IUU fishing and to exclude such seafood from the global supply chain. *Id*. Illegal fishing operations do not "pay the true cost of sustainable production," and thus "gain an unfair advantage in the marketplace over law-abiding fishing operations." *Id*. It is estimated that IUU fishing causes losses of $10-23 billion each year across the globe. *Id*. Seafood caught by IUU fishing floods the U.S. market and drives down prices paid to U.S. seafood harvesters. *See id*.

King crab is a prime example of how IUU fishing operations exploit the global supply chain and cause economic harm to U.S. harvesters. Russian waters of the North Pacific

[1] In contravention of LCR 7(h)(2), Plaintiffs submitted a separate Statement of Facts. Dkt. # 48-2. To the extent not addressed in this brief, ABSC denies the factual assertions in that document.

[2] Citations to the Administrative Record ("AR") produced in this case refer to the specific Bates labeled page of the AR.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Ocean are vast and enforcing fishing regulations is difficult. *See* AR 00022833. Crab illegally harvested from and around Russian waters enters the global supply chain in several ways. King crab is either illegally harvested by Russian vessels which are authorized to catch crab but exceed their catch limits, or by foreign-flagged vessels illegally fishing in and around Russian waters. *See* AR 00022834-00022835; 00022841. This illegally harvested crab is either delivered directly, or transferred to another vessel at sea for delivery, to ports in Japan, North and South Korea, or China. *Id.* After the crab is processed and integrated into the supply chain, there are multiple opportunities to obscure the origin of the illegal product through misrepresentation of its origin, or by co-mingling the illegal product with legally harvested crab. *See, e.g.*, AR 00022846; 00022851-00022852. These activities make it nearly impossible for end users of the product to differentiate between legally and illegally caught crab.

U.S. crab harvesters must compete with the influx of illegally harvested Russian king crab into the U.S. market. *See* AR 00022849. Up to 80 percent of the king crab on the U.S. market is purportedly of Russian origin, and it is estimated that up to 40 percent of that amount is caught illegally. AR 22834; 000193. The oversupply from illegal fishing directly reduces prices paid at the dock to U.S. king crab harvesters. For example, in 2013 it was estimated that illegally caught Russian crab reduced dockside prices for U.S. crab harvesters by 25 percent. AR 000193. From 2000 through 2013, imports of illegally caught Russian crab cost U.S. crab harvesters an estimated $600 million in lost revenues, or more than $45 million per year. *Id*. The problems of IUU fishing are not limited to crab but extend to numerous other fish species caught around the globe and imported into the United States.

To address these issues, in 2014 President Obama commissioned the Presidential Task Force on Combating Illegal, Unreported and Unregulated (IUU) Fishing and Seafood Fraud (the "Task Force"). *See* AR 000001-00002. The Task Force developed numerous

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

recommendations to combat IUU fishing. Two of these, Task Force Recommendations 14 and 15, called for the development of a "traceability" program by which imports of certain fish species deemed particularly "at-risk" for IUU fishing would be subject to enhanced documentation requirements. *See* AR 004478 (81 Fed. Reg. 6210, 6211 (Feb. 5, 2016)). NMFS relied on expert working groups to identify at-risk species and solicited two rounds of public comment on its methodology and selection of species. *See* AR 004465 (80 Fed. Reg. 66867, 66868 (Oct. 30, 2015)). NMFS then issued a proposed rule specifying the enhanced import documentation that would be required for these at-risk species, culminating in the Seafood Import Monitoring Program at issue in this case. *See* AR 006907 (81 Fed. Reg. 88975 (Dec. 9, 2016) ("Final Rule")). NMFS developed the Seafood Import Monitoring Program pursuant to its authority under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") to enforce the MSA's prohibition on the importation of certain illegally harvested seafood products. *See* AR 006909 (81 Fed. Reg. at 88977); 50 C.F.R. § 300.324 ("Seafood Traceability Program") (citing "section 307(1)(Q) of the [MSA]," 16 U.S.C. § 1857(1)(Q)).

Under the Final Rule, importers of at-risk species must obtain a permit and provide certain information at the time of entry of such products into the United States, including the identity of the entity that harvested the fish such as the name of the vessel, flag state, evidence of fishing authorization, and type of fishing gear used; the identity of the species being imported; and information about where and when such fish was harvested. *See* 50 C.F.R. § 300.324(b). Importers must retain documentation sufficient to back up this data for two years. *Id*. § 300.324(c). In addition, importers must maintain "information on the chain of custody of the fish or fish products sufficient to trace the fish or fish product from point of entry into U.S. commerce back to the point of harvest…and information that identifies each custodian of the fish or fish product…." *Id*. § 300.324(e). These measures are designed to ensure that

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

illegally harvested seafood is excluded from the United States, thus depriving illegal fishing operations of access to the world's largest market.

Plaintiffs complain about the burdens and costs of collecting the required traceability documentation. *See* Plaintiffs' Motion for Summary Judgment, Dkt. # 48-1 at 21-22.[3] But the costs to U.S. harvesters due to unfair competition from imports of illegally caught seafood are significant -- nearly $50 million *each year* just due to imports of illegally caught king crab *alone*. *See* AR 000193. The Final Rule is aimed at addressing this problem and halting revenue losses to U.S. harvesters that result from such unfair competition. In addition, third-party service providers are already offering cost-effective technology solutions to help importers comply with the new traceability requirements, enabling better tracking of product throughout their supply chains and yielding ancillary business efficiencies. *See, e.g.*, AR 47, 316, 31068, 45766.

Plaintiffs filed suit on January 6, 2017, asserting a number of legal claims against the Seafood Import Monitoring Program and seeking to vacate and permanently enjoin the program. *See* Dkt. # 1. Domestic seafood harvesters, such as ABSC's members, would be harmed if Plaintiffs succeed in vacating the rule because they would lose the protections the rule affords from unfair competition by IUU fishing and imports. *See* Dkt. #s 43, 50.

III. LEGAL STANDARD

Plaintiffs' claims arise under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 611. The RFA incorporates the APA's standard of review by reference. *See id*. Under the APA, a reviewing court may set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary

[3] References to the case filings in this docket correspond to the page numbers generated by ECF.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

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 difference in view or the product of agency expertise." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard of review is "highly deferential" and "presumes agency action to be valid." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

IV. ARGUMENT

Plaintiffs contend that NMFS and its officers lack authority to promulgate the Seafood Import Monitoring Program, that the record fails to support the rule, and that the substance of the rule is inconsistent with the RFA. As discussed below, the program was duly promulgated under NMFS's broad authority to regulate under the MSA, the rule is supported by the record evidence, and Plaintiffs' RFA claims are not cognizable. For all of these reasons, Plaintiffs' claims should be dismissed and the Court should grant summary judgment in favor of the defendants.

A. NMFS Has Ample Statutory Authority to Promulgate the Seafood Import Monitoring Program.

The Seafood Import Monitoring Program falls squarely within the scope of NMFS's broad authority to regulate under the MSA. Plaintiffs' arguments to the contrary ignore the statutory bases for NMFS's authority and the deference due to NMFS's determination of the scope of its own authority and, therefore, should be rejected.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1) The program falls within NMFS's broad authority to issue regulations to combat IUU fishing and imports.

Under the MSA, Congress gave NMFS broad authority to issue regulations to combat IUU fishing and deter importation of fish caught by illegal or unregulated means. In particular, under the MSA it is unlawful for any person:

> to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation or any treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party.

16 U.S.C. § 1857(1)(Q).

The MSA further provides that the "Secretary may undertake activities to promote improved monitoring and compliance for high seas fisheries, or fisheries governed by international fishery management agreements, and to implement the requirements of this subchapter," 16 U.S.C. § 1829(a), i.e., "Subchapter III—Foreign Fishing and International Fishery Agreements." *See also* 16 U.S.C. § 1826i(c) ("The Secretary may…take appropriate action against listed [IUU] vessels and vessel owners, including action against fish, fish parts, or fish products from such vessels….").[4]

The MSA also expressly provides that the Secretary of Commerce "may promulgate such regulations, in accordance with section 553 of title 5 [the APA], as may be necessary…to carry out any other provision of this chapter." 16 U.S.C. § 1855(d). "[T]his chapter" refers to chapter 38 of title 16 of the U.S. Code (16 U.S.C. §§ 1801 through 1891(d)), which includes the entire MSA. Thus, NMFS has broad authority to issue any regulations that are necessary, in NMFS's view, to carry out any provision of the MSA, including enforcing the prohibition against importation of any fish taken, transported or sold in violation of foreign law, treaty or international conservation measure adopted by an

[4] The MSA defines "Secretary" as "the Secretary of Commerce or his designee." 16 U.S.C. § 1802(39). The Secretary has delegated authority to his designees. *See* section IV(B), *infra*.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

organization to which the United States is a party. *See Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 542 n.8 (1954) (stating that similar statutory language delegated "broad powers to promulgate regulations").

The Seafood Import Monitoring Program falls squarely within NMFS's broad rulemaking authority under 16 U.S.C. §§ 1855(d) and 1857(1)(Q). NMFS determined that "[o]ne of the biggest global threats to the sustainable management of the world's fisheries is illegal, unreported, and unregulated (IUU) fishing" that "undermines the biological and economic sustainability of fisheries both domestically and abroad." AR 002665 (79 Fed. Reg. at 75537). NMFS found that "IUU fishers gain an unfair advantage in the marketplace over law-abiding fishing operations as they do not pay the true cost of sustainable production." *Id.*; *see also* AR 004465 (80 Fed. Reg. at 66868 ("IUU fishing and fraudulent seafood products distort legal markets and unfairly compete with the products of law-abiding fishers and seafood industries globally.")). NMFS concluded that "[it] is in the national interest to prevent the entry of illegal goods, including illegal seafood into U.S. commerce." AR 002668 (79 Fed. Reg. at 75540).

Accordingly, under the rule at issue here, seafood importers must document the source of their supplies, thus making it more difficult for importers to introduce illegally caught seafood into the U.S. market by placing "greater scrutiny o[n] the source of seafood products and on the entire supply chain from point of harvest to entry into U.S. commerce." AR 006909 (81 Fed. Reg. at 88977). The Seafood Import Monitoring Program thus

> establishes permitting, reporting and recordkeeping procedures relating to the importation of certain fish and fish products, identified as being at particular risk of [IUU] fishing or seafood fraud, in order to implement the MSA's prohibition on the import and trade, in interstate and foreign commerce, of fish taken, possessed, transported or sold in violation of any foreign law or regulation or in contravention of a treaty or a binding conservation measures of a regional fishery organization to which the United States is a party.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

AR 006907 (81 Fed. Reg. at 88975). When adopting the rule, NMFS expressly invoked the provisions of 16 U.S.C. § 1857(1)(Q), concluding that the Seafood Import Monitoring Program was necessary to enforce that statute. *See* AR 006909 (81 Fed. Reg. at 88977). Plaintiffs' concession that NMFS has authority "to issue regulations to combat unreported and unregulated fishing," Dkt. # 48-1 at 26, is fatal to Plaintiffs' claims because that authority is sufficient to promulgate the challenged rule.

2) Plaintiffs' argument that the rule must fail because NMFS lacks authority to regulate "seafood fraud" is defective and lacks merit.

Plaintiffs' contention that NMFS lacks authority to regulate "seafood fraud" is irrelevant; the question before the Court is whether the Seafood Import Monitoring Program is within the scope of NMFS's broad rulemaking authority. Plaintiffs concede that it is; thus, Plaintiffs' arguments regarding "seafood fraud" are unavailing.

Plaintiffs disregard Supreme Court precedent and utterly fail to analyze the scope of NMFS's rulemaking authority within the *Chevron* framework as required. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (holding that determining the scope of an agency's rulemaking authority is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). In *City of Arlington*, the Supreme Court held that "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id*. (emphasis in original). Resolving this question requires analyzing the statutory provisions authorizing the agency to act, and determining whether Congress has spoken to the precise question at issue or, if not, whether the agency's asserted authority is based upon a permissible construction of the statute. *Id*.; *see also id*. at 1871-73 ("we have consistently held that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers" (internal quotation marks and citation

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

omitted); "[t]he U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction") (citing cases)).

Plaintiffs fail to even address the relevant statutory provisions giving rise to NMFS's rulemaking authority, *e.g.*, 16 U.S.C. §§ 1857(1)(Q) and 1855(d). *See* Dkt. # 48-1 at 24-28. Without even addressing these provisions, or explaining why NMFS's statutory interpretation of its own authority is not entitled to deference, Plaintiffs cannot meet their burden on summary judgment to show that NMFS lacks the requisite rulemaking authority. *See Level the Playing Field v. Fed. Election Comm'n*, No. 15-cv-1397-TSC, 2017 WL 437400, at *4 (D.D.C. Feb. 1, 2017) ("The plaintiff bears the burden of establishing the invalidity of the agency's action."). And it is too late at this stage for Plaintiffs to rehabilitate their defective argument. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (argument inadequately raised in opening brief is waived).

Plaintiffs make much of the fact that certain species were selected for inclusion in the program based "in part" on concerns about seafood fraud, which Plaintiffs contend NMFS lacks authority to police. Dkt. # 48-1 at 26-27. But NMFS rationally concluded based upon evidence in the record that IUU fishing and fraud are inextricably linked. In particular, fraud can be used to "cover up" IUU fishing, such as "through species substitution or falsification of the country of origin." AR 002665 (79 Fed. Reg. at 75537).

The supply chain for king crab provides a good example of fraud being used to cover up IUU fishing. In some cases, king crab is caught outside Russian waters in violation of international conservation measures,[5] offloaded to a vessel at sea or delivered directly to

[5] Unregulated harvests of king crab outside Russian waters violate Conservation and Management Measure ("CMM") 2016-04 of the North Pacific Fisheries Commission, established pursuant to the Convention of the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean. The Convention entered into force on July 19, 2015, and the United States is a party. CMM 2016-04 took effect on January 16, 2017. *See* North Pacific Fisheries Commission (http://npfc.r-cms.jp/), CMM 2016-04, *available at* http://npfc.r-cms.jp/topics_detail40/id=975.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Asian ports, where it is co-mingled with legally caught product of Russian origin. AR 003019; 00022832. The illicit crab is fraudulently labeled as a product of Russia, even though it was caught outside Russian waters and never entered Russia, and then imported into the United States. *See id*. Fraudulent labeling allows for entry into the United States of illegally caught product co-mingled with product of legal Russian origin.

NMFS does not need an express delegation of authority to regulate "seafood fraud" in order to promulgate the rule at issue here. *See City of Arlington*, 133 S. Ct. at 1871-72 (citing numerous cases where the Supreme Court "afforded *Chevron* deference" to agencies' determinations of the scope of their statutory authority). NMFS reasonably determined that the rule was "necessary" under § 1855(d) to carry out the MSA's prohibition against the importation of fish taken, transported or sold in violation of foreign law, treaty or international conservation measure adopted by an organization to which the United States is a party. *See* AR 006909 (81 Fed. Reg. at 88977) ("To effectively enforce [§ 1857(1)(Q)], NMFS is adopting the reporting and recordkeeping requirements set forth in this rule.") (citing 16 U.S.C. §§ 1857(1)(Q) and 1855(d)). The Court should defer to NMFS's reasonable determination about the scope of its authority to regulate under the MSA. *See City of Arlington*, 133 S. Ct. at 1871-72.

Plaintiffs cite an out-of-circuit case to suggest that a rule that relies on some "improper factors" must be vacated. Dkt. # 48-1 at 27 (citing *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1983)). NMFS did not rely on any improper factors, and the decision in *Thorn* is inapposite. *Thorn* involved a determination of whether an administrative law judge's factual findings were supported by the record in a benefits determination proceeding. *Id*. The case had nothing at all to do with an agency's authority to act under a given statute, and is therefore totally irrelevant.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Plaintiffs' contention that NMFS is improperly treading on FDA's authority to regulate seafood fraud also fails. Dkt. # 48-1 at 25. As NMFS concluded, the FDA "does not currently administer any laws or programs which enable the U.S. government to ensure that seafood products imported into the United States were not taken, possessed, transported, or sold in violation of any foreign law or regulation." AR 006909 (81 Fed. Reg. at 88977). For example, as with king crab, "the co-mingling of legally harvested and IUU seafood products between the point of harvest and entry into U.S. commerce would not be identified by existing FDA inspections." *Id*. The record evidence is clear that NMFS was acting under the authority of the MSA to prohibit the importation of seafood caught by IUU fishing, not under any statute delegating authority to the FDA. *See* 16 U.S.C. § 1857(1)(Q).

B. The Program Was Duly Promulgated.

Plaintiffs contend that the Seafood Import Monitoring Program is void because it was issued by an official without authority. These arguments fail because NMFS Deputy Assistant Administrator Sam Rauch[6] was properly acting within delegated authority of NMFS.

1) The MSA does not prohibit subdelegation of rulemaking authority.

Plaintiffs' argument that the rule is invalid because the MSA does not allow for "successive delegations" is without merit. The language of the MSA is clear: it expressly provides that the Secretary of Commerce *or her designee* "may promulgate such regulations . . . as may be necessary" to carry out the provisions of the MSA. 16 U.S.C. § 1855(d); 16 U.S.C. §1802(39) (defining "Secretary" to mean "the Secretary of Commerce *or his designee*"); *Recreational Fishing All., Inc. v. Nat'l Marine Fisheries Serv.*, No. 8:11-cv-00705-T-30AEP, 2012 WL 868880, at *7 (M.D. Fla. Feb. 24, 2012) ("The definition of

[6] Mr. Rauch is currently the Acting Assistant Administrator, but was Deputy Assistant Administrator when the Seafood Import Monitoring Program published in the Federal Register. AR 006928.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

'Secretary' in the Magnuson Act explicitly provides that the Secretary of Commerce may delegate authority.").

There is no limiting or qualifying language in the MSA that prohibits the Secretary's designee from redelegating his or her authority to deputies within the agency. If Congress wanted to limit the redelegation of authority in the way that Plaintiffs demand, it would have done so. *See, e.g.*, 42 U.S.C. § 1864(c) (expressly providing that the Director of the National Science Foundation "may not redelegate policymaking functions delegated to him by the Board"). The Court should not read such a limitation into the statute. *See Freytag v. C.I.R.*, 501 U.S. 868, 874 (1991) (courts "are not at liberty to create an exception where Congress has declined to do so." (internal quotation marks omitted)).

Furthermore, even absent Congress' express authorization allowing the Secretary to delegate rulemaking authority under the MSA, "the broad power to delegate authority to act has been long established as a necessary practice within a functioning government." *Recreational Fishing All., Inc.*, 2012 WL 868880, at *7. For example, in *Shreveport Engraving Co. v. United States*, 143 F.2d 222, 226 (5th Cir. 1944), the court noted that the express provisions of the War Powers Act authorized the President to delegate his authority, but acknowledged that, even absent those provisions, "it is too clear for debate that Congress, in conferring the powers in question, did not expect or intend that the President should in person execute all of the tremendous powers and in person discharge all the vast duties imposed upon him, and that if there had been no express authority to act by deputies, that authority would have been implied." As the court in *Shreveport Engraving* explained:

> The long and unbroken history of our government presents not a few, but a multitude of, instances where powers, the nature of which are such that they are impossible of personal execution, have been delegated to an office or a department. In all of those cases, the established practice has been that the duties so delegated are performed by the many persons the delegate has selected to perform them.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Id. at 226-27. Accordingly, even if the MSA did not expressly allow for subdelegation (it does), authority for such subdelegation should be implied. *See Recreational Fishing All., Inc.*, 2012 WL 868880, at *7 (rejecting the plaintiff's argument that the Secretary and NOAA unlawfully delegated authority to NMFS on the basis that the MSA expressly allows for delegation, and because there is a broad implied power to delegate authority to act).[7]

2) It is beyond dispute that the Secretary has delegated rulemaking authority to NOAA and NMFS under the MSA.

Plaintiffs complain that there is no evidence of the Secretary's delegation to NOAA/NMFS in the administrative record. Plaintiffs cite no authority that would support such a requirement because there is none. The fact that the Secretary *has* designated NOAA and NMFS to perform rulemaking under the MSA cannot be contested. *See* Department Organization Order 10-15, § 3.01(aa); § 3.05 (Dec. 12, 2011)[8] (delegating to the Under Secretary/Administrator of NOAA the "functions prescribed in the Magnuson Fishery Conservation and Management Act" vested in the Secretary of Commerce, and stating that the Under Secretary/Administrator "may exercise or delegate his/her authority in the capacity of either Under Secretary or Administrator, and may delegate such authority to any employee of NOAA"); NOAA Organization Handbook, Transmittal No. 61 (Feb. 28, 2006), at (A)(1);

[7] Plaintiffs imply that NMFS Deputy Assistant Administrator Rauch was acting as some rogue agent issuing the rule in his personal capacity. This contention ignores the facts and the law of subdelegation. A person acting on behalf of a delegate is not acting as an individual, but as an agent of the delegate such that the action is that of the delegate, not the individual. *See Shreveport Engraving Co.*, 143 F.2d at 227 ("[I]t must be held that orders and directives signed by persons in the Agency appointed by the Chairman to sign them, though published over their signature and not the signature of the Chairman, were published not as their personal fiats but as the acts of the War Production Board, and that that board, through its chairman had in fact issued the orders and directives and caused them to be authoritatively published in the [Federal] Register."). Mr. Rauch was not acting in his individual capacity in promulgating the rule, but rather was acting on behalf of NMFS, NOAA, and the Secretary, within the authorities delegated under the MSA. Indeed, Plaintiffs sued Mr. Rauch in his official, not personal, capacity. Dkt. # 1 at ¶ 18.

[8] *Available at* http://www.osec.doc.gov/opog/dmp/doos/doo10_15.html (last accessed Apr. 28, 2017).

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

(C)(26)(iv)[9] (stating that authority delegated to NOAA under Department Organization Order 10-15 is relegated to the Assistant Administrator for Fisheries, including the authority to sign material for publication in the Federal Register and Code of Federal Regulations, as well as issue implementing regulations under the MSA); *see also Mass. v. Pritzker*, 10 F. Supp. 3d 208, 211 n.2, 212 n.4 (D. Mass. 2014) (NMFS is a division of NOAA; "The Secretary has delegated her authority under the MSA to promulgate regulations implementing [Fishery Management Plans ("FMP")] and their Amendments to NMFS."); *see also id.* at 212 ("NMFS (as the Secretary's designee) may . . . promulgate regulations necessary to effectuate a FMP or plan amendment." (citing 16 U.S.C. § 1855(d)).

Plaintiffs' contention that an agency's rule is void *ab initio* if it was issued by an agency that lacked rulemaking authority is unremarkable. Of course that is the case. The problem with Plaintiffs' position, however, is that there *has* been a delegation of authority to NMFS, and as discussed above, that delegation is expressly allowed under the MSA and impliedly allowed as a necessary function of governance. Plaintiffs do not argue that NMFS Deputy Assistant Administrator Rauch exceeded the authority delegated to the agency, as was argued in *Nat'l Ass'n of Waterfront Employers v. Chao*, 587 F. Supp. 2d 90 (D.D.C. 2008) (on agency's motion to dismiss plaintiffs' claim that the Chief ALJ lacked authority to issue a rule, the issue was whether issuing a rule fell within the scope of the Chief ALJ's delegated powers). Instead, Plaintiffs contend that NMFS (and Mr. Rauch) lacked *any* rulemaking authority at all under the MSA. As explained above, that contention conflicts with the plain language of the MSA.

[9] *Available at* http://www.corporateservices.noaa.gov/ames/directives_management/delegations_of_authority/61.pdf (last accessed May, 5, 2017).

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

3) Plaintiffs' Appointments Clause argument is without merit.

Plaintiffs also challenge the rule under the Appointments Clause of the U.S. Constitution, which governs appointment of certain government officers. The Appointments Clause provides that principal officers must be appointed by the President and confirmed by the Senate, and "inferior" officers may be appointed by the President, the Courts of Law, or Heads of Departments, if so provided by Congress. U.S. Const., art. II, § 2, cl. 2. Plaintiffs argue that when NMFS Deputy Assistant Administrator Rauch promulgated the Seafood Import Monitoring Program (as a NMFS official), he was exercising a type of authority only exercisable by a principal officer and, therefore, because he was not a Presidential appointee, the rule that he promulgated is constitutionally invalid. That argument fails because, among other things, it is based on a false premise.

Contrary to Plaintiffs' argument that only Presidentially-appointed and confirmed principal officers may exercise rulemaking authority, courts have recognized that inferior officers may exercise extensive authority, including rulemaking authority. *See, e.g.*, *Eltra Corp. v. Ringer*, 579 F.2d 294, 300 (4th Cir. 1978) (holding that the Register of Copyrights, who is appointed by the Librarian of Congress, who is in turn appointed by the President with the consent of the Senate, has the power to issue rules and regulations); *Estes v. U.S. Department of the Treasury*, No. 1:16-cv-00450, 2016 WL 6956594 (D.D.C. Nov. 28, 2016) (holding that rule issued by inferior officer in the Treasury Department was not invalid under the Appointments Clause).

The Court's recent rejection of a similar argument in *Estes* highlights this point. In *Estes*, the plaintiffs challenged a Department of Treasury rule that had been promulgated by the Department's Fiscal Assistant Secretary, arguing that the rule was *ultra vires* because it was issued by an official who had not been appointed by the President with the consent of the Senate. *Id.* at *13. The Fiscal Assistant Secretary who issued the rule was an appointee of the

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Treasury Secretary, who was in turn appointed by the President with consent of the Senate. *Id.* The Court rejected the argument that the rule issued by the Fiscal Assistant Secretary was invalid, explaining that the Fiscal Assistant Secretary was an "inferior officer" because he has "multiple superiors, in the sense that his work is directed and supervised at some level by others who were appointed by Presidential nomination and with the advice and consent of the Senate." *Id.* at *14. Accordingly, the Court held that the Fiscal Assistant's "appointment as an inferior officer was constitutionally valid, and the rule he promulgated was not *ultra vires*." *Id.* at *15.

Similar to the officer in *Estes*, NMFS Deputy Assistant Administrator Rauch is an inferior officer in NMFS whose work is directed and supervised by others who were appointed by the President with the consent of the Senate. NMFS is a division of NOAA, which is an agency housed in the Department of Commerce. *See Mass. v. Pritzker*, 10 F. Supp. 3d at 211 n.2. The Secretary of Commerce, a named plaintiff, is appointed by the President with the consent of the Senate. 15 U.S.C. § 1501. Similarly, the Under Secretary and Administrator of NOAA are appointed by the President with the consent of the Senate. 15 U.S.C. § 1503b. The rulemaking authority delegated to NMFS from NOAA is subject to reservations requiring that the Under Secretary of NOAA be advised before any final rules are implemented under the MSA. NOAA Organization Handbook, Transmittal No. 61, at (C)(26). Similarly, the Under Secretary must advise the Secretary before any final rules are implemented. Department Organization Order 10-15, § 3.01(aa). This organizational framework demonstrates that, like the Treasury official in *Estes*, NMFS Deputy Assistant Administrator Rauch is an inferior officer whose work is directed and supervised by presidential appointees.

To the extent Plaintiffs argue that the process NMFS used to issue this particular rule violated the Appointments Clause, such a claim is not cognizable. *See Estes*, 2016 WL

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

6956594, at *14 (noting that "Appointments Clause challenges are properly structural, not procedural," and that in "evaluating such challenges, reviewing courts do not evaluate the degree of supervision or reversal authority actually exercised by superiors . . . but rather the extent to which relevant statutes or regulations provide for such oversight as a structural matter"). Plaintiffs' claim that any rule issued by an inferior officer is *ultra vires* is not only legally incorrect, but also ignores the obvious reality that inferior officers, under the supervision of principal officers, routinely carry out rulemaking functions as a matter of course.

C. Plaintiffs Ignore Substantial Record Evidence Showing that NMFS Complied with the Administrative Procedure Act.

The Seafood Import Monitoring Program relies on a voluminous record of data and public comment. Plaintiffs' claims that NMFS violated the APA must fail because, under the APA, agency action is set aside only when the administrative record "reveals that the challenged conduct is so lacking in evidentiary support that the action is arbitrary, capricious or an abuse of agency discretion." *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 131 (D.D.C. 1979) (citing 5 U.S.C. § 706(2)(A) (1976). Agency action must be upheld if it was based on a consideration of all relevant factors and has a rational basis. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). NMFS's action readily meets this test.

1) NMFS did not engage in "secret rulemaking."

Plaintiffs contend that the process NMFS used to select the species that are subject to the Seafood Import Monitoring Program was flawed because it relied on "secret data" that precluded Plaintiffs from meaningfully commenting on the selection of those species. Dkt. # 48-1 at 33-34. This argument does not withstand scrutiny.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

The record shows that NMFS's rulemaking process was fully transparent: "the NOC Committee, through the Working Group, solicited public input through a Federal Register notice (80 FR 24246, April 30, 2015) on what principles should be used to determine the seafood species at risk of IUU fishing or seafood fraud. Public input was received both in writing and through webinars." AR 004465 (80 Fed. Reg. at 66868). After considering public comments, the Working Group developed a list of draft principles that "were then published in a Federal Register notice (80 FR 45955, August 3, 2015) to solicit additional public comment." *Id.* NMFS relied on these public comments to develop the final list of at-risk species. *Id.*

In addition, the principles developed by the Working Group to select at-risk species relied on independently verifiable data, such as the value of domestic landings and imports for species valued at over $100 million in 2014, and species with a high cost of product per pound that would be attractive for IUU fishing operations to exploit. AR 004466 (80 Fed. Reg. at 66869). The Working Group also relied on the expertise of representatives from enforcement agencies, such as U.S. Customs and Border Protection, U.S. Department of Homeland Security, and the Food and Drug Administration, *id*., as well as data from stakeholders. *See, e.g.*, AR 014043 (submission from World Wildlife Fund documenting "Fish Species at Highest Risk from IUU Fishing").

Based on the transparency with which NMFS selected the species subject to the rule and the volume of evidence in the administrative record justifying the agency's rationale, Plaintiffs' allegations that NMFS engaged in "secret rulemaking" fail under the "highly deferential" standard for challenging the evidentiary basis for an agency rulemaking. *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013); *see also Nat'l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 223 (D.D.C. 1990) (It is "especially appropriate for the Court to defer to the expertise and experience of those

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

individuals and entities—the Secretary, the Councils, and their advisors—whom the [MSA] charges with making difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors.").

Plaintiffs ignore the substantial weight of the evidence in the record and focus on a specific category of law enforcement-related data that was not disclosed during the rule's promulgation. This data consisted of highly confidential government prosecution and enforcement data that the Working Group *only partially relied upon* to determine at-risk species in combination with the other data and public comment discussed above. NMFS could not disclose this data without undermining government efforts to enforce the import laws or disclosing information about companies subject to investigation. "NOAA explained that the working group used verifiable data from the US government . . .[that was] sensitive and/or confidential, and could compromise the integrity of individual businesses, systems or enforcement capability," AR 00036681, and determined that this "enforcement and prosecution data" could not be published, AR 14308. *See, e.g., Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, at 1195 (D.C. Cir. 2009) (IRS could withhold from response to FOIA request data regarding investigations of lease-in/lease-out tax arrangements because "this information would inform [taxpayers'] cost-benefit analysis about the advantages of evading the law").

Moreover, the law enforcement data NMFS withheld was not "the most critical factual material that was used to support the agency's position." *See Prof'l Plant Growers Ass'n v. Dep't of Agric*., 942 F. Supp. 27, 32 (D.D.C. 1996) (holding that rulemaking was not arbitrary and capricious when the undisclosed data was "not the most critical" and "the administrative record reflect[ed] a careful literature review, the use of a team of outside experts to identify risks and another team of APHIS scientists to develop an approach to risk management, and detailed consideration of comments received from the public"). As previously described, the

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Working Group selected the species subject to the rule after taking into account two rounds of public comment, including submissions of data and scientific studies, independently verifiable data (such as the cost of product per pound), and the expertise of Working Group. AR 004465-66; AR 014043. *See Nat'l Fisheries Inst., Inc.,* 732 F. Supp. at 212 (NMFS's rulemaking was "adequately supported by the administrative record" even where some data was incomplete "due to inherent difficulty of obtaining absolutely precise information").

Plaintiffs' reliance on *American Radio* is misplaced. *See* Dkt. # 48-1 at 33 (citing *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 239 (D.C. Cir. 2008)). In *American Radio* the agency relied on five studies but redacted critical portions, which precluded commenters from challenging the studies' methodology. 524 F.3d at 239. The court found this to be an unacceptable "hide and seek application of the APA's notice and comment requirements." *Id.* (internal citations omitted). Unlike the agency in *American Radio*, NMFS expressed confidentiality concerns with releasing the prosecution data, and such data was only one of many sources of information NMFS considered in developing the rule. In any event, Plaintiffs' claims of "prejudice" from the law enforcement data NMFS withheld are wholly conclusory. Dkt. # 48-1 at 34. *See Am. Radio*, 524 F.3d at 237 (plaintiffs must meet "their burden to demonstrate prejudice by showing that [they] ha[ve] something useful to say" regarding the missing data) (internal citation omitted).

Finally, Plaintiffs' claim that "there is no data in the administrative record showing a relationship between a traceability program and a reduction in IUU fishing or seafood fraud," Dkt. # 48-1 at 35, is demonstrably false. For example, Plaintiffs overlook an academic study published in the Journal of Marine Policy that analyzes IUU seafood imported to the United States, including Russian king crab, and concludes that

> government and private sector systems are called for to address the lack of transparency and traceability in wild seafood supply chains. These could include the use of catch documentation, improved chain of custody procedures

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

> and certified product sources to ensure that seafood imports are traceable to verifiably legal sources.

AR 000366 (Ganapathiraju Pramod et al., *Estimates of illegal and unreported fish in seafood imports to the USA*, 48 Marine Policy 102-113 (2014)). This article appears in at least four places in the administrative record, *see* AR 000357; AR 002467; AR 7242; AR 00044986, and NMFS cited this article in its Final Regulatory Flexibility Analysis. *See* AR 00030375. NMFS also received data supporting traceability as a means of reducing IUU fishing during the public comment process, for example:

> A lack of effective catch documentation systems: Thorough, up-to-date catch documentation and consistent cross-checks of those records helps to reduce opportunities to funnel illegally-caught fish into legal market streams, especially for complicated trade routes.

AR 003974 (80 Fed. Reg. 45955, 45959 (August 3, 2015)). The Global Food Traceability Center also submitted comments citing to several studies to support its conclusion that "[c]hallenges for the seafood industry such as IUU fishing and seafood fraud will continue unless innovative, digital data solutions such as electronic traceability are pioneered and implemented." AR 000056. In light of this evidence, Plaintiffs cannot sustain their claim that NMFS's conclusions are unsupported by the record. *See United States v. Allegheny-Ludlum Steel Corporation*, 406 U.S. 742, 749 (1972).

2) The Seafood Import Monitoring Program is fully supported by the record.

Plaintiffs' remaining arguments that the rule is not supported by the record fail for several reasons. First, Plaintiffs ignore NMFS's reliance on the European Union's catch documentation scheme. *See* AR 006918 (81 Fed. Reg. at 88968) (citing EU IUU regulation as evidence that the Rule would not result in significant increased seafood costs); AR 007254 (report describing the impact of the EU IUU regulation). Instead, Plaintiffs misrepresent and criticize NMFS's reliance on a particular Swedish study. *See* Dkt. # 48-1 at 37 (citing AR

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925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

006935 (Blomquist, J., *et al.*, *Price Premiums for Providing Eco-labelled Seafood: Evidence from MSC-certified Cod in Sweden*, 66 J. Agricultural Econ. 690-704 (2015)). NMFS relied on the Swedish study to support the limited proposition that "evidence exists of consumer willingness to pay premiums at the retail level for fishery products of certified and sustainable origin." AR 006935 (Final Regulatory Flexibility Analysis at 5 n.6). This study does not contradict NMFS's position that existing government catch documentation systems, like the one in the EU, resulted in no measureable increases to the cost of seafood. As its title suggests, the Swedish study examined only the costs of products certified under a private nonprofit organization's non-governmental eco-labeling program. The study does not analyze the costs of existing catch documentation systems implemented by governments to prevent IUU fishing, and a study analyzing the costs of premium eco-labeled product is not analogous to an IUU traceability program.

Plaintiffs also misrepresent NMFS's statement in the preamble of the Final Rule regarding possible increases in the cost of seafood related to the rule. Dkt. # 48-1 at 37. Through selective quotations, Plaintiffs claim that NMFS "acknowledges that chain of custody costs in complex systems 'may be either passed through to U.S. consumers or result in a decline in exports to the U.S.'" *Id*. (quoting AR 006918 (81 Fed. Reg. at 88986)). But Plaintiffs omit the portion of this quote wherein NMFS qualifies such cost increases or declines as merely a possibility. Plaintiffs also omit NMFS's conclusions that "evidence indicates that there were not significant effects on supply to the EU seafood market in response to the EU's IUU regulation," AR 006918 (81 Fed. Reg. at 88986), and "[t]he United States represents an equally attractive international market, access to which is well worth the effort of providing traceability data to exporters," *id.* Finally, Plaintiffs incorrectly assert that NMFS failed to base its conclusion that cost or price increases would be minimal on an independent assessment. Dkt. # 48-1 at 38. As previously mentioned, NMFS reached its

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

conclusion about cost impacts based on the results of the EU's IUU regulation. *See* AR 6918 (81 Fed. Reg. at 88968); AR 007254. This conclusion is further supported by NMFS's determination that "permitting and electronic reporting requirements implemented by this rulemaking would build on current business practices and are not estimated to pose significant adverse or long-term economic impacts." AR 006935.

Plaintiffs' contention that NMFS presented no evidence concerning seafood fraud and various species subject to the rule is incorrect. *See* Dkt. # 48-1 at 39-43. In fact, NMFS received exhaustive data documenting species subject to seafood fraud during the public comment period, including a submission from Oceana wherein its "scientists found snapper, tuna, wild salmon, cod, grouper, shrimp, sea bass, halibut, and sole were the species most likely to be mislabeled or fraudulent, but in addition to these worst offenders, we found at least one instance of mislabeling in 27 of the 46 fish types (nearly 60 percent) sampled." AR 003092-3100. NMFS also relied on the expertise of its Working Group. *See* AR 00040353 ("Atlantic Cod is a high value groundfish with white meat that can easily be substituted with lower quality meat. Atlantic cod has a known history of seafood substitution and other types of seafood fraud . . . .").

Further, Plaintiffs once again mischaracterize the agency's statement regarding the existence of seafood fraud data. Plaintiffs quote portions of emails between NMFS employees discussing gaps in NMFS's seafood fraud data. *See* Dkt. # 48-1 at 39-40. Contrary to Plaintiffs' characterization, these emails do not prove the absence of evidence related to seafood fraud. In fact, the same emails describe evidence that the agency does possess, such as "[d]ata related to suspect catch certificates," AR 00032022, and data regarding "rejected product," AR 00032023. These emails merely highlight the gaps in data necessary to detect imports of IUU seafood and mislabeled product that will be filled by data collected pursuant to the Seafood Import Monitoring Program.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Likewise, NMFS presented sufficient evidence concerning the species subject to the rule, particularly red king crab. The Marine Policy study referenced above discussed the effects of IUU Russian king crab on the U.S. economy at length:

> From China, significant amounts of [Russian king crab] are exported to the United States. Once the IUU crab is in the U.S. supply chain, the routes into the marketplace are the same as that for legal crab, and because of false documentation, repacking and obfuscation of traceability, it is currently undetectable. . . Moreover, the volume of illegally caught Russian crab depressed prices for Alaskan king crab by an estimated 25% in 2012.

AR 007248-7249; *see also* AR 00022829- 22868 (World Wildlife Fund's 2014 Report: "Illegal Russian Crab: An investigation of trade flow"). Plaintiffs' allegations that no data exists to support inclusion of other species are also contradicted by evidence in the administrative record. *See, e.g.*, AR 002643 (Oceana report entitled "Widespread Seafood Fraud Found In New York City" describing results of DNA analysis of fish samples that revealed mislabeling and seafood fraud of species covered by the rule).

Finally, Plaintiffs' allegation that NMFS concealed costs related to the compliance date for the rule is unfounded. Once again, Plaintiffs support their claim by selectively quoting from an email exchange between NMFS employees and omitting context that changes its meaning. Dkt. # 48-1 at 44. The NMFS employee notes that a lag time exists between product harvested prior to the notice date of the Final Rule and importation of that product after the compliance date. AR 00020256. The same employee, however, concludes that "[i]f the trade prepares for the implementation of the rule, disruption in supply should be minimal." *Id.* The employee also suggests that traders can plan for the implementation date by rushing to import this product in the period prior to the compliance date. *Id.* NMFS further considered the possible impacts of the compliance date at length, weighing such factors as "[d]evelopment, translation and distribution of compliance guides, [s]upporting international capacity building, [and s]oftware development and testing compatibility with ACE (development typically takes 3 months, and Bumble Bee recommended 3-6 months for

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

testing)." AR 00016725. After receiving public comment on the compliance date, NMFS made the determination that one year was sufficient "for businesses to establish information systems needed to comply with the reporting and recordkeeping requirements." AR 00030393 (FRFA at 23). Plaintiffs may disagree with NMFS' conclusions, but they have failed to meet their burden to show that the conclusion has no rational basis.

The evidence in the administrative record, the volume of public comment solicited by the agency, and the rationale supplied by NMFS in the Final Rule and related notices demonstrate that NMFS considered all relevant factors in promulgating the Seafood Import Monitoring Program and that its conclusions are rationally supported. *See Overton Park*, 401 U.S. at 416; *Allegheny-Ludlum Steel Corporation*, 406 U.S. at 749. Plaintiffs have therefore failed to establish that NMFS violated the Administrative Procedure Act, and summary judgment must be denied as to this issue.[10]

D. NMFS Complied with the Regulatory Flexibility Act.

Plaintiffs' argument that NMFS failed to perform the analysis required by the Regulatory Flexibility Act ("RFA") fails because it challenges the substance of NMFS's analysis. Such challenges are not cognizable under the RFA.

The RFA requires agencies that issue rules under the APA to publish a final regulatory flexibility analysis. 5 U.S.C. § 604. The RFA provides that each final regulatory flexibility analysis must address a number of legally mandated subject areas, which are described in Section 604. The requirements of the RFA, however, "are purely procedural." *Nat'l Tel. Coop. Ass'n v. F.C.C.*, 563 F.3d 536, 540 (D.C. Cir. 2009). "Though [the RFA] directs agencies to state, summarize, and describe, the Act in and of itself imposes no substantive

[10] Plaintiffs' argument that NMFS violated the APA by misreporting costs under the Paperwork Reduction Act between its proposed rule and its final submission is also meritless. *See* Dkt. # 48-1 at 41. These projections changed in response to feedback during the public comment period, and furthermore, Plaintiffs cite no authority indicating that such a "violation" of the Paperwork Reduction Act is a basis for invalidating an agency rule.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

constraint on agency decisionmaking. In effect, therefore, the Act requires agencies to publish analyses that address certain legally delineated topics." *Id.* Accordingly, arguments related to the merits of the agency's analysis are not cognizable under the RFA. *See Associated Dog Clubs of N.Y., Inc. v. Vilsack*, 75 F. Supp. 3d 83, 94 (D.D.C. 2014) (rejecting plaintiffs' argument that the agency's analysis violated the RFA, explaining that plaintiffs "do not suggest that [the agency] failed to address the required topics [in the RFA], but rather dispute the merits of the agency's analysis" and that the RFA "does not provide another forum for the [plaintiffs] to chew over their substantive arguments").

Here, Plaintiffs do not contend that NMFS failed to address all of the legally mandated subject areas in its final RFA analysis. Instead, Plaintiffs attack the substance of NMFS's analysis, arguing that NMFS did not consider all of the relevant costs[11] or all available alternatives.[12] Each of these arguments goes to the *substance* of NMFS's analysis, not to whether it complied with the procedural requirements of the RFA. Because "[t]he only question upon judicial review [of the RFA] is whether the agency's analysis addressed all of the legally mandated subject areas," *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-cv-1035-RDM, 2016 WL 6573480 (D.D.C. Nov. 4, 2016), at *40 (D.D.C. 2016), Plaintiffs' arguments

[11] The RFA does not require "cost-benefit analysis or economic modeling," and expressly allows agencies to provide "either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." *Alenco Commc'ns v. F.C.C.*, 201 F.3d 608, 625 (2000) (quoting 5 U.S.C. § 607). Plaintiffs' reliance on *N. C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) and *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998) is unavailing. As the Court has already pointed out, "[t]hose were extreme cases in which the Secretary and his designees either stubbornly refused to admit that the regulations at issue would adversely affect small entities or overlooked altogether plausible proposals properly before them." *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 94 (D.D.C. 2007). That is not the case here. The Final RFA Analysis in this case did analyze the economic impacts of the rule on small entities, as well as alternatives to the rule. *See* AR 6935-6938; AR 6953-54.

[12] Plaintiffs do not argue that NMFS failed to include a statement explaining why "each one of the other significant alternatives to the rule considered by the agency" was rejected, as required by the RFA. *See* 5 U.S.C. § 604(a)(6). Rather, they argue that NMFS should have considered other, additional alternatives. This is the type of substantive argument that cannot serve as the basis for an RFA challenge.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

must fail. *See id.* at *41 ("Although [the plaintiff] may disagree with the *substance* of the Department's analysis, that argument is not cognizable under the purely procedural RFA." (emphasis in original; internal quotation marks omitted)). Regardless of whether Plaintiffs agree with NMFS's analysis, all the RFA requires is a "reasonable, good-faith effort" to perform the analysis, which NMFS has done here. *Id.* at *42.[13]

E. Plaintiffs Are Not Entitled to the Sweeping Remedies They Seek.

Plaintiffs seek sweeping remedies -- vacatur of the rule and a permanent injunction. Plaintiffs are not entitled to any relief. To the extent the Court grants any relief, it should be limited to remand without vacatur.

1) Remand without vacatur is the appropriate remedy, if any.

Even assuming the Court determines that the rule violates the APA, the Court is not required to vacate it. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) ("An inadequately supported rule, however, need not necessarily be vacated."). Instead, the Court has the discretion to remand the rule to the agency to remedy the deficiencies. *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241-42 (D. Colo. 2011) ("Vacatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion."). Courts consider two equitable factors in determining whether to remand a rule without vacatur: (1) the seriousness of the deficiencies in the agency's decision (*i.e.*, the possibility that the agency can fix its decision on remand), and (2) the disruptive consequences of the vacatur. *Id.* at 150-51.

[13] Plaintiffs do not raise a distinct claim that NMFS's action is arbitrary and capricious under the APA because the agency failed to reasonably address the rule's impact on small businesses under the RFA. *See id.* at 540 (explaining that, in addition to raising a claim that the Federal Communication Commission violated the RFA, the plaintiff raised "a related but distinct claim that the FCC's action is arbitrary and capricious under the APA because the agency did not reasonably address the Order's impact on small businesses.").

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Under the first factor, courts recognize that there is a difference "between agency reasoning that is so crippled as to be unlawful and action that is potentially lawful but insufficiently or inappropriately explained." *Shands Jacksonville Medical Ctr. v. Burwell*,139 F. Supp. 3d 240, 267 (D.D.C. 2015) (internal quotation marks omitted). "In the former circumstance, the court's practice is to vacate the agency's order, while in the [latter circumstance] the court frequently remands for further explanation (including discussion of relevant factors and precedents) while withholding judgment on the lawfulness of the agency's proposed action." *Id.* at 267-68 (internal quotation marks omitted); *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur.").

As to the second *Allied-Signal* factor, this Court has recognized that the disruptive consequences of vacatur are "only barely relevant when . . . it is apparent that the agency will likely be able to provide adequate justification for retaining its rules after remand." *Securities Indus. and Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 435 (D.D.C. 2014) (internal quotation marks omitted). Because the *Allied-Signal* factors are equitable factors, as opposed to requirements, neither factor is determinative. *See Mayo v. Jarvis*, 177 F. Supp. 3d 91, 140-41 (D.D.C. 2016) (after finding the second factor irrelevant in that case, the court nonetheless remanded without vacatur based on the first factor alone); *see also Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002) (remanding without vacatur even though "the disruptive consequences of vacatur might not be great"), *amended in other respects by Fox Television Station*s, *Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002).

In this case, any APA violations alleged could be readily addressed on remand. For example, Plaintiffs allege that the agency failed to disclose data and evidence it relied upon.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

If correct, the agency could release this information on remand under appropriate protective conditions. Plaintiffs complain that the agency's cost estimates are inconsistent. If correct, the agency could provide an explanation for any inconsistencies on remand. All of the APA violations that Plaintiffs complain about are errors that could be easily remedied on remand to the agency without vacating the rule. *See FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 343 (D.D.C. 2016) (remanding without vacatur, noting that the court was reluctant to vacate the rule thereby "forcing [the agency] to go all the way back to the drawing board and delaying the rule by many months--based on errors the agency could perhaps fix relatively easily and quickly."). Thus, the first *Allied-Signal* factor weighs heavily in favor of remand without vacatur.

Additionally, there would be disruptive consequences if the rule was vacated. For example, businesses that are subject to the rule may already be in the process of bringing their operations within compliance of the rule, which takes effect in approximately seven months. Courts have recognized this type of consequence is cognizable under the *Allied-Signal* factors. *See U.S. Sugar Corp. v. Envtl. Prot. Agency*, 830 F.3d 579, 652 (D.C. Cir. 2016) (noting that vacating rules that set emissions limits on boilers and solid waste incinerators "would be unnecessarily disruptive for synthetic boiler operators who, in the interim, would not know whether they needed to begin the expensive, time-consuming process of obtaining" the required permit). Accordingly, the Court should exercise its discretion to remand the rule to NMFS to fix any errors that could be fixed relatively easily, as opposed to vacating the rule entirely.

2) A permanent injunction is not appropriate here because a less drastic remedy exists to address any RFA violations.

For the same reasons, a permanent injunction is not appropriate for any of the alleged violations of the RFA in this case. A court has "considerable latitude to fashion an

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

appropriate remedy" for violations of the RFA. *N.C. Fisheries Ass'n, Inc.*, 27 F. Supp. 2d at 666. The RFA "expressly authorizes 'corrective action' that includes '(A) remanding the rule to the agency, and (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement is in the public interest.'" *Id.* (quoting 5 U.S.C. § 611(a)(4)). In this case, Plaintiffs ask this Court to permanently enjoin the rule because of the alleged violations of the RFA. To obtain a permanent injunction, Plaintiffs must demonstrate, among other things, that they have suffered an irreparable injury. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The D.C. Circuit has "set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).[14] The injury "must be both certain and great; it must be actual and not theoretical." *Id.* (quoting *Wisc. Gas Co. v. FERC*, 785 F.2d 669, 674 (D.C. Cir. 1985). The party seeking injunctive relief must demonstrate that the "injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm," and that the injury is "beyond remediation." *Id.* (internal quotation marks omitted); *see also Wisc. Gas Co.*, 785 F.2d at 674 ("Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." (internal quotation marks omitted)).

Additionally, "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010). As a result, permanent injunctions are not appropriate where a less drastic remedy--such as a remand to the agency--is sufficient to redress the plaintiffs' injury. *See id.*

Here, compliance with the final rule is not required until January 1, 2018--more than six months from now. 81 Fed. Reg. at 88975. Thus, even if the Court determines that there were violations of the RFA, the Court may fashion a less drastic remedy than a permanent

[14] The requirements for a permanent injunction are adopted from the requirements for a preliminary injunction. *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 44 (D.D.C. 2000).

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

injunction to fix those violations. For example, the Court could remand the rule to NMFS and require the agency to comply with the RFA within a specific time period. *See, e.g.*, *N.C. Fisheries Ass'n*, 16 F. Supp. 2d at 658 (after determining that NMFS had violated the RFA in establishing a quota, the court remanded the quota to the Secretary to conduct the required level of analysis under the RFA "within a reasonable period of time"). The Court could also stay the effective date of the rule until the agency complies with the RFA. Given the variety of less-drastic remedies available for the alleged RFA violations, the Court should decline to issue a permanent injunction in this case.

V. CONCLUSION

ABSC respectfully requests that the Court grant its motion for summary judgment, deny Plaintiffs' motion for summary judgment, and dismiss this case.

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Respectfully submitted,

K&L GATES LLP

By: */s J. Timothy Hobbs*
Michael F. Scanlon (DC Bar # 479777)
Michael.Scanlon@klgates.com
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 661-3764
Facsimile: (202) 778-9100

J. Timothy Hobbs (*Pro Hac Vice*)
Tim.Hobbs@klgates.com
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Telephone: (206) 623-7580
Facsimile: (206) 623-7022

Attorneys for Intervenor-Defendant
Alaska Bering Sea Crabbers