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

REPLY IN SUPPORT OF INTERVENOR-DEFENDANT ALASKA BERING SEA CRABBERS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

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I. INTRODUCTION

Plaintiffs seek to vacate the Seafood Import Monitoring Program, which is designed to exclude illegally harvested seafood products from the U.S. market and protect domestic seafood harvesters from unfair competition. Illegal, unreported, and unregulated ("IUU") fishing causes billions of dollars of losses each year, including an estimated $45 million in annual losses to domestic king crab harvesters like members of Intervenor-Defendant Alaska Bering Sea Crabbers ("ABSC"). The Seafood Import Monitoring Program requires seafood importers to document the supply chain for certain fish species from the point of harvest to the point of entry into U.S. commerce in order to exclude illegally harvested fish from the U.S. market. The National Marine Fisheries Service and other defendants (collectively, "NMFS") promulgated the program after an extensive, years-long process that took into account multiple rounds of public comment and advice from expert working groups, and involved extensive cooperation between numerous federal agencies.

In their opening briefs, NMFS and ABSC explained why Plaintiffs' challenges to the program are all meritless. In their reply, Plaintiffs ignore many of these explanations, assert new meritless arguments, continue to disregard extensive record evidence that directly refutes their claims, and abandon some claims altogether. For the reasons cited in the opening briefs and below, the Court should dismiss this case.

II. ARGUMENT

The Court should uphold the Seafood Import Monitoring Program because it was duly promulgated pursuant to NMFS's broad statutory authority, the program relied on extensive record evidence, and it complied with all legal requirements.

A. NMFS Promulgated the Seafood Import Monitoring Program Pursuant To Its Broad Statutory Authority.

Plaintiffs contend that the Seafood Import Monitoring Program is invalid because NMFS lacks express statutory authority to regulate "seafood fraud." Dkt. # 62 at 26-32. As

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ABSC explained in its opening brief, Dkt. # 57 at 15-21, this argument fails because NMFS does not need such authority to promulgate the program at issue here, which is designed to preclude entry of illegally harvested fish into the U.S. market. In their reply brief, Plaintiffs continue to disregard the source of NMFS's rulemaking authority and the deference due to NMFS's own determination that the program falls within that authority.

The Magnuson-Stevens Act ("MSA") makes it unlawful to "import…any fish taken, possessed, transported, or sold in violation of" any foreign law, regulation, treaty, or binding international conservation measure. 16 U.S.C. 1857(1)(Q). The MSA also provides that NMFS "may promulgate such regulations…as may be necessary…to carry out" any provision of the MSA. *Id*. § 1855(d). NMFS thus has broad authority to implement regulations to enforce the import prohibition set forth at § 1857(1)(Q). NMFS expressly relied upon that broad authority to implement the Seafood Import Monitoring Program, determining that the program was necessary to carry out § 1857(1)(Q). *See* AR 006909 (81 Fed. Reg. 88975, 88977 (Dec. 9, 2016)) (citing §§ 1855(d), 1857(1)(Q)). NMFS's determination on this point is entitled to deference. *See City of Arlington, Tex. V. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (holding that *Chevron* deference is due to an agency's determination of the scope of its statutory authority).

As in their opening brief, Plaintiffs never explain in their reply brief why NMFS's determination about its rulemaking authority should not receive *Chevron* deference. Plaintiffs never mention *Chevron* at all, nor do they address NMFS's broad authority to regulate under § 1855(d). Instead, Plaintiffs insist that NMFS lacks the requisite authority to regulate seafood fraud and that Congress delegated exclusive authority over this field of regulation to other agencies. These arguments are unavailing.

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1. The program's ancillary benefits of combatting seafood fraud do not deprive NMFS of its broad authority to exclude illegally harvested imports.

Plaintiffs' professed "difficult[y]" in understanding how the Seafood Import Monitoring Program "does not regulate seafood fraud," Dkt. # 62 at 29, arises from their total disregard of the program's primary objective to preclude entry of illegally harvested fish into the U.S. market. NMFS concluded that the program would "enable the United States to exclude the entry into commerce of products of illegal fishing activities" and "will help authorities verify that the fish or fish products were lawfully acquired by providing information that traces each shipment from point of harvest to entry-into-commerce." AR 004477 (81 Fed. Reg. 6210-6211 (Feb. 5, 2016)); *see also* AR 6907 (81 Fed. Reg. at 88975). Plaintiffs concede that NMFS has authority to take such action. *See* Dkt. # 48-1 at 26 (NMFS has authority "to issue regulations to combat unreported and unregulated fishing"). NMFS's determination that the program "will also decrease the incidence of seafood fraud," AR 004477 (81 Fed. Reg. at 6211); AR 006907 (81 Fed. Reg. at 88975 (emphasis added), cannot deprive NMFS of its undisputed statutory authority to combat unreported and unregulated fishing. Plaintiffs' assumption to the contrary is a logical error that fatally taints all of Plaintiffs' arguments.[1]

NMFS also found that IUU fishing and seafood fraud are related. Plaintiffs contend that "[t]he Administrative Record is devoid of any evidence to support this proposition," Dkt. # 62 at 28, but Plaintiffs ignore the record evidence supporting this proposition cited by both ABSC and NMFS in their opening briefs. *See* Dkt. # 57 at 19 (citing AR 002665 (79 Fed. Reg. 75536, 75537 (Dec. 18, 2014)), where NMFS found that fraud can be used to "cover up" IUU fishing through "species substitution or falsification of country of origin"); Dkt. # 56-1 at

[1] For example, Plaintiffs' argument (Dkt. # 62 at 30) that an additional provision found in a section of the Lacey Act analogous to § 1857(1)(Q) shows that NMFS lacks authority to regulate seafood fraud is irrelevant because NMFS acted pursuant to its undisputed authority to combat IUU fishing. The absence of such a provision from § 1857(1)(Q) does not nullify that section altogether.

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26 (citing AR 13152 for the same proposition). Plaintiffs further disregard extensive other evidence in the record showing how seafood fraud and IUU fishing are related. *See, e.g.*, AR 003084 (because of complex supply chains, "those involved in the trade of IUU product have more opportunities to engage in misreporting and fraud, mixing in IUU product with legally caught product"); AR 004012 (noting that U.S. import statistics show Canada as a major supplier of king crab, but stating that "Canada does not harvest or process King crab" and so the "mislabelling is a disguise of illegally harvested King crab, most likely in Russia"); AR 000349 (discussing techniques used to "launder" illegally caught crab through fraud); AR 000362 ("Current practices thus allow illegal fish to be concealed, mixed indistinguishably into legal product flows.").

As an example of the relationship between fraud and IUU fishing, ABSC described how king crab are caught outside Russian waters and delivered to Asia, co-mingled with legal Russian harvests, and fraudulently labeled a product of Russia. *See* Dkt. # 57 at 19-20. Plaintiffs respond that "it is unclear whether this would even qualify as misidentification of product origin." Dkt. # 62 at 28. Of course it would. *See* 19 C.F.R. § 102.11(a)(1) ("The country of origin of a good is the country in which…[t]he good is wholly obtained or produced…") (emphasis added). Plaintiffs' contention that a product wholly obtained outside Russia and that never entered into Russia can nevertheless legally be labeled a product of Russia underscores the merit in NMFS's Seafood Import Monitoring Program.

Plaintiffs' complaint that the selection of species subject to the Seafood Import Monitoring Program "all hinge[d] on the agency's use of seafood fraud to categorize species," Dkt. # 62 at 28, is also refuted by the record. Of the thirteen species NMFS determined to be "at-risk" and thus subject to the program,[2] all but one[3] were identified at least in part due to

[2] Two of these species, abalone and shrimp, ultimately were excluded from the program because domestic data collection from U.S. aquaculture facilities was not analogous to the information to be collected for imports. *See* AR 006908 (81 Fed. Reg. at 88976) ("the effective date of this rule for imported shrimp and abalone products is stayed indefinitely").

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concerns about IUU fishing. *See* AR 004467-004468 (80 Fed. Reg. at 66870-66871). Fraud did not play the dispositive role Plaintiffs suggest.

To the extent the program regulates seafood fraud, it is ancillary to the primary purpose of the program to exclude imports of IUU products, the authority for which is undisputed, and NMFS reasonably determined that the program as designed was "necessary" to carry out § 1857(1)(Q) in any event. *See* 16 U.S.C. § 1855(d). That is the end of the inquiry, particularly where, as here, Plaintiffs never explain why NMFS's determination should not be entitled to the deference it is due. *See City of Arlington*, 133 S. Ct. at 1868.

2. Other agencies' authority to regulate seafood fraud is irrelevant.

Plaintiffs contend that other agencies' authority to regulate seafood fraud somehow deprives NMFS of its undisputed statutory authority to promulgate the Seafood Import Monitoring Program. Plaintiffs are incorrect.

Plaintiffs misquote and mischaracterize § 701(b) of the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 371(b), in contending that "all rules 'affecting efficient enforcement of section 801' must be jointly prescribed by the 'Secretary of the Treasury and the Secretary of Health and Human Services.'" Dkt. # 62 at 31 (emphasis added; purporting to quote from FCDA § 701(b)). The word "affecting" is not found in the statute as Plaintiffs represent, and Section 701(b) is not as sweeping as Plaintiffs make it seem. All the provision says is that the Secretaries of Treasury and HHS "shall jointly prescribe regulations for the efficient enforcement of the provisions" of § 801 of the FDCA. 21 U.S.C. § 371(b). The provision is a standard instruction to agencies to promulgate regulations; there is nothing in the statute to

[3] The record shows that this one species, blue crab, is often substituted by blue swimming crab, a species that is subject to IUU fishing. *See* AR 004467 (80 Fed. Reg. at 636870) ("Blue crab has been substituted or co-mingled with blue swimming crab, which is native to Southeast Asia."); AR 003125 ("[B]lue swimming crab, a product that is imported in large quantities into the U.S. market, is harvested by China, India and countries in Southeast Asia, yet the management measures, enforcement and monitoring have been ineffective, and pose a high risk of IUU fishing."); *see also* AR 004075, AR 004128. Thus, it was rational for NMFS to list blue crab in order to exclude imports of blue swimming crab caught by IUU fishing and fraudulently labeled as blue crab.

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suggest that Congress intended to preempt all other agencies from taking all other actions that might have some relationship to the subjects regulated by § 801 of the FDCA. Indeed, Congress rejected that construction when it adopted § 1857(1)(Q) of the MSA and gave NMFS express statutory authority to ensure that illegally harvested fish do not enter U.S. commerce. Plaintiffs' sweeping construction of § 701 of the FDCA would read § 1857(1)(Q) out of the MSA.

Plaintiffs also never address NMFS's determination that 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." 81 Fed. Reg. at 88977. NMFS's promulgation of the Seafood Import Monitoring Program filled a gap that FDA could not fill and that Congress expressly authorized NMFS to fill under §§ 1857(1)(Q) and 1855(d) of the MSA.

B. NMFS Properly Issued the Program.

Plaintiffs devote many pages of their reply brief trying to show that NMFS invalidly issued the Seafood Import Monitoring Program. These efforts fail because the MSA allows the Secretary to delegate her authorities under the MSA, and it is indisputable that such delegation has been lawfully made for these purposes to NOAA and NMFS.

1. The MSA provides the secretary or her designee with authority to issue rules and nothing in the MSA prohibits subdelegation of that rulemaking authority.

Section 305 of the MSA expressly allows the Secretary of Commerce to delegate her rulemaking authority under 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"). Courts have recognized that this is the plain and express meaning of the MSA. *See Recreational Fishing Alliance, 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), report and recommendation adopted, 2012 WL 868875 (M.D. Fla.

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2012) ("The definition of 'Secretary' in the Magnuson Act explicitly provides that the Secretary of Commerce may delegate authority.").

The Secretary has delegated all of her authorities under the MSA to the National Oceanic and Atmospheric Administration ("NOAA"). In Department Organization Order 10-5, the Secretary delegated to the Under Secretary/Administrator of NOAA the "functions prescribed in the Magnuson Fishery Conservation and Management Act" vested in the Secretary of Commerce. Commerce Department Organization Order 10-15 ("DOO 10-15"), § 3.01(aa) (Dec. 12, 2011). The Secretary's delegation goes on to provide 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"). *Id*. at § 3.05. The Under Secretary/Administrator, in turn, has subdelegated that authority to the Assistant Administrator for Fisheries of the National Marine Fisheries Service ("NMFS"). NOAA Organization Handbook, Transmittal No. 61 ("NOAA No. 61") (Feb. 28, 2006), at (C)(26).

In their reply brief, Plaintiffs argue that the delegation to the Assistant Administrator was limited to the Under Secretary's rulemaking authority under MSA sections 303 and 304, whereas the rule in this case was issued pursuant to MSA section 305. Plaintiffs are incorrect. The delegation from the Under Secretary clearly provides a delegation of authority under the entire MSA, not just sections 303 and 304. *See* NOAA No. 61 at (C)(26) (delegating to the Assistant Administrator the authority to "perform functions relating to . . . The Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882 [MSA §§ 2-408]"). While the Under Secretary's delegation contains certain reservations with respect to rules issued under sections 303 and 304, those are not the only sources of authority that the Under Secretary delegated. *See id*. at (C)(26)(iii)-(iv) (requiring NMFS to advise the Under

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Secretary of certain rulemakings under 16 U.S.C. §§ 1821(h) or 1853 and 1854, that is, MSA sections 201, 303, and 304, respectively).

Nor do the delegations need to be published in the Federal Register to be effective. Neither of the two statutes cited by Plaintiffs require the internal delegations in this case to be published in the Federal Register. For instance, 5 U.S.C. § 301 is merely a housekeeping statute that allows department heads to issue rules that govern the internal affairs of the department. And, while the statute states that it "does not authorize withholding information from the public or limiting the availability of records to the public," nothing in the statute requires publication in the Federal Register. Moreover, the delegations in this case are publicly available, and therefore comply with any requirements imposed by 5 U.S.C. § 301.

Plaintiffs also rely on 5 U.S.C. § 552(a)(1) to support their argument that the delegations in this case had to be published in the Federal Register. However, established case law demonstrates that internal agency delegations, like the ones in this case, are not required to be filed in the Federal Register under 5 U.S.C. § 552(a)(1). *See, e.g., Lonsdale v. United States*, 919 F.2d 1440, 1445 (10th Cir. 1990) (Treasury Department's failure to publish department orders delegating authority to the Commissioner of the IRS in the Federal Register did not render the IRS' actions unlawful; publication was not required under 5 U.S.C. § 552(a)(1)); *United States v. Goodman*, 605 F.2d 870, 887–88 (5th Cir. 1979) (holding that unpublished delegation of authority from Attorney General to Acting Administrator of the DEA did not violate either the FRA or the APA, relying on APA cases to the effect that internal delegations of authority need not be published and do not "adversely affect" the public); *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970), cert. denied, 401 U.S. 910 (1971) ("We hold that the Administrative Procedure Act does not require that all internal delegations of authority from the Attorney General must be published in order to be effective.").

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The MSA expressly allows the Secretary to delegate her general rulemaking authority under the MSA. The Secretary has delegated that authority to NOAA, which, in turn, has redelgated that authority to NMFS. Nothing in the MSA prohibits these subdelegations of authority and no statute requires that they be published in the Federal Register. Plaintiffs' argument that this Court should read a limitation on redelegation into the MSA is contrary to established principles of statutory construction and should be rejected outright. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("The government's reading would require us to rewrite [the statute], but we may not add terms or provisions where congress has omitted them[.]"); *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)); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [the statute's plain] language must ordinarily be regarded as conclusive."). Plaintiffs have failed, once again, to establish that the delegations of authority exercised in this case were unlawful for any of the reasons that they claim.

2. There was no Appointments Clause violation here.

Plaintiffs' Appointments Clause challenge also fails for several reasons. As the Court explained in *Estes v. U.S. Department of the Treasury*, No. 1:16-cv-00450 (CRC), 2016 WL 6956594 (D.D.C. Nov. 28, 2016), challenges brought pursuant to the Appointments Clause are structural, not procedural. In other words, courts do not look at the particular process that was used to render the particular decision in the case, but rather courts look at "the extent to which relevant statutes or regulations provide" for the required oversight or reversal authority. *Id*. (citing *Edmond v. United States*, 520 U.S. 651, 663-64 (1997) and *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012)).

Here, the organizational structure of the Department of Commerce and its subagencies, the plain language of the MSA, and the various delegations that have been made

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under the MSA demonstrate that, as a structural matter, there was the requisite oversight from presidentially-appointed principal officers. As noted above, the MSA expressly provides that the Secretary of Commerce can delegate authority under the law to a designee. The Secretary is a principal officer, who is appointed by the President, with the advice and consent of the Senate. 15 U.S.C. § 1501. Thus, a Presidential appointee decides who will have delegated authority under the MSA. The Secretary has delegated that authority to the Under Secretary/Administrator of NOAA, who is also a Presidential appointee. *See* DOO 10-15, § 3.01(aa); 15 U.S.C. § 1503b. In that delegation, the Secretary provided that the Under Secretary/Administrator could redelegate that authority to any employee of NOAA. *Id*. § 3.05. Again, the person determining whether and to whom to delegate rulemaking authority under the MSA is a Presidential appointee. The Under Secretary/Administrator of NOAA redelegated her authority to the Assistant Administrator for Fisheries. NOAA No. 61 at (C)(26). The Assistant Administrator for Fisheries is a position appointed by the Secretary of Commerce. *See* Reorganization Plan No. 4 of 1970, 84 Stat. 2090 (1970) (providing the Assistant Administrator for Fisheries will be appointed by the Secretary of Commerce). NMFS promulgated the Rule on behalf of NMFS, NOAA, and the Department of Commerce, pursuant to the MSA. *See* 81 Fed. Reg. 88975. In light of that statutory and regulatory organizational framework, it cannot be seriously argued that the Rule issued in this case was not directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Additionally, because courts analyze Appointments Clause challenges for structural, not procedural, deficiencies, Plaintiffs' arguments about Ms. Sobeck's appointment and her involvement in the particular rulemaking process in this case are irrelevant. So too are Plaintiffs' arguments about whether the NOAA Administrator approved the Rule at issue in this case.

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There was no Appointments Clause violation. This is not a situation in which an individual issued legislative rules by personal fiat without any oversight by a presidentially-appointed principal officer. Instead, rules promulgated by NMFS under the MSA are pursuant to proper delegation from presidential appointees and are, at many turns, the subject of oversight by presidential appointees.

C. Plaintiffs Ignore Extensive Record Evidence Supporting the Program.

Plaintiffs reassert that NMFS engaged in "secret rulemaking" and that the Seafood Import Monitoring Program lacks adequate support in the record. In support of these arguments, Plaintiffs alternate between ignoring contrary evidence in the administrative record and urging the Court to adopt Plaintiffs' interpretation of the evidence relied upon by NMFS. Both strategies run afoul of the APA standard of review, under which an agency action will be upheld unless the agency lacked a "reasonable factual basis" to support its action. *See Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 133 (D.D.C. 1979) (holding that a sufficient evidentiary basis existed to support agency's import prohibition of green sea turtle products and withdrawal of an exemption for plaintiff's turtle breeding farm despite existence of evidence presented by plaintiff that supported alternative conclusions). Plaintiffs' APA claims wither in light of the "voluminous record" supporting NMFS's promulgation of the rule. *See id.* at 132.

1. Plaintiffs ignore extensive record evidence previously cited by ABSC.

Plaintiffs continue to argue that there is "no data" to support implementation of the Seafood Import Monitoring Program, while ignoring many supporting citations to the administrative record provided by ABSC in its opening brief. *See* Dkt. # 62 at 38-39; compare Dkt. # 57 at 28-35. For example, Plaintiffs allege that there is no support for the relationship between the rule and reducing IUU fishing and seafood fraud. Dkt. # 62 at 38. In reasserting this argument, Plaintiffs fail to acknowledge contrary citations to the record raised

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by ABSC. *See* Dkt. # 57 at 30-31 (citing AR 000366, (Ganapathiraju Pramod et al., Estimates of illegal and unreported fish in seafood imports to the USA, 48 Marine Policy 102-113 (2014); AR 003974 (80 Fed. Reg. 45955, 45959 (August 3, 2015)) (public comment submission); AR 000056 (Global Food Traceability Center submission)).

Plaintiffs further argue that there is no evidentiary basis for including "individual species" subject to the rule. Dkt. # 62 at 38. Once again, Plaintiffs disregard evidence in the record supplied by ABSC.[4] Dkt. # 57 at 33-34 (AR 003092-3100 (submission from Oceana); AR 007248-7249 (Pramod, *supra*); AR 00022829- 22868 (submission from World Wildlife Fund); AR 002643 (additional Oceana submission)). Plaintiffs dismiss NMFS's reliance on the EU Catch Documentation system, but never acknowledge the detailed report ABSC cites to in the record describing the impacts and effectiveness of that regulation. *Id.* at 31 (citing AR 007254).

Plaintiffs' repeated contentions that the record is devoid of support for the program are simply wrong. As Plaintiffs point out, parties are not entitled to their "own facts." Dkt. # 62 at 46.

2. Plaintiffs cannot prevail on their APA claims by disputing the relative quality of evidence in the record.

To the extent that Plaintiffs acknowledge adverse record evidence, they dispute the quality of that evidence. But making determinations about the quality of evidence is left to the agency, not Plaintiffs, under the APA's "highly deferential" standard. *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013). The APA standard of review holds agencies "to certain minimal standards of rationality." *Ctr. for*

[4] Plaintiffs have failed to respond to ABSC's arguments and citations to the record demonstrating that inclusion of king crab as an "at-risk species" subject to the rule is supported by adequate record evidence. Plaintiffs therefore concede that the rule does not violate the APA with respect to its inclusion of king crab. *See Baptist Mem'l Hosp.-Golden Triangle v. Leavitt*, 536 F. Supp. 2d 25, 40 (D.D.C. 2008), *aff'd sub nom. Baptist Mem'l Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226 (D.C. Cir. 2009) ("A Party that fails to refute an opposing party's argument on Summary Judgment may be found to have conceded the point.")

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Biological Diversity v. E.P.A., 749 F.3d 1079, 1088 (D.C. Cir. 2014) (citing *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 36 (D.C. Cir. 1976)). While the government must provide a reasonable basis in the record for its decision, "it is not for the judicial branch to undertake comparative evaluations of conflicting scientific evidence." *Id.* (citing *Natural Res. Def. Council v. E.P.A.*, 824 F.2d 1211, 1216 (D.C. Cir.1987)).

Plaintiffs urge the Court to parse the overall persuasive quality of the data in the record and conclude that Plaintiffs' preferred evidence is more persuasive than the evidence relied upon by NMFS and its expert Working Group. *See Am. Wildlands v. Kempthorne*, 478 F. Supp. 2d 92, 96 (D.D.C. 2007), *aff'd*, 530 F.3d 991 (D.C. Cir. 2008) ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.") (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989).

Plaintiffs complain about the quality or reliability of data NMFS relied on. For example, Plaintiffs criticize a study from the Journal of Marine Policy as biased due to its association with the World Wildlife Fund and opine that it is otherwise based on "scant data." Dkt. # 62 at 37. Plaintiffs make a similar argument related to the evidence supporting NMFS's seafood cost assumptions. *See id.* at 39-41. Plaintiffs also disagree with NMFS's reliance on the EU catch documentation system and the meaning of a Swedish study cited in NMFS's RFA analysis regarding the MSC system. *Id.* Finally, Plaintiffs continue to challenge the evidence and rationale in the record that NMFS relied upon to select the compliance date for the rule. *Id.* at 41. Rather than establish a lack of rational basis for the government's rulemaking, these arguments urge the Court to determine which parties' interpretation of the facts in the record are more persuasive, and thus those arguments fail under the APA standard of review. *Ctr. for Biological Diversity*, 749 F.3d at 1088; *Wildlands*, 478 F. Supp. 2d at 96.

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As ABSC described in its opening brief, *see* Dkt. # 57 at 28-35, the record shows that the government analyzed and rationally based its determinations on ample data, public comments, and agency expertise contained in the record. *See*, *e.g.*, AR 000357; AR 002467; AR 7242; AR 00044986 (Pramod, *supra*); 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).; AR 006935 (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 00020256 (traders can plan for the implementation date by rushing to import this product in the period prior to the compliance date); AR 00016725 (factors for compliance date length considered by NMFS included "[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 testing)).

Neither Plaintiffs' challenges to the quality of the evidence relied upon by NMFS nor their alternative interpretation of that evidence establish an APA violation. Where as here, "the agency's decision was reasoned and supported by record evidence," *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 59 (D.D.C. 2014), a court will not substitute its judgment or the judgment of the challenging party for that of the agency, *see id.* at 58 (citing *Steel Mfrs. Ass'n v. E.P.A.*, 27 F.3d 642, 646 (D.C. Cir. 1994)).

D. Omission of law enforcement data does not amount to "secret rulemaking."

Plaintiffs' argument that NMFS engaged in "secret rulemaking" by withholding certain law enforcement data relied upon by its expert Working Group related to the selection of "at-risk" species, Dkt. # 62 at 32-36, fails because NMFS only partially relied upon the

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data it withheld. The record demonstrates that NMFS selected the species subject to the rule based on ample alternative data, including reports and scientific studies collected through two rounds of public comment, independently verifiable data (such as the cost of product per pound), and the expertise of the agency's Working Group. AR 004465-66; AR 014043. An agency's failure to disclose certain data does not violate the APA where, as here, the omitted data 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 where 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") (internal citations omitted). The rulemaking process upheld in *Prof'l Plant Growers* is analogous to the one NMFS employed here. Considering the volume of public comment the Working Group accepted pertaining to "at-risk species," the transparent principles it relied upon in selecting those species, and the independently verifiable species-specific data included in those selection principles, Plaintiffs' argument that the enforcement data "goes to the heart of the decision to include a species," Dkt. # 62 at 33, misses the mark.

Plaintiffs continue to rely on *American Radio*, but that case only shows why Plaintiffs' arguments here lack merit. Dkt. # 62 at 35 (citing *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 239 (D.C. Cir. 2008)). As ABSC pointed out in its opening brief, the facts of *American Radio* are readily distinguishable from this case. The agency in *American Radio* violated the APA by redacting critical portions of five scientific studies it relied upon, precluding commenters from challenging the studies' methodology. 524 F.3d at 239. Unlike the agency in *American Radio*, the data NMFS withheld here was not the most critical data the Working Group relied upon. To the contrary, NMFS's promulgation of the rule was

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overwhelmingly supported by data and studies in the record, extensive public comment, independently verifiable data related to the economic value of particular species, and the expertise of the Working Group. AR 004465-66; AR 014043.

As in *Prof'l Plant Growers Ass'n*, the volume of alternative record evidence supporting NMFS's promulgation of the rule upon which Plaintiffs were able to, and in fact did comment, satisfies the APA. *See* 942 F. Supp. at 32. Further, since the agency disclosed ample alternative evidence and criteria for selecting "at-risk" species and accepted Plaintiffs' comments on the same, Plaintiffs were not prejudiced by their inability to challenge the omitted data. *See Am. Radio*, 524 F.3d at 237.

E. Plaintiffs Fail to Raise Cognizable Arguments Under the Regulatory Flexibility Act.

In their reply, Plaintiffs again advance arguments related to the substance of the agency's analysis under the Regulatory Flexibility Act ("RFA"), which are not cognizable under the RFA. *See Nat'l Tele. Co-op. Ass'n v. F.C.C.*, 563 F.3d 536, 540 (D.C. Cir. 2009) (the requirements of the RFA "are purely procedural") (internal citation omitted); *Associated Dog Clubs of N.Y., Inc. v. Vilsack*, 75 F. Supp. 3d 83, 94 (D.D.C. 2014) (rejecting the plaintiffs' argument that the agency's analysis violated the RFA, explaining that the 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.").

For instance, Plaintiffs take issue with the correctness and adequacy of the agency's cost assessments, as well as the agency's alleged omission of a cost category. *See* Plaintiffs' Reply Brief, Dkt. #. 62, at 34-36. These are substantive, not procedural issues. *See* 5 U.S.C. § 604 (describing procedural requirements of the RFA). If Plaintiffs wanted to challenge the agency's RFA analysis on substantive grounds, they needed to (but did not) file a separate APA challenge on those bases. *See, e.g., Nat'l Tele. Co-op. Ass'n*, 563 F.3d at 540

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(recognizing that a plaintiff can raise "a related but distinct claim that the [agency's] action is arbitrary and capricious under the APA because the agency did not reasonably address the Order's impact on small businesses [under the RFA].").

F. Vacatur is Not an Appropriate Remedy.

Plaintiffs have failed to demonstrate why their APA claims, if successful, would require vacatur in this case. Plaintiffs' APA claims are related to issues that are addressable on remand; therefore, there is no reason to vacate the rule. *See FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 343 (D.D.C. 2016) (remanding a rule 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.").[5] In any event, Plaintiffs are not entitled to any remedy because all of their claims should be dismissed.

III. CONCLUSION

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

[5] In their reply, Plaintiffs make no arguments about their other requested remedy: a permanent injunction for any RFA violations. That requested remedy should now be considered abandoned; to the extent it is not, ABSC incorporates by reference its prior arguments against such relief. *See* Dkt. # 57 at 39-41.

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