UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFA INTERNATIONAL SEAFOOD, INC., *et al.*,	)	
Plaintiffs	)	Case No. 1:17-cv-00031-APM
v.	)	
WILBUR ROSS, *et al.*,	)	
Defendants.	)	

COMBINED BRIEF IN RESPONSE TO CROSS-MOTIONS FOR SUMMARY JUDGMENT AND IN REPLY TO RESPONSES TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants have played fast and loose with the Administrative Procedure Act ("APA") and now are forced to "defend the indefensible." *United States v. Faulkenberry*, 614 F. 3d 573, 587 (6th Cir. 2010). First, the government issued a significant rule ("Rule") affecting foreign policy but admits that the employee (defendant Rauch) who issued the Rule lacked delegated authority to do so. Notwithstanding this binding admission, the government does an about face and now argues in its Brief that defendant Sobeck, not Rauch, really issued the Rule in her capacity as an inferior officer, even though she did not sign the Rule. But in a press release, the government acknowledged that Sobeck was appointed by the Acting Under Secretary, meaning that she was not an "inferior office," under the Appointments Clause and therefore ineligible, under the government's interpretation of that Clause, to issue any rule. *See* Exhibit 1, attached. Again, the government does an about face in its brief, arguing, without the benefit of any evidence, declarations or other facts, that its own press release was wrong and that Sobeck was actually appointed by the Secretary.[1] The government also argues that Sobeck, had she been properly appointed, was delegated the authority to issue the Rule. The delegation relied on by the government, though, only applies to a limited set of rules issued under the Magnuson-Stevens Act ("MSA") §§ 303 and 304. This Rule, however, was issued under MSA § 305. The rulemaking delegation therefore did not authorize Sobeck to issue this MSA § 305 Rule, even were she properly appointed. Also, there is nothing in the delegations that authorizes anyone to "re-delegate" rulemaking authority of any kind to Sobeck. When Congress authorizes re-delegation it expressly so states. It did not do so here.

Second, in response to plaintiffs' argument that Commerce lacks statutory authority under the MSA to regulate seafood fraud, the government argues that even though this Rule is designed to combat seafood fraud it does not regulate seafood fraud. This is a distinction

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[1] It should be noted that under the Reorganization Plan that governs Commerce and NOAA, the Assistant Administrator for Fisheries must be appointed by the Secretary with the approval of the President. *See* Reorganization Plan No. 4 of 1970, 84 Stat. 2090 (1970). There is no indication whatsoever that the President approved the appointment.

without meaning as is the government's attempt to argue that seafood fraud is illegal under the laws of various unidentified nations and therefore constitutes "illegal fishing," over which Commerce has jurisdiction. This is not so for three reasons. First, regulation of fraud with respect to imported seafood has been delegated jointly to the Secretaries of Health and Human Services and Treasury and not to the Secretary of Commerce. The MSA contains no express or implied delegation of authority to Commerce to regulate seafood fraud. Second, the Lacey Act uses the same language as MSA § 307(1)(Q) to prohibit the sale of illegally harvested seafood, but goes on to bestow limited jurisdiction to be exercised jointly by Commerce and Interior to regulate seafood fraud. Congress therefore believed that authorizing Commerce to regulate illegal fishing under the Lacey Act was not sufficient to reach seafood fraud. Since the Lacey Act and the MSA use identical language with respect to illegal fishing, the absence of an express delegation for seafood fraud in the latter but not in former strongly suggests that the MSA provides no independent basis for Commerce to regulate seafood fraud. Third, the government argues that multiple agencies can simultaneously regulate the same conduct as long as they do not interfere with one another. The argument's underlying assumption does not hold sway, where, as here, one set of agencies has express authority and another agency has not. Moreover, the conclusion is incorrect: Commerce's regulation of seafood fraud through this Rule necessarily undermines FDA's efforts. Commerce abjured without discussion the gold standard for detecting seafood fraud, namely DNA testing, in favor of an indirect but costly data entry program encapsulated in the Rule. Costs incurred by importers to comply with the Rule undermine their ability to DNA test, which is something that FDA does and favors. Finally, the government argues that this Rule is merely designed to collect information and does not regulate anything. However, an agency can collect information only if it furthers and is within the agency's statutory functions. Here, Congress has not delegated such a function to Commerce under the MSA. Moreover, seafood fraud was hardly a benign parameter: the risk of seafood fraud was one of two factors used by the government to identify the species that would be subject to the Rule.

Third, the Rule violates the fundamental transparency and public participation features of the APA. Common sense suggests and this Circuit's law dictates that central to notice and comment rulemaking is the notion that agencies that undertake voluntary legislative rulemaking must reveal the "unredacted 'technical studies and data that it has employed in reaching [its] decisions.'" *American Radio Relay League, Inc. v. Federal Commc'n Comm'n*, 524 F.3d 227, 240 (D.C. Cir. 2008). Hiding the ball, as was done here, is not only a recipe for a lemon among rules, but also precludes "the opportunity for more extensive public participation in the rulemaking process" as "assure[d]" by the APA. *Small Ref. Lead Phase-Down Task Force v. USEPA*, 705 F. 2d 506, 523 (D.C. Cir. 1983) (internal quotations and citations omitted). The government, relying on the Freedom of Information Act's law enforcement and separate "confidentiality" exemptions, argues that concealing the fundamental data underlying the Rule is permissible. In this Circuit, concealing data on which substantive decision-making was based is inimical to notice and comment rulemaking. The FOIA exemptions do not apply to APA § 4, especially where, as here, the rulemaking was voluntary, and even if the FOIA exemptions did apply, the agency did not justify their applicability in the administrative record. The Rule also lacks any data or other evidence to support other determinations including coverage of seafood harvested through aquaculture and even data identifying seafood subject to seafood fraud. The administrative record reveals that the agency had no data and was seeking data from one grocery chain that declined to provide it. The FDA data, using DNA analysis, did not support Commerce's conclusions and was therefore ignored by the agency.

Finally, the government's cost benefit analysis required by the Regulatory Flexibility Act and Executive Order 12866 was internally inconsistent, and naïve. The agency originally stated that the total annual cost to the $9 billion dollar seafood sector in the United States would be $338,000. Later, in light of public comments, and analyses by OMB and the Small Business Administration, the agency increased its estimated costs to $20 million on the high end. However, the agency also estimated that the Rule could add up to one percent to the cost of

seafood (*see* AR 6963); that translates to $90 million, not $20 million. Moreover, if one relies on the one study relied upon by the agency, those costs sky rocket to $900 million. In short, the agency was so keen on issuing this rule that it was unwilling to assess fully the costs of the Rule or less costly and potentially more efficient alternatives. In an era when public health professionals and the federal government urge Americans to adopt healthier diets by eating more seafood, a rule that increases the prices to consumers by 10% will have the opposite effect.

ARGUMENT

I. The Traceability Rule Was Not Issued By Anyone with Proper Legal Authority

At issue is whether this "significant regulation," which the agency admits has foreign policy implications,[2] was promulgated by an individual with re-delegated authority to do so, and if so, whether that authority was consistent with the agency's organic legislation and the limitations of the Appointments Clause. To support this Rule, the government must show that (1) Defendant Sobeck "issued" the Rule, (2) she had re-delegated authority to do so, (3) the MSA authorizes re-delegations of rulemaking authority down to Sobeck's level, (4) under the Appointments Clause, an inferior officer can issue significant rules, given a proper delegation of authority, and (5) Sobeck was such an inferior officer. To support this Rule, the government must "run the table" by prevailing on all five points. *In re Efron*, 746 F.3d 30, 35 (1st Cir. 2014). This Court can avoid the thorny constitutional issue (point (4)) and even the statutory issue (point (3)) because the government has admitted in its Answer that Rauch, not Sobeck, issued this Rule, and no one has argued that Rauch has re-delegated authority to issue rules. *See* Gov't Ans. at ¶18 (Doc. #21); *Estes v. United States Dep't of Treasury*, No. 17-5015 (D.C. Cir. Appeal docketed Jan. 31, 2017).[3] Therefore, the government falters on the first step through its own admission and the Rule must be vacated.

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[2] *See* Agency's Regulatory Impact Analysis at 15 (AR 6945) ("However, given that the final action described in this RIR raises international trade policy issues, it has been deemed significant under the meaning set forth in E.O. 12866.").

[3] Alaska Bering Sea Crabbers ("ABSC") rely on the district court's decision in *Estes* for the proposition that an Assistant Secretary can, consistent with the Appointments Clause, issue a

Even if Sobeck had issued this Rule, it does not matter. As it now stands, neither Sobeck nor Rauch was re-delegated authority to issue rules under MSA § 305. But even if Sobeck had received that authority, she was not appointed by the Secretary and was therefore not an "inferior officer." Since she was not an inferior officer, she had no authority, under any reading of the Appointments Clause, to issue the Rule. But even if she were an inferior officer who been re-delegated rulemaking authority, she could not exercise that authority constitutionally. Only those appointed by the President with the advice and consent of the Senate can issue legislative rules.

A. Sobeck Was Never Re-Delegated Authority to Issue Rules Under MSA § 305 and Did Not Issue this Rule.

1. Under NOAA's Organizational Handbook, Sobeck Had No Delegated Authority to Issue Rules Under MSA § 305.

Both the final and proposed rules were signed exclusively by Samuel Rauch, III, the Deputy Assistant Administrator of NOAA. The government implies that the Rule was really issued by the Assistant Administrator of NOAA, Ms. Sobeck, and that signing the regulation for publication in the Federal Register was a ministerial task that could be performed by anyone. To support its claim, the government relies on two sets of delegations, neither of which is published in the Federal Register.[4] The first set involves delegations by the Secretary to the NOAA Administrator and in particular, an order that delegates the Secretary's rulemaking authorities under the MSA to the Under Secretary of Commerce and Administrator of NOAA. The second is a set of internal delegations within NOAA. Under that set, the NOAA Administrator delegated certain of her responsibilities to her employees, including, according to the

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rule. *See* Intervenor-Defendant Alaska Bering Sea Crabbers' Cross-Motion for Summary Judgment ("ABSC Br.") at 16-17. The matter is on appeal, a fact not mentioned by intervenor.

[4] The government stated in its Response that "[t]he Final Rule was properly issued by the Assistant Administrator for Fisheries . . . ." Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment ("Gov't Br.") at 41.

government, "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 Regulations' (CFR) to the Assistant Administrator for Fisheries." Gov't Br. at 41-42 (quoting NOAA Organizational Handbook, Transmittal No. 61, Part II(A)(1), (C)(26) (Feb. 24, 2015)), attached as Exhibit 2. The Assistant Administrator re-delegated to the Deputy Assistant Administrator the "[s]ignature of material for publication in the Federal Register and the Code of Federal Regulations." The Assistant Administrator (Sobeck), though, did not re-delegate to the Deputy Assistant Administrator (Rauch) her re-delegated authority to issue certain rules. Assuming that these delegations are consistent with the statute and the Appointments Clause, which they are not, they leave a gap; this Rule falls into that gap.

The full text of the delegation limits the Assistant Administrator's rulemaking authority to MSA §§ 303 and 304, neither of which is applicable here:

> The Under Secretary/Administrator redelegates to the Assistant Administrator for Fisheries, with noted conditions and reservations, the authority to perform functions relating to:
>
> …
>
> C. Management of Living Marine Resources …
>
> 26. The Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882, with the following functions:
>
> a. The Under Secretary must be advised before final action is taken with respect to the following functions: …
>
> iv. Approving, disapproving, partially disapproving, or issuing a fishery management plan or amendment, or issuing implementing or emergency regulations, if the Assistant Administrator considers the action to be controversial (1853 and 1854).

NOAA Organizational Handbook at Part II (C)(26). Here, though, the NOAA Administrator re-delegated limited authorities to issue rules only under 16 U.S.C. §§ 1853 and 1854 (MSA §§ 303 and 304); she did not re-delegate the Secretary's general rulemaking authority under MSA §

305(d), 16 U.S.C. § 1855(d), to the Assistant Administrator, nor could she for constitutional reasons.

Yet, according to the government, this Rule was issued pursuant to the Secretary's general MSA rulemaking authority at § 1855(d), *see* Gov't Br. at 3-4, and not under the more limited authorities at §§ 1853 and 1854. *See United States v. Mead Corp*., 533 U.S. 218, 231-32 (2001) (recognizing that Congress can and has delegated limited rulemaking authorities to non-independent agencies within departments). Indeed, neither section 1853 nor section 1854 is mentioned in the Final Rule. The only authority relevant here that was re-delegated to Sobeck was the authority to sign the Rule for publication in the Federal Register, an act which she did not perform.

Even if Sobeck possessed re-delegated authority to issue this Rule, it appears that she did not exercise that authority. The delegation to the Assistant Administrator was for approving, issuing and signing rules under MSA §§ 303 & 304. On July 20, 2016, Ms. Sobeck formally approved a traceability rule (*i.e.*, a rule and its preamble). However, the rule and preamble that she approved was not the same rule and preamble that was published as the Final Rule in the Federal Register on December 9, 2016. There are numerous and substantial differences between the two versions, both in the preamble and the actual rule. *Compare* AR 21027-21104 (July 20, 2016 version of Final Rule) *with* AR 6907-6930 (Dec. 9, 2016 version of the Final Rule). Nowhere in the administrative record is any Sobeck approval for or issuance of the Final Rule, as published on December 9, 2016.

Moreover, the Complaint alleged that "Samuel D. Rauch III is the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service and the individual who signed and issued the Rule." Compl. at ¶ 18 (emphasis supplied). In its Answer, the government admitted that Rauch signed the Rule, but did not deny that he also issued the Rule. *See* Gov't Ans. at ¶ 18.[5] Under the Federal Rules of Civil Procedure, "[a]n allegation—other

[5] The government's Answer states: "In response to the allegations in the first sentence of Paragraph 18, Defendants admit that Samuel D. Rauch III is the NOAA Fisheries Deputy

than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied." Fed. R. Civ. P. 8(b)(6). *See Scholl v. Scholl*, 152 F.2d 672, 674 (D.C. Cir. 1945) (where the complaint "pleaded in respect to the ownership of the house, its occupancy and plaintiff's ownership and defendant's removal of the furniture" and the answer responded to averments respecting the house and its occupancy but neither admitted nor denied averments concerning furniture, averments concerning furniture were considered to be admitted); *Cutino v. Nightlife Media, Inc*., 575 Fed. Appx. 888, 891 (Fed. Cir. 2014) (where a Notice of Opposition alleged that Cutino was the owner of a trademark and corresponding registration, and the trademark Applicant admitted Cutino's ownership of the mark but did not deny ownership of the registration, Cutino's claimed ownership of the registration was deemed admitted); *Hall v. Aetna Cas. & Sur. Co*., 617 F.2d 1108, 1111 (5th Cir. 1980) (where the complaint alleged the existence and coverage of Aetna's insurance policy and Aetna "denied only that the claimed negligence was the proximate cause of plaintiffs' injuries," the issue of the existence and coverage was considered admitted); *Hodgson v. Humphries*, 454 F.2d 1279, 1281 (10th Cir. 1972) ("The Secretary's Complaint alleged coverage under the Act and continual violation of its minimum wage, overtime, and recordkeeping provisions. Coverage was not denied in the Answer and was appropriately admitted in the court's pretrial order.") (citations omitted).

Based on this admission, it was Rauch, not Sobeck, who issued this Rule. Yet the authority to issue rules of any sort was never re-delegated by Sobeck to Rauch. In short, based on the materials provided by the government, no one with delegated authority actually issued the Rule: Sobeck only had authority to sign, not issue, but she did neither; Rauch only had authority to sign the rule, not issue it, but he did both.

Assistant Administrator for Regulatory Programs, and that he signed the Final Rule in his official capacity."

2. NOAA Delegations Were Organizational Rules that Were Never Published, As Required, in the Federal Register

Within constitutional and statutory limits, agencies have broad discretion to delegate authority within their hierarchies. The public, though, has the right to know who has been authorized to make decisions and therefore, the right to know when authority is being delegated downward. Issuances that channel duties through delegations of authority are "rules," and as such, must be published in the Federal Register. *See* 5 U.S.C. §§ 301, 552(a)(1).[6] NOAA's internal delegations have never been published or even noticed in the Federal Register. A Rule that has been putatively issued pursuant to unpublished delegations is less than a model of transparency and is inconsistent with federal law.

B. The MSA Does Not Authorize Re-Delegation of Core Authorities

The Secretary of Commerce is authorized to issue rules to implement the MSA. *See* MSA § 305(d). The MSA defines "Secretary" to mean "Secretary of Commerce or his [or her] designee." 16 U.S.C. § 1802(39). The Secretary may therefore properly delegate rulemaking authority to the Administrator of NOAA, another Officer within the Department. However, nothing in the MSA or the Department's organic legislation authorizes the NOAA Administrator to re-delegate that rulemaking authority. In response, the government argues that "[t]he statute and its accompanying regulations do not . . . forbid sub-delegations." Gov't Br. at 42. The government's position that the authority to re-delegate is somehow automatic collides with two fundamental precepts: (1) agency personnel may only perform functions that Congress has authorized them to perform; and (2) words in a statute are not to be viewed as mere surplusage. Thus, in keeping with the first precept, the Secretary and the other officers within the Department can only perform those functions that have been authorized by Congress. *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 488 (2001) (Stevens, Souter, JJ., concurring).

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[6] Section 301 provides as follows: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301.

Re-delegation has not been one of those functions. More than fifty federal statutes expressly authorize re-delegation; the MSA is not one of those statutes. If re-delegation were automatic, as the government and intervenor appear to suggest, then the re-delegation provisions in those many statutes would be pure surplusage.

Not only is the power to re-delegate not automatic, but the MSA impliedly forecloses it. Generally, statutes that contemplate re-delegation of authority say so expressly. *See e.g.*, 39 U.S.C.A. § 402 (West) ("Board may delegate the authority vested in it to the Postmaster General under such terms, conditions, and limitations, including the power of redelegation, as it deems desirable."); 20 U.S.C.A. § 3472 (West) ("the Secretary may delegate any function to such officers and employees of the Department as the Secretary may designate, and may authorize such successive redelegations of such functions within the Department as may be necessary or appropriate."); 15 U.S.C.A. § 3364 (West) ("The President may delegate all or any portion of the authority granted to him under section 3361, 3362, 3363 of this title, or this section to such Federal officers or agencies as he determines appropriate, and may authorize such redelegation as may be appropriate."); 6 U.S.C.A. § 455 (West) ("Unless otherwise provided in the delegation or by law, any function delegated under this chapter may be redelegated to any subordinate."); 38 U.S.C.A. § 512 (West) ("the Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions"); 22 U.S.C.A. § 2603 (West) ("If the President shall so specify, any individual so designated under this section is authorized to redelegate to any of his subordinates any functions authorized to be performed by him under this section"); 26 U.S.C.A. § 7701 (West) ("when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context"); 22 U.S.C.A. § 2381 (West) ("The head of any such agency or such officer may from time to time promulgate such rules and regulations as may be necessary to carry out such functions, and may delegate authority to perform any such functions, including, if he shall so specify, the authority

successively to redelegate any of such functions to any of his subordinates"); 29 U.S.C.A. § 551 note (West) ("For transfer of functions of other officers, employees, and agencies of the Department of Labor, with certain exceptions, to the Secretary of Labor, with power to redelegate" (by Reorg. Plan. No. 6 of 1950)); 31 U.S.C.A. § 3343 (West) ("Secretary [of the Treasury] may delegate duties and powers of the Secretary under this section to the head of an agency. Consistent with a delegation from the Secretary under this subsection, the head of an agency may redelegate those duties and powers to officers or employees of the agency.").

"The absence of [a provision authorizing redelegation] is significant, as Congress knows how to" draft such a provision as shown by the above statutes. *Elonis v. United States*, 575 U.S.__, 135 S. Ct. 2001, 2023 (2015). It just chose not to do so with respect to the MSA. "Where Congress knows how to say something but chooses not to, its silence is controlling." *Animal Legal Defense Fund v. United States Dept. of Agric*., 789 F. 3d 1206, 1217 (11th Cir. 2015) (internal citations omitted). To argue otherwise requires one to treat the phrase "authorize redelegation" or its variants as mere surplusage. *See Lowe v. SEC,* 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("In construing a statute we are obligated to give effect, if possible, to every word Congress used."); *Babbitt v. Sweet Home Chapter, Cmties. for Great Ore*., 515 U.S. 687, 698 (1995) (noting "[a] reluctance to treat statutory terms as surplusage").

ABSC proves this point by arguing that the National Science Act ("NSA"), which established the National Science Foundation, expressly forecloses re-delegation. According to ABSC, 42 U.S.C. § 1864(c) expressly provides that the Director of the National Science Foundation "may not redelegate policymaking functions delegated to him by the Board." This proves plaintiffs' point that re-delegation requires specific authority. Immediately before the provision quoted by ABSC, the NSA authorized the director to re-delegate functions: "The Director may from time to time make such provisions as he deems appropriate authorizing the performance by any other officer, agency, or employee of the Foundation of any of his functions

under this chapter, including functions delegated to him by the Board, except he may not redelegate policymaking functions delegated to him by the Board." 42 U.S.C.A. § 1864(c) (West). In short, Congress expressly gave the Director broad powers of re-delegation and then cut those back in one area. The difference here is that unlike the NSA, the MSA did not authorize re-delegations to anyone.

Reliance on a Florida Magistrate Judge's opinion in *Recreational Fishing Alliance, Inc. v. National Marine Fisheries Serv.*, 2012 WL 868880 (M.D. Fla. 2012), is misplaced. At issue in that case was whether the Secretary of Commerce could delegate the approval of certain fishery plans under MSA § 304 to NMFS. The court ultimately held that "the Plaintiff's argument that the Secretary of Commerce must personally sign off on every decision made pursuant to the MSRA is improper." *Id*. at *6. The court was not asked to and did not examine whether the MSA authorized "re-delegation." Nor did the court examine whether NOAA's delegation of authority was broad enough to cover general rulemaking under MSA § 305(d), because the matters at issue in *Recreational Fishing Alliance, Inc.* arose specifically under § 304, which is covered by the delegation.

C. Delegation of Rulemaking to an Individual Who Is Neither an Officer Nor Inferior Officer Violates the Appointments Clause

The government does not dispute that there are three levels of civil servants: Officers, inferior officers, and employees. Nor does the government dispute that an officer is appointed by the President with the Advice and Consent of the Senate and that an inferior officer is one who reports to an officer and is appointed by the head of the Department, *i.e*., the Secretary, or the President. The government does not dispute that an "employee," *i.e*., a non-officer, may not issue a rule and remain faithful to the Appointments Clause. Finally, the government does not dispute that Rauch, the person who actually issued the rule, is neither an officer nor an inferior officer, but rather an ordinary employee.

1. Sobeck Is Not an Inferior Officer

The government argues that although Rauch signed the Rule, that act was purely ministerial. The government suggests by implication that the Rule was really issued by Rauch's supervisor, Sobeck, even though the government admits otherwise in its Answer. Assuming that Sobeck issued the Rule, which she did not, and had delegated authority to issue the instant Rule, which she did not, she still is not authorized to issue the Rule because like Rauch, she was not appointed by the head of the Department, *i.e.,* the Secretary of Commerce, as required by the Appointments Clause. According to a NOAA press release, Sobeck was appointed by Acting Under Secretary Sullivan, who at the time of Sobeck's appointment, had not been confirmed by the Senate and even if she had been, was not and would not have been the head of the Department. No matter, according to the government. In a footnote the government asserts that its press release was incorrect and Sobeck was lawfully appointed by the Secretary. *See* Gov't Br. at 44 n.33. The only problem is that the government already "admit[ted] that Sobeck was appointed by Defendant Sullivan." Gov't Answer at ¶ 17 (Doc. 21). "A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.,* 976 F.2d 58, 61 (1st Cir. 1992) (quoting *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985)) (internal quotation marks omitted). Further, the government has failed to provide any evidence to support its assertion that Sobeck was appointed by the Secretary or that Sobeck's appointment was approved by the President, as required by Reorganization Plan.[7] Therefore, even if inferior

[7] Federal Rule of Civil Procedure 56(c) requires that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Accordingly, an opposing party must provide more than mere conclusory allegations that the contents of a document are inaccurate or "in error." "If a party fails to . . . properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e). Here, it must consider that fact as admitted based on the government's answer.

officers are eligible to issue binding legislative rules, Sobeck was not an inferior officer, and no one has argued that a mere employee can issue rules.

2. Rauch Is Not an Inferior and Has No Delegated Rulemaking Authority

Rauch was never re-delegated rulemaking authority. To get around this inconvenience, the government argues that Rauch merely signed the rule, a ministerial act, and that by implication, Rauch did not "issue the rule."[8] However, here too, the government admitted in its Answer that Rauch both signed and issued the Rule. *See* Gov't Answer at ¶ 18. The government has provided no legal basis for parsing rulemaking between an "issuer" and a "signer." Neither the APA nor the MSA recognizes this division of labor. Even so, the government provided no evidence in Administrative Record that Rauch's conduct was purely ministerial. To the contrary, there was nothing ministerial about Mr. Rauch's involvement in the entire rulemaking process. The Administrative Record highlights that Rauch directed the rulemaking effort; gave orders to staff and made decisions about the tone, tenor, and wording of the rule and its preamble. *See, e.g.,* AR 21113, AR 24689, AR 24914, AR 26033, AR 26573, AR 27139-40, AR 36098-99. If, as the government claims, Rauch's function was purely ministerial, then someone could have issued a writ of mandamus to compel him to issue the rule, a position that the Department of Justice should be reluctant to take. *See* ATTORNEY GENERAL'S MANUAL at 108 (1947) (noting that APA § 10(e)(A), 5 U.S.C. § 706(1), merely codifies the notion that a writ of mandamus lies "to compel an agency or officer to perform a ministerial or non-discretionary act."). The rulemaking record highlights that Rauch was a key player, while Sobeck was in the bleachers watching another game. *See* AR 39042 (Memorandum dated October 1, 2015, from Emma Htun, stating: "Decisionmakers are basically Russell and Sam (confirming with Brandon).").

[8] If, as the government argues, the act of signing is purely ministerial, a delegation of authority would have been unnecessary. Ministerial acts must be performed.

D. An Inferior Officer May Not Exercise Re-Delegated Authority to Issue Legislative Rules

Assuming that Sobeck had been re-delegated authority to issue the instant Rule, that she actually issued the rule, and that she was somehow an inferior officer, the Appointments Clause halts this rulemaking parade. Inferior officers have no authority to issue legislative rules that are deemed significant because of their potential effect on foreign relations, as is the case here. Both the government and ABSC, relying on *Edmond v. United States*, 520 U.S. 651 (1997), argue that the real division is between "officer" and "non-officer" and not between an inferior officer and an officer. At issue in *Edmond* was whether Coast Guard judges could exercise judicial authority within the military criminal justice system as "inferior officers." The petitioner claimed that judicial responsibilities necessarily implied that the judges had to be "officers," *i.e.*, appointed by the President with the Advice and Consent of Senate, and not "inferior officers," who are appointed by the Secretary of Transportation. The Court held that actions of these military judges were overseen by the General Counsel of the Department of Transportation, who was an "officer" under the Appointments Clause. *Edmond*, 520 U.S. at 666.

Here, unlike in *Edmond*, there is no evidence of any oversight by a superior officer. Indeed, it is the Assistant Administrator who determines whether it is even necessary to advise the Administrator of the action to be taken and is only required to do so if the Assistant Administrator deems that action to be controversial. *See* NOAA Organizational Handbook at II.C.26(a)(iv). *Estes*, relied upon by ABSC, is on appeal to the D.C. Circuit on the issue of whether an assistant secretary, appointed by the Secretary and therefore an inferior officer, can issue a rule. As both the government and ABSC stress, the Appointments Clause is aimed at protecting the structural integrity of the Executive Branch. An entity's organizational chart describes that structure. In *Estes*, the individual who issued the challenged rule was the only one of twelve assistant secretaries who was not an Officer (*i.e.*, someone appointed by the President with the Advice and Consent of the Senate). The other eleven assistant secretaries within Treasury were all Officers and, assuming proper delegation, could issue rules. The twelfth

assistant secretary position at issue in *Estes* was structurally identical to the other eleven in terms of placement within the hierarchy. That is not the case here. Assuming that Sobeck was appointed by the Secretary, which she was not, her position was not equivalent structurally to an assistant secretary. Indeed, she reported to an assistant secretary. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 21 (Doc. 48-1).

Even though *Estes* is on appeal, this Circuit has already decided that there are distinctions between inferior officers and non-inferior officers and that delegation of rulemaking powers to an inferior officer can violate Appointments Clause. *See Ass'n of Am. R.R. v. U.S. Dep't of Transp*., 821 F.3d 19, 39 (D.C. Cir. 2016), *reh'g en banc denied* (Sept. 9, 2016). At issue there was whether an arbitrator, who was an inferior officer having been appointed by the Safety Transportation Board, could issue a final legislative rule. This Circuit held that the arbitrator's actions were not sufficiently supervised or reviewed by officers appointed by the President with the advice and consent of the Senate and therefore, the arbitration provision in the Passenger Rail Investment and Improvement Act of 2008 was unconstitutional. Here, the delegation in the NOAA Handbook only requires the Assistant Administrator, potentially an inferior officer, to notify the NOAA Administrator (an Officer) about rulemaking if that inferior officer believed that the rule was controversial. In short, the Assistant Administrator had no obligation to consult with or obtain the approval of the Administrator before issuing a rule, making the Assistant's decision binding and unreviewable within the bureaucracy. The administrative record demonstrates that the NOAA Administrator did not approve or issue the Rule; it was issued by the Deputy Assistant Administrator, who is not even an inferior office. *See* AR 26333 (December 1, 2016 note from Samuel Rauch stating that he "looked over this whole thing [the Final Rule] and I am go whenever the esig is ready.").

Plaintiffs are unaware of any case where a court has upheld under the Appointments Clause rulemaking by a fifth tier bureaucrat, such as Sobeck.

II. Congress Did Not Delegate to Commerce Any Rulemaking Authority Over the Labeling of Imported Seafood Under the MSA

Summary judgment is proper, in part, because the MSA does not authorize the Secretary of Commerce to issue seafood fraud regulations. In response, the government appears to concede that Commerce lacks direct authority to issue rules governing seafood fraud, but argues that this "Final Rule does not 'regulate seafood labeling or fraud.'" Instead, according to the government, the rule merely requires importers to provide information to improve seafood traceability. Artful linguistics, though, cannot conceal that the stated purpose of this Rule is to "combat seafood fraud" and that species were selected for regulation based in large part on their perceived vulnerability to seafood fraud. AR 4467-68; AR 38459. Recognizing that there is no distinction between "regulating," on the one hand, and "combatting," on the hand, the government is left to argue that seafood fraud falls within its bailiwick because the MSA is a broad remedial statute, that FDA's jurisdiction over seafood fraud is not exclusive, and that NMFS can regulate seafood fraud because seafood fraud violates the laws of the other countries and that constitutes "illegal fishing." First, a statute's allegedly broad remedial purpose is no substitute for specific words authorizing the agency to act.[9] The notion that a remedial statute must be broadly construed to advance its purposes—was aptly labeled the "last redoubt of losing causes" by an eight-Justice majority in *OWCP v. Newport News Shipbldg. & Dry Dock Co*., 514 U.S. 122, 135 (1995). Second, the FDA has been given express jurisdiction to issue rules to combat seafood fraud, while Commerce has been given no such authority, express or otherwise. Third, the notion that combatting seafood is nothing but another form of combatting unspecified illegal actions under unidentified laws of unidentified foreign nations (*see* MSA § 307(1)(Q)) is

[9] Moreover, combatting "seafood fraud" is, by definition, not "remedial" for purposes of statutory interpretation. A statute is remedial when it provides a remedy for a wrong that is otherwise not available at common law or through other statutes. *See* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 86 (4th ed. 1770). Since there is a private remedy at common law for fraud and public remedies under the Food, Drug, and Cosmetic Act, Lacey Act, and various state consumer protection laws (*see, e.g.,* Cal. Bus. & Prof. Code § 17200), the MSA is not a "remedial" statute with respect to seafood fraud.

beyond the pale and inconsistent with the rulemaking record and with the government's argument that is not regulating seafood fraud.

A. The Final Rule Is Designed to Regulate Seafood Fraud

The government concedes, as it must, that Commerce has not been given authority to regulate seafood fraud under the MSA. *See* Gov't Br. at 14 (citing AR 19459). To circumvent this roadblock, the government initially argues that the Rule does not really regulate seafood fraud but merely imposes reporting obligations on those who import various "at-risk" species. This artful argument is too cute by half. First, if there were a distinction between "combating . . . seafood fraud," which is an avowed purpose of the Rule (*see* 81 Fed. Reg. 88,976), and "regulating seafood fraud," it is one without meaning. The only difference between "regulating" and "combatting" is that the former is designed to effectuate the latter: a regulation is designed to combat an evil. *See e.g.*, Breyer, Stewart *et al.,* ADMINISTRATIVE LAW AND REGULATORY POLICY 4 (7th ed. 2011); *California Dump Truck Owners Ass'n v. Nichols*, 924 F. Supp. 2d 1126, 1133 (E.D. Cal. 2012). If the agency has no jurisdiction to combat that evil, then it has no jurisdiction to regulate against that evil. The two necessarily go hand-in-hand. *See CTIA--Wireless Ass'n v. Echols*, No. 1:13-CV-399-RWS, 2013 WL 6633177, at *2 (N.D. Ga. Dec. 17, 2013).

Nor can the absence of jurisdiction be remedied by casting the regulation as one that is merely intended to garner information. *See* Gov't Br. at 11. There is no such thing as information collection in a vacuum. Under federal law, information collection must be linked to the jurisdiction of the agency that seeks to collect the information and must be "necessary for the proper performance of the functions of the agency." 44 U.S.C. § 3506(c)(3). In short, if an agency is collecting information to combat seafood fraud under the MSA, it must have jurisdiction over seafood fraud under the MSA. *See Environmental Integrity v. EPA*, 177 F. Supp. 3d 36 (D.D.C. 2016) (EPA has authority to collect information so that it can implement its statutory obligations); *United Airlines, Inc. v. McKinnon,* 580 F. Supp. 189 (D.D.C. 1983) (same re CAB); *Diaz v. Holder*, No. 12-3813, 2013 WL 1777225 (6th Cir. 2013) (same re INS).

Second, the Rule does more than merely impose traceability requirements on importers; it requires those who import "at-risk" species to purchase a special permit allowing one to enter data into the government's database and makes it illegal to import any one of the at-risk species without entering the data required by the Rule. *See* 50 C.F.R. § 300.325(c); 16 U.S.C. § 1857(a) (violation of rule issued under the MSA is a prohibited act); § 1858(a) (authorizing the imposition of $100,000 civil money penalty for each prohibited act). Because submission of all required data to the government's satisfaction is a condition of entry, IFTP holders will soon be unable to operate their businesses unless they comply. That is more than mere data collection; that is regulation.

Third, the identification of the at-risk species was based on two separate factors: susceptibility to IUU and susceptibility to seafood fraud. *See e.g.*, 81 Fed. Reg. at 88,984 (col. b). An importer's obligation to pay a special fee, enter significant data, and operate at risk if those data are not properly entered all hinge on the agency's use of seafood fraud to categorize species. The government suggests that seafood fraud and IUU fishing are related and if it can regulate one, it can regulate the other. The Administrative Record is devoid of any evidence to support this proposition. Indeed, in some cases, the only evidence of IUU fishing to warrant classification as an at-risk species is the agency's perception of "seafood fraud." *See infra* at 29. It is very much like saying that the FAA should have jurisdiction over nutrition labeling because good nutrition labeling may reduce obesity and a thinner population permits airlines to decrease the size of the seats in coach class. ABSC argues that crab illegally caught in international waters are labeled as Russian crab and that is seafood fraud. *See* ABSC Br. at 10-11. It is unclear whether this would even qualify as misidentification of product origin. However, this is largely irrelevant since most of the species selected on the basis of seafood fraud were chosen because of the alleged theoretical likelihood of species substitution. See, e.g., AR 4465-66. ABSC does not suggest that crab caught outside the Russian water border in international water is necessarily a different species than crab caught 50 feet away inside Russian waters.

In short, it is difficult to understand how a rule explicitly designed to combat seafood fraud, which ostensibly selected species subject to regulation based on seafood fraud, and which imposes penalties on those who fail to enter data on those allegedly "seafood fraud" prone species, does not regulate seafood fraud.

B. Commerce Has Not Been Authorized to Regulate Seafood Fraud Under the MSA

The government also argues, notwithstanding its concession to the contrary, that is it authorized to issue rules concerning seafood fraud under the MSA because there is "[n]othing in the statutory text or legislative history indicat[ing] that Congress intended to preclude NMFS from imposing reporting and recordkeeping requirements aimed at preventing the importation of illegally harvested fish." Gov't Br. at 13. There is also no express language that would preclude NMFS from regulating seafood fraud. But that is not the correct question. The proper question is whether there is anything in the MSA that authorizes the Secretary to regulate seafood fraud. Here, neither the government nor ABSC has pointed to any authorizing language. The absence of authorizing language is significant given the government's recognition that "[t]o 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)." Gov. Br. at 12. That delegation at MSA § 307(1)(Q) states that it is unlawful for any person

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

This addresses illegally caught fish; it does not address species substitution*, i.e.,* mislabeled fish. The government argues that species substitution, *i.e.,* seafood fraud, necessarily violates foreign law, but has not pointed to any foreign law.

The Lacey Act makes the government's strained interpretation untenable. The Lacey Act uses language virtually identical to MSA § 307(1)(Q) to outlaw illegally caught fish:

> It is unlawful for any person— * * *
>
> > (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce— (A) 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

16 U.S.C. § 3372(a). The Lacey Act, though, goes on to also outlaw species substitution:

> It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be—
>
> > (1) imported, exported, transported, sold, purchased, or received from any foreign country; or
> >
> > (2) transported in interstate or foreign commerce.

16 U.S.C. § 3372(d). Under the government's logic, § 3372(a) of the Lacey Act and § 307(1)(Q) of the MSA both, using same language, prohibit seafood fraud even though neither mentions mislabeling or species substitution, and it is only subsection (d) of § 3372 which brings seafood fraud within the ambit of the Lacey Act. But "were we to adopt [the government's] construction of the [MSA and necessarily the Lacey Act], we would render . . . . [subsection (d)] insignificant, if not wholly superfluous. It is our duty to give effect, if possible to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); see *Marx v. Gen. Revenue Corp*., 568 U.S. ___, 133 S.Ct. 1166, 1177–78 (2013) (noting that a statutory interpretation that renders other statutory language superfluous is generally disfavored, particularly if there is another interpretation that gives effect to every clause and word of a statute); *NetCoalition v. S.E.C*., 715 F.3d 342, 351 (D.C. Cir. 2013) ("Moreover, the petitioners' proposed reading of the statute would render the review provisions of section 19(b)(3)(C) a mere superfluity, simply repetitive of the review provisions of section 25(a)(1) and the APA. We cannot adopt such an interpretation."). The only way to harmonize the various provisions while giving effect to every

provision is to interpret both § 3372(a) of Lacey Act and § 307(1)(Q) of the MSA as not including seafood fraud.[10]

C. The Secretary of Health and Human Services and Not the Secretary of Commerce Has Rulemaking Authority Over Seafood Fraud

The government suggests that Commerce has rulemaking authority over seafood fraud for two reasons. First, the Rule does not clash with those issued by FDA, and second, Commerce is not exercising rulemaking authority over misbranded foods. That of course is not the test, as discussed. An agency does not acquire rulemaking authority by default. More critically, though, if one agency has express rulemaking authority and a second agency does not, the courts do not infer rulemaking authority in that second agency. *See Bayou Lawn & Landscape Servs., v. Sec. of Labor*, 713 F. 3d 1080 (11th Cir. 2013).

The government misunderstands the scope of the Secretary of Health and Human Services' ("HHS") rulemaking authority. With one significant exception, the authority to issue rules to implement the provisions of the Food, Drug, and Cosmetic Act ("FDCA") is vested exclusively in the Secretary of HHS. *See* FDCA § 701(a). The one exception eliminates Commerce's rulemaking authority over seafood fraud. Specifically, all rules "affecting efficient enforcement of section 801" must be jointly prescribed by the "Secretary of Treasury and the Secretary of Health and Human Services." FDCA § 701(b) (emphasis supplied). Section 801 covers foods that are offered for export into the U.S. that are not only misbranded under U.S. law (*see* FDCA § 403), but also misbranded under foreign law. *See id*. at § 801(a)(2). In short, Congress expressly gave HHS and Treasury joint rulemaking authority for the efficient enforcement of the rules concerning the importation of food, including seafood. That express and broad delegation to two departments is inconsistent with any inferred authority, no matter how cleverly portrayed, to a third department.

[10] The other problem for the government with the Lacey Act is that it vests rulemaking authority over seafood labeling jointly in two agencies; neither can issue the rule on its own. *See* 16 U.S.C. § 3376(a)(2).

Finally, the government argues that Commerce is not exercising rulemaking authority over misbranded food. *See* Gov. Br. at 15 n.10. HHS's and Treasury's joint authority, however, is broader than merely punishing those importing misbranded food. It goes to the "efficient enforcement" of laws governing the importation of food. Yet, that is precisely what this Rule is intended to do--to improve enforcement of misbranding laws. *See* Gov. Br. at 25. The fact that FDA attended the task force meetings is not relevant, especially given that FDA does not have any rulemaking authority. *See* FDCA § 701(a). In short, there is no statutory basis under the MSA for Commerce to improve the efficiency of enforcement of the misbranding laws, both domestically and under foreign law. That authority has already been delegated jointly to Treasury and HHS. Congress did not invite Commerce to the party, and this Court should not either.

III. The Government's Secret Rulemaking Is Inconsistent with the APA

The government's defense of its reliance on undisclosed information is a bundle of contradictions. It both admits and denies that it relied on information that it did not disclose. Thus the government insists that it provided the public sufficient documentation and a meaningful opportunity to review and comment even though it admittedly relied on, but withheld, allegedly confidential and "law enforcement" privileged documents from scrutiny by the public and this Court. Gov't Br. at 17 & n.4, 20. According to NMFS, it was not required to produce the underlying support that justified its decision to include certain species as "at-risk." According to NMFS, it is enough to identify the principles on which it based its decision and to declare that "much of the information was law enforcement privileged or confidential." Gov't Br. at 19. Finally, despite its admission, it claims that its rule is not based on secret data at all because the government provided summaries of the law enforcement and confidential information. Gov't Br. at 20. Missing from this announcement, however, is any reference to where in the Administrative Record those summaries appear. The government's admission that it relied on withheld evidence and its failure to identify where in the record the withheld

evidence is summarized precludes a finding of summary judgment in its favor and warrants summary judgment for plaintiffs.

Apparently, in the alternative, the government argues that the exclusion of law enforcement privileged and confidential information does not automatically invalidate the rule, but the cases it relies on are far afield from the situation presented here. The government relies on two cases to suggest that it can rely on secret data: *Pub. Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009), which denied a challenge to the Nuclear Regulatory Commission's modification of the Design Basis Threat rule, in part, because it believed that the NRC had properly relied on non-public information in its rulemaking, and *Credit Union Nat'l Ass'n v. Nat'l Credit Union Admin.*, 57 F. Supp. 2d 292 (E.D. Va. 1995), which denied a challenge to regulations promulgated by the National Credit Union Administration addressing the integration between corporate credit union and state credit union leagues in part due to unavoidable conflicts of interest. In *CUNA*, there was no allegation that the public lacked enough information to meaningfully participate in the rulemaking. The court concluded that the agency did not have to disclose confidential information that it obtained in its role as an examiner in order to promulgate rules to protect the safety and soundness of federally insured credit unions by prohibiting interlocking boards. Such information is specifically exempted from public disclosure under 5 U.S.C. § 552(b)(8) dealing with bank audits by federal examiners. Here, the withheld information goes to the heart of the decision to include a species as a subject of the rule's reporting requirements. *See* AR 4467. Nor has the government even attempted to show that the withheld material falls within any exception for disclosure under 5 U.S.C. § 552(b), assuming that section 552 even applies to rulemaking. No Executive order is identified that makes the withheld data "confidential" under section 552(b)(1)(A) and there is nothing in the Administrative Record indicating, let alone supporting, that any of the information satisfies the "confidential" requirements of section 552(b)(4). To the extent the secret data were records or information compiled for law enforcement purposes, that data would be shielded only under

certain circumstances, none of which is alleged here.[11] The government has not provided sufficient information to demonstrate that the withheld information falls within this exception to disclosure. Nor does the government seek to differentiate which information has been withheld for law enforcement and which for reasons of confidentiality.

In *Public Citizen*, under the Atomic Energy Act, the agency was specifically authorized to withhold classified information about nuclear facilities from public scrutiny. The Act has been described as "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Public Citizen*, 573 F.3d at 918, quoting *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968). Here, the government has not and cannot contend that the MSA is similarly unique (if it were, neither would be unique) or that it has been vested with such responsibility. The confidentiality provisions in the MSA and its implementing regulations cited by the government do not assist. Gov't Br. at 20, citing 16 U.S.C. § 1881a(b)(1); 50 C.F.R. §§ 600.415(e) and 600.10. These provisions require disclosure of aggregated or summarized data. *See id.* at § 1881a(b)(3). Neither aggregated nor summarized data were made available as part of the rulemaking.

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[11] Section 552(b)(1)(7) shields records from disclosure "only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, … which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual," *id.*, § 552(b)(1)(7). Even then, as much of the data as possible must be disclosed with redactions. 5 U.S.C. § 552(b). Here no data were disclosed.

The government relies on a third case for the view that the APA does not require every bit of background information to be included for public comment, *BF Goodrich Co. v. Dep't of Transp.*, 541 F.2d 1178 (6th Cir. 1976).[12] Here too, that reliance is as misplaced as it is odd. There, the plaintiffs complained that the Department of Transportation had produced too much evidence into the administrative record. They objected to the timing of the submission, not whether the government had relied on secret data to promulgate its rule. The court held that the agency did not have to produce every piece of paper into the record for public comment in order to comply with the APA. The case does nothing to justify the government's conduct in this case. The court did not relieve the agency of its obligation to justify its rule with evidence in the administrative record.

Finally, the government asserts that plaintiffs' reliance on *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), is misplaced because that case involved a claim that information could be withheld in the rulemaking process under the deliberative process exception and not under the law enforcement exception. Gov't Br. at 22. That may be true, but this case is not about what FOIA exception is asserted; it is about transparency in rulemaking and compliance with the dictates of APA § 4. The "trust me" approach adopted by the government here is not sufficient. Where, as here, the government chooses to promulgate regulations, it agrees to expose the data on which it relies to public scrutiny no matter what potential exemption might otherwise apply had the document been requested in the context of a FOIA request. This Circuit in *Radio Relay* has held that redacting data from the administrative record is inconsistent with notice and comment rulemaking even if those data could be withheld had they been requested under FOIA.

As a fallback, the government argues that plaintiffs have not shown that they were prejudiced by the government's failure to produce the underlying data here. The government asserts that any suggestion by plaintiffs that they were deprived of any ability to challenge the

[12] The government then cites *In re Surface Mining Reg. Litig.*, 627 F.2d 1346, 1354 n.9 (D.C. Cir. 1980), because it quoted *BF. Goodrich*.

selection of the species selected as "at-risk" species is undermined by the fact that NMFS invited public comment on the issue. Gov't Br. at 22. This is a canard. All that is required to mount an APA challenge is standing, which has not been contested, and a violation of the APA. However, prejudice, in the form of irreparable injury, has been demonstrated here and is uncontested by the government. *See* Plaintiff's Statement of Facts Pursuant to Local Rule 7(h)(2) at ¶ 3 (Doc. # 48-2). Moreover, the opportunity to comment is a hollow gesture when the government has provided only a framework without the underlying data or support. This is akin to obtaining an indictment by setting out the elements of the offense without providing any of the facts linking the defendant to the crime. The inclusion of Atlantic and Pacific Cod shows the prejudice. Here, the government classified these as "at-risk" species even though it admits that it had no genuine evidence of IUU fishing; it was concerned about mislabeling in the United States, a concern that was not borne out by FDA's genetic testing and one that, in any event, the Rule here cannot possibly deter. *See* AR 29128.[13] If there was some other data that the government relied on, it did not disclose it. It is hard to know what more prejudice plaintiffs could offer. Wholly apart from the lack of confidence in the government's rulemaking and the ultimate rule it has produced, plaintiffs are clearly prejudiced by the imposition of burdensome and expensive recordkeeping requirements without adequate justification.

ABSC takes a different approach. It argues that the Rule is amply supported, pointing to a study from the Journal of Marine Policy, appearing in six different locations in the administrative record, that concluded that traceability programs should be adopted. ABSC Br. at 21-22, citing AR 366, AR 357, AR 247, AR 7242, AR 44986, AR 3974, AR 56. ABSC neglects

[13] The government suggests that this report is "extra-record," Gov't Br. at 28, ignoring that it is referenced in NFI's Comments that are, without dispute, part of the "core record." AR 6615 ("Atlantic cod is deemed at risk because it supposedly violates the Principle of Known Species Substitution and 'has been the subject of species substitution with other white fish.' But when the FDA conducted DNA testing of cod at the import and wholesale level, "100% (15 out of 15) of the cod samples were labeled properly.") (citing FDA DNA Testing at Wholesale Level to Evaluation Proper Labeling of Seafood Species in FY 12-13 at http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/ucm419982.htm).

to mention that the authors of the article were affiliated with the World Wildlife Fund, and the article itself was based on scant data (including confidential interviews with undisclosed persons) that NOAA could not verify. *See* AR 358 ("According to personal communications with NOAA staff, no detailed examinations of the origin of imports to the USA have been conducted by NOAA, USDA, or others"). Nor could the authors confirm that traceability programs deter IUU fishing. *See id.* ("even products carrying a traceability claim on the package could well derive from mixed shipments with mixed species fished by a mix of licensed and blacklisted vessels."); AR 359 ("even product entering the relatively well regulated EU market can have substantial illegally sourced fish …"). "[T]he trustworthiness of a story is not enhanced by repetition." 4 Weinstein & Berger, WEINSTEIN'S EVIDENCE § 801(d)(1)(B)[01] (1988). Nor is it confirmed by the Director, Office of Law Enforcement, NMFS, who raised concerns from the outset as to how a traceability program would combat IUU fishing. *See* AR 52521-22 ("How does imposing an import documentation requirement lead to the determination that the fish was taken/possessed/transported/sold in violation of foreign law? … What verification scheme would show whether or not the fish was a product of illegal fishing? In other words, a box of shrimp from Thailand is offloaded from a ship in NY. All the paperwork is complete and accurate. What would tell us that the shrimp was (or was not) taken in violation of some foreign law?"). Plaintiffs could not find no response to his question in the Administrative Record.

IV. The Rule Is Arbitrary and Capricious and Therefore Inconsistent with the APA

The government's claim that an APA violation cannot exist without some tethering to the relevant statute ignores that Count II, which raised a violation of the APA, was, in fact, related to the MSA, which directs the Secretary of Commerce to engage in rulemaking subject to the APA. *See* Gov't Br. at 22-23. Perhaps recognizing the weakness of this defense, the government insists that its rule is not arbitrary and capricious, but on each point, its argument is supported only by its own *ipse dixit*.

A. No Data Support the Decision to Implement the Rule

The government asserts that there is a rational connection between the recordkeeping requirements it imposes and its goal of curbing IUU fishing and seafood fraud. But the support it relies upon provides no such connection. The process by which NMFS created its list of "at-risk" species does not explain how requiring traceability data will curb IUU fishing and seafood fraud and even if it did, the government withheld material on the basis of the law enforcement or confidentiality exemptions, making it impossible to understand, let alone test, the connection. The government seems intent on misconstruing plaintiffs' point here. To the extent it addresses the actual complaint, the government asserts that there is ample explanation for how traceability can combat IUU fishing and seafood fraud, but its two references provide no support. *See* Gov't Br. at 25. The government cites AR 2668, which simply recites Recommendation 14, and AR 6916, which identifies the protocol for identifying and granting access to confidential data. Neither provides any support for the notion that traceability requirements combat IUU fishing or seafood fraud.

The government also asserts that the record demonstrates a basis for including the individual species of fish on the at-risk species list. Here too, the support provides no genuine support at all; it certainly provides no data and it is the absence of data that makes the rules arbitrary and capricious under 5 U.S.C. § 706(2)(A). The government's reference to AR 4467, AR 52106-07 and 52118 does not supply the missing data. Those references disclose that without exception, the decision to include each of the species on the at-risk list relates to the risk of species substitution and mislabeling, *i.e.*, seafood fraud. This was true even though the government acknowledged that there are rigorous reporting requirements already in place for some of those species (Atlantic Cod, King Crab, Pacific Cod, Red Snapper) or that DNA testing is the only possible method for species identification of other species (Blue Crab, Sharks). *See id.* Without jurisdiction over seafood fraud, however, the basis for identifying these species as "at-risk" disappears.

The other common feature is the absence of a catch documentation scheme, a type of traceability program. But the government does not provide data that show how it prevents illegal fishing. To the extent that the government's theory is that the absence of such a scheme makes a species vulnerable to IUU fishing, this theory alone is not sufficient. Moreover, the government notes that although there is no catch documentation scheme, several species are subject to documentation requirements under the MSC certification program or U.S. (federal or state) and E.U. programs (Atlantic Cod, Pacific Cod, Blue Crab). As for shark, the government highlights that "mesures [sic] to protect shark populations are infrequent." Gov't Br. at 24 citing AR 52126. However, that is not the same as demonstrating that those measures are ineffective or unenforced. The only support for the notion that this traceability program will lead to a decrease in IUU fishing and seafood fraud is that fact that it was included as "one of four thematic approaches identified by the Task Force" coupled with NMFS's belief that "the sum of the entire suite of recommendations [is] an integrated and effective framework for combatting IUU fishing and seafood fraud" and "are very closely aligned with those used in other catch documentation schemes which share the objective of preventing the entry of illegally harvested and misrepresented fish and fish products into commerce." AR 6919 (cols. a & b). More than stating a belief is required to demonstrate a rational connection between reporting and recordkeeping requirements and preventing IUU fishing. Despite the government's attempt to distinguish this case from *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Federal Highway Admin.*, 151 F. Supp. 3d 76 (D.D.C. 2015), the government provides no data to support its selection and no explanation for its decision to depart from the admission of NMFS staff members during the administrative process in the final rule. The goal of the program set forth at AR6916 and AR 2668 is not the same as data or proof to support that goal.

B. The Record Refutes NMFS's Cost Assumptions

The government's Final Regulatory Flexibility Act Analysis relies on a single study by Blomquist *et al.* *See* AR 6935. In briefing before this Court, however, it disavows reliance on

that study. *See* Gov't Br. 26. But without that study, the agency is left with an arbitrary rule. The government declares that the Blomquist study was cited only for its finding that consumers appear to be willing to pay more for sustainably harvested seafood, not for any conclusions about the costs of implementing such a program. *See* Gov't Br. at 26 & n.19, 27. The government suggests that there is a difference between a voluntary certification program such as the sustainability program certified by the Marine Stewardship Council ("MSC") and the collection of traceability information by the government. If there is meaningful difference between the two, it does not appear in the administrative record.

Moreover, while the government argues that plaintiffs have confused increases in compliance costs with increases in retail costs, it cannot dispute that the latter follows from the former. This is basic economic theory captured as early as the 18th century by Adam Smith in the WEALTH OF NATIONS and is aptly reflected in the nation's antitrust laws which recognize that costs tend to be passed on to the consumer. Nor does the government dispute that the Rule will impose burdens and costs on the regulated entities. After suggesting that plaintiffs' argument relied on a quotation taken out of context, it responds with its own reference taken out of context. The government reasserts that its Rule will not result in "measurable" increases in the cost of seafood based on the experience of the EU catch documentation system. *See* Gov't Br. at 27, citing AR 6917. But in the very next paragraph, it recognizes that although it assumed a minimal incremental regulatory burden,

> it is possible that some businesses within these countries will incur costs as a consequence of this rule, in particular the chain-of-custody recordkeeping in cases of complex supply chains, that may be either passed through to U.S. consumers or result in a decline in exports to the U.S. market. Both of these responses to the Program could affect prices in the U.S. market.

AR 6918. The government has no answer for that fact that the EU program and its Rules are different. Both in promulgating its Final Rule and in its response to plaintiffs' motion for summary judgment, it ignores that the EU program did not reach freshwater fish or aquaculture

operations.[14] *See* AR 19334. Nor does the government explain why the experience of the MSC system – which raised the price of seafood by 10 percent – is not also instructive. What is sauce for the goose is sauce for the gander.

C. The Record Contains No Valid Basis on Which to Regulate Aquaculture

Plaintiffs argued that the government both lacked a reasonable basis for subjecting the aquaculture industry to the Rule when it agreed that IUU fishing was not a concern directly related to the aquaculture industry, and lacked any evidence to justify its regulation of these operations. In response, the government argues that "the opportunity for illegal activity," which plaintiffs did not contest, apparently is sufficient to justify the Final Rule. Gov't Br. at 30-31. But there is always an opportunity for illegal activity; that has never been sufficient to justify rulemaking. Moreover, the only risks that the government identifies for aquaculture species are risks for product misrepresentation, *i.e.*, mislabeling or fraud, not IUU fishing. *See* Gov't Br. at 31, citing AR 2963-65, 2966-2013, 4000-03, 4438, 6909.

D. The Record Fails to Support the Compliance Date Selected by the Government

As with the rest of its Rule, the government asserts that the selection of January 1, 2018, for compliance was reasonable notwithstanding the injury that this would cause and the difference of opinion expressed within NOAA. The government reiterates that judicial review focuses on the agency's final action. Gov't Br. at 32. However, resort to materials in the Administrative Record is always permitted in assessing the reasonableness of agency action and the justification for its key findings. *See, e.g., Washington v. Trump*, 847 F. 3d 1151, 1167-68 (9th Cir. 2017); *citing Village of Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating

[14] The government acknowledges this gap only to note that the EU experience with catch documentation could not be applied to aquaculture because catch documentation systems govern only wild caught fish. Gov't Br. at 31.

whether a governmental action was motivated by a discriminatory purpose). Otherwise, why bother filing an administrative record?

The government defends its compliance date out of a concern that exporters may push to export undocumented inventory prior to the effective date. AR 20256. There is no support for the government's speculation. But there is support for the damage that that compliance date will have on the regulated community.

And the government did not respond at all to the costs associated with the need to refuse "undocumented" inventory after the effective date. *Id.* Instead, the government asserts, with no data or support, that "disruption in supply should be minimal." *Id.* The agency's overly optimistic view is not sufficient. *See Cobell v. Norton*, 283 F. Supp. 2d 66, 218 (D.D.C. 2003) (noting that an agency, as an interested party, "possesses a natural incentive to view the process with rose-colored glasses" so "it must be expected that any reports of the various stages of implementation will tend to err on the side of over-optimism."), *vacated on other grounds*, *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004). The agency's wishful thinking is not sufficient to support its Rule.

The government's response also does not dispute that for products other than tuna subject to Tuna Tracking and Verification Program or products subject to regional fisheries management organization schemes, the Rule will have an impermissible retroactive impact. *Id.*

V. The Government's Regulatory Impact Analyses Were Inaccurate, Insufficient and Not Undertaken in Good Faith

The government believes that all that the RFA requires is a good faith effort to check boxes, even if many of the boxes are skipped and left blank. The government is half correct. It must make a good faith effort, but if misses certain categories of costs altogether, the analysis is necessarily flawed and inconsistent with the RFA. Here, the government did not make a good faith effort, a point noted in plaintiffs' opening brief and ignored by the government in its briefing. *See* Plaintiff's Br. at 7. The absence of good faith is aptly illustrated by the government's Initial Regulatory Flexibility Act analysis which pegged the total costs of the Rule

at $338,000 per annum across the entire seafood sector. *See* AR 4487: 81 Fed. Reg. at 6220 (col. b). The Small Business Administration and OMB both criticized this assessment as unrealistic. The lack of a robust analysis calls into question the willingness of the agency to complete an assessment that is economically realistic. "Pursuant to § 603, an IRFA would have required NMFS to engage in a careful and meaningful study of the problem from the beginning." *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998). That was clearly not done here.

The agency begrudgingly increased its cost assessment in its Final RFA Analysis from $338,000 to $20 million. Even so, it missed the single largest category of costs and justified that omission by arguing essentially that that is good enough for government work and that those increased costs would be initially borne by processors that are not directly subject to the rule. "'Good enough for government work' has never been a legitimate critique of the important processes that turn the wheels of our constitutional democracy" and it sets an embarrassing low bar for federal employees and outside contractors. *United States v. Span*, 789 F.3d 320, 332 (4th Cir. 2015); *Guiton v. Colvin*, No. 12-2100, 546 Fed. Appx. 137, 145 (4th Cir. Nov. 7, 2013) (Davis, J., concurring) ("'good enough for government work" should [not] be the test of reliability "); *Material Techs., Inc. v. Carpenter Tech. Corp.,* No. 01-2965 (D.N.J. June 28, 2005) (excluding under *Daubert*, expert testimony that regarded certain data as good enough for government work, but not good enough to submit for peer review).

The government argues that since the increase in costs wrought by the Rule would initially be borne by processors outside the U.S., those costs can be ignored. However, where those costs are borne by the third-parties solely to enable the regulated sector to provide information required by the Rule and those compliance costs are then passed on to the regulated sector, they must be considered. The cases relied upon by the government do not state otherwise and have been refined by the Circuit. *See Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161 (D.C. Cir. 2007) (finding that regulatory costs to those affected as contractors to a regulated entity must be considered under the RFA). In *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d

855 (D.C. Cir. 2001), relied upon by the government, the Court refused to entertain the indirect costs incurred by one set of operators where the economic relationship between its sector and the regulated entities were tenuous at best. That is not the case here. The RFA requires the agency to consider the Rule's costs on small entities such as importers; the only way the data required by the Rule can be collected by the importer is if processors collect and maintain those data and transmit them to the importer. The costs to the processor will be directly passed to the importer. This is acknowledged in the administrative record, where the agency stated that chain of custody costs in complex systems "may be either passed through to U.S. consumers or result in a decline in exports to the U.S." *See* AR 6918: 81 Fed. Reg. at 88,986. By ignoring the costs imposed on the processors which are passed on to the importer, the agency has swept one of the largest cost components under the rug.

The government also argues that the Final Rule would not require processors to segregate catches. Gov't Br. at 37. There is nothing in the actual Rule that suggests this exception. The fact that in the preamble the Agency would not require each piece of fish in a 44,000 pound container to be labeled with its pedigree does not mean that the processors are freed from the chore of segregating seafood by customer. That would still be required, and the costs of doing so are significant, yet they were not evaluated. Ignoring a major cost component, as was done here, is not even good enough for government work. *See e.g., North Carolina Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) (finding a NMFS RFA analysis failed to comply with the requirements of the RFA because it failed to assess of categories of costs). Plaintiffs estimated that these costs would be in the $900 million range. *See* Plaintiffs' Br. at 35.

The agency's assertion that it adequately weighed alternatives rings hollow in light of the magnitude of the costs and the significant alternatives it weighed for the first time in its brief. First, the agency argued that not regulating was not an alternative because of the agency's mandate. *See* Gov't Br. at 38. That reasoning is circular: "we have to regulate because we have to regulate." Improved or enhanced enforcement, increased penalties and better international cooperation are all viable alternatives to a complex and costly Rule. None of these was

evaluated in the RFA. The major alternatives, including DNA testing, which is considered a best practice for verifying proper labeling, was never mentioned in the RFA analysis and was brushed off by the government in the brief because there are supposedly not enough government laboratories. *See* Gov't Br. at 38. However, no one envisions government laboratories running DNA tests. It is a burden to be borne by the importers in appropriate circumstances and a method already used for species difficult to ascertain by visual identification. It is a far more direct and better way of ensuring seafood label integrity than forcing importers to enter millions of data points that no one will review. Notwithstanding any discussion of DNA testing, the agency has a slew of available tools to address these challenges. Most notably, the MSA gives NMFS authority to identify countries whose fleets are engaged in IUU fishing, and then to consult with those countries on improving their fishery management and enforcement practices. Using its existing programs more aggressively to confront IUU fishing may not be exciting for the government, but those programs are available alternatives regardless. In short, the government's RFA analysis was legally defective.[15]

VI. Vacatur With Remand Is An Appropriate Remedy Here

Where a party makes out its case under the APA, it is entitled to a remedy. Under the APA, setting aside the rule is the appropriate remedy for a rule that is issued without sufficient justification or without proper authority. 5 U.S.C. § 706(2). The Rule should be vacated and remanded to the agency for correction, and, if warranted, reissuance. Both the government and ABSC concede that remand is warranted in the event this Court finds the Rule is infirm, but they argue against vacatur. They do not dispute that remand without vacatur should be rare, but the government argues that continued enforcement of the Rule is in the public interest because of the threat of IUU fishing. Gov't. Br. at 45. The argument ignores that confidence and transparency in rulemaking also are in the public interest. And, given that the Rule has been in the works

[15] The government also wants to strike the Connelly Declaration because it introduced non-record materials. It is unclear what the government believes is outside the record. The government should be careful for what it wishes: its discussion of alternatives was outside the administrative record.

since 2014, neither the government nor ABSC has shown that a delay in the enforcement of the Rule will be significant or disruptive. ABSC suggests that vacatur is not required because the defects here are simply technicalities that can readily be addressed on remand. "Everyone is entitled to his own opinion, but not his own facts." *Resolute Forest Prods. v. U.S Dep't of Agriculture.*, 187 F. Supp. 3d 100, 120 (D.D.C. 2016) (quoting Sen. Daniel Patrick Moynihan). When it comes to the seriousness of the shortcomings in the government's rulemaking effort here, the facts speak for themselves; the government's errors cannot be lightly tossed off as mere technicalities. As the court in *Bayou* noted, it is never in the public interest for an agency to issue a rule that it has no authority to issue. *Bayou*, 713 F.3d at 1085.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be granted and the Court should vacate and enjoin the Final Rule. The government's and ABSC's cross-motions for summary judgment should be denied.

Respectfully submitted,

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