IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFA INTERNATIONAL SEAFOOD, INC., *et al*., Plaintiffs, v. WILBUR L. ROSS, JR., Secretary of Commerce, *et al*., Defendants, and ALASKA BERING SEA CRABBERS, Intervenor-Defendant.	Case No. 1:17-cv-31 APM

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The seafood traceability rule issued by the National Marine Fisheries Service (NMFS) is a rational rule that will provide the agency with information critical to detecting and preventing the importation of certain seafood products that are taken, possessed, transported, or sold in violation of a foreign law, treaty, or conservation measure adopted by an international agreement or organization. Deterring the entry of these products into U.S. commerce will be instrumental to the United States' overall efforts to combat illegal, unreported, and unregulated (IUU) fishing and seafood fraud that occurs globally. U.S. vessels operating in U.S. fisheries are already subject to similar reporting and recordkeeping requirements and "[t]he United States' greatest asset in fighting domestic IUU fishing and seafood fraud is the vast amount of data collected" across U.S. fisheries. AR 13154.

The administrative record in this case establishes that NMFS acted reasonably in promulgating this rule and that the agency complied with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1801 et seq., the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., and the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 et seq. NMFS also acted in compliance with its authority to delegate rulemaking authority and with the Appointments Clause of the Constitution. Plaintiffs have provided no basis for overturning NMFS's well-reasoned decisions regarding the collection of information for priority species. They fail to identify any record evidence that would satisfy their burden to demonstrate that NMFS acted arbitrarily and capriciously. Instead, Plaintiffs offer unsupported assertions that cannot be squared with the record or case law. For the reasons stated below and in Federal Defendants' opening brief, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

ARGUMENT

I. NMFS Reasonably Exercised Its Delegated Authority Under the MSA.

NMFS reasonably interpreted MSA Section 307(1)(Q) to authorize "the collection of information on imported fish and fish products at the point of entry into U.S. commerce." AR 6908; 16 U.S.C. § 1857(1)(Q) (making it illegal 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"). Section 307(1)(Q), combined with NMFS's broad authority to promulgate regulations to carry out provisions of the MSA, *see* 16 U.S.C. § 1855(d), provides ample support for NMFS's interpretation that the Final Rule falls within the legal authority delegated to it by Congress, and NMFS's statutory interpretation must be given controlling weight. *See Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007); Fed. Defs. Br. at 11-16.

NMFS reasonably concluded that Section 307(1)(Q) authorizes the agency to seek the types of information required by the Final Rule. *See* AR 6909. The plain language of the statute is ambiguous, and therefore the court must defer to the agency's interpretation if it "reflects a permissible construction of the statute." *Union Neighbors United v. Jewell*, 831 F.3d 564, 579 (D.C. Cir. 2016); *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–844 (1984)); *see also* Fed. Defs. Br. at 13-14.

Plaintiffs mischaracterize the Final Rule as directly regulating seafood fraud. *See* Pls. Resp. at 18-20. The rule creates "an information system that better facilitates data collection, sharing, and analysis among relevant regulators and enforcement authorities" to assist them in

"addressing IUU fishing and seafood fraud." AR 6909. The data collected may be used to assist the enforcement efforts of agencies, but the rule does not itself prohibit or impose penalties for seafood fraud or illegal fishing. *See* AR 6930 (50 C.F.R. § 300.325). Although seafood fraud is one possible underlying "violation of any foreign law or regulation" or international conservation measure, 16 U.S.C. § 1857(1)(Q), such fraud is not directly regulated by the rule.

Plaintiffs' unremarkable argument that an agency's information-collecting activities must relate to its functions, Pls. Resp. at 18, does not advance their cause because the information collected directly relates to NMFS's authority to prevent importation of illegally harvested seafood by improving the agency's ability to detect illegal seafood products. AR 6916. The importers of record must report information on the entities harvesting or producing the fish; the type of fish that was harvested or processed; where and when the fish were harvested and landed; and the importer's International Fisheries Trade Permit (IFTP) number.[1] AR 4483. The importer of record must also maintain records regarding each custodian in the chain of custody and provide them upon request. *Id.* NMFS determined that the information "will help authorities verify that the fish or fish products were lawfully acquired by providing information to trace each import shipment back to the initial harvest event(s)." AR 6907. The information sought is directly tied to NMFS's authority under MSA Section 307(1)(Q) to exclude from U.S. commerce fish that was illegally harvested. The lawful purpose of the Final Rule is not undermined by the fact that the same information may assist NMFS and its partner agencies in preventing seafood fraud. *See* AR 6907 (the information required by the Final Rule "will also decrease the incidence

[1] The IFTP is required for several existing permit programs and the Final Rule extends the permit requirement to those importing shipments containing the priority species. *See* AR 4484. Only one permit is required for each importer of record, even "if the imported species are covered under more than one program or the importer trades in more than one covered species." *Id.*

of seafood fraud"); *see also Int'l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1529 (D.C. Cir. 1984) ("In the absence of clear congressional direction to the contrary, we will not deprive the agency of the power to fine-tune its regulations to accommodate worthy nonsafety interests" in the context of modifying regulations related to highway safety).

NMFS's consideration of the priority species' susceptibility to fraud does not invalidate the Final Rule. *Contra* Pls. Resp. at 19. Fraud and IUU fishing are often intertwined. For example, species substitution may be used to mask illegal fishing. *See* AR 3974, 13152. NMFS's consideration of fraud does not render the rulemaking arbitrary or capricious. *See Nat'l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 216 (D.D.C. 1990) ("Merely because Congress chose to also specify certain actions as unlawful *per se* in § 1857(1)(B)-(I) does not mean that it intended those prohibitions to be the boundaries of the Secretary's broad rulemaking authority."). Here, as in *Mosbacher*, the Plaintiffs "ignore the[] 'real world' considerations facing the Secretary." *Id.* at 218. The Department of Commerce was a co-chair of the Presidential Task Force. *See* AR 2. The traceability program recommended by the Task Force was aimed at combatting IUU fishing and seafood fraud, *see* AR 13183, and those two issues were intertwined in the public process that led to the rule. IUU fishing and seafood fraud can both "be effectively addressed through traceability within the scope of the Program (from the point of harvest or production to entry into U.S. commerce) because both are enabled by lack of transparency within the seafood supply chain." AR 6910. Thus, NMFS reasonably considered susceptibility to both IUU fishing and seafood fraud when it identified priority species. *See* AR 3972-73, 4467-68. Plaintiffs have not shown that NMFS "impermissibly misconstrued the Magnuson Act or overstepped the bounds of [its] broad rulemaking authority under the Act," *Mosbacher*, 732 F. Supp. at 218, when it considered the susceptibility of priority species to seafood fraud.

In relying on the Lacey Act to dispute the reasonableness of NMFS's statutory interpretation, Plaintiffs mischaracterize Federal Defendants' opening brief. Federal Defendants noted that Congress modeled Section 307(1)(Q) after the Lacey Act prohibition, 16 U.S.C. § 3372(a)(2)(A), but did not argue that either of those provisions directly prohibits seafood fraud. *See* Fed. Defs. Br. at 13; *contra* Pls. Resp. at 21. Rather, Federal Defendants noted that a different provision of the Lacey Act, 16 U.S.C. § 3372(d), authorizes NMFS to take action with respect to seafood fraud. Fed. Defs. Br. at 13 n.8. Plaintiffs' argument is based on the faulty premise that the Final Rule directly regulates seafood fraud. *See* Pls. Resp. at 21. NMFS did not interpret MSA Section 307(1)(Q) to provide direct authority for the agency to prohibit seafood fraud, *see* Fed. Defs. Br. at 14 (citing AR 19459), and the Final Rule is consistent with NMFS's statutory interpretation because it does not prohibit seafood fraud.

Because NMFS is not exercising rulemaking authority over seafood fraud, Plaintiffs' observation that FDA has authority over misbranding, including items misbranded under foreign law, is beside the point. *See* Pls. Resp. at 22. As explained in Federal Defendants' opening brief, the Final Rule serves a distinct purpose that is directly tied to NMFS's authority under MSA Section 307(1)(Q), and it does not interfere with FDA's authority over seafood fraud. *See* Fed. Defs. Br. at 15; AR 6909 ("For example, 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."). FDA's authority over misbranded food cannot reasonably be read to affect NMFS's independent obligation to administer MSA Section 307(1)(Q). *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (EPA's responsibility to protect public health is "a statutory obligation wholly independent of DOT's mandate to promote energy efficiency," and DOT's authority "in no way licenses EPA to shirk its environmental responsibilities").

Plaintiffs' delegated authority argument fails because it hinges upon the mistaken premise that NMFS is regulating seafood fraud. *See* Pls. Resp. at 17-23. In reality, the Final Rule does not directly regulate seafood fraud. Rather, it imposes reporting, recordkeeping, and permitting requirements that are directly related to the MSA's prohibition on the import of fish harvested in violation of foreign law or an international conservation measure. Because Plaintiffs have failed to demonstrate that the Final Rule is "manifestly contrary to the statute," the rule "must be given controlling weight." *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1230.

II. NMFS Satisfied the APA's Notice and Comment Requirements and the Final Rule Reflects Reasoned Decision Making by NMFS.

The record establishes that NMFS met the notice and comment requirements of the APA and acted appropriately in providing a summary of the law enforcement privileged and confidential information. In reply, Plaintiffs do not rebut the record evidence showing NMFS's public engagement through notices and comments, and Plaintiffs' other arguments in support of Count 1 misread Federal Defendants' position and the case law. Plaintiffs' attempt to salvage their other APA claim (Count 2) also falls short. Plaintiffs fail to allege any violations of a substantive statute and, in any event, the record shows that NMFS promulgated a rational rule.

A. NMFS's Rulemaking Process Allowed for Meaningful and Informed Comment.

In accordance with APA Section 553, NMFS described the "terms or substance of the proposed rule" and gave "interested persons an opportunity to participate in the rule making" through public comment. 5 U.S.C. § 553(b)-(c); Fed. Defs. Br. at 18-19. Indeed, the record shows that NMFS began engaging with the public on specific issues related to the rulemaking *before* it published the Proposed Rule. NMFS sought public input on what principles to consider in identifying at-risk species, which species of fish were most at-risk, and what types of information should be collected under the seafood traceability rule. Fed. Defs. Br. at 18-19. This

engagement, along with the Proposed Rule and responses to comments in the Final Rule, satisfy the requirements of Section 553 by "includ[ing] sufficient detail on [the rule's] content and basis in law and evidence to allow for meaningful and informed comment." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995). Plaintiffs' reply ignores this record evidence.

As part of the notice and comment process that preceded the Proposed and Final Rules, a National Oceanic and Atmospheric Administration (NOAA)-led Working Group developed a list of at-risk species that would be subject to the Final Rule. NMFS explained the inclusion of each at-risk species. AR 3972-73, 4467-68. Although a subset of the species-specific information considered was law enforcement privileged or confidential, NMFS included summaries of that information in the notices. *Id.* (cited in Fed. Defs. Br. at 19). This record evidence is "the underlying support that justified [NMFS's] decision to include certain species as 'at risk.'" *Contra* Pls. Resp. at 23. Providing summaries of the law enforcement privileged and confidential information was consistent with NMFS's dual obligations to comply with APA Section 553 and to protect privileged and confidential information. Fed. Defs. Br. at 20-21; *Credit Union Nat'l Ass'n v. Nat'l Credit Union Admin. (NCUA)*, 57 F. Supp. 2d 294, 302 (E.D. Va. 1995) ("the information concerning specific cases under review is confidential and the NCUA is under no obligation to disclose such information when promulgating a rule"), *aff'd Nat'l Ass'n of State Credit Union Supervisors v. NCUA*, 188 F.3d 228 (4th Cir. 1999); *see also FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 119 n.2 (D.D.C. 2015) (notices adequately summarized conclusions drawn from classified information, and "providing further unclassified summaries would be difficult if not impossible, without revealing the underlying classified information.").[2]

[2] The *FBME Bank* court found that the Financial Crimes Enforcement Network failed to meet its procedural obligations when it withheld "large portions of the non-classified and non-protected information," especially as it relied "on a substantial amount of classified information." *FBME*

Plaintiffs' challenge to NMFS's assertions of the law enforcement privilege and confidentiality should be rejected. *See* Pls. Resp. at 24-25. As an initial matter, if Plaintiffs wished to contest the assertion of privilege after the record was completed they would have had to file a separate record motion rather than raise the challenge in a merits brief. *See Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) ("the agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary.") (citation omitted). Even if Plaintiffs' challenge to the assertion of the privilege were properly presented, the D.C. Circuit would weigh ten factors specifically applicable to the law enforcement privilege. *See Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996). Those factors weigh in favor of affirming NMFS's assertion of the law enforcement privilege because disclosure of the information could compromise the agency's enforcement capability. AR 4469. NMFS also acted in accord with the MSA's confidentiality provision, which generally prohibits disclosure of information submitted to the Secretary, but allows the release of such information in "aggregate or summary form." 16 U.S.C. § 1881a(b)(1), (3).[3] Plaintiffs fail to distinguish several cases cited by Federal Defendants in support of NMFS's decision to withhold a small subset of the information relied on in developing the at-risk species list. Plaintiffs concede that in *Credit Union*, the "court concluded that the agency did not have to disclose confidential information that it obtained in its role as an examiner." Pls. Resp. at 24. Plaintiffs cannot distinguish the case based on the nature of the non-disclosure.[4] *See id.* Plaintiffs also ignore the

Bank Ltd., 125 F. Supp. 3d at 120, 122. This part of the holding is inapplicable here as NMFS did not withhold "large portions" of protected information or rely on a "substantial amount" of it.

[3] Plaintiffs incorrectly assert that this provision and NMFS's regulations "require" disclosure of summarized data and that such summaries were not made available. Pls. Resp. at 25.

[4] Plaintiffs incorrectly state that "there was no allegation [in *Credit Union*] that the public lacked enough information to meaningfully participate in the rulemaking." *Id.* at 24. According to the

fact that the Federal Register notices included summaries of the protected information. Contrary to Plaintiffs' suggestion, *Public Citizen v. Nuclear Regulatory Commission*, 573 F.3d 916, 928 (9th Cir. 2009), did not turn on the fact that the Atomic Energy Act is "virtually unique." *See* Pls. Resp. at 25. In fact, the case demonstrates that, in the context of a rulemaking, an agency can withhold certain sensitive information without running afoul of the APA. *Pub. Citizen*, 573 F.3d at 928; *see also MD Pharm. v. DEA*, 133 F.3d 8, 13 (D.C. Cir. 1998) ("We find nothing in the statute or the regulations that gives third parties such sweeping access to sensitive agency materials."). Finally, *B.F. Goodrich Co. v. Department of Transportation*, 541 F.2d 1178 (6th Cir. 1976), supports Federal Defendants' argument about the scope of the information provided to the public for comment. *Contra* Pls. Resp. at 26. In that case, appellant argued that the agency violated Section 553 because the administrative record included documents not published for public comment, but the court disagreed because "[t]he basic data upon which the agency relied in formulating the regulation was available to petitioners for comment." *B.F. Goodrich*, 541 F.2d at 1184. Here, NMFS provided the basic, "most critical factual material," including summaries for each at-risk species. *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984).

Plaintiffs' continued reliance on *American Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), is to no avail. Pls. Resp. at 26. Plaintiffs concede that the case was not about law enforcement privileged information yet aver, without support, that where an agency promulgates a rule, "it agrees to expose the data on which it relies to public scrutiny no matter what potential [FOIA] exemption might otherwise apply." *Id.* The case law shows otherwise.

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opinion, plaintiffs argued that "NCUA's notice of proposed rulemaking was deficient because it *did not contain enough information*." *Credit Union*, 57 F. Supp. 2d at 302 (emphasis added).

Similarly, Plaintiffs aver, without support, that a plaintiff need not show prejudice to challenge an agency's withholding of information. Pls. Resp. at 27. A plaintiff must demonstrate "how it might have responded if given the opportunity" and "show that on remand [it] can mount a credible challenge." *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 202 (D.C. Cir. 2007) (citation omitted). Plaintiffs' alleged injury, unconnected to any failure to disclose information, does not suffice to show prejudice. *See* Pls. Resp. at 27.

B. Plaintiffs' APA Section 706(2) Claim Fails Because It Is Not Tied to a Relevant Statute and, Alternatively, Because Their Claim Is Meritless.

Federal Defendants demonstrated in their opening brief that Plaintiffs' freestanding APA Section 706(2) claim fails as a matter of law because a plaintiff cannot seek relief under the APA without alleging that an agency has violated a relevant substantive statute. Fed. Defs. Br. at 22-23; *see El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991); *Perales v. Casillas*, 903 F.2d 1043, 1050 n.3 (5th Cir. 1990). Plaintiffs only response is that Count 2 "was, in fact, related to the MSA." Pls. Resp. at 28. But Count 2 does not reference the MSA and, under the approach urged by Plaintiffs, a defendant would have to assume that a freestanding APA claim could refer to any related statute. Without more, the claim cannot be sustained. In any event, Plaintiffs have failed to show that NMFS acted arbitrarily or capriciously. Contrary to Plaintiffs' arguments, NMFS acted reasonably in: (1) developing a traceability rule and designating the at-risk species list; (2) considering supply-side costs; (3) considering aquaculture; and (4) establishing a compliance date.

1. The Record Supports the Link Between Traceability and IUU Fishing and Seafood Fraud and the At-Risk Species List.

The record establishes how the Final Rule will aid in curbing global IUU fishing and seafood fraud in at least four ways. *See* Fed. Defs. Br. at 23-25. First, the information "will be

used to screen products in an effort to detect and prevent illegally-harvested and misrepresented seafood from entering U.S. commerce." AR 6916.[5] Second, the information "will further enhance the effectiveness" of the inspections performed by NMFS's Seafood Inspection Program and NOAA's Office of Law Enforcement and "provide information that will allow limited enforcement resources to be better targeted at fish and fish products suspected of being misrepresented or illegally harvested." *Id.* Third, "[e]ntries for which timely provision of records is not provided to NMFS or that cannot be verified as lawfully acquired and non-fraudulent by NMFS, will be subject to enforcement or other appropriate action by NMFS in coordination with [Customs and Border Protection]." AR 6924. All of these efforts will be enhanced by NOAA's partnerships with other agencies. AR 6916. Fourth, the information will help NMFS with its other programs aimed at combatting IUU fishing by, for example, informing the agency's decision to add a foreign nation to the list of countries with vessels that engage in IUU fishing, which NMFS produces pursuant to the High Seas Driftnet Fishing Moratorium Protection Act, and by enabling the effective implementation of any trade restrictions that may be imposed pursuant to that Act. AR 4485-86. This record evidence refutes Plaintiffs' assertions about the lack of support for the connection between the Final Rule and deterring IUU fishing and seafood fraud. *See* Pls. Resp. at 29-30.

The record also supports NMFS's choice of which at-risk species to include in the Rule. *See* Fed. Defs. Br. at 24-25. Contrary to Plaintiffs' assertion, Pls. Resp. at 29, the species substitution and mislabeling concerns alone did not determine the species selection, *see* AR

[5] Federal Defendants' opening brief cited this part of the Final Rule, which was a core document included in the First Release of the record. In reply, Plaintiffs refer instead to another page marked with the same Bates number (6916 in the Second Release). As Federal Defendants pointed out, the Second Release mistakenly contains some Bates numbers that overlap with the First Release. Fed. Defs. Br. at 5 n.3.

4466, and NMFS acted appropriately in considering seafood fraud. *See supra* Section I. Moreover, Plaintiffs' rebuttal of the "basis" for the selection of each species belies their contention in the same paragraph that there is "no genuine support at all" for the at-risk species list. *See* Pls. Resp. at 29. Plaintiffs also miss the mark when they assert that the absence of a catch documentation scheme (CDS) is not a proper principle for determining whether a species is at risk.[6] *See id.* at 30. The Working Group received comments regarding the benefits of a CDS in reducing market access for illegally-harvested fish and, consequently, how the lack of a CDS poses a risk to fish. *See* AR 3083, 3974, 4024-25, 4376, 4450. In addition, CDSs collect the same type of information that will be required under this rule, making the inclusion of species already covered by such schemes in the at-risk species list unnecessary.

2. NMFS Acted Reasonably in Considering Supply-Side Costs.

NMFS's Rule also provides consistent analysis of the anticipated supply-side costs of the reporting and recordkeeping requirements. *See* Fed. Defs. Br. at 25-28. Plaintiffs' reply offers unsupported assertions that misconstrue the record and Federal Defendants' arguments. Contrary to Plaintiffs' suggestion that the Final Regulatory Flexibility Analysis (FRFA) "relies on a single study" that NMFS "disavows," Pls. Resp. at 30, the FRFA cites a number of studies, AR 6934-38, and Federal Defendants have simply pointed out that the Blomquist study supports a proposition that cannot be read to apply to the supply-side cost projections. Fed. Defs. Br. at 26-27. Further, the FRFA recognizes the difference between government-mandated reporting and recordkeeping requirements and "eco-labeling and certification services [offered] to harvesters,

[6] Plaintiffs offer no response to Federal Defendants' distinguishing of *United Steel v. Federal Highway Administration*, 151 F. Supp. 3d 76, 85 (D.D.C. 2015). *See* Pls. Resp. at 30. Nor do they respond to the well-established principle that judicial review of agency action is based on the "*final* action, and not the views expressed by individual staff." *See* Fed. Defs. Br. at 25.

processors, wholesalers and retailers throughout the seafood supply chain." AR 6937; *contra* Pls. Resp. at 31-32.[7] Plaintiffs compound the inaccuracies in their discussion of the European Union (EU) CDS. *See* Pls. Resp. at 31-32. NMFS acknowledged in the FRFA that the "costs for aquaculture products may have been underestimated as these products are excluded from the EU program," and in response to comments about the cost of compliance, NMFS modified the rule to include a provision for aggregated harvest reports for aquaculture deliveries. AR 6938, 6943. In short, Plaintiffs fail to meet the narrow arbitrary and capricious standard.

3. The Record Supports NMFS's Decision to Include Aquaculture.

The record provides a reasoned explanation for why NMFS decided to apply the rule to products grown in aquaculture facilities.[8] First, because "some imported fish products are sourced from both wild capture fisheries and aquaculture operations, yet are indistinguishable in product form," the exclusion of "aquaculture products from the import reporting requirement of the Program presents enforcement issues if shipments are declared to be of aquaculture origin with no information to support such declaration." AR 6909. Second, aquaculture products taken, possessed, transported, or sold in violation of any foreign laws or regulations pertaining to production (including transport of fish to and from aquaculture facilities), licensing, distribution, or reporting would be prohibited from importation into the United States under MSA Section 307(1)(Q). *Id.* Third, these products have been subject to misrepresentation. *Id.*

Plaintiffs originally objected to the inclusion of aquaculture because of an alleged lack of evidence that aquaculture products have been subject to misrepresentation. Pls. Br. at 31. In the

[7] Plaintiffs also contend that Federal Defendants have taken out of context the reference to the lack of "measurable" increases by failing to acknowledge text from the preamble to the rule, Pls. Resp. at 31, but Federal Defendants quoted from this very passage. Fed. Defs. Br. at 27.
[8] NMFS has stayed the portion of the rule that pertains to the only two at-risk species partially produced through aquaculture – shrimp and abalone. AR 6907.

face of the record evidence, however, Plaintiffs now contend that Federal Defendants have identified risks only for misrepresentation and not for IUU fishing. Pls. Resp. at 32. This revised position ignores both the record evidence discussed above and the fact that fraudulent activity can also serve as the predicate offense under Section 307(1)(Q). *See also supra* at 3.

4. NMFS's Selection of the Compliance Date is Supported by the Record.

NMFS acted rationally when it established the compliance date for the Final Rule. NMFS considered public comment, the time interval from harvest date to entry date for several fish products currently subject to import monitoring programs, the time needed for the development of software, and the interests of avoiding disruption to trade and the accelerated importation of illegally harvested fish. AR 6914-15; AR 20256. Balancing these factors, NMFS determined that 12 months was a reasonable time for compliance, in large part because most U.S. imports occur within a few months of the harvest event. AR 6915. Although "[s]ome products may be in the supply chain longer due to processing, cold storage and shipping time," *id.*, any priority species caught domestically, then re-imported, would be subject to existing reporting and recordkeeping requirements. AR 24745-49. Notwithstanding Plaintiffs' protestations, Federal Defendants discussed this record evidence and weighing of issues in their opening brief. Fed. Defs. Br. at 32. Plaintiffs' case law references offer no support: one is a non-APA case and the other does not relate to the development of a rulemaking. *See* Pls. Resp. at 32-33.

5. NMFS Reasonably Considered Seafood Fraud and Paperwork Costs.

Federal Defendants have demonstrated that NMFS adequately assessed seafood fraud when considering potential at-risk species and complied with the Paperwork Reduction Act. Fed. Defs. Br. at 28-30. Plaintiffs made no attempt to respond to either of these arguments and thus have conceded both. *Maddux v. Dist. of Columbia*, 144 F. Supp. 3d 131, 140 (D.D.C. 2015).

III. NMFS Met the Requirements of the Regulatory Flexibility Act.

NMFS's consideration of the costs to small entities complied with the "purely procedural" requirements of the Regulatory Flexibility Act (RFA). *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001); Fed. Defs. Br. at 32-39. Plaintiffs suggest that applying this correct standard of review is equivalent to claiming that the agency's review is "good enough for government work." *See* Pls. Resp. at 34. Based on this flawed comparison and without citing any cases rejecting an FRFA with an analysis as substantial as the one in this case, Plaintiffs ask the Court to second-guess the substance of the RFA analysis and conduct its own calculations in lieu of deferring to the expert agency. The Court should not accept this invitation.

Plaintiffs' reply renews their attack on the initial regulatory flexibility analysis (IRFA), but it is undisputed that the IRFA is unreviewable under the RFA. 5 U.S.C. § 611(a)(1), (c); *U.S. Cellular Corp.*, 254 F.3d at 89. Additionally, NMFS's amendment of the cost estimate between the IRFA and the FRFA, actually shows the agency's genuine effort to accurately consider the impact on small entities and fulfill the RFA's aim. *See* 5 U.S.C. § 604(a)(2), (3); *contra* Pls. Resp. at 33. Further, the RFA requires analysis of impacts only to directly regulated small entities, not all businesses that could be indirectly affected, such as processors. *See id.* § 604(a)(4).[9] NMFS nevertheless addressed the costs to processors. *See* AR 6935-36, 6950-51. NMFS used "generalized descriptive statements" to assess these costs, which the RFA permits when "quantification is not practicable or reliable." 5 U.S.C. § 607. Plaintiffs ignore this

[9] Plaintiffs misleadingly summarize *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161 (D.C. Cir. 2007) as "finding that regulatory costs to those affected as contractors to a regulated entity must be considered under the RFA." Pls. Resp. at 34. In fact, the D.C. Circuit held that the contractors *were* directly regulated parties, because the rule expressly included contractors in the category of employees subject to drug testing. *Aeronautical Repair*, 494 F.3d at 177. The Final Rule in this case, however, does not directly impose regulations on processors.

evidence and the fact that many processors already keep records that may be sufficient. AR 6917-18. Contrary to Plaintiffs' argument, Pls. Resp. at 35, the Final Rule does not require processors to segregate products by harvest event or by consumer and will not require a change to current comingling practices. AR 6913, 6921. Plaintiffs also assert that the processors' costs will be passed on to importers, Pls. Br. at 35, but Plaintiffs' comments and the record as a whole contain no information suggesting that this is likely to occur. AR 6917.

NMFS also reasonably considered significant alternatives to the Final Rule. Although the agency did not address every conceivable alternative, it was not required to do so. *See* 5 U.S.C. § 604(a)(6); *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62 (D.D.C. 2007). Plaintiffs' reply offers new alternatives, including improved enforcement, increased penalties, and better international cooperation. Pls. Resp. at 36. But Plaintiffs waived these arguments by failing to make them in their opening brief. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 353 (D.C. Cir. 2011). Even if they were properly raised, the Task Force Action Plan, cited in the FRFA, demonstrates that the federal government is applying these and other tools in its multi-pronged approach to address IUU fishing and seafood fraud. *See* AR 13146-89. Also, the alternatives Plaintiffs raised in their opening brief would not address the various types of illegal fishing deterred by the rule. *See* Fed. Defs. Br. at 38-39. This explanation was not "extra-record," as Plaintiffs claim, Pls. Resp. at 36, but was based upon citations to the record and common sense.[10]

This Court should uphold NMFS's FRFA under the "highly deferential" standard of review for RFA claims (here, Count 5). *See Council for Urological Interests v. Burwell*, 790 F.3d 212, 227 (D.C. Cir. 2015).

[10] Plaintiffs, on the other hand, cite the Connelly Declaration for facts and opinions about the potential impact of the rule that were not part of the administrative record and thus cannot be considered by the Court. *See* Fed. Defs. Br. at 36 n.27.

IV. Plaintiffs' Executive Order 12866 Claim Should Be Rejected.

The Court has no jurisdiction over Plaintiffs' Executive Order (E.O.) 12866 claim (Count 6), but even if it did, the record establishes that NMFS complied with the E.O. Fed. Defs. Br. at 39-41. Plaintiffs did not respond to these arguments and thus concede the claim. *Maddux*, 144 F. Supp. 3d at 140.

V. The Assistant Administrator for Fisheries Exercised Lawfully Delegated Authority to Issue the Final Rule and Did Not Violate the Appointments Clause.

The Final Rule was issued and signed in full compliance with the provisions of the MSA and the Appointments Clause of the Constitution. *See* Fed. Defs. Br. at 41-44. The Secretary of Commerce appropriately delegated authority to promulgate this rule to the Assistant Administrator (AA) for Fisheries, and subsequently, the AA for Fisheries appropriately delegated the authority to sign this rule to the Deputy Assistant Administrator for Regulatory Programs (DAARP). *See* 16 U.S.C. §§ 1855(d) (providing general rulemaking authority to the "Secretary") and 1802(39) (defining "Secretary" as the "Secretary of Commerce or his designee"). The AA for Fisheries is an "inferior Officer" who exercised her lawfully delegated power in accord with the Appointments Clause. This Court should reject Plaintiffs' arguments in support of Count 3, which are rife with misstatements about the law and the facts.

A. The Authority to Issue the Final Rule Was Properly Delegated.

Transmittal No. 61, which is part of the NOAA Organizational Handbook, specifically delegates authority for all functions related to the MSA – including rulemaking under Section 305 – to the AA for Fisheries subject to certain limited restrictions not applicable here. The plain language of Transmittal No. 61 explains that the NOAA Administrator "redelegates to the Assistant Administrator for Fisheries, with noted conditions and reservations, the authority to perform functions related to . . . The Magnuson Fishery Conservation and Management Act, 16

U.S.C. § 1801-1882. . . .” NOAA Organizational Handbook, Transmittal No. 61, Part II(C)(26) (Feb. 24, 2015), http://www.corporateservices.noaa.gov/ames/delegations_of_authority/ (last visited May 30, 2017).[11]

Contrary to Plaintiffs’ assertions, subsection (a) of Part II(C)(26) of Transmittal No. 61 does not exclude Section 305 from the delegation. Rather, Part II(C)(26)(a) merely requires the AA for Fisheries to advise the NOAA Administrator before taking specifically identified actions, including issuing controversial regulations implementing a fishery management plan (FMP) or FMP amendment under Sections 303 or 304 of the MSA. The fact that Section 305 is not mentioned in Part II(C)(26)(a)(iv) as an action requiring notification to the NOAA Administrator does not exclude Section 305 from the general delegation of functions relating to the MSA. In fact, Section 305 of the MSA falls within the statutory range expressly delegated by Part II(C)(26). Had the NOAA Administrator wished to reserve the authority to issue regulations under Section 305(d), she would have had to do so explicitly, as she did in Part II(C)(26)(b), which states that the NOAA Administrator “reserves the authority to issue a fishery management plan for highly migratory species or amendment to such plan or any implementing regulations (16 U.S.C. § 1854(f)(3)) [now 16 U.S.C. §§ 1852(a)(3), 1854(g)]. . . .” Based on the plain language of the delegating documents, Ms. Sobeck, the AA for Fisheries, had authority to issue regulations under MSA Section 305.

Plaintiffs also erroneously question the validity of Department Organization Order (DOO) 10-15 and Transmittal No. 61. However, the authorities relied upon by the Plaintiffs do not require the publication of internal agency orders such as delegations in the Federal

[11] This delegation includes all of the authority under the MSA that the Secretary delegated to the Administrator in Department Organization Order (DOO) 10-15. DOO 10-15 §§ 3.01(aa), 3.05 (Dec. 12, 2011), http://osec.doc.gov/opog/dmp/doos/doo10_15.html (last visited May 30, 2017).

Register.[12] First, 5 U.S.C. § 552 explicitly exempts matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); *see also id.* § 553(b)(A) (exempting "rules of agency organization, procedure, or practice" from the APA's rulemaking provision). Thus, "the APA does not require publication of [orders] which internally delegate authority." *Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990) (citing cases).

Additionally, 5 U.S.C. § 301 is a permissive "housekeeping statute," *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979), providing that the heads of departments "*may* prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301 (emphasis added). No agency or court has adopted Plaintiffs' extreme interpretation of this statute as a ban on any internal management of an agency conducted by means other than formal rulemaking. Further, the Federal Register Act, 44 U.S.C. §§ 1501-11, exempts orders "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof" from the requirement of publication in the Federal Register. 44 U.S.C. § 1505(a)(1); *see also United States v. Saunders*, 951 F.2d 1065, 1067-68 (9th Cir. 1991) (holding that the Treasury Department was not required to publish delegating orders). Plaintiffs' assertion that the delegation orders had to be published in the Federal Register is without merit.

Next, Plaintiffs incorrectly assert that sub-delegation is never permissible unless explicitly provided for by statute. Pls. Resp. at 9-12. Plaintiffs cite no case law relating to delegation. This is because the case law makes clear that, "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is

[12] Notably, both delegating documents are publicly available, even though they were not published in the Federal Register. This addresses Plaintiffs' concern that the public has "the right to know when authority is being delegated downward." Pls. Resp. at 9.

presumptively permissible absent affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190-91 (10th Cir. 2014) (citing numerous cases), *cert. denied*, 135 S. Ct. 2891 (2015). Courts have declined to "impose a standard that requires clear and explicit subdelegations in all instances, as such a standard could hamper the functionality of federal agencies as they carry out their duties." *League of Women Voters of U.S. v. Newby*, -- F. Supp. 3d --, No. CV 16-236 (RJL), 2017 WL 1273895, at *4 (D.D.C. Feb. 24, 2017); *see Recreational Fishing All. v. NMFS*, No. 8:11-cv-00705-JSM-AEP, 2012 WL 868880, at *7 (Feb. 24, 2012) (citing *Shreveport Engraving Co. v. United States*, 143 F.2d 222, 226-27 (5th Cir. 1944)), *report and recommendation adopted*, 2012 WL 868875 (M.D. Fla. Mar. 14, 2012)).[13]

Further, the Secretary's interpretation of his own authority under the MSA warrants *Chevron* deference. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1870 (2013); *Kobach*, 772 F.3d at 1190. The Secretary reasonably interpreted the statutory language allowing him to select a "designee" to permit the delegation and sub-delegation of responsibilities under the MSA. 16 U.S.C. § 1802(39). Accordingly, the Secretary delegated authority to the NOAA Administrator and expressly permitted the re-delegation of that authority. DOO 10-15 §§ 3.01(aa)(4), 3.05.[14]

[13] NMFS has a long-held, routine practice under which Deputy Assistant Administrators (DAAs) sign proposed and final rules and transmit them to the Federal Register. For example, a DAA signed the final rule promulgated under MSA Section 305(d) that implements shark finning prohibitions under MSA Section 307(1)(P). 81 Fed. Reg. 42,285, 42,288 (June 29, 2016). DAAs also sign regulations to implement FMPs developed by regional fishery management councils and also to implement NMFS-developed plans. 16 U.S.C. §§ 1854(b)-(c) and 1852(a).

[14] The only court to decide whether the MSA allows for the re-delegation of authority has determined that it does. *Recreational Fishing All.*, 2012 WL 868880, at *7. Contrary to Plaintiffs' assertions, Pls. Resp. at 12, the plaintiffs in that case challenged the Secretary's delegation to the NOAA Administrator and NOAA's "attempt to further delegate the authority to [the NMFS]," *i.e.*, the sub-delegation. *Id.* (alteration in original). While *Recreational Fishing* involved MSA Section 304, authority under both sections is delegated by the Secretary through the same provision of DOO 10-15, *see supra* at 17-18, and thus they are analogous.

B. NMFS's Exercise of Authority Was Consistent With the Appointments Clause.

The promulgation of the Final Rule was consistent with the Appointments Clause. First, Ms. Sobeck was an "inferior Officer" under the Appointments Clause because she was appointed by the head of a department pursuant to statutory authorization by Congress and her "work is directed and supervised at some level by [a principal officer]." *Edmond v. United States*, 520 U.S. 651, 662-63 (1997). As an inferior officer, Ms. Sobeck had the delegated authority to promulgate regulations under the MSA and exercised that authority. Mr. Rauch, on the other hand, had the delegated authority to sign the rule for publication and exercised that authority.

Ms. Sobeck was appointed as an inferior officer in compliance with the Appointments Clause. Federal Defendants concede that their Answer erroneously admitted that Ms. Sobeck was appointed by the NOAA Administrator, Dr. Sullivan, and Federal Defendants have moved for leave to amend their Answer to reflect the correct facts in this case. *See* Fed. Defs. Mot. for Leave to Amend Answer (ECF 64). Despite this error, Federal Defendants' opening brief accurately explained that Ms. Sobeck was an inferior officer, noting that Congress provided for the AA of Fisheries to "be appointed by the Secretary [of Commerce], subject to approval of the President." Fed. Defs. Br. at 43-44; Reorganization Plan No. 4 of 1970, § 2(e)(1), 84 Stat. 2090 (1970). "There is, of course, a presumption that acts of public officers are taken in accordance with applicable statutes." *Wilson v. United States*, 369 F.2d 198, 200 (D.C. Cir. 1966); *see also United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (citations omitted).

Out of an abundance of caution, Federal Defendants have attached further evidence of Ms. Sobeck's appointment. Denise A. Yaag, Director of the Department of Commerce's Office

of Executive Resources, attests that "Secretary of Commerce Penny Pritzker appointed Ms. Sobeck" with the approval of the President. Exhibit 1, Declaration of Denise A. Yaag ¶¶ 3, 5 (Yaag Decl.). Ms. Yaag explains that Office of Personnel Management Form 1652, Exhibit 2, entitled "Request for Senior Executive Service Appointing Authority," was signed by the White House Liaison and by Bruce Andrews, who was then Chief of Staff for Secretary Pritzker. Yaag Decl. ¶ 4. Mr. Andrews signed Form 1652 "with the approbation of Secretary Pritzker." Yaag Decl. ¶ 4; *see United States v. Hartwell*, 73 U.S. 385, 393-94 (1868) (holding that an officer appointed by the assistant treasurer "with the approbation of the Secretary" was "appointed by the head of a department within the meaning of [the Appointments Clause]").[15]

Ms. Sobeck's appointment as an inferior officer aligns with her role as a subordinate to the NOAA Administrator and other officers in the Commerce Department. Plaintiffs suggest that an inferior officer cannot exercise rulemaking authority unless a superior officer oversees the rulemaking, and allege that Ms. Sobeck was not subject to oversight. Pls. Resp. at 15-16. But Plaintiffs misconstrue the case law. *Edmond*, 520 U.S. at 662-63, explained that, whether an officer "has a superior," as a general matter, is a key fact for determining whether they classify as an inferior or principal officer. But the Supreme Court did not require that *every* action taken by the inferior officer, or even the action that formed the basis for a plaintiff's challenge, be directly supervised by a principal officer. In fact, the Court noted that the officer "supervising" the Coast Guard judges lacked authority to influence the outcome of individual proceedings or

[15] The Office of Legal Counsel, after thoroughly surveying the enactment and historic understanding of the Appointments Clause as well as relevant case law, concluded that "it is well established that the documents evidencing an appointment by the President or the head of a department need not be signed by that person" as long as the appointment is submitted to the Secretary for approval and executed on his behalf. Assignment of Certain Functions Related to Military Appointments, 29 Op. O.L.C. 132, 137 (2005).

"reverse decisions of the court." *Id.* at 664-65; *see also Estes v. U.S. Dep't of the Treasury*, -- F. Supp. 3d --, No. 1:16-CV-00450 (CRC), 2016 WL 6956594, at *14 (D.D.C. Nov. 28, 2016) ("reviewing courts do not evaluate the degree of supervision . . . but rather the extent to which relevant statutes or regulations provide for such oversight as a structural matter").[16]

Plaintiffs misinterpret *Association of American Railroads v. U.S. Department of Transportation* as holding that "delegation of rulemaking powers to an inferior officer can violate [sic] Appointments Clause." Pls. Resp. at 16. In *American Railroads*, the D.C. Circuit held that an arbitrator must be a *principal* officer because he had *no* superior directing or supervising his actions in any way. 821 F.3d 19, 38-39 (D.C. Cir. 2016). The Court never said that inferior officers are unable to exercise rulemaking power, and reiterated that "the degree of an individual's authority" does not determine whether an officer is principal or inferior. *Id.* at 38.

In accordance with the case law, Ms. Sobeck was an inferior officer capable of exercising significant authority as long as she had a superior, which she clearly did. NOAA's organizational chart, which Plaintiffs cite, Pls. Br. at 21, Pls. Resp. at 15, makes clear that the AA for Fisheries is in a "Line Office" supervised by NOAA Headquarters, with the NOAA Administrator at the helm.[17] Even the title "Assistant Administrator for Fisheries," signifies Congress's intent that the AA be subordinate to the Administrator. *See* Reorganization Plan No. 4 of 1970, § 2(e)(1). Further, the NOAA Administrator, the Secretary, and other Departmental officials have the authority to remove the AA for Fisheries. Executive Personnel Policy Manual (May 2011), at 11-

[16] Plaintiffs invent a new factor for Appointments Clause analysis: whether an inferior officer is in a hierarchical position on the organization chart that is similar to principal officers. Pls. Resp. at 15-16. This issue was not mentioned in *Estes*, and Plaintiffs point to no cases that discuss, or give weight to, whether the officer is a certain number of "tiers" below the Department head.
[17] The NOAA Administrator is a principal officer, "appointed by the President, by and with the advice and consent of the Senate." Reorganization Plan No. 4 of 1970, § 2(b).

12, *available at* http://hr.commerce.gov/Practitioners/SESPolicies/index.htm (last visited May 30, 2017). "The power to remove officers . . . is a powerful tool for control" and is strong evidence that an officer has superiors. *Edmond*, 520 U.S. at 664 (citations omitted).

In her capacity as an inferior officer with delegated authority, Ms. Sobeck promulgated the Final Rule. Plaintiffs assert, however, that Ms. Sobeck did not exercise this authority because the Final Rule changed between the July 20, 2016 version she approved and the final December 9, 2016 version she allegedly did not approve. Pls. Resp. at 7. The record shows otherwise. Ms. Sobeck stayed involved in the inter-agency discussions on the content of the Final Rule between August and late November 2016 and engaged with NOAA and NMFS leadership on the contents of the Final Rule. AR 20614, 32610, 18203, 19884, 20288, 20308, 20350, 20521, 21122, 21875, 22043, 25289, 25301, 32789.

Plaintiffs' contention that Mr. Rauch issued the Final Rule without delegated authority rests on a false premise. *See* Pls. Resp. at 7-8, 14. Plaintiffs assert that Federal Defendants admitted that Mr. Rauch issued the Final Rule. Although Federal Defendants did not specifically deny that Mr. Rauch issued the rule, the Answer included a general denial that expressly denied all statements not specifically admitted, denied, or qualified. ECF 21, at 1.[18] Further, Mr. Rauch had delegated authority to sign the rule for publication and doing so did not constitute an exercise of rulemaking authority. *See Huntco Pawn Holdings, LLC v. U.S. Dep't of Def.*, No. 16-cv-1433 (CKK), 2016 U.S. Dist. LEXIS 139619, at *61-62 (D.D.C. Oct. 3, 2016) ("Plaintiffs read too much into the signature block in the Federal Register" when challenging a lower-level official's "purely ministerial" act of signing a rule for publication).

[18] In any event, Federal Defendants seek to amend their answer to remove any doubt regarding this denial. *See* Fed. Defs. Mot. for Leave to Amend Answer.

VI. Remand, and Not Vacatur, Would Be the Appropriate Remedy.

Federal Defendants maintain that NMFS's rule was lawful but, if the Court disagrees, the appropriate remedy is remand without vacatur.[19] *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The decision whether to vacate "depends on (1) the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and (2) the disruptive consequences of an interim change that may itself be changed." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (citation omitted). Under the first prong, if the Court identifies any procedural errors, the Court should remand because the same rule could be in place following any new analysis. *See, e.g.*, *Am. Radio*, 524 F.3d at 242 (remanding where agency failed to provide an opportunity for public comment); *Aeronautical Repair*, 494 F.3d at 178 (remanding where an agency did not comply with the RFA). Remand is also appropriate if the Court determines that NMFS failed to provide an adequate explanation for some aspect of the Rule because "there is at least 'a serious possibility' that the Secretary on remand could explain" the rule "in a manner that is consistent with the statute. . . ." *Milk Train*, 310 F.3d at 756. Under the second prong, vacatur would be disruptive because it would allow the substantial effects of IUU fishing and seafood fraud to continue for a potentially lengthy time while a new rulemaking process occurs. *See Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458-59 (D.C. Cir. 1997) (finding that vacating would lead to greater emissions than would occur under remand).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, and Federal Defendants' cross-motion for summary judgment should be granted.

[19] Federal Defendants respectfully requested the opportunity to fully brief remedy issues separately should the Court identify a legal violation. Fed. Defs. Br. at 44. Plaintiffs do not oppose this request.

Dated: May 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

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