Nos. 11-1952, 11-1964, 11-1987, & 11-2001

United States Court of Appeals
For the First Circuit

No. 11-1952

JAMES LOVGREN; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; RICHARD GRACHEK; ROANOKE FISH CO., INC.; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,
Plaintiffs,
(caption continued on next page)

Appeal from the United States District Court for the District of Massachusetts
(Hon. Rya W. Zobel) No. 1:10-cv-10789

BRIEF FOR THE FEDERAL DEFENDANT-APPELLEES

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CITY OF NEW BEDFORD; CITY OF GLOUCESTER,
Plaintiffs-Appellants

v.

THE HONORABLE JOHN BRYSON,[1] Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO,
Administrator of the National Oceanic and Atmospheric Administration,
Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC)
Defendants

No. 11-1964

JAMES LOVGREN,
Plaintiff-Appellant

CITY OF NEW BEDFORD; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; RICHARD GRACHEK; ROANOKE FISH CO., 1NC.; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,
Plaintiffs

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[1] John Bryson was sworn in as Secretary of Commerce on October 21, 2011 and is automatically substituted for Gary Locke. *See* FRAP 43(c)(2).

v.

THE HONORABLE JOHN BRYSON, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERICADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE,(NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration, Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC), Defendants

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No. 11-1187

JAMES LOVGREN; CITY OF NEW BEDFORD; PAUL THERIAULT; CHUCK WEIMER; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; ROANOKE FISH CO., INC.; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,
Plaintiffs

NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; DAVID ARIPOTCH; RICHARD GRACHEK; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES,
Plaintiffs-Appellants

v.

THE HONORABLE JOHN BRYSON, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration, Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),
Defendants

No. 11-2001

JAMES LOVGREN; CITY OF NEW BEDFORD; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; RICHARD GRACHEK; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; REIDAR'S MANUFACTURING, INC.; LOCAL 1749 ILA, AFL-CIO, NEWBEDFORD FISH LUMPERS PENSION PLAN,
Plaintiffs

TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; ROANOKE FISH CO., INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPEII, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.,
Plaintiffs-Appellants

v.

THE HONORABLE JOHN BRYSON, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration,
Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),
Defendants

No. 11-2001

JAMES LOVGREN; CITY OF NEW BEDFORD; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; RICHARD GRACHEK; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; REIDAR'S MANUFACTURING, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN
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THE HONORABLE JOHN BRYSON, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration
Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC)
Defendants

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GLOSSARY

A13	Amendment 13 to the Northeast Multispecies Fishery Management Plan
A16	Amendment 16 to the Northeast Multispecies Fishery Management Plan
APA	Administrative Procedures Act
DAS	Days at Sea
EIS	Environmental Impact Statement
FMC	Fishery Management Council
FMP	Fishery Management Plan
IFQ	Individual Fishing Quota
LAPP	Limited Access Permit Program
MSA	Magnuson-Stevens Act
NEFMC	New England Fishery Management Council
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
PSC	Potential Sector Contribution
TAC	Total Allowable Catch

INTRODUCTION

Fishing for groundfish such as cod, haddock, and flounder has been a way of life for the people of New England for centuries. But as diesel replaced sail and trawl nets replaced hook and line, the fishery became depleted. By the time the Magnuson-Stevens Act (MSA) was enacted in 1976, groundfish landings had dwindled from a peak of 288,000 tons annually in the mid-1960s to a little over 100,000 tons. JA70.[2]

Until Amendment 13 (A13) went into effect in 2004, the fishery management plans (FMPs) for the Northeast multispecies fishery relied exclusively on effort controls, such as limiting the "days at sea" (DAS) that fishermen could fish, in an attempt to reverse the decline of the groundfish fishery. JA261. There were some successes, most notably haddock, but despite almost twenty years of increasingly restrictive DAS limits, many of the fish stocks that make up the New England groundfish fishery are still overfished. JA111.

A13 introduced a new management option. Under A13, any group of fishermen holding multispecies permits could form a group, called a sector, that would agree to be bound by a management plan. If they so chose, the fishermen could agree to abide by a limit (based on their

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[2] References to the appellees' Joint Supplemental Appendix will be cited as JA__; to New Bedford's Appendix as NB App., and to American Alliance's Appendix as Alliance App.

combined landings history) on the amount of fish they could catch, and in exchange, would be freed from other restrictions such as DAS limitations. Two sectors were approved under A13.

Meanwhile, in 2007, Congress amended the MSA to require, among other things, that FMPs "establish a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur in the fishery" and that the annual catch limits include "measures to ensure accountability." 16 U.S.C. §1853(a)(15). These changes became law while A16 was being developed, and were required to be implemented by 2010.

In compliance with the new statutory requirements, A16 included catch limits on every stock, and established accountability measures to ensure those catch limits were met. Complying with the MSA's directive to "end overfishing immediately" required drastic reductions in the total allowable catch (TAC) and the DAS available to fishermen. To ease the burden on fishermen and provide them some flexibility, A16 expanded the sector program established in A13. As A16 was being developed, it was not known how many fishermen would choose to join a sector, but as it turned out, most did, and 17 new sectors were approved.

NMFS recognized that A16, like the amendments that preceded it, will have adverse short term economic impacts on fishermen and fishing communities. But they also recognized that the long-term health of fishing communities depends on the recovery of the fishery, and that the

only way to restore the fishery – and to comply with the MSA's clear mandates – is to end the unsustainable overfishing and rebuild the overfished stocks.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the plaintiffs' complaints under 16 U.S.C. §1861(d), which confers exclusive jurisdiction on the district courts for cases and controversies arising under the Magnuson-Stevens Act, and under 16 U.S.C. §1855(f)(1), which provides for judicial review of regulations and actions implementing fishery management plans.

The federal appellees concur in appellants' statements of appellate jurisdiction.

ISSUES PRESENTED

1. Whether the sector management program established under Amendment 13 (A13) and expanded in Amendment 16 (A16) is an Individual Fishing Quota (IFQ) or Limited Access Permit Program (LAPP) within the meaning of the Magnuson-Stevens Act (MSA).

2. Whether the MSA requires the National Marine Fisheries Service (NMFS) to allow the overfishing of some species of fish in order to obtain the optimum yield from a multi-species fishery.

3. Whether NMFS gave sufficient consideration to economic and social data indicating the importance of fishery resources to affected fishing communities.

4. Whether NMFS violated the National Environmental Policy Act (NEPA) in approving Amendment 16 to the New England Multispecies Fishery Management Plan.

5. Whether the MSA requires that each fisherman's potential sector contribution be calculated using the same time frame, where doing so would require the use of unreliable data and would disrupt settled expectations on which fishermen had relied.

STATEMENT OF THE CASE

A. Statutory background

1. The Magnuson-Stevens Act

In response to the depletion of the nation's fishing stocks as a result of overfishing, Congress enacted the Fishery Conservation and Management Act in 1976. That statute, as amended by the Sustainable Fisheries Act of 1996 and the Magnuson Reauthorization Act of 2006, is generally known as the Magnuson-Stevens Act (MSA). 16 U.S.C. §1801 *et seq*.; *see generally Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104 (1st Cir. 1997). The MSA created eight regional fishery

management councils, 16 U.S.C. §1852(a), which develop fishery management plans to conserve and manage the nation's fisheries. *Id.*, 16 U.S.C. §1852(h)(1). The Councils are composed of state and federal fishery management officials, commercial and recreational fishermen, and others with relevant scientific experience and training. 16 U.S.C. §1852(b).

Once stocks within a fishery are identified as overfished, the Act requires the relevant Council to develop within two years a fishery management plan (FMP), or an amendment to an existing FMP, that will "end overfishing immediately" and rebuild overfished stocks in a time period "as short as possible" but no longer than ten years unless "the biology of the stock of fish, environmental conditions, or . . . international agreement . . . dictate otherwise." 16 U.S.C. §§1854(e)(3), (4). The plan or amendment is then transmitted to the National Marine Fisheries Service (NMFS) which can only approve, partially approve, or disapprove it. 16 U.S.C. §1854(a). To the extent the plan is approved, NMFS is responsible for implementing it through regulations and enforcing it. 16 U.S.C. §1854(b).

The MSA allows Councils to create, and NMFS to approve, an FMP that implements a "limited access privilege program" (LAPP), 16

U.S.C. §1853a(a), which by definition includes, and is essentially identical to, an "individual fishing quota" (IFQ). 16 U.S.C. §1802(23), (26). [3] In New England, any FMP that creates a new IFQ cannot take effect until approved by two-thirds of those voting in a referendum. 16 U.S.C. §1853a(c)(6)(D)(i). Congress was explicit, however, that the sector program is not subject to the referendum requirement: "[i]n this subparagraph, the term 'individual fishing quota' does not include a sector allocation." 16 U.S.C. §1853a(c)(6)(D)(vi).

The MSA requires that FMPs be consistent with ten National Standards, 16 U.S.C. §1851, the first of which requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. §1851(a)(1). The MSA charges NMFS with balancing the competing interests implicit in the standards, but only to the extent that conservation objectives are not compromised. *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996) ("Congress required the Secretary to exercise discretion and judgment in balancing among the conflicting

[3] The parties agree that the terms are essentially identical. *See, e.g.*, NB Br. at 26. We therefore use the terms interchangeably.

national standards in section 1851."); *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000)("[U]nder the Fishery Act, the Service must give priority to conservation measures").

2. The National Environmental Policy Act

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for any major action "significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). The purpose of an EIS is to examine the environmental effects of, and alternatives to, the proposed action, and to inform the public of the agency's decisionmaking process. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). NEPA is designed to "insure a fully informed and well-considered decision, not necessarily a decision [judges] would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

B. Statement of Facts

1. The Northeast Multispecies Fishery and its history

a) The early fishery management plans, based on effort controls, failed to end overfishing and restore the fishery

The Northeast Multispecies Fishery, also known as the New England groundfish fishery, consists of thirteen bottom-dwelling fish

species divided into twenty stocks due to geographical distinctions. Once a seemingly limitless resource, landings in this fishery had fallen precipitously from a peak of 288,000 tons per year to less than half of that by the time the MSA was enacted in 1976. JA70. The MSA's exclusion of foreign fishing boats led more U.S. vessels to enter the fishery, which caused a temporary increase in U.S. groundfish landings, but the overfishing soon caused landings to drop back down to about 130,000 tons per year by the time the first permanent FMP went into effect in 1986. *Id.*; 51 Fed. Reg. 29642 (Aug. 20, 1986), 52 Fed. Reg. 23570 (June 23, 1987).

The 1986 FMP did not restrict the number of vessels, the amount of fish that could be caught, or the number of days that could be fished, relying instead solely on minimum net mesh sizes, area closures, and minimum fish size. 51 Fed. Reg. 29642 (Aug. 20, 1986). Those measures proved inadequate to end overfishing, and landings fell further to about 50,000 tons per year by the mid-1990s. JA70.

In 1994, NMFS approved Amendment 5, which created the days-at-sea (DAS) effort-control system. That system attempts to reduce fishing mortality by limiting the amount of fishing effort that can be "input" into the fishery, but does not directly limit the amount of fish

that can be caught – the "output." Despite this new restriction, key stocks continued to collapse. *Associated Fisheries*, 127 F.3d at 108.

In response to the insufficiency of Amendment 5, as well as additional requirements imposed by the Sustainable Fisheries Act of 1996, Amendment 7 reduced DAS allocations, expanded area closures, and eliminated many exemptions. Subsequent amendments have further reduced DAS in an attempt to halt overfishing, with mixed results. The total biomass of the fishery has been improving, JA71, and some stocks, such as haddock, have rebounded. JA84, 261. Other stocks, however, have not, and some have further deterioriated. JA84, 111.

b) Amendment 13 further reduced DAS, and created the sector program as an alternative

Amendment 13 (A13), approved in 2004, continued the earlier pattern of relying primarily on effort controls to prevent overfishing, and to that end it "greatly reduced fishing effort and capacity" through further reductions in DAS allocations. JA126. A13 also pioneered an alternative approach, however, allowing fishermen to form voluntary, self-selecting groups called sectors. 69 Fed. Reg. 22914 (Apr. 24, 2004). Sectors would receive an allocation of either Total Allowable Catch (TAC) based on the members' documented landings for the years 1996 to 2001, or an allocation of DAS based on the members' cumulative DAS

allocations.[4] They would create and submit for approval a binding management plan governing how they would fish their joint allocation of catch or effort. If the plan were approved, sector participants could be exempted from "any Federal fishing regulations necessary to allow such participants to fish in accordance with the Operations Plan," with certain exceptions. *Id.* at 22982. What this meant is that under A13, a group of fishermen could agree to be bound by a hard TAC for specific stocks based on their collective landings history, and in exchange would be exempted from certain effort controls, including DAS limitations applicable to those stocks.

A13 also approved a sector plan for the Georges Bank Cod Hook Sector, allocating it a TAC proportional to its members' landings from 1996 to 2001. Another sector, the Georges Bank Cod Fixed Gear Sector, was approved in 2006. 71 Fed. Reg. 62156 (Oct. 23, 2006).

[4] Although A13 allowed sectors to base their management plan on either DAS or on a hard TAC, the two sectors approved opted for the hard TAC.

c) The Magnuson Reauthorization Act, enacted during the development of A16, required catch limits and an "immediate" end to overfishing

In November 2006, the Council published a notice of intent to begin preparing the next amendment to the FMP, A16.[5] Two months later, Congress enacted the Magnuson Reauthorization Act, which amended the MSA in ways that impacted the groundfish FMP. Specifically, the amended MSA required that FMPs contain annual catch limits (ACLs) to prevent overfishing, and accountability measures to ensure that those catch limits are adhered to. 16 U.S.C. §1853(a)(15). The amendments also clarified that FMPs, as developed by the Councils, could no longer allow overfishing, even temporarily; the new law required the Councils to develop FMPs to "end overfishing immediately." 16 U.S.C. §1854(e)(3)(A).[6]

The statute imposed deadlines requiring the Council and NMFS to implement a FMP that would end and prevent overfishing, and implement accountability measures, by the 2010 fishing year for

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[5] 71 Fed. Reg. 64,941 (Nov. 6, 2006).

[6] A13, for example, had temporarily allowed overfishing to accommodate the "needs of fishing communities," reasoning that "nothing in the Act . . . require[s] that overfishing be ended immediately upon implementation of such a plan." 69 Fed. Reg. 22920 (Apr. 24, 2004). The 2006 amendments changed that.

fisheries subject to overfishing, and by the 2011 fishing year for healthy stocks. JA128; Pub. L. No. 109-479, Title I, §104(b). The Northeast groundfish fishery's fishing year begins on May 1. Although the statute did not specifically require that the FMP be in place at the *start* of the fishing year, the Council and NMFS reasonably concluded that changing management systems in the middle of the fishing year would be unworkable for fishermen and managers alike, JA286, and therefore, for this fishery, the deadline for implementing the new FMP was May 1, 2010.

d) A16 adopted measures to end overfishing as mandated by the MSA, and provided fishermen with the option to form sectors as an alternative to DAS management

After a lengthy series of public meetings, the Council published a draft EIS, analyzing all measures under consideration in A16, on April 24, 2009, with comments due June 8, 2009. JA260. The Council then adopted its final measures for A16 in June 2009, and submitted the plan to NMFS for approval. The final vote of the Council, which is composed of commercial and recreational fishermen, state and federal fishery management officials, and fishery scientists, was 14 in favor to one opposed, with one abstention.

A notice of availability of A16 as submitted to the Secretary of Commerce, and of the final EIS, was published on October 23, 2009, 74 Fed. Reg. 54773, with comments due December 22, 2009. A proposed rule implementing A16 was published on December 31, 2009, with comments due January 20, 2010. 74 Fed. Reg. 69382.

After considering all comments, NMFS partially approved A16 and issued three related sets of regulations to implement it. The first set of regulations is A16 itself, which details rebuilding programs for overfished stocks and revises existing management measures. 75 Fed. Reg. 18,262 (Apr. 9, 2010) (JA271). The second is the sector operations rule, which approved 17 sector operations plans for fishing year 2010. 75 Fed. Reg. 18,113 (Apr. 9, 2010) (JA268). The third is Framework Adjustment 44, which sets the specific catch limits for each stock in accordance with the process defined by A16. 75 Fed. Reg. 18,356 (Apr. 9, 2010) (Alliance App. 116). The parties refer to these three rules collectively as A16. They took effect on May 10, 2010.

A16 makes many changes in the management of the fishery, but two are particularly relevant to this litigation. First, as mandated by the 2006 amendments to the MSA, A16 for the first time establishes ACLs for each stock, Alliance App. 119-122, and sets forth the

accountability measures (AMs) to ensure compliance with the ACLs. JA275-279. Those catch limits represent, for some stocks, dramatic reductions in the amount of fish that can be caught, in order to comply with the statutory requirement to "rebuild affected stocks of fish" within ten years. 16 U.S.C. §1854(e)(3),(4).

Second, A16 expands the sector program created in A13, in order to provide vessel owners with additional ways to adapt to and mitigate the negative impacts of the more severe limitations on fishing. JA119-20, 131-32, 224-28, 231-34, 296-97. To facilitate participation in sectors, each vessel was assigned a Potential Sector Contribution (PSC) for each stock, based on the vessel's landings history. If that vessel chose to join a sector, its PSC would be combined with the other vessels' PSCs to determine the Annual Catch Entitlement (ACE) for the sector. JA284. Once the members of a sector catch the sector's ACE for a stock, they must stop fishing for that stock for the rest of the fishing year. In exchange for agreeing to be bound by hard catch limits, however, sector members are exempted from effort controls such as DAS restrictions or limits on how many fish can be landed per trip (trip limits). JA281.

Because they are exempt from DAS and other effort controls, fishermen in sectors have much greater flexibility to decide how, when,

and where to fish. JA270. The Council and NMFS believed this flexibility would enable fishermen to mitigate the negative impacts of more restrictive measures by increasing their efficiency, reducing discards and adopting selective fishing practices to target healthy stocks, ultimately benefiting the fishery as well as the fishermen. JA215, 262.

The sector program is voluntary, and permit holders that choose not to join a sector may still fish from the "common pool" of fish under the DAS effort-control program. JA287. Fishermen who do not opt to join a sector may not fish their PSC, however; the PSC has no application except as an element in calculating a sector's ACE, and does not confer on the permittee any right or privilege to catch that quantity of fish.

Neither NMFS nor the Council could know, as they were developing A16, how many vessels would choose to join a sector once the new rule was implemented. As it turned out, 812 of the 1477 permitted vessels joined sectors. Those 812 vessels were responsible for landing 98% of the previous decade's catch. JA269.

2. The district court litigation

On May 9, 2010, a group of fishermen, businesses, organizations, and the Cities of New Bedford and Gloucester, Massachusetts, filed a five-count complaint in the District of Massachusetts, alleging that A16 and its implementing regulations violated, *inter alia*, the MSA and NEPA. Meanwhile, on April 29, 2010, fisherman James Lovgren filed a thirteen-count complaint in the District of New Jersey, raising similar claims. Those actions were consolidated in the District of Massachusetts, and Conservation Law Foundation intervened as a defendant.[7]

The parties filed cross-motions for summary judgment, and on June 30, 2011, the district court (Judge Rya Zobel) ruled for the defendants. Addressing the threshold question of what deference is due to NMFS decisionmaking, the court noted that A16 "is the product of a highly formalized administrative procedure, including a notice-and-comment period." Accordingly, it held that NMFS' interpretation of the

[7] A separate challenge to A16 was filed by Oceana, an environmental group, in the District of the District of Columbia, but the judge in that case denied a motion to consolidate it with the other challenges. The district court in that case held that the accountability measures for five species were insufficient, and upheld A16 in all other respects. *Oceana v. Locke*, 2011 WL 6357795 (D.D.C., Dec. 20, 2011).

MSA should be reviewed under *Chevron, USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). NB Add. 6.

The district court affirmed NMFS' conclusion that sectors do not fall within the MSA's definition of LAPPs or IFQs, and are therefore not subject to requirements applicable to LAPPs and IFQs. *Id. at* 7-8. The court also affirmed NMFS' interpretation that, in exempting "sectors" from the referendum requirement, 16 U.S.C. §1853a(c)(6)(D)(vi), Congress "was referring to the existing A13 sector program," and that A16 sectors fall within that exemption. *Id.* at 8-9.

The district court also rejected the plaintiffs' argument that NMFS is required to manage the groundfish fishery to obtain the optimum yield from the fishery as a whole, even if that would cause the overfishing of individual stocks. Although the court acknowledged "sufficient ambiguity" in the relevant statutory provision "to encompass either the Agency's or the plaintiffs' interpretation," the court held that "the rest of the MSA makes clear that the Agency must manage the health of individual stocks." *Id. at* 10.

The district court also found that NMFS had complied with its duty under the MSA's National Standard 8 to "take into account the importance of fishery resources to fishing communities by utilizing

economic and social data . . .", *id.* at 11-12, and had permissibly chosen the time frames from which to calculate PSC for various groups of permit holders, *id.* at 12-13. In addition, the court rejected plaintiffs' argument that NMFS had violated NEPA by eliminating an industry-favored alternative management system from detailed consideration in A16 (deferring consideration to the forthcoming Amendment 17) on the ground that the proposed system could not have been implemented by the statutory deadline. *Id.* at 17.

Several plaintiffs moved for reconsideration, which was denied on August 17, 2011. Various groups of plaintiffs filed four separate appeals, which this Court consolidated.

SUMMARY OF ARGUMENT

The Magnuson-Stevens Act imposes certain requirements on new LAPPs/IFQs, including, in New England, the requirement that they be approved in a referendum by a two-thirds majority. NMFS reasonably concluded that sectors are not subject to any of the MSA's requirements on LAPPs because neither sectors nor PSCs meet the MSA's definition of an IFQ nor a LAPP. Congress defined LAPP as "a Federal permit, issued as part of a limited access system under section 1853a of this title to harvest a quantity of fish expressed by a unit or units

representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person." 16 U.S.C. §1802(26). Sectors do not receive a federal permit, and so do not meet the statutory definition of a LAPP. Individual fishermen do receive a federal permit, but that permit does not confer authorization to harvest a quantity of fish for their exclusive use. Therefore, NMFS correctly concluded that A16 does not establish a LAPP.

NMFS further noted that even if the sector program were construed as a LAPP (which it is not), it would still not be subject to the referendum requirement for two additional reasons: first, because sectors are not new – A13, not A16, created the sector program; and second, because the statute specifically states that for purposes of the referendum requirement, "the term 'individual fishing quota' does not include a sector allocation.'"

The American Alliance plaintiffs (Alliance) argue that the MSA requires NMFS to manage a multi-stock fishery so as to obtain the optimum yield from the fishery as a whole, even if that means that individual stocks of fish within a multi-species fishery are overfished, or are not rebuilt. Alliance's interpretation is inconsistent with the many provisions of the MSA that require NMFS to "prevent" or "end"

overfishing, and to "rebuild affected stocks of fish." Moreover, the "optimum" yield is, by statutory definition, one that "provides for rebuilding" of overfished stocks. 16 U.S.C. §1802(33)(C).

New Bedford argues that NMFS violated National Standard 8 of the MSA, which requires NMFS, to the extent consistent with conservation requirements, to "take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . ." New Bedford acknowledges the comprehensive economic analysis in the EIS, but protests that the separate analysis of social data, at "only 43 pages," is too short. New Bedford fails, however, to identify any actual error in those 43 pages or to identify any social impact omitted, or data ignored, in the social or overlapping economic analysis.

NMFS complied with NEPA, producing a comprehensive EIS. NMFS considered an appropriate range of alternatives, and properly eliminated from further study those which could not satisfy one of the key objectives of the FMP: compliance with the MSA. NMFS also explained its conclusion that sectors were not likely to increase the rate of consolidation in the fishing industry, which has been ongoing for

decades. Alliance may disagree with that conclusion, but it has not shown that the agency acted arbitrarily or capriciously.

Finally, NMFS acted rationally in selecting the baseline periods for allocating certain stocks of fish between the commercial and recreational fisheries, and for setting PSCs. Alliance argues that the baseline period should have been the same for all decisions, but NMFS selected different periods in order to avoid using unreliable data, and in order to preserve stability for those fishermen who had joined sectors under A13. NMFS explained its decisions, which were rational and well within its substantial discretion in balancing the goals embodied in the National Standards.

STANDARD OF REVIEW

The district court's summary judgment order is reviewed *de novo*. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

Plaintiffs' claims under both the MSA and NEPA are reviewed under the Administrative Procedure Act (APA), whereby courts may set aside agency decisions only if they are "arbitrary, capricious, or otherwise contrary to law." *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (MSA); *see also United States v.*

Coalition for Buzzards Bay, 644 F.3d 26, 30 (1st Cir. 2011) (NEPA). As this Court explained in an earlier challenge to an earlier FMP, "[a]n agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it." *Associated Fisheries*, 127 F.3d at 109. The reviewing Court's role is simply "to determine whether the Secretary's decision to promulgate the fishery regulation was consonant with his statutory powers, reasoned, and supported by substantial evidence in the record." *Id.*

NMFS' interpretation of the MSA is reviewed according to *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006). The Court first considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "So long as the agency's construction is reasonably consistent with

the statute, [the Court] defer[s] to it." *Oregon Trollers*, 452 F.3d at 1116.

ARGUMENT

I. Sectors are not LAPPs or IFQs, and are explicitly exempted by statute from the referendum requirement applicable to new IFQs.

Plaintiffs argue that the sector program established in A16 constitutes a LAPP and/or an IFQ, and is thus subject to the requirement of 16 U.S.C. §1853a(c)(6)(D)(vi) that any new IFQ program be approved by a referendum before taking effect, and to several other requirements applicable to LAPPs.

NMFS explained in its Final Rule implementing A16 that the sector program does not establish either an IFQ or a LAPP. JA283. Moreover, as NMFS explained in response to comments in the Final Rule, the MSA explicitly provides that sectors are not IFQs for the purpose of the referendum requirement on new IFQs. JA289, *see* 16 U.S.C. §1853a(c)(6)(D)(3) ("In this subparagraph, the term 'individual fishing quota' does not include a sector allocation.")

A. Sectors are voluntary, temporary contractual organizations of individual permit-holding fishermen

To understand why NMFS concluded that the sector program does not create an IFQ or a LAPP, and to review whether its interpretation

is reasonable and consonant with the statute, it is necessary to understand exactly what a sector is. They are, by definition,

> a group of persons holding limited access NE multispecies permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and that have been allocated a portion of the TACs of the species managed under the NE Multispecies FMP to achieve objectives consistent with the applicable goals and objectives of the FMP.

50 C.F.R. §648.2.

A sector is assigned an ACE for each stock, which is "the maximum amount of a particular stock that a sector could catch – including both landings and discards – on a yearly basis." JA284. A sector's ACE "represents a share of that stock's ACL available to commercial NE multispecies vessels based upon the cumulative PSCs of vessels participating in each sector." *Id*. A vessel's PSC, in turn, is based on its landings history for the years 1996-2006.[8] The ACE is valid for one fishing year only, and is "recalculated on a yearly basis based upon changes to sector rosters."

Exactly how members of a sector catch the sector's ACE is up to them. Sector members agree to an operations plan – essentially, their

[8] As explained *infra*, pp. 66-68, limited exceptions to this time frame exist.

own miniature FMP – which governs how they will access the sector's ACE. JA269. They may, if they choose, agree to fish an amount proportional to the PSC they contributed to the sector, or they may choose to pool harvesting resources and consolidate operations in order to maximize efficiency. *Id.* Sectors must submit their sector contract, operations plan, and an environmental assessment for approval before an ACE will be assigned. *Id.*

Sector membership is voluntary; permit holders need not join a sector in order to be able to fish. However, vessels that do not join a sector are not entitled to fish their PSC as if it were a personal quota; the PSC is meaningless outside the sector context. Vessels that do not join a sector remain bound by effort controls such as DAS restrictions and trip limits, as well as by the overall TAC for the fishery. JA275.

B. For purposes of the referendum requirement, the MSA explicitly provides that a sector is not an IFQ.

1. Congress has explicitly provided that sectors are not subject to the referendum requirement.

In any challenge to an agency's implementation of a statute it administers, the first step is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. With respect to the question of whether sectors are subject to the

referendum requirement of 16 U.S.C. §1853a(c)(6)(D), Congress has spoken directly to the issue in two ways. First, the referendum requirement by its express terms applies to an FMP that "*creates*" an IFQ program. Since A16 did not "create" the sector program, but merely revises and expands the existing A13 sector program, JA268, the referendum requirement would not apply even if a sector were an IFQ. Second, to make absolutely clear that the referendum requirement does not apply to the sector program, Congress explicitly provided that "[i]n this subparagraph, the term 'individual fishing quota' does not include a sector allocation." 16 U.S.C. §1853a(c)(6)(D)(vi). Because Congress's intent that sectors are not subject to the referendum requirement is clear, the inquiry should be at end.

2. If there is any doubt about Congress's intention, NMFS' interpretation of the MSA, reached through notice-and-comment rulemaking, is entitled to deference.

Despite the plain language of §1853a(c)(6)(D)(vi), the plaintiffs argue that it does not apply in this case because A16 sectors are not "sectors" within the meaning of the MSA. The MSA does not define "sector," but all parties agree that Congress had the A13 sector program

in mind when it wrote that provision.[9] Since A16's sector program is simply an expansion and revision of A13's sector program, NMFS reasonably interpreted it to apply to A16 sectors as well, and concluded that "sectors . . . are not subject to the referendum or cost-recovery requirements of the Magnuson-Stevens Act." JA283, *see also* JA289 (responding to comments). That conclusion was reached in the context of a notice-and-comment rulemaking, in which NMFS expressly considered and responded to opposing viewpoints from multiple commenters. JA283 (stating NMFS view that sectors are not subject to the referendum requirement), JA289 (responding to comments). NMFS' interpretation is reasonable and consistent with the statute, and is therefore entitled to *Chevron* deference.

Amicus Food and Water Watch (FWW) denies both that the decision was made in a notice and comment rulemaking, and that opposing viewpoints were considered. FWW Br. at 7-12. This denial is particularly remarkable because FWW itself participated in the notice and comment process, and NMFS specifically responded to FWW's opposing views. JA289.

[9] *See* New Bedford Br. at 43; Lovgren Br. at 13-14; Alliance Br. at 34.

FWW attempts this feat of obfuscation by ignoring the agency's final decision and focusing instead on a 2007 opinion letter in which "[t]he interpretation was originally put forth." FWW Br. at 8, citing AR10135-37. FWW then argues that the *letter* is not entitled to deference because it was not the product of notice and comment rulemaking, does not address conflicting viewpoints, and was non-binding.[10]

FWW's argument that the 2007 letter is not entitled to *Chevron* deference is wholly irrelevant because A16, not the 2007 letter, is the agency action under review here. As shown above, A16 is undeniably the product of an extensive notice-and-comment rulemaking, in which the applicability of the referendum requirement to A16 was explicitly decided. JA283, 289. In its response to comments, NMFS mentions the 2007 letter, but uses it as background explanation of NMFS' consistent interpretation of the IFQ and LAPP provisions of the MSA, not as the last word on the question of whether A16 sectors, as set forth in the final rule, are subject to the referendum requirement. In fact, NMFS

[10] NMFS disputes FWW's claim that the 2007 letter, which is well-reasoned and persuasive, would not merit deference. However, since it is not the subject of judicial review here, the level of deference owing to that letter is immaterial.

explicitly states that "none of the revisions to the current sector program in this final rule change the conclusions reached in that letter." JA289. By finding that the revisions to the sector program *do not change* the conclusions in the letter, NMFS was clearly not just following the letter, but was making a new, separate determination about the applicability of that previously-expressed reasoning to the current set of facts. It is *that* determination, made and expressed in a notice and comment rulemaking, that is under review here.

FWW cites no authority, and we are aware of none, suggesting that an agency's application of a statute it administers, arrived at through notice and comment rulemaking, is not entitled to deference if it is consistent with an earlier, less formal agency statement. *Chevron* deference should be applied.

3. A16 sectors are sufficiently similar to A13 sectors to be "sectors" within the meaning of the MSA.

The plaintiffs and FWW acknowledge that 16 U.S.C. §1853a(c)(6)(D)(vi) expressly provides that sectors are not IFQs for the purposes of the referendum requirement. They argue, however, that A16 sectors are so different from A13 sectors that they are not really "sectors" within the meaning of that provision. Their purported

distinctions between A13 and A16 sectors, however, cannot withstand scrutiny.

The New Bedford plaintiffs allege that under A13, sectors "referred to groups of fishermen formed around a unifying characteristic of the members, *e.g.* type of gear used, targeted stock, or purpose (recreational versus commercial)." NB Br. at 43-44. A16 sectors are "fundamentally different," New Bedford argues, because NMFS has "impermissibly expanded the term sector beyond its traditional meaning." New Bedford is wrong about A13, which never required that sectors be based on common gear, geography, or any other trait other than holding a Northeast multispecies permit. The rule implementing A13 sectors stated simply that "any person may submit a Sector allocation proposal for a group of limited access NE multispecies vessels . . .," and imposes no requirement of any other commonality among the prospective sector members. 50 C.F.R. §648.87(a)(1) (2004), 69 Fed. Reg. 22981 (Apr. 24, 2004). While the two sectors approved under A13 did organize themselves around common traits, that was a choice, not a requirement. The EIS for A13 explicitly refutes the notion that any such common factor is a requirement for forming a sector:

> Such self-selected sectors might be based on common fishing practices, vessel characteristics, community organization, or marketing arrangements, *but this would not be required. Since self-selection of sector membership would not necessarily be based on any common vessel or gear* characteristics this alternative offers a great deal of flexibility in the formation of sectors.

JA1 (emphasis added).

Lovgren argues that A13 sectors and A16 sectors "only share a name in common," because "under Amendment 13 the DAS input controls are the core of the sector organization, whereas Amendment 16 focuses on output controls." Lovgren Br. at 14-15. Lovgren is mistaken about A13 sectors: they could be based on "either a TAC limit (hard TAC), or a maximum DAS usage limit . . . ." 50 C.F.R. §648.87(b)(i) (2004), 69 Fed. Reg. 22981 (Apr. 24, 2004). Both of the sectors that were approved under A13 provisions chose to operate under a hard TAC for Georges Bank cod and to be free from DAS limits when fishing for that stock. Thus, Lovgren's asserted difference between A13 and A16, like New Bedford's, turns out to be no difference at all.

FWW joins the refrain of claiming that A16 sectors are "nothing like" A13 sectors, FWW Br. at 16. FWW argues that under A13, a sector is

> a group of permit-holders who voluntarily entered into a legally binding agreement with NMFS to limit their catch

> either through days-at-sea effort controls or hard Total Allowable Catch limits. . . . If the sector opted for the latter, NMFS allocated a portion of the Total Allowable Catch to the sector as a unit . . . . In other words, under Amendment 13, a sector formed *before* an allocation of catch was made, and the allocation was then made to the sector *as a whole*. However, under Amendment 16, each fisherman is individually allocated a quota (portion of the Total Allowable Catch) in the form of a PSC, which he then brings to a sector.

FWW Br. at 17 (emphasis in original). FWW is mistaken about how A13 sector allocations worked.[11] A13 provided that "[a]llocation of fishery resources to a sector is based on documented accumulated landings for the 5-year period prior to submission of a sector allocation proposal to the Council, of each participant in the sector." 69 Fed. Reg. 22914 (Apr. 24, 2004). In other words, it worked exactly the same way A16 sectors do: a sector's allocation of fish is based on the sum of its members' landings over a specified period of time. In both A13 and A16, the sector's allocation is necessarily assigned after the sector forms, because it can't be calculated until the membership of the sector, with their

[11] FWW is also wrong about how A16 sectors work. FWW simply asserts that each fisherman is given a quota, as if that were an agreed premise rather than the disputed conclusion they are trying to prove. As shown above, PSC is not an individual quota; it is simply a piece of data. It represents how many fish were landed under that permit in a given time frame, and is used *only* for the purpose of determining a sector's ACE.

collective landings history, is known. The only difference here is that in A16 NMFS has given a name – PSC – to the "documented accumulated landings . . . of each participant in the sector." JA284 (A16 rule, explaining that PSC is "calculated by summing the dealer landings for each permit during FY 1996 through 2006").

NMFS does not claim that A16 sectors are exactly the same as A13 sectors. There were changes, some of them important. A16 eliminated the never-used option of basing sectors on combined DAS rather than combined landings history (PSC), added enhanced monitoring and reporting requirements, imposed new accountability measures, and removed the 20%-of-TAC cap that had previously limited the size of sectors. JA283-85. None of those details, however, so fundamentally alter the sector program as to make it no longer a sector within the meaning of the MSA.

Contrary to the suggestions of plaintiffs and amici, the statute does not limit the sector exemption to A13, or to sector programs that are identical in every detail to A13. Congress could easily have written an exemption that was limited to A13, but it did not. FWW suggests that §1853a(c)(6)(D)(vi) should be read as a grandfather clause for

A13,[12] likening it to other statutory exclusions that are explicitly limited to programs in existence at the time of, or within six months of, enactment of the Magnuson Reauthorization Act. FWW Br. at 18. In fact, FWW's argument cuts the other way. The fact that Congress did include such limitations in other simultaneously-enacted provisions, but did not include a comparable limitation in §1853a(c)(6)(D)(vi), strongly suggests that no such limitation was intended. "It has long been settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Trenkler v. United States*, 268 F.3d 16, 23 (1st Cir. 2001), *quoting Russello v. United States*, 464 U.S. 16, 23 (1983). That inference is at its strongest when the disparate provisions were enacted simultaneously, as these were. *Lindh v. Murphy*, 521 U.S. 320, 331 (1997).

None of plaintiffs' or amici's arguments are sufficient to show that NMFS acted arbitrarily, capriciously, or manifestly contrary to statute

[12] Even if FWW's argument had merit, which it does not, it would not affect the applicability of § 1853a(c)(6)(D)(vi) here, because A16 sectors are a revision and expansion of A13 sectors, not a new sector program.

in interpreting §1853a(c)(6)(D)(vi) to apply to A16 sectors. Its reasonable interpretation, reached through notice-and-comment rulemaking, of a statute it is charged with implementing is entitled to deference and should be affirmed.

C. NMFS reasonably concluded that neither sectors nor PSCs meet the MSA's definition of a LAPP or an IFQ

The MSA imposes certain other requirements on LAPPs. *See* 16 U.S.C. §1853a. With respect to those requirements, unlike the referendum requirement, the statute does not directly state whether the requirements apply to sectors. The statute does, however, define LAPP, and as NMFS explained, sectors do not fall within that definition.

The MSA defines "limited access privilege" as "a Federal permit, issued as part of a limited access system under section 1853a of this title to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person." 16 U.S.C. §1802(26). The definition of an "individual fishing quota" is virtually identical. 16 U.S.C. §1802(23).

The A16 sector program does not implement an IFQ or a LAPP because under A16, no one – not an individual, a vessel, nor a sector – receives "a Federal permit . . . to harvest a quantity of fish expressed by

a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person." 16 U.S.C. §1802(26); *see* JA283. As NMFS explained in the final rule implementing A16, "[t]here is no permit issued to a sector, and no long-term allocation of fish is made to any sector. Unlike individual fishing quotas (IFQs), sectors are temporary, voluntary, fluid associations of vessels that can join together to take advantage of flexibilities and efficiencies that sectors are afforded." JA283. Because sectors do not receive a Federal permit, sectors do not fall within the MSA's definition of a LAPP.

Vessels do receive permits that enable them to participate in the fishery, but the permit does not confer upon the permittee the right to harvest a particular quantity of fish for his or her exclusive use. Although a PSC does indeed identify a quantity of fish, the permit does not give the permit-holder the right to harvest the PSC for his or her exclusive use. Therefore neither PSCs, nor the permits containing them, meet the statutory definition of a LAPP.

1. Sectors do not receive a federal permit

New Bedford argues that, even though sectors do not actually or literally receive a permit, they receive the "functional equivalent" of

one. New Bedford's argument begins reasonably enough, relying on the statutory definition to argue that a sector is a "person," but then invokes the broadest, vaguest sense of the word "permit" (taken from the 1976 edition of the American Heritage Dictionary) to argue that because sectors "may fish" their ACE (those words taken from the government's trial brief), they have been given a "permit" to do so. NB Br. at 27.

New Bedford's expansive interpretation of the word "permit" is at odds with the entire regulatory scheme and with common sense. The ordinary legal definition of the word "permit" is "a certificate evidencing permission; a license," Black's Law Dictionary (2009 ed.), not, as New Bedford suggests, any sort of permission. Moreover, in the context of a heavily regulated environment in which permits are part of the regulatory structure, the word "permit" obviously means a permit issued under that system. If Congress had intended the meaning New Bedford suggests, it could have defined LAPP more broadly as "any program in which a person or entity may harvest a quantity of fish . . . ." But Congress did not do that; it specifically stated that a LAPP consists of "*a Federal permit,* issued as part of a limited access system under section 1853a of this title to harvest a quantity of fish . . . ." 16

U.S.C. §1802(26) (emphasis added). NMFS certainly did not act unreasonably in construing "a Federal permit" to refer to an actual Federal permit issued through NMFS's regulations, 50 C.F.R. §648.4, and specifically in this case to a Northeast multispecies permit. NMFS' reasonable interpretation of "permit" and of the LAPP definition in general should be upheld; it is New Bedford, not NMFS, that is attempting to "manufacture ambiguity" here. NB Br. at 25.

2. The statutory definition of LAPP is a more reliable guide to Congressional intent than a weak negative inference from the exclusion of sectors from the referendum requirement

Alliance argues that because Congress explicitly stated that sectors are *not* IFQs for the purpose of the referendum requirement, an inference arises that Congress believed that sectors *are* IFQs for all other purposes. Alliance Br. at 33-34. Any such inference, however, is too weak to overcome the plain language of the LAPP definition, which clearly requires the issuance of a Federal permit that confers on the permittee authorization to harvest a quantity of fish for their exclusive use. A more plausible explanation of Congress's intent in enacting the referendum exemption is that it was simply making absolutely clear that the sector program does not require a referendum.

"Superfluous exceptions are commonplace, . . . and have the effect of 'mak[ing] assurance doubly sure.' Thus, although a provision's meaning might be guided somewhat by the exceptions to that provision, the inference is a weak one." *Williamson v. J.C. Penney Life Ins. Co.,* 226 F.3d 408, 411 (5th Cir. 2000), quoting *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring) (stating that "superfluous exceptions (to 'make assurance doubly sure') are a . . . common phenomenon"). This court has similarly held that its "preference for avoiding surplusage constructions is not absolute." *Recovery Group, Inc. v, C.I.R.*, 652 F.3d 122, 127 (1st Cir. 2011), *quoting Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004). Congress's intent as actually enacted in the definition of LAPP, rather than a dubious negative inference about Congress's unwritten intent, should guide this Court's analysis of whether the sector program creates a LAPP.

3. NMFS has not "admitted" that a sector is a LAPP

New Bedford alleges that NMFS has "admitted" that sectors are LAPPs. The sole support for this assertion is a 2007 NOAA technical memorandum entitled "The Design and Use of Limited Access Privilege

Programs."[13] The document provided technical advice to regional councils on how to design limited access privilege programs. In an appendix, the document "spotlighted" certain existing programs, one of which was the Georges Bank Cod Hook Sector, created under A13 – creating an inference that the authors of the technical memorandum considered that sector to be a LAPP.

No one disputes that the question of what constitutes a LAPP, as opposed to a catch share program (which includes, but is not limited to, LAPPs and IFQs) is a complicated legal question.[14] The authors of this technical memorandum were not focused on that legal issue, but rather on the technical details of fishery management plans. Their inadvertent use of the wrong term to describe the Georges Bank Cod Hook Sector signifies little.

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[13] New Bedford also cites a NMFS newsletter talking about a LAPP in Alaska, which New Bedford claims is similar to a sector. That newsletter is obviously not an admission that sectors are LAPPs both because it is an informal document and because it is not even talking about sectors.

[14] NOAA's Catch Share Policy explains that Catch Share "is a general term for several fishery management strategies that allocate a specific portion of the total allowable fishery catch to individuals, cooperatives, communities, or other entities. Catch share programs include LAPPs and IFQs, but also encompass a broader range of fishery management strategies, including sectors.

The technical memorandum, moreover, expressly states that it provides only "non-binding technical advice." NB App. 64.1. It explicitly states that

> [g]iven that LAP program design is a complex and controversial issue, *there is certainly room for differing views especially concerning interpretations of the details of the revised MSA*. Informal discussions on these different interpretations will continue as Councils work under the new legislation, and *in some cases formal legal interpretations and federal rulemaking will be necessary to settle some issues*.

Id. (emphasis added). In fact, formal legal interpretations and federal rulemaking did settle this issue. New Bedford's attempt to trump NMFS' final and formal decision with an inference from an earlier non-binding technical memorandum that explicitly said it was not deciding such issues should be disregarded.

4. PSC is not an individual quota

Amicus FWW admits that "sectors are not LAPPs," JA229, but argues that A16 nevertheless creates a LAPP because the permits issued to fishermen contain an individual quota. FWW's argument is based, however, on a false and question-begging premise: FWW simply asserts that the PSC "represents the quantity of fish that [an] individual is allowed to catch." FWW Br. at 14. That is not true.

As explained above, pp. 17-18, the PSC is a piece of data. It represents the cumulative landings attributable to that permit, over a specified period of time, expressed as a portion of the TAC. But it does not set an individual limit or create an individual entitlement; its only use is in calculating a sector's ACE. JA284. Neither A16 nor the permit confers on any fisherman the right to catch the PSC associated with that permit, nor does it limit any fisherman to catching the PSC. Because neither the permit nor the associated PSC authorize the permittee "to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person," 16 U.S.C. §1802(26), neither the permit nor the associated PSC is a LAPP.

FWW and New Bedford argue that the sectors authorized to date have allocated back to each member the PSC that they contributed to the sector, and so the PSC is in effect an individual quota. This argument is wrong both in its facts and in its logic. First of all, *no* sector management plan allows its members simply to fish their own PSC. All of the sectors have set aside some reserve to ensure that the sector as a whole does not hit its ACE and have to stop fishing prematurely, which is the sort of conservation- and efficiency-enhancing self-policing

measure that sectors were designed to encourage. *See, e.g.*, JA307, JA311-12. Second and more importantly, nothing in A16 requires sector members to distribute the ACE among its members in such a manner. They can, as *amici* Representatives Frank and Tierney complain, consolidate operations to save money rather than having each member fish a share of the ACE proportional to their PSC. Frank/Tierney Br. at 7. The fact that sectors, composed largely of fishermen participating in sectors for the first time, chose to distribute ACE in proportion to PSC is unremarkable. It may take some time before fishermen become comfortable enough with sectors to try new ways of cooperating to increase efficiency and maximize catch.

The bottom line is that nothing in A16 entitles a fisherman to fish the PSC associated with his or her permit. The PSC therefore does not convert a permit into a LAPP.

5. Plaintiffs' policy arguments should be directed to Congress

The plaintiffs argue at length that the legal requirements imposed on LAPPs serve important purposes. NMFS agrees, and further agrees that *when it creates a LAPP*, it must comply with those requirements. The issue in this case, however, is not whether those requirements apply to LAPPs – obviously they do – it is whether they apply to *sectors*.

Since, as shown above, sectors are not LAPPs, the requirements do not apply to sectors.

Plaintiffs' real point appears to be that, as a policy matter, the requirements applicable to LAPPs *should* be extended to all catch share programs regardless of whether they meet the MSA's definition of a LAPP. Whatever the merit of that policy argument, it is not appropriate in this forum. "Such policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864. The question before this Court is whether NMFS has complied with the MSA as it currently exists, not as plaintiffs think it should be.

6. Because the MSA does not unambiguously state whether sectors or PSCs qualify as LAPPs or IFQs, NMFS' reasonable interpretation is entitled to *Chevron* deference

NMFS's interpretation that the sector program does not fall within the MSA's definition of a LAPP or IFQ, and is therefore not subject to requirements applicable to LAPPs or IFQs, was made in the context of a notice-and-comment rulemaking. JA283, 289. It therefore falls squarely within the category of agency decisions governed by the *Chevron* analysis. *Mayo Found. for Medical Educ. v. United States*, 131 S.Ct. 704, 714 (2011); *Dickow v. United States,* 654 F.3d 144, 150 (1st Cir. 2011).

Where the MSA speaks directly to the issue of whether a sector is an IFQ or LAPP, the statute obviously controls. As shown above, the statute does explicitly state that sectors are not IFQs for the purpose of the referendum requirement, but with respect to the other LAPP requirements, the statute is less explicit. One must look to the statutory definition of LAPP, which, as shown above, does not include sectors or PSCs because neither of those involves the issuance of a Federal permit authorizing the permittee to harvest a specified quantity of fish for their exclusive use.

Plaintiffs and amici argue that sectors (or in FWW's case, PSCs) do fall within the statutory definition of LAPP. Their arguments rely, however, on the false premise that a PSC is an individual quota, and on the claim that certain aspects of the sector program are "functionally equivalent" to or "similar to" LAPPs. Their arguments, therefore, rely on a broad *interpretation* of the LAPP definition, rather than on that definition's plain language.

Where the MSA is silent or ambiguous, NMFS' interpretation of the statute it is charged with implementing must be upheld. As shown above, NMFS' interpretation cannot fairly be described as "arbitrary, capricious, or manifestly contrary to the statute," and is therefore

entitled to deference. Such deference is "particularly appropriate in complex and highly specialized areas where the regulatory net has been intricately woven." *Strickland v. Commissioner,* 48 F.3d 12, 18 (1st Cir. 1995) (quotation omitted).

II. A16 does not violate the MSA by managing this multi-stock fishery on a stock-by-stock basis

The Northeast multispecies fishery is a multi-stock fishery, consisting of thirteen different species grouped in twenty different stocks. When A16 was being developed, the most recent stock assessment indicated that while some of those stocks had been rebuilt, eleven stocks were still overfished and subject to overfishing.[15] JA272-73. Under the 2007 amendments to the MSA, NMFS lacked the discretion to allow that situation to continue. As amended, the MSA requires the appropriate council, within two years of when a stock is identified as overfished, to develop an FMP that will "end overfishing immediately" and "rebuild affected stocks of fish." 16 U.S.C. §1854(e)(3). The MSA already required that such plans rebuild the

[15] "Overfished" refers to the stock's biomass – if it is less than that required to produce the maximum sustainable yield, the stock is overfished. "Subject to overfishing" means that the stock is subject to fishing mortality great enough to jeopardize its capacity to produce maximum sustainable yield. 50 C.F.R. § 600.310(e)(2)(i)(B), (E).

fishery in a time period "as short as possible" and "not [to] exceed 10 years, except in cases where the biology of the stock of fish . . . indicate otherwise." 16 U.S.C. §1854(e)(4).

A16 complied with those mandates by ending overfishing immediately and implementing an FMP that would rebuild most stocks of fish within four to six years. It did so by reducing catch significantly to allow overfished stocks to rebuild so they will again be able to produce their maximum sustainable yield (MSY). JA116. Unfortunately, in a mixed stock fishery like this one, reducing the catch limits on overfished stocks can impact the yield of healthy stocks as well. JA223. Because the gear used by most vessels in this fishery cannot target specific stocks selectively, "most fishing trips in this fishery catch a wide range of species," JA109, including fish from both healthy and overfished stocks.

The Council and NMFS did what they could to enable fishermen to increase their harvest of healthy stocks. They reduced the minimum size for haddock, a healthy stock, and created several "special access programs" which rely on gear, area, and seasonal restrictions to improve selectivity. JA282, 296. But they acknowledged that the yield of healthy stocks would still be impacted by the measures needed to

rebuild overfished stocks, explaining that "constraints in harvesting one stock because of more restrictive measures on other stocks in a mixed-stock fishery are inevitable and unavoidable due to Magnuson-Stevens Act mandates and national standards." Alliance App. 126.

Alliance and *amici* Representatives Frank and Tierney argue that, notwithstanding the MSA's clear command to "end overfishing immediately," NMFS is actually *required to allow overfishing* of weaker stocks in a multi-species fishery in order to obtain the "optimum yield" from the fishery as a whole. Their argument is premised on National Standard 1 (NS1), which states that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1851(a)(1). Disregarding the requirement to "prevent overfishing," they conclude from NS1 that the paramount goal of the MSA is obtaining the optimum yield from a fishery as a whole,[16] without regard to the condition of individual stocks of fish within that fishery. Therefore, they argue, in the "inevitable and unavoidable" conflict in a mixed-stock

[16] *See* Alliance Br. at 39 ("The primary purpose of the Act" is to "achieve . . . the optimum yield from each fishery"); Frank/Tierney Br. at 10 ("the goal of the Magnuson-Stevens Act is not to 'protect' fishery resources from use but rather to maximize food production . . . .").

fishery between rebuilding overfished stocks and obtaining the optimum yield from the fishery as a whole, maximizing overall harvest trumps rebuilding overfished stocks.

The MSA does not require NMFS to ignore individual stocks and focus on maximizing yield from the "fishery as a whole." It is true that many of the provisions of the MSA use the term "fisheries," including the requirement to achieve "the optimum yield from each fishery." 16 U.S.C. §1851(a)(1). But the MSA's definition of "fishery" includes both mixed-stock fisheries and individual stocks: "fishery means . . . "*one or more stocks* of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." 16 U.S.C. §1802(13)(A) (emphasis added). Where, as here, fishing for one stock of fish jeopardizes the rebuilding of other stocks of fish, it is entirely consistent with the MSA for NMFS to manage those stocks individually rather than just seeking the greatest aggregate yield from a mixed-stock fishery as a whole.

Plaintiffs' insistence that individual stocks of fish must be sacrificed to maximize yield from the fishery as a whole is also inconsistent with the many sections of the MSA that require NMFS to

"rebuild affected stocks of fish." *See* 16 U.S.C. §1853(a)(1)(A) (requiring FMPs to contain necessary measures to "rebuild overfished stocks"); 16 U.S.C. §1854(e)(2) (requiring that, once a fish stock is classified as overfished, "action be taken . . . to rebuild affected stocks of fish"); 16 U.S.C. §1854(e)(3)(A) (requiring Council and NMFS, within two years of identifying a fishery as overfished, to implement an FMP that will "end overfishing immediately" and "rebuild affected stocks of fish"); 16 U.S.C. §1854(e)(4)(A) (requiring FMP to "rebuild[] the fishery" in a time "as short as possible, taking into account the status and biology of *any overfished stocks of fish*") (emphasis added). In light of these express requirements, plaintiffs' claim that the MSA is unconcerned with the status of individual stocks of fish, and is directed solely at maximizing the yield from a multi-species fishery as a whole, is untenable.

NMFS does not dispute that NS1 requires it to manage the fishery in such a way as to "achiev[e], on a continuing basis, the optimum yield from each fishery . . . ." 16 U.S.C. §1851(a)(1). That requirement, however, is explicitly predicated by the requirement to "prevent overfishing." *Id.*; *see also Natural Res. Def. Council*, 209 F.3d at 753 (holding that NMFS "must give priority to conservation measures.") Moreover, achieving the "optimum yield" does not mean ignoring

rebuilding requirements. To the contrary, the MSA defines the "optimum" yield as "the amount of fish" that "provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery." 16 U.S.C. §1802(33)(C). And NMFS has clarified in its guidelines for National Standard 1 that optimum yield "must take into account the need to . . . rebuild overfished stocks" and that the "measures chosen to achieve the [optimum yield] must principally be designed to prevent overfishing and rebuild overfished stocks." 50 C.F.R. §§600.310(e)(3)(iv), (l)(4).

Plaintiffs and amici point to a statement that Congressman Young of Alaska inserted into the Congressional Record[17], expressing his opinion that the MSA should not be interpreted to "shut down entire fisheries if one stock of a multi-species complex is experiencing overfishing." 152 Cong. Rec. H. 9233 (Dec. 8, 2006). It is well-established that the comments of a single legislator are not controlling, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), and Congressman

[17] The Congressional Record uses "a distinctive type style" to distinguish between remarks "actually uttered" on the floor of the House from those merely submitted for publication. *See* www.gpo.gov/help/congressionalrecord-laws-rules.txt. The typeface indicates that the remarks relied upon by plaintiffs were not spoken on the House floor.

Young's statement is best understood as advocacy for his position rather than an expression of the intent of Congress as a whole. It also stands in tension with the views expressed in the Report of the Senate Committee on Commerce, Science and Transportation, which approvingly describes a multi-species fishery that is managed on a stock-by-stock basis. S. Rep. No. 109-229, 109th Cong., 2d Sess. 23-24 (2006). "Committee Reports are more authoritative than comments from the floor . . . ." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quotation omitted). According greater weight to the Senate Committee Report than to the statement of an individual Congressman is particularly appropriate here, because as *amicus* Congressman Frank noted at the time, "This bill was developed mostly in the Senate." 152 Cong. Rec. H. 9233 (Dec. 8, 2006).

III. NMFS complied with National Standard 8

National Standard 8 (NS 8) provides:

> Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that [are the best scientific information available] in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. §1851(a)(8). The plain language of NS 8 makes clear that conservation requirements, including prevention of overfishing and rebuilding overfished stocks, take precedence over the goal of minimizing adverse economic impacts. "[T]he Service must give priority to conservation measures." *Natural Res. Def. Council*, 209 F.3d at 752.

The conservation measures necessary to satisfy the MSA's commands to end overfishing immediately, and to rebuild overfished stocks in accordance with strict deadlines, required a drastic reduction in fishing mortality for overfished stocks. A16 imposed reduced catch limits, and reduced the DAS available to fishermen choosing to fish in the common pool. The Council and NMFS both acknowledged that these conservation measures will have negative economic and social effects on fishermen and fishing communities in the short term, and they undertook an extensive analysis of those impacts in the EIS for Amendment 16, AR 773 at 48382-534, and in the environmental assessment for Framework 44, AR 882 at 51221-264. Indeed, the Council's concern about these negative effects was a primary impetus for expanding and revising the sector program as an option for fishermen to mitigate the negative impacts. *See* JA119-20, 131-32, 224-28, 231-34, 296-97.

The over 300 pages of economic impact analysis cannot be summarized here, but a few highlights are illustrative. The Council and NMFS broke economic effects down by vessel size, JA179; gear type, *id.*, home state, JA180; and home port, JA182. They considered the economic effects of the methods they used to allocate the total catch between different sectors and the common pool. AR 773 at 48387-435. They evaluated the potential costs of forming and operating sectors. JA165-67. And they weighed whether vessels would still be able to break even under these new restrictions. JA182-87.

Overall, the Council concluded that the economic effects of A16 "are expected to be severe and in some cases may threaten the existence of fishing businesses in some communities." JA119, 244. Those effects "will fall most heavily on vessels and communities that are most dependent on groundfish," which tend to be "Maine, New Hampshire, and Massachusetts ports adjacent to the Gulf of Maine, though New Bedford is also a port that will be adversely affected." *Id.*

New Bedford argues that the EIS's extensive economic analysis is insufficient to satisfy NS 8 because NMFS did not sufficiently consider *social* data, which, according to New Bedford, "is separate and distinct from the economic data requirement." NB Br. at 52. New Bedford's sole

support for that proposition is NS 8, which directs NMFS to consider "economic and social data." But the fact that a statute uses two words does not necessarily mean that their meanings or purposes are entirely "separate and distinct." National Standard 4, for example, requires that allocations to fishermen be "fair and equitable." 16 U.S.C. §1851(a)(4). Social and economic data may not be quite that redundant, but they certainly overlap, as evidenced by the common use of the word "socioeconomic."[18] NS 8 itself requires the consideration of this "economic and social data" in order to "minimize adverse economic impacts." It is therefore appropriate to consider NMFS's extensive analysis of economic data in determining whether it sufficiently considered "economic and social data."

Moreover, NMFS *did* independently consider social data in addition to the extensive economic analysis. JA190-222; 236-43; 119. New Bedford dismisses it as "only 43 pages," 16 of which are "almost" the same as the corresponding part of the A13 EIS. NB Br. at 53. But

[18] *See*, *e.g.*, *Associated Fisheries*, 127 F.3d at 116 (discussing measure to reduce "the socioeconomic burden" on fishermen affected by Amendment 7); *Oregon Trollers*, 452 F.3d at 1122 (stating, in challenge under NS 8, that NMFS "considered the socio-economic impact" of the measures.

New Bedford fails to identify anything in those 16 pages that is outdated or incorrect. Moreover, the remaining 27 pages are wholly new, and examine the social impacts of A16's new provisions, such as the implementation of additional sectors, JA214, hard catch limits, JA210, potential friction between sector and common pool fishermen, JA216, and accountability measures, JA216-17. The Ninth Circuit rejected a similar argument in *Oregon Trollers*, holding that "[s]o long as the agency appropriately updates its analysis under National Standard No. 8, there is no reason why it must start from scratch every year." 452 F.3d at 1122.

It is true, as New Bedford claims, NB Br. at 55, that the EIS does not *separately* discuss how each of those issues would socially impact each of the fifteen identified fishing communities, JA193, but New Bedford fails to show why it must. This Court's decision in *Little Bay Lobster Co. v. Evans,* 352 F.3d 462 (1st Cir. 2003), is instructive. In that case, the plaintiffs argued that NMFS violated NS 8 by failing to provide a "*separate* assessment of the effects on [plaintiffs'] local community" of a particular conservation measure. *Id.* at 470 (emphasis in original). This Court acknowledged the omission, but upheld NMFS's decision, explaining that "the required analysis of alternatives and

impacts is subject to a rule of reason, for study could go on forever." *Id.* This Court explained that a rule of reason is "especially" necessary "where, as here, a plan comprises a set of new or changed restrictions designed to work as a whole; a rule that every element in such a plan be assessed separately to determine its own individual impact would be unworkable for most complex plans could be subdivided without end." *Id.* Despite New Bedford's conclusory allegation that NMFS' analysis is "insufficient as a matter of law," NB Br. at 54, it has failed to identify any social impact that was improperly omitted from the EIS, or to identify better social data that was ignored. It has therefore failed to show any violation of NS 8. "[S]ome burden lies on the contestant to show why a particular gap or omission is unreasonable." *Id.*

Amici Representatives Frank and Tierney also state that NMFS violated NS 8, but they fail to explain how. They allege that A16 violates NS 8 because it will have negative economic impacts on fishing communities in the short term, until the fisheries are rebuilt. Frank/Tierney Br. at 17. But NS 8 does not prohibit NMFS from implementing an FMP that will have adverse economic impacts; it requires only that those impacts be minimized, to the extent practicable and consistent with conservation measures. Relying on an unpublished

2005 district court case, *amici* claim that NMFS could lessen impacts by "allow[ing] overfishing for a time in order to take account of fishing communities' needs" Frank/Tierney Br. at 17. Congress amended the MSA in 2007, however, to require NMFS to end overfishing "immediately." *Amici* have not shown a violation of NS 8.

IV. NMFS complied with NEPA

A. NMFS considered a reasonable range of alternatives

NEPA and its implementing regulations require an agency to "evaluate all reasonable alternatives" to a proposed action, including the alternative of no action. 40 C.F.R. §1502.14. The range of "reasonable alternatives" is defined as those "that are technically and economically practical or feasible and meet the purpose and need of the proposed action." 43 C.F.R. §46.420; *accord Theodore Roosevelt Conserv. Ptshp. v. Salazar*, 661 F.3d 66, 72-73 (D.C. Cir. 2011) ("[t]he goals of an action delimit the universe of the action's reasonable alternatives"). Alternatives that do not satisfy the purpose and need of the project can be eliminated from further study, but the agency must provide a brief explanation. 40 C.F.R. §1502.14. An agency's stated purpose and need for an action, and the alternatives it evaluates to

satisfy that purpose and need, are deferentially reviewed under a rule of reason. *Theodore Roosevelt*, 661 F.3d at 73.

New Bedford and FWW argue that NMFS failed to consider a sufficient range of alternatives. They challenge NMFS's decision to eliminate from further consideration several alternative management systems, in particular a program known as the "points system," in which each permit would be assigned a number of points based on its existing DAS allocation, and fishermen would "spend" those points to land fish. JA46. Although the Council and NMFS gave significant consideration to the points system and have expressed interest in pursuing it further for the next Amendment, JA130, the point system was eliminated from further consideration for A16 because of concerns that it could not be implemented before the statutory 2010 deadline. (Among the many uncertainties about the point system is whether it would constitute an IFQ, thus requiring a referendum). Two other suggestions, an IFQ program and an area management system, were eliminated for the same reason. As NEPA's regulations require, NMFS provided a brief explanation of that decision in the EIS. JA164.

NMFS' elimination of those alternatives from further study was appropriate because this project's purpose and need included "meet[ing]

all the requirements of the Magnuson-Stevens Act." JA129. Alternatives that could not be implemented by the statutory deadline would not satisfy that legitimate objective, and were therefore properly eliminated from further consideration.

New Bedford and FWW argue that the MSA's statutory deadline does not excuse NMFS from complying with NEPA, but this is a straw-man argument. NFMS has never claimed that it is exempt from NEPA due to the deadline or any other reason, and it has fully complied with NEPA. But NEPA does not require an agency to give detailed consideration to alternatives that are "infeasible, ineffective, or inconsistent with the basic policy objectives" of the project. *Northern Alaska Env. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006).

FWW implies that NMFS manipulated the statement of purpose to eliminate disfavored alternatives, FWW Br. at 29, but that allegation is groundless. NMFS did not invent the 2010 deadline, nor did it have discretion to ignore it; it is a statutory mandate. "Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004).

FWW argues that NMFS was actually "under no obligation to overhaul the fishery management system . . . by a certain date" because "NMFS's obligations were limited to developing annual catch limits and accountability measures by 2010." FWW Br. at 28. That argument, however, actually supports NMFS' decision to employ the pre-existing management measures of DAS restrictions and sectors as the means to implement the catch limits and accountability measures, and to defer consideration of novel management measures like the points system until Amendment 17.

FWW also argues that the EIS is *per se* inadequate because, it alleges, for some decisions, only the proposed alternative and a no-action alternative were considered. *See* FWW Br. at 26. That position is factually and legally wrong. Factually, FWW overlooks the vastness and complexity of A16. The A16 EIS evaluated a broad suite of proposed measures "designed to achieve [fishery] mortality targets, provide opportunities to target healthy stocks, mitigate (to the extent possible) the economic impacts of the measures, and improve the administration of the fishery." JA110-15 (summary of proposed measures). In addition, the EIS also evaluated in detail a wide range of alternatives to the

proposed measures, including the no-action alternative for each measure proposed. JA121-24 (summarizing alternative measures).

The EIS evaluated a number of alternatives to the proposed DAS management measures, including the DAS transfer and leasing program and special management program, JA143-44; a number of alternative sector management measures, including not revising sector policies, JA133; not allowing confirmation of permit history category ("CPH") permits to joint sectors, *id.*; not allowing annual catch entitlement transfers, JA140; different options for enforcement and management, JA138-39; and five alternatives for calculating potential sector contributions, JA136-38; alternatives concerning reporting requirements and commercial and recreational component allocations, JA142; alternative measures to control fishing mortality for vessels that did not join sectors, JA152-60; alternatives related to recreational fishing, JA161-63; and accountability measure alternatives, JA163A-163D. *See also* JA121-23 (briefly summarizing alternatives). It is only by ignoring that context and focusing narrowly on specific choices that FWW can claim that, in some cases, only the proposed alternative and the no action alternative received detailed consideration.

FWW's argument is also legally wrong. "To the extent that [FWW] is complaining that having only two final alternatives – no action and a preferred alternative – violates NEPA, a plain reading of the regulations dooms that argument. So long as 'all reasonable alternatives' have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied. In short, the regulation does not impose a numerical floor on alternatives to be considered." *Native Ecosystems Council v. U.S. Forest Service,* 428 F.3d 1233, 1246 (9th Cir. 2005). NMFS evaluated a reasonable range of alternatives, and reasonably eliminated other alternatives from further consideration for A16 because they could not satisfy the requirements of the statute. FWW and New Bedford have failed to show a violation of NEPA.

B. The EIS addressed whether the sector program would increase the industry's ongoing consolidation

Consolidation has been occurring in the Northeast groundfish fishery for decades, because there have been too few fish, and too many restrictions, for the entire fleet to profitably fish. JA202. Between 2001 and 2007 – well before A16 was implemented – the number of vessels participating in the fishery declined every year in every vessel size class. Small vessels declined 33 percent in that period; large and

medium vessels declined by 19%. JA42. *Amici* Representatives Frank and Tierney cite a post-decision, extra-record report that indicates that from 2007-2010, the number of vessels declined by another 17%.[19] There is no denying that consolidation has been a long-term trend in the Northeast groundfish fishery. JA202, 293.

The Council and NMFS considered whether sectors would cause increased consolidation, and concluded that they likely would not. JA293. NMFS' ability to assess the economic impacts of sectors was somewhat limited by the lack of information, at that time, of how many vessels were going to join sectors, JA188-89, but it nevertheless considered the issue and made a reasoned conclusion. NMFS explained that consolidation was caused primarily by restrictions on harvesting groundfish. JA202, 293. Sectors do not reduce catch. In fact, by freeing members from DAS restrictions and trip limits, and by providing incentives for fishermen to fish selectively, sectors might actually reduce consolidation by enabling more vessels to remain economically viable. JA226.

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[19] This extra-record document should not be considered, but if it is, the Court should note that A16 was only in effect for one of those four years, and the decline spread fairly steadily across all four years. www.nefsc.noaa.gov/publications/crd/crd1119/crd1119.pdf

Alliance disagrees with that conclusion, relying on an extra-record document assessing leasing and permit stacking in the scallop fishery. The document is of dubious relevance, and Alliance has failed to show that any justification for looking outside the record is applicable. At any rate, the document's alleged relevance is its claim that when permits, quota, or any other sort of fishing privileges are transferable, some of it gets transferred, leading to consolidation. Alliance argues that sectors allow for members to transfer fishing opportunity to each other, and thus increase consolidation.

The principal problem with Alliance's argument is that vessels were already allowed to lease DAS under A13. Sectors did not introduce the concept of transferability into this fishery, and there was no conclusive evidence during the development of A16 that sectors would increase it. Moreover, PSCs remain with the permit, not the sector, and so cannot be permanently transferred (except by sale of the entire permit, which was equally possible under A13). Thus, they are less susceptible to consolidation than the systems discussed in Alliance's extra-record report.

Alliance has failed to show that NMFS's conclusion that sectors are unlikely to increase consolidation relative to any other management system is arbitrary and capricious.

V. NMFS did not violate National Standard 4

Under A16, catch is allocated to each sector in proportion to the landings history of the vessels participating in that sector. For the new sectors created by A16, NMFS used landings history from 1996 to 2006 as the baseline to calculate PSC. JA106. The original baseline for the two sectors approved under A13, however, used their landings history from 1996 to 2001. Reasoning that "[i]f sectors are to operate successfully, they need some certainty that their allocation is not likely to change based on future decisions to form sectors by other fishermen," NMFS decided to freeze that baseline for the A13 sectors when it adopted A16. *Id.*

NMFS also used a different baseline for the purpose of allocating Gulf of Maine cod and Gulf of Maine haddock between the commercial and recreational components of the fishery. NMFS used the period 2001 to 2006 as the baseline for both the recreational and commercial fishery for two reasons: first, the data prior to 2001 was unreliable, JA107, and second, the recreational and commercial fisheries had been managed

differently in the earlier time frame, so comparison between the two during that period was difficult. *Id.*

Alliance argues that NMFS violated National Standard 4's command to allocate fish in a "fair and equitable" manner by failing to use the same time frame for all allocations. NMFS, however, did not act arbitrarily; rather, it chose the baselines for sound and rational reasons. Alliance acknowledges that "the need for stability is a valid concern," and approves of freezing the baseline for A16 sectors. Alliance Br. at 45-46. That valid concern justifies NMFS' choice. It is equally clear that NMFS was justified in choosing a baseline that avoided relying on unreliable data and apples-to-oranges comparisons. Indeed, National Standard 2 requires NMFS to utilize the best scientific data available. NMFS has broad discretion in applying the National Standards, and unless it "acts in an arbitrary and capricious manner" in promulgating fisheries regulations, "they may not be declared invalid." *Alliance Against IFQs v. Brown*, 84 F.3d at 350.

CONCLUSION

For the foregoing reasons, the District Court's order granting summary judgment for the defendants should be affirmed.

Respectfully submitted,

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