IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFA INTERNATIONAL SEAFOOD, INC., *et al*., Plaintiffs,	)	
v.	)	Case No. 1:17-cv-31 APM
WILBUR L. ROSS, JR., Secretary of Commerce, *et al*., Defendants.	)	

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **PAGE**

Statutes

Regulations

TABLE OF ACRONYMS

ACE	Automated Commercial Environment
APA	Administrative Procedure Act
ASFIS	Aquatic Sciences and Fisheries Information System
CBP	Customs and Border Protection
FDA	Food and Drug Administration
FR	Federal Register
HHS	Health and Human Services
IFTP	International Fisheries Trade Permit
ITDS	International Trade Data System
IUU	Illegal, Unreported, and Unregulated
MSA	Magnuson-Stevens Fishery Conservation and Management Act
MSC	Marine Stewardship Council
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NOC	National Ocean Council
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
RFA	Regulatory Flexibility Act
RFMO	Regional Fishery Management Organization
RIR	Regulatory Impact Review
SIMP	Seafood Import Monitoring Program
SIP	Seafood Inspection Program

INTRODUCTION

Illegal, unreported, and unregulated (IUU) fishing and seafood fraud have posed persistent threats to the economic and environmental sustainability of both the U.S. seafood market and global fisheries. The economic losses from IUU fishing and seafood fraud are immense, running into the billions of dollars each year, and the avoidance of the operational costs of *legal* fishing undermines sustainable fishing practices. The United States government, through the work of an interagency National Ocean Council (NOC) Committee, recently adopted more than a dozen measures to combat IUU fishing and seafood fraud. One of the cornerstones is the Seafood Import Monitoring Program (SIMP), a regulatory framework intended to provide the government with information critical to verifying that imported fish and fish products are legal. Specifically, the SIMP traceability rule promulgated by the National Marine Fisheries Service (NMFS) requires importers of record for priority species to submit reports and retain records that would support traceability from the point of harvest (or production for aquaculture products) to the point of entry into U.S. commerce.

The information gathered pursuant to this rule will allow NMFS to determine whether and to what extent seafood products are taken, possessed, transported, or sold in violation of a foreign law, treaty, or conservation measure adopted by an international agreement or organization. By verifying the origin and identity of these imports, the United States will be able to deter the entry of illegally harvested and fraudulently represented seafood, and the incentives to engage in those illicit and environmentally damaging practices will be reduced globally. Moreover, interest in ensuring continued seafood trade with the United States might encourage those countries that export seafood to implement more robust management measures so that the necessary information is available to U.S. importers. Implementation of the traceability rule will

level the playing field for U.S. vessels operating in U.S. fisheries, whose operations already are subject to similar reporting and recordkeeping requirements for seafood.

Congress provided NMFS with the authority under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §1801 et seq., to issue this type of rule to combat what it recognized as a significant problem. That Congress has given other agencies their own authorities to address seafood fraud and that Congress has sought to address IUU fishing and seafood fraud through other programs or provisions in the MSA and other laws does not preclude NMFS from promulgating a traceability rule that addresses activities affecting not only American consumers of seafood but also those engaged in the domestic fishing industry. Further, it is well established that agency heads, such as the Secretary of Commerce, have the authority to delegate rulemaking authority.

There is ample support in the administrative record demonstrating that NMFS provided sufficient notice about this regulatory proposal and gave the public meaningful opportunities to comment at every stage from the initial principles that would guide selection of the priority species included in the initial phase of the SIMP to the Proposed Rule. NMFS took into consideration public comments from this extensive notice and comment process, as it developed a list of priority species and the Proposed and Final Rules. In response to public comments, NMFS made changes between the Proposed and Final Rules in order to lower the compliance costs to the regulated entities. The result is a rational rule that serves as one of many measures in the NOC Committee's overall effort to deter IUU fishing and seafood fraud and a first step in the long-term plan to expand the program to include all species.

For these reasons, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

STATUTORY BACKGROUND

The MSA establishes federal jurisdiction over fishery resources within the United States' exclusive economic zone. 16 U.S.C. §§ 1801(a)(6), 1811(a). Congress first enacted the statute in 1976 as the Fishery Conservation and Management Act, Pub. L. No. 94-265, renamed it as the MSA, performed significant revisions in 1996 through the Sustainable Fisheries Act, Pub. L. No. 104-297, and amended it in 2007 with the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. L. No. 109-479. The 2007 MSA amendments reflected Congress' growing concern with IUU fishing and its impact on domestic fisheries. Congress found that "[i]nternational cooperation is necessary to address [IUU] fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry." 16 U.S.C. § 1801(a)(12). Among other changes, Congress amended the High Seas Driftnet Fishing Moratorium Protection Act to establish a process for identifying and certifying nations whose vessels engage in IUU fishing or bycatch of protected living marine resources, *id.* §§ 1826j, 1826k.

Congress went further in 2007 by adding a new Section 307(1)(Q) to the MSA's list of prohibited acts: "It is unlawful for any person – to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation." *Id.* § 1857(1)(Q); Pub. L. No. 109-479 § 118. This provision is similar to language in the Lacey Act, which makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce "any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any

State or in violation of any foreign law."[1] 16 U.S.C. § 3372(a)(2)(A). Congress added Section 307(1)(Q) to the MSA to prevent illegally-harvested fish, including fish harvested in violation of internationally-agreed conservation measures, from entering U.S. commerce by making "transgressors subject to penalties under the Magnuson-Stevens Act as well." S. Rep. No. 109-229, at 36. Moreover, the Lacey Act expressly exempts certain activities and species covered by the new MSA provision. 16 U.S.C. § 3377(b).

In 2015, Congress extended the prohibition of Section 307(1)(Q) to any fish taken, possessed, transported, or sold in violation of "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." Pub. L. No. 114-81 § 112. In doing so, Congress enlarged the universe of violations that could trigger Section 307(1)(Q). For instance, fish caught in violation of a measure adopted by a Regional Fishery Management Organization (RFMO) could be excluded from import into the United States.[2] The MSA provides broad authority to the Secretary of Commerce, or her designee, to "promulgate such regulations, in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter." 16 U.S.C. § 1855(d); *see id.* § 1802(39).

[1] The Lacey Act authorizes criminal penalties for knowingly importing fish in violation of 16 U.S.C. § 3372(a), *see* 16 U.S.C. § 3373(a), (d), but the maximum civil monetary penalty available where the violation was not knowingly committed is very low, currently $25,881 as adjusted for inflation. 15 C.F.R. § 6.3(f)(18)(i). In contrast, the maximum civil monetary penalty available for violation of the MSA is $181,071 as adjusted for inflation. *Id.* § 6.3(f)(15).

[2] RFMOs are established by treaty and composed of member nations with shared fishery interests that adopt conservation and management measures, such as catch reporting and vessel monitoring provisions. *See* http://www.nmfs.noaa.gov/ia/agreements/regional_agreements/intlagree.html (providing information on NMFS's participation in international fishery organizations) (last visited May 8, 2017).

FACTUAL AND PROCEDURAL BACKGROUND

As Plaintiffs acknowledge, IUU fishing is a global concern. *See* Plaintiffs' Brief (Pls. Br.), ECF 48-1, at 1. The exact scope of the problem is not known because much of the activity is by definition "unreported," but estimates indicate that the economic losses globally from IUU fishing range between $10 and $23.5 billion annually. AR 6934.[3] The entities that engage in IUU fishing gain an unfair advantage in the marketplace over those who follow fisheries regulations by avoiding the costs associated with compliance and sustainable fishing practices. AR 6932, 13151. Those entities often circumvent conservation measures aimed at maintaining stocks at a sustainable level, which in turn can have harmful effects on the marine environment and lead to bycatch of non-target species. AR 13151. These impacts are also evident in the United States because the country imports nearly all of its seafood. AR 6934 (United States imported more than 90% of its seafood in 2014). Estimates indicate that between 20% and 32% (or $1.3 to $2.1 billion) of wild-caught seafood imported into the United States is illegal. AR 6934-35.

Seafood fraud also threatens the economic viability of U.S. and global fisheries, including the market competitiveness of those in the industry who comply with fisheries regulations. AR 6932, 13152. Seafood fraud refers to mislabeling or other forms of deceptive marketing regarding the quality, quantity, origin, or species of fish or fish product. AR 13152. The fraudulent activity can overlap with IUU fishing in the context of species substitution, *i.e.*, where a product is marketed as a different species in order to conceal a lower-value species. *Id.* The fraud also affects consumers by reducing their ability to make informed decisions. *Id.*

[3] Citations to the administrative record are noted by the letters AR and a page cite corresponding to the Bates number. The cites for the Final Rule, Final Regulatory Flexibility Analysis, and Regulatory Impact Review refer to Bates numbers in the First Release. The Second Release mistakenly contains some Bates numbers that overlap with the First Release.

The substantial economic and environmental threats posed by IUU fishing and seafood fraud led to the issuance of a Presidential Memorandum in June 2014, which established a Presidential Task Force on Combating IUU Fishing and Seafood Fraud. AR 1-4. In December 2015, the Task Force published in the Federal Register (FR) and sought comment on a set of fifteen recommendations. AR 2664. And in March 2015, the Task Force published an Action Plan that described implementation steps for each recommendation. AR 13146-89. Two of the Action Plan's fifteen items related to a seafood traceability program that would be applied first to seafood products that are most at risk of being caught by IUU fishing and subject to seafood fraud, though it would eventually be expanded to all fish species.[4] AR 13183-84. The Task Force then became the NOC Committee. AR 13156.

The NOC Committee began development of the traceability program through a series of four notices published by NMFS. Two notices (April and August 2015) addressed draft principles to be applied in determining the at-risk species and a draft at-risk species list. A Working Group finalized the principles and list of at-risk species in an October 2015 notice. AR 4464. As explained, *infra* note 5, these species are now listed as "priority" species. The Working Group was led by the National Oceanic and Atmospheric Administration (NOAA) and composed of members from the Department of State, the Food and Drug Administration (FDA), the Department of Homeland Security's Customs and Border Protection (CBP), and the Office of the U.S. Trade Representative. AR 3971. To inform development of the Proposed Rule, a fourth notice was published in July 2015 soliciting public comment on the types of information that should be collected as part of the reporting and recordkeeping requirements. AR 3129-31.

[4] NMFS received numerous comments expressing the desire that all species be included in the initial phase. AR 4482; *see* AR 3981, 4308, 4353, 4391.

I. Proposed Rule

After nearly a year of notice and comment from the public on which species to trace and what information to gather, in February 2016, NMFS issued a Proposed Rule that would establish a program to provide Federal agencies with information that would be central to excluding products of illegal fishing activities from entry into U.S. commerce. AR 4477. NMFS proposed reporting and recordkeeping requirements for importers of record, who would need to obtain a permit from NMFS and provide catch and landing information for the at-risk species at the time of import. AR 4479.

NMFS proposed four categories of data that importers of record would be required to report when importing at-risk species: information on the entity(ies) harvesting or producing the fish (who); the fish that was harvested or processed (what); and where and when the fish were harvested and landed. AR 4483. Also, the importer of record would have to provide an International Fisheries Trade Permit (IFTP) number and maintain records regarding each custodian in the chain of custody, including, as applicable, transshippers, processors, storage facilities, and distributors. *Id.* In response to the notice requesting comment on the types of information that should be required, NMFS received comments from the domestic fishing community expressing desire for importers to be held to the same reporting and recordkeeping standards that apply to U.S. fisheries. *Id.*

The mechanics for submitting the information required under the Proposed Rule would rely on both CBP's International Trade Data System (ITDS), which is an integrated, government-wide system for the electronic collection, use, and dissemination of trade information, and the newly-created IFTP program for importing or exporting certain NMFS-regulated seafood commodities. AR 4479, 4484. Importers of record would be responsible for

inputting the data, or message set, for the at-risk species through a "single window" computer portal known as the Automated Commercial Environment (ACE), which serves as the vehicle for submitting all U.S. government-required import data under the ITDS. The message sets would then automatically be checked against NMFS reference files (*e.g.*, the list of IFTP permit holders, species and seafood product forms subject to the traceability program) and if any of the data points were absent, the importer of record would be notified that the entry filing had been rejected and be given an opportunity to correct any deficiencies. AR 4484.

NMFS noted that much of the data needed to combat IUU fishing was already being collected and that typical supply chain records, such as bills of lading, would contain information sufficient for NMFS to conduct a trace back. AR 4483. To the extent that the data overlapped with information collected under other programs, NMFS proposed that the entities subject to another program would only have to report the data once through the ACE portal to eliminate reporting redundancies. AR 4482.

II. Final Rule

Two and a half years after issuance of the Presidential Memorandum on IUU fishing and seafood fraud, NMFS finalized the seafood traceability rule. AR 6907. This Final Rule marked the conclusion of an extensive notice and comment period during which the NOC Committee, and NMFS in particular, engaged in public outreach to help shape the traceability program.

NMFS made some changes between the Proposed Rule and Final Rule, many of which were aimed at reducing the rule's reporting and recordkeeping burden.[5] *See* AR 6920-21. For example, in response to concerns raised about the burden that would result from accounting for

[5] NMFS noted that for the Final Rule the agency would refer to the "at-risk" species as "priority" species in response to public comments that "at-risk" conveys negative implications about the conservation and management status of such species. AR 6908.

vessel information for small-scale fisheries, NMFS exempted importers from providing vessel or aquaculture facility specific information in cases where the fish was caught by small-scale fishing vessels[6] or raised in small-scale aquaculture facilities. AR 6913. This exemption allows importers to provide an "aggregated harvest report" and would "substantially reduce the amount of data" required from importers for seafood coming from small-boat fisheries or small-scale aquaculture facilities. AR 6913; *see* 50 C.F.R. § 300.324(b). NMFS made additional changes to eliminate redundancies and alleviate the burden on the regulated importers. AR 6913 (NMFS reduced the record retention time from five years to two years); AR 6912 (rather than require an importer of record to report three names – scientific, common, and Aquatic Sciences and Fisheries Information System (ASFIS) 10-digit number and 3-alpha code – NMFS only required the ASFIS code); AR 6920 (NMFS eliminated the requirement for the "product description"). Finally, NMFS stayed the effectiveness of the Final Rule as it relates to shrimp and abalone "until appropriate reporting and/or recordkeeping requirements for domestic aquaculture can be established." AR 6921. To allow time for importers of record to work with their suppliers to ensure that the required information would be available, the compliance date was set as January 1, 2018. AR 6907.

STANDARD OF REVIEW

Challenges to regulations promulgated under the MSA are subject to judicial review under Section 706(2)(A) of the APA. 16 U.S.C. § 1855(f)(1); 5 U.S.C. § 706(2)(A); *Oceana v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011). Courts will set aside NMFS's regulations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[6] A small-scale fishing vessel is defined as a vessel of "20 measured gross tons or less or 12 meters length overall or less." 50 C.F.R. § 300.321.

5 U.S.C. § 706(2)(A). This "arbitrary and capricious" standard is a narrow one, and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A regulation is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005). A court must only "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. This review is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

"Judicial review of agency action under the MSA is especially deferential." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007) (citation omitted). "Courts defer to NMFS decisions that are supported in the record and reflect reasoned decision making, especially where, as here, the dispute involves technical issues that implicate substantial agency expertise." *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005), *aff'd*, 488 F.3d 1020 (D.C. Cir. 2007). Summary judgment usually means that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In APA cases, however, the agency decides factual issues, *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 79, and the "district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Courts implement summary judgment as a means of ascertaining whether the record supports the agency's action. *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 60 (D.D.C. 2014).

ARGUMENT

I. NMFS Acted Pursuant to Its Delegated Authority Under the MSA.

NMFS acted pursuant to its delegated authority under the MSA when it issued the Final Rule, and the agency's policy choice to consider species at risk of seafood fraud – in addition to illegal fishing – is a reasonable interpretation of the statute that is entitled to deference. The Final Rule does not "regulate seafood labeling or fraud." *Contra* Pls. Br. at 16 and Count 4. Rather, it is a procedural reporting and recordkeeping rule that facilitates "the collection of information on imported fish and fish products at the point of entry into U.S. commerce." AR 6908.[7] The MSA provides broad authority to NMFS to collect such information in furtherance of its duty to prevent the importation and sale of illegally harvested fish. That such information may also be useful in decreasing the incidence of seafood fraud does not deprive NMFS of authority to issue the Final Rule.

NMFS acted within the legal authority delegated to it by Congress in promulgating the Final Rule, and its interpretation is entitled to deference. *See Michigan v. EPA*, 268 F.3d 1075, 1081-82 (D.C. Cir. 2001) (an agency regulation is entitled to deference if it is acting pursuant to authority delegated by Congress). As explained above, the 2007 amendments to the MSA reflected Congress' increasing concern with IUU fishing and added a new provision to the statute 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

[7] The Final Rule requires importers to report data on the harvest of fish and fish products, retain additional supply chain data, and maintain an IFTP. AR 6907. NMFS explained 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)" and "will also decrease the incidence of seafood fraud by requiring the reporting of this information to the U.S. Government at import and requiring retention of documentation so that the information reported (*e.g.*, regarding species and harvest location) can be verified." *Id.*

or regulation or any treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party." 16 U.S.C. § 1857(1)(Q). NMFS relied on this statutory provision, combined with its broad rulemaking authority under 16 U.S.C. § 1855(d), in issuing the Final Rule. AR 6909 ("To effectively enforce [16 U.S.C. 1857(1)(Q)], NMFS is adopting the reporting and recordkeeping requirements set forth in this rule."); AR 19459; *see also* AR 6909 ("NMFS has broad discretion under the MSA to promulgate regulations as necessary to carry out provisions of the MSA.").

To determine whether the Final Rule was a valid exercise of the authority granted under the MSA, the starting point is "the language of the delegation provision itself." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). As with the Endangered Species Act, in the MSA, Congress "delegated broad administrative and interpretive power to the Secretary." *See Babbitt v. Sweet Home*, 515 U.S. 707, 708 (1995) (*citing* 16 U.S.C. § 1540(f)); *compare* 16 U.S.C. § 1540(f) ("The Secretary . . . [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter. . . .") *with* 16 U.S.C. § 1855(d) ("The Secretary may promulgate such regulations. . . as may be necessary to. . . carry out any other provisions of this Act."). *Gonzales*, relied upon by Plaintiffs, (Pls. Br. at 14) is distinguishable because the statute at issue in that case did not "grant the Attorney General this broad authority to promulgate rules." 546 U.S. at 259. Here, NMFS exercised its broad rulemaking authority to carry out the express prohibition in the MSA on the import of fish harvested in violation of any foreign law or treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party. 16 U.S.C. § 1857(1)(Q).

NMFS's interpretation of Section 307(1)(Q) is entitled to *Chevron* deference because "Congress has delegated authority to the agency generally to make rules carrying the force of

law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 579 (D.C. Cir. 2016) (citation omitted). Under *Chevron*'s two-step framework, the court "asks if the statute unambiguously forecloses the agency's interpretation, . . . and, if it does not, then at Step Two [the court] defer[s] to the administering agency's interpretation as long as it reflects a permissible construction of the statute." *Id.* (citations omitted). The Court need not find that NMFS's interpretation is "the only permissible construction," but merely that it is not "'manifestly contrary'" to the MSA. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007) (quoting *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985)).

Nothing in the statutory text or legislative history indicates that Congress intended to preclude NMFS from imposing reporting and recordkeeping requirements aimed at preventing the importation of illegally harvested fish. Indeed, the legislative history reflects Congress' concern with the prevention of illegal fishing. S. Rep. No. 109-229 at 11 ("[IUU] fishing, expanding fleets, and high bycatch levels, are threats to sustainable fisheries worldwide. There are few effective tools in place to ensure international and regional management organizations can end these practices."). Among other changes aimed at combatting IUU fishing, Congress added "a prohibition on commercial activity with respect to any fish acquired in violation of any foreign law or regulation." *Id.* at 36 (noting that Section 307(1)(Q) is "similar to language contained in the Lacey Act (16 U.S.C. 3371 *et seq.*)").[8]

[8] The Lacey Act authorizes NMFS to take action with respect to seafood fraud, *see* 16 U.S.C. § 3372(d) (prohibiting false labeling), but because of the difference in the civil monetary penalties available under the Lacey Act and the MSA, *see supra* note 1, NMFS did not rely on its authority under the Lacey Act in promulgating the Final Rule. *Contra* Pls. Br. at 16. However, because Congress modeled Section 307(1)(Q) after the Lacey Act prohibition, 16 U.S.C. § 3372(a)(2)(A),

NMFS reasonably interpreted Section 307(1)(Q) to grant it the authority to collect data that would improve seafood traceability. *See* AR 6910 ("[T]he stated objective of the Program is to trace seafood products from the point of entry into U.S. commerce back to the point of harvest or production for the purpose of ensuring that illegally harvested or falsely represented seafood does not enter U.S. commerce. The data elements captured by the reporting and recordkeeping requirements were chosen to serve this specific objective."). NMFS was aware of the limits on its statutory authority. *See* AR 19459 (rule signatory stating that the MSA does not provide "direct authority" for NMFS to prohibit seafood fraud). However, although MSA Section 307(1)(Q) does not directly prohibit seafood fraud, it does prohibit, among other things, the importation into the U.S. of fish taken in violation of a foreign law or regulation, which would include foreign labeling laws. Accordingly, the Final Rule appropriately imposes reporting and recordkeeping requirements aimed at helping NMFS in preventing importation of fish harvested or produced in violation of foreign law or internationally-agreed measures and does not impose a prohibition on seafood fraud. The Final Rule is not "manifestly contrary to the statute," and thus "it must be given controlling weight." *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1230.[9]

court interpretations of that provision are instructive here. In *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1989), the court broadly interpreted the term "any foreign law" in light of Congress' intent to deter illegal trade in wildlife. *Id.* at 828 ("While the legislative history is not totally one-sided, the thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect. To read the term as [the appellant] urges risks severely limiting the scope of the Act."). Here, the Court should read Section 307(1)(Q) broadly to effectuate Congressional intent.

[9] Alternatively, at a minimum NMFS's interpretation warrants *Skidmore* deference. *See Union Neighbors United*, 831 F.3d at 580 ("Under *Skidmore*, the court grants an agency's interpretation only as much deference as its persuasiveness warrants." (quoting *Brown v. United States*, 327 F.3d 1198, 1205 (D.C. Cir. 2003))). The Final Rule is consistent with the statutory text and legislative history of the MSA amendments, and NMFS's interpretation is persuasive and entitled to deference. *Id.* at 580.

The Final Rule serves a distinct purpose that complements, and does not interfere with, the FDA's authority over seafood fraud.[10] The Task Force determined that there was a need for "a seafood traceability program that placed greater scrutiny o[n] the source of seafood products and on the entire supply chain from point of harvest to entry into U.S. commerce." AR 6909. NMFS acknowledged FDA's existing authority with respect to seafood labeling, but found that authority insufficient to reach a significant problem that Congress placed under NMFS's purview: the importation of illegally harvested fish. *See id.* (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."). Even if NMFS and FDA have overlapping obligations with respect to imported seafood, "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).[11]

NMFS's consideration of seafood fraud in addition to illegal fishing was reasonable in light of its participation on the Presidential Task Force. The Task Force, which was co-chaired by the Departments of State and Commerce, was charged with combating both IUU fishing and

[10] *See* 21 U.S.C. § 331(a) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is. . . misbranded"); *id.* § 343 (defining "misbranded food" to include that which is "offered for sale under the name of another food"). Because NMFS has not exercised rulemaking authority over misbranded food, this is not a case, as Plaintiffs suggest, where an agency is exercising power that has been "expressly delegated by Congress to a different agency." *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) (cited in Pls. Br. at 14).

[11] In fact, NMFS and FDA are already working cooperatively in the area of seafood inspections. NMFS has an established practice of using its seafood inspection authority in furtherance of FDA's Hazard Analysis and Critical Control Point program. NMFS offers inspection services on a fee-for-service basis to assist entities in complying with FDA regulations. *See* http://www.seafood.nmfs.noaa.gov/program_services/program_services.html (last visited May 8, 2017); *see also* AR 6916 ("About 20 percent of domestic [seafood] consumption is examined by [NOAA's Seafood Inspection Program (SIP)]. These examinations include checks for proper labeling, proper net weight and proper nomenclature.").

seafood fraud. *See* AR 1. One of the responsibilities of the Task Force members was to identify existing regulatory authorities – such as MSA Section 307(1)(Q) – that could be used to improve seafood tracking and traceability. AR 2. 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, and so the exercise of NMFS's regulatory authority over illegal fishing would have the added benefit of deterring seafood fraud. Further, IUU fishing and seafood fraud can be related, as when product is mislabeled to conceal illegal capture. AR 13152. Nothing in the MSA precluded NMFS from considering susceptibility to seafood fraud while evaluating the risk that a species would also be subject to illegal fishing. *See Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1230 (courts should not "infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute" (quoting *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998))).

The Final Rule is a reasonable exercise of NMFS's broad rulemaking authority under 16 U.S.C. § 1855(d) in furtherance of the statutory prohibition on the import and export of fish harvested in violation of foreign law, including laws and regulations that prohibit mislabeling of seafood products. 16 U.S.C. § 1857(1)(Q). As such, the Final Rule is entitled to deference and should be upheld because the administrative record reflects that NMFS had a rational basis for finding that the rule would assist the agency in detecting illegally harvested seafood before it enters U.S. commerce. AR 6915-16.

II. NMFS Satisfied the APA's Notice and Comment Requirements and Produced a Rational Rule Supported by the Record.

The record shows that NMFS met the notice and comment benchmarks established for agency rulemaking under the APA, and thus Plaintiffs' claim (Count 1) that NMFS failed to

provide sufficient notice to the public is demonstrably wrong. *See* Pls. Br. at 22-23. Nor can Plaintiffs succeed on their claim (Count 2) that NMFS violated the APA by failing to identify or explain the relevant data, Pls. Br. at 23-33, because a plaintiff cannot seek relief under APA Section 706(2) without alleging a violation of a substantive statute. In any event, NMFS did not act arbitrarily or capriciously because the Final Rule was "based on a consideration of the relevant factors" and Plaintiffs did not identify a "clear error in judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

A. NMFS Engaged Extensively with the Public Through Notice and Comment.

From the development of the priority species list to the Final Rule, NMFS engaged in an extensive notice and comment process, not "secret rulemaking," *see* Pls. Br. at 22-23.[12] The Proposed Rule "include[d] sufficient detail on its 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). To the extent that NMFS withheld law enforcement privileged and confidential information, it was obligated to do so, and thus its withholding did not violate the APA.

1. NMFS's Notices on the At-Risk Species Provided the Public With a Meaningful Opportunity to Review and Comment.

Rules promulgated under the APA must meet certain notice and comment requirements. Subject to certain exceptions relevant here, general notice of the rule must be published in the Federal Register and must include, *inter alia*, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). Following notice, the

[12] Plaintiffs' use of the term "secret rulemaking" appears to refer to NMFS's reliance on a subset of confidential and law enforcement sensitive information. NMFS treated that information appropriately, but Plaintiffs also incorrectly insinuate that the entire rule, and not just the priority species selection, was based on confidential information that could not be shared with the public. Pls. Br. at 22-23. As described below, the record evidence shows otherwise.

agency must "give interested persons an opportunity to participate in the rule making" through public comment. *Id.* § 553(c); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (notice and comment allows public participation in the decisionmaking process and "assure[s] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." (quotation omitted)).

Plaintiffs' opening brief ignores the nature and scope of NMFS's engagement with the public regarding the seafood traceability rule in general and the priority (*i.e.*, at-risk) species list in particular. *See* Pls. Br. at 22-23. The record demonstrates that NMFS solicited and responded to comments over the course of multiple FR notices. From the beginning, public input was sought, starting with the April 2015 FR notice requesting public comment on principles that the Working Group should consider for determining at-risk species. AR 2675. Then, an August 2015 FR notice presented a draft set of principles and draft at-risk species list that incorporated some of the changes proposed by commenters and rejected others. AR 3971 (adding chain of custody transparency to the principles based upon public comments); AR 3975-76 (disagreeing with comments about adding country of origin and species vulnerability to the list of principles).

The August 2015 FR notice also provided a detailed explanation for how the Working Group developed the list of at-risk species. First, it created a base list of 47 species by looking at: (1) the species with an imported or domestic landed value over $100 million dollars in 2014; (2) the species with a high cost of production, which could correlate to increased incentives for IUU fishing; and (3) the species proposed by members of the Working Group based on their expertise.[13] AR 3971-73, 25036-38. Second, the Working Group analyzed each species on the base list, relying on verifiable data from CBP, FDA, and NOAA as well as RFMOs of which the

[13] The Working Group used a base list because it was infeasible to consider all species. AR 3971.

United States is a member. AR 3971. Third, by assessing the "suite of risks posed to species[, which] varied not only in terms of what risks affected which species, but also in terms of the scale of the risks," the Working Group established the draft list of species that would be covered by the first phase of the traceability program. AR 3971-72. For each species, the notice provided the rationale for its inclusion on the at-risk list. *Id.*

After another comment period, the Working Group published a third notice in October 2015 with a final set of principles and list of at-risk species. AR 4464. In response to comments, the Working Group had analyzed an additional eight species, but determined that there was not enough risk to warrant adding them at this time. AR 4473; *see* AR 52150-53. NMFS further explained the process for the at-risk species list, noting that the Working Group had evaluated the principles evenly rather than weighting them and that no single principle was determinative; provided a list of the agency offices involved; and, in response to comments about disclosure of the data, explained that much of the information was law enforcement privileged or confidential. AR 4466. NMFS again provided the rationale for placing each species on the list. AR 4467-68.[14]

Building upon this extensive engagement with the public, NMFS issued a Proposed Rule providing a detailed explanation of how the reporting and recordkeeping program would work and why it was collecting the information. *See supra* at 6-8. Following a two-month comment period, NMFS issued the Final Rule, which incorporated a number of changes based on comments, including changes aimed at reducing the reporting and recordkeeping burden without undermining the rule. AR 6920-21. The scope of this notice and comment process shows that NMFS clearly satisfied the requirements of Section 553 of the APA.

[14] To solicit early public input to inform development of the rule, NMFS also published an FR notice in July 2015, seeking public comment on the types of information to be collected by a traceability program. AR 3129-31.

2. NMFS Properly Withheld a Subset of Information on the At-Risk Species.

In developing the at-risk species list, NMFS relied on law enforcement information from ongoing investigations and law enforcement partners at home and abroad as well as confidential information collected through its regulatory oversight of fisheries. AR 4467, 4469. Pursuant to the law enforcement privilege and the MSA's confidentiality provision, 16 U.S.C. § 1881a(b), NMFS did not include this sensitive and privileged information in its notices or Proposed Rule. However, NMFS described the rationale for why each at-risk species was listed, and these descriptions included summaries of the law enforcement and confidential information. NMFS's actions were fully consistent with APA Section 553 as an agency that relies in part on law enforcement privileged or confidential information, it "is under no obligation to disclose such information when promulgating a rule." *Credit Union Nat'l Ass'n v. NCUA*, 57 F. Supp. 2d 294, 302 (E.D. Va. 1995).

The law enforcement privilege protects from disclosure "information that would be contrary to the public interest in the effective functioning of law enforcement." *A.N.S.W.E.R. Coal. v. Jewell*, 292 F.R.D. 44, 50 (D.D.C. 2013) (citation omitted). Specifically, the privilege protects "the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations." *Id.* (citation omitted). Similarly, the MSA's confidentiality provision provides that "[a]ny information submitted to the Secretary, a state fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this chapter shall be confidential and shall not be disclosed" except in "aggregate or summary form" or subject to a court order. 16 U.S.C. § 1881a(b)(1); 50 CFR § 600.415(e); *see* 50 C.F.R. § 600.10.

The exclusion of law enforcement privileged and confidential information from the Proposed Rule does not, as Plaintiffs suggest, automatically invalidate the rule. *See* Pls. Br. at 22-23. As one court addressing a similar situation noted, "[t]o take Plaintiffs[']' argument to its logical extension, the [agency] would never be able to promulgate a rule based on confidential information obtained in its role as examiner without disclosing such information to the public. The APA requires no such result." *Credit Union Nat'l Ass'n*, 57 F. Supp. 2d at 302; *see also Pub. Citizen v. NRC*, 573 F.3d 916, 928 (9th Cir. 2009) (finding that the Nuclear Regulatory Commission was not required to reveal classified information about nuclear facilities in the challenged rulemaking and that it would not "be able to do so while fulfilling its duty to maintain the common defense and security of classified information."). Moreover, courts have made clear that the APA "does not require that every bit of background information used by an administrative agency be published for public comment." *B.F. Goodrich v. Dep't of Transp.*, 541 F.2d 1178, 1184 (6th Cir. 1976); *see In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1354 n.9 (D.C. Cir. 1980) (citing *B.F. Goodrich*, 541 F.2d at 1184).

Plaintiffs' reliance on *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), is unavailing. Pls. Br. at 22-23. The question in that case was whether five studies relied on by the Federal Communications Commission for a rulemaking were properly redacted in the administrative record as deliberative process privileged (DPP) material. *Am. Radio*, 524 F.3d at 237. The court remanded and ordered the agency to make the studies available for notice and comment, but limited the application of its ruling to DPP materials by stating that the agency "ha[d] not suggested that any other confidentiality considerations would be implicated were the

unredacted studies made public for notice and comment."[15] *Id.* at 239-40. Plaintiffs do not cite to case law suggesting that DPP materials that also contain law enforcement privileged and/or confidential information must be published in notices of proposed rulemaking.

In any event, Plaintiffs have failed to show that they were prejudiced by any alleged failure on the part of NMFS to satisfy the notice and comment requirements. *See Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 202 (D.C. Cir. 2007) (plaintiff must demonstrate "how it might have responded if given the opportunity" and show that "on remand [they] can mount a credible challenge") (quotations and citations omitted); *see Am. Radio*, 524 F.3d at 237 ("The failure to disclose for public comment is subject, however, to the 'rule of prejudicial error.'") (citation omitted). Plaintiffs' suggestion that they "may have credibly challenged the selection [of at-risk species] if they had been given an opportunity to comment on the data relied upon by the agency," Pls. Br. at 23, is undermined by the record evidence that, on multiple occasions, NMFS invited public comment on both the draft list and the reasons why each species was included on that list.

B. Plaintiffs' Standalone APA Section 706(2) Claim Should be Dismissed But the Record Shows That The Claims Are Without Merit.

Plaintiffs' claim under APA Section 706(2) (Count 2) should be dismissed as a matter of law because it is untethered to any relevant substantive statute. Even if the Court does not dismiss Count 2, it should reject Plaintiffs' arguments in support of the claim, Pls. Br. at 23-33, because the record demonstrates that NMFS acted reasonably in establishing the at-risk species list, explaining the compliance and paperwork costs, considering seafood fraud and aquaculture, and setting a compliance date.

[15] In the privilege log for the record, NMFS marked the law enforcement privileged information that it redacted as both DPP and law enforcement privileged.

The APA is a procedural statute that does not expand a federal agency's substantive duties; instead, it establishes the framework for judicial review of agency action taken pursuant to relevant statutes. *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997). Under the APA, judicial review is available to those "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). As such, "[t]here is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint." *El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)); *Calif. Dep't of Health Servs. v. Babbitt*, 46 F. Supp. 2d 13, 20 (D.D.C. 1999), *vacated on other grounds*, 231 F.3d 20 (D.C. Cir. 2000). The language of Section 706(2) supports this conclusion: providing that courts may only set aside agency action that is "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*." 5 U.S.C. § 706(2)(A) (emphasis added). Plaintiffs' Count 2 fails to allege any violations or set forth any provisions of a relevant statute as the basis of such an allegation, and therefore fails to state a claim upon which relief can be granted.

Alternatively, this Court should reject Plaintiffs' flawed arguments under APA Section 706(2)(A) because the record shows that NMFS acted reasonably. Under the narrow "arbitrary and capricious" standard of review, this Court should defer to NMFS's decision, "especially where, as here, the dispute involves technical issues that implicate substantial agency expertise." *Ocean Conservancy*, 394 F. Supp. 2d at 157.

1. The Record Supports NMFS's At-Risk Species List and the Connection Between the Rule's Requirements and IUU Fishing and Seafood Fraud.

The record demonstrates not only a reasoned approach to the establishment of the at-risk species list but also a rational connection between reporting and recordkeeping requirements and

the goal of curbing IUU fishing and seafood fraud. In addition to the numerous public notices described above, the record provides further detail on how the at-risk species list was created. First, the species-specific summaries in NMFS's notices drew on information contained in a matrix developed by the Working Group in considering the "suite of risks" facing each species from the base list. AR 52103-38. Some of the information in the matrix was law enforcement privileged or confidential, however, significant portions of the matrix are not redacted and show the type of data that the Working Group analyzed and then aggregated for the public notices. *See, e.g.*, AR 52126 (section on sharks indicating that "measures to protect shark populations are infrequent," there is no known catch documentation scheme, and the "nature of processing, which reduces [a shark] to primarily fins, makes it difficult to identify by species as it moves through trade and difficult to track"). Second, the record contains numerous public comments on various species that were considered by the Working Group. *See* AR 4005 (sharks and tunas); AR 4297 (crab); AR 4308 (sharks); AR 4436 (shrimp, tunas, blue crab, sharks, snapper).

Plaintiffs also contend that the record does not support the inclusion of Pacific and Atlantic cod, blue crab, or red snapper on the at-risk species list.[16] But the notices regarding the at-risk list, the matrix, and the preamble to the Final Rule offer substantial support for their inclusion.[17] AR 4467, 52106-7, 52118, 6919. For example, the matrix entry for Pacific cod indicated that there is no known catch documentation scheme, the processing is often highly

[16] Plaintiffs address these specific species in Section IV.B.2.d. Pls. Br. at 32. For purposes of clarity, Federal Defendants address those arguments here.

[17] Plaintiffs' reference to the statement of one NMFS employee on blue crab and red snapper, *see id.*, does not make the agency's decision arbitrary or capricious. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007) ("[T]he fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.").

globalized and complex, there was an FDA alert regarding species substitution, and the fish are "aggressively targeted by global IUU fishing operators in northern Pacific waters." AR 52106.

Plaintiffs' reliance on *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Federal Highway Admin.*, 151 F. Supp. 3d 76, 85 (D.D.C. 2015), Pls. Br. at 24, is misplaced because the relevant agency acted *without* going through the notice and comment process.[18] Moreover, the critical number in that case had no support in the record. *United Steel*, 151 F. Supp. 3d at 90. Here, by contrast, the agency explained the process for developing the at-risk list and each species on it. *See supra* Section II.A. Likewise, a NOAA email questioning how the rule would work does not show that NMFS failed to demonstrate a rational connection between the goal and substance of the rule, *see* Pls. Br. at 24-25, because review is "based on the agency's *final* action, and not the views expressed by individual staff at earlier stages of the administrative process." *Ctr. for Biological Diversity v. NMFS*, 977 F. Supp. 2d 55, 75 (D.P.R. 2013) (citing *Nat'l Ass'n of Home Builders*, 551 U.S. at 658-59). The record provides ample explanation for how traceability can combat IUU fishing and seafood fraud. AR 2668 (noting the benefits of "[c]reating an information system that better facilitates data collection, sharing, and analysis among relevant regulators and enforcement authorities"); AR 6916 (noting that the data would improve detection of illegal seafood products, allow for more effective use of limited enforcement resources, and reduce the need for random inspections).

2. NMFS Provided a Reasonable Analysis of the Supply-Side Costs.

During the comment period on the Proposed Rule, NMFS received numerous comments, including from Plaintiff National Fisheries Institute (NFI), AR 6609, about the possibility of

[18] Plaintiffs cite this case for their argument under Section 706(2) yet their parenthetical quotes a part of the District Court's opinion that analyzed the agency's compliance with Section 553.

increased compliance costs, including concerns raised by importers about "the cost of paying harvesters and farmers for traceability data." AR 6917 (Comment 42). In response, NMFS stated, in part, that it "does not agree that harvesters and farmers will be in a position to demand payment for traceability data. . . . There is no indication that the imposition of existing catch documentation systems (*e.g.*, the [European Union] system) resulted in *measurable* increases in the cost of seafood." *Id*. (emphasis added).

Plaintiffs' contentions that this response is inconsistent with other statements or studies are flawed. *See* Pls. Br. at 26-27. Plaintiffs' first and third arguments rely on an alleged discrepancy between this statement and the Blomquist study cited by NMFS in the Final Regulatory Flexibility Analysis (FRFA) required under the Regulatory Flexibility Act (RFA), discussed *infra* in Section III. But that study, which considered whether a sustainability program certified by the Marine Stewardship Council (MSC) would result in a price premium for fish producers, is irrelevant to the compliance costs of this traceability rule.[19] *See* AR 6935. The voluntary MSC-certification program involves an eco-label that signifies product harvested from fisheries deemed sustainable by MSC, while the traceability rule involves the collection of information by the government to trace the origin of seafood. *See id.* Nevertheless, Plaintiffs cite to the Blomquist study's statistic showing a ten percent increase in the *retail* price of seafood, compare it to the less than one percent rise in *compliance* costs discussed in NMFS's FRFA, and write that it is "difficult to fathom what happened to [sic] remaining nine percent." Pls. Br. at 26. But the supposedly unfathomable difference stems from the fact that Plaintiffs both ignore major differences between MSC certification and the traceability rule and fail to distinguish between

[19] The Blomquist study was cited in the FRFA solely for its finding that consumers appear to be willing to pay more for sustainably harvested seafood. NMFS did not suggest that the Final Rule would impose similar costs to the MSC program. AR 6935.

retail and compliance costs. Plaintiffs' reference to case law on a Health and Human Services (HHS) rule to support their argument about the Blomquist study is inapt. *See id.* at 27. For example, one those cases involved a study that was the primary basis for the HHS rule; the court remanded the rule because the agency failed to consider a key distinction in the study. *See Bedford Cty. Mem. Hosp. v. HHS*, 769 F.2d 1017, 1021-22 (4th Cir. 1985). The Blomquist study, on the other hand, was not the primary basis for this Final Rule. Nor was there a discrepancy that would undermine the rule's rationale. Finally, the Blomquist study concluded there was no rise in price premiums at the producer level. *See* AR 6935.

Plaintiffs' second argument is based on a quote that is taken out of context. *See* Pls. Br. at 26. When NMFS disagreed with the comment about harvesters and farmers demanding payment for data, it stated that the EU's catch documentation system did not result in "*measurable* increases in the cost of seafood." AR 6917 (emphasis added). NMFS explained further that the harvest data required by the EU program aligns very closely with the harvest data required by the Final Rule. *Id.* NMFS acknowledged "that some businesses and some countries do not currently export to the EU" and could face additional compliance costs, which "may be either passed through to U.S. consumers or result in a decline in exports to the U.S." AR 6918. However, "[t]here are few affected countries not currently exporting the designated priority species to the E.U. market, suggesting compliance with the U.S. requirements would not pose an *inordinate* burden on U.S. importers or consumers given the relatively small volume of trade involved" and there were "not significant effects on *supply* to the EU seafood market in response to the EU's IUU regulation." *Id.* (emphasis added.) When read in full, this response indicated that the costs would not be significant, and it should not be read as inconsistent simply because the agency recognized that those supply-side costs might ultimately affect consumer prices. *See Nat'l Envtl.*

Dev. v. EPA, 686 F.3d 803, 811 (D.C. Cir. 2012) ("The quotations selected by [plaintiffs], however, only support [plaintiffs'] arguments when taken out of their original context.").

3. The Record Evidence Demonstrates that NMFS Acted Reasonably When It Considered Seafood Fraud.

The record likewise supports NMFS's reliance on verifiable data of seafood fraud in assessing the history of misrepresentation or mislabeling of potential priority species. Such verifiable data included information from CBP, FDA, and NOAA databases, published reports, data gathered by RFMOs to which the United States is a member and whose data is developed and reviewed with active U.S. government participation, the knowledge of subject matter experts, and public comments. AR 3971, 289, 7730-31, 9688, 25205. This data was used to populate the matrix and the data was summarized for each listed species in both the August and October 2015 FR notices identifying the at-risk species. AR 52103-38, 3972-73, 4467-68.

Plaintiffs attempt to dispute this evidence on seafood fraud by quoting from a handful of NOAA emails. Pls. Br. at 28-29. But these internal communications do not bear the weight that Plaintiffs put on them. For example, Plaintiffs rely on statements made by one NOAA employee about the difficulty in providing information at the species level. *Id.* (citing AR 23942-43). Yet Plaintiffs ignore the fact that despite the difficulty, the employee produced a list, by species. AR 71998, 71998-00001. Plaintiffs' reliance on emails from NOAA employees about tracking seafood fraud is also misplaced. *See* Pls. Br. at 28-29 (citing AR 32017-19). The quoted email chain was limited to NMFS's SIP offices and cannot be read to suggest that NMFS or NOAA as a whole lacked evidence regarding fraud, as Plaintiffs imply.[20] These internal communications

[20] Plaintiffs rely on an extra-record report regarding FDA's DNA testing of 11 individual cod during the summer of 2012. Pls. Br. at 29. But Plaintiffs failed to move this Court to consider the document. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (noting that plaintiff "did not even move to supplement the record."). Nor did they show how it meets one of the extra-record

are slender reeds on which to rest an argument about a lack of data, especially where, as here, there is other evidence to the contrary.[21]

Plaintiffs have failed to meet their burden of showing that NMFS committed "clear error in judgment" in its consideration of the risks posed by seafood fraud to at-risk species.

4. NMFS Provided a Reasonable Analysis of the Paperwork Costs.

This Court should reject Plaintiffs' request to vacate the Final Rule based on allegations that NMFS "misreported" data collected pursuant to the Paperwork Reduction Act (PRA). Pls. Br. at 30.[22] The PRA does not provide a private right of action, and Plaintiffs cannot subvert that bar on judicial review through the APA.

Congress enacted the PRA to "control the amount of paperwork the federal government can require of private businesses, educational institutions, federal contractors, state and local governments and individuals." *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F. Supp. 3d 160, 170 (D.D.C. 2014) (citing 44 U.S.C. § 3501(1)). The PRA prohibits an agency from sponsoring the "collection of information" unless it has conducted notice and comment rulemaking, submitted a certification to the Office of Management and Budget (OMB), and received approval from OMB. 44 U.S.C. § 3507(a)-(c). Section 3512 of the PRA provides that "no person shall be subject to any penalty for failing to comply with a collection of information"

---

exceptions to the record rule. *See id.* The report and any reference to it should therefore be stricken. Moreover, the report is based on a very small sample size and is outweighed by the other information on cod that was available to NMFS. *See* AR 6919, 52106. To the extent that Plaintiffs allege that NMFS failed to consider DNA testing as a less costly alternative, this argument is flawed. *See infra* at 38.

[21] Plaintiffs' footnote characterizing NMFS's proposed response to concerns raised by an Atlantic cod producing nation, Pls. Br. at 29, n.7, misreads the email. The NOC Committee and NMFS stated repeatedly that seafood fraud can occur at multiple points along the seafood supply chain, from the point of harvest or production to the point of entry into U.S. commerce.

[22] Plaintiffs did not raise this allegation in their Complaint and cannot amend their Complaint in a brief. *See Hodges v. Gov't of District of Columbia*, 975 F. Supp. 2d 33, 57 (D.D.C. 2013).

if certain conditions are met and that "[t]he protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." *Id.* § 3512 (a)-(b).

"Those federal courts that have addressed the PRA have confirmed what the plain language of the statute already makes clear: the PRA may be raised as a *defense* to an agency action, but *does not create* a private cause of action." *Alegent*, 34 F. Supp. 3d at 170 (citing *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999); *Tozzi v. EPA*, 148 F. Supp. 2d 35, 43 (D.D.C. 2001)). Plaintiffs are impermissibly attempting to use the PRA as "a sword to persuade the Court to find the Secretary in violation of the PRA." *Id.* at 170. Plaintiffs cannot rescue their PRA claims by suggesting that the APA waives sovereign immunity because the APA's waiver of sovereign immunity does not apply where a statute explicitly precludes judicial review, as is the case here. 5 U.S.C. § 701(a)(1); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Moreover, NMFS's submission of the certification to OMB does not constitute final agency action. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

In any event, NMFS satisfied the requirements of the PRA. AR 4487-88, 6927-28, 20980-91. Plaintiffs' suggestion that the agency hid conflicting data is unavailing because the numbers contained in the two submissions to OMB (AR 20977 and AR 19126) reflect the adjustments that NMFS made to the paperwork cost estimates based on comments and information gathered throughout the rulemaking process, including Plaintiff NFI's suggestion for costs associated with paperwork. *See* AR 6927-28.

5. The Record Evidence Demonstrates that NMFS Acted Reasonably When It Considered Aquaculture.

The record also supports NMFS's decision to consider aquaculture. Indeed, Plaintiffs appear to concede that there exists the opportunity for illegal activity surrounding aquaculture

facilities. Pls. Br. at 31. Plaintiffs nevertheless contend that no evidence is presented showing that "seafood raised through aquaculture are *as at risk* for mislabeling as seafood caught in the wild." *Id.* (emphasis added). As an initial matter, Plaintiffs provide no explanation for why the risk level for aquaculture species would need to be the same as it is for wild caught species. Moreover, the record provides evidence of the risks for product misrepresentation in fish grown in aquaculture facilities. AR 2963-65, 2966-3013, 4000-03, 4438, 6909. Plaintiffs also misconstrue the language from the Final Rule preamble about compliance costs. *See* Pls. Br. at 31-32. In response to Comment 42 regarding the possibility that harvesters and farmers would increase supply-side costs to importers, NMFS disagreed, and as part of its explanation, referred to the lack of measurable supply-side costs in "existing *catch* documentation systems (e.g., the EU system)." AR 6917 (emphasis added). Catch documentation systems govern wild caught fish, and thus NMFS did not suggest that this evidence applied to aquaculture.

6. The Compliance Date is Reasonable.

NMFS reasonably chose a compliance date 12 months from the date of the Final Rule after seeking and receiving comments. AR 6907. NMFS sought public comment on the compliance date – *i.e.*, the date on which importers of record would be required to begin entering data into the ACE portal and initiating recordkeeping – in the Proposed Rule. AR 4485. NMFS ultimately decided on a compliance date of January 1, 2018, which is one year and three weeks after the Final Rule was signed.

Plaintiffs' assertions that NMFS "intentionally ignored" information about the impacts, namely the costs, of the compliance date are without merit.[23] Pls. Br. at 32-33. Plaintiffs present

[23] Plaintiffs also make arguments about the compliance date as part of their RFA claim. Those arguments are addressed below. *See infra* at 37.

only general statements about "large quantities of seafood" that were caught domestically, exported before the Final Rule was issued, and will not reenter the United States until after the compliance date. *Id*. at 33. But in fact, any priority species that was caught domestically and then re-imported is subject to existing reporting and recordkeeping requirements for domestic fisheries, and thus the data would already be collected. AR 24745. Therefore, the rule was not "effectively retroactive." *See* Pls. Br. at 33. Moreover, the fact that an individual within NOAA expressed a different approach to the compliance date in an email, but the agency ultimately made a different determination, does not mean that the compliance date is unreasonable. Judicial review is based on the agency's final action, and not on the "various statements" made by individual staff. *Nat'l Ass'n of Home Builders*, 551 U.S. at 658-59. Plaintiffs' contention about this particular email also ignores the countervailing consideration that "[e]xporters may push to export 'undocumented' inventory prior to the effective date of the seafood traceability program," which was mentioned in the response to the email. AR 20256.[24]

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

A review of the FRFA and the administrative record demonstrates that NMFS complied with the "purely procedural" requirements of the RFA. *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). Even if the Court were to scrutinize the substantive conclusions of the FRFA, NMFS's consideration of costs and significant alternatives in the FRFA was not arbitrary or capricious.

[24] Plaintiffs contend, incorrectly, that NMFS has failed to meet its commitment to provide compliance guidance and a plain language description. Pls. Br. at 33. NMFS published a compliance guide, a fact sheet, a webinar presentation, and a press release on the Final Rule. These are available at: http://www.iuugishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx (last visited May 8, 2017). Although these materials are post-decisional, and therefore outside the scope of the record, Federal Defendants request that the Court take judicial notice of them.

The RFA requires federal agencies to consider potential impacts of their rules on small entities, including small businesses and organizations. 5 U.S.C. § 601(3), (6). Under the RFA, an agency promulgating a rule that will have a "significant impact" on "small entities" must "prepare and make available for public comment an initial regulatory flexibility analysis . . . [that] describe[s] the impact of the proposed rule" on those entities and publish a "final regulatory analysis" with the final rule. *Id.* §§ 605, 603, 604. The RFA states that "an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." *Id.* § 607. Congress limited judicial review to claims regarding "agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610. . . ." *Id.* § 611(a)(1); *see also id.* § 611(c).[25] The RFA provides that reviewable claims must be evaluated in accordance with the APA's arbitrary and capricious standard. *Id.* § 611(a)(1), (2).

In applying this deferential standard of review, courts must keep in mind that the RFA "does not require rules that are less burdensome for small businesses," it merely requires agencies to consider a rule's costs, benefits, and alternatives. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 226 (D.C. Cir. 2015). Indeed, the statute "requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate.'" *U.S. Cellular Corp.*, 254 F.3d at 88 (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)) (alteration in original). "So long as the procedural requirements of

[25] The judicial review provision does not authorize review of section 603, which sets out the requirements for an IRFA. Therefore, Plaintiffs' allegation that the IRFA was deficient is not reviewable. *U.S. Cellular Corp.*, 254 F.3d at 89. Even if it were reviewable, the RFA states that "[t]he [IRFA] *or a summary* shall be published in the Federal Register." 5 U.S.C. § 603(a) (emphasis added). In full compliance with Section 603, a summary of the IRFA was published in the Federal Register as part of the Proposed Rule and a full version of the IRFA was available to the public upon request. AR 4487.

the [RFA] are met," the Court's "review is 'highly deferential' as to the substance of the analysis, particularly where an agency is predicting the likely economic effects of a rule." *Council for Urological Interests*, 790 F.3d at 227 (quoting *Helicopter Ass'n Int'l, Inc. v. F.A.A.*, 722 F.3d 430, 438 (D.C. Cir. 2013)).

Here, the FRFA easily meets this deferential standard because it addressed each of the applicable procedural requirements of the RFA. *See* AR 6947-48 ("a statement of the need for, and objectives of, the rule," per Section 604(a)(1)); AR 6948-51 (a statement of the significant issues raised by public comments and comments from the Chief Counsel for Advocacy of the Small Business Administration, per Section 604(a)(2) and (3)); AR 6951-52 ("a description of and an estimate of the number of small entities to which the rule will apply," per Section 604(a)(4)); AR 6952-53 ("a description of the projected reporting, recordkeeping and other compliance requirements of the rule," per Section 604(a)(5)); AR 6953-54 (a description of the steps NMFS took to minimize the significant economic impact on small entities, including a statement of the reasons for selecting the alternative adopted in the Final Rule per Section 604(a)(6)). NMFS's "analysis in essence tracks subsection-by-subsection what Congress by statute required an agency to provide in a FRFA." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 96.

Plaintiffs cite only three cases to support their claim (Count 5) that the RFA analysis was deficient, Pls. Br. at 35-36, but in each case the agency entirely failed to address at least one of the topics required by the RFA. *See Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161, 177-78 (D.C. Cir. 2007) (rejecting an agency's determination that no RFA analysis was required); *N.C. Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998) (same); *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1434 (M.D. Fla. 1998) (finding that a cursory FRFA which failed to address public comments lacked "procedural or rational

compliance with the requirements of the RFA"). In contrast, NMFS addressed each RFA requirement in its FRFA, making a good-faith effort to comply with the RFA.

A. NMFS Adequately Described the Projected Reporting, Recordkeeping, and Other Compliance Costs of the Rule.

The Court should decline Plaintiffs' request to ignore the purely procedural nature of the RFA and adopt Plaintiffs' flawed analysis of the Final Rule's potential costs over the expert agency's economic projections. Pls. Br. at 35. *See Council for Urological Interests*, 790 F.3d at 227 (requiring courts to be highly deferential "where an agency is predicting the likely economic effects of a rule"). Plaintiffs' argument that NMFS should have calculated the costs of the Proposed Rule by multiplying the cost for a fishery to comply with the MSC certification program, as estimated in the Blomquist study, by the number of importers and entry filers subject to the Final Rule is unreasonable given that the MSC certification program is a sustainable labeling scheme that often requires substantive changes in how a fishery operates, as opposed to merely requiring reporting and recordkeeping on existing practices. Plus, the MSC certification costs cited in Blomquist were calculated at the fishery level, not at the level of individual importers. Therefore, even if those costs were applicable, they should not be multiplied by 2,600 (2,000 importers plus 600 entry filers), as Plaintiffs suggest, but by the much smaller number of *fisheries* affected by the Final Rule.[26]

In contrast to Plaintiffs' haphazard calculation, the FRFA offered reasonable estimates of the costs of compliance with the Final Rule. The FRFA explains that importers will face costs associated with acquiring an IFTP, buying or developing software, entering data, and recordkeeping, as well as other incremental costs. AR 6952. NMFS undertook two separate

[26] Plaintiffs also ignore the fact that entry filers are hired by importers to enter data on their behalf. The entry filers are not separate importers who must gather and maintain data.

quantitative estimates of compliance costs to importers – one of which utilized the methodology suggested by Plaintiff NFI in its comments to the Proposed Rule. AR 6952, 6962-65. The FRFA concluded that the Final Rule would impose costs on importers of $7.9 million to $20.3 million in the first year (setting the upper bound limit based on NFI's estimate), and $6 million to $18.5 million annually after that. AR 6952. This reasonable estimate of costs fulfilled NMFS's obligation under Section 604(a)(5). *See Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) ("Although the FCC's explanation of implementation costs was not elaborate, we find its consideration of those costs reasonable and reasonably explained in light of the record in this case."); *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 96 ("The RFA does not mandate 'mathematical exactitude.'") (quotation omitted).

Plaintiffs' next assertion that NMFS's cost calculation ignored the potential costs to non-importers generally and processors in particular is similarly flawed.[27] Pls. Br. at 36-37. The RFA requires the agency to consider only direct costs to regulated small entities, not indirect effects. 5 U.S.C. § 604(a)(4) (requiring agency to estimate "the number of small entities *to which the rule will apply*") (emphasis added). The D.C. Circuit "has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (collecting cases). For instance, in *Cement Kiln Recycling Coalition*, the D.C. Circuit held that hazardous waste generators were not direct "targets" of a regulation setting emission standards for hazardous waste combustors,

[27] Here, Plaintiffs cite to the Declaration of John P. Connelly, which they attached to their brief. Pls. Br. at 37. This Declaration and any reference to it should be stricken because it is extra-record evidence and Plaintiffs have neither moved this Court to consider it nor shown how it meets one of the extra-record exceptions to the record rule. *See CTS Corp. v. EPA*, 759 F.3d at 64. And indeed, any extra-record evidence that is cited to in support of Plaintiffs' merits arguments should be stricken for the same reasons.

even though the regulation would almost certainly raise the cost of hazardous waste incineration. *Id.* Here, the regulated entities are importers, and thus NMFS had no obligation under the RFA to address the costs to processors, restaurants, or grocery stores.

In any event, the FRFA and Regulatory Impact Review (RIR) did describe additional incremental costs to processors and other actors in the supply chain, addressing their potential need to "develop[] interoperable systems to ensure that the data are transmitted along with the product" and store data to fulfill recordkeeping requirements. AR 6936, 6950-51. Moreover, processors may not face significant new costs. *See* AR 3130 (processors "may already be required to trace their products through some portion of the supply chain" or choose to do so as a business practice to ensure quality control or aid in the event of a recall). AR 3157. Additionally, the Final Rule will not require processors to segregate seafood products by harvest event or otherwise change their current practices of co-mingling products. AR 6908-09; 6913.

Lastly, Plaintiffs argue that NMFS's cost calculation ignored the alleged cost of the loss of fish harvested and exported before the Final Rule was published on December 9, 2016, but re-imported after January 1, 2018. Pls. Br. at 34. However, NMFS explained that these costs were not likely to be significant because data for several of the priority species indicated that most U.S. imports occur within a few months of the harvest event. AR 6915.

B. NMFS Reasonably Considered Viable Alternatives in the FRFA.

The FRFA also complies with the RFA because it explained the "legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6); AR 6953-54. The FRFA addressed three significant alternatives, starting with the option of taking "no action." AR 6954. NMFS rightfully rejected this alternative

since it was not "consistent with the stated objectives of applicable statutes." 5 U.S.C. § 604(a)(6). The FRFA next addressed two alternatives designed to reduce the number of data points that importers would need to enter into the ITDS. AR 6954. NMFS rejected these options because they would not allow for the searching and collecting of data for audit selection and other purposes and because they would create an unnecessary burden on both the private sector and NMFS. In addition to these rejected alternatives, NMFS considered and adopted several modifications to the Proposed Rule to reduce the impact on small businesses. *See supra* at 8-9.

Plaintiffs' assertion that NMFS's analysis of alternatives was deficient because it failed to address an additional alternative – "developing new or adapting existing technologies to better identify and track IUU fishing," Pls. Br. at 37 – attempts to impose a requirement not contained in the RFA. The RFA does not require agencies to address every possible alternative. Instead, the agency must make a good-faith effort to describe "significant" alternatives. 5 U.S.C. § 604(a)(6). Additionally, "agencies have wide latitude to attack a regulatory problem in phases" or to use multiple tactics to address a single problem. *U.S. Air Tour Ass'n v. F.A.A.*, 298 F.3d 997, 1010 (D.C. Cir. 2002) (quotation omitted). The Task Force determined that the complex problems posed by IUU fishing must be combatted through a multi-step, multi-level process incorporating several different agencies. AR 24805, 24836. Although there are some new technologies that can aid in detecting illegal and fraudulent seafood, these "developing" technologies are not capable of operating on the scale necessary to achieve the goals of the Final Rule. For instance, federal forensic laboratories are able currently to test the DNA of fish in enforcement cases involving illegal importation, including fraudulent labeling, "but have not been able to significantly expand efforts to effectively address the issues of seafood fraud and IUU fishing." AR 24810; *see also* AR 9688 (public comment noting both the potential and challenges to implementing widespread

DNA testing). Plus, DNA testing can only determine the species of the fish, and not where or how it was harvested and whether that harvest was illegal. AR 24810, 32018. Additionally, SeaVision or other vessel tracking programs have potential to aid in the detection of illegal fishing, but cannot reliably provide the information necessary to tie a particular fish shipment entering the United States to data about its location of harvest, vessel, gear type, supply-chain documentation, or other key pieces of information included in the Final Rule. AR 6929-30.[28] NMFS reasonably determined that DNA testing and GPS monitoring were not "significant alternatives" to the Final Rule, and therefore fully complied with RFA Section 604(a)(6).

IV. NMFS Completed a Cost-Benefit Analysis.

The Court lacks subject matter jurisdiction over Plaintiffs' Executive Order (E.O.) 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) claim (Count 6), Pls. Br. at 37, because the E.O. expressly forbids judicial review of its provisions. Indeed, courts in the D.C. Circuit routinely dismiss E.O. 12866 claims on this basis. *E.g.*, *Helicopter Ass'n Int'l*, 722 F.3d at 439; *All. for Natural Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011). This Court should do the same.

To avoid the express ban on judicial review, Plaintiffs assert that this claim arises not under the Executive Order but under the APA for failure to comply with § 305(e) of the MSA, which Plaintiffs claim incorporates E.O. 12866. Pls. Br. at 39. But MSA Section 305(e), 16 U.S.C. § 1855(e), entitled "Effect of certain laws on certain time requirements," does not impose any additional substantive requirements upon the Secretary or create a cause of action for otherwise non-reviewable provisions of the PRA, the RFA, or E.O. 12866. It merely clarifies that

[28] The record supports NMFS's conclusion that DNA testing and tracking technologies face numerous challenges before they can be implemented on a large scale. *See* AR 9688 (comment from Therion International regarding DNA testing); AR 9485 (comment from Technology Services Corp. regarding airborne surveillance); AR 14142 (Department of Homeland Security and Department of Defense report discussing future uses of SeaVision and other tracking tools).

"as they apply to the functions of the Secretary," *id.*, these regulatory requirements should not interfere with the timing provisions in Section 304 of the MSA, 16 U.S.C. 1854(a)–(c). Accordingly, courts have consistently held that claims under E.O. 12866 are not reviewable, even in MSA cases. *See Coastal Conservation Ass'n v. Locke*, No. 2:09-CV-641-FTM-29, 2011 WL 4530631, at *37 (M.D. Fla. Aug. 16, 2011), *report and recommendation adopted sub nom. Coastal Conservation Ass'n v. Blank*, No. 2:09-CV-641-FTM-29, 2011 WL 4530544 (M.D. Fla. Sept. 29, 2011); *Associated Fisheries of Maine, Inc. v. Daley*, 954 F. Supp. 383, 390 (D. Me.), *aff'd,* 127 F.3d 104 (1st Cir. 1997). In *Associated Fisheries of Maine*, the court explained that "section [305(e)] addresses only timeliness issues" and was "designed to eliminate the ability of an agency to argue that the need to comply with laws like the Executive Order allows it to delay compliance with the Magnuson Act requirements." 954 F. Supp. at 390.[29]

Even if the Court had jurisdiction to consider this claim, NMFS's compliance with E.O. 12866 was not arbitrary or capricious. E.O. 12866 states that "costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." E.O. 12866 §1(a); *see also id.* § 1(6). E.O. 12866 does not require agencies to develop a "mathematical model" for indeterminable benefits and costs. *See* Pls.Br. at 38. Here, NMFS completed a thorough and reasonable cost-benefit analysis, both in its draft RIR, AR 4498-4506, and its final RIR completed for the Final Rule, AR 6931-46.

Contrary to Plaintiffs' assertions, the final RIR did explain "the impact that its reporting rule would have on deterring IUU fishing." Pls. Br. 38. The final RIR states that the Final Rule

[29] The Court concluded that E.O. 12291, the precursor to E.O. 12866, was not subject to judicial review by virtue of MSA Section 305(e).

would "enable the U.S. to exclude unlawfully acquired seafood products from the U.S. market," which "will reduce the incentive (profitability) of IUU fishing, thus diminishing its prevalence in, and impact on, global fisheries." AR 6935. The 16-page final RIR further explains that reducing IUU fishing would benefit law-abiding fishermen, ensure the sustainable use of fish stocks, enhance food security, and support the long-term economic livelihood of dependent populations. AR 6935, 6946. Many of these benefits cannot be usefully estimated in monetary terms, and therefore were described qualitatively, as E.O. 12866 allows.[30]

The final RIR also assessed the costs of compliance with the rule, incorporating feedback from public comments – including comments from Plaintiff NFI. AR 6940-44. Again, as allowed by E.O. 12866, some of the costs were assessed qualitatively because quantification was not available or useful. AR 6938. Like the FRFA, the RIR considered data entry, permitting, and data storage costs to importers, as well as "[i]ncremental costs to the supply chain." AR 6936.

For all of the above reasons, Plaintiffs' claim related to E.O. 12866 should be rejected.

V. NMFS Acted Properly when the Deputy Assistant Administrator Signed the Seafood Traceability Rule.

The Final Rule was properly issued by the Assistant Administrator for Fisheries, who serves as the head of NMFS and signed for publication by NMFS's Deputy Assistant Administrator for Regulatory Programs (DAARP). The MSA explicitly gives the Secretary authority to delegate his powers under the Act. The statute defines the term "Secretary" to mean "the Secretary of Commerce *or his designee*." 16 U.S.C. § 1802(39) (emphasis added). The

[30] When possible, NMFS included quantifiable information. For instance, the RIR notes that global economic losses due to IUU fishing ranges from $10 billion to $23 billion annually. AR 6934 (noting that because illegal fishing is often unreported and undetected, it is difficult to estimate). The RIR also cites one study estimating that between 20% and 32% ($1.3-2.1 billion) of wild-caught seafood imports into the U.S. are illegal, indicating that the Final Rule could remove billions of dollars' worth of illegal products from the U.S. market. AR 6935.

MSA further provides that "[t]he Secretary"—or his designee—"may promulgate such regulations . . . as may be necessary . . . to carry out any other provision of this chapter." *Id.* § 1855(d). The statute and its accompanying regulations do not put any limitations on who this "designee" may be or forbid sub-delegations.[31] Based on the explicit terms of the statute, the Secretary was authorized by Congress to delegate the authority necessary to promulgate and publish the Final Rule.

Exercising this power to assign a designee, the Secretary properly delegated his authority to sign the Final Rule to the DAARP. In Departmental Organizational Order 10-15 (DOO 10-15), the Secretary delegated "the functions prescribed in the [MSA]" including "issuing implementing or emergency regulations, under Sections 304 and 305 of the Act,"[32] to the Under Secretary of Commerce for Oceans and Atmosphere, who serves as the Administrator for NOAA (NOAA Administrator). DOO 10-15 §3.01(aa)(4) (Dec. 12, 2011), http://osec.doc.gov/opog/dmp/doos/doo10_15.html (last visited May 8, 2017). In DOO 10-15, the Secretary explicitly provided that the NOAA Administrator may further "delegate his/her authority . . . to any employee of NOAA" subject to conditions prescribed by the Administrator or DOO 10-15. DOO 10-15 §3.05. In accordance with DOO 10-15, the NOAA Administrator subsequently delegated authority for the issuance of regulations pursuant to the MSA and the "administrative" duty of "signature of material for publication in the Federal Register and the Code of Federal

[31] Nor does the MSA specifically limit the Secretary's ability to delegate rulemaking powers, in contrast to other statutes. *See* Clean Air Act, 42 U.S.C. § 7601(a)(1) ("The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.").

[32] Section 305 states that "[t]he Secretary may promulgate such regulations . . . as may be necessary to discharge such responsibility or to carry out any other provision of this chapter." 16 U.S.C. § 1855(d).

Regulations" (CFR) to the Assistant Administrator for Fisheries. NOAA Organizational Handbook, Transmittal No. 61, Part II(A)(1), (C)(26) (Feb. 24, 2015), http://www.corporate services.noaa.gov/ames/delegations_of_authority/ (last visited May 8, 2017). The Assistant Administrator for Fisheries further delegated authority for the signature of material for publication in the Federal Register and the CFR to the DAARP, among others. *Id.* at Part III.

Through this series of delegations, which are all publicly accessible, the Assistant Administrator for Fisheries had authority to issue this rule and the DAARP of NMFS had authority to sign it for publication. *See Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 212, 212 n.4 (D. Mass. 2014) (recognizing that NMFS, as the Secretary's designee, has authority to promulgate certain regulations under the MSA); *Recreational Fishing All., Inc. v. NMFS*, No. 8:11-cv-00705-JSM-AEP, 2012 WL 868880, at *6-*7 (M.D. Fla. Feb. 24, 2012), *report and recommendation adopted*, No. 8:11-CV-705-T-30AEP, 2012 WL 868875 (M.D. Fla. Mar. 14, 2012) (rejecting the plaintiff's argument that the delegation of rulemaking authority from the Secretary to NMFS, pursuant to DOO 10-15 and other NOAA Delegations of Authority, was illegal and inconsistent with the MSA). Thus, Plaintiffs' claim (Count 3) should be rejected.

Finally, the Secretary's delegations of authority do not violate the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. Eileen Sobeck, then the Assistant Administrator for Fisheries, exercised lawfully delegated power to issue the Final Rule as the Secretary's designee. Ms. Sobeck was an "inferior Officer" properly appointed in accordance with the Appointments Clause. Reorganization Plan No. 4 of 1970, 84 Stat. 2090 (1970) (providing that the Assistant Administrator for Fisheries "shall be appointed by the Secretary, subject to

approval of the President").[33] Plaintiffs misconstrue *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976), which explains that the term "Officers of the United States" includes both principal officers, nominated by the President and confirmed by the Senate, and inferior Officers, who may be appointed by the head of a department. Therefore, rulemaking power and other "significant authority" may be exercised by either class of executive "Officer." *Id.*; *Edmond v. United States*, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer."). Further, the signature of material for publication in the Federal Register is a "ministerial task[]" – not a significant exercise of authority – and thus may be performed by an employee regardless of how he or she was appointed. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991). In sum, the DAARP's signature of the Final Rule did not violate the Appointments Clause.

VI. Plaintiffs' Request for Vacatur of the Rule and for a Permanent Injunction Should be Rejected.

Although Federal Defendants do not believe that any remedy is warranted in this case, they submit that a remand to the agency for a reconsideration of its decision would be the only appropriate remedy if Plaintiffs were to succeed on the merits. This remedy would be fully consistent with the normal course of judicial review of agency decisions under the standards set by the APA. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In the event that the Court finds any flaw with the seafood traceability rule, Federal Defendants request supplemental remedy briefing.

[33] The press release cited by Plaintiffs states that the NOAA Administrator appointed Eileen Sobeck, but that was a misstatement. Ms. Sobeck's formal appointment came from the Secretary, as Congress requires.

Further, in the event that the Court determines that the RFA analysis was arbitrary and capricious, the Court should not, as Plaintiffs request, vacate or enjoin the Final Rule in its entirety, Pls. Br. at 40-42, but instead remand the RFA analysis to the agency for reconsideration without vacatur. Courts may order corrective action for RFA violations, "including, but not limited to . . . remanding the rule to the agency, and deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4). The RFA does not contemplate a permanent injunction of a rule, and RFA violations do not typically warrant vacatur of the rule. *Cement Kiln Recycling*, 255 F.3d at 868; *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 73 ("Failure to comply with one or more of the statutory requirements [of the RFA], moreover, does not necessarily mean that the regulation must be invalidated."). Here, the appropriate remedy for any RFA violation would be a remand to the agency for the "limited purpose of conducting the analysis required under [the RFA]." *Aeronautical Repair Station Ass'n, Inc.*, 494 F.3d at 178; *see also U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42-43 (D.C. Cir. 2005).

Additionally, the Court should not defer the enforcement of the Final Rule because "continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4). IUU fishing poses a serious threat of harm to the environment, law-abiding members of the fishing industry, and the public. The Final Rule would take significant steps towards deterring IUU fishing and should move forward, even if procedural errors are found in the RFA analysis.

CONCLUSION

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

Dated: May 9, 2017

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
SETH M. BARSKY
Chief
MEREDITH L. FLAX
Assistant Section Chief

OF COUNSEL:

/s/ Frederick H. Turner
FREDERICK H. TURNER
Trial Attorney
KRISTEN FLOOM
Senior Trial Attorney
DEVON LEA DAMIANO
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0641
Fax: (202) 305-0275
Email: frederick.turner@usdoj.gov

TOM GLEASON
National Oceanic and Atmospheric Administration
Office of General Counsel
Silver Spring, MD

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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.

/s/ Frederick H. Turner
FREDERICK H. TURNER
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0641
Fax: (202) 305-0275
Email: frederick.turner@usdoj.gov

Attorney for Federal Defendants