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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GROUND FISH FORUM, INC.,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE; NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION;
GINA RAIMONDO, in her official capacity
as the United States Secretary of Commerce;
and JANET COIT, in her official capacity as
Assistant Administrator, National Oceanic
and Atmospheric Administration,

Defendants.

Case No. 3:23-cv-00283-HRH

COMPLAINT AND PETITION FOR REVIEW
(42 U.S.C. §§ 4321-4347; 16 U.S.C. §§ 1801-1891d; 5 U.S.C. §§ 701-706)

SUMMARY OF ACTION

1. Plaintiff Groundfish Forum, Inc. (“GFF” or “Plaintiff”) challenges the National Marine Fisheries Service’s (“NMFS”) decision to approve and implement a Pacific halibut bycatch reduction measure in Amendment 123 to the Fisheries Management Plan for the Groundfish of the Bering Sea and Aleutian Islands (“BSAI”) Management Area (the “Groundfish FMP”), pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). The record demonstrates that Amendment 123 violates the MSA and the National Environmental Policy Act (“NEPA”), and is a politically motivated, arbitrary, and unlawful allocation of fishing privileges that unfairly singles out Plaintiff’s members for punishing restrictions that, according to NMFS’s own findings, will cause Plaintiff’s members significant economic losses, potentially exceeding \$100 million annually.

2. The MSA is the primary statute governing the management of the Nation’s fishery resources. Under the MSA, Congress established regional fishery management councils charged with the obligation to create fishery management plans (“FMPs”) that establish conservation and management measures for each fishery within a council’s regional jurisdiction. These conservation and management measures are subject to review and approval by NMFS, and they are limited and guided by specific provisions of the MSA, including its 10 “National Standards.”

3. The North Pacific Fishery Management Council (“NPFMC” or “Council”) developed the Groundfish FMP to provide management measures for numerous fishing sectors and fishing gear types that operate in the BSAI. Plaintiff’s members represent just

one sector operating under the Groundfish FMP, typically referred to as the “Amendment 80” sector.

4. Every commercial fishery has bycatch. Bycatch occurs when fishery participants targeting one or more species, or one or more stocks of fish, incidentally catch and discard other non-target species, or non-target stocks of fish, in the process. The U.S. National Bycatch Report estimates the average bycatch rate across all United States commercial fisheries to be over 11% of the total catch. Bycatch can be wasteful, particularly when it results in mortality of a species with limited or no economic value (called “economic discards”), or when regulations, for political reasons or otherwise, *require* valuable bycatch to be discarded (called “regulatory discards”). Pacific halibut is a regulatory discard under the Groundfish FMP because, although halibut is valuable and could be retained and sold, NMFS requires Groundfish FMP vessels to discard every halibut they catch, whether dead or alive.

5. Bycatch reduction measures can be economically burdensome to fishery participants and result in reductions in their harvest of target species. Accordingly, Congress instructed that such measures should only be imposed “to the extent practicable” and further required that if it becomes necessary to impose measures “which reduce the overall harvest of a fishery” (as does Amendment 123) that the FMP “allocate” the burden “fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” 16 U.S.C. § 1853(a)(1), (14). The MSA also requires every allocation of fishing privileges to be “fair and equitable” and “reasonably calculated to promote conservation,” and to not “discriminate between residents of

different States.” *Id.* § 1851(a)(4). All FMP measures must achieve “on a continuing basis, the optimum yield from each fishery for the United States fishing industry,” which reflects “the amount of fish that will provide the greatest overall benefit to the Nation.” *Id.* § 1851(a)(1); 50 C.F.R. § 600.310(e)(3)(i)(A). As set forth in this Complaint, Amendment 123 runs afoul of all these requirements and more.

6. Like all BSAI groundfish sectors and gear types, the Amendment 80 sector unavoidably catches some Pacific halibut when fishing for targeted species. Over almost three decades, however, the Amendment 80 sector has dramatically reduced Pacific halibut bycatch and mortality through the implementation of numerous operational measures and regulatory bycatch caps that limit the amount of halibut bycatch mortality that is permitted. Most recently, in 2016, NMFS reduced Pacific halibut bycatch caps on many BSAI fishing sectors, with the most stringent cap imposed on the Amendment 80 sector. In response, the fleet implemented numerous operational and mitigative tools (as contemplated by Amendment 111) to comply with the cap. This helped to preserve the fleet’s fishing opportunities for its target species. By 2022, the Amendment 80 fleet’s halibut bycatch mortality ratio had been reduced to only *one* pound of halibut for every 214 pounds of groundfish (or 0.46%).

7. Despite these improvements, NMFS approved Amendment 123, which creates a new “abundance-based” limit on halibut bycatch that is a significant reduction from the limit imposed on the Amendment 80 sector by Amendment 111. Unlike prior bycatch reduction efforts, Amendment 123 singles out the Amendment 80 fleet for this new abundance-based limit, while all other BSAI groundfish sectors continue to use

bycatch caps that are not tied to estimates of abundance. Some sectors in the BSAI continue to operate without any halibut bycatch limits. And also unlike prior bycatch reduction efforts, there are no known additional mitigation measures that the Amendment 80 sector can practicably or reasonably employ to avoid halibut bycatch or mortality. Therefore, this new “abundance-based” cap will force the Amendment 80 fleet to reduce its fishing for target species, which will have immediate and drastic economic consequences.

8. NMFS considered no alternatives that could have produced different results because NMFS and the Council decided ahead of time that this action would be specifically and solely targeted at the Amendment 80 fleet. The Council’s October 2020 amended “purpose and need” for Amendment 123 targets only the Amendment 80 sector. NMFS and the Council adopted an unduly narrow purpose and need statement and failed to consider alternatives that would apply to all groundfish sectors, taking an admittedly “narrowed” focus that “eliminat[ed] the other sectors for the action and analysis.” Final Environmental Impact Statement for Amendment 123 (“Final EIS”) at 85. This was entirely improper and unlawful. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (“As a result of this unreasonably narrow purpose and need statement, the [agency] necessarily considered an unreasonably narrow range of alternatives.”).

9. Unlike the rulemaking that implemented bycatch caps in 2016, there was no analysis of alternatives to further reduce halibut bycatch fairly and equitably across the many BSAI groundfish sectors. Instead, the Council and NMFS bowed to the halibut

fisheries' interests, who view halibut bycatch as wasteful (which, due to NMFS's regulatory discard policy choice, it is) and claimed that more restrictions on the Amendment 80 sector would give them more halibut fishing opportunities.

10. It is no surprise, therefore, that NMFS's stated rationale for Amendment 123 was merely pretext. NMFS justified its decision with the assertion that the Pacific halibut stock is declining and Amendment 123's restrictions "*could* promote conservation of the halibut stock," and "*may* provide additional opportunities for the directed halibut fishery." Final EIS at 16 (emphases added). But these justifications are belied by the facts before the agency. The Pacific halibut stock has been stable for at least a decade and is not overfished or subject to overfishing. Amendment 123 will not "promote conservation" because it applies to only one sector, and any bycatch decreases can be offset by increases in bycatch or catch in other sectors or fisheries (as NMFS hopes and contemplates will happen). This is precisely why NMFS's prior regulations in 2016 comprehensively addressed halibut bycatch reduction across numerous BSAI groundfish sectors. Moreover, for the last several years, the directed halibut fishery has received ample halibut allocations (*i.e.*, "opportunity") that far exceed what that fishery has caught. In other words, Amendment 123 reallocates the ability to catch halibut (whether as bycatch or directly), such that the Amendment 80 sector has a smaller proportion and all other users of halibut have larger proportions than existed before Amendment 123.

11. Thus, Amendment 123 will substantially reduce catch of target species in the Amendment 80 fleet, have no conservation benefit for the Pacific halibut stock (in fact, NMFS concluded that Amendment 123 will result in no increase in the size of the

Pacific halibut spawning stock), and result—according to NMFS’s own finding—in a *net economic loss* to the Nation of hundreds of millions of dollars. This directly violates NMFS’s core obligations under National Standard 1 to ensure that FMPs achieve optimum yield on a continuing basis, by effectively crippling the ability of the Amendment 80 fleet to harvest target species based on (at best) speculative and undefined conservation benefits. To make matters worse, this disastrous result was a foregone conclusion because the Council and NMFS only considered options that had exactly the same purpose (reducing *only* the Amendment 80 sector’s allocated halibut bycatch) and exactly the same result (a *net economic loss* to the Nation).

12. NMFS’s approval and implementation of Amendment 123 violates the APA and numerous provisions of the MSA. Additionally, the Final EIS violates NEPA, which, among other things, required NMFS to evaluate a “reasonable range of alternatives” to inform federal decision-making. Plaintiff therefore respectfully requests that the Court declare that Amendment 123, its implementing regulations, the final rule promulgating those regulations (88 Fed. Reg. 82,740 (Nov. 24, 2023) (the “Final Rule”)), and the Final EIS are arbitrary, capricious, and an abuse of discretion; not in accordance with law; and in excess of statutory jurisdiction, authority, and limitations. Plaintiff further requests that the Court vacate NMFS’s decision approving Amendment 123 and its implementing regulations, the Final Rule, and the Final EIS, and remand to NMFS to address these serious errors.

PARTIES

Plaintiff

13. GFF is a non-profit section 501(c) trade association with its principal place of business in Seattle, Washington. GFF represents five companies and 17 trawl catcher-processors, which consist of all the vessels in the Amendment 80 sector. GFF was formed in 1996 to craft meaningful solutions to problems such as discards, incidental catches, and impacts on fish habitat. GFF member vessels fish according to their respective permits and allocations for varied portfolios of sole and flounder species, including yellowfin sole, rock sole, rex sole, flathead sole, arrowtooth flounder, Alaska plaice, Pacific cod, Atka mackerel, Pacific Ocean perch, and other species. None of these target stocks are overfished or subject to overfishing, as defined by the MSA. GFF members supply seafood to the United States and markets throughout North America, as well as markets in Asia and Europe. Fish species harvested by the Amendment 80 sector have received Responsible Fisheries Management and Marine Stewardship Council certification for environmental sustainability.

14. Since 2018, the Amendment 80 sector has operated under a single cooperative, the Alaska Seafood Cooperative, which receives all of the Amendment 80 sector allocations. The Amendment 80 cooperative, which is incorporated in the State of Washington, is a “person” under the MSA.

15. GFF and its members engaged in the Council process for developing Amendment 123 through participation in Council committees and by providing public testimony and written comments. GFF and its members commented extensively on

analyses and environmental review documents related to Amendment 123, including the proposed FMP amendment, the proposed rule to implement Amendment 123, and the draft and final EISs that preceded the final decisions challenged in this lawsuit. A true and correct copy of GFF’s comment letter in response to the Amendment 123 proposed rule (without the exhibits) is attached to this Complaint as Exhibit A.

16. GFF has standing to bring this action. GFF’s mission is to ensure the long-term viability of Amendment 80 fisheries while promoting sustainable harvests on safe vessels, providing economic prosperity to the maritime communities in which we operate, minimizing fishery impacts on habitat, and reducing bycatch. GFF’s members are directly and adversely impacted by Amendment 123 and its implementing regulations, which reduce allowable halibut bycatch mortality levels (*i.e.*, halibut not returned to the sea alive, also referred to as “halibut PSC”) for all vessels in the Amendment 80 sector, which, in turn, causes those vessels to forgo fishing opportunities for target catch species and, as a consequence, lose significant revenue. As NMFS has recognized, the revenue loss to the fleet in a single year could exceed \$100 million and force some Amendment 80 vessels to exit the fishery (*i.e.*, go bankrupt). Indeed, multiple GFF members are already being forced to mothball fishing vessels for the 2024 season as a result of Amendment 123 and the Final Rule, which results not only in a significant loss of revenue but also a significant loss of jobs. GFF and its members have strong interests in ensuring functioning marine ecosystems and healthy stocks of fish in Alaska, including halibut, as part of maintaining a sustainable and lasting fishery. GFF and its members are also adversely impacted by Defendants’ failure to comply with the procedural

requirements of NEPA and the MSA. The challenged agency decisions are final and ripe for review by this Court.

Defendants

17. NMFS is an agency of the National Oceanic and Atmospheric Administration (“NOAA”) of the U.S. Department of Commerce. NMFS is sometimes referred to as “NOAA Fisheries.” Among its duties, NMFS is responsible for managing commercial marine fisheries to ensure sustainable harvests that provide the greatest overall benefit to the Nation pursuant to the MSA.

18. Gina Raimondo is the Secretary of the U.S. Department of Commerce and is sued in her official capacity. Secretary Raimondo directs all business of the Department of Commerce, including NOAA and NMFS. Through these agencies, Secretary Raimondo is responsible for the approval of Amendment 123, its implementing regulations, the Final Rule, and the Final EIS, and for the associated violations of the MSA, NEPA, and the APA, as alleged in this Complaint.

19. Janet Coit is the Assistant Administrator for NMFS and is sued in her official capacity. The Secretary of Commerce has delegated responsibility to the NOAA Administrator to ensure compliance with NEPA, the MSA, and the APA, and to promote effective management and stewardship of the Nation’s fisheries resources and assets to ensure sustainable economic opportunities. The NOAA Administrator, in turn, has subdelegated this responsibility to NMFS.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. §§ 1855(f) and 1861(d) (MSA).

21. Defendants have waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1855(f).

22. Plaintiff has exhausted all administrative remedies.

23. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because the activities, species, and geographic areas at issue in and affected by Amendment 123, its implementing regulations, the Final Rule, and the Final EIS are located in this district, and a substantial part of the acts or omissions giving rise to this controversy occurred in this district.

STATUTORY FRAMEWORK

The Administrative Procedure Act

24. The APA provides for judicial review of final agency action. 5 U.S.C. § 702. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” *Id.* § 706(2)(D). Decisions by NMFS

to approve fishery management plan amendments and issue final rules and regulations implementing those plans under the MSA are subject to judicial review under the APA.

The Magnuson-Stevens Fishery Conservation and Management Act

25. The MSA is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801–1891d. The MSA’s purpose is to place national fishery resources under “sound management” and “to realize the full potential of the Nation’s fishery resources.” *Id.* § 1801(a)(5)–(6).

26. The MSA created eight regional fishery management councils that are primarily charged with preparing FMPs and plan amendments for each managed federal fishery. *Id.* § 1852(a)(1). The NPFMC manages fisheries in the EEZ off Alaska’s coast, including the BSAI groundfish fisheries.

27. The MSA requires an FMP for each fishery under the regional council’s jurisdiction “that requires conservation and management.” *Id.* § 1852(h)(1). The FMP is the foundational document for management of each fishery and provides the framework for ensuring that fisheries are managed in a manner consistent with the requirements of the MSA and its National Standards.

28. Fishery management councils submit proposed FMPs and FMP amendments to the Secretary of Commerce for review and approval. *Id.* §§ 1853, 1854. All FMPs, and FMP amendments, must be consistent with the requirements of the MSA, including the MSA’s 10 National Standards.

29. The MSA enumerates certain “required provisions” of FMPs and FMP amendments. *Id.* at § 1853(a). For example, FMPs and FMP amendments must “contain

the conservation and management measures” that are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” *Id.* § 1853(a)(1). They also must “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable . . . minimize bycatch” and “minimize the mortality of bycatch which cannot be avoided.” *Id.* § 1853(a)(11). Additionally, “to the extent that . . . conservation and management measures which reduce the overall harvest in a fishery are necessary,” FMPs and FMP amendments must “allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” *Id.* § 1853(a)(14).

30. The MSA’s National Standards guide all FMPs and MSA regulations. For example, National Standard 1 requires FMPs to prevent overfishing while achieving the optimum yield on a continuing basis from each fishery for the U.S. fishing industry. *Id.* § 1851(a)(1). National Standard 2 requires that all conservation measures be based on the best scientific information available. *Id.* § 1851(a)(2). National Standard 4 requires that any allocation of fishing rights be “fair and equitable” to fishermen and “reasonably calculated to promote conservation,” and “shall not discriminate between residents of different States.” *Id.* § 1851(a)(4). National Standard 5 requires conservation and management measures to “consider efficiency in the utilization of fishery resources.” *Id.*

§ 1851(a)(5). National Standard 6 requires conservation and management measures to “take into account and allow for variations among, and contingencies in” fisheries. *Id.* § 1851(a)(6). National Standard 7 requires conservation and management measures to, “where practicable, minimize costs and avoid unnecessary duplication.” *Id.* § 1851(7). National Standard 9 requires that all bycatch reduction measures must be “practicable.” *Id.* § 1851(a)(9).

31. The Secretary of Commerce, acting through NMFS, must disapprove an FMP amendment to the extent it is inconsistent with provisions of the MSA or any other applicable law.

32. The Secretary of Commerce must also approve all regulations that implement an FMP. *Id.* § 1854(b). The Secretary must give notice of proposed rulemaking and provide an opportunity for public comment on proposed regulations. *Id.*

33. Any fishery management regulation implementing an FMP must be consistent with all requirements of the MSA, including the 10 National Standards for fishery management and conservation, and all other applicable laws. *Id.* §§ 1854(b), 1851(a).

34. Regulations promulgated and certain actions taken by the Secretary of Commerce under the MSA “shall be subject to judicial review to the extent authorized by [the APA’s judicial review provisions] if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register.” *Id.* § 1855(f)(1).

The National Environmental Policy Act

35. Approvals of FMPs, FMP amendments, and implementing regulations are subject to NEPA requirements, 42 U.S.C. § 4321, *et seq.*; 16 U.S.C. § 1854(i).

36. The purpose of NEPA is to ensure that federal decision-making is fully and publicly informed through a reasonably thorough and thoughtful analysis of the probable impacts to the human environment resulting from a proposed federal action, and through identification and analysis of a reasonable range of alternative actions, including the no-action alternative. In enacting NEPA, Congress sought to ensure that federal agencies take a hard look at the environmental consequences of any proposed action and required agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.

37. NEPA requires that a federal agency proposing a major federal action with significant environmental effects prepare a detailed statement, which must include the environmental impacts of and alternatives to the proposed action. *Id.* § 4332(C)(i)(iii). This detailed written statement is an EIS. *See* 40 C.F.R. § 1508.1(j) (2020).

38. An EIS must evaluate reasonable alternatives to the proposed action, identify a “no action” alternative, discuss in detail each alternative considered, and discuss the reasons alternatives were eliminated from detailed study. *Id.* § 1502.14(a)–(f) (2020). This analysis of alternatives, which is the “heart” of an EIS, must discuss “each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.” *Id.* § 1502.14(b). Reasonable alternatives “means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.” *Id.* § 1508.1(z).

39. The EIS must also “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” *Id.* § 1502.13. Agencies enjoy “considerable discretion” to define the purpose and need of an action. *Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir.1998). However, “an agency cannot define its objectives in unreasonably narrow terms.” *City of Carmel-By-The-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997). An agency’s purpose and need statement violates NEPA where it is “so narrowly drawn as to foreordain” the outcome or results in the agency necessarily considering an “unreasonably narrow range of alternatives.” *Nat’l Parks & Conservation Ass’n*, 606 F.3d at 1072.

40. An agency must prepare a supplement to either a draft or final EIS if “a major Federal action remains to occur” and, *inter alia*, “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1)(ii).

41. An EIS issued by a federal agency under NEPA is subject to judicial review pursuant to the APA, 5 U.S.C. §§ 702, 706.

STATEMENT OF FACTS

The Pacific Halibut Stock

42. Pacific halibut (*Hippoglossus stenolepis*) is a wide-ranging species and managed as a single stock extending from Northern California to the Aleutian Islands and Bering Sea. The harvest of halibut has been managed jointly by the United States and Canada through what is now known as the International Pacific Halibut Commission

(“IPHC”) since approximately 1923. The United States may establish domestic regulations that are in addition to, but not in conflict with, the rules established by the IPHC. Over several decades, NMFS has implemented numerous measures to manage the harvest and bycatch of halibut.

43. The abundance of the Pacific halibut stock has fluctuated widely over the more than 100 years that data on the stock have been collected. Following a once-in-a-century recruiting event, the Pacific halibut stock declined from record-high abundance in the 1990s until approximately 2012. After 2012, the stock’s spawning biomass, which is the portion of the stock contributing to the conservation of the stock, stabilized around 100,000 metric tons (“mt”) and has remained stable since 2012. The stock is not overfished or subject to overfishing.

44. Total fishing mortality of Pacific halibut consists of directed (targeted) commercial fishery landings, discard halibut mortality (bycatch or wastage) in directed commercial and recreational fisheries, recreational harvest, subsistence harvest, and discard halibut mortality (bycatch or prohibited species catch) in non-directed fisheries (*i.e.*, fisheries that target other species and are required by law to discard halibut). For decades, NMFS and the IPHC have limited the retention of halibut in both fisheries that target halibut and those that do not target halibut. For fisheries that do not target halibut, NMFS has made a policy choice to require those vessels to discard halibut that would otherwise be retained and sold (*i.e.*, regulatory discards). It is this policy choice that results in “bycatch” of halibut in the Amendment 80 fleet, as that term is used in the MSA.

45. Annual Pacific halibut mortality across all fisheries (directed and non-directed) ranges from 15,000 mt to 45,000 mt, with an annual average of 29,000 mt. In its 2023 stock assessment report, the IPHC stated that “[o]verall, spawning biomass estimates remain highly consistent with those of recent stock assessments.” The IPHC’s 2022 stock assessment explains that “[t]he 2022 stock assessment estimates a lower level of fishing intensity and higher relative stock status compared to previous assessments....”

46. Pacific halibut is not fully utilized in the BSAI. For example, the directed halibut commercial fleet’s catch allocations have increased in recent years, but a growing and significant percentage of that allocation goes unused, particularly in the area defined as “Area 4,” which roughly corresponds to the same geographic area as the BSAI. For example, 2022 represented the highest harvest allocation for Area 4 over the last 10 years. Despite this high allocation, the directed halibut fleet only used 67% of that allocation. And, in 2023, the directed halibut fleet only harvested 56% of their total allocation, leaving 2,056,410 net pounds (44%) of their allocation unharvested.

47. Halibut is incidentally caught and discarded (*i.e.*, as bycatch) in groundfish fisheries by vessels using longline (also referred to as “hook-and-line”), pot, and trawl gear. For some, but not all, groundfish fisheries, NMFS has limited participants’ fishing operations by defining limits on the maximum amount of halibut bycatch mortality, also referred to as a prohibited species catch limit (“PSC limit”).

The Amendment 80 Sector

48. In 2007, NMFS issued a final rule implementing Amendment 80 to the Groundfish FMP. 72 Fed. Reg. 52,668 (Sept. 14, 2007). The Amendment 80 program

was an initiative “by the Council and NMFS to reduce bycatch and discard of fish species [including Pacific halibut] in the BSAI non-pollock trawl groundfish fisheries.” With respect to BSAI trawl fisheries, the Amendment 80 program “allocate[d] crab and halibut PSC to the Amendment 80 and BSAI trawl limited-access sectors to accommodate PSC use by these sectors based on past PSC use with specific consideration given to possible future requirements.”

49. The Amendment 80 sector has taken numerous actions over many years to reduce its halibut bycatch, which is just a small fraction of the total fishery removals from the Pacific halibut stock. Numerous other groundfish sectors and fisheries also have halibut bycatch.

50. The Amendment 80 sector, as it has existed pre- and post-Amendment 80, has a long history of operating under bycatch limits, including limits for halibut bycatch. In 1993, 3,775 mt of halibut PSC was assigned to all vessels using trawl gear, including vessels now operating in the Amendment 80 sector. At that time, NMFS assigned a PSC limit to each fishery on a seasonal basis. When the Western Alaska Community Development Quota program was implemented in the late 1990s, the trawl halibut PSC limit was reduced to 3,675 mt. Upon implementation of Amendment 80 in 2008, the halibut PSC limit was initially further reduced to 2,525 mt for the sector, followed by a series of annual stair-step reductions, reducing the halibut PSC limit to 2,475 mt in 2009, 2,425 mt in 2010, 2,375 mt in 2011, and 2,325 mt in 2012. Most recently, the Amendment 80 halibut PSC limit was further reduced by 25% to 1,745 mt in 2016, under Amendment 111 to the Groundfish FMP.

51. For the most recent full year (2022), the Amendment 80 fleet harvested over 335,000 mt of target groundfish species, while operating within the 2016 halibut PSC limit. This represents a halibut bycatch mortality rate of roughly 1 kg of halibut for 214 kg of groundfish, or 1 pound of halibut for 214 pounds of groundfish. These target groundfish harvests provide hundreds of millions of dollars to U.S. businesses, support thousands of crew members and numerous communities throughout Alaska and the Pacific Northwest, and feed millions of people.

52. The Amendment 80 fleet's ability to continue to operate despite these repeated regulatory reductions in halibut PSC levels is largely the result of numerous tools implemented and utilized by the Amendment 80 fleet to reduce both halibut bycatch rates and halibut mortality rates. These include the use of agreed-upon fishing strategies within the Amendment 80 cooperative Halibut Avoidance Plan, fleet communication, the use of small test tows, reduced night fishing, the use of gear modifications that help keep halibut out of trawl nets (*e.g.*, halibut excluders), and deck sorting.

53. Deck sorting in particular has been very effective in reducing halibut mortality by allowing halibut that are incidentally caught to be sorted and returned to the sea alive as soon as possible, thereby reducing bycatch mortality. The Amendment 80 sector developed the deck sorting program and applied for an exempted fishing permit ("EFP") to test its innovation. In 2015, NMFS granted an EFP for all Amendment 80 vessels to test the conditions necessary to effectively conduct deck sorting.

54. Based on the success of the EFP, NMFS issued a series of annual EFPs intended to collaboratively continue to develop halibut catch handling and accounting

protocols. In 2020, NMFS published regulations implementing deck sorting. 84 Fed. Reg. 55,044 (Oct. 15, 2019) (codified at 50 C.F.R. pt. 679). The Final EIS estimates a fleetwide achievable deck sorting rate of 80% of halibut caught. Deck sorting also has consequences for fishing operations as fishing vessels that utilize deck sorting have an average loss of production of one tow per day, or roughly a 20% reduction in fishing effort on a typical, five-tow day. Deck sorting cannot be conducted during certain fishing conditions, such as certain rough weather conditions or if crew safety is at risk.

55. All of the bycatch mitigation innovations and strategies mentioned above occurred *before* the development of Amendment 123 and have been fully implemented for several years. Neither NMFS nor the Amendment 80 sector have identified new tools that are available to the Amendment 80 fleet to further reduce halibut bycatch, other than forgoing catch or exiting the fishery. Minimizing halibut bycatch imposes a considerable cost on the Amendment 80 sector and, even under current halibut bycatch limits, vessels have been retired from the fishery due in large part to challenges in meeting current bycatch control limits.

Amendment 111

56. In 2016, NMFS issued a final rule implementing Amendment 111 to the Groundfish FMP. 81 Fed. Reg. 24,714 (Apr. 27, 2016). Amendment 111 and its implementing regulations reduced halibut PSC limits for four sectors in the BSAI groundfish fisheries, including the Amendment 80 sector, which received the “largest reduction for any of the four groundfish sectors” affected by Amendment 111.

57. NMFS explained that “Amendment 111 seeks to minimize halibut PSC to the extent practicable while maintaining, on a continuing basis, the potential to achieve optimum yield from the groundfish fishery” and that it “achieves that objective fairly and equitably by decreasing halibut PSC limits by sector and by establishing the PSC reduction for each sector based on an evaluation of what is practicable for that sector.” NMFS further justified the allocations in Amendment 111 as “fair and equitable” on the basis that “[t]he impact of reduced PSC limits under the Preferred Alternative differs among the various groundfish sectors, but this is equitable in that it reflects both the degree to which each sector contributes to overall halibut PSC, and also the tools available to each sector to reduce halibut PSC.”

58. NMFS also based its determination that the Amendment 111 bycatch reductions were “practicable” on the impacts of the reduced limits on each of the various sectors of the groundfish fisheries and the tools available to each of those sectors to reduce halibut bycatch, along with other factors. NMFS specifically found that the reduced halibut PSC limit for the Amendment 80 sector was “achievable and practicable” through the use of the new tools available to the fleet. The Council and NMFS concluded that larger reductions in halibut bycatch limits than those enacted by Amendment 111 were “not practicable” and “would reduce the net benefit to the nation.”

59. The Council prepared and NMFS finalized an environmental assessment (“EA”) to analyze the impacts of Amendment 111 under NEPA. The EA states:

The purpose of the proposed action is to minimize halibut PSC in the commercial groundfish fisheries to the extent practicable, while preserving the potential for the optimum

harvest of the groundfish TACs assigned to the trawl and non-trawl sectors. The proposed action aims to minimize halibut PSC to the extent practicable in consideration of the regulatory and operational management measures currently available to the groundfish fleet, and the need to ensure that catch in the trawl and non-trawl fisheries contributes to the achievement of optimum yield in the groundfish fisheries.

60. Based on this statement of purpose and need, the Amendment 111 EA evaluated a range of three alternatives—a no-action alternative and two action alternatives—that were “designed to allow the Council to consider parity among the groundfish sectors in terms of the impact of PSC reductions.” Each of the two action alternatives contained six different options for implementing the limits. The two action alternatives considered various levels of halibut bycatch reductions for numerous BSAI groundfish sectors.

Amendment 123 and the Final EIS

61. In September 2019, the Council released an “Initial Review Draft” of an EIS that evaluated the use of “abundance-based” management for halibut PSC (the “2019 Initial Review Draft”). The “statement of purpose and need” discussed the supposed need to use abundance-based management to reduce halibut PSC across BSAI groundfish sectors and included two action alternatives (Alternatives 2 and 3) that imposed abundance-based limits on all the sectors, including the BSAI trawl limited-access sector, the Amendment 80 sector, longline catcher vessels, longline catcher-processors, and the Community Development Quota sector. The 2019 Initial Review Draft proposed “gear specific” abundance-based limits on all these sectors and explained that “[a]llocations of the gear-specific PSC limits under Alternatives 2 and 3 are intended to reflect the current

(Status Quo) allocation proportions to the extent possible.” 2019 Initial Review Draft at 15.

62. In February 2020, the Council changed course. It passed a motion stating that, moving forward, it would only consider applying abundance-based management to the Amendment 80 sector.

63. In September 2020, the Council released a new Initial Review Draft (the “2020 Initial Review Draft”). The 2020 Initial Review Draft kept the same statement of purpose and need as the 2019 Initial Review Draft, but the alternatives were revised to focus only on abundance-based management for the Amendment 80 sector. The 2020 Initial Review Draft states that “[t]he Council may also wish to revisit their purpose and need statement and objectives in light of changing this action to only directly modify PSC limits for the Amendment 80 sector.” 2020 Initial Review Draft at 41. The 2020 Initial Review Draft *deleted* the discussion from the 2019 Initial Review Draft that addressed the “allocation” impacts of abundance-based management.

64. In September 2021, the Council released a new draft of the analysis, which included the Council’s new statement of purpose and need—retrofitted to match the narrowed scope of “alternatives.”

65. In December 2022, NMFS issued the Final EIS. In March 2023, NMFS issued its record of decision for the Final EIS and formally approved Amendment 123. On November 24, 2023, NMFS issued the Final Rule, which implements Amendment 123 with the promulgation of federal regulations. The new regulations become effective on January 1, 2024. However, NMFS concluded—in December 2022, before approving

Amendment 123 and before receiving and considering public comment on the proposed rule to implement Amendment 123—that “Amendment 123 is consistent with the Magnuson-Stevens Act, including the ten national standards.”

66. GFF and its members participated, through verbal testimony, written testimony, and written comments, at every stage of the Council and NMFS processes leading up to final decisions to approve and implement Amendment 123 and the Final EIS. GFF and its members consistently objected to the new halibut bycatch limits on the bases that the limits, among other things, constitute an unjustified allocation, are not practicable, fail to achieve optimum yield on a continuing basis, and are not based on the best scientific information available.

67. Amendment 123 and its implementing regulations establish “abundance-based” limits on halibut bycatch applicable only to the Amendment 80 sector. No other fishery or sector is subject to “abundance-based” limits on halibut bycatch.

68. The Amendment 123 halibut PSC limit is established annually based on the results of the most recent IPHC setline survey and Alaska Fishery Science Center Eastern Bering Sea shelf trawl survey. The best available scientific information demonstrates that neither of those surveys produces data that are correlated with the halibut encounter rates of the Amendment 80 sector. As the Council’s Scientific and Statistical Committee found, “the groundfish fleet’s ability to avoid halibut is poorly related to indices of abundance.” Thus, NMFS’s repeated statements and justification that Amendment 123 “links” the Amendment 80 halibut PSC limits to halibut abundance are contradicted by the best scientific information available.

69. Moreover, in December 2022, the IPCH supported reducing the number of survey stations in the Area 4 IPHC setline survey in 2023 by over 90% and future surveys are in serious doubt due to budget constraints. In 2023, no survey stations were sampled in Area 4. Effectively, there was no IPHC setline survey in Area 4, even though NMFS purports to “link” the Amendment 123 halibut PSC reductions with the IPHC’s setline survey in Area 4. Thus, the design, function, purpose, and reliability of the IPHC setline survey are fundamentally and materially different than they were before 2023. The changes to the IPHC setline survey have a substantive and direct impact on the calculation of the survey index used to establish the halibut PSC limits under the Final Rule. In a letter dated May 19, 2023, Plaintiff’s counsel notified NMFS of these changes and the significant and substantial resulting implications for Amendment 123 and the proposed rule to implement Amendment 123. NMFS took no action in response to the survey changes or the letter, and proceeded to issue the Final Rule with no changes and no rational or reasonable evaluation of the survey changes.

70. Nevertheless, Amendment 123 uses the results of the surveys described in a regulatory formula that produces the annual halibut PSC limit for the Amendment 80 fleet. That formula relies on “breakpoints” to establish whether the IPHC setline survey index represents a “high,” “medium,” “low,” or “very low” level of halibut abundance and whether the Eastern Bering Sea shelf trawl survey index reflects a “high” or “low” level of halibut abundance. These breakpoint categories are then placed on a “look-up table” to establish the annual halibut PSC limits for the Amendment 80 sector. The breakpoints were determined by “visual inspection of relative trends in the survey indices

historically.” Neither the Council nor NMFS provided an explanation for how that “visual inspection” was conducted, who conducted that visual inspection, what “trends” were used, or how the Council and NMFS determined the “historically” valid range to use. Nor were any alternatives to these breakpoints considered. The breakpoints have no rational basis.

71. None of the possible limits under Amendment 123 are higher than the limit applicable to the Amendment 80 sector under Amendment 111, and almost all scenarios under Amendment 123 result in significantly reduced limits. For example, with similar halibut abundance levels, Amendment 123 reduces the Amendment 111 limit by 349 mt. The lowest limit possible under Amendment 123 represents a 611 mt reduction from the Amendment 111 limit.

72. Amendment 123 does not reduce or constrain the halibut PSC limits for any other BSAI groundfish sector or gear type. Amendment 123’s reduction of the halibut PSC limit for the Amendment 80 sector therefore directly and deliberately reallocates the halibut PSC available to the BSAI groundfish sectors and gear types by reducing the proportional amount available to the Amendment 80 sector and increasing the proportional amount available to other BSAI groundfish sectors and gear types. Amendment 123 also directly and deliberately reduces the Amendment 80 sector’s halibut PSC limit for the purported purpose of increasing the halibut fishing opportunity for the directed halibut fishery and the recreational halibut fishery.

73. There are no known tools or other measures available to the Amendment 80 sector (other than what was already considered, analyzed, and relied upon in

Amendment 111) to further reduce the sector’s halibut bycatch and mortality levels. Thus, further reducing halibut bycatch and mortality levels in the Amendment 80 sector must be accomplished by vessels in the sector forgoing fishing opportunities. The new limits imposed by Amendment 123 will therefore significantly reduce target species catch levels. This, in turn, will have substantial negative economic consequences to the Amendment 80 fleet and to the Nation.

74. Although NMFS underestimated the economic consequences of Amendment 123, NMFS states that the economic impact resulting from lost target catch could be over \$100 million in a single year. NMFS also states that the imposition of Amendment 123 could cause Amendment 80 sector companies to “exit the fishery” (*i.e.*, go bankrupt). Amendment 123 therefore results in a net loss to the Nation.

75. There are substantially more harvest opportunities for the directed halibut fleet now than there were when Amendment 111 was developed. NMFS assumed that Amendment 111 “could result in increased commercial fishery harvests in Area 4 ranging from 315,000 pounds to 353,000 pounds each year compared to current levels of harvests over the 10-year period used for the Analysis.” In 2015, the commercial IFQ and CDQ catch limits in Area 4 were 3.815 million net pounds. In 2022, the commercial IFQ and CDQ catch limits in Area 4 were 5.1 million net pounds. This improved harvest opportunity is nearly four times greater than the harvest opportunities envisioned under Amendment 111, even though the overall abundance of halibut on a coastwide basis has not changed substantially since 2015.

76. Amendment 123’s economic impact to the Amendment 80 sector is many times greater than the impacts assessed by NMFS for Amendment 111, even though halibut harvesting opportunities in Area 4 are 60% higher than they were in 2015 when Amendment 111 was implemented and even though halibut bycatch in the Amendment 80 sector is 35% lower than it was in 2015.

77. Amendment 123 will have no effect on the conservation of the Pacific halibut stock that is any different from the pre-Amendment 123 *status quo*. For example, NMFS found that “[i]mpacts to the halibut biomass under all of the alternatives are expected to be similar and result in no impact to spawning stock biomass” and that “there is likely to be little difference among the average future halibut spawning biomass under levels of PSC anticipated across all of the alternatives including the preferred alternative (Alternative 5).” Amendment 123 does not require any “savings” of halibut that will remain unused or unharvested because Amendment 123 does not preclude other sectors or fisheries from taking more halibut.

78. The Final EIS’s purpose and need statement provides that the sole purpose of Amendment 123 is to establish “abundance-based” halibut PSC limits for only the Amendment 80 sector. This, in turn, prevented the inclusion in the Final EIS of alternatives that would reduce halibut PSC limits across all sectors in the BSAI groundfish fisheries or for any other NMFS-managed fishery that has halibut bycatch. The Final EIS’s purpose and need statement is also premised on numerous errors, such as the mistaken assumption that there is a “continued decline in the halibut stock.”

79. An alternative analyzing halibut PSC limits applicable to all sectors in the BSAI groundfish fisheries, such as was analyzed (and adopted) in Amendment 111 and analyzed in the 2019 Initial Review Draft, was both viable and reasonable and should have been considered and evaluated in the draft EIS and Final EIS. Instead, NMFS and the Council improperly rejected that alternative by narrowing the statement of purpose and need to exclude that alternative. The reason given by the Council and NMFS for not including such an alternative in the Final EIS was that the Amendment 80 sector “comprises the majority [52%] of halibut PSC mortality.” Numerous other viable and reasonable action alternatives were presented to the Council and NMFS, and all of them were rejected without any rational justification.

80. The Final EIS does not include any data from 2021 or 2022 and, for some important datasets, does not include data for 2020 either.

81. The Final EIS’s cumulative effects analysis identifies only one “reasonably foreseeable future action.” There are other actions that are reasonably foreseeable and bear upon the effects of Amendment 123 that are not analyzed in the Final EIS. These reasonably foreseeable actions were identified in public comments but were not included in the Final EIS. This is due, in part, to NMFS’s decision to narrow its consideration of reasonably foreseeable future actions to only actions that have effects on Pacific halibut.

82. The Final EIS does not include or analyze available scientific information regarding how climate change in the Bering Sea will affect the Amendment 80 sector’s ability to catch its target species under the lower halibut PSC levels of Amendment 123.

This information is documented in numerous comments submitted by GFF and its

members, but it is not included in the Final EIS. For example, those comments provided data showing how a halibut PSC limit reduction is likely to adversely impact the Amendment 80 sector's ability to operate under reasonably foreseeable warmer ocean conditions. Those comments also provided data demonstrating the effects of 2018 and 2019 record-warm seafloor temperatures. NMFS's own Bering Sea climate projections indicate that fishing conditions experienced in 2018 and 2019 are likely to be the predominant future fishing conditions, but that data is also not included or analyzed in the Final EIS. The Final EIS does not include any of the models and analyses created by NMFS showing how a warming Bering Sea will affect fisheries.

83. In public comments, including in response to the draft EIS and Final EIS and in the May 19, 2023 letter referenced above, GFF and its members identified numerous sources of significant new information relevant to NMFS's analysis and consideration of Amendment 123. NMFS ultimately considered none of this information and ignored GFF's request that NMFS prepare a supplement to the Final EIS to address the significant new information. NMFS provided no analysis or other rational explanation for why it did not supplement the Final EIS, as required by NEPA's implementing regulations.

FIRST CLAIM FOR RELIEF

(Violation of the MSA and APA)

84. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

85. The MSA allows judicial review pursuant to the APA, 5 U.S.C. § 706(2)(A), (B), (C), or (D). 16 U.S.C. § 1855(f)(1)(B). Those provisions of the APA authorize reviewing courts to set aside federal agency action that is arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, or without observance of the procedures required by law.

86. MSA section 304(a) and (b), 16 U.S.C. § 1854(a)–(b), requires Defendants to ensure FMPs, FMP amendments, and implementing regulations are consistent with the requirements of the MSA.

87. Based on the facts and reasons stated above, and those additional reasons stated below, Amendment 123, its implementing regulations, and the Final Rule (collectively referred to below as “Amendment 123”) violate the MSA and the APA, as follows:

a. Because Amendment 123 reduces the overall harvest of a fishery, NMFS was required to “allocate” the burden of Amendment 123 (*i.e.*, halibut PSC reduction) “fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.” 16 U.S.C. § 1853(a)(14). NMFS’s failure to do so violates the MSA and the APA.

b. NMFS is required to affirmatively make a determination that a conservation or management measure is an “allocation” and complies with all requirements applicable to allocations. 16 U.S.C. §§ 1851(a), 1853(a); 50 C.F.R. § 600.325. NMFS violated the MSA by irrationally determining that Amendment

123 is not an “allocation,” as that term is used in the MSA, or, alternatively, by failing to make any determination as to whether Amendment 123 is an allocation.

c. Amendment 123 is an “allocation” under the MSA. Amendment 123 violates the MSA because it is not “fair and equitable” to U.S. fishermen or “reasonably calculated to promote conservation,” and because it discriminates between residents of different states. 16 U.S.C. § 1851(a)(4); 50 C.F.R. § 600.325. NMFS violated the MSA by failing to sufficiently address the statutory and regulatory requirements applicable to allocations or rationally explain why they are satisfied.

d. Conservation and management measures intended to minimize bycatch or bycatch mortality must be “practicable.” 16 U.S.C. § 1851(9). Amendment 123 imposes bycatch reduction measures that are not “practicable” and, therefore, violates the MSA. NMFS also violated the MSA by failing to sufficiently address the statutory and regulatory requirements applicable to “practicability” determinations or rationally explain why those requirements are satisfied here, and by arbitrarily applying a new, undefined, and unexplained “case-by-case” practicability standard. That violation is premised, in part, on NMFS’s change in policy regarding what measures are “practicable” in the context of BSAI halibut PSC reduction. Specifically, NMFS applied a “practicability” standard for Amendment 123 that directly contradicts the standard it applied for Amendment 111. NMFS’s failure to explain its reversal in position also renders Amendment 123 arbitrary and capricious.

e. In the Final Rule, NMFS claims, for the first time in this rulemaking process, that “[n]ew bycatch reduction tools are not necessary for this action to be practicable.” 88 Fed. Reg. at 82,755. This claim is unsupported by the record and was otherwise not considered or analyzed by NMFS or the Council in the process leading up to approval of Amendment 123 or issuance of the Final Rule. This claim also directly contradicts the Council’s and NMFS’s findings made during the Amendment 111 rulemaking. This claim is therefore without a rational explanation and is arbitrary and capricious.

f. The MSA 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). Amendment 123 violates this requirement because it will cause the BSAI groundfish fisheries to not achieve optimum yield on a continuing basis, has no conservation benefit, and creates a net economic loss to the Nation. Additionally, NMFS interpreted and applied National Standard 1 in a manner that violates the MSA and its implementing regulations.

g. The MSA requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). In approving and implementing Amendment 123, NMFS failed to consider and analyze, and made determinations that are contrary to, the best scientific information available. For example, NMFS ignored that the Pacific halibut stock has been in a stable condition for at least a decade, ignored that the

directed halibut fishery underutilizes the Pacific halibut stock, failed to account for the fact that Amendment 123 has no conservation benefit to the Pacific halibut stock, failed to account for information demonstrating significant and environmental and climatic effects bearing directly upon the effects of Amendment 123, incorrectly determined that Amendment 123 “links” halibut PSC limits in the Amendment 80 sector with halibut abundance, failed to consider significant changes made to the IPHC setline survey, and determined and approved statutory formulae for calculation of halibut PSC limits that are inconsistent with the best scientific information available and are otherwise arbitrary and unexplained.

h. Amendment 123 violates the MSA because it is not “necessary and appropriate for the conservation and management of the fishery” for all the reasons stated in this Complaint and in GFF’s and its members’ comments.

16 U.S.C. § 1853(a)(1)(A), (b)(14).

i. Amendment 123 violates the MSA because it does not consider “efficiency in the utilization of fishery resources.” *Id.* § 1851(a)(5). NMFS provided no rational explanation for how this requirement is satisfied and arbitrarily relied on a new and undefined term (“wise use”) in purporting to comply with this requirement.

j. Amendment 123 violates the MSA because it does not “take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” *Id.* § 1851(a)(6). NMFS provided no rational explanation

for how this requirement is satisfied. NMFS failed to consider, among other things, how Amendment 123 will address changing climate and ocean conditions, changing utilization rates in the directed halibut fishery, or the changing of either of the two survey methodologies upon which NMFS will establish bycatch caps under Amendment 123.

k. Amendment 123 violates the MSA because it does not “minimize costs and avoid unnecessary duplication.” *Id.* § 1851(a)(7). NMFS provided no rational explanation for how this requirement is satisfied.

l. NMFS justified many of its MSA determinations in the Final Rule on the basis that Amendment 123 “maximizes net benefits to the Nation.” This conclusion is unsupported by the record, directly contradicts NMFS’s conclusion that Amendment 123 is likely to result in negative net benefits to the Nation and will result in a net economic loss, and is therefore arbitrary and capricious. This conclusion is also an unexplained and unlawful change in position.

m. The MSA requires NMFS to take into account “information, views, and comments received from interested persons” as part of NMFS’s review of FMP amendments before making a consistency determination. *Id.* § 1854(a)(2)(A). However, NMFS expressly “concluded that Amendment 123 is consistent with the Magnuson-Stevens Act, including the ten national standards” in the proposed rule and in the Final EIS before receiving and considering “information, views, and comments” from interested persons, completing the required MSA consistency review, and issuing the Final Rule. In so doing, NMFS

unlawfully predetermined the result of the proposed action before completing the required process, and violated the MSA and the APA.

88. For all of the reasons stated in this Complaint and in GFF's and its members' comments, Amendment 123, its implementing regulations, and the Final Rule violate the MSA and are arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, and without observance of the procedures required by law, in violation of the APA. Accordingly, Amendment 123, its implementing regulations, and the Final Rule should be vacated.

SECOND CLAIM FOR RELIEF

(Violation of NEPA and APA)

89. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

90. NEPA requires agencies to evaluate a reasonable range of alternatives. An agency violates NEPA when the EIS's purpose and need statement is "so narrowly drawn as to foreordain" the outcome or result in the agency necessarily considering an "unreasonably narrow range of alternatives." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072.

91. The Final EIS's purpose and need statement violates this requirement by focusing strictly on "abundance-based" halibut PSC limits applied only to the Amendment 80 sector, to the exclusion of all other sectors and gear types and potential bycatch reduction strategies. After initially proposing to regulate all sectors through abundance-based management in 2019, NMFS and the Council changed their minds in

2020, revised the statement of purpose and need to narrowly focus on the Amendment 80 sector, and refused to consider reasonable alternatives, such as was originally proposed, based on that overly narrow statement of purpose and need. This foreclosed the Council and NMFS from considering other viable and reasonable alternatives to the proposed action and the public’s ability to reasonably consider and provide input on the proposed action. The purpose and need statement is also premised on numerous false or unreasonable assumptions. Accordingly, the Final EIS violates NEPA.

92. Because all action alternatives in the Final EIS consider only “abundance-based” halibut PSC limits applied only to the Amendment 80 sector, the Final EIS fails to consider a reasonable range of alternatives. For example, an alternative, or alternatives, analyzing reduced halibut PSC limits applied to multiple sectors in the BSAI groundfish fisheries was viable and reasonable because, among other reasons, NMFS considered such alternatives in the Amendment 111 EA and in the 2019 Initial Review Draft. NMFS and the Council were presented with such alternatives, and other reasonable and viable alternatives, during the NEPA process for Amendment 123 but (a) failed to present and analyze them as action alternatives in the Final EIS and (b) failed to provide a rational explanation for not doing so. Instead, the Final EIS presents only variations on a single action alternative: application of abundance-based Pacific halibut limits to the Amendment 80 sector. Accordingly, the Final EIS violates NEPA.

93. NMFS violated NEPA because it failed to analyze Amendment 123 as an “allocation,” as that term is defined under the MSA. As a result, NMFS performed no lawful NEPA analysis of the impacts of the allocation established by Amendment 123.

94. NMFS was required to evaluate the cumulative effects of its action, “which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” 40 C.F.R. § 1508.1(g)(3). The Final EIS considers only a single reasonably foreseeable future action. The Council and NMFS were presented with numerous other reasonably foreseeable future actions that should have been disclosed and analyzed as part of the Final EIS’s cumulative effects analysis, but those actions are omitted from the Final EIS. Accordingly, the Final EIS violates NEPA.

95. In an EIS, an agency must disclose where there is incomplete or unavailable information. If incomplete but available information is relevant to reasonably foreseeable significant adverse impacts and essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency “shall include the information in the [EIS].” *Id.* § 1502.21(b). NMFS failed to obtain and include available information in the Final EIS and failed to explain why the cost of obtaining the information was unreasonable. Indeed, much of the information, such as data and analyses regarding the effects of climate change in the Bering Sea, was already in NMFS’s possession. Additionally, if information cannot be obtained because the costs to do so are unreasonable or there is no means to obtain the information, then the agency is required to follow four specific requirements in the EIS, as prescribed by 40 C.F.R. § 1502.21(c). Nowhere in the Final EIS does NMFS reference or apply 40 C.F.R. §

1502.21, let alone address and discuss the four specific requirements of 40 C.F.R. § 1502.21(c). Accordingly, the Final EIS violates NEPA.

96. NMFS is required to prepare a supplemental EIS if “a major Federal action remains to occur, and . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1). Significant new circumstances or information were brought to NMFS’s attention before it issued the Final Rule, and throughout the NEPA process, but NMFS ignored it and did not prepare a supplement to the draft EIS or the Final EIS. NMFS failed to provide a rational explanation for why it did not supplement the draft EIS or Final EIS. Accordingly, the Final EIS violates NEPA.

97. For all of the reasons stated in this Complaint and in GFF’s and its members’ comments, Amendment 123, its implementing regulations, the Final Rule, and the Final EIS violate NEPA and are arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, not in accordance with law, and without observance of the procedures required by law, in violation of the APA. Accordingly, Amendment 123, its implementing regulations, the Final Rule, and the Final EIS should be vacated.

THIRD CLAIM FOR RELIEF

(Violation of APA)

98. The APA requires NMFS to examine the relevant data and articulate a satisfactory explanation for its decision to implement Amendment 123, including a rational connection between the evidence before the agency and the decisions it made.

99. NMFS did not rationally explain how Amendment 123, its implementing regulations, and the Final Rule comply with the requirements of the MSA and NEPA.

100. Amendment 123 and the Final Rule are based on numerous improper assumptions unsupported by the facts. NMFS failed to explain a rational basis, supported by the facts, for its conclusions, as set forth in this Complaint. Accordingly, NMFS failed to provide a rational basis, supported by the facts, for its decision to approve and implement Amendment 123. Amendment 123, its implementing regulations, and the Final Rule are therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law, and should be vacated.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Expedite this matter, as required by 16 U.S.C. § 1855(f)(4);
- B. Declare that Defendants violated the MSA, NEPA, and the APA, as set forth above;
- C. Declare that Defendants' actions were arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law, as set forth above;
- D. Vacate Amendment 123, its implementing regulations, the Final Rule, and the Final EIS;
- E. Remand Amendment 123, its implementing regulations, the Final Rule, and the Final EIS to NMFS to address the deficiencies identified in this Complaint;

F. Enjoin, as necessary, Amendment 123, its implementing regulations, and the Final Rule;

G. Maintain jurisdiction over this action until Defendants are in compliance with the MSA, NEPA, the APA, and every order of this Court;

H. Award Plaintiff its reasonable attorney fees, costs, expenses, and disbursements, including attorney fees associated with this litigation, pursuant to the Equal Access to Justice Act or other law; and

I. Award Plaintiff such other and further relief as this Court may deem just and equitable.

DATED: December 19, 2023.

STOEL RIVES LLP

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February 7, 2023

Via Federal eRulemaking Portal (<http://www.regulations.gov>)

Gretchen Harrington, Assistant Regional Administrator
Josh Keaton, Former Acting Assistant Regional Administrator
Sustainable Fisheries Division, NMFS Alaska Region
Alaska Region NMFS, Attn: Records Office
P.O. Box 21668
Juneau, AK 99802-1668

Re: Comments of the Groundfish Forum on proposed Amendment 123 to the BSAI FMP, proposed rule to implement Amendment 123, and associated EIS, NOAA-NMFS-2022-0088

Dear Ms. Harrington and Mr. Keaton:

I write on behalf of the Groundfish Forum, Inc. (“Groundfish Forum”) and submit the following comments in response to the National Marine Fisheries Service’s (“NMFS”) proposed Amendment 123 to the Fishery Management Plan (“FMP”) for Groundfish of the Bering Sea and Aleutian Islands Management Area (“BSAI”), the related proposed rule to implement Amendment 123 (“Proposed Rule”), and the associated final environmental impact statement (“FEIS”) and related regulatory review documents. *See* 87 Fed. Reg. 67,665 (Nov. 9, 2022) (codified at 50 C.F.R. pt. 679) (notice of proposed Amendment 123); 87 Fed. Reg. 75,570 (Dec. 9, 2022) (codified at 50 C.F.R. pt. 679) (Proposed Rule).¹ The Groundfish Forum appreciates NMFS’s consideration of these comments.

¹ The proposed Amendment 123 and the Proposed Rule are jointly referred to in this letter as the “Proposed Action.” When NMFS posted the notice of proposed Amendment 123 on November 9, 2022, it failed to make the proposed Amendment 123 and the FEIS available to the public. On November 10, 2022, the Groundfish Forum alerted NMFS to this issue. The Groundfish Forum followed up with a letter dated November 18, 2022, requesting an extension of the public comment periods for both the proposed Amendment 123 and the (then-forthcoming) Proposed Rule. NMFS did not respond to the request by the date requested or make the documents publicly available, and, on December 2, 2022, counsel for the Groundfish Forum alerted, via email, counsel for NMFS to this problem. On that same day, counsel for the Groundfish Forum and counsel for NMFS discussed the issue over the phone. In that call, NMFS counsel acknowledged the problem and stated that NMFS intended to (i) make the documents publicly available, (ii) issue a 60-day extension for the public comment period for proposed Amendment 123, (iii)

I. THE GROUND FISH FORUM AND AMENDMENT 80 SECTOR

The Groundfish Forum is a nonprofit trade association representing five companies that collectively operate all of the vessels in the Amendment 80 sector in the BSAI that would be directly regulated by the Proposed Action. Member companies also fish in the Gulf of Alaska. The Groundfish Forum was formed in 1996 to craft meaningful solutions to problems such as discards, incidental catches, and impacts on fish habitat. Groundfish Forum member vessels fish according to their respective permits for varied portfolios of sole and flounder species, including yellowfin sole, rock sole, rex sole, flathead sole, arrowtooth flounder, and Alaska plaice, as well as Pacific cod, Atka mackerel, Pacific Ocean perch, and other species. None of these target stocks are overfished or subject to overfishing as defined by the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”). Groundfish Forum members supply seafood to the United States and markets throughout North America, as well as markets in Asia and Europe. The Amendment 80 sector has received Responsible Fisheries Management and Marine Stewardship Council certification for environmental sustainability.

Since 2015, when the North Pacific Fishery Management Council (“NPFMC” or “Council”) began considering additional potential reductions to allowable halibut bycatch levels for the Amendment 80 sector, along with other sectors in the BSAI, the Groundfish Forum and its members have engaged in the Council process through participation in Council committees, public testimony, and written comments. The Groundfish Forum and its members have commented extensively on past analyses and environmental review documents related to proposals for halibut abundance-based management (“ABM”). All of those comments are part of the administrative record, and the Groundfish Forum incorporates them by reference.

issue the Proposed Rule on approximately December 9, 2022, with a 45-day comment period, and (iv) despite the 45-day comment period on the Proposed Rule, accept as timely public comments on *both* the Proposed Rule and proposed Amendment 123 (and FEIS) if submitted by the deadline for comments on proposed Amendment 123 (as is NMFS’s typical practice). NMFS’s counsel stated that the notices may not perfectly reflect that intent and, if they did not, to contact him. NMFS subsequently issued the extension on the public comment period for proposed Amendment 123 on December 9, 2022, establishing a new deadline of February 7, 2023. 87 Fed. Reg. 75,569. NMFS also issued the Proposed Rule on December 9, 2022 (with a comment deadline of January 23, 2023). As NMFS counsel had alerted, the language in the Proposed Rule stating NMFS’s intent that comments on both the Proposed Rule and proposed Amendment 123 (and associated FEIS) would be considered timely submitted by February 7, 2023 was not clearly conveyed. Accordingly, counsel for the Groundfish Forum emailed NMFS counsel requesting confirmation that all such comments could be timely submitted by February 7, 2023. Counsel for NMFS confirmed via email. NMFS posted the proposed Amendment 123 and FEIS to its website during the week of December 5, 2023. All communications relevant to these issues are included in the attachments provided with this comment letter.

II. SUMMARY OF COMMENTS

The proposed FMP Amendment 123, Proposed Rule, and FEIS are unlawful. As a whole, the Proposed Action is an ill-advised and arbitrary attempt to allocate the catch of a species from one fishery to another fishery without a demonstrated conservation benefit, without a demonstrated benefit to the directed halibut fleet, and with a significant and substantial harm to the Amendment 80 sector, which has already dramatically reduced halibut bycatch over decades.

For numerous reasons, discussed in detail in the following sections and in previous comments submitted by the Groundfish Forum and its members, NMFS's Proposed Action violates the Magnuson-Stevens Act, the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), the Northern Pacific Halibut Act ("Halibut Act"), the Information Quality Act ("IQA"), and the statutory Capacity Reduction Program ("CRP"). NMFS's Proposed Action would also establish an unlawful delegation of federal agency authority to an international body, in violation of U.S. law. Key deficiencies with the Proposed Action and FEIS are summarized as follows:

- The Proposed Action is facially arbitrary. Its purported sole purpose is to "link" the halibut Prohibited Species Catch ("PSC") limit for the Amendment 80 sector to indices of halibut abundance. But the Amendment 80 sector's halibut encounter rates are either poorly or negatively correlated with those indices of abundance. This is the opposite of rational basis rulemaking.
- NMFS has failed to make any demonstration that the Proposed Action is necessary and appropriate for the conservation or management of the fishery. In fact, the best available scientific information demonstrates that this threshold Magnuson-Stevens Act requirement is not satisfied.
- The record shows that NMFS has unlawfully predetermined the result of the Proposed Action. For example, NMFS has "concluded" that the Proposed Action is consistent with the Magnuson-Stevens Act *before* receiving public comment and input, contrary to the Magnuson-Stevens Act's provisions governing Secretarial review of proposed amendments.
- The Proposed Action delegates a key decision to the International Pacific Halibut Commission ("IPHC") that would directly determine the halibut PSC limits applied to the Amendment 80 sector each year. That IPHC decision is subject to none of the safeguards provided by U.S. law and cannot be administratively appealed or judicially challenged. This constitutes an unlawful delegation of authority by a U.S. agency.
- Substantial adverse impacts from the Proposed Action are certain to occur. These impacts could include *at least* an \$86 million direct impact to the Amendment 80 fleet *each year*. And yet, NMFS has found that the Proposed Action will have little or no conservation

benefit for the Pacific halibut stock that differs from *status quo* management and that any benefit to the directed halibut fishery is, at best, speculative. This is the definition of arbitrary and capricious agency action.

- The Pacific halibut stock extends from Alaska to Northern California and is managed on a stock-wide basis. The stock's abundance has been stable since approximately 2012. The directed halibut fleet's catch allocations have increased in recent years, but a growing and significant percentage of that allocation goes unused, particularly in the area defined as "Area 4," which roughly corresponds to the same geographic area as the BSAI. Indeed, 2022 represented a record-high harvest allocation for the directed fleet and only 67% of that allocation was used.
- The Amendment 80 fleet has taken numerous actions over decades to reduce its halibut bycatch, which is just a small fraction of the total fishery removals from the Pacific halibut stock. Numerous other groundfish sectors and fisheries also have halibut bycatch, as do the directed halibut fisheries. Under these circumstances, the Proposed Action—which singles out the Amendment 80 fleet for further bycatch reductions, holding all other fisheries that have halibut bycatch harmless, while offering no additional tools to accomplish those reductions—is arbitrary and capricious.
- The Proposed Action violates multiple other procedural and substantive provisions of the Magnuson-Stevens Act. These violations include noncompliance with all of the National Standards, most notably National Standards 1, 2, 4, and 9. Among other flaws, the Proposed Action does nothing to "achieve" optimum yield ("OY"), fails to consider and apply the best scientific information available, constitutes an unlawful allocation of fishing privileges, and is not "practicable" under any formulation of that term.
- The FEIS's statement of purpose and need narrowly (and unlawfully) focuses on establishing "abundance-based" limits for the Amendment 80 sector, even though other fisheries and sectors have substantial halibut bycatch (and none of them are subject to abundance-based halibut bycatch limits). This resulted in an unreasonable range of alternatives that unlawfully excludes indisputably viable alternatives, such as an alternative that would have included other fisheries and sectors within the scope of the action.
- The FEIS does not even attempt to comply with 40 C.F.R. § 1502.21, which is an important NEPA regulation governing how the agency must address unavailable or incomplete information, despite the FEIS's express recognition of areas where information is unavailable or incomplete.
- The FEIS relegates the cumulative effects analysis to a non-substantive, barely two-page discussion that ultimately identifies only *one* "reasonably foreseeable future action."

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There are many more actions that are reasonably foreseeable and bear upon the effects of the Proposed Action. NMFS was required but failed to analyze those reasonably foreseeable future actions in its cumulative effects assessment.

For all of these reasons, NMFS should disapprove Amendment 123 in its entirety and not implement the Proposed Rule. If NMFS nevertheless proceeds with this action, it must prepare a new EIS (complete with public review and comment) and undertake a new Magnuson-Stevens Act process to address the serious legal violations and other errors described in this letter and previous comment letters. Should NMFS unlawfully proceed with the action based on the current record (to which the Groundfish Forum strongly objects), then it should implement the final action no earlier than January 1, 2025, at a minimum.

III. DETAILED COMMENTS²

A. Background and context.³

Pacific halibut (*Hippoglossus stenolepis*) is wide-ranging and managed as a single stock extending from Northern California to the Aleutian Islands and Bering Sea. The stock has been managed jointly by the United States and Canada through what is now known as the IPHC since approximately 1923. A convention⁴ and the Halibut Act established the responsibilities of the contracting parties and the United States. Under the provisions of the convention and the Halibut Act, the United States can also establish domestic regulations that are in addition to, but not in conflict with, the rules established by the IPHC. The IPHC does not manage the groundfish fisheries. Limitations on the incidental catch of halibut in the groundfish fisheries, including those proposed here, are established under the authority of the Magnuson-Stevens Act, not the Halibut Act.

All fisheries have incidental catch of other species that are not the intended target of a fishing operation. Halibut is incidentally caught in groundfish fisheries by vessels using longline (also referred to as “hook-and-line”), pot, and trawl gear. If that catch is not retained and does not

² In addition to these comments, we have provided a table at the end of this letter (and before the “Attachments” section) that presents some of the incorrect and contradictory statements made in the Proposed Action and FEIS, as well as the corrections required in the proposed regulatory text, should NMFS inappropriately choose to proceed.

³ Also included for important context are numerous documents and data that are attached to this letter (in the “Attachments” section at the end of this letter). These attachments, along with this letter and all previous comment letters submitted by the Groundfish Forum, the Alaska Seafood Cooperative, and their members, and the attachments to those letters, are part of the administrative record.

⁴ Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed at Ottawa, Ontario, March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, March 29, 1979), <https://www.iphc.int/uploads/pdf/basic-texts/iphc-1979-pacific-halibut-convention.pdf>.

enter into commerce (for whatever reason), it is considered “bycatch” under the Magnuson-Stevens Act. *See* 15 U.S.C. § 1802(2). For decades, NMFS and the IPHC have limited the retention of halibut in both fisheries that target halibut and in those that do not target halibut. Because the incidental catch of halibut is unavoidable, and halibut cannot be retained by vessels using trawl gear under existing regulations, halibut “bycatch” is unavoidable.⁵ For some, but not all, groundfish fisheries, NMFS has further limited fishing operations by allocating limits on the maximum amount of halibut bycatch mortality, also referred to as a “PSC limit.”⁶ This policy choice—*i.e.*, to require certain vessels using certain gear to discard halibut that would otherwise be retained and sold—results in halibut “bycatch.” An alternative policy choice would be to allow the halibut that cannot be returned to the sea and survive to be retained and ultimately enter into commerce and become food.⁷

Total fishing mortality of Pacific halibut consists of directed (targeted) commercial fishery landings, discard halibut mortality (bycatch) in directed commercial and recreational fisheries, recreational harvest, subsistence harvest, and discard halibut mortality (bycatch) in non-directed fisheries (*i.e.*, fisheries that target other species and are required by law to discard halibut).

The Pacific halibut stock is not considered to be subject to overfishing, or overfished, by the IPHC, even though those terms are not applicable to Pacific halibut because it is not managed under the Magnuson-Stevens Act or an FMP.⁸ The halibut stock is considered to be stable.⁹ The

⁵ *See* 87 Fed. Reg. at 75,574 (“The groundfish fisheries cannot be prosecuted without some level of halibut bycatch because groundfish and halibut occur in the same areas at the same times and no fishing gear or technique has been developed that can harvest commercial quantities of groundfish while avoiding all halibut bycatch.”).

⁶ *See, e.g.*, 50 C.F.R. § 679.91(d)(1)(4)(i). Not all groundfish fisheries that have halibut bycatch are subject to PSC limits. For example, vessels using jig and pot gear are not subject to PSC limits in the BSAI.

⁷ It bears emphasis that directed halibut fisheries discard significant amounts of halibut (“waste”). If NMFS’s intention in the Proposed Action is to reduce bycatch, which includes “waste,” then it could simply make it lawful for the Amendment 80 fleet to retain and sell any halibut caught below the established PSC limits. Expanding the fisheries and gears authorized to retain halibut is not unprecedented. NMFS and the IPHC recently implemented measures to allow vessels using pot gear to retain halibut. *See* 85 Fed. Reg. 840 (Feb. 7, 2020) (codified at 50 C.F.R. pts. 300, 600, and 679); 87 Fed. Reg. 12,604 (Mar. 7, 2022) (codified at 50 C.F.R. pt. 300). There is no rational basis for NMFS’s continuing prohibition on the Amendment 80 fleet’s ability to retain and sell the halibut it catches below the PSC limits.

⁸ *See* I. Stewart, A. Hicks, R. Webster, & D. Wilson, Summary of the data, stock assessment, and harvest decision table for Pacific halibut (*Hippoglossus stenolepis*) at the end of 2022, IPHC-2022-IM098-11, <https://www.iphc.int/uploads/pdf/im/im098/iphc-2022-im098-11.pdf> (“2022 Summary of Halibut Data”), at 14, Table 2.

⁹ *Id.* at 1 (“Spawning biomass trends appear to have stabilized, as fish from the 2012 year-class, critically important to short-term projections of stock and fishery dynamics, continue to mature.”).

Pacific halibut stock declined from the 1990s to approximately 2012. After 2012, the stock's spawning biomass stabilized around 100,000 metric tons ("mt") and has remained stable since 2012. Annual halibut mortality across all fisheries ranges from 15,000 mt to 45,000 mt, with an annual average of 29,000 mt.¹⁰ In its 2023 stock assessment report, the IPHC stated that "[o]verall, spawning biomass estimates remain highly consistent with those of recent stock assessments."¹¹ The IPHC's 2023 stock assessment notes that fishing intensity (mortality) due to harvest and bycatch is lower, and stock yields (harvest opportunities) could increase by 26% if the IPHC allocated halibut under its current harvest policy. "The 2022 stock assessment estimates a lower level of fishing intensity and higher relative stock status compared to previous assessments, as well as a 26% increase in the yield corresponding to the reference level of fishing intensity (F43%) for 2023 compared to 2022."¹²

The Amendment 80 sector, as it has existed pre- and post-Amendment 80, has a long history of operating under bycatch limits, including limits for halibut bycatch. In 1993, 3,775 mt of halibut PSC was assigned to the overall trawl sector. At that time, NMFS assigned a PSC limit to each fishery on a seasonal basis. When the Western Alaska Community Development Quota ("CDQ") program was introduced in the late 1990s, the trawl halibut PSC limit was reduced to 3,675 mt. NMFS implemented the Amendment 80 Program in 2008.¹³ The Amendment 80 Program was an initiative "by the Council and NMFS to reduce bycatch and discard of fish species in the BSAI non-pollock trawl groundfish fisheries."¹⁴ The Amendment 80 Program included measures that "would consider efficiency in utilization of fishery resources, minimize costs, and further minimize bycatch to the extent practicable, thereby meeting the objectives of National Standards 5, 7, and 9 of the [Magnuson-Stevens Act]."¹⁵

Upon implementation of Amendment 80 in 2008, the halibut PSC limit was initially further reduced to 2,525 mt for the sector, followed by a series of annual stair-step reductions, reducing the halibut PSC limit to 2,475 mt in 2009, 2,425 mt in 2010, 2,375 mt in 2011, and 2,325 mt in 2012. Most recently, the Amendment 80 halibut PSC limit was further reduced by 25% to 1,745 mt in 2015, under Amendment 111.¹⁶ In sum, since 1993, the halibut PSC available to Amendment 80 vessels has been reduced seven times by over a total of 50%.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 1.

¹² *Id.* at 1.

¹³ 72 Fed. Reg. 52,667 (Sept. 14, 2007) (codified at 50 C.F.R. pt. 679).

¹⁴ *Id.* at 52,669.

¹⁵ 72 Fed. Reg. 21,198 (April 30, 2007).

¹⁶ 81 Fed. Reg. 24,714 (Apr. 27, 2016) (codified at 50 C.F.R. pt. 679).

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For the most recent year (2022), the halibut bycatch mortality that occurred in the Amendment 80 fishery was used in the harvest of over 335,000 mt of groundfish. This represents a halibut bycatch use rate of roughly 1 kg of halibut for 214 kg of groundfish, or 1 pound of halibut for 214 pounds of groundfish. These groundfish harvests provide hundreds of millions of dollars to U.S. businesses and support thousands of crew members and numerous communities throughout Alaska and the Pacific Northwest.

The Amendment 80 fleet's ability to continue to operate despite these repeated reductions in halibut bycatch and mortality by the Amendment 80 fleet is largely the result of numerous tools implemented and utilized by the Amendment 80 fleet. These include the use of agreed-upon fishing strategies within the Amendment 80 cooperative Halibut Avoidance Plan ("HAP"), fleet communication, the use of small test tows, reduced night fishing, the use of excluders, and deck sorting. Deck sorting in particular has been very effective in reducing halibut bycatch mortality by allowing halibut that are incidentally caught to be sorted and returned to the sea as soon as possible, thereby reducing bycatch mortality. The Amendment 80 sector developed the deck sorting program and applied for an exempted fishing permit ("EFP") to test its innovation. In 2015, NMFS granted an EFP for all Amendment 80 vessels to test the conditions necessary to effectively conduct deck sorting.

Based on the success of the EFP, NMFS issued a series of annual EFPs intended to collaboratively continue to develop halibut catch handling and accounting protocols. In 2020, NMFS published regulations implementing deck sorting. 84 Fed. Reg. 55,044 (Oct. 15, 2019) (codified at 50 C.F.R. pt. 679). The FEIS estimates a fleetwide achievable deck sorting rate of 80% of halibut caught. Deck sorting also has consequences for fishing operations as fishing vessels that utilize deck sorting have an average loss of production of one tow per day, or roughly a 20% reduction on a typical, five-tow day.

All of the bycatch mitigation innovations and strategies mentioned above occurred *before* the Proposed Action was developed and have been fully implemented for several years.¹⁷ Neither NMFS nor the Amendment 80 sector have identified new tools that are available to the Amendment 80 fleet to further reduce halibut bycatch, other than foregoing catch or exiting the fishery.¹⁸ Minimizing halibut bycatch imposes a considerable cost on the Amendment 80 sector and, even under current halibut bycatch limits, vessels have been retired from the fishery due in large part to challenges in meeting current bycatch control limits.

¹⁷ Since 2009, the Alaska Seafood Cooperative has submitted annual reports to the NPFMC and NMFS that highlight annual efforts related to reducing halibut bycatch and mortality. *See* <https://www.npfmc.org/cooperative-reporting/>; Alaska Seafood Cooperative Halibut Bycatch Performance, Report to the NPFMC, B1 A80 Sector Report on Halibut (Dec. 2021).

¹⁸ *See* FEIS at 319 ("Reductions in halibut mortality that are realized are expected to result from the sector increasing costs or reducing efficiency."); 87 Fed. Reg. at 75,579 ("Firms that cannot remain viable under the new conditions would eventually exit the fishery.").

B. The Proposed Action is facially arbitrary and capricious and violates the Magnuson-Stevens Act's requirement that an amendment be necessary and appropriate for the conservation and management of a fishery.

This Proposed Action is facially arbitrary and capricious, in violation of the APA. NMFS states that “[t]he primary objective of this action is to link halibut PSC limits to the abundance of halibut.” FEIS at 323. But the record demonstrates that the Amendment 80 sector’s halibut encounter rates are not significantly correlated with one of the indices of halibut abundance used for the Proposed Action (NMFS trawl survey) and are *negatively correlated* with the other index of abundance (IPHC setline survey).¹⁹ This is addressed in detail elsewhere in this letter. At a basic level, however, it is nonsensical to implement a new management measure ostensibly intended to reduce halibut bycatch by solely premising that measure on a metric that has little or no correlation to, and in fact, for one of the indices, is *negatively correlated* with, halibut bycatch. Accordingly, for this reason (and the many other reasons addressed below), this action has no rational basis and is therefore arbitrary and capricious.

Additionally, the Proposed Rule states:

Halibut is fully utilized in the BSAI. Therefore, consistent with the Council’s purpose and need statement for this action to prevent halibut PSC from becoming a larger proportion of total halibut removals in the BSAI, the Council recommended, and NMFS agrees, that PSC limits should decline in proportion to reduced amounts of halibut available for harvest by all users.

87 Fed. Reg. at 75,576. There are at least two major problems with this statement. *First*, halibut is *not* fully utilized in the BSAI. The table in Section III.G.2.b *infra* is derived from publicly available NMFS data showing Area 4 utilization rates from 2011 through 2022 in the Area 4 commercial fishery (includes individual fishing quota (“IFQ”) and CDQ allocations). As made clear in the table, halibut is plainly not fully utilized in the BSAI.²⁰ *Second*, the Proposed Action cannot and will not “prevent halibut PSC from becoming a larger proportion of total halibut removals in the BSAI.” That is because the Proposed Action would not constrain the PSC limits in any other BSAI groundfish fishery. As Tables 2-11 and 3-19, and Figure 3-25, in the FEIS show, there is a substantial amount of potential additional bycatch that could occur in those other sectors. Thus, even if the Proposed Action resulted in reduced halibut

¹⁹ NPFMC. Discussion Paper: Abundance Based Management for BSAI Pacific Halibut PSC Limits (Agenda C-9), Oct. 2017, pp. 68-77.

²⁰ The FEIS does not include the best available data from 2020-2022 on the utilization of halibut from the BSAI trawl limited access non-trawl sector, or CDQ groundfish fisheries. These data are readily available on NMFS’s website. 2020-2022 data are located here: BSAI Prohibited Species Catch (Salmon, Halibut Mortality, Herring, Crab) with CDQ, <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska>.

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bycatch in the Amendment 80 sector, any such reduction could be offset by increases in halibut bycatch in other sectors (or decreases in the directed fleet's allowable catch). Additionally, the Proposed Action does not control the allocation of the halibut to the commercial halibut fishery or otherwise contain any measure to ensure the "full utilization" of BSAI halibut. *See* 87 Fed. Reg. at 75,578 ("[T]here is no guarantee that this action would translate into increased opportunities for the directed fishery since the IPHC is not obligated to alter, maintain, or implement their current harvest strategies based on the outcome of this action.").

For these reasons, and the additional numerous reasons addressed below, the Proposed Action is not "necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(1)(A), (b)(14). And NMFS has made no demonstration that the Proposed Action is necessary or appropriate for either the conservation or the management of the Amendment 80 sector. In fact, this requirement is not even considered in the purpose and need statement for the Proposed Action. All of the available information, as documented in this letter and previous comment letters and testimony before the Council, demonstrates that the Proposed Action is *not* necessary or appropriate for the conservation or management of the fishery.

Accordingly, for these reasons (and the many other reasons addressed below), the Proposed Action and its stated purpose and justification violate the Magnuson-Stevens Act and have no rational basis, and the Proposed Action is therefore arbitrary and capricious and contrary to law.²¹

C. NMFS unlawfully determined the result of the Proposed Action before completing the required regulatory processes.

NMFS has unlawfully pre-decided the result of the Proposed Action. The Proposed Rule states: "The Council *and NMFS* have *concluded* that Amendment 123 is consistent with the Magnuson-Stevens Act, including the ten national standards." 87 Fed. Reg. at 75,579 (emphases added). Accordingly, as of at least December 9, 2022, NMFS had "concluded" that Amendment 123 "is consistent with" the Magnuson-Stevens Act.²² This violates the Magnuson-Stevens Act, which

²¹ Additionally, it is unclear which agency official has been delegated authority to approve the Proposed Action. The Proposed Rule is signed by Sam Rauch (Deputy Assistant Administrator for Regulations, NMFS). The Notice of Availability for proposed Amendment 123 ("NOA") is signed by Kelly Denit, Director, Office of Sustainable Fisheries, NMFS. The comment extension deadline for the NOA is signed by Jennifer M. Wallace, Acting Director, Office of Sustainable Fisheries, NMFS. The FEIS "Dear Reviewer Letter" is signed by Jon Kurland, Regional Administrator. The Groundfish Forum hereby objects to any final action taken in this matter that is not undertaken by an official with lawfully delegated authority.

²² Similarly, the FEIS, which was prepared by NMFS staff, purports to make Magnuson-Stevens Act National Standard consistency findings (Section 7.1), again before the required "review" has been completed. *Contrast, e.g.*, 72 Fed. Reg. 30,051, 30,108 (May 30, 2007) (codified at 49 C.F.R. § 571.116) ("At this time, NMFS has not determined that the FMP that this rule would implement, Amendment 80, is

states that Secretarial review of amendments (which is delegated to NMFS) does not “commence” until the amendment is transmitted to NMFS. NMFS must take into account “information, views and comments received from interested persons” as part of that “review”—*before* making a consistency determination. 16 U.S.C. § 1854(a). By expressly reaching its conclusions before completing that review, NMFS has unlawfully predetermined the result of the Proposed Action and rubber-stamped the Council’s ill-advised proposal.²³ *See, e.g., Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (“[I]t certainly does not follow that . . . NMFS may simply rubber stamp the Council’s decisions. Section 1854(a) is clear: NMFS must examine whether the FMP ‘is consistent with the national standards, the other provisions of [the Magnuson-Stevens Act], and any other applicable law.’”); *Nat. Res. Def. Council, Inc. v. Evans*, 168 F. Supp. 2d 1149, 1156 (N.D. Cal. 2001) (“Presumably NMFS and the Secretary of Commerce do not simply rubber stamp whatever recommendations are made to them by the Council, and the opportunity for the public to address its grievances and concerns directly to the Secretary, under 16 U.S.C. § 1854(b), ensures public access to Council review.”).²⁴

D. NMFS’s “equity” basis for the Proposed Action is unsupported and unlawful.

NMFS repeatedly justifies the Proposed Action on the premise that it “must” take action to achieve “equity” and that the Proposed Action is “equitable.”²⁵ Nowhere does NMFS explain

consistent with the national standards of [the Magnuson-Stevens Act] and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.”).

²³ And to the extent the Council (or NMFS) never formally deemed the proposed regulations “necessary” or “appropriate,” as the Magnuson-Stevens Act requires, the Proposed Action is unlawful for that reason as well. *See Fishing Co. of Alaska v. Gutierrez*, 510 F.3d 328 (D.C. Cir. 2007).

²⁴ This is also evidenced by the fact that NMFS made essentially no substantive changes in the FEIS despite extensive substantive comment on the draft EIS by interested stakeholders. A notable exception is the incidence of unexplained revisions in the FEIS on a range of economic issues that are apparently unsupported by any additional analyses. These arbitrary changes are discussed later in this letter.

²⁵ *See, e.g.,* FEIS at 23 (“The Preferred Alternative reflects for the Council’s effort to balance equitably several factors when establishing PSC limits, including the likely impacts on the halibut stock and affected participants in the Amendment 80 and directed halibut fisheries.”); *id.* at 24 (“In short, it would promote conservation of the halibut resource, improve its management, and create a more equitable distribution process between the directed and non-directed fisheries.”); *id.* at 303 (“To the extent that the PSC limits imposed upon commercial groundfish sectors constitute allocations, the change to those limits here is fair and equitable.”); *id.* at 319 (“While foregoing the harvest of groundfish is not a purpose of this action, in conserving halibut and achieving a more equitable approach to setting PSC limits, the Council and NMFS recognize that that is a potential and unfortunate outcome.”); *id.* at 370 (“NMFS has determined that the preferred alternative considers fair and equitable uses of halibut resources through PSC limits that are based on halibut abundance indices.”); *id.* at 377 (“a more equitable balance between

why it must take action to achieve “equity” or how that perceived equitable need is achieved. NMFS also does not explain why “equity” is not achievable under other viable alternatives that would cause less harm to the Amendment 80 fleet, the only directly regulated fishery. The purpose and need statement (which is unlawful for other reasons described in this letter) nowhere mentions “equity.” Thus, NMFS’s stated justification for the Proposed Action (*i.e.*, that it is “equitable”) arbitrarily and unlawfully fails to satisfy or otherwise address the stated purpose and need.

Additionally, the only applicable basis in the Magnuson-Stevens Act in which equity could be relevant to the Proposed Action is National Standard 4. However, in its National Standard 4 analysis, NMFS does not even determine whether the Proposed Action would constitute an allocation. *See infra* Section III.F.2.d. It is arbitrary for NMFS to conclusively determine that the Proposed Action is “fair and equitable” (presumably on National Standard 4 grounds) without even determining whether its Proposed Action constitutes an allocation.

NMFS also premises the Proposed Action on the supposed need to achieve equity in the specific circumstance when “the IPHC setline survey results fall into the very low abundance state.” 87 Fed. Reg. at 75,578; *see also id.* at 75,579 (“The Council and NMFS considered that the potential hardship imposed on the Amendment 80 fleet at low and very low survey indices was, on balance, outweighed by the potential benefits from the reduction in the Amendment 80 fleet’s halibut mortality and the potential increase in halibut availability to the directed halibut fisheries.”). But this too is arbitrary because the Proposed Action addresses *all* abundance states and, indeed, substantially reduces the Amendment 80 fleet’s halibut PSC limit under the *status quo*. Even worse, the halibut stock *has never been* in a “very low” abundance state, which means the Proposed Action is chasing a phantom and doing so in an overly broad way by reducing the halibut PSC limit in *all* abundance states. For all of these reasons, NMFS’s Proposed Action has no rational basis and violates the Magnuson-Stevens Act, NEPA, and the APA.

E. The Proposed Action would unlawfully delegate important regulatory decisions affecting U.S. fisheries to an international body.

Under the Proposed Action, NMFS would impermissibly delegate to the IPHC the critical responsibilities of (1) conducting a survey for determining the abundance of halibut and (2) establishing the “index” for the abundance of that halibut, which is then used directly, by regulation, to determine the annual halibut PSC limit for the Amendment 80 fleet under the Proposed Action.²⁶ The proposed regulations provide NMFS with no discretion to review,

users must be struck and greater conservation of the halibut resource by the A80 sector must be achieved”).

²⁶ *See, e.g.*, 50 C.F.R. § 679.21(b)(1)(i)(B) (as proposed) (“Each year, NMFS will request that the [IPHC] provide to the Regional Administrator, by December 1 of that year, an estimate of halibut biomass

modify, or reconsider the index value provided by the IPHC. Accordingly, NMFS has directly “linked” its halibut PSC management for the Amendment 80 sector to actions and decisions of the IPHC that cannot be reviewed or otherwise second-guessed by NMFS. *See U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.”).

NMFS therefore proposes to delegate to the IPHC its authority to undertake the discretionary non-ministerial function of assessing, analyzing, and determining the abundance of halibut in a manner that requires the exercise of judgment. There is no provision in the Magnuson-Stevens Act or any other applicable U.S. law that provides this authority to NMFS. The IPHC’s annual determinations will bypass all U.S. laws that would otherwise be applicable if NMFS were making these determinations, and any form of oversight by NMFS (or any other U.S. government agency). The IPHC’s determinations will not be subject to any public review and comment nor can they be administratively appealed or judicially challenged. They will also not be subject to any of the standards for scientific integrity, such as peer review or a process for data review, that would otherwise apply to the actions of U.S. agencies. This renders the Proposed Action *ultra vires* and unlawful. *U.S. Telecom Ass’n*, 359 F.3d at 566 (“[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”).

F. The Proposed Action violates the Magnuson-Stevens Act.

For all of the reasons set forth below, the Proposed Action violates the Magnuson-Stevens Act. For these same reasons, the Proposed Action violates the APA, specifically 5 U.S.C. § 706(2)(A), (B), (C), (D), (E), and (F).²⁷

1. The Proposed Action violates numerous important provisions of the Magnuson-Stevens Act implementing regulations.

The Magnuson-Stevens Act implementing regulations establish numerous important regulatory guidelines that NMFS and the Council must follow when developing and implementing FMP amendments. NMFS’s violations of these regulatory provisions include, but are not necessarily limited to, those described below. These violations are further supported by the facts and analyses presented in the other sections of this comment letter.

derived from the most recent [IPHC] setline survey index,” and NMFS “will apply” that index in “Table 58” to establish “the amendment 80 sector halibut PSC limit in the following calendar year.”).

²⁷ Additionally, for all the reasons stated in this section, the Proposed Action is not “necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. § 1853(a)(1)(A), (b)(14). And NMFS has made no demonstration otherwise.

a. NMFS and the Council failed to explain how biological constraints and human needs were balanced or priorities were established.

The Magnuson-Stevens Act implementing regulations require the Council to “balance biological constraints with human needs, reconcile present and future costs and benefits, and integrate the diversity of public and private interests. If objectives are in conflict, priorities should be established among them.” 50 C.F.R. § 600.305(b)(1). The record does not show how the Council complied with this regulation. For example, there is no discussion about how the lack of any conservation benefit from the Proposed Action was balanced against the certain negative impacts. There is no discussion about why that negative impact is warranted in light of the uncertain benefit to the directed halibut fishery. There is no discussion about how and why competing priorities were established. NMFS and the Council’s failure to comply with 50 C.F.R. § 600.305(b)(1) renders the Proposed Action unlawful.

b. The objectives of the Proposed Action are not clearly stated and lack definable events and measurable benefits.

The Magnuson-Stevens Act implementing regulations require the objectives of a proposal to be “clearly stated, practicably attainable, framed in terms of definable events and measurable benefits, and based upon a comprehensive rather than a fragmentary approach to the problems.” *Id.* § 600.305(b)(3).²⁸ NMFS and the Council failed to comply with this directive. As the FEIS admits, none of the alternatives (i) is likely to result in an improvement in the spawning stock biomass of halibut, (ii) will constrain the overall use of halibut PSC in the many other fisheries and sectors that take halibut as bycatch, or (iii) ensure that the IPHC will provide an increased allocation in Area 4. Against those failures, it is *certain* that the Proposed Action will impose costs that could exceed \$86 million annually without any offsetting conservation or other benefits. Given these facts, the only discernable “objective” of the Proposed Action is to impose

²⁸ See EIS at 203 (“The revenue estimates for the A80 fishery and the directed halibut fishery sectors are estimated separately using different methodologies, and are meant to compare impacts across alternatives within each sector. They should not be used to compare impacts across sectors....” NMFS has created a catch-22 by stating that it is impossible to measure benefits when the revenue impact analysis nonsensically states that revenue impacts should not be compared. This also stands in stark contrast to the methods of comparing economic impacts among fishery sectors that NMFS deemed entirely acceptable under a comparable bycatch reduction action implemented under Amendment 111 to the BSAI FMP. That action reduced the halibut PSC limit for numerous sectors in the BSAI, including the Amendment 80 sector. See 81 Fed. Reg. 24,714 (April 27, 2016). There, NMFS and the Council considered “the potential socioeconomic impacts of reduced halibut PSC limits for each sector. As part of the last consideration, the Council and NMFS considered the potential adverse socioeconomic impacts of halibut PSC limit reductions from reduced groundfish harvests on harvesters of BSAI groundfish and on fishing communities that participate in the groundfish fisheries, as well the potential benefits to the harvesters of halibut and to fishing communities that participate in the halibut fishery.” 81 Fed. Reg. at 24,781. Neither NMFS nor the Council have adequately explained why a comparison of the impacts of alternatives recently completed is now unacceptable.

substantial costs on a single fishing sector for no supportable reason. But, of course, such an objective is not recognized by NMFS in the Proposed Action. Accordingly, the proposal is unlawful for failure to contain clearly stated and practicably attainable objectives, framed by definable events and measurable objectives.

c. The Proposed Action is not “practically attainable.”

To the extent the Proposed Action does have an objective of either allocating halibut to the directed fishery or conserving halibut by reducing bycatch (neither of which is supported by the record or clearly stated by NMFS), the objective is not “practically attainable.” *Id.* § 600.305(b)(3)). As explained in more detail in the comments below, it is not reasonably certain that (i) overall halibut bycatch will be reduced as a result of this action, (ii) the IPHC will increase catch limits in Area 4, or (iii) any increase in catch limits will result in an increased commercial catch in the directed halibut fishery. And, to the extent conservation is a goal of the Proposed Action, NMFS has concluded that the Proposed Action has little or no conservation benefit to the halibut stock. Thus, neither potential “objective” is practicably attainable. Moreover, an action cannot be *practicably* attainable when it is only achievable by requiring substantial reductions in food production by U.S. vessels costing the economy at least \$86 million annually (with no countervailing benefit).

d. The Proposed Action is “fragmentary” and not “comprehensive.”

Unlike the approach taken with BSAI FMP Amendment 111, the Proposed Action is a “fragmentary,” and not a “comprehensive,” approach to halibut and groundfish management. *Id.* § 600.305(b)(3) (fishery management should be “based upon a comprehensive rather than a fragmentary approach to the problems addressed”). Halibut is managed on a coastwide basis and halibut bycatch occurs in multiple fisheries and sectors across that wide range. Yet, the Proposed Action would myopically regulate the halibut bycatch of just one fishery sector in one area. To make matters worse, any “benefit” that might result from the Proposed Action is itself uncertain because any reallocation of halibut to the directed fishery hinges entirely on future unknown actions of the IPHC. This is the definition of a “fragmentary” approach to fisheries management, in violation of 50 C.F.R. § 600.305(b)(3).

e. The Secretary failed to inform the Council of the Secretary’s interpretation of National Standards.

The Magnuson-Stevens Act implementing regulations state that “[t]he Secretary has an obligation under section 301(b) of [the Magnuson-Stevens Act] to inform the Councils of the Secretary’s interpretation of the national standards so that they will have an understanding of the basis on which FMPs will be reviewed.” 50 C.F.R. § 600.305(a)(2). This did not occur here.

The Proposed Action is a novel approach to fishery management (as no other fishery manages halibut PSC limits based on abundance) and is particularly reliant upon interpretations of terms

in the National Standards that are not defined in statute or regulation, such as (but not limited to) the terms “reasonably calculated to promote conservation” and “fair and equitable” in National Standard 4, and “minimize bycatch to the extent practicable” in National Standard 9. NMFS did not provide the Council with the Secretary’s interpretation of these, or any, National Standard terms during the deliberations that resulted the Proposed Action. In fact, the Council received contrary guidance. For example, rather than provide guidance on how the term “minimize to the extent practicable” would be interpreted by the Secretary, during final Council deliberations, the Secretary’s delegated representative further muddied the waters.²⁹ Without clear and appropriate required guidance, the Council did not receive the information required to lawfully develop and propose an action, as required by NMFS’s regulations.

2. The Proposed Action violates the Magnuson-Stevens Act’s National Standards.³⁰

a. National Standard 1.

National Standard 1 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). NMFS states that the Proposed Action will “continue” to “achieve” OY. But “achieving” OY is not actually an objective of the Proposed Action. To “achieve” is active, and there is nothing in the Proposed Action that actively attempts to *increase the likelihood of achieving OY*. Instead, the action *decreases* the likelihood of achieving OY. National Standard 1 is not satisfied by an action that decreases the likelihood of achieving OY.

Neither the FEIS nor the Proposed Rule adequately considers the likelihood that the Proposed Action could result in the failure to achieve OY on a continuing basis. Failure to achieve OY on a continuing basis is a foreseeable future condition that is *increasingly likely* under the restrictions that would be imposed by the Proposed Action. The OY for the BSAI groundfish fisheries is defined as “a range or specific amount that *can be harvested consistently* with this part, plus the amounts of ‘unspecified species’ taken incidentally to the harvest of target species.” 50 C.F.R. § 679.20(a)(1)(i) (emphasis added). The OY range for groundfish in the BSAI “is 1.4 million to 2.0 million mt.” *Id.* § 679.20(a)(1)(i)(A).

With implementation of Amendment 123, it is not reasonably foreseeable that the groundfish fishery will “consistently” achieve OY on a continuing basis. For example, in 2009 and 2010

²⁹ Transcript of North Pacific Fishery Management Council Meeting, Dec. 9, 2021, at 40-41 (Halibut ABM “may provide incentives for the fleet to minimize halibut mortality at all times” . . . “This practicability standard’s an elusive -- an evolving concept but, you know, under the Magnuson-Stevens Act, the government is directed to prioritize conservation measures, which I think this action does.”).

³⁰ All of the failures documented in this section also constitute a failure of NMFS’s obligation to lawfully evaluate all of the direct, indirect, and cumulative effects of the action pursuant to NEPA.

total harvests of BSAI groundfish were 1,335,116 mt and 1,354,662 mt, respectively.³¹ FEIS at 91 (Table 3-1). In both of those years, harvests in the BSAI groundfish fishery failed to achieve the low range of OY (1.4 million mt). The stock conditions prevalent in 2009 and 2010 will occur again and, in fact, decreases in TAC limits and harvests are likely to occur, given documented harvest patterns and groundfish stock assessments. The statutorily required Fishery Impact Statement purportedly included as the FEIS does not rationally explain whether the Proposed Action will result in the consistent achievement of OY. The FEIS states:

Given that in 2021 the A80 sector's apportionment of all BSAI groundfish species was about 12% of the 2 million mt limit, it would be possible to achieve OY (as defined in the FMP) without harvesting any of the A80 allocation, based on current groundfish stock conditions. This is because not harvesting that 12 percent of 2 million mt (240,000 mt) would still yield 1.76 million mt, well within the OY range.

Annual groundfish harvest can be highly variable across years for a variety of reasons (e.g. changing ocean conditions, variability in recruitment or prey field, fisheries interactions, etc.), which may result in years where achieving OY is difficult. For example, mostly due to decrease in Pollock TACs, BSAI groundfish harvest was below 1.4 million mt in 2009 and 2010 (1.34 million mt, and 1.35 million mt, respectively). National Standard 1, however, refers to achieving OY on a continuing basis, so the failure to harvest groundfish within the OY range for two out of several years of fishing is not, in and of itself, a failure to comply with National Standard 1. In years such as the most recent ones when overall groundfish harvest levels are low, further reductions to the A80 sector's PSC limit, and possible reductions in the sectors groundfish harvest, could further limit groundfish harvest in the BSAI.

FEIS at 302. There are several problems with this explanation. *First*, NMFS never intended that OY could be met by a single fishery in the BSAI, and the history of the establishment of OY for the BSAI groundfish fishery belies that assertion.³² *Second*, the FEIS assesses the proportion of

³¹ NPFMC, Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the BSAI Regions (November 2022), https://apps-afsc.fisheries.noaa.gov/Plan_Team/2022/BSAIintro.pdf.

³² *See id.*, Regulatory Impact Review / Initial Regulatory Flexibility Analysis of Amendment 1 to the Fishery Management Plan for the Bering Sea / Aleutian Island Groundfish Fishery, August 1982; 50 C.F.R. § 679.20(a)(1)(i) (“(i) BSAI and GOA. The OY for BSAI and GOA target species is a range or specific amount that can be harvested consistently with this part, plus the amounts of ‘nonspecified

BSAI “apportionment” to the Amendment 80 sector, but not actual harvests. *Third*, the FEIS fails to consider a situation when pollock stocks are once again low, which has occurred periodically over the past several decades and will certainly occur in the reasonably foreseeable future. The 2021 allocation to pollock will not be 1.375 million mt as it was in 2021 for the foreseeable future. *Fourth*, the FEIS does not account for the fact that the Amendment 80 sector harvests groundfish other than its allocated species that are available for harvest to multiple fishing sectors in the BSAI. However, the Amendment 80 fleet must harvest *all* groundfish with the amount of halibut PSC that it receives.

For example, the table below shows the total BSAI TACs in 2010, and the proportions of TACs, Amendment 80 allocations, and BSAI groundfish (“GF”) TACs, total GF harvest, A80 GF harvest of allocated and unallocated species, and A80 halibut PSC allocation and halibut PSC use (mortality) (all values in mt).³³

Total GF TACs	Total GF Harvest	Pollock TACs	Pollock Harvests	A80 GF Allocations	A80 GF Allocations Harvested	A80 Total Harvest (allocated and non-allocated)	A80 Halibut PSC Limit	A80 Halibut PSC Use
1,677,154	1,354,622	832,050	811,651	395,038	252,890	336,280	2,425	2,284

This table demonstrates that, in conditions of low pollock TAC, the BSAI groundfish fishery will not be able to be “harvested consistently” above the minimum OY range if the Proposed Action is implemented. In low pollock abundance years, the proportion of the BSAI harvested by the Amendment 80 sector is nearly 25% of total BSAI groundfish harvests (336,280 mt / 1,354,622 mt), and not 12%, as was the case in 2021 that is cited in the FEIS as the basis for determining

species’ taken incidentally to the harvest of target species. The species categories are defined in Table 1 of the specifications as provided in paragraph (c) of this section.”); 87 Fed. Reg. at 76,444 (“The ABC surpluses and the ABC reserves are necessary to mitigate the operational variability, environmental conditions, and economic factors that may constrain the CDQ groups and the Amendment 80 cooperatives from fully harvesting their allocations and to improve the likelihood of achieving and maintaining, on a continuing basis, the optimum yield in the BSAI groundfish fisheries.”); Northern Economics, Inc., *Five-Year Review of the Effects of Amendment 80*. Prepared for North Pacific Fishery Management Council. October 2014.

³³ Source data for this table are as follows: 2010 BSAI groundfish GF TACs (<https://www.federalregister.gov/documents/2010/03/12/2010-5484/fisheries-of-the-exclusive-economic-zone-off-alaska-bering-sea-and-aleutian-islands-final-2010-and#p-1>), total GF harvest (FEIS at 91, Table 3-1), A80 GF harvest of allocated and unallocated species (<https://www.fisheries.noaa.gov/alaska/ecosystems/economic-status-reports-gulf-alaska-and-bering-sea-aleutian-islands>), and A80 halibut PSC allocation and use (mt) (Pers Comms, Beth Concepcion, Alaska Seafood Cooperative).

that OY can be achieved on a continuing basis even if there is no Amendment 80 fishery. Indeed, the failure to achieve OY occurred in the past when the Amendment 80 sector was not constrained by the Proposed Action, and halibut PSC use was nearly 1,200 mt higher in 2010 than it was in 2021 (2,254 mt in 2010 vs. 1,061 mt in 2021). NMFS fails to consider this important and relevant aspect of the Proposed Action and fails to consider the data set forth above, which were readily available to NMFS.

Additionally, NMFS fails to consider the best available scientific information (contrary to National Standard 2) to assess reasonably foreseeable future environmental conditions that are likely to constrain harvests for the Amendment 80 sector in a manner that will result in a failure to achieve OY on a consistent basis. Such conditions include, but are not limited to, constraints on salmon bycatch that could limit the pollock fishery (a major contributor of the groundfish harvests), constraints due to low crab stock abundance that will likely result in tighter restrictions on crab PSC limits and/or new closed areas for Amendment 80 trawling, and increasing variability in oceanic and atmospheric conditions that scientists predict will shift flatfish and other Amendment 80 target species and result in more target species moving to areas where Amendment 80 is not allowed to fish (*e.g.*, the Northern Bering Sea Research Area). There have been well-documented “marine heat waves” that have had adverse impacts on numerous stocks, including Pacific cod, another major groundfish harvest species in the BSAI. These factors alone will place the BSAI’s groundfish fishery’s ability to achieve OY on a consistent basis in jeopardy, but the Proposed Action greatly exacerbates that risk (again, because it does nothing to affirmatively achieve OY and decreases the likelihood of doing so). None of these factors were examined or meaningfully considered by NMFS (or the Council), rendering the Proposed Action arbitrary and unlawful.

Finally, NMFS’s novel approach to evaluating OY here presumes that the Amendment 80 sector, an otherwise viable fishery under the *status quo*, could be eliminated without running afoul of National Standard 1. *See* 87 Fed. Reg. at 75,579 (“The [a]nalysis indicates that even if the Amendment 80 sector harvested no fish, overall, the groundfish fisheries would continue to harvest within this OY range in most years.”). This is both nonsensical and unprecedented. An explicit goal of National Standard 1 is to achieve OY on a *continuing* basis because of the myriad benefits produced by a fishery. The record demonstrates that the Proposed Action would cause OY to not be achieved in some years. But National Standard 1 does not say OY must be achieved “most” of the time; it says it must be achieved on a “continuing” basis. And, again, there is nothing in the history of the development of OY for the BSAI groundfish fisheries that supports the notion that OY should be achieved by eliminating one of the fisheries. NMFS’s interpretation is inconsistent with the Magnuson-Stevens Act and the history of NMFS’s regulation of the BSAI groundfish fisheries, and is unlawful.

b. National Standard 2.

NMFS has not considered the best scientific information available or applied a consistent standard in the incorporation of data that were considered, contrary to National Standard 2,

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which requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). The Proposed Action violates National Standard 2 in multiple ways.

First, the FEIS states:

In October 2017, the Science and Statistical Committee (SSC) recommended, and the Council selected two abundance indices to track Pacific halibut abundance and guide setting halibut PSC limits in the BSAI groundfish fisheries. These indices are derived from the NMFS Alaska Fisheries Science Center (AFSC) eastern Bering Sea (EBS) shelf bottom trawl survey (EBS shelf trawl survey) and from the IPHC setline survey covering IPHC Areas 4ABCDE. Both indices represent the best available scientific information on halibut abundance.

FEIS at 16. This directly contradicts the findings of the Council’s own peer-review body (the Scientific and Statistical Committee [“SSC”]), which specifically cautioned *against* the use of these metrics in April 2021. The April 2021 SSC meeting minutes state:

The SSC strongly cautions against using indices of abundance couched in absolute units for look up tables. The IPHC’s survey index is based on a spatio-temporal model, meaning the scale of the entire time series can change during any update to the data or modelling methods. This could lead to unintended and changing relationships between the scale of recent years, the status quo and the specified absolute levels in the table. Specifically, the state of the PSC lookup value could change location in the tables due to methodological changes rather than actual changes in the survey observations. Similarly, model-based estimators are now used for both Pacific cod and pollock in order to include the northern Bering Sea as the distributions of these species shift northward; a similar approach for halibut would lead to model-based estimators on both axes of the look up tables. The SSC notes that the analysts have cautioned against using absolute indices from the beginning of halibut ABM and used primarily relative indices in their earlier alternatives. The SSC recommends treating the indices of abundance as relative values compared to a specific year (or years) in order to eliminate this potential scaling problem and ensure that

future use of the tables remains consistent with their intent at the outset.^[34]

In less technical terms, the SSC is saying that any change to the survey methods, area to which the survey applies, or methods and models used to convert the survey data into abundance values could result in changes in the Amendment 80 bycatch limits that result not from actual changes in halibut abundance, but from changes in the survey design and methods used to calculate halibut abundance. NMFS *entirely ignored* this advice and recommendation from the very body that is statutorily charged with “assisting . . . in the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant to” the development of FMP amendments. 16 U.S.C. § 1852(g)(1)(A). It was arbitrary for the Council and NMFS to ignore the advice and recommendations of the SSC, which indisputably reflects the best “scientific information” available.

The Council and NMFS also ignored the SSC’s admonition in October 2019 that:

[T]he analysis shows that the relationship between halibut PSC per-unit groundfish in the trawl fishery and the trawl survey halibut biomass ranges from moderate to nonexistent and is highly variable (e.g., p. 150). This finding was also supported by public testimony to the SSC. Therefore, there is limited empirical support that the trawl survey biomass index reflects what halibut encounter rates will be in the groundfish trawl fishery. Rather, the realized halibut encounter rates, and the associated likelihood of PSC dependent fisheries foregoing considerable groundfish catch, are highly variable year-to-year. The SSC emphasizes that a result of the analysis is that the groundfish fleet’s ability to avoid halibut is poorly related to indices of abundance.^[35]

The Council and NMFS arbitrarily and unlawfully ignored the advice of their scientific advisors and pushed on with the development of the Proposed Action, contrary to that advice.

Second, the FEIS states that “[t]his analysis uses the best available information to determine the effects of the alternatives on the halibut stock.” FEIS at 36. This is incorrect. Numerous tables in the FEIS report catch and revenue in the groundfish and halibut fisheries only through 2019 or

³⁴ See NPFMC, SSC Final Report to the NPFMC Meeting Minutes (Apr. 5-8, 2021), at 14 <https://meetings.npfmc.org/CommentReview/DownloadFile?p=18a502af-a848-4c92-a7cb-9d2151dd2666.pdf&fileName=SSC%20FINAL%20Report%20April%202021.pdf>.

³⁵ Scientific and Statistical Committee Report to the North Pacific Fishery Management Council, October 2019, at 3.

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2020, when data for both groundfish metrics are plainly available for both 2020 and 2021³⁶ (and catch data only for 2022).³⁷ NMFS itself has prepared cost recovery reports for the 2020 and 2021 halibut fishery (and soon, 2022) that document the ex-vessel value of the halibut fishery.³⁸

This lack of updated catch and revenue data is more than an academic concern. There have been substantial changes in the harvest opportunities available in the Area 4 halibut fisheries in 2021 and 2022 that are not reported in the FEIS. These data show that, under status quo management, in 2022, the Area 4 halibut fishery received the largest catch allocation in 10 years. Additional catch data, also available on NMFS's website, detail a trend of decreasing utilization in the Area 4 halibut fishery that is not considered at all in the FEIS or anywhere else in the record. These issues are addressed in greater detail later in this letter.

Moreover, NMFS inconsistently picks and chooses when it will use certain datasets in both the FEIS and the Proposed Rule. *See, e.g.*, FEIS at 115 (using “fishery data for the years 2010 through 2020”); *id.* (using data only for “2017 through 2019”); *id.* at 36 (trawl survey data available for 1982 through the present with exception of 2020); *id.* at 74 (using survey data only for 1998 through 2019);³⁹ *id.* at 24 (using data for 2016 through 2020 and expressly excluding 2021 data);⁴⁰ *id.* at 325 (using halibut mortality data only for 2015-2020); 87 Fed. Reg. at 75,573 (using harvest data for 2016-2019); *id.* at 75,574 (using harvest data for 2015-2019); *id.* at 75,575 (using data for 2015-2019); and *id.* at 75,576 (using data for 2010-2019). This

³⁶ Pacific States Marine Fisheries Commission, Groundfish Economic SAFE: Groundfish Wholesale Production Statistics by Processor Group (data last refreshed Aug. 18, 2022), <https://reports.psmfc.org/akfin/f?p=501:914::INITIAL>.

³⁷ National Oceanic and Atmospheric Administration (“NOAA”), Fisheries Catch and Landings Reports in Alaska (last updated Jan. 13, 2023), <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska>.

³⁸ NOAA, IFQ Cost Recovery Report for Alaska (Jan. 29, 2021), <https://www.fisheries.noaa.gov/resource/document/individual-fishing-quota-ifq-cost-recovery-reports-alaska>.

³⁹ As described earlier, the break points “were determined by visual inspection of relative trends in the survey indices” (FEIS at 73), and NMFS’s choice to use a truncated data set in Figure 2-1 may have significantly impacted the irreproducible “visual inspection” that was used to establish bycatch limits.

⁴⁰ *See* <https://www.alaskaseafood.org/wp-content/uploads/COVID-Alaska-Seafood-Impacts-March-2022.pdf>; https://www.alaskaseafood.org/wp-content/uploads/MRG_ASMI-Economic-Impacts-Report_final.pdf. The exclusion of 2021 data because fisheries “were affected by COVID-19 mitigation” is arbitrary because NMFS does use data from 2020, even though fishery operations were likely *more* affected by COVID-19 in 2020 than in 2021. Numerous COVID-19 measures at federal, state, and local levels were in effect throughout nearly the entirety of the 2020 fishery season, which heavily restricted vessel operations and groundfish harvest. Both 2020 and 2021 data should have been used, as well as data from 2022.

inconsistent use of data was arbitrary and represents a failure to use the best scientific information available.

Third, the premise underlying the Proposed Action is that halibut PSC limits should be “linked” to halibut abundance. The “abundance-based management” concept assumes that the Amendment 80 sector’s ability to avoid halibut correlates with survey abundance. However, analyses performed by stakeholders, the SSC, the Council, and NMFS have repeatedly shown that NMFS’s trawl survey abundance (*i.e.*, one of the two indices identified in the Proposed Action) does *not* reflect or correlate with halibut encounter rates in the Amendment 80 fishery.⁴¹ And the record shows that the IPHC setline survey is actually negatively correlated with Amendment 80’s halibut catches.⁴² This negative correlation shows that the index will tend to *increase* the cap in years where halibut catch would be expected to be *lower* and *decrease* the cap when catch would be expected to be *higher*. Most importantly, the proposed indices cannot effectively predict PSC encounters in past years, and this problem will likely get worse in future years, due to a changing environment.

To make matters worse, the net benefits and economic impacts analyses assume correlation between on-the-grounds abundance and survey abundance indices. Under this assumption, revenue losses at the most restrictive PSC limits are expected to range from \$86 million to \$120 million annually.⁴³ Economic impacts could be much higher under a scenario where survey biomass is low but encounter rates are high and the only halibut avoidance tool available to the Amendment 80 sector is to forego fishing opportunities. “Linking” the Amendment 80 sector’s halibut PSC limits directly to abundance indices that are either not correlated with or negatively correlated with actual bycatch encounters is irrational, unsupported, arbitrary, and inconsistent with National Standard 2.

Fourth, NMFS’s determination of “breakpoints” to establish the PSC limits that apply to the Amendment 80 sector is arbitrary and unexplained, and fails to rationally apply the best scientific information available. The Proposed Action relies on several “breakpoints” to establish whether the Eastern Bering Sea NOAA survey index reflects a “high” or “low” level of halibut abundance and whether the IPHC setline survey index represents a “high,” “medium,” “low,” or “very low” level of halibut abundance. The Proposed Action combines these two surveys to

⁴¹ Indeed, this problem was repeatedly stated by the SSC in 2019, 2020, and 2021, as indicated in the attached SSC reports to the Council in 2019, 2020, and 2021.

⁴² See NPFMC. Discussion Paper: Abundance Based Management for BSAI Pacific Halibut PSC Limits (Agenda C-9), Oct. 2017, pp. 68-77.

⁴³ See FEIS at Table 5-5. These estimates also “do not attempt to estimate the costs associated with changing fishing operations to avoid halibut that are described in Section 5.3.2.3.” *Id.* at 221. Impacts on individual firms are also highly variable as “[i]t is important for the reader to keep in mind that results are aggregated at the A80 sector level; the distribution of impacts across companies and vessels will certainly differ based on many factors, most notably a company’s species allocation portfolio and whether it is relatively more dependent on species that tend to carry a higher halibut PSC rate.” *Id.* at 212.

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create a “look-up table” to establish the annual halibut PSC limits for the Amendment 80 sector. The “breakpoints” used to establish those limits (based solely on the survey indices) are unexplained and lack a rational basis.

The FEIS states that “[t]he breakpoints employed in these look up tables were determined by visual inspection of relative trends in the survey indices historically.” FEIS at 73. However, there is no explanation for how that “visual inspection” was conducted, who conducted that “visual inspection,” what “trends” were used, or how the Council and NMFS determined the “historically” valid range to use. These determinations have profound effects. For example, assuming that a “high” level of abundance (biomass) in the Eastern Bering Sea trawl survey is 145,000 mt as opposed to 150,000 mt could have a substantial impact on PSC limits. In 2023, NMFS estimated the level of abundance (biomass) of halibut in the Eastern Bering Sea trawl survey at 149,050 mt.⁴⁴

If an alternative “visual inspection” that separated “high” and “low” categories at 145,000 mt was used for the Eastern Bering Sea trawl survey for the 2023 fishery, it would have resulted in a “high” designation and would have increased the halibut PSC allocation to the Amendment 80 sector by 5% or nearly 87 mt. The arbitrary and irreproducible “visual inspection” chosen by NMFS has serious real-world regulatory and operational implications.

NMFS does not examine any other approaches for establishing these breakpoints or explain why the choices made for the survey indices or PSC breakpoints are the most appropriate. There is no statistical analysis of these breakpoints or evaluation of whether the breakpoints are appropriately evenly spaced within the historical range of abundance index values. Using a “visual inspection” of a graph to make the impactful determination that governs PSC limits is plainly insufficient, unscientific, and arbitrary.⁴⁵

Fifth, the FEIS fails to utilize a wealth of available and highly relevant scientific information on how climate change in the Bering Sea will affect the Amendment 80 sector’s ability to catch its target species under the lower PSC levels of the Proposed Action. NMFS’s Alaska Fishery Science Center (“AFSC”) has as one of its primary missions the development of science to understand how climate change will affect fisheries. AFSC has adopted this priority because climate change is affecting marine ecosystems in high-latitude marine ecosystems, such as the Bering Sea, faster and more profoundly than anywhere else in the world. In fulfillment of its commitment to help fishery managers of the North Pacific better understand and incorporate an

⁴⁴ See D. Stevenson, NOAA, Results from the Eastern (and Northern) Bering Sea Bottom Trawl Survey May 26 to July 31, 2022, slide 27, https://meetings.npfmc.org/CommentReview/DownloadFile?p=02e397c4-a1cc-46eb-b2ae-1c3cc368e682.pdf&fileName=2022_EBSsurvey_planteam.pdf.

⁴⁵ Additionally, the Proposed Action is unclear how NMFS and the IPHC will validate the Pacific halibut data obtained from the surveys. This undermines the public’s ability to determine if NMFS is using the best available data.

understanding of how climate change is affecting fisheries and to increase climate change resilience in fishery management, the AFSC annually produces a broad array of climate change indicators, report cards, and other advice in the “Ecosystem Chapter” of its annual Stock Assessment and Fishery Evaluation (“SAFE”) Report.⁴⁶

The Council and NMFS utilize this information to set annual catch limits and for general management of groundfish and crab stocks in the face of obvious effects of climate changes in the North Pacific ecosystem that are already occurring, such as shifting distribution of stocks from the Bering Sea to the northern Bering Sea and Arctic. This scientific guidance is, for example, being incorporated into the rebuilding plan for Bering Sea “snow crab” (*C. opilio*) and being used in the consideration of drivers of low stock abundance for Bristol Bay red king crab.

The AFSC has also produced studies and publications evaluating how loss of seasonal ice in the Bering Sea will affect groundfish and crab stock distribution, and in “process” studies, such as an examination of how a shrinking seasonal “Cold Pool” is allowing Pacific cod to expand north and predate crab and other groundfish stocks; and how flatfish species spatial distributions are changing and the resulting effects on NMFS annual trawl survey design. This body of scientific work is not only extensive but it is entirely relevant and essential information for understanding the effects of this action. And yet, it is *ignored* in the FEIS and in the record supporting the Proposed Action.⁴⁷ Moreover, the “analysis” that is included in the FEIS about climate-related effects is, at best, non-substantive:

The analysts also note that PSC use is a function of many factors, some of which are outside of the fleet’s direct control. For example, changing environmental conditions could disperse groundfish or cause them to move out of well-known, fishable areas. This could cause the fleet to tow more hours for the same amount of catch, increasing gross costs as well as the possibility of

⁴⁶ The 2022 SAFE Report is available at https://apps-afsc.fisheries.noaa.gov/Plan_Team/2022/EBSecosys.pdf.

⁴⁷ See, e.g., A. Hollowed, M. Barange, S-I. Ito, S. Kim, H. Loeng, & M. Peck, Effects of climate change on fish and fisheries: Forecasting impacts, assessing ecosystem responses, and evaluating management strategies, 68 *J. of Marine Sci.* 984 (2011); C. Yeung & D. Cooper, Contrasting the variability in spatial distribution of two juvenile flatfishes in relation to thermal stanzas in the eastern Bering Sea, 77 *J. of Marine Sci.* 953 (2019); C. Yeung & M-S. Yang, Spatial variation in habitat quality for juvenile flatfish in the southeastern Bering Sea and its implications for productivity in a warming ecosystem, 139 *J. of Sea Rsch.* 62 (2018); A. Hollowed et al., Projected impacts of climate change on marine fish and fisheries 70 *J. of Marine Sci.* 1023 (2013); F. Mueter & M. Lithow, Sea ice retreat alters the biogeography of the Bering Sea continental shelf, 18 *Ecological Applications* 309 (2008); and D. Stevenson & R. Lauth, Bottom trawl surveys in the northern Bering Sea indicate recent shifts in the distribution of marine species, 42 *Polar Biology* 407 (2019). More examples of relevant studies are included in the attachments to this letter.

high-bycatch events. A changing environment might also change the extent to which groundfish and halibut are comingled, also changing the probability of bycatch. The extent of these changes is presently unknown, meaning that at this time they can be thought of as risk factors that may affect the fleet's ability to maintain harvest levels under a lower PSC limit in a practicable manner.

FEIS at 221.

Sixth, under the Proposed Action, NMFS will use only the estimated abundance from the trawl survey *in the eastern Bering Sea* to calculate the annual index value for the NMFS trawl survey. That value will drive a key component of the Amendment 80 bycatch limit. The use of only the eastern Bering Sea trawl survey fails to accommodate likely impacts of climate change and additional survey data. Based on the extensive body of NMFS's research on climate change affecting fisheries, groundfish stock distributions in the North Pacific are shifting to new areas, typically to the north in the Bering Sea. *See, e.g.*, FEIS at 89, 224.⁴⁸ NMFS explicitly addresses this climate change-driven redistribution of fishery stocks by conducting a trawl survey in the northern Bering Sea.⁴⁹ For groundfish stocks, NMFS's stock assessment authors incorporate this survey data into their models to derive total population abundance estimates that include eastern Bering Sea and northern Bering Sea in their stock assessments. It is likely the halibut stock will continue shifting north in the Bering Sea.⁵⁰ The Proposed Action fails to address the likely redistribution of halibut and use the best available information from both the eastern Bering Sea and the northern Bering Sea trawl surveys to establish its abundance-based bycatch limit. This is arbitrary and capricious, in violation of the APA, the Magnuson-Stevens Act, and NEPA.

c. National Standard 3.

National Standard 3 requires that “[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.” 16 U.S.C. § 1851(a)(3). Section 7.1 of the FEIS provides only a cursory summary of the Proposed Action's alleged consistency with National Standard 3:

Section 4.1 describes the range of the Pacific halibut stock, which extends coastwide, and the analysis considers effects throughout the range. Except for sablefish, which is not subject to this action,

⁴⁸ *See* C. Rooper et al., Predicted shifts of groundfish distribution in the Eastern Bering Sea under climate change, with implications for fish populations and fisheries management, 78 J. of Marine Sci. 220 (2020).

⁴⁹ *See* D. Stevenson & R. Lauth, Bottom trawl surveys in the northern Bering Sea indicate recent shifts in the distribution of marine species, 42 Polar Biology 407 (2019); NPFMC, Groundfish Plan Team Meeting, <https://meetings.npfmc.org/Meeting/Details/2949>, Page 27.

⁵⁰ D. Stevenson & R. Lauth, *supra* note 49.

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all groundfish species are assessed at the scale of the BSAI FMP (Section 3.1), which is the geographic scope of the proposed action (Chapter 1 Section 1.5). The groundfish stocks will continue to be managed as single stocks throughout their range under the proposed action.

FEIS at 280. This summary provides no rational explanation for how the halibut stock (or any other stock) is managed “as a unit,” “throughout its range,” consistent with National Standard 3. In this vein, NMFS’s implementing regulations state:

Unity of management. Cooperation and understanding among entities concerned with the fishery (e.g., Councils, states, Federal Government, international commissions, foreign nations) are vital to effective management. Where management of a fishery involves multiple jurisdictions, *coordination among the several entities should be sought in the development of an FMP. Where a range overlaps Council areas, one FMP to cover the entire range is preferred.*

50 C.F.R. § 600.320(c) (emphasis added).

Here, there is no FMP for the management of halibut, even though halibut is managed in multiple jurisdictions, by multiple entities (including NMFS). The only comprehensive NEPA document describing the management of the directed halibut fishery is an EIS prepared over 30 years ago for the halibut and sablefish IFQ fishery that has not been updated since.⁵¹ NMFS fails to address this glaring inadequacy in the FEIS or any other record document, and provides no rationale for why a narrowly drawn action, focused on a single fishery in a single area, that involves a stock managed across multiple jurisdictions and is without any FMP or contemporary EIS, satisfies National Standard 3.

Additionally, the Proposed Action would manage the same stocks of fish in the same area very differently depending on who is fishing for those stocks. For example, under the Proposed Action, the BSAI yellowfin sole fishery is subject to more restrictive provisions limiting halibut bycatch when fished by trawl vessels in the Amendment 80 sector under the Proposed Action

⁵¹ See Notice of Availability for EIS No. 920159, Draft Supplemental EIS, Alaska Halibut and Sablefish Fixed Gear Fisheries Individual Fishing Quota Management Alternative. 57 Fed. Reg. 20,825 (May 15, 1992) (EIS not currently on NMFS website). The Council has recommended, and NMFS has made, numerous modifications over the years to halibut fishery, but none of these actions were evaluated under NEPA, in violation of NEPA. See NPFMC, Pacific Halibut and Sablefish Individual Fishing Quota (IFQ) Program, Program Amendment Summaries (June 2021), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=d57b49c4-592e-4a88-9202-07e1b923daa9.pdf&fileName=B1%20IFQ%20Amendment%20Summaries.pdf>.

than in the non-Amendment 80 trawl BSAI fisheries (commonly known as the trawl limited-access, or “TLAS,” fishery).

While differential management of stocks throughout their range may be appropriate, the FEIS fails to analyze how the Proposed Action affects, and is implicated by, this issue under the National Standard 3 guidelines. NMFS has failed to provide any meaningful analysis demonstrating how the Proposed Action is consistent with National Standard 3.

d. National Standard 4.

National Standard 4 mandates that:

Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a)(4). The Proposed Action violates National Standard 4 in numerous ways.⁵²

First, NMFS fails to determine whether the Proposed Action is an allocation in the first place. See 87 Fed. Reg. at 75,579 (“[t]o the extent this action involves an allocation of fishing

⁵² For all of the same reasons set forth in these comments, the Proposed Action also violates the Halibut Act. Specifically, 16 U.S.C. § 773c(c) states, in relevant part:

The Regional Fishery Management Council having authority for the geographic area concerned may develop regulations governing the United States portion of Convention waters. . . . Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges....

The Proposed Action violates 16 U.S.C. § 773c(c).

privileges...”); FEIS at 303.⁵³ This is legally insufficient. NMFS’s own regulations set out very detailed guidelines for how NMFS must determine whether an action constitutes an allocation. *See* 50 C.F.R. § 600.325(c). NMFS cannot simply suggest its action *could be* an allocation and then provide a short and legally insufficient explanation for why it nonetheless complies with National Standard 4. NMFS’s failure to determine whether the Proposed Action is an allocation as a threshold matter violates the Magnuson-Stevens Act and is arbitrary. And, if the Proposed Action is an allocation, it still violates National Standard 4 for the following reasons.

Second, this Proposed Action violates National Standard 4 because it discriminates against residents of different states by establishing a regulation that would limit the harvesting activities of only one sector, and effectively one “person” (the Amendment 80 cooperative), which is incorporated in only one state. The numerous regulatory incentives implemented by NMFS over the years have had the intended effect of consolidating all Amendment 80 fishing operations into cooperative management. Since 2018, the Amendment 80 sector has operated under a single cooperative, the Alaska Seafood Cooperative, which receives all of the Amendment 80 sector allocations. The Amendment 80 cooperative, which is incorporated in the State of Washington, is a “person.” *See* 50 C.F.R. § 679.2.

Under the Proposed Action, the Amendment 80 sector would be subject to a severely restricted halibut PSC limit and would be the *only sector or fishery* subject to an abundance-based limit. The Proposed Action therefore uniquely regulates the Amendment 80 sector, compared to all of the participants in the BSAI fisheries or other users of halibut PSC. This plainly discriminates against the Amendment 80 cooperative, in violation of National Standard 4.

Third, the Proposed Action violates National Standard 4 because it allocates or assigns fishing privileges among various U.S. fishermen, but this allocation is not “[f]air and equitable to all such fishermen.” *Id.* § 600.325(a). As explained above, the Proposed Action applies an approximately \$100 million regulatory measure to a single regulated “person.” All other fisheries and sectors in the BSAI are unaffected and all other users of halibut PSC are not affected (and would continue to be managed under fixed limits). This action will not regulate those other fisheries and sectors and will do nothing to ensure that the halibut bycatch in those fisheries and sectors is reduced (nor will it prevent those bycatch levels from increasing). Accordingly, this action allocates or assigns halibut PSC limits in a manner that is not fair or equitable.

⁵³ Aside from NMFS’s side-stepping of its legally required obligation to determine whether the Proposed Action is an allocation, NMFS muddles the record even further with statements suggesting that the Proposed Action *is* and *is not* an allocation. *Compare, e.g.*, FEIS at 24 (the “rule will ensure that halibut PSC in Amendment 80 fisheries does not become a greater share of overall halibut removals in the BSAI, particularly in Area 4CDE, and may increase halibut harvest opportunities in directed halibut fisheries” (emphasis added)) *with id.* at 372 (“We also agree that the action before the Council does not reallocate halibut from A80 to the directed halibut fishery.”).

Additionally, any allocation of halibut from the Amendment 80 fleet to the directed halibut fishery is not fair or equitable because the negative effect on the Amendment 80 fleet is extremely disproportionate to any benefit that could be realized by the directed halibut fishery. As the Proposed Rule makes clear, there may be no harvest opportunity realized by the directed fishery at all depending on actions taken by the IPHC.⁵⁴ Potential “savings” from the Amendment 80 fishery from reducing the Amendment 80 allocation on halibut PSC limits can be realized as additional harvest only if bycatch in other fisheries does not increase (which is not guaranteed), only if an international body chooses to reallocate any potential savings to the Area 4 fishery (which is not guaranteed), and only if the harvesters in Area 4 can harvest any potential additional opportunities (which is also not guaranteed). Furthermore, only those “savings” that are greater than the regulatory minimum size limit established for the commercial fishery can be harvested. The Proposed Rule estimates an additional 360,000 pounds of potential savings under current status of the halibut indices. 87 Fed. Reg. at 75,578. That estimate is entirely reliant on every one of the above-mentioned unguaranteed and uncertain conditions being met consistently and reliably every single year. NMFS’s assumption that this will transpire is baseless and arbitrary. There is nothing fair or equitable about severely punishing one fishery with a highly restrictive limit out of the mere hope (at best) that it may result in some benefit to another fishery.

Moreover, any allocation of halibut from the Amendment 80 fleet to the directed halibut fishery is not fair or equitable because the total Area 4 catch limits for the directed fishery have *increased* over the past decade while, at the same time, the total Area 4 directed halibut harvests have steadily *declined*, as depicted in the following table.⁵⁵

Year	Total Area 4 Catch Limits in net pounds (CDQ and IFQ)	Total Area 4 Harvests in net pounds (CDQ and IFQ)	Amendment 80 Sector Halibut PSC Limit (total weight mt)	Amendment 80 Halibut PSC Mortality (total weight mt)
2013	4,761,540	4,177,711	2,325	2,166
2014	3,275,000	3,164,253	2,325	2,178
2015	3,815,000	3,583,972	2,325	1,638

⁵⁴ 87 Fed. Reg. at 75,578 (“The provision of additional opportunities for the directed halibut fishery that may accompany PSC limit reductions would be determined by IPHC management processes, (see section 5.4 of the Analysis). However, there is no guarantee that this action would translate into increased opportunities for the directed fishery since the IPHC is not obligated to alter, maintain, or implement their current harvest strategies based on the outcome of this action.”).

⁵⁵ Table source data for halibut (2020 – 2022) from <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska> and for Amendment 80 PSC (2020 – 2022) personal communication with Steve Whitney (NOAA AK Region). *See also* FEIS at Table 1-7, Figs. 4-6.

2016	4,190,000	3,899,228	1,745	1,412
2017	4,230,000	3,937,051	1,745	1,167
2018	4,000,001	3,663,813	1,745	1,343
2019	4,900,000	3,991,894	1,745	1,461
2020	4,240,000	3,647,968	1,745	1,097
2021	4,559,400	3,566,831	1,745	1,061
2022	5,100,000	3,370,067	1,745	1,556
Average	4,307,094	3,700,279		

Over the last 10 years, the actual harvests in Area 4 have been within a narrow one million-pound range between a high of 4.18 million net pounds in 2013 to a low in the following year of 3.16 million net pounds. Total Area 4 harvests under these widely varying conditions occur in a tight range of approximately 3.6 million pounds over this 10-year period. In fact, the 10-year high harvests in Area 4 (2013) occurred under far less restrictive halibut bycatch measures than those currently in place. Conversely, in 2022, when catch limits (harvest opportunity) were at their 10-year high of 5.1 million pounds, actual harvests were lower than the preceding year (2021) when catch limits were over 540,000 pounds lower. There does not appear to be any reliable correlation between the bycatch management regimes in place for the Amendment 80 fishery and the actual harvests realized in Area 4. And yet, NMFS fails to provide any meaningful explanation for how it allegedly balanced the harm to the Amendment 80 sector and the potential benefits that may accrue to directed fishery participants. Further restricting halibut PSC in the Amendment 80 sector under these circumstances is not fair or equitable.⁵⁶

Fourth, NMFS provides no interpretation of the term “reasonably calculated to promote conservation” and otherwise fails to rationally explain why the Proposed Action is “reasonably calculated to promote conservation.” In fact, the record shows that the Proposed Action will *not* promote conservation. The FEIS makes clear that the Proposed Action will have no effect on the conservation of the halibut stock that is any different from the *status quo*.⁵⁷ Specifically, NMFS states that “[i]mpacts to the halibut biomass under all of the alternatives are expected to be similar and result in no impact to spawning stock biomass.” FEIS at 37; *see also id.* at 202. NMFS also states that “there is likely to be little difference among the average future halibut

⁵⁶ NMFS also fails to provide any interpretation of the term “fair and equitable,” and its application of that term in its analysis is, at best, cursory and conclusory. NMFS’s failure to provide any rational explanation for why the Proposed Action is “fair and equitable,” or to rationally interpret and apply that term, is unlawful.

⁵⁷ *See Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 89 (D.D.C. 2019) (“[I]f the Service decides to allocate fishing privileges to a specific group, that allocation must actually ‘promote’ a conservation purpose—that is, advance or further it—rather than just avoid jeopardizing one”); *United Cook Inlet Drift Ass’n v. NMFS*, No. 21-cv-00247, 2022 WL 2222879, at *15 (D. Alaska June 21, 2022) (FMP amendment that was “not rationally related to conservation” violated National Standard 4).

spawning biomass under levels of PSC anticipated across all of the alternatives including the preferred alternative (Alternative 5).” *Id.* at 39-40; *see also id.* at 202-03.

If the Proposed Action has “no impact to spawning stock biomass,” the very foundation for the conservation of the halibut resource, then it is impossible for NMFS to rationally conclude that the Proposed Action is “reasonably calculated to promote conservation.” Instead of providing a clear explanation for the impacts and the benefits of the Proposed Action, and how it is “fair and equitable,” the Proposed Rule describes the halibut resource as currently fully utilized and says that “the Council and NMFS assume that under this proposed action, a dynamic balance between halibut allocated to the directed fisheries by the IPHC on one hand and PSC limits for the Amendment 80 fleet (plus fixed halibut PSC limits for other sectors) on the other, would always result in full utilization of halibut, but not over-utilization of the halibut resource.” 87 Fed. Reg. at 75,578. The meaning of this is unclear. NMFS does not explain the “dynamic balance” in the context of IPHC controlling catch allocations or how it has determined “full utilization” exists despite contrary evidence. NMFS also fails to define or explain what “over-utilization” means or examine whether it would ever occur. Amendment 80 vessels operate under strict management controls and are fully observed at all times. Amendment 80 PSC limits have not been exceeded since Amendment 80 was implemented, and all Amendment 80 halibut bycatch is accounted for by NMFS and the IPHC. NMFS’s assertion that this Proposed Action provides a fair and equitable allocation is both baseless and unexplained.

The Proposed Action violates National Standard 4, and NMFS’s unsupported and unexplained conclusion to the contrary is arbitrary and capricious.⁵⁸

e. National Standard 5.

NMFS provides no explanation for how the Proposed Action satisfies National Standard 5, which requires that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.” 16 U.S.C. § 1851(a)(5). Instead, NMFS simply states:

Efficiency in the context of the proposed action refers to economic efficiency. The analysis presents information on the relative

⁵⁸ 2022 Summary of Halibut Data at 9 (“The spawning biomass (SB) is estimated...to be...an estimated 192 million pounds (~87,100 t) at the beginning of 2023). The recent spawning biomass estimates from the 2022 stock assessment are very consistent with previous analyses, back to 2012 (Figure 9) and suggest that the trend is effectively flat after a slow decline since 2016”). Moreover, the best available information shows that the halibut spawning stock biomass is at a minimum stable or continues to improve. *see also id.* at 19 (IPHC determination that “the stock is considered to be ‘not overfished’”). In addition to these stable and improving halibut stock conditions, there is substantially less bycatch overall in 2022 than in 2015 and substantially greater harvest opportunities in Area 4 in 2022 than in 2015.

importance of economic efficiency versus other considerations and provides information on the economic risks associated with the proposed PSC measures.

FEIS at 281. This statement provides no indication of how NMFS considered efficiency *in the utilization of fishery resources*, as National Standard 5 requires. *See* 50 C.F.R. § 600.330(b)(1) (“Given a set of objectives for the fishery, an FMP should contain management measures that result in as efficient a fishery as is practicable or desirable.”); *id.* § 600.330(b)(2) (“An FMP should demonstrate that management measures aimed at efficiency do not simply redistribute gains and burdens without an increase in efficiency.”).

In fact, the Proposed Action increases inefficiency and cost. As explained elsewhere in these comments, the Proposed Action results in a *negative* net benefit to the Nation. The proposed large reduction in halibut PSC limits for the Amendment 80 sector could increase costs and reduce revenue to that sector by over \$100 million annually while at the same time resulting in no conservation benefit for the halibut stock and no commensurate benefit for the directed halibut fishery (and, at best, a speculative one given the role of the IPHC). That is the very definition of inefficiency.

Indeed, the FEIS goes on to explain the various ways in which the Proposed Action will actually *reduce* efficiency. *See, e.g.*, FEIS at 32 (“Reductions in halibut mortality are expected to result from the sector increasing costs or reducing efficiency.”), at 146 (“Fuel costs and efficiency loss is also incurred when vessels transit to move away from time/area combinations that are resulting in high encounter rates.”), and at 219 (“The loss of efficiency is directly related to minimizing bycatch mortality.”). The Proposed Action will indisputably increase burdens and inefficiency for the Amendment 80 sector without any offsetting benefits. This violates National Standard 5 and NMFS has failed to explain otherwise.

f. National Standard 6.

NMFS fails to provide a rational explanation for how the Proposed Action is consistent with National Standard 6, which requires that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” 16 U.S.C. § 1851(a)(6). NMFS’s “explanation” is simply: “The analysis for the proposed action is consistent with this standard. Interannual variability in catch is described in Section 3.3.” FEIS at 281. This is legally insufficient. Had NMFS actually analyzed the Proposed Action for consistency with National Standard 6, it would have found that there is no consistency, for at least the following reasons.

First, the Proposed Action will not protect against the “unique uncertainties” associated with the Amendment 80 sector. 50 C.F.R. § 600.335(b). Instead, the Proposed Action would create highly restrictive bycatch limits for only this sector. And those limits are tied to metrics (abundance indices) that are either poorly or *negatively correlated* with the fleet’s historical halibut bycatch

encounter rates (which may vary substantially with increasing climate change). Moreover, those limits do not increase above current limits even if abundance increases significantly. None of the variability associated with the annual determinations on the bycatch limits or any changes in the methods used to determine those limits are addressed by NMFS. Nor is any of the variability or contingencies associated with the economic and environmental effects the Amendment 80 sector will experience under the Proposed Action.⁵⁹ For example, as addressed elsewhere in these comments (and in past comments), the Proposed Action does not meaningfully address the effects of climate change on the Amendment 80 sector, the stocks targeted by that sector, and the management of the fleet under the Proposed Action.

Second, the Proposed Action does not include any mechanism to accommodate changes in halibut catch limits that may occur independently of this action. For example, the IPHC could choose to increase catch limits from the current 10-year high of 5.1 million pounds substantially even if halibut “abundance” as measured by the Proposed Action were to decrease. This is not a remote possibility. Under the current IPHC’s harvest policy rate (F43%), the amount of total coastwide harvestable surplus in 2023 (commonly known as the “TCEY”) could increase from the current 41.2 million pounds to 51.95 million pounds under *current* bycatch levels.⁶⁰ Conversely, the IPHC could choose to adopt catch limits that are not correlated with its stated harvest policy, or abandon the idea of an area-specific harvest policy altogether. That just happened at the IPHC’s 2023 Annual Meeting. The IPHC recommended a *reduction* of the coastwide TCEY to 36.97M pounds. This represents a 15 million pound decrease in TCEY relative to its coastwide harvest policy, or nearly a 30% lower TCEY than its established harvest policy. In addition, the IPHC did not establish specific TCEY apportionments to specific areas based on a stated harvest policy.⁶¹ This is further evidence that the use of the IPHC’s harvest policy as a basis for analytical comparison is not founded in fact.⁶² In addition, the fact that utilization rates (percent harvested) in the Area 4 halibut fishery are at a record low of 66% is not addressed or analyzed by NMFS. None of these issues and the uncertainties created by them are addressed by NMFS.

⁵⁹ NMFS was required, but failed, to consider: “Unpredictable events - such as unexpected resource surges or failures, fishing effort greater than anticipated, disruptive gear conflicts, climatic conditions, or environmental catastrophes - are best handled by establishing a flexible management regime that contains a range of management options through which it is possible to act quickly without amending the FMP or even its regulations.” 50 C.F.R. § 600.335(d).

⁶⁰ See 2022 Summary of Halibut Data at 17, Table 3.

⁶¹ See IPHC, Summary of the 2022 data and stock assessment, and decision table for 2023, Agenda item 5.3, IPHC-2023-AM099-11 (I. Stewart), Slide 50, <https://www.iphc.int/uploads/pdf/am/am099/ppt/iphc-2023-am099-11-p.pdf>.

⁶² See 2023 International Pacific Halibut Commission Fishery Regulations, Section 5 “Mortality and Fishery Limits” (under Contracting Party review), <https://www.iphc.int/uploads/pdf/regs/iphc-2023-regs.pdf>.

Third, NMFS’s disapproval of Amendment 22 to the Mackerel, Squid, and Butterfish Fishery Management Plan is instructive. There, NMFS explained:

The *Illex* squid fishery currently operates with 75 limited access vessels.... The proposed action would reduce that to 39 vessels with unlimited possession limits, reducing fishing opportunity for the remaining 36 vessels by imposing fishing limits that could lead to substantial inefficiencies in their fishing operations. Absent any conservation need or other rationale supported by the evidence, to further reduce opportunities for permitted vessels to participate in the *Illex* squid fishery would be contrary to the intent of National Standard 6. Given the unknown and uncertain impacts of climate change on fish stocks in the region, the potential impacts of wind energy development on the squid fishery to conduct operations, and shifting and evolving markets, any reduction in flexibility in the *Illex* squid fishery could have detrimental effects. By consolidating the majority of harvest opportunities into fewer vessels and fishing companies, we would potentially be increasing the risk that the fishery could fail to effectively adapt to changing conditions and continue to achieve OY.^[63]

The same conditions NMFS relied upon to justify disapproving Amendment 22 are present here. Under the Proposed Action, NMFS would undeniably reduce fishing opportunities by imposing highly restrictive fishing limits on the Amendment 80 sector. This would result in substantial inefficiencies by limiting substantial harvest of flatfish species. NMFS would impose these reduced fishing limits and inefficiencies absent any conservation need or other rationale, contrary to the intent of National Standard 6. The Amendment 80 sector, like many fisheries in the North Pacific, is facing the unknown and uncertain effects of climate change on fish stocks in the region, and the Proposed Action will hinder the ability of the sector to adapt to those effects. The Amendment 80 sector is also facing shifting and evolving markets, and any reduction in flexibility could have detrimental effects. Amendment 123 is highly likely to cause the consolidation of the majority of harvest opportunities into fewer vessels, as many vessels will not have adequate halibut PSC to harvest their allocations and may lead to even greater consolidation in the fishery, and this important factor is ignored by NMFS.⁶⁴

⁶³ See September 6, 2022 letter from Michael Pentony to Michael Luisi, [Illex+A22+Decision+Council+Letter+Signed.pdf \(squarespace.com\)](#).

⁶⁴ The EIS contemplates that “increased consolidation could result” based on the Proposed Action, and that “[t]he current A80 [Amendment 80] ownership and control limits leave room for one firm to exit the fishery.” EIS at 237-39.

Fourth, the Proposed Action “must be” but is not, “flexible enough to allow timely response to resource, industry, and other national and regional needs.” 50 C.F.R. § 600.335(b). NMFS relies on the “average” impact of the Proposed Action to justify its action but fails to consider the well-documented variations that occur in the fishery and the highly variable impacts on the Amendment 80 fleet. For example, the Proposed Rule states:

Based on the halibut abundance values from the 2021 setline and EBS shelf trawl survey abundance indices in the proposed index table, a 1,309 mt PSC limit for the Amendment 80 sector would apply. This constitutes a 25 percent reduction from the 1,745 mt limit currently in regulation and is 37 mt under the sector's average halibut PSC levels from 2016 through 2019.

87 Fed. Reg. at 75,577. Using average PSC use from a curated set of years (2016 through 2019) does not capture known inter-annual variability. Halibut PSC is highly variable, as shown in Table 2-5 of the EIS. In 2021, halibut PSC use was at a near record low of 1,061 mt. In the next year, 2022 halibut PSC use was 1,556 mt, according to NMFS’s data.⁶⁵ PSC use is variable largely due to factors that are not related to specific fishing operations, such as changing ocean conditions. NMFS recognizes that “[t]his variability makes it clear that it is not sufficient to consider only average halibut PSC use over a series of years when making decisions about establishing PSC limits.” FEIS at 324. The potential impact on specific companies is also highly variable. “[T]he distribution of impacts across companies and vessels will certainly differ based on many factors, most notably a company’s species allocation portfolio and whether it is relatively more dependent on species that tend to carry a higher halibut PSC rate.” *Id.* at 212. The Proposed Rule does not provide clarity on the differential and highly variable impact of this proposed action.

In sum, the Proposed Action violates National Standard 6, and is arbitrary and capricious. NMFS’s failure to provide *any* substantive discussion about National Standard 6 is similarly unlawful.

g. National Standard 7.

NMFS also fails to provide any rational explanation for how the Proposed Action is consistent with National Standard 7, which requires that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” 16 U.S.C. § 1851(a)(7). NMFS merely states: “The proposed action is consistent with this standard. Chapter 5 describes the potential impacts from the Preferred Alternative, including costs of PSC limits as a management measure.” FEIS at 304. This is legally insufficient.

⁶⁵ Personal communication with Steve Whitney, NMFS Alaska Region, Inseason Management.

Moreover, the Proposed Action is *not* consistent with National Standard 7, which NMFS interprets by regulation to require that management measures “not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments.” 50 C.F.R. § 600.340(b). The best available data show that the substantial economic burden of the Proposed Action on the Amendment 80 sector is entirely unnecessary. Under *status quo* bycatch management in 2022, the IPHC was able to provide directed halibut users with a *10-year high* harvest allocation of 5.1 million pounds. And, in Area 4, a record low of only 66% of that limit was actually harvested. Moreover, 2022 is not a mere anomaly as the 10-year data set shows general trends of increasing harvest allocations and decreasing harvest rates. *See supra*, table. NMFS does not address these data or “demonstrate” how, in light of these data, “the benefits of fishery regulations are real and substantial” relative to “the costs to the industry of compliance,” as required by National Standard 7.⁶⁶

Additionally, the National Standard 7 guidelines state that “[m]anagement measures should be designed to give fishermen the greatest possible freedom of action in conducting business and pursuing recreational opportunities that are consistent with ensuring wise use of the resources and reducing conflict in the fishery.” 50 C.F.R. § 670.340(c)(1). The Proposed Action accomplishes the exact opposite of this directive. Specifically, the Proposed Action is predicated not on providing “fishermen the greatest possible freedom of action in conducting business,” but envisions bankruptcy as a viable and reasonable outcome.⁶⁷

Again, NMFS’s disapproval of Amendment 22 is instructive:

⁶⁶ NMFS also fails to rationalize the enormous costs the Proposed Action with the requirements of E.O. 12866 and E.O. 13563. E.O. 13563 states that “each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.” EIS at 270. NMFS does not provide a rational or sufficient explanation for how the Proposed Action meets these requirements.

⁶⁷ *See* FEIS at 237 (“In other words, as A80 firms are required to implement more measures to reduce halibut mortality their operating costs may increase and their revenue may decrease when the halibut limits constrain target catch, making annual net revenue more volatile. Firms that cannot remain viable under the new conditions would eventually exit the fishery.”).

The National Standard 7 Guidelines at § 600.340(c)(1) also direct that “management measures should be designed to give fishermen the greatest possible freedom of action in conducting business ... that are consistent with ensuring wise use of the resources and reducing conflict in the fishery.” Reducing fishing opportunities for almost half of the *Illex* squid fleet when not necessary for conservation, not solving the perceived race to fish, and reducing flexibility through restrictive possession limits was determined to be directly contrary to the intent of National Standard 7.^[68]

The same conditions exist here. Amendment 123 unequivocally will reduce fishing opportunities for all of the Amendment 80 fleet, and NMFS has found that doing so will have no conservation benefit for the halibut stock and result in no identifiable benefit to the directed halibut fishery. The Proposed Action fails to ensure any “wise use” of fishery resources or “reduce conflict.” Halibut bycatch throughout the coastwide range of the Pacific halibut stock is currently at a record low of only 9% of total halibut removals.⁶⁹ The Amendment 80 fishery is responsible for a fraction of that percentage. In fact, the Proposed Action *increases* conflicts, as evidenced by the comment letters received by NMFS on the Proposed Action. NMFS has *unwisely* singled out a single fishing sector that represents only a fraction of all halibut bycatch and is proposing to subject that sector to further devastating limits with no identified benefit for the alleged and unexplained purpose of “achieving a more equitable approach to setting PSC limits.” FEIS at 319. The Proposed Action violates National Standard 7.⁷⁰

h. National Standard 8.

National Standard 8 requires that:

Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of

⁶⁸ September 6, 2022 letter from Michael Pentony to Michael Luisi.

⁶⁹ See J. Jannot, H. Tran, T. Kong, K. Magrane, & K.S. Van Vleck, Fisheries Data Overview (2022), IPHC-2023-AM099-07, <https://www.iphc.int/uploads/pdf/am/am099/iphc-2023-am099-07.pdf>.

⁷⁰ NMFS failed to consider any viable alternatives that would have provided the Amendment 80 fleet with the ability to respond to the costs of implementation (National Standard 7) or the flexibility to respond to contingencies and variations in the fisheries (National Standard 6). NMFS listed three “options” to ostensibly reduce costs and increase flexibility to the Amendment 80 fleet with limited or no impact on the overall PSC limit. Even though the sufficiency of those options is questionable (and none of them remedies NMFS’s failure to consider a reasonable range of alternatives, as addressed later in this letter), none of the options were selected and no discussion is provided in the record for their rejection. See, e.g., FEIS at 75-77. This violates National Standards 6 and 7, as well as NEPA and the APA.

overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), 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). NMFS's assessment of the Proposed Action's purported consistency with National Standard 8 is nonsensical.

Although NMFS admits that any potential benefits of the Proposed Action to the directed halibut fleet are highly attenuated and conditional upon other factors, such as bycatch from other fisheries not managed under the Proposed Action, and the management decisions of the IPHC. NMFS concludes that "[i]n selecting its Preferred Alternative, the Council considered providing for the sustained participation of fishing communities and minimizing adverse economic impacts on such communities, while balancing the requirements of [the Magnuson-Stevens act]." FEIS at 304-05. NMFS otherwise provides no support for this perplexing conclusion, which is inconsistent with the rest of NMFS's National Standard 8 analysis. NMFS's analysis also entirely overlooks the fact that, as demonstrated above, the IPHC halibut allocation for the directed fishery was recently at a 10-year high and yet the allocation is substantially unused, which is plainly relevant to the National Standard 8 analysis and further undermines NMFS's unsupported conclusion.

Moreover, NMFS's National Standard 8 analysis provides only a cursory consideration of the significant adverse impacts of the Proposed Action on the fishing communities that rely upon the Amendment 80 sector. The Proposed Action will decrease employment opportunities for fishermen and processing plant workers, thereby adversely affecting their families and communities. The Proposed Rule recognizes that "communities engaged in the Amendment 80 sector groundfish fisheries could be adversely impacted on a more direct basis." 87 Fed. Reg. at 75,579. However, NMFS does not analyze the certain and adverse impact of the Proposed Action on communities reliant on the Amendment 80 fishery, compared to any benefits to communities reliant on the directed halibut fishery (which are uncertain).⁷¹

Additionally, much of the analysis of community impacts is specifically focused on either a single community, St. Paul, or a small group of discrete communities, which are reliant on, and benefit from, the directed halibut fishery. Aside from the fact that any potential benefits of the

⁷¹ Tellingly, NMFS's discussion in the Proposed Rule refers only to the potential impacts of the Proposed Action on communities associated with the directed halibut fishery. 87 Fed. Reg. at 75,880. NMFS does not consider compliance with National Standard 8 as it pertains to communities that participate in the groundfish fisheries—the very fisheries that would be directly regulated by this Proposed Action. This violates National Standard 8.

Proposed Action are speculative (for reasons addressed elsewhere in this letter), NMFS's effort to reallocate halibut to benefit these communities (or St. Paul individually) violates National Standard 8 (as well as National Standard 4). *See Groundfish Forum*, 375 F. Supp. 3d at 86-89 (finding unlawful NMFS's effort to "in effect, convert[] National Standard 8's mandate that the Service 'take into account' impacts on affected fishing communities when pursuing the [Magnuson-Stevens Act's] conservation objectives into a tool to affirmatively reallocate fishing privileges to benefit specific communities"). With the Proposed Action, NMFS is again attempting to unlawfully use National Standard 8 as a justification for reallocating fishing privileges (for halibut) to benefit specific fishing communities.

i. National Standard 9.

National Standard 9 requires that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." 16 U.S.C. § 1851(a)(9). The Proposed Action violates National Standard 9 for numerous reasons, as set forth below. Generally, there is nothing "practicable" about an action that will cause one fishing sector to incur hundreds of millions of dollars in cost, has a net negative benefit to the Nation, has no conservation benefits, has no identifiable benefits to any other fishery or sector, and imposes severe bycatch limits without any new tools to achieve those limits. NMFS provides no rational justification for how the Proposed Action is consistent with National Standard 9. Nor can it.⁷²

(i) NMFS fails to rationally interpret and apply the term "to the extent practicable."

NMFS fails to rationally interpret the term, "to the extent practicable," and describe how the Proposed Action meets that standard. NMFS provided no guidance to the Council or the public on the interpretation of this term during consideration of this action, as required by National Standard guidelines. The best NMFS can muster is a simple reference to the Merriam-Webster Dictionary, stating that practicable means "capable of being done or carried out." 87 Fed. Reg. at 75,580. But this is plainly insufficient in the context of the Magnuson-Stevens Act and its implementing regulations, which consider numerous factors other than the capability to do an action as part of the practicability analysis, such as economic costs and relative burdens.

When Congress enacted the term in 1996, it stated that Regional Fishery Management Councils "should make reasonable efforts in their management plans to prevent bycatch and minimize its

⁷² NMFS fails to fully address Section 303(a)(11) of the Magnuson-Stevens Act, which requires that each FMP "include conservation and management measures that, to the extent practicable and in the following priority— (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided." 16 U.S.C. § 1853(a)(11). Here, NMFS appears to have concluded that it is prioritizing the minimization of bycatch mortality and not the minimization of bycatch overall. There is no analysis of part (A) of Section 303(a)(11), as the Magnuson-Stevens Act requires. Nor is this addressed in the FEIS.

mortality,” that it is “not the intent of the Congress that the councils ban a type of fishing gear or a type of fishing in order to comply with this standard,” and that practicability “requires an analysis of the cost of imposing a management action.” 142 Cong. Rec. H11436 (1996). Congress was clear that it did “not intend that this provision will be used to allocate among fishing gear groups, nor to impose costs on fishermen and processors that cannot be reasonably met.” *Id.*⁷³ None of this is considered in NMFS’s purported “interpretation” of the term, but all of it undermines the application of National Standard 9 here. NMFS’s failure to rationally interpret and apply the term, “to the extent practicable,” is unlawful and arbitrary and capricious.⁷⁴

(ii) NMFS fails to rationally consider and apply regulatorily mandated factors.

NMFS’s National Standard 9 guidelines state that “a determination of whether a conservation and management measure minimizes bycatch or bycatch mortality to the extent practicable, consistent with other national standards and maximization of net benefits to the Nation, should consider” a range of specific factors. 50 C.F.R. § 600.350(d)(3). As detailed below, *none* of these factors support NMFS’s conclusion that the Proposed Action is “practicable.”

- **“Population effects for the bycatch species.”** The FEIS makes clear that the Proposed Action will have no population effects on halibut. *See* FEIS at 37 (“Impacts to the halibut biomass under all of the alternatives are expected to be similar and result in no impact to spawning stock biomass (SSB).”).
- **“Ecological effects due to changes in the bycatch of that species.”** The FEIS clarifies that the Proposed Action is not expected to have impacts that are not already considered. *Id.* at 301 (“To the extent that Alternatives 2 through 4 change effort in the BSAI groundfish fisheries, those changes are not likely to have impacts on ecosystem components and considerations beyond those summarized in the annual Stock Assessment and Fishery Evaluation report for the BSAI groundfish fisheries (NPFMC 2020).”).

⁷³ This concern is precisely what has materialized here. NMFS is proposing to take an action that is premised on the idea that halibut catch will be reallocated from one fleet to another, at extraordinary cost to one fleet.

⁷⁴ Moreover, NMFS fails to provide any rational, fact-based explanation for why the Proposed Action is practicable. Instead, NMFS makes conclusory statements that the Proposed Action is “practicable” (despite the imposition of extraordinary costs and lack of any new tools to comply with the proposed measure) simply because NMFS has determined it is. *See, e.g.*, FEIS at 377 (“The analysis estimates revenue reductions of 9% to 15% from status quo using the 2016 through 2019 data if the PSC limit is reduced by 30% PSC and revenue reductions of 22% to 32% from status quo if the PSC limit is reduced by 40%. We do not believe that this range of potential revenue losses from the minimization of bycatch in the very low halibut abundance conditions renders the action impracticable, even though the potential economic losses are substantial.”).

- **“Changes in the bycatch of other species of fish and the resulting population and ecosystem effects.”** The FEIS notes that the Proposed Action could shift the location and timing of fisheries and may result in shifts of bycatch but does not analyze changes in the Amendment 80 sector and impacts on other bycatch species (*e.g.*, crab). However, the FEIS makes clear that the Proposed Action is *not* expected to *reduce* the bycatch of other species, such as crab, or enhance the resulting population or ecosystem effects. Moreover, during its review of the draft EIS, the SSC highlighted concerns associated with changing stock distributions due to a rapidly changing North Pacific ecosystem:

Further, in light of the dynamic changes observed in recent years in the BSAI due to climate change, the SSC cautions that the predictability of the spatial and biological behavior of the fish stocks in this region is very low and suggests that the Council does not base its evaluation of the alternatives on the relative likelihood of future states.⁷⁵

This plainly relevant consideration for the National Standard 9 analysis is ignored by NMFS.

- **“Effects on marine mammals and birds.”** The FEIS states that none of the alternatives are expected to have a differential impact on marine mammals and birds. *Id.* at 291 (“Therefore, the incidental takes under Alternatives 2, 3, and 4 are not expected to have a significant effect on marine mammals and are not expected to occur beyond the scope analyzed in previous NEPA or ESA documents.”); *id.* at 298 (“Therefore, effects on seabirds under Alternatives 2, 3 and 4 are not expected to be significant and are not expected to occur beyond the scope analyzed in previous NEPA or ESA documents.”). Thus, the Proposed Action is no improvement over the no-action alternative in this regard.
- **“Changes in fishing, processing, disposal, and marketing costs.”** The Proposed Action will have severe adverse impacts on the Amendment 80 sector in terms of fishing and processing costs. *See, e.g., id.* at 134 (“When constraints such as high Pacific cod or halibut bycatch rates emerge, vessel operators do not have the option to cease fishing completely because cost accrual on such large platforms would be unsustainable.”); *id.* at 227 (“To the extent the A80 fleet spends additional time trying to find areas with higher CPUE and lower halibut bycatch, it will incur higher operational costs.”); and *id.* at 237 (“In other words, as A80 firms are required to implement more measures to reduce halibut mortality their operating costs may increase and their revenue may decrease when

⁷⁵ NPFMC, SSC Final Report to the North Pacific Fishery Management Council (Apr. 5-8, 2021), at 10, <https://meetings.npfmc.org/CommentReview/DownloadFile?p=18a502af-a848-4c92-a7cb-9d2151dd2666.pdf&fileName=SSC%20FINAL%20Report%20April%202021.pdf>.

the halibut limits constrain target catch, making annual net revenue more volatile. Firms that cannot remain viable under the new conditions would eventually exit the fishery.”). These severe impacts will be incurred largely because the Proposed Action provides *no additional tools* to the Amendment 80 sector to reduce halibut bycatch.

- **“Changes in fishing practices and behavior of fishermen.”** The Proposed Action will result in reduced harvests because the available tools to minimize halibut bycatch have already been adopted. *See* Draft EIS at 32 (“Because of the efforts and expenditures already undertaken by the sector, dramatic increases in halibut avoidance or reductions in mortality are not expected with the tools that are currently available to the fleet. Some marginal improvements are anticipated to continue to be realized, especially if halibut limits are further reduced and the fleet forgoes some profitability to reduce halibut mortality further. *Reductions in halibut mortality are expected to result from the [Amendment 80] sector increasing costs or reducing efficiency.*” (emphasis added)).⁷⁶
- **“Changes in research, administration, and enforcement costs and management effectiveness.”** The Amendment 80 sector is subject to cost recovery fees as a portion of its ex-vessel revenue for costs directly related to the management of the fishery. Because the Proposed Action would significantly reduce the amount of harvests in the fishery and the expected value to the fishery, Amendment 80 sector participants would expect to pay considerably higher amounts of their ex-vessel revenue to meet their required cost recovery payments. This is not analyzed in the FEIS, but effects on cost recovery fees are recognized in the Proposed Rule. 87 Fed. Reg. at 75,581. NMFS was required to analyze this aspect of the Proposed Action under NEPA, but failed to do so.
- **“Changes in the economic, social, or cultural value of fishing activities and nonconsumptive uses of fishery resources.”** The Proposed Action will adversely affect the economic and social value of the groundfish fisheries. In contrast, the Proposed Action will not result in any identifiable economic, social, or cultural benefits to the directed halibut fishery. *See* FEIS at 267 (“Subsistence harvest of halibut would not be directly affected by the proposed action alternatives.”); and *id.* at 267 (“Sport harvest of halibut would not be directly affected by the proposed action alternatives.”).
- **“Changes in the distribution of benefits and costs.”** The Proposed Action would impose enormous costs, conservatively ranging from \$86 million to \$110 million annually under certain PSC limits, and result in significant harm to Amendment 80 sector participants. NMFS also finds that the net benefits to the Nation from the Proposed

⁷⁶ This true statement was included in the draft EIS but was arbitrarily modified in the FEIS to imply an opposite conclusion, without any factual support or rational explanation. *Compare* FEIS at 319. This occurred in numerous other instances in the FEIS on a variety of topics, without explanation. This violates NEPA and the APA. Moreover, these modifications apparently occurred *after* the Council took final action.

Action are *negative*. And any “benefits” from this action in the form of increased opportunities for the directed halibut fishery are entirely speculative because they rely on the unknown actions of the IPHC. The adverse economic impacts to the Amendment 80 sector and the coastal communities engaged in the support and provisioning of the Amendment 80 sector are *certain* to occur.

- “**Social effects.**” The Proposed Action is not expected to harm long-term participation by communities in the directed halibut fishery. *Id.* at 268 (“Sustained participation of fishing communities in the BSAI groundfish or BSAI halibut fisheries would not appear to be directly at risk from implementation of the proposed action alternatives.”). But, as explained elsewhere in these and previous comments, it will have significant social effects on the communities reliant upon the Amendment 80 sector.

In sum, based on the application of the 50 C.F.R. § 600.350(d)(3) factors, the Proposed Action plainly does not “minimize[] bycatch or bycatch mortality to the extent practicable, consistent with other national standards and maximization of net benefits to the Nation.” On this basis alone, the Proposed Action is unlawful and should be rejected.⁷⁷

(iii) The Proposed Action is not practicable because no additional measures or tools are available to reduce halibut bycatch in the Amendment 80 fleet.

The Proposed Action is not practicable because it provides no new measures or tools to reduce halibut bycatch and relies entirely on the Amendment 80 sector significantly reducing its catch of target species in order to comply with the bycatch measures. The record makes this clear:

Because of the efforts and expenditures already undertaken by the sector, dramatic increases in halibut avoidance or reductions in mortality are not expected with the tools that are currently available to the fleet. Some marginal improvements are anticipated to continue to be realized, especially if halibut limits are further reduced and the fleet forgoes some amount of profitability to reduce halibut mortality further.

⁷⁷ *See, e.g.*, 57 Fed. Reg. 23,231, 23,323 (June 3, 1992) (in disapproving a portion of Amendment 18, NMFS stated: “Based on the available information supplied by the Council, NMFS and the public, the Secretary determined that full approval of amendments 18 and 23 would result in favorable economic, impacts to Alaska coastal communities but would also result in net economic losses to the Nation ranging from \$103 to \$178 million, depending upon various assumptions. There was almost a zero probability that the action would produce positive net National economic benefits.”); *see also* 68 Fed. Reg. 52,142 (Sept. 2, 2003) (disapproving portions of BSAI Groundfish FMP Amendment 75 because “the record for this action does not show how overall benefits outweigh the costs”).

Draft EIS at 32.⁷⁸

If substantial reductions in halibut mortality are realized, they are likely to be derived from the development and implementation of new technologies that are not currently available or practicable.

*Id.*⁷⁹

Factors exogenous to the operations are anticipated to have as much or a greater impact on A80 halibut mortality rates than implementing changes to the current tools. Because halibut encounter has not been strongly correlated with halibut abundance (Section 3.4.4), exogenous factors other than estimated halibut abundance (e.g., climate change) may be more significant in changing halibut mortality rates in the A80 sector.

Id. at 223.⁸⁰

The lack of correlation between surveyed abundance and A80 encounter may affect the potential impacts of the action and the ability of the fleet to avoid halibut catch, particularly in years in which the surveyed abundance is low and resulting PSC limits are low, but A80 PSC encounter is high.

FEIS at 237.

In other words, the Amendment 80 sector cannot achieve the proposed halibut PSC reductions without massive economic impacts, fleet disruption, and companies going out of business. And even if this were a lawful consequence of NMFS's action (it is not), it is not offset by a discernable conservation benefit to the halibut stock or an identifiable benefit to the directed halibut fleet.

Additionally, the FEIS incorrectly concludes that a 1,309 mt halibut PSC limit (a 25% reduction from the current limit) will not constrain groundfish harvests. Groundfish harvest will absolutely

⁷⁸ As indicated in the above footnote, this true statement was arbitrarily modified in the FEIS without explanation. *Compare* FEIS at 319.

⁷⁹ This statement was also arbitrarily and unlawfully modified in the FEIS, without explanation, to eliminate the indisputable fact that new technologies “are not currently available or practicable.” *Compare id.*

⁸⁰ This statement too was arbitrarily and unlawfully modified in the FEIS without a rational explanation. *Compare id.* at 237.

be constrained. Indeed, halibut PSC use amounts in three of the past five years have been *greater* than the proposed limits. Some of the reasons—acknowledged by NMFS—why the proposed limits cannot be achieved without massive disruption to the Amendment 80 fleet are as follows:

- The Amendment 80 sector cannot be prosecuted without some level of halibut interception.
- Amendment 80 companies have limited ability to shift their target species or areas fished due to their disparate permits and allocations.
- The Amendment 80 sector has been in an almost constant state of change since its creation in 2008.
- Some portion of each Amendment 80 company's PSC limit is left unharvested to provide a buffer for hard caps.
- All Amendment 80 companies participate in the flatfish fisheries, and yellowfin sole is the sector's most important fishery.
- Because of the disparate flatfish and roundfish mix in each company's portfolio, some companies are more constrained than others by lower PSC limits, and some may not survive under substantially lower PSC limits.
- The sector has been able to reduce its PSC usage and halibut mortality rates by the use of three principal mechanisms: choice of fishing time and location, use of halibut excluders, and deck sorting of halibut. The sector has also used other halibut avoidance tools, such as cooperative fishing strategy, setting standard bycatch rates, communication among members of the fleet, small test tows, and reduced night fishing. No new tools are available.

The Amendment 80 sector has *already* reduced halibut PSC usage to the maximum extent practicable using all available tools. The sector has reduced its halibut PSC usage by nearly 35% since 2014. As a result, the sector is currently catching fewer target fish with more hauls relative to the earlier years in the 2010 through 2019 period. The sector also incurs direct costs to avoid halibut bycatch and/or reduce mortality rates. For example, halibut excluders reduce target catch per effort and increase fuel consumption. Efficiency is lost when vessels spend time moving away from areas with relatively high halibut encounters. Transit time increases fuel costs, decreases fishing time, and reduces productivity for the vessel, with negative impacts on crew compensation. The same impacts occur with shorter tows that yield fewer targets. Deck sorting requires approximately 45 minutes of downtime per haul. This accounts for time needed for crew members to transit from processing area to the deck and back, and pausing fishery factory operations while deck sorting is occurring. On a typical day, this costs approximately three hours of production per day. Deck sorting thus eliminates approximately one tow per day. One fewer tow reduces daily catch by one-fifth, which lengthens the number of fishing days in a season and increases operating costs correspondingly. Further reductions in the PSC limit will result in the sector forgoing gross harvest revenue and incurring massive disruptive impacts.

The FEIS says that “[a]dditional improvements are anticipated to continue to be realized, especially if halibut limits are further reduced and the fleet forgoes some amount of profitability to reduce halibut mortality further.” *Id.* at 237. No evidence or analysis is presented in the FEIS for any “additional improvements” that can be reasonably expected and the Proposed Action recommends none (because none are known). The FEIS goes on to say that “[i]f substantial reductions in halibut mortality are realized, they are likely to be derived from the development and implementation of new technologies.” *Id.* But there is no discussion in the FEIS or other record documents of what those new technologies could be (and as explained above, NMFS arbitrarily omitted its previous acknowledgment that such new technologies are not presently available or practicable, which remains true). To make matters worse, “[t]he lack of correlation between surveyed abundance and A80 encounter rates may affect the potential impacts of the action and the ability of the fleet to avoid halibut catch, particularly in years in which the surveyed abundance is low and resulting PSC limits are low, but A80 PSC encounter rates are high.” *Id.* Eventually, “[f]irms that cannot remain viable under the new conditions would eventually exit the fishery.” *Id.* This is not rational or practicable bycatch reduction as contemplated by the Magnuson-Stevens Act.

In sum, despite NMFS’s unexplained, baseless attempts to modify the FEIS, the Amendment 80 sector has no options for additional halibut PSC reductions other than to forego substantial harvests. This has been a fact throughout the entire administrative process and remains true to this day. The sector cannot shift to different species with lower halibut encounter rates, and all other regulatory changes to support existing bycatch reductions have already been made. The sector has already substantially changed its operations by implementing the tools that are available, and in the face of volatile environmental conditions driven by climate change. The sector has already reduced bycatch to the extent practicable under National Standard 9, and no further reductions are practicable.

(iv) The Proposed Action is not practicable because there is no rational basis for the bycatch limits.

As addressed elsewhere in this letter, the abundance indices NMFS proposes to use to establish annual halibut PSC limits for the Amendment 80 fleet are either poorly or negatively correlated with the fleet’s halibut encounter rates. This means that any index-driven halibut PSC limit will result in impracticable bycatch limits, particularly if the changes in those limits are substantial (as they are proposed to be). Notably, *none* of the proposed limits would represent *increases* over the current limit. Amendment 80 companies cannot sustain their businesses through periods where PSC limits are out of step with the conditions on the grounds, and their only option is to forego harvesting opportunities. The lack of any rational basis for the proposed limits renders them impracticable under National Standard 9.

Moreover, NMFS fails to consider the levels of halibut bycatch that currently exist, or that could exist under this Proposed Action, relative to other fisheries that have much higher rates of bycatch that NMFS has determined are fully compliant with National Standard 9. NMFS’s own

National Bycatch Report provides summaries of bycatch in each region, and in some regions total bycatch *exceeds* total catch, and yet these regions are operating dozens of fisheries that NMFS has deemed meet the requirement to “minimize bycatch to the extent practicable” and are fully compliant with National Standard 9. Table 2.2 in the most recent National Bycatch Report (pasted below) shows that many *regions* in the United States have bycatch rates far in excess of the 9% halibut bycatch rate (highlighted in bolded text).⁸¹ Fisheries in the Southeast Region have a bycatch rate that is *nearly 20 times* that currently experienced for halibut, but are fully compliant with National Standard 9.

Region	Fish Bycatch (lb)	Fish Landings (lb)	Bycatch % compared to Landings (*derived from Table 2.2)
Greater Atlantic	219,452,252	1375202155	16%
Southeast	319,972,147	169560856	189%
Alaska	245,673,877	4567757475	5%
West Coast	16,093,327	391935034	4%
Pacific Islands	13,339,353	33743755	40%
Totals	814,530,956	6538199275	12%

These data, the absence of any analysis of these data, and the blatant inconsistency in NMFS’s treatment of bycatch “practicability,” renders the Proposed Action arbitrary and capricious, in violation of the APA and the Magnuson-Stevens Act.

(v) NMFS’s “practicability” determination for the Proposed Action contradicts its previous determinations and is an arbitrary and unexplained change in position.

The Proposed Action is arbitrary because it directly contradicts NMFS’s previous “practicability” determinations and represents an unlawful and unexplained change in policy.⁸² In 2016, under nearly identical halibut stock conditions, NMFS implemented Amendment 111 to the BSAI FMP. That action reduced the halibut PSC limit for numerous sectors in the BSAI, including the Amendment 80 sector. *See* 81 Fed. Reg. 24,714 (Apr. 27, 2016) (codified at 50 C.F.R. pt. 679).

As to the Amendment 80 sector, the Amendment 111 final rule states: “NMFS concluded that alternatives that would have reduced the halibut PSC limit by 30, 35, 40, 45, or 50 percent in the Amendment 80 sector would have come at significant economic cost to the Amendment 80

⁸¹ L. Benaka, D. Bullock, A.L. Hoover, & N.A. Olsen (editors), U.S. National Bycatch Report First Edition Update 3 (2019), U.S. Dept. of Commerce, NOAA, NOAA Technical Memorandum NMFS-F/SPO-190.

⁸² *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

sector and fishing communities participating in the Amendment 80 fisheries.” *Id.* at 24,721. For context, the 30, 35, 40, and 45% halibut PSC reductions previously considered and rejected by NMFS correspond to Amendment 80 halibut PSC limits of 1,628 mt, 1,511 mt, 1,395 mt., 1,279mt, and 1,163 mt, respectively. *All* of the Amendment 80 halibut PSC limits that NMFS rejected as too costly in 2015 are *greater* than the minimum halibut PSC limit under the Proposed Action (1,134 mt), and all but two of the previously rejected PSC limits are greater than the anticipated halibut PSC limit of 1,309 mt under current halibut stock conditions.⁸³ In addition, when NMFS implemented Amendment 111, it reduced the Amendment 80 halibut PSC limit to the current 1,745 mt limit based on the availability and anticipated availability of many tools, which are detailed in the proposed rule to implement Amendment 111 (*see* 80 Fed. Reg. at 71,664):

- Expanding the use of gear modifications known as excluders to reduce halibut bycatch;
- Improving communication on the fishing grounds;
- Using modified pelagic trawl gear to harvest groundfish instead of non-pelagic gear. Generally, pelagic trawl gear has a lower incidental rate of halibut bycatch and it has shown promise in the Central GOA rockfish fisheries, and other fisheries nationally in harvesting a number of groundfish species;
- Using test hauls to gauge halibut rates and considering the use of night-time hauls that tend to have lower halibut PSC rates;
- Modifying the timing of fishing to reduce halibut PSC rates toward the end of the year;
- Defining a threshold halibut PSC rate (*e.g.*, when the halibut PSC rate is greater than 80% of the average halibut PSC rate) that would lead to fishery management actions such as stopping fishing in an area or moving fishing operations. Requiring vessels to react to these rates through Amendment 80 cooperative contracts and the HAP has helped to significantly reduce halibut PSC limits;⁸⁴

⁸³ *See also* 80 Fed. Reg. 71,649, 71,664 (Nov. 16, 2015) (“Ultimately, the Council determined, and NMFS agrees, that the proposed rule would minimize halibut bycatch to the extent practicable in the Amendment 80 sector after considering information on the sector’s use of halibut PSC in recent years, the availability of a number of tools for Amendment 80 cooperatives and vessels to reduce halibut PSC use, the likely impact on net benefits to the Nation, and potential additional harvest opportunities to halibut fishery participants in Area 4 and elsewhere.”).

⁸⁴ At the request of the NPFMC, the Alaska Seafood Cooperative provides an annual report on its halibut bycatch performance or HAP. *See* <https://meetings.npfmc.org/CommentReview/DownloadFile?p=fafdeed8-9aed-46b6-8418-46ee20261d27.pdf&fileName=B1%20A80%20Sector%20Report%20on%20Halibut%20.pdf>.

- Shifting the composition of species that are harvested to focus on species that appear to have a lower intrinsic rate of halibut PSC than other species (*e.g.*, shifting away from arrowtooth flounder to yellowfin sole); and
- Establishing measures to shift fishing effort away from specific geographic locations with higher halibut PSC rates relative to other areas.

An additional tool—deck sorting of halibut to return halibut to the water as quickly as possible—was contemplated and under development at the time that the Council adopted Amendment 111. That tool has now been implemented and is widely used throughout the Amendment 80 sector.⁸⁵

Moreover, in 2015, NMFS justified the Amendment 111 halibut PSC reductions for the Amendment 80 sector and other fishery sectors, as follows:

Since 2008, the commercial halibut fishery catch limit in the BSAI in Area 4 has declined, although the 2015 commercial catch limit in Area 4 has increased slightly from the recent low in 2014. The Council determined that the proposed rule [Amendment 111] is necessary because catch limits for the commercial halibut fisheries in the BSAI have declined in recent years and because the halibut PSC used in the BSAI groundfish fisheries has increased as a proportion of total halibut removals.

80 Fed. Reg. at 71,661. In contrast, there are now substantially *more* harvest opportunities than anticipated in 2015. In 2015, NMFS assumed that Amendment 111 “could result in increased commercial fishery harvests in Area 4 ranging from 315,000 pounds to 353,000 pounds each year compared to current levels of harvests over the 10-year period used for the Analysis.” *Id.* at 71,662. In 2015, the commercial IFQ and CDQ catch limits in Area 4 were 3.815 million net pounds.⁸⁶ In 2022, the commercial IFQ and CDQ catch limits in Area 4 were 5.1 million net

⁸⁵ The total amount of halibut bycatch on a coastwide basis now is substantially *lower* than it was when NMFS implemented Amendment 111. In 2015, total halibut bycatch was 3,397 mt (not including wastage in the directed halibut fishery, which was 580 net mt) and represented 18% of total removals from all sources. *See* IPHC, IPHC 2015 Annual Report, ISSN: 0074-7238, <https://iphc.int/uploads/pdf/ar/IPHC-2015-Annual-Report.pdf>. In 2021, halibut bycatch in the halibut fishery was at a record low amount (in pounds) and represented approximately 10% of total removals from all sources. *See id.*, IPHC 2021 Annual Report, ISSN: 0074-7238, <https://iphc.int/uploads/pdf/ar/iphc-2022-ar2021-r.pdf>. In 2022, bycatch as a proportion of total removals was at a record low percentage of total halibut removals at 9%. *See* 2022 Summary of Halibut Data.

⁸⁶ *See* NOAA, Individual Fishing Quota (IFQ) Allocations and Landings (2015), <https://media.fisheries.noaa.gov/dam-migration/15ifqland.pdf>.

pounds.⁸⁷ This improved harvest opportunity is nearly *four times greater* than the harvest opportunities envisioned under Amendment 111 even though the overall abundance of halibut on a coastwide basis has not changed substantially since 2015.⁸⁸

In sum, the Proposed Action directly contradicts NMFS's previous determinations and therefore violates National Standard 9, is arbitrary and capricious, and represents an unexplained change in policy.⁸⁹ The Proposed Action would impose more restrictive measures than NMFS deemed practicable in 2015 even though (i) the Amendment 80 sector's use of halibut has declined substantially since 2015, (ii) NMFS has identified no new halibut bycatch reduction tools, (iii) the impacts are now far more substantial, and (iv) harvest opportunities to halibut fishery participants in Area 4 and elsewhere have improved dramatically since 2015 without the measures now proposed by NMFS.⁹⁰

⁸⁷ See *id.*, Individual Fishing Quota (IFQ) Allocations and Landings (2022), <https://www.fisheries.noaa.gov/sites/default/files/akro/22ifqland.htm>.

⁸⁸ Additionally, in 2015, the Area 4CDE commercial halibut catch limit was 1.285 million pounds for IFQ and CDQ harvesters. See *supra* note 86 (<https://media.fisheries.noaa.gov/dam-migration/15ifqland.pdf>). In 2022, the Area 4CDE commercial halibut catch limit was 2.06 million pounds for IFQ and CDQ harvesters. See *supra* note 87 (<https://www.fisheries.noaa.gov/sites/default/files/akro/22ifqland.htm>). This is a 60% increase over the 2015 Area 4CDE catch limits, and it represents the largest IFQ and CDQ allocation to Area 4CDE since 2013.

⁸⁹ This unlawful and unexplained change in policy requires rejection of the Proposed Action. If NMFS nevertheless proceeds, then NMFS must prepare and provide its explanation to the public for review and comment before proceeding with any action.

⁹⁰ NMFS's practicability determination for Amendment 123 also directly contradicts its decision on Amendment 75 to the BSAI FMP. In rejecting Amendment 75, NMFS found that the disapproved action was inconsistent with National Standard 9:

The Council has implemented numerous measures to reduce bycatch and provided incentives for industry to reduced [sic] discards in BSAI and GOA groundfish fisheries. Nonetheless, with respect to these specific flatfish resources, there is a tension between "minimizing bycatch" and deriving economic value from these fish stocks (i.e., permitting viable directed fisheries). While the Council's preferred alternative sought to balance these contradictory concerns, it was not a practicable alternative from a legal perspective, and the status quo alternative was not practicable from an industry cost perspective. The approved alternative [removing the requirement for full retention of flatfish] clearly fulfills the intent of National Standard 9, as it imposes few additional costs on industry, including those that are small entities, and does not impede the Council from proposing further IR/IU measures.

NMFS, Supplemental EIS for Amendment 75 to the FMP for the Groundfish of the BSAI (July 2003), at 112, <https://repository.library.noaa.gov/view/noaa/23923>.

(vi) The Proposed Action violates National Standard 9 because it will result in negative net benefits to the Nation and substantial economic impacts to the Amendment 80 fleet.

NMFS concludes that, for the Proposed Action, the “net economic benefits are expected to be negative.” FEIS at 44. Moreover, NMFS’s projected impacts from the Proposed Action dwarf those expected from Amendment 111. For example, NMFS concluded that the halibut PSC limits adopted under Amendment 111 “would reduce wholesale revenues for [Amendment 80] fishery participants from \$6.2 million to \$18.7 million for each year during the 10-year analytical period. The total wholesale revenue reduction is estimated to range from \$62 million to \$187 million for the full 10-year period.” 80 Fed. Reg. at 71,664. By contrast, under the Proposed Action, the estimated costs to the Amendment 80 sector could range from \$86 million to \$110 million annually. FEIS at 216, Table 5-5; Draft EIS at 202, Table 5-5. Applying that to a 10-year period results in an economic impact of *\$860 million to \$1.1 billion dollars*. Even worse, NMFS admits that “[f]irms that cannot remain viable under the new conditions would eventually exit the fishery.” FEIS at 237. There is simply no rational way that such impacts can be justified as “practicable.”

Furthermore, the SSC explained in its review of the draft EIS for the Proposed Action that the economic impacts on Amendment 80 revenue may be *underestimated*:

It is important to note that each year of data represents a host of different factors, including environmental conditions, markets, fishing behavior, sampling procedures (e.g., deck sorting), etc. It seems reasonable that for estimating short-run revenue impacts, the most recent years of data are probably the most relevant. However, it is important to note that deviations in any one factor would likely result in revenue impacts that differ from those predicted from this analysis. This is particularly important to consider given the lack of correlation between A80 halibut encounter rates and the halibut abundance indices, which means it is equally likely that for any given combination of survey states, the A80 sector could face high or low halibut encounter rates. Thus, the range of revenue impacts may be considerably larger than those estimated and reported in the analysis. Finally, while the revenue impact estimates from the stratified-random-sampling approach may represent an upper-bound, the extent to which the A80 sector can adapt their fishing behavior in response to PSC limits is largely unknown.^[91]

⁹¹ Science and Statistical Committee Final Report To The North Pacific Fishery Management Council, April 5-8, 2021, at 13.

In the FEIS, NMFS states that the anticipated revenue impacts to the Amendment 80 sector will only decline between 2% and 9% under a 25% reduction in the halibut PSC limit and by less than 3% under a 10% or 20% reduction in the PSC limit. *Id.* at 305. However, these conclusions are based upon NMFS’s selective choice of a limited dataset (2016-2019). As NMFS elsewhere admits, “the choice of which dataset to use in the revenue analysis *has the largest impact*” in understanding potential impacts to Amendment 80 fleet revenues. *Id.* at 34, 218. NMFS summarily claims that “[g]iven reductions in PSC limits and operational changes such as increased deck sorting, it is most likely that future PSC use will be similar to what has been seen in the years since 2015 – i.e., estimates using 2016 – 2019 or 2017 – 2018 data are most likely.” *Id.* at 219. But this one-sentence “explanation” ignores all of the evidence presented in public testimony and comment letters showing that selectively choosing the 2016-2019 dataset would result in an *underestimate* of revenue impacts.⁹² Some of the problems with using such a narrow dataset of years that do not reflect the most likely impacts, as explained in previous testimony and letters, are as follows:

- In 2016, flatfish harvest in the Alaska Groundfish Cooperative (“AGC”) was 45% lower than in the previous four years (2012-2015). This low flatfish catch was due to the AGC fleet—which, at the time, consisted of four vessels operated by Fishing Company of Alaska (“FCA”)—choosing to significantly limit flatfish harvests as a way to reduce halibut PSC usage in response to the Council’s 2015 25% PSC reduction action. The loss of the FCA-owned vessel, Alaska Juris, due to flooding and sinking in June 2016 further contributed to this reduction in flatfish harvest (and associated halibut bycatch).
- In 2017, halibut PSC usage was unusually low because a significant portion of the Amendment 80 sector had very limited fishing time in the first quarter due to the sale of FCA. Three FCA vessels were purchased by other Amendment 80 companies in January 2017, and it took several months for the new owners to re-crew and integrate the former FCA vessels into their operations. These operational decisions impacted halibut bycatch because the vessels did not fish for the first several months of the year (and thus there was no halibut bycatch from those vessels).

Instead of considering the effects that these variations might have on a business confronted with constraining bycatch limits, the analysis simply averages the two together analyzing only the impact of that average, as if the business need only plan on every year being average. For these reasons, among others, NMFS should have used the most complete available dataset (2010-2021) for estimating impact revenues to the Amendment 80 sector because it reflects a wider set of environmental and operational conditions.

⁹² NMFS’s choice to use only *part* of the best available scientific information relevant to fleet impacts also violates National Standard 2.

For example, in 2022, Amendment 80 sector fishing operations were significantly altered from past practices due to reasonably foreseeable conditions requiring triggered area closures (Red King Crab Savings Area) and potential other area closures (Zone 1) due to significant declines in Bristol Bay red king crab stocks. This resulted in the Amendment 80 fleet moving to areas not recently utilized, which significantly contributed to higher halibut bycatch mortality (1,556 mt) than in any year since 2015. Had the Proposed Action been in effect in 2022, the halibut PSC limit would have been 1,309 mt. This limit would have significantly curtailed flatfish fishing in 2022, resulting in two Groundfish Forum member companies ceasing operations by July. We estimate that revenue losses for our five companies would have been between \$58 million and \$62 million and would have reduced fleetwide groundfish harvest by at least 20%. Assessing “average” impacts hides the known substantial variability that exists in fishery operations and the disparate impacts of the Proposed Action.

Although the FEIS acknowledges that “it is possible that estimates using the earlier, high PSC use datasets may be representative if encounter rates and were to increase and efforts to reduce mortality became less effective,” NMFS’s choice to use an incomplete dataset clearly would have substantially underestimated revenue impacts in 2022. Instead of revenue declines ranging from -2% to -9%, actual impacts as demonstrated by looking at a full range of data, including estimates of additional indirect costs that NMFS ignored (e.g., additional fuel costs to avoid halibut, limiting fishing operation timing and locations), the overall impacts are higher assumed by NMFS. Based on estimates from the fleet based on realistic operational choices, average costs are likely greater than -20% to the Amendment 80 sector and likely approaching -40% for individual companies. Once again, by providing an “average” estimate of costs for the entire sector based on a limited set of years, not incorporating estimates of all direct and indirect costs, and not examining the true potential costs of the Proposed Action, NMFS presents an inaccurate assessment of the impacts that does not consider all of the best available scientific information and is otherwise arbitrary. Halibut abundance estimates will change from year to year, and the use of a curated “average” is not a realistic portrayal of true costs.

In sum, NMFS proposes to impose costs that are 6 to 14 times *higher* than those deemed acceptable in 2015 even though halibut harvesting opportunities in Area 4 are 60% higher than they were in 2015, and even though halibut bycatch in the Amendment 80 sector is 35% lower than it was in 2015. NMFS fails to even acknowledge, much less provide any rationale to support, such an arbitrary and dramatic about-face in its rationale for imposing such enormously high costs on the Nation to be borne by one, and only one, fishery.⁹³ The Proposed Action therefore violates National Standard 9 and is arbitrary and capricious.

⁹³ This too represents an unlawful and unexplained change in policy. See *Fox Television Stations, Inc.*, 556 U.S. 502.

j. National Standard 10.

National Standard 10 requires that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.” 16 U.S.C. § 1851(a)(10). NMFS fails to rationally assess the effects of the Proposed Action against this standard, offering only conclusory unsupported statements for why the Proposed Action is allegedly consistent with National Standard 10.⁹⁴

The Proposed Action will create situations that result in Amendment 80 vessels going out farther, fishing longer, or fishing in weather worse than they generally would have in the absence of the action. The Proposed Action will force Amendment 80 fishermen to search for areas with lower halibut abundance, often leaving productive concentrations of target species. These areas may be farther from a safe haven and increase the time a vessel is exposed to inclement weather. Moving away from productive fishing areas may also cause a vessel to fish longer into the winter months to catch the same amount of quota. November and December are notoriously bad weather months in the BSAI, and fishermen (even those on larger vessels) are likely to experience unsafe operating conditions they would otherwise avoid but for the Proposed Action. These impacts may be exacerbated during warm years, when halibut are known to be more intermingled with target species.

Additionally, neither the FEIS nor the Proposed Rule describes any consultation process undertaken with the U.S. Coast Guard (“USCG”) and industry to ensure the safety of the Proposed Action and the potential impacts on fishing vessels. *See* 50 C.F.R. § 600.355(d). To our knowledge, the Council did not formally consult with the USCG or industry through a Council advisory panel, committee, or other review on the safety implications of this action. It is also not clear how or whether NMFS considered all of the National Standard 10 mitigation measures. *See id.* § 600.355(e). The regulations describe a list of some potential mitigation measures that FMPs may incorporate to minimize impacts to human life at sea. Safety mitigation measures are not limited to this list, and additional measures may be developed based on specific aspects of the fishery proposed to be regulated. This was apparently never considered or addressed by NMFS.

The FEIS also does not consider the impacts of the Proposed Action on a company’s ability to modernize its fleet. Perhaps the most impactful way of improving safety at sea is to replace older vessels with vessels that meet modern safety standards. This has been previously recognized, in Amendment 97, by the Council and NMFS:

⁹⁴ NMFS claims that “if continual reductions in PSC limits became apparent, there would be time to address new vessel safety concerns before they became significant.” FEIS at 280. This apparently refers to the options available to the Council and NMFS as part of any action alternative. A description of Options 1-3 can be found in Section 2.3 of the FEIS, and an impacts analysis of each option can be found in Section 5.3.3 of the FEIS. Neither of those sections discuss Options 1-3 as mitigating the action’s negative safety at sea impacts. The Council had no analysis to this effect before it and chose not to adopt any of the three options.

Allowing Amendment 80 vessel owners to replace their vessels, due to actual total loss, constructive total loss, permanently ineligibility to be used in a U.S. fishery, or for other reasons, would allow vessel owners to improve vessel safety, meet international class and loadline requirements that would allow a broader range of onboard processing options, or otherwise improve the economic efficiency of their vessels....

Since 2000, vessel losses and individual fatalities have made the Amendment 80 fleet one of the highest risk federal fisheries within the jurisdiction of the North Pacific Fishery Management Council. Amendment 80 vessels are considered by the USCG as high risk primarily due to the area in which they operate, the large number of crew they carry, and their high consequence marine casualty history.^[95]

The average vessel age of the current Amendment 80 fleet is over 40 years old. Most of these vessels were not purpose-built fishing vessels but were re-purposed from other offshore industries. Since 2012, three new Amendment 80 vessels have been built and two existing vessels have been rebuilt/repurposed with an estimated cost of \$300 million. These projects represent massive, once-in-a-generation investments for Amendment 80 companies and help these companies to remain viable in the highly competitive global fishery marketplace. New vessel construction not only supports U.S. shipyards and other maritime support sector businesses, but new vessels also greatly enhance and improve safety for U.S. fishermen. Vessel accommodations are more spacious, and increased automation reduces vessel injury rates. New vessels ensure long-term investment in Alaskan coastal communities Western Alaska CDQ communities where ownership ties (North Star / Norton Sound Economic Development Corporation and harvest partners (Ocean Peace / Aleutian Pribilof Island Community Development Association and U.S. Seafoods / Bristol Bay Economic Development Corporation) generate significant revenues for western Alaska Native communities. Furthermore, new vessels represent a quantum leap in improving efficiency and reducing greenhouse gas emissions, which ensures that our fisheries will remain sustainable in the face of climate change.

Impracticable bycatch reductions decrease the likelihood of further modernization and cloud the future of recapitalization. *See, e.g.*, FEIS at 237 (“[A]s A80 firms are required to implement more measures to reduce halibut mortality their operating costs may increase and their revenue may decrease when the halibut limits constrain target catch, making annual net revenue more

⁹⁵ RIR/EA/IRFA, BSAI Amendment 97, Amendment 80 vessel replacement (February 2012), at 3, 60, <https://repository.library.noaa.gov/view/noaa/19143>.

volatile.”). NMFS fails to consider these factors, which are plainly relevant to its National Standard 10 analysis. In sum, the Proposed Action violates National Standard 10.

3. NMFS failed to prepare a legally sufficient Fishery Impact Statement.

The FEIS purports to serve as the required Magnuson-Stevens Act Section 303(a)(9) Fishery Impact Statement (“FIS”) for the Proposed Action. The Magnuson-Stevens Act requires that every FMP:

[S]hall include a fishery impact statement for the plan or amendment ... which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for— (A) participants in the fisheries and fishing communities affected by the plan or amendment; (B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and (C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery.

16 U.S.C. § 1853(a)(9). As documented and explained in detail elsewhere in this comment letter, the FEIS fails to sufficiently “assess, specify, and analyze” the likely effects, “including the cumulative conservation, economic, and social impacts,” of the Proposed Action. Moreover, the FEIS does not contain any meaningful discussion regarding “the conservation and management measures on, and possible mitigation measures for” the Proposed Action, which is a legally required component of an FIS and particularly important here given the enormous impacts anticipated to occur as a result of the Proposed Action as well as the lack of any tools to reasonably mitigate those significant impacts.⁹⁶ The FEIS does not comply with the requirements applicable to a Magnuson-Stevens Act FIS, and therefore NMFS has failed to comply with the Magnuson-Stevens Act’s FIS requirements.

G. The Proposed Action violates NEPA.

For all of the reasons set forth below, the Proposed Action violates NEPA. For these same reasons, the Proposed Action violates the APA, specifically 5 U.S.C. § 706(2)(A), (B), (C), (D), (E), and (F).

⁹⁶ The Proposed Rule states that “[w]hether PSC limits under the proposed rule will result in changes in fishing practices or fishermen’s behavior is unclear.” 87 Fed. Reg. at 75,580. This is precisely the type of issue that must be evaluated in an FIS. Such an evaluation is necessary to assess potential conservation and mitigation measures.

1. NMFS must prepare a draft supplement to the FEIS and provide it for public review and comment.

NMFS is required to prepare a supplemental EIS if “a major Federal action remains to occur, and . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1). Here, there is ample, significant new information that requires supplementation of the FEIS, summarized as follows and addressed in detail elsewhere in these comments. All of this information indisputably bears on the proposed action and its impacts.

- Relevant Amendment 80 sector and halibut fishery data for the years 2020, 2021, and 2022. *See* Sections III.F.2.b, III.F.2.d.
- There have been significant changes in the status of the directed halibut fishery harvest patterns that affect both the amount and location of harvest of halibut in the fishery. *See* Section III.G.5.
- There have been significant changes in the location of deliveries of the halibut resource that affect the potential distribution of impacts on fishing communities that differ from those contemplated in the FEIS. *See* Section III.G.5.
- There is significant new information on climate change and ecosystem impacts that substantially affects the potential and foreseeable distribution of fishery resources. *See* Sections III.G.5, III.F.2.b; *see* note 47.
- There is significant new information on inflation, tariffs, fuel costs, and other factors that profoundly affect fishing operations and potential harvest patterns of groundfish and halibut stocks. *See* Section III.F.2.b.
- There is significant new information on changes in the methodology that the IPHC uses to determine the weight of halibut bycatch that increases the impact of the Proposed Action in ways that are not analyzed or discussed in the FEIS.⁹⁷
- There is significant new information on the status of the BSAI crab resource and a reprioritization of bycatch reduction efforts by the groundfish sectors that has a profound effect on the anticipated impact of the Proposed Action on groundfish fishery operations.⁹⁸

⁹⁷ *See* IPHC-2023-AM099-INF04, Revision of the IPHC length-weight relationship, Jan. 2023; IPHC-2021-SRB019-05, IPHC Fishery-Independent Setline Survey (FISS) and commercial data modelling, Aug. 2021.

⁹⁸ *See* Stock Assessment and Fishery Evaluation Report for the King and Tanner Crab Fisheries of the Bering Sea and Aleutian Islands Regions; 2022 Final Crab SAFE Compiled by The Plan Team for the King and Tanner Crab Fisheries of the Bering Sea and Aleutian Islands, October 2022; October 19, 2021, Letter from Alaska Regional Administrator James W. Balsiger to Council Chair Simon Kinneen notifying

As to the last bullet above, the FEIS fails to consider the implications of recent red king crab biomass changes on the fleet's ability to avoid halibut. In 2022, NMFS determined that the red king crab effective spawning biomass met the regulatory criteria to reduce the Zone 1 red king crab PSC limit by 67%. *See* 50 C.F.R. § 679.21(e). These conditions are expected to remain for the foreseeable future. The Amendment 80 Zone 1 red king crab allocation was reduced from 43,292 animals in 2021⁹⁹ to 14,282 animals in 2022.¹⁰⁰ In response, Amendment 80 fishermen reduced time spent fishing in Zone 1, which includes highly productive flatfish grounds, and forced vessels into areas with higher halibut rates. The Amendment 80 sector's 2022 halibut PSC catch of 1,556 mt represents a 47% increase from its 2021 catch of 1,061 mt. While myriad factors affect halibut PSC rates, the FEIS should have evaluated whether a reduced red king crab PSC limit will influence halibut bycatch rates. Since Amendment 80 implementation in 2008, the sector's red king crab catch has been under the current regulatory PSC limit three of the previous 15 years.¹⁰¹

In sum, all of the information provided above bears directly on the impacts of the Proposed Action on the Amendment 80 sector, but none of it is considered in the FEIS (despite almost all of it being available to NMFS before the FEIS was published). NMFS must consider the information, prepare a draft supplement to the FEIS, and provide that draft supplement for public review and comment before finalizing the FEIS and determining whether to proceed with the Proposed Action.

2. The FEIS's purpose and need statement is unlawful.

a. The purpose and need statement is unlawfully narrow.

The purpose and need statement is unlawfully narrow and forecloses the consideration of viable alternatives. It states that the Council is establishing "an abundance-based halibut PSC management program in the BSAI" and that this program will apply exclusively to the Amendment 80 sector. FEIS at 50. By narrowing the purpose in this fashion, the FEIS forecloses

the Council of the overfished status of Bering Sea snow crab and rebuilding requirements and timelines under the Magnuson-Stevens Act; *see also* October 10, 2022 Council motion identifying "the Bristol Bay red king crab and snow crab stocks as a priority conservation concern" and identifying voluntary measures and encouraging "all sectors to implement these voluntary measures in the 2023 season and provide a status report on the efficacy of these measures in December 2023."

⁹⁹ 86 Fed. Reg. 11,449 (Feb. 25, 2021), Final 2021 and 2022 BSAI Harvest Specifications (see Table 14), <https://www.federalregister.gov/documents/2021/02/25/2021-03564/fisheries-of-the-exclusive-economic-zone-off-alaska-bering-sea-and-aleutian-islands-final-2021-and#p-65>.

¹⁰⁰ 87 Fed. Reg. 11,626 (Mar. 2, 2022), Final 2022 and 2023 BSAI Harvest Specifications (see Table 14),

¹⁰¹ NPFMC, Preliminary/Initial Review Draft Cab PSC Limits in the BSAI Groundfish Trawl Fisheries (February 2021), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=89a2a312-6ccc-4b86-8b86-e0484c8a0583.pdf&fileName=C4%20Crab%20PSC%20Analysis.pdf>.

the consideration of other types of bycatch reduction that, *if* needed, may be more rational (than an abundance-based program) and fisheries or sectors beyond the Amendment 80 sector. *See City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (“an agency cannot define its objectives in unreasonably narrow terms”); *see also Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070-71 (9th Cir. 2010).

Halibut is managed on a coastwide basis and halibut bycatch occurs throughout Alaska, British Columbia, and the U.S. west coast. The combined halibut PSC limits in the BSAI and GOA for fisheries and sectors that are not subject to this action are *greater* than the halibut PSC limits proposed here for the Amendment 80 sector. Specifically, under the Proposed Action, if the estimated halibut abundance in the BSAI is “very low” and “low” under the two indices, then the Amendment 80 sector’s PSC limit can decrease to as low as 1,134 mt. In contrast, the combined halibut PSC limit in the BSAI and GOA of all other sectors subject to PSC limits is more than *three times higher* at 3,745 mt (1,770 mt in the BSAI (without Amendment 80) and 1,975 mt in the GOA).¹⁰² Moreover, other sectors have halibut bycatch but are not even subject to PSC limits (*e.g.*, groundfish pot sectors, bycatch in the directed halibut fishery). The purpose and need statement forecloses consideration of revised or new halibut bycatch limits for any of these other fisheries or sectors as well as any U.S. West Coast fisheries (that also have halibut bycatch). And the Proposed Action would not preclude other fisheries or sectors from increasing their total amount or the proportional bycatch in either the GOA or the BSAI. The purpose and need statement is unlawful.¹⁰³

b. The purpose and need statement is premised on erroneous and uncertain statements that are unsupported by the best available information.

The purpose and need statement erroneously asserts that a “continued decline in the halibut stock requires consideration of additional measures for management of halibut PSC in the Amendment 80 fisheries.” FEIS at 50. The statement was last modified over *five years ago*, in October 2017. In reality, the halibut stock has been stable or increasing in overall abundance over the past

¹⁰² *See supra* note 100.

¹⁰³ As demonstrated in Council process documentation included as attachments with this letter, the Council improperly (and without rational basis) narrowed the alternatives to only include the Amendment 80 sector *before* it modified the purpose and need statement for the Proposed Action. The purpose and need statement that was before the Council at the February 2020 meeting (when the Council improperly narrowed the alternatives) stated: “The Council is considering abundance based PSC limits *to control total halibut mortality*, particularly at low levels of abundance.” (Emphasis added.) In fact, the Council retrofitted its purpose and need statement to match its selected range of alternatives *eight months* later, during the October 2020 Council meeting. This plainly violates NEPA. The purpose and need statement must guide the range of alternatives considered, not the other way around.

several years.¹⁰⁴ This fact has been known to NMFS for several years. *See* 81 Fed. Reg. at 24,718 (“[T]he halibut stock is stable or potentially increasing slightly in overall abundance, as measured by the IPHC stock assessment of exploitable halibut biomass and female spawning biomass.”). This key erroneous assumption undermines the entire purpose and need statement, which claims that the alleged “continued decline” *requires* the Proposed Action. This fatal flaw requires NMFS to start over and reconsider the entire proposed action, complete with development of a new purpose and need and a new EIS (should NMFS determine that bycatch limit reductions are still necessary when the correct facts regarding the halibut stock are considered).

The purpose and need statement also erroneously relies on a series of conditional statements and presumed relationships that are not supported by available data. *See* FEIS at 50 (“When BSAI halibut abundance declines, PSC in Amendment 80 fisheries *can* become a larger proportion of total halibut removals in the BSAI, particularly in Area 4CDE, and *can* reduce the proportion of halibut available for harvest in directed halibut fisheries.” (emphasis added)). The record demonstrates that catch limit allocation decisions made by the IPHC provide harvest opportunities to various regulatory areas independent of halibut abundance in a regulatory area, and therefore the proportional impact of bycatch is driven not by PSC limits, but primarily by the choices of the IPHC to allocate halibut based on political considerations and negotiated settlement.

The following table, derived from publicly available information from the IPHC’s website, demonstrates the lack of correlation between the proportion of the amount of legally harvestable halibut (halibut over 32” in length (“O32”)), in various halibut regulatory areas, and the proportion of the total commercial, bycatch, subsistence, and recreational catch limits (the TCEY) allocated to various regulatory areas.¹⁰⁵

¹⁰⁴ *See* IPHC Annual Reports (IPHC 2018-AR2017; IPHC-2019-2018AR-IPHC; IPHC-2020-AR2019-R; IPHC 2021-AR2020-R; IPHC-2022-AR2021); IPHC Fishery Regulations 2023; Report of the 93rd Session of the IPHC Conference Board (CB093).

¹⁰⁵ Data sources for table: IPHC, Modelled FISS O32 stock distribution estimates by IPHC Regulatory Area. IPHC Secretariat (Jan. 13, 2023), IPHC-2023-TSD-006, <https://www.iphc.int/data/time-series-datasets>; *Id.*, Total Constant Exploitation Yield (TCEY, net tonnes) for each IPHC Regulatory Area. IPHC Secretariat (Jan. 13, 2023), IPHC-2023-TSD-017, <https://www.iphc.int/data/time-series-datasets>.

Year	Proportion of O32” abundance estimated by IPHC in Area 4 (% of all O32 fish observed in coastwide survey)	Proportion of commercial, bycatch, recreational, and subsistence catch limits (TCEY) actually assigned by the IPHC (% of total TCEY assigned to Area 4)	Proportion of O32” abundance estimated by IPHC in Canada, Area 2B (% of all O32 fish observed in coastwide survey)	Proportion of commercial, bycatch, recreational, and subsistence catch limits (TCEY) actually assigned by the IPHC in Canada, Area 2B (% of total TCEY)
2013	25.4 %	19.0 %	12.8 %	17.1 %
2014	25.8 %	18.1 %	12.0 %	20.8 %
2015	26.8 %	19.6 %	13.0 %	20.0 %
2016	24.8 %	18.7 %	12.3 %	20.8 %
2017	26.7 %	17.1 %	10.8 %	20.4 %
2018	26.7 %	17.8 %	12.5 %	19.1 %
2019	25.8 %	19.1 %	12.9 %	17.7 %
2020	23.1 %	19.0 %	11.4 %	18.7 %
2021	21.0 %	19.1 %	12.0 %	17.9 %
2022	23.7 %	18.6 %	13.0 %	18.3 %

These data show that in every single one of the past 10 years, the IPHC has consistently chosen to provide fewer harvest opportunities in Area 4 (a lower TCEY) than the abundance of harvestable halibut in Area 4 (O32 halibut). Instead, in every single one of the past 10 years, the IPHC has consistently provided greater harvest opportunities in other regulatory areas, particularly in Canada (Area 2B), as shown in this table, than the amount of harvestable halibut occurring in that regulatory area. Effectively, the IPHC is choosing to allocate catch limits among regulatory areas based on considerations other than the abundance of halibut.¹⁰⁶ It is therefore entirely speculative whether the IPHC will use abundance of halibut in Area 4, or Area 4CDE, as the basis of allocations to Area 4. In fact, all evidence is to the contrary. Even if halibut abundance were to increase in Area 4, that may or may not result in any difference in allocation choices by the IPHC. The Proposed Action cannot therefore be reasonably expected to result in any increase in harvest opportunities in Area 4. By relying on contingencies over which NMFS has no control, and that are not subject to the Magnuson-Stevens Act, the purpose and need statement is irrational, insufficient, uncertain, and unlawful.

Finally, other statements in the purpose and need statement are also erroneous. As indicated above, the Proposed Action does not consider “practicable” measures and includes no measures that are designed to “achieve” OY. Nor does the Proposed Action “link” the Amendment 80

¹⁰⁶ This further demonstrates the arbitrariness of NMFS’s proposed decision to use an “abundance-based” metric to regulate the Amendment 80 fleet’s halibut bycatch.

halibut PSC limit to halibut abundance. Instead, as halibut abundance increases from current levels, the proposed halibut PSC limit is actually *lower* than it is currently. Under no conditions does the Proposed Action allow the halibut PSC limit to increase from the current 1,745 mt level, regardless of the abundance of the stock. In addition, although the purpose and need statement says (erroneously) that the Proposed Action “could also promote conservation of the halibut stock,” NMFS’s findings elsewhere in the FEIS foreclose that possibility altogether.

3. The FEIS does not consider a reasonable range of alternatives and the Council and NMFS unlawfully rejected reasonable alternatives.

The analysis of alternatives is the “heart” of an EIS. 40 C.F.R. § 1502.14. An agency must “[r]igorously explore and objectively evaluate *all* reasonable alternatives” to a proposed action. *Id.* § 1502.14(a) (emphasis added); *see also* 42 U.S.C. § 4332(2)(E) (agencies must “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”). “The existence of a viable but unexamined alternative renders an [EIS] inadequate.” 40 C.F.R. §§ 1501.7, 1502.1. The “touchstone” of the inquiry is “whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1004 (9th Cir. 2013) (quotations and citation omitted). The range of alternatives considered in the FEIS is unlawful for multiple reasons, as discussed below.

First, because the purpose and need statement is unlawfully narrow, NMFS unlawfully failed to consider other reasonable alternatives, such as (i) other mechanisms for reducing halibut bycatch and (ii) other fisheries and sectors that have significant halibut bycatch.¹⁰⁷ In the FEIS, NMFS flippantly states that it rejected the latter because the “Amendment 80 sector comprises the majority of halibut PSC mortality.” FEIS at 85.¹⁰⁸ But this does not explain *why* considering alternatives involving other fisheries and sectors was not “viable.” 40 C.F.R. § 1501.7. In fact, NMFS *did* consider such alternatives when implementing Amendment 111, which demonstrates that alternatives involving other fisheries and sectors *are in fact* viable. And NMFS has provided no information or explanation showing how that has changed. Moreover, just because other fisheries and sectors comprise the approximately half of halibut PSC mortality in the BSAI does

¹⁰⁷ The Council record demonstrates that, at one point in the process, other fisheries and sectors were considered as part of the Proposed Action. But alternatives considering other fisheries and sectors were summarily eliminated from the scope of the Proposed Action without any rational explanation or basis. *See* North Pacific Fishery Management Council Discussion Paper, Approaches to ABM PSC Limits for the A80 Sector, Agenda Item C-6, Sep 2020; BSAI Halibut Abundance-based Management (ABM) of PSC Limits, Initial Review Draft, September 2019.

¹⁰⁸ *See* North Pacific Fishery Management Council D-4 Halibut ABM Motion to refocus ABM on Amendment 80 and reduce the number of alternatives (Feb. 1, 2020); North Pacific Fishery Management Council D-4 Halibut ABM Motion to initiate a discussion paper refocusing ABM alternatives that include indexes (Feb. 1, 2020).

not mean that including those fisheries and sectors in one or more alternatives was not viable or prevented NMFS from analyzing alternatives involving those fisheries and sectors in the FEIS. Rather than consider a “range” of alternatives, NMFS merely considered similar, very minor variations on a *single* alternative—i.e., establishment of an “abundance-based” halibut PSC limit for only the Amendment 80 sector. That violates NEPA. The public should have been given an opportunity to, at the very minimum, review and consider at least one alternative that would have addressed halibut bycatch in a broader array of sectors and fisheries, just as was done in Amendment 111.¹⁰⁹

Second, as explained on page 86 of the FEIS (and as addressed elsewhere in this letter), the SSC strongly recommended that the Council and NMFS consider an alternative that calculates the annual halibut PSC limits by treating the abundance indices as *relative* values. The Council and NMFS rejected such an alternative because it would supposedly “make[] it more difficult for stakeholders to read survey report indices” and “in the interest of greater transparency.” FEIS at 86. However, even if these reasons were true (they are not), NMFS again provides no explanation for why such an alternative was not *viable*. Indeed, the SSC certainly believed that its preferred method was “viable.” At the very minimum, this alternative should have been carried forward for full analysis in the FEIS because it was viable.

Third, during development of the draft EIS, the Council and NMFS failed to consider, and unreasonably rejected, other reasonable alternatives that would cause far less harm. These unreasonably (and unlawfully) rejected alternatives include, but are not limited to:

- An alternative submitted by the Amendment 80 sector to the NPFMC Halibut ABM Stakeholder Workgroup, which recommended practicable bycatch limits for the Amendment 80 sector. After alternatives were presented to the Council in February 2019, the workgroup was discontinued after a single meeting.¹¹⁰
- An alternative proposed by the Amendment 80 sector that would utilize a common index for both the Amendment 80 sector and directed halibut fishery. This proposal would have

¹⁰⁹ In the Proposed Rule, NMFS refers to a purported rationale from the Council’s February 2020 to focus only on the Amendment 80 sector, *i.e.*, that halibut bycatch was being addressed for the Pacific Cod Trawl Cooperative (“PCTC”) program through a separate action. *See* 87 Fed. Reg. at 75,575. However, the Council took action on the PCTC program *20 months after* February 2020, so that was plainly not a rationale for narrowing the scope of the Amendment 123 action in February 2020. Moreover, if NMFS deems the PCTC program action to have been foreseeable in February 2020 (as it apparently does), then that is another “reasonably foreseeable future action” that NMFS unlawfully failed to address in its cumulative impacts assessment under NEPA.

¹¹⁰ *See* Halibut ABM Stakeholder Committee Minutes, Feb. 2019, <https://meetings.npfmc.org/CommentReview/DownloadFile?p=da6e5039-306d-4dc6-850f-e931e8b618e1.pdf&fileName=ABM%20Stakeholder%20Committee%20minutes%202-4-2019.pdf>.

reduced Amendment 80 halibut PSC limits under certain conditions to provide additional harvest opportunities to directed fishery CDQ participants in Area 4CDE.¹¹¹

- Creating an averaging of halibut survey results that will ensure that there are not “knife edge” drops in the allocations depending on one year’s survey results. *See* FEIS at 23.
- Indexing the halibut and NMFS survey results to “standardized” and not “absolute” values, as recommended by the SCC. *See supra*.
- Phasing in the halibut PSC limits to accommodate the need for the fleet to transition to halibut PSC limits that are below current levels of use. *See* FEIS at 75-77.
- Establishing “performance standards” or other mechanisms to allow vessels to adopt measures that seek to minimize bycatch at all levels of abundance, but that set reasonable and achievable limits that balance potential benefits with costs (*e.g.*, Amendments 91 and 110 for the Bering Sea pollock fishery). *See* FEIS at 75-77.
- Failure to consider a recommendation from the SSC to explore alternative approaches to an index-triggered ABM action.¹¹²
- An alternative that would have allowed unused halibut PSC to be “rolled over” from one year to the next to moderate the adverse impact of the Proposed Action. This was considered and rejected in April 2021—not because it was not viable but because it was “eliminated from consideration at that time due to difficulties in incorporating such a provision with annually varying PSC limits.”¹¹³ This is not a lawful basis to reject consideration of a viable alternative. The record shows this alternative was plainly viable: “History indicates that the final rollover amount would not need to be settled in order for NMFS to manage the first one or two months of the A80 fishery.”

¹¹¹ *See* NPFMC Motion #2, Agenda Item D-4 BSAI Halibut ABM, p.2, bullet #3 (Feb. 2020), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=21274088-e7ec-405b-89f7-09b01ac00e9f.pdf&fileName=D4%20MOTION%20PSC%20limits.pdf>.

¹¹² “In the absence of a strong relationship between halibut PSC mortality and measures of abundance, the SSC encourages the Council to consider allocation approaches that allow for inseason flexibility. For example, the Council currently relies on inseason management to reallocate groundfish apportionments across sectors to facilitate full utilization of groundfish TACs. One option for managing halibut allocation would be an inseason, intersector rollover provision whereby PSC limits could be transferred between groundfish sectors or from the groundfish sector to the directed halibut fishery. Another option would be a within-sector interseason rollover provision comparable to the salmon savings plans used to provide individual incentives to avoid salmon PSC in the pollock fishery.” *See* Scientific and Statistical Committee Report To The North Pacific Fishery Management Council, Sept. 30 – Oct. 2, 2019, page 6 of 36.

¹¹³ BSAI Halibut Abundance-based Management (ABM Amendment 80 of PSC Limit Initial Review Draft March 2021, page 68) and related transcript of Council deliberations (attached); *see also* EIS at 85.

Fourth, NMFS and the Council’s use of historical survey values and encounter rates fails to consider expected conditions under commonly accepted climate change scenarios. The last five to ten years indicate that “normal” conditions in the North Pacific may be changing rapidly. Conditions from 2016 through 2019 (relatively warm years) are reasonably likely to reappear for the foreseeable future. In 2019, the fleet experienced relatively high halibut encounters despite relatively low levels for both proposed indices. Annual environmental conditions are the likely driver of variability but are ignored by the proposed index-driven structure. It is irrational to ignore the potentially increasing impacts of climate change to the North Pacific, and to base management decisions on the assumption that cooler historical conditions will persist indefinitely. The alternatives considered in the FEIS do not reflect the real-world conditions encountered by the Amendment 80 sector and do not account for the “new normal” of warming temperatures in the North Pacific. NMFS should have considered an alternative that accounted for the changing conditions of the North Pacific.

4. The FEIS fails to address incomplete or unavailable information under 50 C.F.R. § 1502.21.

The NEPA implementing regulations set forth a detailed process for how an agency must address “incomplete or unavailable information.” *See* 50 C.F.R. § 1502.21. Initially, if there is incomplete or unavailable information, “the agency shall make clear that such information is lacking.” *Id.* § 1502.21(a). Next, “[i]f the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.” *Id.* § 1502.21(b). And if the costs of obtaining the unavailable information are unreasonable, then the agency must document four specific regulatory steps in the EIS. *Id.* § 1502.21(c).

Incredibly, 50 C.F.R. § 1502.21 is not mentioned a single time in the FEIS. That means NMFS simply (and erroneously) overlooked this regulation entirely or encountered no areas in the FEIS for which there was “incomplete or unavailable” information. The latter is plainly not true.

First, when evaluating environmental justice impacts, NMFS stated that “no recent information from secondary sources on sector-wide catcher/processor crew demographics is readily available...” FEIS at 262. Clearly, this is “unavailable” information. But NMFS engaged in no 40 C.F.R. § 1502.21 process to address this unavailable information. Moreover, this information is relevant because, as NMFS acknowledged, “if disproportionate high and adverse impacts were to accrue to BSAI Amendment 80 catcher/processor workforce due to implementation of a proposed action alternative, *environmental justice would potentially be an issue of concern.*” *Id.* (emphasis added). That question is not answered, and NMFS entirely overlooks the required 40 C.F.R. § 1502.21 analysis for the unavailable information (and leaves the issue entirely unanalyzed).

Second, the FEIS expressly “provides a listing of relative uncertainties in population modeling of the halibut stock (Section 4.2), the methodology used to estimate impacts to groundfish fisheries and the uncertainties in estimating future PSC usage (Section 5.3.2.1), and the uncertainty in estimating relative impacts to the directed halibut fishery (Section 5.4).” *See id.* at 303. Again, nowhere in the FEIS does NMFS address the incomplete or unavailable information giving rise to these recognized uncertainties under 40 C.F.R. § 1502.21, as it was required to do.

Third, as addressed elsewhere in this letter, the FEIS fails to consider important fishery data for 2020, 2021, and 2022. The data for these years were “available” and therefore should have been included and analyzed in the FEIS in the first place. NMFS’s decision to leave out data for those years suggests NMFS believes the data were “unavailable,” in which case NMFS was required to perform a 40 C.F.R. § 1502.21 analysis. No analysis under 40 C.F.R. § 1502.21 is performed for these data, leaving it a mystery as to why NMFS failed to include the data. NMFS clearly could have included these data, including for 2022. NMFS has stated that it is not planning to implement the Proposed Action until 2024.¹¹⁴ NMFS obviously could have refrained from prematurely finalizing the FEIS and waited to do so after the 2022 data became available a few weeks later. But no rationale is given by NMFS for the absence of any of these data because it performed no 40 C.F.R. § 1502.21 analysis.¹¹⁵

Finally, NMFS acknowledges that other categories of information are unavailable, but fails to perform any 40 C.F.R. § 1502.21 for any of them. These include, but are not limited to:

- “Specific data on crew compensation was identified as a data gap in the 20-Year Review and is also listed as a category of unavailable information in Section 4.5.4 of the SIA.” *Id.* at 200.
- “This analysis also recognizes that some information (such as operational costs) is unavailable.” *Id.* at 302; *id.* at 369 (“recognizing that some information (such as operational costs) is unavailable”).
- “The SIA also notes that baseline information on the retention of subsistence halibut from commercial fisheries harvest in some of the key commercial fishing communities is unavailable.” *Id.* at 349.

¹¹⁴ NPFMC, October 2022, Agenda Item B2 Council Audio Files, YouTube (Oct. 6, 2022) beginning at 1110 ALT, <https://www.youtube.com/watch?v=pNwCx3gxTfc>.

¹¹⁵ NMFS maintains regular updates of catch data on its website, and these data are readily available in near real time, and these data could have easily been incorporated into the FEIS. NMFS’s failure to do so also violates National Standard 2: “For information that needs to be updated on a regular basis, the temporal gap between information collection and management implementation should be as short as possible, subject to regulatory constraints, and such timing concerns should be explicitly considered when developing conservation and management measures.” 50 C.F.R. § 600.315(a)(6)(v)(A).

In sum, NMFS's complete failure to follow the required process under 40 C.F.R. § 1502.21 for any and all incomplete or unavailable information renders the FEIS unlawful.

5. The FEIS's cursory treatment of cumulative effects is insufficient and unlawful.

The FEIS's cumulative effects "analysis" consists of a cursory four-paragraph section that barely takes up two pages. *Id.* at 278-79. There, NMFS identifies *only one* "reasonably foreseeable future action" (IPHC direct fishery harvests), which NMFS "analyzes" in a mere couple of sentences. The FEIS's treatment of cumulative effects is plainly insufficient and unlawful, for numerous reasons.

First, the FEIS improperly constrains what is considered to be a "reasonably foreseeable future action." The FEIS states:

Actions are considered reasonably foreseeable if some concrete step has been taken toward implementation, such as a Council recommendation or NMFS's publication of a proposed rule. Actions only "under consideration" have not generally been included because they may change substantially or may not be adopted, and so cannot be reasonably described, predicted, or foreseen. Identification of actions likely to impact a resource component within this action's area and time frame will allow the public and Council to make a reasoned choice among alternatives.

Id. at 279. This approach to reasonably foreseeable future actions is contrary to the NEPA implementing regulations, which define "reasonably foreseeable" to mean "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." 40 C.F.R. § 1508.1(aa). There are numerous actions, documented below, that are presently under consideration by the Council and NMFS that "a person of ordinary prudence would take into account."¹¹⁶ NMFS's exclusion of reasonably foreseeable future actions through its unduly narrow (and unlawful) definition violates NEPA.

¹¹⁶ Once an action is undergoing review at the Council, the most likely result is a regulation implemented by NMFS. For example, from 2020 to 2022, the Council considered numerous actions that resulted in a Council recommendation for action and implementation by NMFS (*e.g.*, revisions to Area 4 halibut vessel use caps and IFQ transfer provisions (detailed in next section), revisions to the halibut and sablefish individual fishing quota program under Amendments 124 and 112 (*see* 87 Fed. Reg. 71,559 (Nov. 23, 2022)), final Council action to recommend changes to the BSAI Pacific cod trawl catcher vessel fishery (*see* NPFMC Council Motion C-4 BSAI Pacific Cod Trawl Catcher Vessel LAPP (Oct. 13, 2021), and regulations that result in changes in economic data reports (*see* 87 Fed. Reg. 65,724 (Nov. 1, 2022)).

Second, the FEIS also unlawfully restricts “reasonably foreseeable future actions” to only those actions that affect Pacific halibut. As the FEIS states:

Based on the preceding analysis, the effects that are meaningful are potential effects on Pacific halibut, if the alternatives result in a change in the spatial or size distribution of halibut removals. The cumulative effects on the other resources have been analyzed in numerous documents and the impacts of this proposed action and alternatives on those resources are minimal; therefore, there is no need to conduct an additional cumulative impacts analysis.

FEIS at 278. Again, this is inconsistent with the NEPA regulations, which define “cumulative effects” as: “[E]ffects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.1(g)(3). Nothing in this regulatory definition suggests that NMFS’s cumulative effects analysis should have been constrained to only those effects on Pacific halibut.

Indeed, the Proposed Action would directly regulate *the Amendment 80 sector*, not the halibut fishery. Actions that affect the Amendment 80 fishery and its operations will have an effect on halibut bycatch rates, the ability of vessels to participate in groundfish fisheries and achieve OY, impacts on other non-target species, and other factors directly relevant to the Amendment 80 sector. NMFS’s limitation of cumulative effects to only those involving Pacific halibut caused NMFS to ignore all cumulative effects that may affect the Amendment 80 sector, and violates NEPA.

Third, the FEIS fails to consider known and reasonably foreseeable regulatory actions that increase consolidation in harvests in the Area 4 directed halibut fishery. Specifically, the FEIS does not consider consistently enacted regulations in 2020, 2021, and 2022 that have resulted in a substantial increased consolidation of fishery landings to fewer vessels. *See, e.g.*, 87 Fed. Reg. 34,215 (June 6, 2022). The FEIS does not consider “fish up” provisions to allow additional harvest opportunities in Area 4B (*see* 85 Fed. Reg. 20,657 (Apr. 14, 2020)) or the implementation of medical transfer provisions that can increase flexibility for IFQ harvesters (*see* 85 Fed. Reg. 8,477 (Feb. 14, 2022)). The FEIS also does not consider Council action taken in June 2022 to provide permanent opportunities for additional consolidation by increasing the

Area 4 vessel use cap¹¹⁷ or an additional Council action in October 2022 to remove Area 4 vessel use caps through 2027,¹¹⁸ both of which are plainly relevant.

These changes have had known and documented impacts. For example, in 2022, halibut harvesters in Area 4 received the largest commercial catch limit allocation since 2013. However, harvest patterns in Area 4 were more consolidated in 2021 and 2022 than at any point in the past 10 years. The harvest pattern in 2022 is characterized by large landings made on fewer vessels. The following table derived from publicly available NMFS data shows that vessel landing activity in Area 4 has decreased and consolidation of fishing has more than doubled over the 2013-22 average time period, and is nearly four times more consolidated now than in 2013.¹¹⁹

Year	Total Number of Landings	All Area 4 Harvests (Net pounds IFQ and CDQ)	Average pounds/landing (Net pounds IFQ and CDQ)
2013	1863	4,177,711	2,242
2014	1072	3,164,253	2,952
2015	793	3,583,972	4,520
2016	930	3,899,228	4,193
2017	915	3,937,051	4,303
2018	847	3,663,813	4,326
2019	1090	3,991,894	3,662
2020	541	3,647,968	6,743
2021	437	3,566,831	8,162
2022	393	3,370,067	8,575
10-Year Average	882	3,700,279	4,193

¹¹⁷ NPFMC, Council Motion, D2 IFQ Committee Report (June 13, 2022), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=2b8ebb4c-cea6-48a0-aed0-0c8ec2ff1354.pdf&fileName=D2%20Council%20Motion%20-%20Area%204%20vessel%20cap.pdf>.

¹¹⁸ NPFMC, E Staff Tasking, Vessel Use Cap (Oct. 11, 2022), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=590f1ebe-a881-4749-9370-fa214aad45e.pdf&fileName=E%20Motion%20-%20Vessel%20Use%20Cap%20.pdf>; NPFMC, Draft RIR Regulatory Impact Review for a proposed regulatory amendment to remove vessel cap limitations for IFQ halibut harvested in IPHC regulatory Areas 4A, 4B, 4C, and 4D for the 2023-2027 IFQ fishing seasons, at 40-41, <https://meetings.npfmc.org/CommentReview/DownloadFile?p=ddd74cfe-eb8d-46fa-a104-b096933b2f87.pdf&fileName=C3%20Area%204%20Vessel%20Use%20Cap%20Analysis.pdf>.

¹¹⁹ Source data from: Individual years available under the heading IFQ Halibut and Sablefish, Allocations and Landings (last updated Jan. 13, 2023), <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska>.

The FEIS and accompanying SIA do not consider these changed circumstances in the fishery or how the distribution of impacts may change among various fishing communities based on these factors. The Council and NMFS assumed certain relationships about directed fishery harvesting patterns that NMFS's data show are changing, but these are not considered in the FEIS or in the development of the Proposed Action. This information is relevant, at a minimum, to the anticipated and likely future harvesting patterns of halibut, delivery patterns and locations, potential levels of vessel activity, and potential impacts on fishery communities and support industry for the halibut fishery to the extent that this action could even be considered to result in additional harvest opportunities in Area 4. These known and reasonably foreseeable future actions result in changes in environmental and socioeconomic concerns that have direct bearing on the Proposed Action. NMFS's failure to consider these effects violates NEPA.¹²⁰

Fourth, the FEIS fails to adequately consider known and reasonably foreseeable harvesting patterns showing an increasing likelihood that the Area 4 catch limits will not be fully harvested. The following table¹²¹ derived from publicly available NMFS data shows that the proportion of halibut harvested in Area 4 has been decreasing even though catch limits have been increasing. In fact, in the last two years, a smaller percentage of the Area 4 catch limits have been harvested than in any of the past 10 years. For example, in 2022, the allocation in Area 4 was increased to a 10-year record high of 5.1 million pounds, but the harvests were well below the 10-year average, at only 3.4 million pounds. In 2022, the percentage of the Area 4 halibut catch limit harvested was at a 10-year record low of only 66%.

Year	Total Area 4 Catch Limits in net pounds (CDQ and IFQ)	Total Area 4 Catch Harvests in net pounds (CDQ and IFQ)	% of Total Area 4 Catch Limits Harvested (CDQ & IFQ)	Area 4 halibut Unharvested in net pounds (CDQ & IFQ)
2013	4,761,540	4,177,711	87.7%	583,829
2014	3,275,000	3,164,253	96.6%	110,747
2015	3,815,000	3,583,972	93.9%	231,028
2016	4,190,000	3,899,228	93.1%	290,772
2017	4,230,000	3,937,051	93.1%	292,949
2018	4,000,001	3,663,813	91.6%	336,188
2019	4,900,000	3,991,894	81.5%	908,106
2020	4,240,000	3,647,968	86.0%	592,032
2021	4,559,400	3,566,831	78.2%	992,569
2022	5,100,000	3,370,067	66.1%	1,729,933
Average	4,307,094	3,700,279	86.8%	606,815

¹²⁰ It also violates National Standard 2 for failure to consider the best scientific information available.

¹²¹ Halibut IFQ and CDQ Limit and Harvest data from: <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska>.

These trends in decreasing harvest rates have a material effect on the conclusions reached in the FEIS. The FEIS and the Proposed Action assume that reduced halibut PSC limits in one sector may result in increased halibut catch limits. These data clearly show that the halibut resource in Area 4 may actually be less fully harvested, regardless of the catch limit provided and regardless of the PSC reductions implemented by this Proposed Action. In the last four years, a smaller percentage of the Area 4 catch limits have been harvested than in all of the past 10 years except 2014. These trends of increasing allocations but decreasing harvest rates are plainly relevant, at a minimum, to the anticipated and likely future harvesting patterns of halibut, halibut delivery patterns and locations, potential levels of vessel activity, and potential impacts on fishery communities and support industry for the halibut fishery. These data are also central to the justification used by the Council and NMFS for the Proposed Action. If actual harvests of halibut are decreasing, or are likely to decrease even when halibut catch limits increase, the FEIS should have presented and evaluated this information to determine whether the Proposed Action can meet its stated purpose. NMFS's failure to consider these effects and information violates NEPA and National Standard 2.¹²²

Fifth, the FEIS does not address the increased challenges in maintaining halibut fishery processing operations throughout Area 4 that have historically relied on offsetting costs with crab processing. For example, the FEIS does not consider the closure of halibut processing facilities in Saint Paul for the 2022 halibut fishing season, the likely closure of halibut processing in Saint Paul in 2023, the closure of the Bristol Bay red king crab fishery in the 2021/2022 and 2022/2023 season, the reduced snow crab TAC for the 2021/2022 season, and the fishery closure in the 2022/2023 seasons.¹²³ These changes in crab processing have already resulted in significant changes in the ability of halibut to be processed in some areas in Area 4. The FEIS and accompanying SIA also do not consider that some communities are now receiving a larger proportion of Area 4 halibut harvests than previously (*e.g.*, catch previously delivered to Saint Paul is now delivered to Akutan or Dutch Harbor), and these changes in harvesting and delivery patterns are increasingly likely in the reasonably foreseeable future. Neither the FEIS

¹²² In the Proposed Rule, NMFS makes a passing reference to the regulations (which it incorrectly cites) establishing the 2022 allocations of halibut. *See* 87 Fed. Reg. at 75,573. So, NMFS recognizes the relevance of the information, but yet mischaracterizes it in the very brief statement contained in the Proposed Rule and entirely ignores it in the FEIS.

¹²³ Snow Crab Reduced TAC: ADFG Commercial Fishery Announcement (Oct. 8, 2021), <https://www.adfg.alaska.gov/static/applications/DCFnewsrelease/1340474868.pdf>; Snow Crab Closure: 2022/2023 (Oct. 10, 2022), <https://www.adfg.alaska.gov/static/applications/DCFnewsrelease/1441272349.pdf>; Bristol Bay Red King Crab Fishery Closures: 2021/2022, <https://www.adfg.alaska.gov/static/applications/DCFnewsrelease/1330721277.pdf>, and 2022/2023, <https://www.adfg.alaska.gov/static/applications/DCFnewsrelease/1441166194.pdf>.

nor the SIA contemplates such a shift in fishery landings even though these shifts in landings were known well before the FEIS was finalized.¹²⁴

Sixth, the FEIS fails to consider the known shift in expectations that fisheries, including the Amendment 80 sector, will prioritize crab bycatch given ongoing concerns about the status of Bristol Bay red king crab and snow crab expressed by the Council. At its October 2022 meeting, the Council identified crab species as “as a priority conservation concern” and the Council’s request that “all sectors [are] to implement” a range of “voluntary measures” to “reduce crab mortality in the non-directed fisheries.”¹²⁵ This request for action and prioritization by the Council of crab bycatch as a priority conservation concern can reasonably be expected to result in changing fishery patterns and bycatch rates on halibut.

Seventh, the FEIS fails to consider the potential establishment of National Marine Sanctuaries near St. Paul and potentially St. George Island. These designations could result in changes in fishery management practices that limit directed fishery opportunities for halibut and groundfish harvesters and redistribute fishery effort into other areas of the BSAI.¹²⁶

Eighth, the FEIS fails to adequately consider how the effects of climate change in the action area will affect the Proposed Action. NMFS’s evaluation of climate change effects is cursory at best. FEIS at 381-83 (NMFS brushing off comments about climate change effects with no substantive responses). This violates NEPA and National Standard 2.

The AFSC’s scientific work is routinely used to understand how fishery management measures will affect fishery participants and communities in light of rapidly changing Arctic and North Pacific ecosystems.¹²⁷ However, the FEIS and Proposed Action utilize virtually none of AFSC’s

¹²⁴ See Draft Regulatory Impact Review for a proposed regulatory amendment to remove vessel cap limitations for IFQ halibut harvested in IPHC regulatory Areas 4A, 4B, 4C, and 4D for the 2023-2027 IFQ fishing seasons, pp. 35-37, 40-41 and Tables 16-20 (“The community of St. Paul has not processed IFQ halibut in Area 4 since 2019.”). NMFS had Area 4 landings data for Saint Paul from 2020 and 2021 well before publication of the draft EIS (landings data is NMFS data) and could have added 2022 data in the final EIS.

¹²⁵ NPFMC, NPFMC Council Motion, D2 BBRKC Expanded discussion paper (Oct. 10, 2022), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=1f631d76-5e1f-4d3b-b36c-fa0509c60972.pdf&fileName=D2%20Council%20Motion%20BBRKC.pdf>.

¹²⁶ See National Marine Sanctuary Inventory, <https://nominate.noaa.gov/nominations/> (Alaġum Kanuuġ (Heart of the Ocean) (Alaska) and St. George Unangan Heritage (Alaska)); see 87 Fed. Reg. 34,8951 (June 8, 2022).

¹²⁷ For example, analysis of how climate change will affect fisheries is routinely completed by AFSC scientists during the annual catch limit setting process. Actions such as establishing rebuilding plans for crashing crab stocks rely heavily on climate projections and analyses evaluating climate resilience for those fisheries.

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scientific capacity to evaluate how the effects of climate change are likely to impact the effects of the Proposed Action or to evaluate how the Amendment 80 sector will be affected by climate change and remain economically viable under the Proposed Action in light of those effects. *See supra* Section III.F.2.b.

AFSC’s extensive research has shown Bering Sea ecosystem changes, reduction in the Bering Sea “Cold Pool” extent, expansion of Pacific cod into the northern Bering and Chukchi seas, and, most recently, crashes of major crab stocks.

AFSC’s “Stock Assessment and Fishery Evaluation” reports and specialized AFSC publications have evaluated climate-related effects underway in the eastern Bering Sea.¹²⁸ For example, AFSC’s climate models were extensively used in 2021 and 2022 to support consideration of a Bering Sea snow crab rebuilding plan.¹²⁹ AFSC scientists are also evaluating how sea ice loss and reduction in “Cold Pool” seasonal extension is related to changes in species Pacific cod and flatfish distributions, which are expanding into the northern Bering Sea. This scientific work is highly relevant to the Proposed Action and should have been used to evaluate Bering Sea flatfish distribution changes, increasing movement of flatfish stocks into the northern Bering Sea (an area closed to the Amendment 80 sector), and downstream effects of how these changes will affect the sector’s operations under proposed lower halibut PSC limits.

A hard look at this information is especially critical since, as the FEIS finds, the Amendment 80 sector’s halibut encounter rates are not correlated with the halibut abundance indices to be used under the Proposed Action. This lack of correlation means that the halibut PSC limits could be reduced in years when Amendment 80 fishermen are seeing higher halibut abundance in areas where flatfish fishing is feasible and open to trawling. This “perfect storm” would result from target flatfish species being spread over a wider area due to warm seafloor conditions. This necessitates longer flatfish tows and higher halibut encounters. The warm seafloor conditions that Amendment 80 sector vessels are already experiencing show that vessels will have to tow nets longer when halibut are more abundant. Warm seafloor conditions occurred in 2018 and 2019 when, according to the FEIS, the proposed halibut PSC limits would have been at low levels. This reasonably foreseeable disaster must be fully analyzed in the FEIS.

In comments on the draft EIS, comment letters repeatedly flagged how warming seafloor temperatures are already affecting the Amendment 80 sector’s target species and halibut catch

¹²⁸ E. Siddon (ed.), *Ecosystem Status Report 2022: Eastern Bering Sea, Stock Assessment and Fishery Evaluation Report*, North Pacific Fishery Management Council (Dec. 2022), https://apps-afsc.fisheries.noaa.gov/Plan_Team/2022/EBSecosys.pdf.

¹²⁹ *See, e.g.*, Litzow et al. 2022: Human induced borealization and the collapse of the Bering Sea snow crab fishery. In prep.; *see also* E. Earl, Scientists point to climate as likely cause for snow crab decline as managers work to rebuild devastated stocks, *Alaska J. of Com.* (June 15, 2022), <https://www.alaskajournal.com/2022-06-15/scientists-point-climate-likely-cause-snow-crab-decline-managers-work-rebuild-devastated>.

rates. Those comments provided data showing how a halibut PSC limit reduction is likely to seriously affect the sector's ability to operate feasibly under reasonably foreseeable warmer conditions as well as observer data demonstrating the effects of 2018 and 2019 record-warm seafloor temperatures. Those conditions were associated with a marine warm water "anomaly" commonly referred to as the "Blob." In 2019, the Amendment 80 sector experienced its lowest yellowfin sole catch rates. NOAA's climate and fishery scientists forecast that similar warming events will be more common over the next two decades. Thus, NOAA's own Bering Sea climate projections indicate that fishing conditions experienced in 2018 and 2019 are likely to be the predominant future fishing conditions. We incorporate by reference all of those previous comments here.

All of that information was plainly relevant to the Proposed Action but was not meaningfully considered or evaluated by NMFS, in violation of NEPA and National Standard 2. Had NMFS done so, it would have incorporated existing climate model projections into the effects analysis to understand how stocks are affected in "ecosystem analyses" associated with risk assessments for annual stock assessments. The FEIS fails to utilize any of the models and analyses used to examine how a warming Bering Sea will affect fisheries.

Ninth, FEIS and the Proposed Action do not adequately evaluate how additional crab bycatch management measures will affect the Amendment 80 sector and the effects of the Proposed Action. The FEIS largely assumes that additional halibut bycatch restrictions would affect the sector in isolation and does not consider how the Amendment 80 sector operates under multiple constraints simultaneously. Halibut is just one of the PSC species applicable to the Amendment 80 sector.

The Amendment 80 Bering Sea crab PSC limits include snow crab, tanner crab, and Bristol Bay red king crab. The FEIS fails to consider how existing regulations¹³⁰ and reasonably foreseeable crab bycatch regulations currently under development¹³¹ will compound the effects of the Proposed Action. These combined constraints will have a profound effect on the Amendment 80 sector's ability to operate under the proposed reduced halibut bycatch limits. The effects will be greater than the sum of the individual limitations because they do not occur separately and are simultaneously constraining factors. These measures are well-known and have been under consideration by the Council for the last three years.¹³²

¹³⁰ 88 Fed. Reg. 3930 (Jan. 23, 2023) (codified at 50 C.F.R. pt. 679).

¹³¹ See NPFMC, Draft Environmental Assessment Rebuilding Plan for Eastern Bering Sea Snow Crab Final Action Analysis (Jan. 12, 2023), <https://meetings.npfmc.org/CommentReview/DownloadFile?p=e130082a-66cb-4817-b2b5-1319341b40ec.pdf&fileName=C1%20Snow%20Crab%20Rebuilding%20Analysis.pdf>.

¹³² See NPFMC, December 2022 Newsletter, at 1-3, <https://www.npfmc.org/december-2022-newsletter/>.

As one example of how future crab closures will affect the Proposed Action, consider the existing closure of the southern 10 miles of the Red King Crab Savings Area, the bottom 10 by 60 nautical-mile section called the “RKC Savings Sub-Area.” Because the State of Alaska did not open the 2021 and 2022 Bristol Bay red king crab fishery, NMFS regulations closed the RKC Savings Sub-Area in those years. The RKC Savings Sub-Area had never been closed and were traditional flatfish fishing grounds prior to their closure. Thus, the Amendment 80 fleet was forced to shift out of formerly productive flatfish grounds with generally *lower* halibut bycatch rates into areas with generally *higher* halibut bycatch rates. Indeed, the RKC Savings Sub-Area closure partially accounts for the Amendment 80 fleet’s higher 2022 halibut bycatch mortality rate. The FEIS should have examined how the RKC Savings Sub-Area closure impacted the Amendment 80 sector and its ability to avoid halibut. This analysis should have been used as a proxy to explore how additional closures could affect the Amendment 80 sector.

This information has been before the Council and NMFS and raised in public comments, and yet it has not been meaningfully considered in the FEIS. Future crab closures are reasonably foreseeable, and the FEIS’s failure to adequately analyze these reasonably foreseeable future effects violates NEPA and National Standard 2.¹³³

Tenth, the FEIS fails to meaningfully consider the very real likelihood that the IPHC will not take any action to increase harvest opportunities in Area 4. The IPHC is not bound to a regulated harvest policy. Each year, the IPHC must recommend, and the Secretary of State must accept (with the concurrence of the Secretary of Commerce), any recommendation from the IPHC before it can be established in regulation. Under the Convention establishing the IPHC and the Halibut Act implementing that Convention, the United States cannot unilaterally increase catch limits through domestic rulemaking. For example, in 2018, the United States and Canada failed to come to agreement on harvest limits (see 2018 IPHC Annual Report). Neither the FEIS nor the Proposed Action meaningfully analyzes this reasonably foreseeable future circumstance.

This failure is particularly arbitrary because the FEIS does, conversely, evaluate a future scenario in which a fixed allocation is provided to Area 4. By examining and presenting for public disclosure a circumstance in which the IPHC provides a fixed allocation to Area 4 and not the equally likely circumstance in which the IPHC provides no such allocation, the FEIS provides a biased and incomplete assessment of the effects of the Proposed Action. This violates NMFS and National Standard 2.

Eleventh, the FEIS fails to meaningfully analyze the reasonably foreseeable future actions of the IPHC that will effectively determine the annual halibut bycatch limits for the Amendment 80 fleet. The Proposed Action does not describe how the survey index is to be calculated by the IPHC. For example, it is not clear if the “setline survey index” is based on the abundance throughout the range of halibut, in a subset of the range of halibut (*i.e.*, all of Area 4), or how that “estimate of halibut abundance” is to be calculated. The proposed regulations do not

¹³³ See also note 109 (failure to consider PCTC program action).

describe what procedures will be followed if the IPHC revises the manner in which it conducts its surveys or the methodology used to calculate the “estimate of halibut biomass.” Equally unclear is what happens if the IPHC does not provide the estimate of halibut biomass after NMFS makes its “request.” This lack of explanation and clarity on how the IPHC will perform all aspects of its role under the proposed regulations violates NEPA and National Standard 2, and is arbitrary and capricious. Clearly, the very IPHC actions that are contemplated by the proposed regulations themselves are “reasonably foreseeable.”

Twelfth, the FEIS fails to consider other reasonably foreseeable actions and conditions that will have a material effect on the impact of the Proposed Action and the conclusions reached by NMFS. These include: (1) persistent inflationary pressures (*e.g.*, increased fuel costs, labor, food) that significantly impact cost of fishery operations and fishery-dependent communities;¹³⁴ (2) ongoing tariffs that increase the costs of businesses and specifically seafood harvesters;¹³⁵ and (3) significant and long-lasting disruptions in fishery supplies and markets due to the Russia-Ukraine war.¹³⁶ These factors affect operational decisions that affect the amount and location of harvests and are directly related to the environmental effects associated with the Proposed Action.

¹³⁴ See Alaska Seafood Marketing Institute, *The Economic Value of Alaska’s Seafood Industry* (Jan. 2022), at 32-33, <https://www.alaskaseafood.org/resource/economic-value-report-january-2022/> (“High shipping costs are a key lingering consequence of the pandemic as of the end of 2021. International shipping costs for Alaska’s processors increased by a factor of three or more in 2021, due to a shortage of empty containers, unprecedented congestion at ports, and other issues as the pandemic-impacted economy recovered and demand for goods soared. Labor costs for Alaska seafood processors have increased steadily for many years, but jumped even higher in 2021, as evidenced by a 28% increase in the “prevailing wage” rate set by the U.S. Department of Labor for H-2B visa workers.”). These inflationary pressures have profoundly affected all commercial activities, including fish harvesting, processing, fuel costs, and market impacts. These inflationary pressures not only affect economic decisions but also the amount of harvest that may occur and the location of harvesting activities as vessel operators seek to minimize costs in a far less favorable economic environment. Indeed, NOAA’s own “Guidelines for Economic Review of National Marine Fisheries Service Regulatory Actions,” at page 18, recommend analysis of these types of impacts: “During the period of analysis, if national or regional economic conditions are expected to change significantly, the changes should be factored into the analysis, if possible.” See NOAA, *Guidelines for Economic Review of National Marine Fisheries Service Regulatory Actions* (Mar. 20, 2007), <https://media.fisheries.noaa.gov/dam-migration/01-111-05.pdf>.

¹³⁵ See <https://www.seafoodsource.com/news/premium/supply-trade/as-u-s-reviews-tariffs-on-chinese-goods-seafood-industry-mixed-on-fees-future>.

¹³⁶ See <https://www.seafoodsource.com/news/supply-trade/consequences-of-russia-s-ukraine-invasion-rippling-through-global-seafood-industry%C2%A0>.

6. NMFS failed to take a “hard look” at the effects of the Proposed Action on the Amendment 80 sector’s cooperative status.

As described above, NMFS has taken numerous actions that effectively mandate the formation of a fishery cooperative for the Amendment 80 sector. The severe limitations of the Proposed Action could undermine the present successful cooperative management system. However, NMFS has not analyzed the potential impacts of the Proposed Action on cooperative formation or whether the Amendment 80 limited access sector will remain a viable alternative for fishery participants.

The FEIS provides only a cursory consideration of the potential impact of the Proposed Action on cooperative dynamics and misstates the potential viability of the Amendment 80 limited access fishery:

It is assumed that members of the A80 sector will continue to participate in a cooperative. Restrictive PSC limits may create an incentive for one firm to leave the cooperative structure and fish the limited access fishery. The firm could operate in the limited access fishery because NMFS would allocate their portion of the halibut PSC limit and the directed fishery limits to the limited access fishery and they would be the only firm that could harvest the allocation.

FEIS at 236. This “analysis” does not account for the fact that participants in the Amendment 80 limited access fishery are subject to even greater halibut PSC limits than those participating in the cooperative. *See* 50 C.F.R. § 679.91(d)(1) (“The amount of Amendment 80 halibut PSC assigned to the Amendment 80 limited access fishery is equal to the amount of halibut PSC assigned to the Amendment 80 sector, as specified in Table 35 to this part, subtracting the amount of Amendment 80 halibut PSC assigned as CQ to all Amendment 80 cooperatives as determined in paragraph (d)(2)(iv) of this section, *multiplied by 80 percent.*” (emphasis added)). In other words, there is an additional 20% cut in the halibut PSC limit assigned to the Amendment 80 limited access sector on top of the cuts that would be established by the Proposed Action.

NMFS fails to consider the implications of this additional layer of halibut PSC reduction on Amendment 80 limited access fishery participants. For example, there is no analysis showing the impacts of the 20% Amendment 80 limited access fishery halibut bycatch reduction on top of the 35% reduction under the Proposed Action. There are no tables in the draft EIS or FEIS that show what the halibut PSC limits would be for participants in the Amendment 80 limited access fishery. There is no discussion about whether given these additional limitations the Amendment 80 limited access fishery remains a viable option. The lack of analysis or consideration of these very relevant impacts and cooperative formation dynamics does not constitute a “hard look.” This failure violates NEPA and National Standard 2, and is arbitrary and capricious.

This failure is particularly arbitrary because NMFS has consistently maintained that it cannot create regulations under a limited access privilege program, such as the Amendment 80 program, that forces fishery participants to operate under a cooperative. However, given the severe limitations that would be imposed by the Proposed Action, combined with the additional constraints described above, that is precisely what NMFS will accomplish by implementing the Proposed Action. The Proposed Action will effectively eliminate the Amendment 80 limited access fishery as a viable management option. This concern is not new to NMFS. When NMFS last modified the Amendment 80 cooperative standards in 2011, it recognized that, without a viable Amendment 80 limited access fishery, fishery participants could be harmed in cooperative negotiations:

Participants may find it difficult to receive the benefits of cooperative management if they cannot reach agreement on negotiated terms, if the limited access fishery is not an economically viable option, or if members of a cooperative are able to derive some benefit from forcing an entity into the limited access fishery.

76 Fed. Reg. 49,417, 49,419 (Aug. 10, 2011) (codified at 50 C.F.R. pt. 679). By creating an unviable Amendment 80 limited access fishery, the Proposed Action is doing exactly what NMFS has cautioned against. This effectively forces fishery participants into an Amendment 80 cooperative under overly burdensome terms and conditions that may not be advantageous. The consequences of this are unaddressed and unanalyzed in the FEIS or the Proposed Action. This aspect of the Proposed Action violates NEPA, the Magnuson-Stevens Act, and the APA.

7. The FEIS underestimates the economic impacts of the Proposed Action to the Amendment 80 sector and overestimates economic benefits to the directed halibut fishery.

The FEIS underestimates the economic impacts of the Proposed Action for several reasons.

First, the analysis relies on resampling historical haul data, which will tend to center around the mean. Large, unexpected halibut catches are rare, but nonetheless occur. Because they are rare, these events are less likely to be selected and sampling is less likely to capture adverse impacts. But they do occur and the effects of that occurrence are not addressed in the FEIS.

Second, the FEIS fails to analyze incremental halibut avoidance costs. For example, vessels may be forced to search for fishing areas with lower halibut encounters, potentially pushing the fleet out of well-known fishing areas and into new areas where flatfish target species may be more dispersed. This results in increased fuel costs, longer tow times, less production, and potentially increased halibut encounter rates. These factors are exacerbated during warm years when halibut are known to distribute more evenly across the eastern Bering Sea shelf.

Third, the resampling technique used in the FEIS assumes 100% halibut PSC use to estimate revenue impacts to the Amendment 80 sector. In reality, however, the Amendment 80 sector does not use 100% of its halibut PSC and has not done so for the last 10 years. This is largely because of quota management constraints that incentivize vessel- and company-level buffers to ensure that the hard cap is not reached in any given year (which would have severe impacts to the entire fleet). Other factors, such as variable temperature-driven encounter rates and the ability of a vessel to deck sort if small halibut are present, also contribute.

Conversely, the FEIS overestimates revenue increases to the directed halibut fishery as a result of the Proposed Action because the analysis assumes 100% usage. However, as demonstrated above, the halibut fishery does not use 100% of its total allowable catch, and the percent usage is steadily *declining* each year, to an all-time low in 2022. This will be further exacerbated in 2023 and potentially into the future as a result of the fact that the St. Paul Trident plant will not be processing crab in at least 2023 and will likely not be available to process halibut, forcing halibut fishermen to travel further to find processing opportunities (or forego harvest).

In sum, the FEIS arbitrarily skews the economic effects of the Proposed Action by both underestimating negative impacts to the Amendment 80 sector and overestimating beneficial impacts to the directed halibut fishery. This mischaracterization of effects results in misinformed agency conclusions about the Proposed Action, and violates NEPA, the Magnuson-Stevens Act, and the APA.

H. The Proposed Action is a “significant regulatory action” under Executive Order 12866.

The Proposed Action is a “significant regulatory action” under Executive Order 12866 (“EO 12866”) and, therefore, should have been reviewed by the Office of Information and Regulatory Affairs (“OIRA”). The Proposed Action is a “significant regulatory action” because it (i) will have an annual effect on the economy of \$100 million or more or adversely affect the economy in a material way and (ii) raises novel legal or policy issues.

The draft EIS estimated that *direct revenue losses* to the Amendment 80 sector under the Proposed Action range from \$86 million to \$120 million annually. Draft EIS at 255. This estimate of direct revenue loss does not include adjustments for known inflationary increases that have occurred since the draft EIS was prepared. The draft EIS did not estimate additional indirect economic losses, such as potential loss of markets, operational costs to avoid halibut bycatch, loss of maritime support sector jobs, including Puget Sound-based shipyards, repair facilities, fishing gear and fish processing equipment manufacturers, and Alaska-based export and trade businesses.

The draft EIS was available to NMFS long before preparation of the Proposed Rule and, therefore, NMFS had the information to know that the total economic impact of the Proposed

Action renders it a “significant regulatory action” under EO 12866. Even the draft EIS recognized this:

Presidential Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant.” The EO lists multiple definitions of a “significant regulatory action,” one of which is an action that is likely to have an annual effect on the economy of \$100 million or more. The percentage change in average estimated revenue from status quo reported in Table 5-6 represent changes of \$100 million or more in some scenarios under the Alternative 4 PSC limits of 960 or 1,047mt.

Draft EIS at 216.¹³⁷ For many of the reasons discussed elsewhere in this comment letter, the Proposed Action also raises numerous novel legal and policy issues, which also triggers review as a “significant regulatory action.” For example, the Proposed Action would delegate authority to an international body to make decisions that directly regulate U.S. domestic fisheries. As another example, the Proposed Action will inflict a negative net benefit on the Nation while at the same time having no discernable conservation benefit and no identified benefit to other fishing sectors. The Proposed Action is also novel in that it singles out *one* regulated entity on a regulatory issue (halibut bycatch) that involves numerous regulated entities.

Section 6 of EO 12866 required NMFS to submit to OIRA, *before publication*, a draft of any proposed “significant regulatory action,” together with an “assessment of the potential costs and benefits” of the proposed action and its legal basis. For any proposed regulatory action, such as the Proposed Action, that is expected to be “economically significant,” NMFS must submit a comprehensive analysis (“Regulatory Impact Assessment”) of the potential costs and benefits and of reasonably feasible potential alternatives. *See* EO 12866, § 6(a)(3)(C). NMFS unlawfully failed to comply with EO 12866.

I. The Proposed Action fails to address the statutory Capacity Reduction Program.

Nowhere does the Council or NMFS consider the provisions of Section 219 of the Consolidated Appropriations Act of 2005 (Pub Law 108-447; December 8, 2004, commonly referred to as the Capacity Reduction Program (“CRP”)). Congress granted NMFS additional specific statutory

¹³⁷ The draft EIS did not directly examine the potential adverse economic costs under the Proposed Action at a 35% reduction to 1,134 mt, but that range of bycatch reductions can be reasonably assumed to be likely to result in direct revenue costs that are at least \$100 million. And, of course, this does not consider costs other than direct revenue costs, as described above. Again, NMFS has removed this statement from the FEIS, but provides no indication as to why that is, or what new analysis supports that change. No new analysis does support the removal of this paragraph.

authority to manage BSAI groundfish fisheries under this statute. The CRP was a key component in defining the parameters and limitations of participation in the Amendment 80 sectors and is referred to extensively in the Amendment 80 implementing rulemaking. *See, e.g.*, 72 Fed. Reg. 52,669. Section 219(g)(2) of the CRP makes clear that the Council should “take actions that promote the stability of [the non-pollock BSAI groundfish fisheries] consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act.”¹³⁸

Plainly, the Proposed Action does not “promote the stability” of the Amendment 80 sector. *See, e.g.*, 87 Fed. Reg. at 75,578 (“When the halibut PSC limits constrain target catch and Amendment 80 firms are required to implement more measures to reduce halibut mortality, operating costs may increase and revenue may decrease making annual net revenue more volatile.”); *id.* (“Firms that cannot remain viable under the new conditions would eventually exit the fishery.”); and *id.* at 75,581 (“The analysis demonstrates that the lower halibut PSC limits may result in reduced groundfish harvests and revenues for the Amendment 80 sector.”). The Proposed Action is contrary to the CRP and thus unlawful and arbitrary. It is also unlawful for failure to even consider the CRP. *See* 16 U.S.C. § 1853(a)(1)(C) (FMP amendments must be “consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), *and any other applicable law*” (emphasis added)).

J. The Proposed Action violates the Information Quality Act.

The Proposed Action does not address how or whether NMFS will apply the requirements of the Information Quality Act (“IQA”) to the results of the annual IPHC surveys. Section IV of NOAA’s published IQA policy clarifies how third-party (*i.e.*, IPHC) data must be assessed:

Although third-party sources may not be directly subject to Section 515, information from such sources, when used by NOAA to develop information products or to form the basis of a decision or policy, must be of known quality and consistent with NOAA’s information quality guidelines. When such information is used, any limitations, assumptions, collection methods, or uncertainties concerning it will be taken into account and disclosed. Further, sufficient information on the data and analysis, including its scope (e.g., temporal or demographic) and any other information

¹³⁸ The CRP also states that developing fisheries that are underutilized “including bottom fish [groundfish] off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby” (Section 2(a)(7)) and encourages the development of fisheries “including bottom fish off Alaska, and that end, to ensure that optimum yield determinations promote such development in a non-wasteful manner” (Section 3(b)(6)).

necessary to allow the public to reproduce the agencies' conclusions should be communicated to the public.^[139]

As described above, under the Proposed Action, NMFS will use third-party data to make critical annual decisions that could have an adverse effect on the U.S. economy to the tune of \$100 million *annually*. Aside from the unlawfulness of this approach (addressed above), the Proposed Action fails to demonstrate how these annual processes and decisions will comply with the IQA. And no information is provided in the Proposed Action to demonstrate such compliance, such as a description of the process that NMFS will use to review the IPHC survey results, how NMFS will determine whether that data is of “known quality,” how NMFS will determine whether those data are “consistent” with NOAA’s information policy guidelines, or how the “limitations” of those data “will be taken into account and disclosed.” Given these failures, the public cannot “reproduce the agencies’ conclusions.” The Proposed Action violates the IQA.

K. If NMFS proceeds with the Proposed Action, it should be implemented no earlier than January 1, 2025.

The Proposed Rule requests public comment on the timing for implementation. Initially, for all the reasons stated above, the Proposed Action should be disapproved by NMFS and not implemented at all. However, should NMFS proceed to (unlawfully) implement the Proposed Action without even preparing a new lawful NEPA document, it should be implemented *no earlier than January 1, 2025*, for at least the following reasons.

First, there is no conservation concern requiring immediate action (and indeed no discernable conservation benefit from the Proposed Action). The Proposed Action does not affect the conservation of the halibut stock, the halibut stock is not “overfished,” and the most recent IPHC stock assessment indicates that the halibut stock is stable and improving. *See* 2022 Summary of Halibut Data.

Second, halibut bycatch is at record-low levels on a coastwide basis, comprising less than 9% of total removals, and bycatch levels are stable in Area 4. There is ample ability for the IPHC to continue to be able to provide halibut catch limits in Area 4 that accommodate this currently record low level of bycatch.

Third, the catch limit allocations in Area 4, and Area 4CDE specifically, are at, or near, a 10-year high. Even if the Secretary of State, in consultation with the Secretary of Commerce, adopts lower catch limits in 2023, the stock status continues to remain stable and favorable with the

¹³⁹ NOAA, Information Quality Guidelines (last updated Nov. 4, 2021), <https://www.noaa.gov/organization/information-technology/policy-oversight/information-quality/information-quality-guidelines>.

recruitment of the 2012 year-class. Poor commercial performance in some IPHC areas is not resolved by implementing restrictions only in the Amendment 80 fishery. NMFS, which leads the U.S. delegation to the IPHC, can maintain current high catch limits in Area 4, and Area 4CDE specifically, simply by choosing not to reduce these catch limits. The United States cannot increase halibut catch limits unilaterally, but it can maintain current catch limits, and if needed, implement domestic management measures to reduce catch limits if conservation needs warrant.¹⁴⁰

Fourth, the proportion of the halibut catch limit harvested in Area 4 is at a 10-year low, with only 66% of the total catch allocation in Area 4 being harvested in the most recent year (2022). Imposing additional costly bycatch reductions measures when *one-third* of the current catch limit allocations are not harvested argues strongly against immediate implementation of the Proposed Action (and against *any* implementation of the Proposed Action).

Fifth, the cost of compliance with the Proposed Action is enormous. The Amendment 80 cooperative and the companies operating under the cooperative are faced with the prospect of completely reconfiguring their fishery operations to comply with the Proposed Action. This will require, at a minimum, revising business plans, adjusting financial forecasts, renegotiating market arrangements, releasing potentially hundreds of crew, removing vessels from service, revising contractual arrangements with hundreds of vendors and suppliers, and potentially dissolving business operations.

Sixth, it is likely that NMFS will not complete a final rule until the end of 2023, at the earliest. Requiring vessel operators to adapt their fishery operations if a final rule publishes in late 2023 for a fishery that begins in January 2024 places an undue, unfair, and unnecessary burden on the regulated public. Until the Proposed Action is approved by the Secretary (*if* it is approved) and a final rule has been published, vessel owners and operators do not have reasonable assurance that the Proposed Action will be implemented. Given the enormity of the costs of compliance and the uncertain timeline for the implementation of the Proposed Action, the regulated community should be afforded ample opportunity to reconfigure their fishing operations if NMFS approves the Proposed Action and issues a final rule.

Seventh, federal agencies regularly postpone the effective date of regulations in order to afford the regulated public an opportunity to adapt to costly regulatory burdens. *See, e.g.*, 85 Fed. Reg. 47,917 (Aug. 7, 2020) (codified at 50 C.F.R. pt. 622) (delayed effective date final rule establishing electronic reporting requirements for South Atlantic charter/headboat federal permit holders); 86 Fed. Reg. 60,374 (Nov. 2, 2021) (codified at 50 C.F.R. pt. 622) (delayed implementation of the Gulf of Mexico Vessel Monitoring System requirement).

¹⁴⁰ NMFS did exactly this in 2018 when Canada and the United States failed to come to agreement on annual catch limits. 83 Fed. Reg. 12,133 (Mar. 20, 2018) (codified at 50 C.F.R. pt. 300).

Eighth, it is reasonable to assume that the Proposed Action will be judicially challenged if finalized. Preliminary injunctive relief is not available for regulations issued under the Magnuson-Stevens Act. Delaying the effective date to January 1, 2025, will allow the litigation to proceed and a court order on the merits to be issued in advance of the potential effective date to provide sufficient notice to the regulated community about the outcome and the potential need to prepare for implementation of the Proposed Action.

For all of these reasons, if NMFS proceeds to approve the Proposed Action and implement a final rule, it should delay implementation until January 1, 2025, at the earliest.

Relatedly, it bears emphasis that mid-year implementation of the Proposed Action in 2023, as some have argued for, is entirely unacceptable and arbitrary. If the Proposed Action is implemented at all, it must be implemented at the start of a calendar year (ideally, 2025 or later) to allow operators the ability to reasonably prepare for the impacts and implications of the Proposed Action. Moreover, mid-year implementation would effectively constitute an unlawful retroactive rulemaking because harvest specifications establish bycatch limits at the start of the year, and those limits are used to guide vessel operations throughout the entire year. Because these allocations are binding at the start of the year, mid-year implementation of the Proposed Action would unfairly and unlawfully bind operators to limits established after they have already begun operations.

IV. CONCLUSION

For all of the reasons set forth above, the Proposed Action and the associated FEIS violate numerous federal laws and regulations.¹⁴¹ Accordingly, NMFS should disapprove Amendment 123 in its entirety and not implement the Proposed Rule.¹⁴² If NMFS nevertheless proceeds with

¹⁴¹ Among other things, all of these violations render the Proposed Action “arbitrary and capricious” and “contrary to law,” in violation of the APA, as well as inconsistent with “any other applicable law,” in violation of the Magnuson-Stevens Act, 16 U.S.C. § 1853(a)(1)(C). Additionally, for all the reasons stated in these comments, the Proposed Action is contrary the Department of Commerce’s obligation “to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States.” U.S. Department of Commerce Strategic Plan, 2022 – 2026, Innovation, Equity, and Resilience Strengthening American Competitiveness in the 21st Century, at <https://www.commerce.gov/sites/default/files/2022-03/DOC-Strategic-Plan-2022%E2%80%932026.pdf> (last visited Feb. 5, 2023). The Proposed Action fails to meet several of the Department of Commerce’s strategic goals for 2022 – 2026. *Id.* The Proposed Action also does not “Drive U.S. Innovation and Global Competitiveness,” or “Foster Inclusive Capitalism and Equitable Economic Growth,” or “Address the Climate Crisis Through Mitigation, Adaptation, and Resilience Efforts.” It certainly does not grow the “blue economy.”

¹⁴² NMFS has an established precedent of disapproving or partially approving FMP amendments when an EIS is inadequate (*see* NMFS Dec. 27, 2010 letter to Council Chair partially approving Amendment 23 and disapproving Amendment 16-5), a more robust analysis is needed (*see* NMFS July 28, 2022 letter to

Gretchen Harrington
Josh Keaton
February 7, 2023
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this action, it must prepare a new EIS (complete with public review and comment) and undertake a new Magnuson-Stevens Act process to address the serious legal violations and other errors addressed in this letter. Should NMFS unlawfully proceed with the action based on the current record (to which the Groundfish Forum strongly objects), then it should implement the final action no earlier than January 1, 2025, at a minimum.

Thank you for your consideration of these comments.

Sincerely,



Ryan P. Steen

RPS:las

Attachments

South Atlantic Fishery Management Council Chair disapproving Amendment 10), or additional new information becomes available after the Council recommends an FMP amendment (*see* 76 Fed. Reg. 30,265 (May 25, 2011) (codified at 50 C.F.R. pt. 648)). All three of these conditions apply to the Proposed Action, and NMFS should similarly disapprove the Proposed Action. Similarly, NMFS has disapproved FMP amendments when the information indicates that the benefits do not exceed the costs. *See* 65 Fed. Reg. 31,507 (May 18, 2000).

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Ex. A, p. 86

Incorrect and Inconsistent Statements in Proposed Rule¹⁴³

Incorrect Proposed Rule Statement	Correct Information and Source & Clarification Required
<p>Pg. 75571, “Pacific halibut is fully utilized in Alaska as a target species in subsistence, personal use, recreational (sport), and commercial halibut fisheries.” [Emphasis added]. Four other similar statements throughout the proposed rule.</p>	<p>Pacific halibut may be fully allocated, but it is not fully utilized. According to NMFS catch reports,¹⁴⁴ on average 731,608 net lbs. of BSAI IFQ and CDQ halibut has gone unharvested by the IFQ and CDQ fisheries from 2016 – 2022. The amount of underharvest has increased in recent years with a 2019 – 2022 average of 1,050,337 net lbs. going unharvested in IPHC Area 4. This statement should be revised to clarify that Pacific halibut is not fully utilized.</p>
<p>Pg. 75571, “In recent years, catch limits for the commercial halibut fishery in the BSAI have generally declined in response to decreasing halibut spawning biomass (though catch limits increased slightly in 2021)...”</p>	<p>An actual plot of Table 5-16 on page 250 of the Analysis (FEIS) and allocations from NMFS catch reports for 2021 and 2022 Area 4 (BSAI)¹ show catch limits have generally increased in recent years (up 55.5% since 2014). This statement should be revised to note that “in recent years, catch limits for the catch limits for the commercial halibut fishery have not declined (or alternatively “have remained stable”) in response to decreasing halibut spawning biomass (and catch limits were at a 10-year high in 2022).”</p>

¹⁴³ Page numbers in this table are references to the Federal Register publication page numbers for the Proposed Rule. All comments and recommendations provided in this table are made subject to all of the comments and legal objections stated in the letter above (and all previous comment letters).

¹⁴⁴ NOAA, Allocations and Landings (last updated Jan. 13, 2023), <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska>.

	<table border="1"> <caption>Area 4 IPHC catch limits 2010 - 2022</caption> <thead> <tr> <th>Year</th> <th>Area 4 million net lbs.</th> </tr> </thead> <tbody> <tr><td>2010</td><td>8.07</td></tr> <tr><td>2011</td><td>8.31</td></tr> <tr><td>2012</td><td>5.9</td></tr> <tr><td>2013</td><td>4.71</td></tr> <tr><td>2014</td><td>3.28</td></tr> <tr><td>2015</td><td>3.82</td></tr> <tr><td>2016</td><td>4.19</td></tr> <tr><td>2017</td><td>4.23</td></tr> <tr><td>2018</td><td>4</td></tr> <tr><td>2019</td><td>4.9</td></tr> <tr><td>2020</td><td>4.24</td></tr> <tr><td>2021</td><td>4.56</td></tr> <tr><td>2022</td><td>5.1</td></tr> </tbody> </table>	Year	Area 4 million net lbs.	2010	8.07	2011	8.31	2012	5.9	2013	4.71	2014	3.28	2015	3.82	2016	4.19	2017	4.23	2018	4	2019	4.9	2020	4.24	2021	4.56	2022	5.1
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<p>Pg. 75571, “In recommending Amendment 123, the Council intended to minimize halibut PSC to the extent practicable as required by section 303(a)(11) and National Standard 9 of the Magnuson-Stevens Act and to continue achieving optimum yield in the BSAI groundfish fisheries on a continuing basis under National Standard 1.”</p>	<p>Pg. 75579, “Firms that cannot remain viable under the new conditions would eventually exit the fishery.” This is inconsistent with what a reasonable person would deem “practicable” in a fully rationalized fishery that has deployed every available tool to both reduce halibut catch and halibut mortality.</p>																												
<p>Pg. 75571, “This action would provide incentives for the Amendment 80 fleet to minimize halibut mortality at all times. Achievement of these objectives would conserve the halibut resource by improving bycatch</p>	<p>The conservation objective is uncertain at best, and this was acknowledged in the FEIS (pg. 273): “The Council weighed the potential for actual economic impacts, versus those estimated here, against the non-quantifiable conservation, social, and management benefits of the abundance-based management of halibut PSC when taking final action (see Section 2.4 for the complete Council rationale for this action).” “As noted in Section 5.2, however, there is likely to be little difference among the average future halibut spawning biomass under levels of PSC anticipated across all of the</p>																												

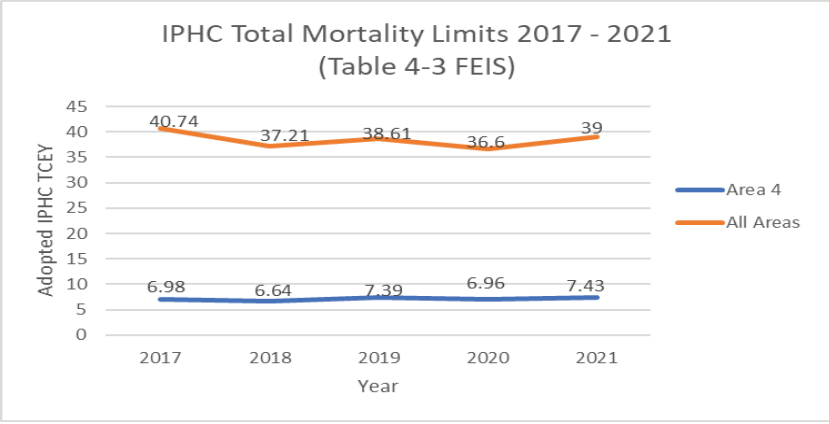
<p>management and could result in additional harvest opportunities in the directed commercial and subsistence halibut fisheries.”</p>	<p>alternatives, including the no action alternative, for multiple reasons.” (FEIS pg. 267 and again on pg. 268). The Proposed Action misrepresents the management of the subsistence fisheries. Subsistence harvests are not allocated, and would not be expected to be affected by the proposed action. “Subsistence harvest of halibut would not be directly affected by the proposed action alternatives. Further, unlike the commercial halibut fishery, the subsistence halibut fishery would not directly benefit from potential incidental reallocative effects that may occur under the proposed action alternatives and provide additional opportunities for the directed halibut fishery.” FEIS at 267. This statement should be corrected to be consistent with the rest of the FEIS.</p>
<p>Pg. 75572, “The IPHC’s harvest control rule reduces fishing intensity linearly if the stock is estimated to have fallen below the 30 percent threshold. As described in the preceding paragraph, this harvest control rule would severely curtail removals during times of particularly poor stock conditions.”</p>	<p>This statement in the Proposed Rule mischaracterizes the nature of the IPHC’s “control rule.” The IPHC has a <u>policy</u> currently in place that would suggest a particular management response at various levels of spawning stock biomass. There is no regulatory provision in place that implements this control rule. <i>See</i> 87 Fed. Reg. 12,604 (Mar. 7, 2022). There is no “if/then” trigger for the implementation of this policy, and it would require the recommendation from the Commission and acceptance and implementation by the Contracting Parties. This statement, and other statements in the Proposed Rule should be clarified to note that the “IPHC’s harvest control rule policy may reduce fishing intensity if recommended by the Commission and subsequently accepted and implemented by the Contracting Parties....”¹⁴⁵</p>
<p>Pg. 75572, “This preamble relies on the best data available consistent with the final Environmental Impact Statement/Regulatory Impact Review (collectively referred to as the “Analysis”) prepared to support this action.”</p>	<p>As noted throughout our comments, there is an extensive amount of “best data available” that was not included in the Analysis or in the Proposed Action. This statement is not correct and should be revised to note “not all best data available has been incorporated or considered.”</p>
<p>Pg. 75572, “The Commission can set total</p>	<p>The IPHC consistently sets total mortality (TCEY) limits that vary from its own harvest policy. This is reflected both in the data shown in Table 4-3 in the FEIS</p>

¹⁴⁵ During approximately two years of high fishing intensity and high catch limit recommendations by the IPHC in the mid-2000s when this harvest control rule policy could have been recommended by the Commission and accepted and implemented by the Contracting Parties, it was not. *See* 2022 Summary of Halibut Data at 14, Fig. 12. Since that time, the IPHC has greatly improved its understanding of harvest rates with enhanced stock assessment and peer-review processes.

<p>mortality limits that do not follow the harvest policy, such as to address socioeconomic considerations.”</p>	<p>(p. 178), and in documentation that was available to NMFS prior to the publication of the Proposed Rule and FEIS.¹⁴⁶ Represented in a modified table below, it is clear that the IPHC consistently establishes TCEYs on a coastwide basis and within Area 4 that vary from its established harvest policy.</p> <p>Variations in TCEY from Harvest Policy, Table 4-3 and 2022 and 2023 IPHC Annual Meeting Data</p> <table border="1"> <thead> <tr> <th>Year</th> <th>Coastwide Harvest Policy</th> <th>Coastwide TCEY allocated</th> <th>Area 4 Harvest Policy</th> <th>Area 4 TCEY allocated</th> </tr> </thead> <tbody> <tr> <td>2017</td> <td>39.1</td> <td>40.74</td> <td>7.36</td> <td>6.98</td> </tr> <tr> <td>2018</td> <td>31.0</td> <td>37.21</td> <td>6.29</td> <td>6.64</td> </tr> <tr> <td>2019</td> <td>40.0</td> <td>38.61</td> <td>8.75</td> <td>7.39</td> </tr> <tr> <td>2020</td> <td>31.9</td> <td>36.6</td> <td>6.75</td> <td>6.96</td> </tr> <tr> <td>2021</td> <td>39</td> <td>39</td> <td>7.96</td> <td>7.43</td> </tr> <tr> <td>2022</td> <td>41.22</td> <td>41.22</td> <td>7.13</td> <td>7.65</td> </tr> <tr> <td>2023</td> <td>51.95</td> <td>36.97</td> <td>N/A</td> <td>6.94</td> </tr> </tbody> </table> <p>(TCEY over policy = red, TCEY below policy = blue, TCEY the same as policy = black, no policy established = green). All data are in net pounds.</p> <p>Since the publication of this Proposed Action, at its 2023 Annual Meeting the IPHC recommended a coastwide TCEY of 37M pounds that was nearly 15 million pounds <i>lower</i>, or nearly 30% <i>lower</i> than that recommended from its harvest policy at its 2023 Annual Meeting.¹⁴⁷ Furthermore, as of 2023, the IPHC no longer has even an “interim” policy for specific regulatory areas. This further reiterates the consistent variation from the harvest policy. This statement should be corrected to state: “The Commission consistently sets total mortality limits that do not follow the harvest policy, such as to address socioeconomic considerations. Furthermore, the IPHC does not have an established harvest policy in Area 4.”</p>	Year	Coastwide Harvest Policy	Coastwide TCEY allocated	Area 4 Harvest Policy	Area 4 TCEY allocated	2017	39.1	40.74	7.36	6.98	2018	31.0	37.21	6.29	6.64	2019	40.0	38.61	8.75	7.39	2020	31.9	36.6	6.75	6.96	2021	39	39	7.96	7.43	2022	41.22	41.22	7.13	7.65	2023	51.95	36.97	N/A	6.94
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¹⁴⁶ See IPHC, Summary of the 2021 data and stock assessment, and decision table for 2022 Agenda items 5.4, 5.5 IPHC-2022-AM098-1057, Slide 54, <https://www.iphc.int/uploads/pdf/am/am098/ppt/iphc-2022-am098-10-p.pdf>; see *id.*, Summary of the 2022 data and stock assessment, and decision table for 2023 Agenda item 5.3 IPHC-2022-IM098-11 Rev_1, Slide 57, <https://www.iphc.int/uploads/pdf/im/im098/ppt/iphc-2022-im098-11-p.pdf>.

¹⁴⁷ See 2023 IPHC Fishery Regulations, Section 5 “Mortality and Fishery Limits” (under Contracting Party review), <https://www.iphc.int/uploads/pdf/regs/iphc-2023-regs.pdf>.

<p>Pg. 75572, “While the harvest control rule has not been triggered, the total mortality limits established by the IPHC have decreased substantially, with the exception of 2021 (see Table 4-3 in the Analysis), corresponding to the low halibut abundance conditions.”</p>	<p>An actual plot of the adopted total mortality limits (TCEYs) in FEIS Table 4-3 is not consistent with this statement:</p>  <p>The additional TCEY limits for 2022 should have been included in Table 4-3 as well, because that information was readily available to NMFS (those data were published by NMFS) nine months before the publication of the FEIS and Proposed Rule (see Table 1 in the 2022 Pacific Halibut Annual Management Measures at 87 Fed. Reg. 12,604 (March 7, 2022)). The TCEYs in 2022 were 41.2 million net pounds coastwide, and 7.65 million net pounds in Area 4, the highest in the time series considered. Regardless, the time series referenced by NMFS do not show TCEYs have “decreased substantially.” This statement should be revised to read: “While the harvest control rule has not been triggered, the total mortality limits established by the IPHC have remained stable in response to decreasing halibut spawning biomass (and were at a 10-year high in 2022).”</p>
<p>Pg. 75574, Paragraph C. <i>Comparing Commercial Halibut Catch and PSC in the BSAI Groundfish Fisheries</i> is misleading because it compares net weight (headed and gutted halibut) to total mortality in groundfish fisheries, which is reported as whole halibut mortality. As presented, the comparison misrepresents how much</p>	<p>When making catch (i.e., mortality) comparisons between the directed fishery and the bycatch fisheries using equal units of measure <i>of whole fish</i> is necessary; otherwise the comparison is biased against the bycatch fisheries. The halibut directed fishery discard mortality should also be included as that coupled with their round fish halibut retention represents their footprint on the halibut resource.</p> <p>This paragraph could be improved by providing a consistent “apples-to-apples” comparison of round-weight in commercial and other sectors in either tabular or graphical format, and provide the data throughout the whole time series and not averages of inconsistent time periods that vary from 7 years (1990 – 1996), 6 years (1997 – 2011), 3 years (2012 – 2014), no information for 2015, and then 4 years (2016 – 2019). These data should also be updated with the best available data from 2020, 2021, and 2022.</p>

<p>halibut the directed fishery uses by -25%.</p>	
<p>Pg. 75574, “With one limited exception for Atka mackerel at 50 CFR 679.21(b)(4)(i)(A), groundfish fishing is prohibited once a halibut PSC limit has been reached for a particular sector or season.”</p>	<p>This statement does not include all exceptions to halibut PSC limits. The groundfish pot and jig sectors and the sablefish hook & line sectors are exempt from halibut PSC limits (see Table 11, Harvest Specifications¹⁴⁸). The halibut directed fishery also does not have a limit on the amount of under-sized halibut they catch. This statement should be revised to note all sectors that take halibut bycatch that are not subject to PSC limits.</p>
<p>Pg. 75574, “Halibut PSC limits in the groundfish fisheries provide a constraint on halibut PSC mortality and promote conservation of the halibut resource.” Similar phrasing is used elsewhere in the preamble to the proposed rule.</p>	<p>This statement is only true if halibut PSC limits are constraining and if the amount of PSC that is taken is actually having an impact on the conservation of the halibut resource. As described in the FEIS, the Proposed Action does not promote conservation of the halibut resource, and NMFS has provided no information to indicate that this general statement is true under all conditions. At a minimum, this overly broad sentence should be revised to state: “Halibut PSC limits in the groundfish fisheries may provide a constraint on halibut PSC mortality, but may not promote conservation of the halibut resource.” Similar changes should be made elsewhere in the preamble for consistency.</p>
<p>Pg. 75575, “The Amendment 80 sector includes vessels that focus primarily on flatfish (i.e., flathead sole, rock sole, and yellowfin sole) and vessels that focus on Atka mackerel.”</p>	<p>While all companies have different portfolios, as written, this statement is not correct. All Amendment 80 companies in the sector focus on flatfish, even those with large amounts of Atka mackerel quota. Flatfish harvest and revenue is significant for all companies. See FEIS, Fig. 3-15. This statement should be revised to note that all Amendment 80 vessels rely on flatfish.</p>
<p>Pg. 75575, “However, at the same meeting, the Council noted that additional halibut bycatch reduction would be needed in the future and initiated analysis of means</p>	<p>This statement suggests that at the time action was taken on Amendment 111, its approval was contingent on a separate and undefined future action. This is inaccurate and is not reflected in the Amendment 111 record. In the Amendment 111 final rule, NMFS states that additional actions such as “abundance-based management” were “outside the scope of this final rule” (see 81 Fed. Reg. at 24,717). NMFS also stated in the Amendment 111 final rule that: “The Council, in conjunction with NMFS and the IPHC, is evaluating</p>

¹⁴⁸ 87 Fed. Reg. 76,435 (Dec. 14, 2022) (codified at 50 C.F.R pt. 679), <https://www.govinfo.gov/content/pkg/FR-2022-12-14/pdf/2022-27119.pdf>

<p>to link halibut PSC limits to halibut abundance, thereby indicating that additional efforts would be required beyond those established by Amendment 111 and utilized by the fisheries to reduce halibut bycatch and mortality.”</p>	<p>whether it would be feasible to establish halibut PSC limits that vary with abundance (see response to comment 6).” <i>Id.</i> at 24,724 (emphasis added). The record reflects that consideration was being given to ABM, but not a determination that “additional halibut bycatch reduction would be needed.” This statement should be corrected to reflect the Amendment 111 record and note that “under Amendment 111 no determination was made that additional management measures would be needed in the future.”</p>
<p>Pg. 75575, “Amendment 80 sector reduced its halibut mortality to levels well below the PSC limit of 1,745 mt established under Amendment 111. Those reductions resulted in halibut mortality levels close to or below the PSC limit that would be implemented by this proposed rule based on halibut abundance estimates derived from current survey indices described below (see section 3.4.1 of the Analysis).”</p>	<p>This statement does not address climate change, variable environmental conditions, differing halibut encounter and bycatch rates, differing impacts of halibut bycatch on differing firms, or the changing bycatch rates in more recent post-COVID 19 conditions that may result in both average and individual firm performance varying from recent averages of PSC use. This statement and the preamble should provide additional context around this statement.</p>
<p>Pg. 75577 “PSC data for 2021 was not considered in the Analysis because Amendment 80 fishing operations, along with other fisheries in Alaska, were more greatly affected in 2021 by COVID-19 mitigation measures and international supply chain and market disruptions in harvesting, processing, and shipping than they were in 2020.”</p>	<p>NMFS does not provide supporting documentation that establishes that the factors it cites affecting operations in 2021 were not equally, if not more challenging in 2020. The COVID-19 pandemic resulted in the U.S. declaring a national public health emergency on March 13, 2020, although fishery operations and logistics were affected well before that date. <i>See</i> Centers for Disease Control and Prevention, CDC Museum COVID-19 Timeline, https://www.cdc.gov/museum/timeline/covid19.html (last visited Feb. 5, 2023). Numerous COVID-19 mitigation measures at federal, state, and local levels were in effect throughout nearly the entirety of the 2020 fishery season. NOAA prepared a “snapshot” of the effects of COVID-19 on Alaskan fisheries from January – August 2020 that highlights the profound impacts COVID-19 had on fishing in 2020. NOAA states: “The seafood industry has been fairly successful in Alaska at limiting virus spread, but they had to deal with a substantial reduction in transportation options in many Western Alaska and Aleutian Islands communities and limited ability to switch crews</p>

	throughout the fishing seasons to date.” See NOAA, Alaska Fisheries Impacts from COVID-19 (Jan. 2021), https://media.fisheries.noaa.gov/2021-02/All-Regional-COVID-19-Impact-Assessment-Snapshots-webready.pdf , p. 1. ¹⁴⁹ This statement in the proposed rule should be revised to reflect that fishing operations were “ greatly affected in both 2020 and 2021 ”.
Pg. 75582, “NMFS is recommending Amendment 123 and the regulatory revisions in this proposed rule to minimize potentially adverse economic impacts on benefits to the Nation. ” (emphasis added).	FEIS, page 221, “Section 5.6 describes expected changes in net benefits to the Nation and concludes that constraining halibut PSC limits set for species harvested by the A80 sector that result in reduced catch and marketing of those species is likely to result in negative impacts to net benefits to the Nation. ” (emphasis added). This statement needs to be reflected to note that this Proposed Action is “ likely to result in negative impacts to net benefits to the Nation. ”
Pg. 75584, Proposed Regulations at 50 C.F.R. § 679.21(b)(1)(i)(B) “an estimate of halibut biomass derived from the most recent Alaska Fisheries Science Center Eastern Bering Sea shelf trawl survey index.” (emphasis added).	The proposed regulations require that the Alaska Fisheries Science Center provide an estimate of halibut biomass from the most recent “Eastern Bering Sea and Northern Bering Sea trawl survey index.” As noted in the FEIS, there is an anticipated northern movement of many stocks, including halibut, due to climate change (see, e.g., pp. 86 and 89 in the FEIS). The Northern Bering Sea trawl survey provides additional best available scientific information to estimate the abundance of halibut. NMFS should include the Northern Bering Sea trawl survey to ensure the abundance of halibut is more accurately estimated and to address the contingency of climate change.
Regulatory Clarifications	
Pg. 75584, Proposed Regulation at 50 C.F.R. § 679.21(b)(1)(i)(B) “(B) <i>Annual procedure. By October 1 of each year, the Alaska Fisheries Science Center will provide the Regional Administrator an estimate of halibut biomass derived from the most recent Alaska Fisheries Science Center Eastern Bering Sea</i>	The proposed methodology and timeline are inconsistent with the proposed harvest specifications process and must be modified. Under the proposed methodology, NMFS would not receive the first of the index estimates until October 1, and the second index estimate is “requested” by December 1 (with no guarantee the results will be provided by that date). NMFS then proposes that it would assemble those two indices and publish them in the proposed harvest specifications. That does not provide adequate time to incorporate those results into the proposed harvest specifications. For example, the proposed two-year harvest specifications for BSAI groundfish have been published on the following dates in recent years: 2023/2024: December 14, 2022, 87 FR 76435; 2022/2023: December 3, 2021, 86 FR 68608; 2021/2022: December 3, 2020, 85 FR 78096; and 2020/2021:

¹⁴⁹ <https://media.fisheries.noaa.gov/2021-02/All-Regional-COVID-19-Impact-Assessment-Snapshots-webready.pdf>.

<p>shelf trawl survey index. Each year, NMFS will request that the International Pacific Halibut Commission provide to the Regional Administrator, by December 1 of that year, an estimate of halibut biomass derived from the most recent International Pacific Halibut Commission setline survey index. NMFS will apply both halibut biomass estimates to Table 58 of this part, such that the value at the intercept of those survey indices in Table 58 is the Amendment 80 sector halibut PSC limit for the following calendar year. NMFS will publish the new Amendment 80 sector halibut PSC limit in the proposed annual harvest specifications.”</p> <p>[Emphasis Added]</p>	<p>December 3, 2019, 84 FR 66129. Although the proposed harvest specifications publish slightly after the proposed December 1 date, that does not account for the several weeks of preparation and review before publication in the Federal Register (see typical regulatory preparation and review timelines at: https://www.fisheries.noaa.gov/sites/default/files/akro/amendments.pdf).¹⁵⁰ Delaying the proposed harvest specifications has profound ramifications on all groundfish sectors. The FEIS did not analyze these impacts.</p> <p>NMFS has several options to address this: (1) establish the same October 1 date for both estimates; (2) establish a slightly later date for the IPHC estimate, (e.g., November 1) that allows incorporation into the harvest specifications; or (3) maintain the current timeline but establish a regulatory process separate from the annual harvest specifications to implement these provisions.</p> <p>Regardless, this proposed action should not result in delaying, or even increase the risk in delaying, of the publication of the proposed harvest specifications that are essential for all groundfish fisheries.</p>
<p>Pg. 75584, Proposed Regulations at 50 C.F.R. § 679.21(b)(1)(i)(B)</p>	<p>The proposed regulations require that the Alaska Fisheries Science Center provide, and “requests” that the IPHC provide an “estimate of biomass.” The regulations do not define how that estimate is made. The term “estimate” should be defined. Other terms within this proposed regulation are also unclear, including but not limited to: “halibut biomass” and “survey index.”</p>
<p>Pg. 75584, Proposed Regulations at 50 C.F.R. § 679.21(b)(1)(i)(B)</p>	<p>The proposed regulations do not provide provisions if the estimates are not provided on a timely basis. The proposed regulations to establish the Amendment 80 PSC limits rely on an estimate of halibut biomass that is “derived from the most recent Alaska Fisheries Science Center Eastern Bering Sea shelf trawl survey index” or that is “derived from the most recent International Pacific Halibut Commission setline survey index.” A possible</p>

¹⁵⁰ NOAA (2023). Status of FMP Amendments.

	<p>scenario that this proposed provision does not consider is that a survey is conducted, but that the information is not provided in time to be incorporated into the proposed harvest specifications process.</p> <p>NMFS can address this contingency by clarifying that it will rely on an estimate that is “derived from the most recent Alaska Fisheries Science Center Eastern Bering Sea shelf trawl survey index available to the Regional Administrator” and “derived from the most recent International Pacific Halibut Commission setline survey index available to the Regional Administrator.”</p>
<p>Pg. 75584, Proposed Regulations at 50 C.F.R. § 679.21(b)(1)(i)(B)</p>	<p>The proposed regulations do not contemplate the potential for a mismatch between the various indices and the calculation of the resulting PSC limits. As noted in the FEIS, the NMFS trawl survey has not been conducted in all years (e.g., 2020). It is possible that surveys may not be conducted in every year either by NMFS or the IPHC. It is also possible that survey methodologies could change, surveys may be incomplete, or other factors could affect the estimates. Additionally, the IPHC is “requested” to provide an estimate of biomass but is under no obligation to do so. Finally, it is possible surveys may be conducted, but the data from those survey could not be available by the proposed timelines.</p> <p>Under the proposed regulations, NMFS could be relying on biomass estimates from differing surveys in differing years, or relying on estimates that are derived from incomplete data, or modified survey methodologies. This could result in the PSC limit being calculated with outdated information, or information that does not reflect the status of the stock. This would have profound effects on the calculation of the PSC limit. NMFS should review and revise its proposed rule to address these contingencies.</p>
<p>Pg. 75585, Proposed Table 58 to Part 679</p>	<p>The proposed Table 58 includes a reference to “survey index in Area 4ABCDE” and “(WPUE)” but does not define those terms. These terms should be defined. The proposed table also uses the term “(t)”. Presumably, “(t)” refers to metric tons “(mt)” used elsewhere in these proposed regulations, but this should be clarified.</p>